

RESOLUTION 3-12-03

DIGEST

Financial Abuse of Mentally Impaired Elders: Public Guardian's Rights and Duties

Amends Probate Code section 2952 to clarify the Public Guardian's rights and duties in protecting the property of an impaired elder.

RESOLUTIONS COMMITTEE RECOMMENDATION

DISAPPROVE

History:

Related to resolutions 3-10-03 and 3-11-03.

Reasons:

This resolution amends Probate Code section 2952 to clarify the Public Guardian's rights and duties in protecting the property of an impaired elder. This resolution should be disapproved because three of the five proposed amendments conflict with other statutes.

At subdivision (c)(7), this resolution would change the valid period for a Certificate of Authority from 15 to 30 days. This conflicts with the valid period for a Certificate of Authority issued under section 2901—which remains at 15 days. This will create an ambiguity for the Public Guardian in processing Certificates, some of which will expire in fifteen days and some in thirty days. Section 2952 already allows the Public Guardian to seek an extension of another fifteen days and so this amendment is unnecessary as well.

At subdivision (c)(3), this resolution attempts to clarify the Public Guardian's authority to take possession of real property but conflicts with similar authority under sections 2900 and 2901. This amendment is also unnecessary because Public guardians have acted under the authority granted them in section 2900, as currently written, for approximately ten years without problem.

By amendment to subdivision (c)(4), this resolution removes permission for the Public Guardian to serve the Certificate of Authority on the elder person by mail. Presumably, the Public Guardian would then personally serve the Certificate. The goal of this amendment is laudable because many impaired elders cannot understand their mail and may not even receive it. Personal service would ensure delivery and provide the elder an opportunity to ask questions. However, this resolution fails to expressly provide for "personal service" in the way other sections concerning conservatees do and so might cause considerable confusion.

At subdivision (b), lines 20-26, this resolution provides that at the same time the peace officer sends the declaration to the Public Guardian, he or she shall also notify the financial institutions which shall then freeze the identified accounts for seventy-two hours. Under current law, financial institutions generally freeze such accounts voluntarily. By making the freeze mandatory, this resolution will impose a legal duty on the institutions, potentially creating liability for the institution if it allows frozen funds to be withdrawn by an abuser who rushes to the bank window as the declaration comes over the bank's fax line.

Finally, this resolution amends subdivision (b) (at lines 18-19) to replace the Adult Protection Service (APS) supervisor as declaration signer with a duty judge or court officer. This change comports with resolutions 3-10-03 and 3-11-03, provided the drafting error in 3-10-03 is corrected.

TEXT OF RESOLUTION

RESOLVED, that the Conference of Delegates of California Bar Associations recommends that legislation be sponsored to amend Probate Code section 2952 to read as follows:

1 §2952

2 (a) A peace officer may issue a declaration, as provided in Section 2954, concerning an elder
3 person if all of the following conditions are satisfied:

4 (1) There is probable cause to believe that the elder person is substantially unable to manage
5 his or her financial resources or to resist fraud or undue influence.

6 (2) There exists a significant danger that the elder person will lose all or a portion of his or
7 her property as a result of fraud or misrepresentations or the mental incapacity of the elder person.

8 (3) There is probable cause to believe that a crime is being committed against the elder
9 person.

10 (4) The crime is connected to the inability of the elder person to manage his or her financial
11 resources or to resist fraud or undue influence, and that inability is the result of deficits in the elder
12 person's mental functions.

13 (5) The peace officer has consulted with an individual qualified to perform a mental status
14 examination.

15 (b) If the requirements of subdivision (a) are satisfied, the peace officer may provide a
16 signed declaration to the public guardian of the county. The declaration provided by the peace
17 officer under this subdivision shall be signed by both the peace officer and a ~~supervisor from the~~
18 ~~county's adult protective services agency~~ the judge or court officer who has been designated to act
19 pursuant to Section 6241 of the Family Code. The declaration shall be transmitted to the public
20 guardian within 24 hours of its being signed, and may be transmitted by facsimile. A summary of the
21 accounts at each financial institution shall also be prepared and transmitted to the financial
22 institutions set forth in the declaration, if any, and may be transmitted by facsimile. Upon receipt of
23 the summary by the financial institution, the accounts set forth therein located at said financial
24 institution shall be frozen for a period not to exceed seventy-two (72) hours, unless a Certificate of
25 Authority pursuant to this section is received by the financial institution prior to expiration of the
26 seventy-two (72) hour period.

27 (c) (1) Upon receiving a signed declaration from a peace officer, the public guardian is
28 authorized to rely on the information contained in the declaration to take immediate possession or
29 control of any real or personal property belonging to the elder person referred to in the declaration,
30 including any property that is held jointly between the elder person and a third party that is subject to
31 loss, injury, waste, or misappropriation, and may issue a written recordable certification of that fact
32 pursuant to this section. The written recordable certification shall substantially comply with the
33 following form:

34

35

"CERTIFICATE OF AUTHORITY

36

37

THIS IS AN OFFICIAL CERTIFICATE ENTITLING THE PUBLIC GUARDIAN TO
38 TAKE POSSESSION OF ANY AND ALL PROPERTY BELONGING TO THE FOLLOWING
39 INDIVIDUAL:

40

41

(Name of Victim) _____

42

43

This Certificate of Authority has been issued by the Public Guardian pursuant to and in
44 compliance with the Financial Abuse of Mentally Impaired Elders statute, Chapter 4 (commencing
45 with Section 2950) of Part 5 of Division 4 of the California Probate Code. Under California law, this
46 Certificate of Authority authorizes the Public Guardian to take possession or control of property
47 belonging to the above-named individual.

48

SPECIAL NOTE TO FINANCIAL INSTITUTIONS:

49 State law requires that upon receiving a copy of this Certificate of Authority, financial institutions
50 shall provide the public guardian with information concerning property held by the above-named
51 individual and surrender the property to the Public Guardian if requested.
52 This Certificate of Authority shall only be valid when signed and dated by the Public Guardian or a
53 deputy Public Guardian of the County of _____ and affixed with the official seal of the Public
54 Guardian below.

55
56 Signature of Public Guardian:
57 Date:
58 Official Seal:"

59 (2) The mere issuance of the declaration provided by this section shall not require the public
60 guardian to take possession or control of property and shall not require the public guardian to make a
61 determination that the requirements for the appointment of a conservator are satisfied.

62 (3) The authority provided to the public guardian in paragraph (1) includes the authority to
63 deny use of, access to, or prohibit residency in the home of the elder, by anyone who does not have
64 an ownership interest in the property, written rental agreement or ~~other legal right to the use of, or~~
65 ~~access to,~~ periodic tenancy interest in the residence, and, subject to the requirements of subdivision
66 (b) of Section 2900, the authority to terminate the occupancy of anyone living in the home of the
67 elder person, and the authority to remove that occupant residing therein.

68 (4) The public guardian shall serve, or cause to be served, a copy of the certification issued
69 pursuant to this section on the elder person ~~by mail~~ within 24 hours of the execution of the
70 certification, or as soon thereafter as is practical, in the manner provided in Chapter 4 (commencing
71 with Section 413.10) of Title 5 of Part 2 of the Code of Civil Procedure.

72 (5) Receipt of a certification issued under this section constitutes sufficient acquittance to
73 financial institutions and others in possession of an elder person's property to provide information
74 and surrender property of the elder person to the public guardian. Any financial institution or other
75 person who provides information or surrenders property pursuant to this section shall be discharged
76 from any liability for any act or omission of the public guardian with respect to the property.

77 (6) A public guardian acting in good faith is not liable when taking possession or control of
78 property pursuant to this section.

79 (7) A certification issued pursuant to this section is valid for ~~15~~ 30 days after the date of
80 issuance. Upon ex parte petition to the superior court, the public guardian may seek additional ~~15~~30-
81 day certifications. The court shall grant that petition only if it determines that the additional
82 certification is necessary to protect the elder from financial abuse and the elder's property from loss,
83 injury, waste, or misappropriation.

84 (d) (1) If the public guardian takes possession of an elder person's property pursuant to this
85 section, the public guardian shall attempt to find agents pursuant to the use of durable powers of
86 attorney or successor trustees nominated in trust instruments, or other persons having legal authority
87 under existing legal instruments, to manage the elder person's estate.

88 (2) If the public guardian is unable to find any appropriate person to manage the elder
89 person's estate pursuant to paragraph (1), the public guardian shall attempt to find appropriate family
90 members willing to manage the elder person's estate. If no documents exist appointing appropriate
91 fiduciaries, the public guardian shall follow the priorities set forth in Article 2 (commencing with
92 Section 1810) of Chapter 1 of Part 3.

93 (3) The public guardian shall take the steps described in paragraphs (1) and (2) within ~~15~~ 30
94 days of taking possession of an elder person's property pursuant to this section.

95 (e) Nothing in this section prevents the county's adult protective services agency from
96 conducting an investigation regarding the elder person named in the declaration and providing
97 appropriate services, in coordination with any actions taken with the public guardian under this
98 section or an investigation conducted by law enforcement regarding the elder person.

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

PROPONENT: Orange County Bar Association

STATEMENT OF REASONS

Existing Law: Probate Code section 2952 provides the remedies that the Public Guardian may pursue on behalf of a mentally impaired elder adult when they receive a Declaration issued by a police officer pursuant to Probate Code section 2954 and the time periods within which the Public Guardian must pursue said remedies.

This Resolution: Seeks to clarify the section and provide more realistic time periods in which the Public Guardian may act.

The Problem: The section, as written, does not provide the Public Guardian with sufficient specificity as to their rights and duties or time periods in which to act. Further, it provides the potential abuser with time in which to transfer property before the Public Guardian has the opportunity to act. This resolution would: 1) provide that law enforcement transmit a summary of the assets to be protected to the financial institutions named in their Declaration at the same time they transmit the Declaration to the Public Guardian; 2) require the financial institution to place a freeze on all assets identified in the summary for a period not to exceed 72 hours; 3) permit the Public Guardian to deny access to the mentally impaired elder's real property to any individual unless they have an ownership interest, a written lease agreement or a periodic tenancy interest in same; 4) clarify that service on the mentally impaired elder adult must be by personal service; and, 5) extend the Certificate of Authority's validity to 30 days with another 30 extension possible by way of ex parte petition and extend the period of time in which the Public Guardian has in which to find agents or appropriate persons to assist the mentally impaired adult to 30 days.

IMPACT STATEMENT

This resolution affects Probate Code sections 2951 and 2954.

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