

Assessment of Capacity to Make Financial Decisions

Probate Proceedings

California law allows a spouse, relative, interested public agency, or any interested person to file a petition with the superior court asking for appointment of a conservator of the estate of an individual. ([Section 1820](#)) [All references are to the Probate Code unless otherwise indicated.]

The petition must allege “the inability of the proposed conservatee to substantially manage his or her own financial resources, or to resist fraud or undue influence.” ([Section 1821](#)(a)(5))

The allegations of the petition track the statutory requirements for establishing a conservatorship of the estate of any adult or a limited conservatorship of the estate of an adult with developmental disabilities. ([Section 1801](#)) However, substantial inability may not be established solely by evidence of isolated incidents of negligence or improvidence. ([Section 1801](#)(b))

If the need therefore is established to the satisfaction of the court and other legal requirements have been met, the court may appoint a conservatorship of the estate. ([Section 1800.3](#)) However, before doing so, the court must make an express finding that the granting of the conservatorship is the least restrictive alternative needed for the protection of the conservatee.

Statutory requirements for a conservatorship of the estate must be established by clear and convincing evidence. ([Section 1801](#)(e)) That is a very high standard of proof, and rightfully so, since taking away an individual’s right to make financial decisions and control his or her property infringes on fundamental constitutional rights. The constitution does not allow a person to be stripped of fundamental rights without such a high standard of proof. (*Conservatorship of Sanderson* (1980) 106 Cal.App.3d 611, 620)

Constitutional Rights

The Fourteenth Amendment to the United States Constitution provides that no state shall deprive a person of life, liberty, or property without due process of law. The requirement of due process applies to proceedings to establish a conservatorship of the person or the estate because such proceedings involve a potential deprivation of liberty and because an order imposing a conservatorship places a stigma on the conservatee. (*Sanderson, supra.*)

The California Constitution declares that acquiring, possessing, and protecting property is an inalienable right. (Cal. Const. [Art. I, Sec. 1](#)) Property rights may not be infringed by the state without due process of law. (Cal. Const. [Art. I, Sec. 7](#))

The California Supreme Court has unanimously declared: “To both the citizen and his government the right to contract is the most valuable right known to the law. The Constitution guarantees its inviolability.” (*May v. Board of Directors* (1949) 34 Cal.2d 125, 132) That is why the infringement of that right by conservatorship requires clear and convincing evidence of the need for such intervention and a finding that no less restrictive alternative will suffice to protect the individual.

The clear and convincing evidence test requires a finding of high probability based on evidence so clear as to leave no substantial doubt and must be sufficiently strong to command the unhesitating assent of every reasonable mind. (*Conservatorship of Wendland* (2001) 26 Cal.4th 519, 552)

This standard should not only govern a judicial finding of the necessity for a conservatorship, it should also guide a capacity assessment professional who renders an opinion that someone is unable to manage finances or resist undue influence. The professional should have no doubt on the issue.

Presumptions and Proof

At the beginning of a proceeding to establish a conservatorship of the estate, it is presumed that the individual in question has the capacity to enter into contracts. That is because all persons are capable of contracting unless it is established they are of unsound mind or that a court has taken away their civil rights. (Civil Code [Section 1556](#))

The Legislature has declared that for purposes of conservatorship proceedings: “[T]here shall exist a rebuttable presumption affecting the burden of proof that all persons have the capacity to make decisions and to be responsible for their acts or decisions.” ([Section 810\(a\)](#)) The mere fact that someone has a mental disorder does not deprive them of capacity to handle their financial affairs or enter into contracts. ([Section 810\(b\)](#))

Capacity Assessment Criteria

So what should a judge or a professional evaluator focus on to determine whether an individual lacks the capacity to substantially manage financial affairs or resist fraud or undue influence? Subdivision (c) of Section 810 explains that such a determination “should be based on evidence of a deficit in one or more of the person’s mental functions rather than on a diagnosis of a person’s mental or physical disorder.” The mere diagnosis of a mental or physical disorder is not sufficient in and of itself to support a determination that a person is of unsound mind or lacks the capacity to do a certain act. ([Section 811\(d\)](#))

The Legislature has clarified that a determination of incapacity in financial management shall be supported by evidence of a deficit in at least one of the following mental functions and evidence of a correlation between the deficit or deficits and the decision or acts in question: (1) alertness and attention; (2) information processing; (3) deficits in thought processes; and (4) inability to modulate mood and affect. ([Section 811\(a\)](#))

A deficit in the mental functions listed above may be considered only if the deficit, by itself or in combination with one or more other mental function deficits, significantly impairs the person’s ability to understand and appreciate the consequences of his or her actions with regard to the type of act or decision in question. ([Section 811\(b\)](#))

If there is no significant impairment in mental functioning as defined above, someone can still lack capacity for financial management if they are not able to communicate a decision, by whatever means, or are not able to understand: (1) the rights, duties, and responsibilities created by the decision; (2) the probable consequences to the individual and others affected by the decision; and (3) the significant risks, benefits, and alternatives involved in the decision. ([Section 812](#))

Capacity Assessment Procedures

California law requires a medical capacity declaration to be filed by a physician or psychologist

before an individual's right to make medical decisions can be taken away in a probate conservatorship proceeding. It is noteworthy that the right of an individual to manage financial affairs can be removed without the court having the benefit of a professional capacity assessment that focuses on the criteria mentioned above. This is often done without any evidentiary hearing whatsoever.

Conservatorship orders are usually issued simply on the basis of paperwork. There is no requirement for a financial capacity declaration to be included. This seems odd, considering the pronouncement of the Supreme Court that "the right to contract is the most valuable right known to the law." (*May, supra.*) This gap in the law should be filled. The Legislature should require a financial capacity declaration to be submitted in any proceeding to establish a conservatorship of the estate.

That is not to say that professional assessments of financial capacity are never done. They are. But whether they occur depends on the policies of individual judges or the diligence or lack thereof of attorneys representing proposed conservatees. In too many cases, the proposed conservatee does not even have an attorney so there is no legal advocate to demand a financial capacity assessment.

When there is a financial capacity assessment done, there are no guarantees that the professional evaluator will obey federal and state laws prohibiting discrimination on the basis of disability in the delivery of services. [Title III](#) of the Americans with Disabilities Act requires businesses to provide accommodations to individuals with disabilities to ensure meaningful access to professional services. [Section 51](#) of the California Civil Code requires the same. Government Code [Section 11135](#) applies the same mandate to professionals whose services are being paid with state funds. Professionals who conduct financial capacity assessments should be required to declare they are aware of these laws and that they have provided the necessary accommodations to ensure the individual can participate in the evaluation process in as meaningful a manner as reasonably possible.

Financial capacity evaluators in these proceedings are conducting forensic assessments. They should be required to specify the training, education, and experience they have in conducting such assessments. They should adhere to professional [ethics](#) and [code of conduct](#). The same concerns about competence and methodology raised in the section on [medical capacity](#) apply here as well.

Less Restrictive Alternatives

As mentioned above, a conservatorship of the estate may not be granted if a less restrictive alternative will provide the needed protection for a person who currently lacks capacity to manage financial matters or resist fraud or undue influence. Just as a preexisting health care directive may be a less restrictive alternative to a conservatorship of the person, so too may a preexisting trust or financial power of attorney be a viable alternative to a conservatorship of the estate.

The court and any financial capacity evaluator should be made aware of such existing documents. These documents should be honored unless the capacity evaluator finds that the individual lacked capacity when the documents were executed or that the documents were signed as a result of undue influence. Dishonoring preexisting documents without due process would be unconstitutional.