

## RESOLUTION 05-04-05

### DIGEST

#### Conservator: Geographic Restrictions on Appointment

Amends Probate Code section 1812 and adds Probate Code section 1814 to require conservators to be located within specific geographic proximity to the conservatee.

### RESOLUTIONS COMMITTEE RECOMMENDATION

DISAPPROVE

#### History:

No similar resolutions found.

#### Reasons:

This resolution amends Probate Code section 1812 and adds Probate Code section 1814 to require conservators to be located within specific geographic proximity to the conservatee. This resolution should be disapproved because it unfairly discriminates against family members who may reside out of the area and adds an unnecessary additional cost to an already expensive proceeding.

The proponent fails to show that a problem actually exists when a conservator is not located near the conservatee. Conservators, whether they are local or out of state, may hire care managers, agents or employees to assist them in the care and oversight of a conservatee. If conservators do hire individuals or agencies to assist them, the conservators remain responsible and liable for any breach of fiduciary duty committed by such individuals or agencies. A majority of conservatorships are filed by family members, and conservatorship proceedings are expensive for the average estate, which also usually incurs the expense of care for the conservatee. This resolution would require another high cost to the estate when family members do not meet the geographic proximity requirements, and the proponent fails to show how the conservatee will benefit from the resolution. Requiring the court to appoint a local conservator, caregiver or manager will be an unnecessary additional cost. In addition, the resolution fails to address any educational or licensing requirements for the caregiver or manager, and the extent of their liability.

### SECTION/COMMITTEE REPORTS

#### TRUSTS & ESTATES COMMITTEE RECOMMENDATION

DISAPPROVE

While geographical proximity to a conservatee is important, this proposed amendment would appear to place a significant burden on non-professional conservators, such as family members, who may not be in a position to meet the geographical proximity test, nor have the resources to hire a caregiver or estate manager meeting the test. The current system for appointing conservators gives the court discretion to determine whether appointment of a particular conservator is in the best interests of the conservatee and factors such as geographical proximity are thus taken into account. The court's discretion in this area would be unduly limited by this modification. Additionally, the statute does not make it clear whether the caregivers or estate managers would need to be bonded as would a conservator and, if not, how the liability on the conservator's bond would be affected.

*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 1812 and add section 1814 to read as follows:

1    § 1812(a)  
2       (a)     Subject to Sections 1810, ~~and 1813,~~ and 1814, the selection of a conservator of the  
3    person and estate, or both, is solely in the discretion of the court and, in making the selection, the  
4    court is to be guided by what appears to be for the best interests of the proposed conservatee.  
5  
6    § 1814  
7       (a)     The appointment of a conservator of the person will be restricted to a person or  
8    entity that is located or resides in the county or adjacent county of the conservatee within the State of  
9    California.  
10      (b)     A conservator of the person may be appointed that does not comply with (a) above if  
11    a court approved caregiver, that does comply with the geographical restrictions in (a), is selected to  
12    represent the conservator in the care of the conservatee.  
13      (c)     A conservator of the estate will be restricted to a person or entity that is located or  
14    resides within the State of California.  
15      (d)     A conservator of the estate may be appointed that does not comply with (c) above if  
16    a court approved manager that does comply with the geographical restrictions in (c) is selected to  
17    represent the conservator in the care of the estate of the conservatee.  
18      (e)     Both the caregiver appointed in (b) and the manager appointed in (d) must have the  
19    authority to perform their duties as if they were the conservator. The conservator may at any time  
20    petition the court without cause to replace either the caregiver or manager. The conservator may  
21    with cause replace the caregiver or the manager without court approval, but must either comply with  
22    the geographical restrictions and notify the court, or nominate a new caregiver or manager and seek  
23    court confirmation by filing a petition for a hearing within 30 days of their removal.

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

PROPOSER: Orange County Bar Association

#### STATEMENT OF REASONS:

Existing Law: Permits a court to appoint a conservator of the estate or person without any geographical restrictions.

This Resolution: Would provide additional protection to the conservatee from neglect by the conservator in that the conservator must reside within a restricted geographical area reasonably close to the location of the conservatee or has appointed a caregiver for the person and a manager for the estate of the conservatee.

The Problem: Very often a person, with the recommendation of their attorney, and the approval of the courts with the very best intentions and consideration of relational ties takes on the responsibility of a conservatorship without regard to the impact of the geographical distance between them and the conservatee. In the care of the person of the conservatee it is critical that the conservator or a court approved caregiver, visit and inspect the living conditions of the conservatee, and in the area of financial management the conservator's visits or those of a court approved manager, are critical to the determination of the proper expenditure of the conservatee's assets.

#### IMPACT STATEMENT

This resolution does not affect any other laws.

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RESPONSIBLE FLOOR DELEGATE: Albert J. Rasch, Jr.

## **COUNTERARGUMENTS**

### **SAN DIEGO COUNTY BAR ASSOCIATION**

This resolution simply adds another level of complexity and liability (that may be unnecessary) to conservatorships in that the amendment would allow a conservator to hire caregivers and managers and transfer responsibility for the conservatee's care to them. With respect to both the caretaker and manager positions, it is unclear what, if any, education or other criteria would be required to qualify to serve in those positions.

### **SANTA CLARA COUNTY BAR ASSOCIATION**

This resolution seeks to require that a conservator of the person or estate of another live in the county where the conservatee resides, or in the adjacent county to protect the conservatee from neglect.

And in fact, neglect is a problem. Also, it's true that on-site inspections and reviews are often important. But distance is not equivalent to neglect, nor does proximity necessarily lead to increased inspection or attention. There is no reason why a more remote, but resourceful conservator could not be as mindful, if not more so than one who lives close by.

The option of appointing a caregiver or manager with all of the same authority as the conservator is ludicrous. A local caregiver might reasonably be given some of the same authorities as a conservator, but if they have the same authority, then make them conservator to begin with.

The court already must be guided by the conservatee's best interests. Clearly distance is a legitimate factor to consider. But to single it out as the sole factor that is going to be legislated is not going to do a thing to solve the problem of neglectful conservators. We think this resolution is misguided and will do more harm than good.