RESOLUTION 08-01-2017

DIGEST

Involuntary Treatment: Substance Abuse in Relation to Mental Illness

Amends Welfare and Institutions Code section 5150.05 to include substance abuse, as it relates to mental illness, to determine if a person is gravely disabled and should be taken into custody.

RESOLUTIONS COMMITTEE RECOMMENDATION

APPROVE IN PRINCIPLE

History:

Similar to Resolution 06-06-2016, which was disapproved.

Reasons:

This resolution amends Welfare and Institutions Code section 5150.05 to include substance abuse, as it relates to mental illness, to determine if a person is gravely disabled and should be taken into custody. This resolution should be approved in principle because it would expressly allow those who are authorized to take a person into custody under Welfare and Institutions Code section 5150 to consider the person's history of substance abuse.

Addiction is common in people who suffer from a mental health disorder. It is a well-known fact that persons who suffer from a mental illness have a tendency to self-medicate with alcohol, illegal drugs or both. Experts estimate that at least 60% of people battling either a mental illness or substance abuse are battling both.

According to the National Institute of Mental Health, one in five adults suffer from a diagnosable mental health disorder. In some, the mental health condition is already present when the substance abuse begins, but the underlying mental disorder has not been diagnosed. The National Alliance on Mental Illness estimates that approximately one-third of all people experience mental illnesses and about half of the people living with a severe mental illness also experience substance abuse. The health professionals refer to this as a "dual diagnosis" and that a person should receive care for both the specific mental illness and the substance abuse. Studies have also shown that a drug addiction will worsen the mental health problem if the addiction goes untreated.

It is clear that there is a correlation between mental illness and substance abuse. The common practice already among law enforcement and mental health professionals is to consider a person's substance abuse history as it relates to their mental illness. The proposed resolution would expressly allow law enforcement to look at more information to determine whether or not a person should be arrested or placed on a 5150 hold. It would also allow those who abuse drugs, due to a mental illness, to seek treatment instead of being incarcerated.

TEXT OF RESOLUTION

RESOLVED that the Conference of California Bar Associations recommends that legislation be sponsored to amend the Welfare and Institutions Code section 5150.05 to read as follows:

§ 5150.05

(a) When determining if probable cause exists to take a person into custody, or cause a person to be taken into custody, pursuant to Section 5150, any person who is authorized to take that person, or cause that person to be taken, into custody pursuant to that section shall consider available relevant information about the historical course of the person's mental disorder, including substance abuse as it relates to mental illness, if the authorized person determines that the information has a reasonable bearing on the determination as to whether the person is a danger to others, or to himself or herself, or is gravely disabled as a result of the mental disorder.

(b) For purposes of this section, "information about the historical course of the person's mental disorder" includes evidence presented by the person who has provided or is providing mental health or related support services to the person subject to a determination described in subdivision (a), evidence presented by one or more members of the family of that person, and evidence presented by the person subject to a determination described in subdivision (a) or anyone designated by that person.

(Proposed new language underlined; language to be deleted stricken)

PROPONENTS: Joseph A. Goldstein, Jonathan A. Goldstein, Charles H. Goldstein, Charles Wake, Erin Noonan, Jodi Taksar, Scott Luskin, Robin Bernstein-Lev, Brian Francis Doyle, Barry Ross

STATEMENT OF REASONS

The Problem: Under the current statutory mechanism, a person who is authorized to involuntarily take an individual into custody pursuant to the 51/50 involuntary protective procedure is not expressly authorized to take into account the individual's history of substance abuse. An individual having both a substance abuse problem and a mental health issue such as depression, bipolar disorder, or anxiety, have what is called a "co-occurring disorder" or "dual diagnosis." These co-occurring disorders are interrelated with, affect, and interact with each other. For example, when a serious mental health issue goes untreated, the substance abuse problem usually gets worse. And when alcohol and/or drug abuse increases, serious mental health issues usually increase. The statistics are eye-popping. According to the National Alliance on Mental Health Issues: (1) Approximately 1 in 5 adults in the U.S.—43.8 million, or 18.5%—experiences mental illness in a given year; (2) Approximately 1 in 5 youth aged 13–18 (21.4%) experiences a severe mental disorder at some point during their life; and (3) An estimated 26% of homeless adults staying in shelters live with serious mental illness and an estimated 46% live with severe mental illness and/or substance use disorders.

The Solution: Would add specific language to subdivision (a) of Section 5150.05 which would provide that any person who is authorized to take any person into custody for involuntary mental health treatment shall consider available relevant information about the historical course of the person's mental disorder, including substance abuse as it relates to mental illness.

IMPACT STATEMENT
The resolution does not affect any other law, statute or rule other than those expressly identified.

CURRENT OR PRIOR LEGISLATION
None known.

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RESPONSIBLE FLOOR DELEGATE: Joseph A. Goldstein

COUNTERARGUMENTS AND STATE BAR SECTION COMMENTS

TEXCOM - DISAPPROVE

The Executive Committee of the Trusts & Estates Section recommends disapproval of this resolution. It appears that the addition is unnecessary and perhaps prejudicial. DSM-5 at pp. 481-589 already describes mental illness related to substance-related and addictive disorders. If an individual has a history of mental illness related to substance abuse, that history is already included in what the decision maker can weigh. It is prejudicial in that family members could conflate use of addictive substances with substance abuse and color the opinion of decision makers. Proponents of the Resolution cite statistics about mental illness but do not provide evidence that failure to take substance abuse into account causes impaired persons who should be involuntarily confined to get around the system.

This position is only that of the TRUSTS and ESTATES SECTION of the State Bar of California. This position has not been adopted by the State Bar's Board of Trustees, and is not to be construed as representing the position of the State Bar of California.

Membership in the TRUSTS and ESTATES SECTION is voluntary and funding for section activities, including all legislative activities, is obtained entirely from voluntary sources.

RESOLUTION 08-02-2017

DIGEST
Probate: Definition of Kindred
Adds Probate Code section 51 to codify a definition of "kindred."

RESOLUTIONS COMMITTEE RECOMMENDATION
APPROVE IN PRINCIPLE

History:
No similar resolutions found.

Reasons:
This resolution adds Probate Code section 51 to codify a definition of "kindred." This resolution should be approved in principle because "kindred" is defined nowhere else in the Code, and codifying a clear, unambiguous and accurate definition will provide certainty, clarity and consistency.

Probate Code section 21110 (commonly referred to as the "anti-lapse statute") generally provides that if a person named as a beneficiary in a testamentary instrument is not alive and is related to the decedent (*i.e.*, a "kindred"), his or her share will pass to that descendant in the absence of a contrary intent expressed in the instrument. The statute does not define "kindred" and the term is not defined elsewhere in the Probate Code.

The decision in *Estate of Dye* (2001) 92 Cal.App.4th 966, and the Law Revision Commission for the 2002 amendment to Probate Code section 21110, make clear that "kindred," as used in the statute, refers to persons related by blood or adoption, and not by affinity (spouses and domestic partners). This definition is sound and clear. This resolution provides certainty and clarity to the term by codifying the *Dye* decision definition, rather than leaving open the possibility of a conflicting interpretation or application.

"Kindred" appears elsewhere in the Probate Code as well (see Prob. Code §§ 6402(f), 15840(a)(2), 21115(c)(1)). While the definition should appear in the portion of the Code applicable to definitions (see Prob. Code §20, *et seq*.), the resolution effectively addresses an identified issue and should be approved in principle.

TEXT OF RESOLUTION

RESOLVED that the Conference of California Bar Associations recommends that legislation be sponsored to add Probate Code section 51to read as follows:

§ 51
"Kindred."
Subject to Section 6451, "kindred" means a relationship by blood or adoption and not by affinity.

(Proposed new language underlined; language to be deleted stricken)

PROPONENT: Bar Association of Northern San Diego County

STATEMENT OF REASONS

The Problem: The anti-lapse statute, Probate Code section 21110, uses the word kindred to define what happens to a bequest when a beneficiary fails to survive the settlor of a trust. However, the Probate Code does not define kindred.

The Solution: This Resolution would codify the California Court's definition of kindred as stated in the *Estate of Dye* (2001) 92 CA4th 966 and the Law Revision Commission Comments, 2002 Amendment. In the *Estate of Dye*, the Court confirmed that kindred, as used in the anti-lapse statute, applies only to relatives by blood or adoption, including parents and children, but would not apply to spouses and domestic partners. The Law Revision Commission Comments confirms that the term kindred refers to persons related by blood and adoption.

IMPACT STATEMENT
The resolution does not affect any other law, statute or rule other than those expressly identified.

CURRENT OR PRIOR RELATED LEGISLATION
None known.

AUTHOR AND/OR PERMANENT CONTACT: Kimberly R. McGhee, Esq., Law Offices of Black & McGhee, 144 East Washington Ave., Escondido, CA 92025; (760) 745-2900.

RESPONSIBLE FLOOR DELEGATE: Kimberly R. McGhee, Esq.

RESOLUTION 08-03-2017

DIGEST
Probate: Revocable Transfer on Death Deeds
Amends Probate Code section 5642 to conform the statutory deed form to changes in the Medi-Cal recovery/reimbursement law.

RESOLUTIONS COMMITTEE RECOMMENDATION
APPROVE IN PRINCIPLE

History:
No similar resolutions found.

Reasons:
This resolution amends Probate Code section 5642 to conform the statutory deed form to changes in the Medi-Cal recovery/reimbursement law. This resolution should be approved in principle because it will make current and more accurate the information provided to lay persons who use the form.

Probate Code section 5642 provides the public with a statutory form of Revocable Transfer on Death Deed. Such a deed allows for a simple method of transferring real property that avoids probate and does not require the creation of a trust, which can be expensive. The form also provides basic information about the deed, in a "questions and answers" format. The last of those questions and answers states that the property transferred may be subject to Medi-Cal reimbursement. However, since the amendment of Welfare and Institutions Code section 14009.5 in 2016, only probate assets are subject to Medi-Cal reimbursement. Thus, this property would be subject to Medi-Cal reimbursement only if the transferee predeceased the transferor, or for some other reason that caused the property to pass by probate transfer. This proposed amendment therefore makes the statutory form correctly state the law.

TEXT OF RESOLUTION

RESOLVED that the Conference of California Bar Association recommends that legislation be sponsored to amend Probate Code section 5642 to read as follows:

§ 5642.

A revocable transfer on death deed shall be substantially in the following form.

(a) The first page of the form shall be substantially the following:

SIMPLE REVOCABLE TRANSFER ON DEATH (TOD) DEED

(California Probate Code Section 5642)

Recording Requested By:
When Recorded Mail This Deed To:
Name:
Address:
Assessor's Parcel Number: Space Above For Recorder's Use

This document is exempt from documentary transfer tax under Rev. & Tax. Code § 11930. This document is exempt from preliminary change of ownership report under Rev. & Tax. Code § 480.3.

IMPORTANT NOTICE: THIS DEED MUST BE RECORDED ON OR BEFORE 60 DAYS AFTER THE DATE IT IS SIGNED AND NOTARIZED

Use this deed to transfer the residential property described below directly to your named beneficiaries when you die. YOU SHOULD CAREFULLY READ ALL OF THE INFORMATION ON THE OTHER PAGES OF THIS FORM. You may wish to consult an attorney before using this deed. It may have results that you do not want. Provide only the information asked for in the form. DO NOT INSERT ANY OTHER INFORMATION OR INSTRUCTIONS. This form MUST be RECORDED on or before 60 days after the date it is signed and notarized or it will not be effective.

PROPERTY DESCRIPTION

Print the legal description of the residential property affected by this deed:

_____

BENEFICIARY(IES)

Print the FULL NAME(S) of the person(s) who will receive the property on your death (DO NOT use general terms like “my children”) and state the RELATIONSHIP that each named person has to you (spouse, son, daughter, friend, etc.):

_____

_____

_____

TRANSFER ON DEATH

I transfer all of my interest in the described property to the named beneficiary(ies) on my death. I may revoke this deed. When recorded, this deed revokes any TOD deed that I made before signing this deed.

Sign and print your name below (your name should exactly match the name shown on your title documents):

_____Date _____

NOTE: This deed only transfers MY ownership share of the property. The deed does NOT transfer the share of any co-owner of the property. Any co-owner who wants to name a TOD beneficiary must execute and RECORD a SEPARATE deed.

ACKNOWLEDGMENT OF NOTARY

A notary public or other officer completing this certificate verifies only the identity of the individual who signed the document to which this certificate is attached, and not the truthfulness, accuracy, or validity of that document.

State of California)
County of _____)

On _____ before me, (here insert name and title of the officer), personally appeared _____, who proved to me on the basis of satisfactory evidence to be the person(s) whose name(s) is/are subscribed to the within instrument and acknowledged to me that he/she/they executed the same in his/her/their authorized capacity(ies), and that by his/her/their signature(s) on the instrument the person(s), or the entity upon behalf of which the person(s) acted, executed the instrument.

I certify under PENALTY OF PERJURY under the laws of the State of California that the foregoing paragraph is true and correct.

WITNESS my hand and official seal.

Signature _____ (Seal)

(b) Subsequent pages of a form executed under this section shall be in substantially the following form:

COMMON QUESTIONS ABOUT THE USE OF THIS FORM

WHAT DOES THE TOD DEED DO? When you die, the identified property will transfer to your named beneficiary without probate. The TOD deed has no effect until you die. You can revoke it at any time.

CAN I USE THIS DEED TO TRANSFER BUSINESS PROPERTY? This deed can only be used to transfer (1) a parcel of property that contains one to four residential dwelling units, (2) a condominium unit, or (3) a parcel of agricultural land of 40 acres or less, which contains a single-family residence.

HOW DO I USE THE TOD DEED? Complete this form. Have it notarized. RECORD the form in the county where the property is located. The form MUST be recorded on or before 60 days after the date you sign it or the deed has no effect.

IS THE "LEGAL DESCRIPTION" OF THE PROPERTY NECESSARY? Yes.

HOW DO I FIND THE "LEGAL DESCRIPTION" OF THE PROPERTY? This information may be on the deed you received when you became an owner of the property. This information may also be available in the office of the county recorder for the county where the property is located. If you are not absolutely sure, consult an attorney.

HOW DO I "RECORD" THE FORM? Take the completed and notarized form to the county recorder for the county in which the property is located. Follow the instructions given by the county recorder to make the form part of the official property records.

WHAT IF I SHARE OWNERSHIP OF THE PROPERTY? This form only transfers YOUR share of the property. If a co-owner also wants to name a TOD beneficiary, that co-owner must complete and RECORD a separate form.

CAN I REVOKE THE TOD DEED IF I CHANGE MY MIND? Yes. You may revoke the TOD deed at any time. No one, including your beneficiary, can prevent you from revoking the deed.

HOW DO I REVOKE THE TOD DEED? There are three ways to revoke a recorded TOD deed: (1) Complete, have notarized, and RECORD a revocation form. (2) Create, have notarized, and RECORD a new TOD deed. (3) Sell or give away the property, or transfer it to a trust, before your death and RECORD the deed. A TOD deed can only affect property that you own when you die. A TOD deed cannot be revoked by will.

CAN I REVOKE A TOD DEED BY CREATING A NEW DOCUMENT THAT DISPOSES OF THE PROPERTY (FOR EXAMPLE, BY CREATING A NEW TOD DEED OR BY ASSIGNING THE PROPERTY TO A TRUST)? Yes, but only if the new document is RECORDED. To avoid any doubt, you may wish to RECORD a TOD deed revocation form before creating the new instrument. A TOD deed cannot be revoked by will, or by purporting to leave the subject property to anyone via will.

IF I SELL OR GIVE AWAY THE PROPERTY DESCRIBED IN A TOD DEED, WHAT HAPPENS WHEN I DIE? If the deed or other document used to transfer your property is RECORDED before your death, the TOD deed will have no effect. If the transfer document is not RECORDED before your death, the TOD deed will take effect.

I AM BEING PRESSURED TO COMPLETE THIS FORM. WHAT SHOULD I DO? Do NOT complete this form unless you freely choose to do so. If you are being pressured to dispose of your property in a way that you do not want, you may want to alert a family member, friend, the district attorney, or a senior service agency.

DO I NEED TO TELL MY BENEFICIARY ABOUT THE TOD DEED? No. But secrecy can cause later complications and might make it easier for others to commit fraud.

WHAT DOES MY BENEFICIARY NEED TO DO WHEN I DIE? Your beneficiary must RECORD evidence of your death (Prob. Code § 210), and file a change in ownership notice

(Rev. & Tax. Code § 480). If you received Medi-Cal benefits, your beneficiary must notify the State Department of Health Care Services of your death and provide a copy of your death certificate (Prob. Code § 215).

WHAT IF I NAME MORE THAN ONE BENEFICIARY? Your beneficiaries will become co-owners in equal shares as tenants in common. If you want a different result, you should not use this form.

HOW DO I NAME BENEFICIARIES? You MUST name your beneficiaries individually, using each beneficiary's FULL name. You MAY NOT use general terms to describe beneficiaries, such as "my children." For each beneficiary that you name, you should briefly state that person's relationship to you (for example, my spouse, my son, my daughter, my friend, etc.).

WHAT IF A BENEFICIARY DIES BEFORE I DO? If all beneficiaries die before you, the TOD deed has no effect. If a beneficiary dies before you, but other beneficiaries survive you, the share of the deceased beneficiary will be divided equally between the surviving beneficiaries. If that is not the result you want, you should not use the TOD deed.

WHAT IS THE EFFECT OF A TOD DEED ON PROPERTY THAT I OWN AS JOINT TENANCY OR COMMUNITY PROPERTY WITH RIGHT OF SURVIVORSHIP? If you are the first joint tenant or spouse to die, the deed is VOID and has no effect. The property transfers to your joint tenant or surviving spouse and not according to this deed. If you are the last joint tenant or spouse to die, the deed takes effect and controls the ownership of your property when you die. If you do not want these results, do not use this form. The deed does NOT transfer the share of a co-owner of the property. Any co-owner who wants to name a TOD beneficiary must complete and RECORD a SEPARATE deed.

CAN I ADD OTHER CONDITIONS ON THE FORM? No. If you do, your beneficiary may need to go to court to clear title.

IS PROPERTY TRANSFERRED BY THE TOD DEED SUBJECT TO MY DEBTS? Yes. DOES THE TOD DEED HELP ME TO AVOID GIFT AND ESTATE TAXES? No.

HOW DOES THE TOD DEED AFFECT PROPERTY TAXES? The TOD deed has no effect on your property taxes until your death. At that time, property tax law applies as it would to any other change of ownership.

DOES THE TOD DEED AFFECT MY ELIGIBILITY FOR MEDI-CAL? No.

AFTER MY DEATH, WILL MY HOME BE LIABLE FOR REIMBURSEMENT OF THE STATE FOR MEDI-CAL EXPENDITURES? SB 833, effective January 1, 2017, limits recovery to only those assets subject to California probate. Upon your death, your property will pass directly to your named beneficiary(ies) and will not be subject to reimbursement. However, if your beneficiary(ies) predeceases you or the transfer fails for some other reason, ~~Y~~your home may be liable for reimbursement. If you have questions, you should consult an attorney.

(Proposed new language underlined; language to be deleted stricken)

PROPONENT: Bar Association of Northern San Diego County.

STATEMENT OF REASONS

The Problem**:** On January 1, 2017, SB 833 became effective and changed the Medi-Cal recovery/reimbursement rules. Under SB 833, a Medi-Cal recovery/reimbursement claim is now limited to assets subject to California probate. The Common Questions section of the Revocable Transfer on Death (TOD) Deed includes a question about whether the property which is the subject of a TOD Deed would be subject to a Medi-Cal reimbursement claim and indicates that it may be recoverable. The answer is misleading under the new rules.

The Solution: This Resolution would clarify that property that passes to a beneficiary pursuant to a TOD Deed passes without probate and would not be subject to a Medi-Cal reimbursement/recovery claim. However, it does provide for additional clarification that if the TOD Deed fails for some reason, such as the prior death of a sole beneficiary, then the property would be subject to probate and now subject to a Medi-Cal reimbursement or recovery claim.

CURRENT OR PRIOR RELATED LEGISLATION:
None known.

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RESPONSIBLE FLOOR DELEGATE: Kimberly R. McGhee, Esq.

COUNTERARGUMENTS AND STATE BAR SECTION COMMENTS

TEXCOM - TECHNICAL COMMENTS ONLY

The California Law Revision Commission has been charged by the legislature with studying the Revocable Transfer on Death Deeds legislation and reporting back. TEXCOM had taken the position previously that no expansions of the RTODD law should be enacted until the CLRC makes its report.

This position is only that of the TRUSTS and ESTATES SECTION of the State Bar of California. This position has not been adopted by the State Bar's Board of Trustees, and is not to be construed as representing the position of the State Bar of California.

Membership in the TRUSTS and ESTATES SECTION is voluntary and funding for section activities, including all legislative activities, is obtained entirely from voluntary sources.

RESOLUTION 08-04-2017

DIGEST
Conservatorships: Increase Value of Small Estates
Amends Probate Code section 2628 to increase the value of a small estate subject to a waiver of accounting in conservatorship and guardianship proceedings.

RESOLUTIONS COMMITTEE RECOMMENDATION
APPROVE IN PRINCIPLE

History:
No similar resolutions found.

Reasons:
This resolution amends Probate Code section 2628 to increase the value of a small estate subject to a waiver of accounting in conservatorship and guardianship proceedings. This resolution should be approved in principle because it is a common-sense increase of the minimum amount an estate can contain to obtain a waiver of accounting.

As the resolution notes, the legislature has authorized increases in the past with the most recent increase in 2007 to $15,000. This resolution would provide an increase to allow conservatorship or guardianship estates with a value of $30,000 or less to obtain a waiver so that the preparation of an accounting is not required. However, the statute still allows the court, the conservatee or ward, or any interested person to request a full accounting.

Generally, estates that fall under this statute consist only of public benefits paid to the conservatee. Since the purpose of the statute is to reduce the expense of administration of small estates, the proposed increase in this resolution both recognizes inflation since 2007, and provides relief to conservators and courts regarding the preparation and review of accountings.

TEXT OF RESOLUTION

RESOLVED that the Conference of California Bar Associations recommends that legislation be sponsored to amend Probate Code section 2628 to read as follows:

§ 2628

(a) The court may make an order that the guardian or conservator need not present the accounts otherwise required by this chapter so long as all of the following conditions are satisfied:

(1) The estate at the beginning and end of the accounting period for which an account is otherwise required consisted of property, exclusive of the residence of the ward or conservatee, of a total net value of less than thirty ~~fifteen~~ thousand dollars ($30,000) ~~($15,000)~~.

(2) The income of the estate for each month of the accounting period, exclusive of public benefit payments, was less than two thousand dollars ($2,000).

(3) All income of the estate during the accounting period, if not retained, was spent for the benefit of the ward or conservatee.

(b) Notwithstanding that the court has made an order under subdivision (a), the ward or conservatee or any interested person may petition the court for an order requiring the guardian or conservator to present an account as otherwise required by this chapter or the court on its own motion may make that an order. An order under this subdivision may be made ex parte or on such notice of hearing as the court in its discretion requires.

(c) For any accounting period during which all of the conditions of subdivision (a) are not satisfied, the guardian or conservator shall present the account as otherwise required by this chapter.

(Proposed new language underlined; language to be deleted stricken)

PROPONENT: Bar Association of Northern San Diego County.

STATEMENT OF REASONS

The Problem: Accountings required in a guardianship or conservatorship matter are highly technical and require strict compliance with the Probate Code. This strict compliance generally requires the retention of counsel or other professionals at great cost to small estates.

The Solution: This Resolution increases the minimum amount an estate can contain to obtain a waiver of accounting as a matter of right. This increase comports with the prior increases by the Legislature. In 1998, the amount was $7,500 (*see* Stats.1998, c. 103 (S.B. 1487), section 7) and was increased 100% nine years later in 2007 to the current amount of $15,000 (*see* Stats.2007, c. 553 (A.B 1727), section 23). An increase is necessary as the cost of an accounting can be a substantial percentage of an estate with less than $30,000.

IMPACT STATEMENT
The resolution does not affect any other law, statute or rule other than those expressly identified.

CURRENT OR PRIOR RELATED LEGISLATION:
Not known.

AUTHOR AND/OR PERMANENT CONTACT: Kimberly R. McGhee, Esq., Law Offices of Black & McGhee, 144 East Washington Ave., Escondido, CA 92025; (760) 745-2900.

RESPONSIBLE FLOOR DELEGATE: Kimberly R. McGhee, Esq.

COUNTERARGUMENTS AND STATE BAR SECTION COMMENTS

TEXCOM - TECHNICAL COMMENTS ONLY

While taking no position on this resolution, TEXCOM notes that in the "Statement of Reasons" the authors of the resolution claim that the proposed changed "increases the minimum amount an estate can contain to obtain a waiver of accounting as a matter of right." (Emphasis added.)

However, as proposed, the waiver would not be as a matter of right as there is no proposal to amend Probate Code section 2628, subdivision (a).

This position is only that of the TRUSTS and ESTATES SECTION of the State Bar of California. This position has not been adopted by the State Bar's Board of Trustees, and is not to be construed as representing the position of the State Bar of California.

Membership in the TRUSTS and ESTATES SECTION is voluntary and funding for section activities, including all legislative activities, is obtained entirely from voluntary sources.

RESOLUTION 08-05-2017

DIGEST
LPS Conservatorships: Definition of "Gravely Disabled"
Amends Welfare and Institutions Code sections 5008, 5350, 5350.5 and 5361 to clarify the definition of "gravely disabled" to include chemical dependence.

RESOLUTIONS COMMETTEE RECOMMENDATION
DISAPPROVE

History:
No similar resolutions found.

Reasons:
This resolution amends Welfare and Institutions Code sections 5008, 5350, 5350.5 and 5361 to clarify the definition of "gravely disabled" to include chemical dependence. This resolution should be disapproved because including chemical dependence, which is not defined, as a standard for determining gravely disabled would make the statute overly broad.

Under current law, a person is gravely disabled if, as a result of a mental health disorder, they are unable to provide for their own basic needs of food, clothing and shelter. This resolution seeks to include chemical dependence as a sole triggering factor to allow someone to be determined as gravely disabled and to be placed on an LPS Conservatorship. The main purpose of an LPS Conservatorship is to provide assistance to someone who is unable to care for him or herself due to a mental illness. Under the proposed resolution, anyone who is chemically dependent could be determined to be gravely disabled and placed on an LPS Conservatorship, whether or not they suffer from a mental illness. This resolution would dilute the definition of gravely disabled and the purpose of an LPS Conservatorship and open an unintended flood gate.

TEXT OF RESOLUTION

RESOLVED that the Conference of California Bar Associations recommends that legislation be sponsored to amend Welfare and Institutions Code sections 5008, 5350, 5350.5 and 5361 to read as follows:

§ 5008

Unless the context otherwise requires, the following definitions shall govern the construction of this part:

(a) "Evaluation" consists of multidisciplinary professional analyses of a person's medical, psychological, educational, social, financial, and legal conditions as may appear to constitute a problem. Persons providing evaluation services shall be properly qualified professionals and may be full-time employees of an agency providing face-to-face, which includes telehealth, evaluation services or may be part-time employees or may be employed on a contractual basis.

(b) "Court-ordered evaluation" means an evaluation ordered by a superior court pursuant to Article 2 (commencing with Section 5200) or by a superior court pursuant to Article 3

(commencing with Section 5225) of Chapter 2.

(c) "Intensive treatment" consists of such hospital and other services as may be indicated. Intensive treatment shall be provided by properly qualified professionals and carried out in facilities qualifying for reimbursement under the California Medical Assistance Program (Medi-Cal) set forth in Chapter 7 (commencing with Section 14000) of Part 3 of Division 9, or under Title XVIII of the federal Social Security Act and regulations thereunder. Intensive treatment may be provided in hospitals of the United States government by properly qualified professionals. Nothing in this part shall be construed to prohibit an intensive treatment facility from also providing 72-hour evaluation and treatment.

(d) "Referral" is referral of persons by each agency or facility providing assessment, evaluation, crisis intervention, or treatment services to other agencies or individuals. The purpose of referral shall be to provide for continuity of care, and may include, but need not be limited to, informing the person of available services, making appointments on the person's behalf, discussing the person's problem with the agency or individual to which the person has been referred, appraising the outcome of referrals, and arranging for personal escort and transportation when necessary. Referral shall be considered complete when the agency or individual to whom the person has been referred accepts responsibility for providing the necessary services. All persons shall be advised of available precare services that prevent initial recourse to hospital treatment or aftercare services that support adjustment to community living following hospital treatment. These services may be provided through county or city mental health departments, state hospitals under the jurisdiction of the State Department of State Hospitals, regional centers under contract with the State Department of Developmental Services, or other public or private entities.

Each agency or facility providing evaluation services shall maintain a current and comprehensive file of all community services, both public and private. These files shall contain current agreements with agencies or individuals accepting referrals, as well as appraisals of the results of past referrals.

(e) "Crisis intervention" consists of an interview or series of interviews within a brief period of time, conducted by qualified professionals, and designed to alleviate personal or family situations which present a serious and imminent threat to the health or stability of the person or the family. The interview or interviews may be conducted in the home of the person or family, or on an inpatient or outpatient basis with such therapy, or other services, as may be appropriate. The interview or interviews may include family members, significant support persons, providers, or other entities or individuals, as appropriate and as authorized by law. Crisis intervention may, as appropriate, include suicide prevention, psychiatric, welfare, psychological, legal, or other social services.

(f) "Prepetition screening" is a screening of all petitions for court-ordered evaluation as provided in Article 2 (commencing with Section 5200) of Chapter 2, consisting of a professional review of all petitions; an interview with the petitioner and, whenever possible, the person alleged, as a result of a mental health disorder, to be a danger to others, or to himself or herself, or to be gravely disabled, to assess the problem and explain the petition; when indicated, efforts to persuade the person to receive, on a voluntary basis, comprehensive evaluation, crisis intervention, referral, and other services specified in this part.

(g) "Conservatorship investigation" means investigation by an agency appointed or designated by the governing body of cases in which conservatorship is recommended pursuant to Chapter 3 (commencing with Section 5350).

(h)(1) For purposes of Article 1 (commencing with Section 5150), Article 2 (commencing with Section 5200), and Article 4 (commencing with Section 5250) of Chapter 2, and for the purposes of Chapter 3 (commencing with Section 5350), "gravely disabled" means either of the following:

(A) A condition in which a person, as a result of a mental health disorder and/or chemical dependence, is unable to provide for his or her basic personal needs for food, clothing, or shelter and/or is a danger to himself or herself.

(B) A condition in which a person, has been found mentally incompetent under Section 1370 of the Penal Code and all of the following facts exist:

(i) The indictment or information pending against the person at the time of commitment charges a felony involving death, great bodily harm, or a serious threat to the physical well-being of another person.

(ii) The indictment or information has not been dismissed.

(iii) As a result of a mental health disorder, the person is unable to understand the nature and purpose of the proceedings taken against him or her and to assist counsel in the conduct of his or her defense in a rational manner.

(2) For purposes of Article 3 (commencing with Section 5225) and Article 4 (commencing with Section 5250), of Chapter 2, and for the purposes of Chapter 3 (commencing with Section 5350), "gravely disabled" means a condition in which a person, as a result of impairment by chronic alcoholism and/or chemical dependence, is unable to provide for his or her basic personal needs for food, clothing, or shelter.

(3) The term "gravely disabled" does not include persons with intellectual disabilities by reason of that disability alone.

(i) "Peace officer" means a duly sworn peace officer as that term is defined in Chapter 4.5 (commencing with Section 830) of Title 3 of Part 2 of the Penal Code who has completed the basic training course established by the Commission on Peace Officer Standards and Training, or any parole officer or probation officer specified in Section 830.5 of the Penal Code when acting in relation to cases for which he or she has a legally mandated responsibility.

(j) "Postcertification treatment" means an additional period of treatment pursuant to Article 6 (commencing with Section 5300) of Chapter 2.

(k) "Court," unless otherwise specified, means a court of record.

(l) "Antipsychotic medication" means any medication customarily prescribed for the treatment of symptoms of psychoses and other severe mental and emotional disorders.

(m) "Emergency" means a situation in which action to impose treatment over the person's objection is immediately necessary for the preservation of life or the prevention of serious bodily harm to the patient or others, and it is impracticable to first gain consent. It is not necessary for harm to take place or become unavoidable prior to treatment.

(n) "Designated facility" or "facility designated by the county for evaluation and treatment" means a facility that is licensed or certified as a mental health treatment facility or a hospital, as defined in subdivision (a) or (b) of Section 1250 of the Health and Safety Code, by the State Department of Public Health, and may include, but is not limited to, a licensed psychiatric hospital, a licensed psychiatric health facility, and a certified crisis stabilization unit.

§ 5350

A conservator of the person, of the estate, or of the person and the estate may be appointed for a person who is gravely disabled as a result of a mental health disorder or impairment by chronic alcoholism and/or chemical dependence .

The procedure for establishing, administering, and terminating a conservatorship under this chapter shall be the same as that provided in Division 4 (commencing with Section 1400) of the Probate Code, except as follows:

(a) A conservator may be appointed for a gravely disabled minor.

(b)(1) Appointment of a conservator under this part, including the appointment of a conservator for a person who is gravely disabled, as defined in subparagraph (A) of paragraph (1) of subdivision (h) of Section 5008, shall be subject to the list of priorities in Section 1812 of the Probate Code unless the officer providing conservatorship investigation recommends otherwise to the superior court.

(2) In appointing a conservator, as defined in subparagraph (B) of paragraph (1) of subdivision (h) of Section 5008, the court shall consider the purposes of protection of the public and the treatment of the conservatee. Notwithstanding any other provision of this section, the court shall not appoint the proposed conservator if the court determines that appointment of the proposed conservator will not result in adequate protection of the public.

(c) No conservatorship of the estate pursuant to this chapter shall be established if a conservatorship or guardianship of the estate exists under the Probate Code. When a gravely disabled person already has a guardian or conservator of the person appointed under the Probate Code, the proceedings under this chapter shall not terminate the prior proceedings but shall be concurrent with and superior thereto. The superior court may appoint the existing guardian or conservator of the person or another person as conservator of the person under this chapter.

(d)(1) The person for whom conservatorship is sought shall have the right to demand a court or jury trial on the issue of whether he or she is gravely disabled. Demand for court or jury trial shall be made within five days following the hearing on the conservatorship petition. If the proposed conservatee demands a court or jury trial before the date of the hearing as provided for in Section 5365, the demand shall constitute a waiver of the hearing.

(2) Court or jury trial shall commence within 10 days of the date of the demand, except that the court shall continue the trial date for a period not to exceed 15 days upon the request of counsel for the proposed conservatee.

(3) This right shall also apply in subsequent proceedings to reestablish conservatorship.

(e)(1) Notwithstanding subparagraph (A) of paragraph (1) of subdivision (h) of Section 5008, a person is not “gravely disabled” if that person can survive safely without involuntary detention with the help of responsible family, friends, or others who are both willing and able to help provide for the person's basic personal needs for food, clothing, or shelter and is not a danger to him or herself or others.

(2) However, unless they specifically indicate in writing their willingness and ability to help, family, friends, or others shall not be considered willing or able to provide this help.

(3) The purpose of this subdivision is to avoid the necessity for, and the harmful effects of, requiring family, friends, and others to publicly state, and requiring the court to publicly find, that no one is willing or able to assist a person with a mental health disorder in providing for the person's basic needs for food, clothing, or shelter.

(4) This subdivision does not apply to a person who is gravely disabled, as defined in subparagraph (B) of paragraph (1) of subdivision (h) of Section 5008.

(f) Conservatorship investigation shall be conducted pursuant to this part and shall not be

subject to Section 1826 or Chapter 2 (commencing with Section 1850) of Part 3 of Division 4 of the Probate Code.

(g) Notice of proceedings under this chapter shall be given to a guardian or conservator of the person or estate of the proposed conservatee appointed under the Probate Code.

(h) As otherwise provided in this chapter.

§ 5350.5

(a) If a conservatorship has already been established under the Probate Code, the court, in a proceeding under the Probate Code, after an evidentiary hearing attended by the conservatee, unless the conservatee waives presence, and the conservatee's counsel, may refer the conservatee, in consultation with a licensed physician or licensed psychologist satisfying the conditions of subdivision (c) of Section 2032.020 of the Code of Civil Procedure providing assessment or treatment to the conservatee, for an assessment by the local mental health system or plan to determine if the conservatee has a treatable mental illness, including whether the conservatee is gravely disabled as a result of a mental disorder or impairment by chronic alcoholism and/or chemical dependence, and is unwilling to accept, or is incapable of accepting, treatment voluntarily. If the conservatee cannot afford counsel, the court shall appoint counsel for him or her pursuant to Section 1471 of the Probate Code.

(b) The local mental health system or plan shall file a copy of the assessment with the court that made the referral for assessment in a proceeding under the Probate Code.

§ 5361

Conservatorship initiated pursuant to this chapter shall automatically terminate one year after the appointment of the conservator by the superior court. The period of service of a temporary conservator shall not be included in the one-year period. Where the conservator has been appointed as conservator of the estate, the conservator shall, for a reasonable time, continue to have such power and authority over the estate as the superior court, on petition by the conservator, may deem necessary for (1) the collection of assets or income which accrued during the period of conservatorship, but were uncollected before the date of termination, (2) the payment of expenses which accrued during period of conservatorship and of which the conservator was notified prior to termination, but were unpaid before the date of termination, and (3) the completion of sales of real property where the only act remaining at the date of termination is the actual transfer of title. If upon the termination of an initial or a succeeding period of conservatorship the conservator determines that conservatorship is still required, he may petition the superior court for his reappointment as conservator for a succeeding one-year period. The petition must include the opinion of two physicians or licensed psychologists who have a doctoral degree in psychology and at least five years of postgraduate experience in the diagnosis and treatment of emotional and mental disorders that the conservatee is still gravely disabled as a result of mental disorder or impairment by chronic alcoholism and/or chemical dependence. In the event that the conservator is unable to obtain the opinion of two physicians or psychologists, he shall request that the court appoint them.

Any facility in which a conservatee is placed must release the conservatee at his request when the conservatorship terminates. A petition for reappointment filed by the conservator or a petition for appointment filed by a public guardian shall be transmitted to the facility at least 30 days before the automatic termination date. The facility may detain the conservatee after the end of the termination date only if the conservatorship proceedings have not been completed and the

court orders the conservatee to be held until the proceedings have been completed.

(Proposed new language underlined; language to be deleted stricken)

PROPONENT: Bar Association of Northern San Diego County

STATEMENT OF REASONS

The Problem: Currently, the Lanterman-Petris-Short Act refers to "mental health disorder" or "chronic alcoholism" as recognized causes, and "inability to provide for his or her basic personal needs for food, clothing, or shelter as effects" when defining "gravely disabled" for purposes of LPS Conservatorship. In cases where a person is subject to section 5150, a court is not able to consider chemical dependency as a cause of the disability, and not able to consider danger to one's self or others as an effect of the disability. The result of this is that the court has to "fudge" to establish an LPS Conservatorship if it is clear the person needs help, but not because of mental illness or chronic alcoholism, because chemical dependence is not a statutory basis for conservatorship. Similarly, when considering the release from LPS Conservatorship of a conservatee, the court is only authorized to consider whether the conservatee has resources to provide for his basic personal needs for food, clothing, or shelter. The statute does not provide for retention of the conservatorship/institutionalization even if it is obvious that the conservatee would be a danger to himself or others if released without some kind of supervision.

The Solution: This resolution would add chemical dependency to the definition of "gravely disabled" for purposes of the Act as an additional recognized cause of mental disability in the context evaluating the propriety of involuntary mental health treatment in a general conservatorship or the extension of an LPS Conservatorship past its initial termination date.

IMPACT STATEMENT
The resolution does not affect any other law, statute or rule other than those expressly identified.

CURRENT OR RELATED LEGISLATION
None Known.

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COUNTERARGUMENTS AND STATE BAR SECTION COMMENTS

TEXCOM - DISAPPROVE

The term "chemical dependence" is not defined in the amendments. It is not clear why a mental illness brought on by substance abuse, as it is defined and described in DSM-5 at pp. 481-589,

would not be adequate to trigger a finding of "gravely disabled" under the present definitions in the Welfare and Institutions Code. Absent a more coherent and documented showing that individuals who are disabled by reason of substance abuse routinely escape the 5150 process, or the further stages in implementation of LPS conservatorships, the amendments are unnecessary and for that reason are opposed.

This position is only that of the TRUSTS and ESTATES SECTION of the State Bar of California. This position has not been adopted by the State Bar's Board of Trustees, and is not to be construed as representing the position of the State Bar of California.

Membership in the TRUSTS and ESTATES SECTION is voluntary and funding for section activities, including all legislative activities, is obtained entirely from voluntary sources.

RESOLUTION 08-06-17

DIGEST
Limited Conservatorships: Immediate Appointment of Counsel
Amends Probate Code section 1471 to allow for the appointment of counsel upon the filing of the petition for limited conservatorship.

RESOLUTIONS COMMITTEE RECOMMENDATION
APPROVE IN PRINCIPLE

History:
No similar resolutions found.

Reasons:
This resolution amends Probate Code section 1471 to allow for the appointment of counsel upon the filing of the petition for limited conservatorship. This resolution should be approved in principle because it would save the court time by not wasting the initial hearing on the mandatory appointment of counsel.

In a limited conservatorship, the appointment of counsel for the proposed conservatee is mandatory. A majority of persons petitioning for a limited conservatorship are family members who are not represented by counsel themselves. At the time of filing the petition for the appointment of a limited conservator, most petitioners do not know that the appointment of counsel is mandatory and are unaware of the mandatory appointment until the initial hearing on the petition. Even though a petitioner can request that counsel be appointed for the proposed conservatee when they file the initial petition, such a request is never made. By requiring the courts to appoint counsel at the time the petition for a limited conservatorship is filed, it will save the court time as well as family member's time and dispense with the unnecessary initial hearing where counsel is usually appointed.

Even if the courts were required to appoint counsel at the time of the filing of the petition, this would not interfere with the proposed conservatee's right to obtain counsel. If the proposed conservatee obtained their own counsel, they could inform the court at the hearing on the petition for the appointment of a limited conservator.

TEXT OF RESOLUTION

RESOLVED that the Conference of California Bar Associations recommends that legislation be sponsored to amend Probate Code section1471 to read as follows:

§ 1471

(a) If a conservatee, proposed conservatee, or person alleged to lack legal capacity is unable to retain legal counsel and requests the appointment of counsel to assist in the particular matter, whether or not that person lacks or appears to lack legal capacity, the court shall, at or before the time of the hearing, appoint the public defender or private counsel to represent the interest of that person in the following proceedings under this division:

1. A proceeding to establish or transfer a conservatorship or to appoint a proposed conservator.
2. A proceeding to terminate the conservatorship.
3. A proceeding to remove the conservator.
4. A proceeding for a court order affecting the legal capacity of the conservatee.
5. A proceeding to obtain an order authorizing removal of a temporary conservatee from the temporary conservatee's place of residence.

(b) If a conservatee or proposed conservatee does not plan to retain legal counsel and has not requested the court to appoint legal counsel, whether or not that person lacks or appears to lack legal capacity, the court shall, at or before the time of the hearing, appoint the public defender or private counsel to represent the interests of that person in any proceeding listed in subdivision (a) if, based on information contained in the court investigator's report or obtained from any other source, the court determines that the appointment would be helpful to the resolution of the matter or is necessary to protect the interests of the conservatee or proposed conservatee.

(c) In any proceeding to establish a limited conservatorship, at the time the petition is filed ~~if the proposed limited conservatee has not retained legal counsel and does not plan to retain legal counsel,~~ the court shall immediately appoint the public defender or private counsel to represent the proposed limited conservatee. The proposed limited conservatee shall pay the cost for that legal service if he or she is able. This subdivision applies irrespective of any medical or psychological inability to attend the hearing on the part of the proposed limited conservatee as allowed in Section 1825.

(Proposed new language underlined; language to be deleted stricken)

PROPONENT: Contra Costa County Bar Association

STATEMENT OF REASONS

The Problem: Limited Conservatorships are proceedings for developmentally disabled adults. The law currently provides for the "immediate" appointment of counsel for the proposed conservatee if counsel has not been retained. It is mandatory that counsel either be retained by the proposed conservatee or the court appoint counsel. The majority of proposed limited conservatees do not have the ability to retain independent counsel. If counsel is not retained by the proposed conservatee then the first hearing serves solely for the appointment of counsel which is a waste of the court's and the family's time. The families with children with developmental disabilities always appear to be willing to jump through any necessary hoop to ensure that their child is protected, but it does not make sense to increase the amount of time necessary in an already overly time consuming process. The courts always exercise the utmost care to ensure that the rights of proposed limited conservatees are honored, and are equally encumbered with this process--court time is completely wasted solely for a mandatory appointment of counsel.

The Solution: At the time the petition is filed the court immediately appoints counsel for the proposed conservatee. If the court were to appoint counsel for the proposed conservatee at the time of the filing of the petition these matters would potentially be completed sooner saving the court time and also saving the family multiple trips to the court.

IMPACT STATEMENT
The resolution does not affect any other law, statute or rule other than those expressly identified.

CURRENT OR PRIOR RELATED LEGISLATION
None known.

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COUNTERARGUMENTS AND STATE BAR SECTION COMMENTS

TEXCOM - DISAPPROVE

Many counties currently appoint counsel for proposed limited conservatees at filing. However, for those that do not, TEXCOM believes this resolution may obstruct an individual, for whom no determination of incapacity has been made, from retaining his or her own counsel. The delay from a continuance when counsel has to be appointed for an individual who has not retained one should be balanced against a proposal that could prevent or interfere with the limited conservatee's right to select counsel of his or her own choosing.

This position is only that of the TRUSTS and ESTATES SECTION of the State Bar of California. This position has not been adopted by the State Bar's Board of Trustees, and is not to be construed as representing the position of the State Bar of California.

Membership in the TRUSTS and ESTATES SECTION is voluntary and funding for section activities, including all legislative activities, is obtained entirely from voluntary sources.

RESOLUTION 08-07-2017

DIGEST
Guardianships: Notice of Parent's Rights
Amends Probate Code section 1510.1 to require an information notice of parents' rights be attached to the order appointing the guardian.

RESOLUTIONS COMMITTEE RECOMMENDATION
DISAPPROVE

History:
No similar resolutions found.

Reasons:
This resolution amends Probate Code section 1510.1 to require an information notice of parents' rights be attached to the order appointing the guardian. This resolution should be disapproved because it is unnecessary to provide notice to parents that their rights as a parent may be terminated in this type of guardianship.

Probate Code section 1510.1 authorizes the court to appoint a guardian of the person for a ward who is 18 years old, but has not yet reached the age of 21, as well as extend the guardianship of the person beyond a ward's 18th birthday, in connection with the youth's proposed or pending application for Special Immigrant Juvenile Status under federal law. Since an 18 year old is considered a legal adult under state law, and not subject to parental control, it is unnecessary to require that an information notice of parents' rights be given in these types of guardianship proceedings.

TEXT OF RESOLUTION

RESOLVED that the Conference of California Bar Associations recommends that legislation be sponsored to amend Probate Code section 1510.1 to read as follows:

§ 1510.1

(a)(1) With the consent of the proposed ward, the court may appoint a guardian of the person for an unmarried individual who is 18 years of age or older, but who has not yet attained 21 years of age, in connection with a petition to make the necessary findings regarding special immigrant juvenile status pursuant to subdivision (b) of Section 155 of the Code of Civil Procedure.

(2) A petition for guardianship of the person of a proposed ward who is 18 years of age or older, but who has not yet attained 21 years of age, may be filed by a relative or any other person on behalf of the proposed ward, or the proposed ward.

(b)(1) At the request of, or with the consent of, the ward, the court may extend an existing guardianship of the person for a ward past 18 years of age, for purposes of allowing the ward to complete the application process with the United States Citizenship and Immigration Services for classification as a special immigrant juvenile pursuant to Section 1101(a)(27)(J) of Title 8 of the United States Code.

(2) A relative or any other person on behalf of a ward, or the ward, may file a petition to extend the guardianship of the person for a period of time not to extend beyond the ward reaching 21 years of age.

(c) This section does not authorize the guardian to abrogate any of the rights that a person who has attained 18 years of age may have as an adult under state law, including, but not limited to, decisions regarding the ward's medical treatment, education, or residence, without the ward's express consent.

(d) For purposes of this division, the terms "child," "minor," and "ward" include an unmarried individual who is younger than 21 years of age and who, pursuant to this section, consents to the appointment of a guardian or extension of a guardianship after he or she attains 18 years of age.

(e) The Judicial Council shall, by July 1, 2016, adopt any rules and forms needed to implement this section.

(f) An information notice of the rights of parents of the minor shall be attached to the order. The guardian shall mail the order and the attached information notice to the minor's parents and minor's relatives, as set forth in subdivision (c) of Section 1510, within 30 days of the issuance of the order.

(Proposed new language underlined; language to be deleted stricken)

PROPONENT: Contra Costa County Bar Association

STATEMENT OF REASONS

The Problem: The rights of the parents after the granting of a probate guardianship are not clearly defined. The majority of parents with children subject to a guardianship are unaware that their child may be adopted by the guardians in a probate guardianship. Most parents believe that guardianships are temporary custodial orders and they are faced with a surprise when the guardians chose to petition to adopt the minor.

The Solution: Providing the parents with an information after the order granting a guardianship would inform the parents of the rights they still maintain. This would also serve to inform the parents that their parental rights could be terminated if the guardianship remains in place and the guardians chose to adopt the minor.

IMPACT STATEMENT

The resolution does not affect any other law, statute or rule other than those expressly identified.

CURRENT OR PRIOR RELATED LEGISLATION

None known.

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COUNTERARGUMENTS AND STATE BAR SECTION COMMENTS

TEXCOM - DISAPPROVE

The stated purpose in the commentary is to give the family members notice of parental rights affected by a guardianship. If this is the purpose, the notice should be drafted as a part of the regular guardianship notices and not just to this specialized guardianship provision. However, the resolution limits this application to Probate Code section 1510.1, a specialized guardianship for adults between 18-21 for specified immigration purposes. The need for this language is not clear, as the wards it would apply to are, pursuant to Section 1510, subdivision (c), legal adults for all other purposes entitled to privacy in their own affairs. The proposal nonetheless refers to these adult wards as "minors" and treats them as such.

This position is only that of the TRUSTS and ESTATES SECTION of the State Bar of California. This position has not been adopted by the State Bar's Board of Trustees, and is not to be construed as representing the position of the State Bar of California.

Membership in the TRUSTS and ESTATES SECTION is voluntary and funding for section activities, including all legislative activities, is obtained entirely from voluntary sources.

RESOLUTION 08-08-2017

DIGEST
Conservatorships: Mental Health Examinations
Amends Code of Civil Procedure section 2032.020 to prohibit the mental or physical examination of a proposed conservatee who objects to the examination.

RESOLUTIONS COMMITTEE RECOMMENDATION
DISAPPROVE

History:
No similar resolutions found.

Reasons:
This resolution amends Code of Civil Procedure section 2032.020 to prohibit the mental or physical examination of a proposed conservatee who objects to the examination. This resolution should be disapproved because it does not allow a court discretion to order a mental examination, even if other facts strongly suggest that the proposed conservatee is vulnerable to elder abuse by a household member, or in other compelling situations.

Code of Civil Procedure section 2032.020 provides for physical and mental examinations of parties as part of the discovery process, where the physical and mental state of the party is at issue. These provisions apply also to probate proceedings. (Prob. Code, § 1000.) Except for physical examinations of personal injury plaintiffs, all such examinations require a motion for a court order. Physical or mental status is always at issue in conservatorship proceedings. However, such proceedings are quasi-criminal in nature, in that the outcome may result in loss of liberty for the proposed conservatee. This is why conservatorship proceedings are the only proceedings under the Probate Code for which a jury is provided. (*Conservatorship of Coffey* (1986) 186 Cal.App.3d 1431, 1441; Prob. Code, §§ 1827.) In a criminal proceeding the Fifth Amendment protects the right to avoid self-incrimination. (Cal. Const., art. I, § 15; Evid. Code, §§ 930, 940.)

Conservatorships are frequently sought for the precise reason that an elderly person is being taken advantage of by a member of their own household. A mental examination might well reveal this abuse. The likely abuser or influencer could and probably would prevail on the proposed conservatee to refuse the examination, thus making detection of elder abuse more difficult. The resolution also makes no showing that proposed conservatees are being forced to undergo such examinations against their will. Practitioners disclose that this is not happening, and that petitions are usually granted based on independent evidence of incapacity. Finally, even if not requiring these examinations were the better general rule, this resolution does not allow for any discretion by the trial judge to order an examination where the facts clearly warrant it. Its enactment would be a boon to elder abusers.

TEXT OF RESOLUTION

RESOLVED that the Conference of California Bar Associations that recommends that legislation be sponsored to amend Code of Civil Procedure section 2032.020 to read as follows:

§ 2032.020

(a) Any party may obtain discovery, subject to the restrictions set forth in Chapter 5 (commencing with Section 2019.010), by means of a physical or mental examination of (1) a party to the action, (2) an agent of any party, or (3) a natural person in the custody or under the legal control of a party, in any action in which the mental or physical condition (including the blood group) of that party or other person is in controversy in the action.

(b) A physical examination conducted under this chapter shall be performed only by a licensed physician or other appropriate licensed health care practitioner.

(c) A mental examination conducted under this chapter shall be performed only by a licensed physician, or by a licensed clinical psychologist who holds a doctoral degree in psychology and has had at least five years of postgraduate experience in the diagnosis of emotional and mental disorders.

(d) A mental or physical examination conducted under this chapter shall not be performed on a proposed conservatee in a Probate conservatorship who objects to submitting to a mental or physical examination.

(Proposed new language underlined; language to be deleted stricken)

PROPONENT: San Bernardino County Bar Association

STATEMENT OF REASONS

The Problem: Existing law provides that a petitioner seeking appointment as Probate Conservator of the Person that includes the power to make medical decisions on behalf of a proposed conservatee, or dementia powers under Probate Code 2356.5, or to determine whether a proposed conservatee is able to attend a court hearing, must submit a capacity declaration by a licensed physician, psychologist or an accredited religions practitioner. If the proposed conservatee objects to the examination, the petitioner can seek an order of the court compelling the proposed conservatee to submit to an examination, that could be against their interests. Further, if the proposed conservatee refuses to submit to the examination, he/she can face sanctions including monetary sanctions. Since Courts are understandably reluctant to issue sanctions against a proposed conservatee who objects to submission to an examination that may have a profound impact on his/her liberty, an order compelling the examination is meaningless and generally without effect.

The Solution: The proposed resolution eliminates the ability of a petitioner for appointment as a probate conservator to compel the proposed conservatee over his/her objection to submit to a medical or physical examination to produce a capacity declaration. Nothing in this resolution would prevent the proposed conservator from seeking medical records or testimony from any treating physicians regarding the health or capacity of the proposed conservatee. However, no proposed conservatee would be compelled to submit to an examination that is violation of one's

right against self-incrimination and may result in his/her and loss of liberty and including the administration of psychotropic drugs or placement in a secure perimeter facility.

IMPACT STATEMENT
The resolution does not affect any other law, statute or rule other than those expressly identified.

CURRENT OR PRIOR RELATED LEGISLATION
None known.

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COUNTERARGUMENTS AND STATE BAR SECTION COMMENTS

TEXCOM - DISAPPROVE

TEXCOM is concerned that this resolution would in effect eliminate the ability of the probate court to order a proposed conservatee to submit to such an examination. While TEXCOM does not question the personal experience of proponent, we find little evidence that this is a prevalent problem, and ample support in case law and practice guides regarding the enforcement of an order to compel a status exam. Absent the ability of the probate court to compel the reluctant proposed conservatee to submit to a mental examination, it may be difficult if not impossible to have a psychiatrist or physician do the examination required to complete a capacity declaration. In the absence of a capacity declaration, the court will be unable to rule upon the conservatee's ability or inability to attend the hearing (Probate Code § 1825(b) or ability to give informed consent to medical treatment medical treatment (Probate Code § 1890(c), and whether the conservator should be granted dementia powers (Probate Code §2356.5(f)(3)).

This position is only that of the TRUSTS and ESTATES SECTION of the State Bar of California. This position has not been adopted by the State Bar's Board of Trustees, and is not to be construed as representing the position of the State Bar of California.

Membership in the TRUSTS and ESTATES SECTION is voluntary and funding for section activities, including all legislative activities, is obtained entirely from voluntary sources.

RESOLUTION 08-09-2017

DIGEST
Guardian ad Litem: Discretionary Appointment by Court
Amends Probate Code section 1003 to allow the court discretion in appointing a guardian ad litem without a finding that the person is incapacitated.

RESOLUTIONS COMMITTEE RECOMMENDATION
DISAPPROVE

History:
No similar resolutions found.

Reasons:
This resolution amends Probate Code section 1003 to allow the court discretion in appointing a guardian ad litem without having to find the person incapacitated. The resolution should be disapproved because it would result in a deprivation of substantive due process rights of an "alleged" incapacitated person to act on their own behalf.

In determining whether a guardian ad litem should be appointed based on incapacity, the courts often rely on the standards set forth in Probate Code section 1801 subdivision (b) which governs the appointment of a Probate Conservator whereby a showing is required that someone is "substantially unable to manage his or her own financial resources or resist fraud or undue influence." Other courts may rely on Code of Civil Procedure section 372 which provides for the appointment of a guardian ad litem for someone "lacking legal capacity to make decisions." An adult's constitutional right to maintain his/her own autonomy, and to make his/her own decisions should preclude intervention by the court if the adult is not incapacitated.

If a client is completely incapacitated, an appointment of a guardian ad litem is obvious, and the level of inquiry by the court may be perfunctory. However, most cases regarding incapacity are less clear, as is the need for appointment of a guardian ad litem. An individual may be able to make some decisions but not others. The individual may indeed have difficulty communicating and cooperating with an attorney working on his/her behalf, but may not need a guardian ad litem. In *In re Sara D. v. Taylor D.* (2001) 87 Cal.App.4th 661, the court rejected the notion that there was a bright line requirement that the court rely on either Probate Code section 1801 or Code of Civil Procedure section 372 to establish incapacity. However, the court held that at a minimum there must be an inquiry sufficient to satisfy that the individual is, or is not, competent, and whether the individual understands the nature of the proceedings and can assist the attorney in protecting his/her rights.

Once a guardian ad litem is appointed, the wishes of the individual allegedly protected are secondary. The guardian ad litem is charged with whatever authority the court bestows which could include managing litigation, deciding where the protected individual lives, how money is spent, what health choices are made, and whether the protected person remains married, all without the input of the protected person. Before the Court can appoint a guardian ad litem and take significant rights away, there must be a showing that the individual is incapacitated.

TEXT OF RESOLUTION

RESOLVED that the Conference of California Bar Associations recommends that legislation be sponsored to amend Probate Code section 1003 to read as follows:

§ 1003

(a) The court may, on its own motion or on request of a personal representative, guardian, conservator, trustee, or other interested person, appoint a guardian ad litem at any stage of a proceeding under this code to represent the interest of any of the following persons, if the court determines that representation of the interest otherwise would be inadequate:

(1) A minor.

(2) An incapacitated person.

(3) An unborn person.

(4) An unascertained person.

(5) A person whose identity or address is unknown.

(6) A designated class of persons who are not ascertained or are not in being.

(7) A person for whom in the discretion of the court such appointment would be helpful to the resolution of the matter or is necessary to protect the person's interests.

(b) If not precluded by a conflict of interest, a guardian ad litem, including compensation and attorney's fees, shall be determined by the court and paid as the court orders, either out of the property of the estate involved or by the petitioner or from such other source as the court orders.

(Proposed new language underlined; language to be deleted stricken)

PROPONENT: Probate Attorneys of San Diego

STATEMENT OF REASONS

The Problem: Existing law requires a court to adjudicate a person incapacitated prior to appointment of a guardian ad litem unless one of the enumerated exceptions applies. Currently a court can appoint legal counsel to individuals where such individual is not otherwise represented by legal counsel and the appointment would be helpful to the resolution of the matter or necessary to protect the person's interests. Probate Code §1470. Frequently, persons for whom a court appoints legal counsel are unable to meaningfully participate in the legal proceedings and are unable to direct or assist their court appointed counsel and therefore their interests may not be adequately protected.

The Solution: Will enable a court to use discretion in appointing a guardian ad litem for a person without first needing to adjudicate the person incompetent.

IMPACT STATEMENT

The resolution does not affect any other law, statute or rule other than those expressly identified.

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COUNTERARGUMENTS AND STATE BAR SECTION COMMENTS

TEXCOM - DISAPPROVE

While perhaps understandable, this resolution is inconsistent with the rights of those who are accused of lacking capacity. It would be unfair to give courts the discretion to appoint a guardian ad litem for someone regardless of whether that person is incapacitated or not. If an interested person wants to have a guardian ad litem appointed for someone, the interested person does not need to obtain a prior conservatorship and, instead, can request appointment of a guardian ad litem by ex parte application. (*Sarracino v. Superior Court* (1974) 13 Cal.3d 1, 12-13.)

This position is only that of the TRUSTS and ESTATES SECTION of the State Bar of California. This position has not been adopted by the State Bar's Board of Trustees, and is not to be construed as representing the position of the State Bar of California.

Membership in the TRUSTS and ESTATES SECTION is voluntary and funding for section activities, including all legislative activities, is obtained entirely from voluntary sources.

RESOLUTION 08-10-2017

DIGEST
Conservatorships: Custody and Control of Financial Accounts After Death of Conservatee
Amends Probate Code section 1860 to clarify that the conservator still has authority to control financial accounts after the death of the conservatee.

RESOLUTIONS COMMITTEE RECOMMENDATION
APPROVE IN PRINCIPLE

History:
No similar resolutions found.

Reasons:
This resolution amends Probate Code section 1860 to clarify that the conservator still has authority to control financial accounts of the conservatorship estate after the death of the conservatee. This resolution should be approved in principle because the resolution adds additional clarity regarding the authority a conservator has after the death of the conservatee.

The resolution would add a reference in Probate Code section 1860 to other existing Probate Code sections, namely sections 2467 and 2631, which gives the conservator the authority and duty of custody and control of the conservatorship estate after the death of the conservatee. This resolution would assist in dispelling any confusion by a financial institution regarding the authority of a conservator after the death of the conservatee pending final discharge of the conservator by a Probate Court.

The author asserts that the resolution is needed because banks have frozen accounts of the conservatorship estate upon hearing that the conservatee has died, based on a reading of Probate Code section 1860, subdivision (a), which suggests that the conservatorship estate is terminated by the death of the conservatee. The result is that the conservator is prevented from paying the debts of the conservatee including funeral expenses.

This resolution is related to Resolution 08-11-2017.

TEXT OF RESOLUTION

RESOLVED that the Conference of California Bar Associations recommends that legislation be sponsored to amend Probate Code section 1860 to read as follows:

§ 1860

(a) A conservatorship continues until terminated by the death of the conservatee or by order of the court, subject to Sections 2467 and 2631, and except as otherwise provided by statute.

(b) If a conservatorship is established for the person of a married minor, the conservatorship does not terminate if the marriage is dissolved or is adjudged a nullity.

(c) This section does not apply to limited conservatorships.

(Proposed new language underlined; language to be deleted stricken)

PROPONENT: Sacramento County Bar Association

STATEMENT OF REASONS

The Problem: Financial institutions have interpreted the language in Probate Code section 1860, subdivision (a), to mean that because the conservatorship has terminated, the conservator no longer has authority to access the accounts of the conservatee. The financial institutions have frozen accounts, and will not allow access to pay debts of the conservatee, including funeral and burial expenses.

The Solution: The provision should be amended by adding language clarifying that the conservator's authority to access accounts does not terminate at the conservatee's death by adding an indication that the conservator of the estate continues to have authority. Two primary codes of reference are Probate Code section 2467, regarding the custody and control of the estate by the conservator until delivery to the personal representative, and Probate Code section 2631, regarding conservator's power to contract and to pay reasonable expenses after the death of the conservatee.

IMPACT STATEMENT
This resolution does not affect any other law, statute or rule other than those expressly identified.

CURRENT OR PRIOR RELATED LEGISLATION
None known.

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RESPONSIBLE FLOOR DELEGATE: Susan C. Hill

COUNTERARGUMENTS AND STATE BAR SECTION COMMENTS

TEXCOM - SUPPORT

TEXCOM agrees with Proponents that a literal reading of Probate Code section 1860 has led financial institutions to often freeze accounts of conservatees until a personal representative has been appointed. This can leave the conservator with no way to pay the debts of the conservatee, including funeral and burial expenses. This Resolution should clarify the continuing authority and obligation of the Conservator of the Estate under other provisions of the Probate Code to pay last expenses, maintain custody and control, and to preserve the assets prior to delivery to the personal representative, or as ordered by the Court.

TEXCOM offers the technical comment that a clearer and more express statement in the affirmative that a Conservatorship of the estate does not terminate upon death, but continues pursuant to the cited sections, should be considered.

This position is only that of the TRUSTS and ESTATES SECTION of the State Bar of California. This position has not been adopted by the State Bar's Board of Trustees, and is not to be construed as representing the position of the State Bar of California.

Membership in the TRUSTS and ESTATES SECTION is voluntary and funding for section activities, including all legislative activities, is obtained entirely from voluntary sources.

RESOLUTION 08-11-2017

DIGEST
Probate Custody and Control of Financial Accounts After Death of Ward
Amends Probate Code section 1600 to clarify that the guardian still has authority to control financial accounts of the guardianship estate after the death of the ward.

RESOLUTIONS COMMITTEE RECOMMENDATION
APPROVE IN PRINCIPLE

History:
No similar resolutions found.

Reasons:
This resolution amends Probate Code section 1600 to clarify that the guardian still has authority to control financial accounts of the guardianship estate after the death of the ward. This resolution should be approved in principle because the resolution adds additional clarity regarding the authority of a guardian after the death of the ward.

This resolution would add a reference in Probate Code section 1600 to other existing Probate Code sections, namely sections 2467 and 2631, which gives the guardian the authority and duty of custody and control of the guardianship estate after the death of the ward. This resolution would assist in dispelling any confusion by a financial institution regarding the authority of a guardian after the death of the ward pending final discharge of the guardian by a Probate Court.

The author asserts that the resolution is needed because banks have frozen accounts of the guardianship estate upon hearing that the ward has died based on an interpretation of Probate Code section 1600, subdivision (b), which suggests that the guardianship estate is terminated by the death of the ward. The result is that the guardian may be prevented from paying the debts of the ward including funeral expenses. This resolution would clarify this code section to explicitly allow the guardian to pay the expenses.

This resolution is related to Resolution 08-10-2017.

TEXT OF RESOLUTION

RESOLVED that the Conference of California Bar Associations recommends that legislation be sponsored to amend Probate Code section 1600 to read as follows:

§ 1600

(a) A guardianship of the person or estate or both terminates when the ward attains majority unless, pursuant to Section 1510.1, the ward requests the extension of, or consents to the extension of, the guardianship of the person until the ward attains 21 years of age.

(b) A guardianship of the person terminates upon the death of the ward, the adoption of the ward, or upon the emancipation of the ward under Section 7002 of the Family Code.

(c) A guardianship of the estate terminates upon the death of the ward, subject to Sections 2467 and 2631, and except as otherwise provided by statute.

(Proposed new language underlined; language to be deleted stricken)

PROPONENT: Sacramento County Bar Association

STATEMENT OF REASONS

The Problem: Similar to the language in Probate Code section 1860, subdivision (a), regarding conservatorships of the estate, financial institutions could interpret the language in Probate Code section 1600 to mean that because the guardianship has terminated by the death of the ward, the guardian no longer has authority to access the accounts of the ward. The financial institutions may freeze accounts at the death of the ward, as they have upon the deaths of conservatees, and not allow access to pay debts of the ward, including funeral and burial expenses.

The Solution: The provision should be amended by adding language clarifying that the guardian's authority to access accounts does not terminate at the ward's death by adding an indication that the guardian of the estate continues to have authority. Two primary codes of reference are Probate Code section 2467, regarding the custody and control of the estate by the guardian until delivery to the personal representative, and Probate Code section 2631, regarding guardian's power to contract and to pay reasonable expenses after the death of the ward.

IMPACT STATEMENT
This resolution does not affect any other law, statute or rule other than those expressly identified.

CURRENT OR PRIOR RELATED LEGISLATION
None known.

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COUNTERARGUMENTS AND STATE BAR SECTION COMMENTS

TEXCOM - SUPPORT

TEXCOM agrees with Proponents that a literal reading of Probate Code section 1600 has led financial institutions to often freeze guardianship accounts until a personal representative has been appointed. This can leave the guardian with no way to pay the debts of the ward, including funeral and burial expenses. This Resolution should clarify the continuing authority and obligation of the Conservator of the Estate under other provisions of the Probate Code to pay last

expenses, maintain custody and control, and to preserve the assets prior to delivery to the personal representative, or as ordered by the Court.

TEXCOM offers the technical comment that a clearer and more express statement in the affirmative that a Guardianship of the estate does not terminate upon death, but continues pursuant to the cited sections, should be considered

This position is only that of the TRUSTS and ESTATES SECTION of the State Bar of California. This position has not been adopted by the State Bar's Board of Trustees, and is not to be construed as representing the position of the State Bar of California.

Membership in the TRUSTS and ESTATES SECTION is voluntary and funding for section activities, including all legislative activities, is obtained entirely from voluntary sources.

RESOLUTION 08-12-2017

DIGEST
Executors: Expansion of Authority
Amends Probate Code section 8400 to expand authority of the named executor to include control over digital assets of the decedent.

RESOLUTIONS COMMITTEE RECOMMENDATION
DISAPPROVE

History:
No similar resolutions found.

Reasons:
This resolution amends Probate Code section 8400 to expand authority of the named executor to include control over digital assets of the decedent. This resolution should be disapproved because it creates numerous ambiguities and practical problems.

Probate Code sections 13100 *et seq*. authorize the person entitled to distribution of a decedent's estate to obtain the assets through the declaration procedure when the total estate is less than $150,000. Otherwise, the personal representative (what many people think of as the "executor") must be appointed by the probate court to administer the estate. In that instance, the personal representative nominated in the will generally has no authority to act until expressly given that authority by the court. For that reason, the terminology "named in the decedent's will" is incorrect. An executor may only be *nominated* in the will, not actually appointed to act. This resolution seeks to fundamentally change the current statutory structure for two reasons, both of which are misguided.

First, the resolution would authorize a person merely *nominated* in a decedent's will to take control over a decedent's digital assets. A far less drastic solution already exists under existing law. Currently, it is possible to request that the court issue letters of special administration (which can be done on an ex parte basis) to permit the administration of a certain limited class of assets, such as digital assets. Therefore, this change in the law is not necessary. Further, the appropriate place for the issue to be addressed would be in Probate Code sections 13100 *et seq*., rather than in section 8400, because the former squarely addresses the passing of property in small estates, whereas the latter addresses the manner in which courts are required to choose amongst potential personal representatives—which, again, many people think of as the executor.

Secondly, the resolution would authorize a person merely *nominated* in a decedent's will to take control over a decedent's personal property. Yet a fundamental premise of the Probate Code is that the person nominated has no authority to act until appointed by the court. It is not entirely clear what problem exists under the current statutory scheme. Probate Code sections 13100 *et seq*. already authorize the transfer of personal property to the beneficiaries ultimately entitled to receive it. To interject a person merely nominated in a will serves no useful purpose, and may cause more problems.

TEXT OF RESOLUTION

RESOLVED that the Conference of California Bar Associations recommends that legislation be sponsored to amend Probate Code section 8400 to read as follows:

§ 8400

(a) A person has no power to administer the estate until the person is appointed personal representative and the appointment becomes effective. Appointment of a personal representative becomes effective when the person appointed is issued letters.

(b) Subdivision (a) applies whether or not the person is named executor in the decedent's will, except that a person named executor in the decedent's will shall be considered a fiduciary with authority over the property of a decedent under subdivision (c) of section 880 relating to digital assets and may, before the appointment is made or becomes effective pay funeral expenses and take necessary measures for the maintenance and preservation of the estate.

(c) The order appointing a personal representative shall state in capital letters on the first page of the order, in at least 12-point type, the following: "WARNING: THIS APPOINTMENT IS NOT EFFECTIVE UNTIL LETTERS HAVE ISSUED."

(d) If appointment has not been made and is not reasonably expected to be required, the person named executor in the decedent's will may take possession of the decedent's tangible personal property and distribute it to the recipient entitled to it under the will once the person could transfer the property to the recipient if presented with a declaration under section 13101.

(Proposed new language underlined; language to be deleted stricken)

PROPONENT: Sacramento County Bar Association

STATEMENT OF REASONS

The Problem: Subdivision (c) of Probate Code section 880 (which is part of the Revised Uniform Fiduciary Access to Digital Assets Act, Probate Code sections 870 et. seq., which took effect January 1, 2017) states in relevant part that a "fiduciary with authority over the property of a decedent … has the right of access to any digital asset in which the decedent … had a right or interest and that is not held by a custodian or subject to a terms-of-service agreement." (Emphasis added.) Probate Code section 871 generally defines a digital asset as an "electronic record in which an individual has a right or interest." This could include, for example, personal financial information in digital form on a computer's hard drive or a portable storage device like a "thumb drive." Under Probate Code section 8400, even a person named the executor in a decedent's will has "no power to administer the estate until the person is appointed personal representative," which occurs only upon the issuance of letters.

1. Access to Digital Assets

Because under Probate Code section 8400, a person named the executor in a decedent's will has no power to administer the estate until issued letters, even a named executor has no authority over the property of a decedent and may not, for example, access the decedent's computer or storage devices for the purpose of determining the decedent's assets or estate plan.

2. Transfer of Tangible Personal Property

Many decedents have estate under the probate threshold because, for example, their most significant assets pass under a trust document or in some other manner not subject to probate. Tangible personal property and other stray assets not subject to probate are often transferred informally or pursuant to a declaration under Probate Code section 13101 (a declaration relating to small estate transfers). Even a named executor has no authority under Probate Code section 8400 to transfer such tangible personal property, although though such transfers are common.

The Solution: 1. Amend Probate Code section 8400 to provide that a person named executor in a will shall be considered a fiduciary with authority over the property of a decedent under subdivision (c) of section 880 relating to digital assets.

2. Amend Probate Code section 8400 to provide that a person named executor in a will has the authority to transfer a decedent's tangible personal property under the terms of the decedent's will if that person could transfer the property pursuant to a Probate Code section 13101 declaration.

IMPACT STATEMENT
This resolution does not affect any other law, statute or rule other than those expressly identified.

CURRENT OR PRIOR LEGISLATION
None known.

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COUNTERARGUMENTS AND STATE BAR SECTION COMMENTS

TEXCOM - DISAPPROVE

Section 8400(b) allows a named executor, prior to appointment, authority to pay funeral expenses and take necessary measures to preserve estate property. Expanding that authority to include control over digital assets is beyond the scope of the statute. Probate Code section 880 limits such possession to fiduciaries with appropriate fiduciary duties and accountability. An Order for Probate not only appoints a fiduciary with court supervision but also determines the validity of the will they are acting under. The Proponent also references the need for access to digital assets to identify a decedent's estate planning documents. This, however, lacks any of the procedures and safeguards for access to a safe deposit box in Probate Code section 331. As to the language regarding delivery of tangible personal property, the named executor has existing authority to secure tangible personal property under section 8400(b) prior to appointment. As a custodian of that property, the executor could deliver it to the declarant of a section 13100

affidavit. Section 13101 would have sufficient safeguards, including the allowance of a 40-day period to file a Petition for Probate.

This position is only that of the TRUSTS and ESTATES SECTION of the State Bar of California. This position has not been adopted by the State Bar's Board of Trustees, and is not to be construed as representing the position of the State Bar of California.

Membership in the TRUSTS and ESTATES SECTION is voluntary and funding for section activities, including all legislative activities, is obtained entirely from voluntary sources.

RESOLUTION 08-13-2017

DIGEST
Probate: Digital Assets
Amends Probate Code section 871 to include trusts within the definition of a "person" to whom the Fiduciary Access to Assets Act applies.

RESOLUTIONS COMMITTEE RECOMMENDATION
DISAPPROVE

History:
No similar resolutions found.

Reasons:
This resolution amends Probate Code section 871 to include trusts within the definition of a "person" to whom the Fiduciary Access to Assets Act applies. This resolution should be disapproved because trust assets are owned by the trustee, who is always a "person" entitled to the protections of the Revised Uniform Fiduciary Access to Assets Act.

The Revised Uniform Fiduciary Access to Assets Act is a new uniform law, effective in California only since 2016, the purpose of which is to address the problem of fiduciaries being unable to access the digital assets of decedents, such as online bank accounts, data and e-mail. Many of its provisions apply to "users" and "designated recipients," who must always necessarily be "persons." The Act's definition of "person" does not include trusts, which creates an inconsistency with Probate Code section 56's more general definition of "person" as including a trust. The proposed amendment would make the definitions of this Act consistent with the rest of the Probate Code, and thus supposedly diminish the possibility of a future court ruling that the provisions of the act do not apply to trust.

But the resolution overlooks the fact that the legal owner of a trust's assets is always the trustee. (See, Prob. Code, § 15200.) The trustee is always either an individual or legal entity within the meaning of the Act's definition of "person," and thus someone who can avail him or herself of the Act's provisions. The proposed amendment is thus unnecessary. Since the Act was very recently enacted, presumably after considerable thought, and since it is based on a uniform act with an identical definition of "person," it is too soon to amend it considering the possibility of unintended consequences resulting from the change.

TEXT OF RESOLUTION

RESOLVED that the Conference of California Bar Associations recommends that legislation be sponsored to amend Probate Code section 871 to read as follows:

§ 871

(a) "Account" means an arrangement under a terms-of-service agreement in which the custodian carries, maintains, processes, receives, or stores a digital asset of the user or provides goods or services to the user.

(b) “Carries” means engages in the transmission of electronic communications.

(c) “Catalogue of electronic communications” means information that identifies each person with which a user has had an electronic communication, the time and date of the communication, and the electronic address of the person.

(d) “Content of an electronic communication” means information concerning the substance or meaning of the communication, which meets all of the following requirements:

(1) Has been sent or received by a user.

(2) Is in electronic storage by a custodian providing an electronic communication service to the public or is carried or maintained by a custodian providing a remote-computing service to the public.

(3) Is not readily accessible to the public.

(e) “Court” means the superior court presiding over the judicial proceedings which have been initiated under this code to administer the estate of the deceased user, or, if none, the superior court sitting in the exercise of jurisdiction under this code in the county of the user’s domicile, and the court, as defined in this section, shall have exclusive jurisdiction over proceedings brought under this part.

(f) “Custodian” means a person that carries, maintains, processes, receives, or stores a digital asset of a user.

(g) “Designated recipient” means a person chosen by a user using an online tool to administer digital assets of the user.

(h) “Digital asset” means an electronic record in which an individual has a right or interest. The term “digital asset” does not include an underlying asset or liability, unless the asset or liability is itself an electronic record.

(i) “Electronic” means relating to technology having electrical, digital, magnetic, wireless, optical, electromagnetic, or similar capabilities.

(j) “Electronic communication” has the same meaning as the definition in Section 2510(12) of Title 18 of the United States Code.

(k) “Electronic communication service” means a custodian that provides to a user the ability to send or receive an electronic communication.

(l) “Fiduciary” means an original, additional, or successor personal representative or trustee.

(m) “Information” means data, text, images, videos, sounds, codes, computer programs, software, databases, or other items with like characteristics.

(n) “Online tool” means an electronic service provided by a custodian that allows the user, in an agreement distinct from the terms-of-service agreement between the custodian and user, to provide directions for disclosure or nondisclosure of digital assets to a third person.

(o) “Person” means an individual, estate, <u>trust</u>, business or nonprofit entity, public corporation, government or governmental subdivision, agency, or instrumentality, or other legal entity.

(p) “Personal representative” means an executor, administrator, special administrator, or person that performs substantially the same function under any other law.

(q) “Power of attorney” means a record that grants an agent authority to act in the place of the principal.

(r) “Record” means information that is inscribed on a tangible medium or that is stored in an electronic or other medium and is retrievable in a perceivable form.

(s) "Remote-computing service" means a custodian that provides to a user computer processing services or the storage of digital assets by means of an electronic communications system, as defined in Section 2510(14) of Title 18 of the United States Code.

(t) "Terms-of-service agreement" means an agreement that controls the relationship between a user and a custodian.

(u) "Trustee" means a fiduciary with legal title to property under an agreement or declaration that creates a beneficial interest in another. The term includes a successor trustee.

(v) "User" means a person that has an account with a custodian.

(w) "Will" includes a codicil, a testamentary instrument that only appoints an executor, or an instrument that revokes or revises a testamentary instrument.

(Proposed new language underlined; language to be deleted stricken)

PROPONENT: Sacramento County Bar Association

STATEMENT OF REASONS

The Problem: Subdivision (o) of Probate Code section 871(which is part of the Revised Uniform Fiduciary Access to Digital Assets Act (the "Act"), Probate Code sections 870 et. seq., which took effect January 1, 2017), defines a "Person" for purposes of the Act as "an individual, estate, business or nonprofit entity, public corporation, government or governmental subdivision, agency, or instrumentality, or other legal entity." It includes no reference to a "trust" – a term found in Probate Code section 56, which defines a "Person" for most Probate Code purposes as "an individual, corporation, government or governmental subdivision or agency, business trust, estate, trust, partnership, limited liability company, association, or other entity."

Several statutes in the Act refer to a "user," which Subdivision (v) of Probate Code section 871 defines as "a person that has an account with a custodian." [Emphasis added] Others refer to a "Designated recipient," which Subdivision (g) of Probate Code section 871 defines as "a person chosen by a user using an online tool to administer digital assets of the user." [Emphasis added] Both a "user" and a designated recipient" must be a "person," but under the Act a "person" does not include a trust (even though for general Probate Code purposes Probate Code section 56 defines a "person" to include a trust). This omission could preclude people from fully taking advantage of the new digital asset disclosure law when they have transferred digital assets to a trust.

The Solution: Amend Subdivision (o) of Probate Code section 871 to provide that a "person" includes a trust (consistent with the general Probate Code section 56 definition of a "person").

IMPACT STATEMENT
The resolution does not affect any other law, statute or rule other than those expressly identified.

CURRENT OR PRIOR RELATED LEGISLATION
None known.

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COUNTERARGUMENTS AND STATE BAR SECTION COMMENTS

TEXCOM - TECHNICAL COMMENTS ONLY

While taking no position on this resolution, TEXCOM notes that a trust is a relationship and not an entity. A trustee requesting access to digital information would necessarily need to prove the existence of the trust, the trustee's authority and powers under the trust instrument, and the connection between the deceased settlor and the digital asset or account that is being sought.

This position is only that of the TRUSTS and ESTATES SECTION of the State Bar of California. This position has not been adopted by the State Bar's Board of Trustees, and is not to be construed as representing the position of the State Bar of California.

Membership in the TRUSTS and ESTATES SECTION is voluntary and funding for section activities, including all legislative activities, is obtained entirely from voluntary sources.

RESOLUTION 08-14-2017

DIGEST
Probate: Petitions for Extraordinary Compensation
Amends California Rules of Court, rule 7.702 to require identification of persons performing services when requesting compensation for extraordinary services.

RESOLUTIONS COMMITTEE RECOMMENDATION
DISAPPROVE

History:
No similar resolutions found.

Reasons:
This resolution amends California Rules of Court, rule 7.702 to require identification of persons performing services when requesting compensation for extraordinary services. This resolution should be disapproved because the statute already requires this, making the proposed revision unnecessary.

Attorneys' fees in probate administrations are divided into two categories: statutory and extraordinary. Statutory fees are flat fees based upon the value of the estate for tasks generally associated with the administration of an estate (e.g., gathering assets of the estate, preparing accountings, etc.). (Prob. Code, §10810; see also, e.g., *Estate of Hilton* (1996) 44 Cal.App. 4th 890, 894–895.) The term "statutory" refers to the fact that the amount of the fees is a percentage of the estate as provided by statute. Extraordinary fees may be awarded in the discretion of the court for services outside the scope of statutory fees (e.g., sales of real estate, most litigation, etc.). (Prob. Code, §10811.) An award of extraordinary fees requires a "statement of the hourly rate of each person who performed services, and the hours spent by each of them." (Cal. Rules of Court, rule 7.702.)

This resolution would amend Rule 7.702 to require the listing of *each person* who performs services when requesting extraordinary compensation. The current version of Rule 7.702 already requires the listing of the hourly rate of *each person* who performs services and the hours spent by each of them. As a result, that requirement is already implicit in the statute. If, as the proponent suggests, courts are not consistently applying the law as it now exists, the solution is not to change the rule but rather to bring the issue to the attention of the noncompliant courts.

TEXT OF RESOLUTION

RESOLVED that the Conference of California Bar Associations recommends that the Judicial Council amend California Rules of Court, rule 7.702 to read as follows:

Rule 7.702

A petition for extraordinary compensation must include, or be accompanied by, a statement of the facts upon which the petition is based. The statement of facts must:

(1) Show the nature and difficulty of the tasks performed;

(2) Show the results achieved;

(3) Show the benefit of the services to the estate;

(4) Specify the amount requested for each category of service performed;

(5) State each person who performed the services, the hourly rate of each person who performed services, and the hours spent by each of them;

(6) Describe the services rendered in sufficient detail to demonstrate the productivity of the time spent; and

(7) State the estimated amount of statutory compensation to be paid by the estate, if the petition is not part of a final account or report.

(Proposed new language underlined; language to be deleted stricken)

PROPONENT: Sacramento County Bar Association

STATEMENT OF REASONS

The Problem: In conservatorship proceedings, any person requesting compensation, including professional fiduciaries, must comply with Rule 7.702 in the request. In some courts, notably Sacramento, some professional fiduciaries are showing all services as having been performed by the supervising fiduciary, usually the highest-billing professional fiduciary, in the firm of fiduciaries, or working on the matter, regardless of who actually performed the work. The justification for this is that the supervising attorney has full responsibility for all of the persons working on the matter. The result of this is that work done by a bookkeeper or person licensed as care manager, caregiver, or nursing associate, the reasonable hourly rate for whom is much lower than that for the supervising fiduciary, is charged at the highest rate. The conservatee thus is paying much more for such services than is truly justifiable. Proponent is also aware that there is inconsistency among counties in applying this rule, with some insisting on identification as proposed by this resolution, and some allowing billing for all services at the professional fiduciary's rate.

The Solution: This change will require that services performed by lower-level employees or agents of a professional fiduciary have established rates that can be observed by the court and other parties, and that their names and time are identified and the time billed at the appropriate rate, saving money for conservatees. It will also bring consistency in application of the rule to all counties.

IMPACT STATEMENT
This resolution does not affect any other law, statute or rule other than those expressly identified.

CURRENT OR PRIOR RELATED LEGISLATION
None known.

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RESPONSIBLE FLOOR DELEGATE: Borden D. Webb

RESOLUTION 08-15-2017

DIGEST
Trust Proceeding: Time Consistency in Notice of Proposed Action
Amends Probate Code section 16502 to shorten time for someone to act on a Notice of Proposed Action from 45 days to 30 days, to provide consistent timing requirements in trust proceedings.

RESOLUTIONS COMMITTEE RECOMMENDATION
APPROVE IN PRINCIPLE

History:
No similar resolutions found.

Reasons:
This resolution amends Probate Code section 16502 to shorten for someone to act on a Notice of Proposed Action from 45 days to 30 days to provide consistent timing requirements in trust proceedings. The resolution should be approved in principle because it will correct an inconsistency in the Probate Code regarding notice requirements during trust administration.

Currently during trust administration, the requirement of 45 days' notice of a proposed action exceeds the general notice requirement of 30 days for other actions of the trustee. As the author of the resolution correctly points out, the period of notice required during trust administration is generally longer than during probate administration. This resolution would align the notice requirements of a proposed action in a trust proceeding with other provisions for notice during trust administration.

TEXT OF RESOLUTION

RESOLVED, that the Conference of California Bar Associations recommends that legislation be sponsored to amend Probate Code section 16502 to read as follows:

§ 16502

The notice of proposed action shall state that it is given pursuant to this section and shall include all of the following:

(a) The name and mailing address of the trustee.

(b) The name and telephone number of a person who may be contacted for additional information.

(c) A description of the action proposed to be taken and an explanation of the reasons for the action.

(d) The time within which objections to the proposed action can be made, which shall be at least ~~45~~ 30 days from the mailing of the notice of proposed action.

(e) The date on or after which the proposed action may be taken or is effective.

(Proposed new language underlined; language to be deleted stricken)

PROPONENT: San Diego County Bar Association

STATEMENT OF REASONS

The Problem: Probate Code sections 16337 and 16500 et seq. permit a trustee to notify the beneficiaries of a trust of a proposed course of action or proposed non-action, and obtain their prior consent, either directly by a beneficiary's written consent or implicitly as a result of a beneficiary's failure to timely object. This notice procedure is intended to (a) promote efficient administration of trusts, (b) to open communication between trustees and beneficiaries, and (c) to provide trustees with a mechanism for obtaining the consent (directly or by implication) of the beneficiaries without having to resort to an expensive and time consuming petition to a court for formal court approval.

The statute was originally based on the "Notice of Proposed Action" procedure applicable in probate administration. (Prob. Code, § 10500)

The current Notice Procedure for trust administrations requires a notice period of 45 days, during which a beneficiary may object to the proposed course of action. (Prob. Code, § 16502). Absent a formal objection during said period, the beneficiary is deemed to have consented to the proposed course of action. All that is required to object is that a box be checked and the Notice returned to the trustee.

The current notice period of 45 days limits the effectiveness of the statute and serves no legitimate purpose, and can unnecessarily delay actions such as close of escrow on sale of property. The Probate Code permits a trustee to seek court approval of a proposed action, or nearly any other relief regarding a trust's affairs sought under Section 17200 et. seq., at a noticed hearing with only a 30-day notice. (Prob. Code, § 17203). There is no rationale for requiring a longer period when a non-court notice procedure is utilized. In promoting efficiency of administration of trusts in California, consistent periods in which a beneficiary must respond or take action should be utilized.

The Solution: This resolution shortens the time to object to a notice of proposed action or be deemed to consent from 45 to 30 days. This makes it consistent with the notice time for any proceeding under Probate Code section 17200. It further allows prompt resolution without court involvement for time sensitive matters, such as sale of property, and relieves a burden on the court from matters unnecessarily brought by noticed hearing to avoid a longer 45-day period.

While the probate Notice of Proposed Action (Prob. Code, § 10500) period of 15 days to take action or have consent deemed might appear attractive to some in the trust context as well, most probate proceedings are consistent in requiring 15 day notice as per Probate Code section 1220, as contrasted with the 30 day period for all Probate Code section 17200 petitions concerning the affairs of a trust. The 15 day limit in Probate proceedings and 30 in trust proceedings are both consistent with notice provisions in their respective practice areas. The current 45 day limit under Section 16502 creates an anomalous inconsistency resolved by this resolution.

IMPACT STATEMENT

The resolution affects any other law, statute or rule other than those expressly identified.

CURRENT OR PRIOR RELATED LEGISLATION
None known.

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COUNTERARGUMENTS AND STATE BAR SECTION COMMENTS

TEXCOM - SUPPORT

The proposal would shorten the notice provisions from the current 45 days to 30 days. Thirty (30) day notice would create consistency with other notice periods applicable in Trust proceedings, increase efficiency of Trust proceedings and encourage communication among interested parties. The shorter period will make the procedure more useful, and thus promote better communication between Trustees and beneficiaries. As the proceeding is optional, the more "user friendly" it can be made, the more the Trustees will elect to use the proceeding to notify beneficiaries of proposed actions; thus enhancing the communication among the interested parties.

This position is only that of the TRUSTS and ESTATES SECTION of the State Bar of California. This position has not been adopted by the State Bar's Board of Trustees, and is not to be construed as representing the position of the State Bar of California.

Membership in the TRUSTS and ESTATES SECTION is voluntary and funding for section activities, including all legislative activities, is obtained entirely from voluntary sources.