

RESOLUTION 05-01-05

DIGEST

Conservators: Psychotropic Medications

Amends Probate Code section 2356.5 to clarify the need for specific authority to administer psychotropic medications for conservatees with dementia.

RESOLUTIONS COMMITTEE

DISAPPROVE

History:

No similar resolutions found.

Reasons:

This resolution amends Probate Code section 2356.5 to clarify the need for specific authority to administer psychotropic medications for conservatees with dementia. This resolution should be disapproved because “psychotropic” medications are not specifically identified. Adding the term “psychotropic” could further confuse courts, if a problem in fact exists.

The proponent has not shown that a real problem exists because some attorneys are unsure when to request dementia powers. If a problem does exist, the proposed resolution does not fix it as “psychotropic medications” are not specifically identified in the probate code or other recognized publications for courts and attorneys to rely upon. Therefore, greater problems would be created. The purpose of the code section is not to limit appropriate medications for the conservatee with dementia, but to make sure the best interests of the conservatee are considered, by a doctor completing the capacity declaration form, by court appointed counsel investigating the allegations and by counsel reporting to the court. The court can then approve the need to authorize dementia medication. In this area, the law should err, if anything, on the side of protecting the conservatee. Unfortunately, conservatorships are expensive by their very nature and require oversight to protect the rights of the conservatee.

SECTION/COMMITTEE REPORTS

TRUSTS & ESTATES COMMITTEE RECOMMENDATION

DISAPPROVE

At the time that Probate Code §2356.5 was adopted, the use of the term “psychotropic” was considered, but rejected because of the difficulty in defining a “psychotropic” medication. Although the proponent states that Aricept, for instance, would not be considered a “psychotropic” medication, some people would define it as such. It is important that conservatees not be administered potentially mind altering medications for dementia without specific safeguards such as those set forth in Probate Code §2356.5 and this resolution would improperly dilute the safeguards now in place.

This position is only that of the Trusts and Estates Section of the State Bar of California. This position has not been adopted by either the State Bar's Board of Governors or overall membership, 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.

TEXT OF RESOLUTION

RESOLVED, that the Conference of Delegates of California Bar Associations recommends that legislation be sponsored to amend Probate Code section 2356.5 to read as follows:

- 1 § 2356.5
- 2 (a) The Legislature hereby finds and declares:

3 (1) That people with dementia, as defined in the last published edition of the "Diagnostic and
4 Statistical Manual of Mental Disorders," should have a conservatorship to serve their unique and
5 special needs.

6 (2) That, by adding powers to the probate conservatorship for people with dementia, their
7 unique and special needs can be met. This will reduce costs to the conservatee and the family of the
8 conservatee, reduce costly administration by state and county government, and safeguard the basic
9 dignity and rights of the conservatee.

10 (3) That it is the intent of the Legislature to recognize that the administration of psychotropic
11 medications has been, and can be, abused by caregivers and, therefore, granting powers to a
12 conservator to authorize these medications for the treatment of dementia requires the protections
13 specified in this section.

14 (b) Notwithstanding any other provision of law, a conservator may authorize the placement of
15 a conservatee in a secured perimeter residential care facility for the elderly operated pursuant to
16 Section 1569.698 of the Health and Safety Code, or a locked and secured nursing facility which
17 specializes in the care and treatment of people with dementia pursuant to subdivision (c) of Section
18 1569.691 of the Health and Safety Code, and which has a care plan that meets the requirements of
19 Section 87724 of Title 22 of the California Code of Regulations, upon a court's finding, by clear and
20 convincing evidence, of all of the following:

21 (1) The conservatee has dementia, as defined in the last published edition of the "Diagnostic
22 and Statistical Manual of Mental Disorders."

23 (2) The conservatee lacks the capacity to give informed consent to this placement and has at
24 least one mental function deficit pursuant to subdivision (a) of Section 811, and this deficit
25 significantly impairs the person's ability to understand and appreciate the consequences of his or her
26 actions pursuant to subdivision (b) of Section 811.

27 (3) The conservatee needs or would benefit from a restricted and secure environment, as
28 demonstrated by evidence presented by the physician or psychologist referred to in paragraph (3) of
29 subdivision (f).

30 (4) The court finds that the proposed placement in a locked facility is the least restrictive
31 placement appropriate to the needs of the conservatee.

32 (c) Notwithstanding any other provision of law, a conservator of a person may authorize the
33 administration of psychotropic medications appropriate for the care and treatment of dementia, upon
34 a court's finding, by clear and convincing evidence, of all of the following:

35 (1) The conservatee has dementia, as defined in the last published edition of the "Diagnostic
36 and Statistical Manual of Mental Disorders."

37 (2) The conservatee lacks the capacity to give informed consent to the administration of
38 psychotropic medications appropriate for the care of dementia, and has at least one mental function
39 deficit pursuant to subdivision (a) of Section 811, and this deficit or deficits significantly impairs the
40 person's ability to understand and appreciate the consequences of his or her actions pursuant to
41 subdivision (b) of Section 811.

42 (3) The conservatee needs or would benefit from appropriate medication as demonstrated by
43 evidence presented by the physician or psychologist referred to in paragraph (3) of subdivision (f).

44 (d) Pursuant to subdivision (b) of Section 2355, in the case of a person who is an adherent of
45 a religion whose tenets and practices call for a reliance on prayer alone for healing, the treatment
46 required by the conservator under subdivision (c) shall be by an accredited practitioner of that religion
47 in lieu of the administration of medications.

48 (e) A conservatee who is to be placed in a facility pursuant to this section shall not be placed
49 in a mental health rehabilitation center as described in Section 5675 of the Welfare and Institutions
50 Code, or in an institution for mental disease as described in Section 5900 of the Welfare and
51 Institutions Code.

52 (f) A petition for authority to act under this section shall be governed by Section 2357, except:

53 (1) The conservatee shall be represented by an attorney pursuant to Chapter 4 (commencing
54 with Section 1470) of Part 1.

55 (2) The conservatee shall be produced at the hearing, unless excused pursuant to Section
56 1893.

57 (3) The petition shall be supported by a declaration of a licensed physician, or a licensed

58 psychologist within the scope of his or her licensure, regarding each of the findings required to be
59 made under this section for any power requested, except that the psychologist has at least two years
60 of experience in diagnosing dementia.

61 (4) The petition may be filed by any of the persons designated in Section 1891.

62 (g) The court investigator shall annually investigate and report to the court every two years
63 pursuant to Sections 1850 and 1851 if the conservator is authorized to act under this section. In
64 addition to the other matters provided in Section 1851, the conservatee shall be specifically advised
65 by the investigator that the conservatee has the right to object to the conservator's powers granted
66 under this section, and the report shall also include whether powers granted under this section are
67 warranted. If the conservatee objects to the conservator's powers granted under this section, or the
68 investigator determines that some change in the powers granted under this section is warranted, the
69 court shall provide a copy of the report to the attorney of record for the conservatee. If no attorney
70 has been appointed for the conservatee, one shall be appointed pursuant to Chapter 4 (commencing
71 with Section 1470) of Part 1. The attorney shall, within 30 days after receiving this report, do one of
72 the following:

73 (1) File a petition with the court regarding the status of the conservatee.

74 (2) File a written report with the court stating that the attorney has met with the conservatee
75 and determined that the petition would be inappropriate.

76 (h) A petition to terminate authority granted under this section shall be governed by Section
77 2359.

78 (i) Nothing in this section shall be construed to affect a conservatorship of the estate of a
79 person who has dementia.

80 (j) Nothing in this section shall affect the laws that would otherwise apply in emergency
81 situations.

82 (k) Nothing in this section shall affect current law regarding the power of a probate court to fix
83 the residence of a conservatee or to authorize medical treatment for any conservatee who has not
84 been determined to have dementia.

85 (l)(1) Until such time as the conservatorship becomes subject to review pursuant to Section
86 1850, this section shall not apply to a conservatorship established on or before the effective date of
87 the adoption of Judicial Council forms that reflect the procedures authorized by this section, or
88 January 1, 1998, whichever occurs first.

89 (2) Upon the adoption of Judicial Council forms that reflect the procedures authorized by this
90 section or January 1, 1998, whichever occurs first, this section shall apply to any conservatorships
91 established after that date.

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

PROPONENT: San Diego County Bar Association

STATEMENT OF REASONS:

Existing Law: Existing law does not limit subdivision (c) to psychotropic medications.

Resolution: Would limit subdivision (c) to psychotropic medications.

The Problem: Prior to 1996, a probate conservator lacked the authority to place a conservatee suffering from dementia in a "secure perimeter" facility, or to authorize the administration of psychotropic medications appropriate to the treatment of dementia. The only remedy at that time if these powers were needed was to petition for an LPS conservatorship. Recognizing that this was an inappropriate tool, the legislature, in 1996, added two "dementia powers" as additional authority available upon a proper showing of need in a standard Probate Conservatorship proceeding. The granting of this optional authority is subject to additional protections and procedures. As for the administration of psychotropic medications, Probate Code section 2356.5 specifically states:

(a) "The legislature specifically finds and declares that is the intent of the Legislature to recognize that the administration of psychotropic medications has been, and can be, abused by caregivers and,

therefore, granting powers to a conservator to authorize these medications for the treatment of dementia requires the protections specified in this section. (Emphasis added)

The legislative history, and this specific statement in the statute, makes it clear that the additional procedural steps and protections were for the purpose of preventing the abuse by inappropriate administration of psychotropic medications.

Unfortunately, in another section of Probate Code section 2356.5 (subsection (c)(2)), the legislature lists as a required finding that the conservatee lacks the capacity to give informed consent to the administration of medications appropriate to the treatment of dementia" (emphasis added). Note the absence of the reference to "psychotropic." Since 1996 several medications "appropriate to the treatment of dementia" (e.g., Aricept; Exelon; Reminyl; Mementine) have come onto the market to treat problems of memory and cognition in Alzheimer's patients. These are not considered psychotropic medications, but function as inhibitors to the enzyme acetylcholinesterase. This has caused some confusion in the courts, significantly exacerbated by the inclusion of the language "appropriate to the treatment of dementia" without reference to psychotropics on various Judicial Council forms (GC 313; GC340).

Faced with uncertainty as to whether or not the administration of a drug such as Aricept requires dementia authority as a "drug appropriate to the treatment of dementia," many elect to request the dementia powers as matter of course. With the appointment of independent counsel required by the Probate Code in requests for dementia authority, this adds significant cost and potential delay to the proceedings. Since the authority once granted is not drug specific, it also may cause a grant of authority to administer psychotropics that is inappropriate to the facts of a specific case, simply to be able to administer memory enhancing medications. The proposed modifications of the code simply add the word "psychotropic" before "medications appropriate to the treatment of dementia" to remove this confusion. This clearly is in harmony with the original legislative intent.

IMPACT STATEMENT:

This resolution does not affect any other law statute or rule

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