

Capacity to Choose One's Residence

Government action limiting the right of an individual to choose a place of residence implicates the constitutional right to travel and the constitutionally protected freedom of association. ([People v. Bauer](#) (1989) 211 Cal.App.3d 937, 944.) Restrictions on a person's choice of living arrangements may also violate the right of privacy under the California Constitution. ([City of Santa Barbara v. Adamson](#) (1980) 27 Cal.3d 123.)

When a petition for conservatorship is filed, the law presumes that a proposed conservatee has the capacity to make decisions, including a decision about where and with whom to live. (Probate Code [Section 810](#)) Therefore, the burden is on the petitioner to establish by clear and convincing evidence that the proposed conservatee is unable to properly care for physical health, food, clothing or shelter.

The granting of an order of general conservatorship may take away from the conservatee the authority to select a place of residence and give that power to a conservator. That is why the clerk is required to notify a proposed conservatee that an order granting the petition may give to the conservator the power to fix the residence of the proposed conservatee. ([Section 1823](#)(b)(2))

If the petitioner is seeking a general conservatorship, an order granting the petition automatically gives the care, *custody*, and control of the conservatee to the conservator. ([Section 2351](#)(a)) Having legal custody of an individual would include the authority to fix that person's place of residence. However, the proposed conservatee (presumably through his or her attorney) can ask the court for an order allowing the power to fix the place of residence to remain with the conservatee. ([Section 2351](#)(b))

In a general conservatorship proceeding, there is no requirement for a determination of the proposed conservatee's capacity to make decisions regarding the place of residence. If the petition for conservatorship is granted without such a capacity assessment, the default result is that the conservator gets the power to fix the residence. ([Section 2352](#)(b)) The only way to avoid that result in a general conservatorship proceeding is for the proposed conservatee to expressly object to the transfer of that authority. Once such an objection is made, the issue of capacity to make decisions fixing the place of residence would need to be determined. The attorney for the proposed conservatee can ask for an expert evaluation on this issue under Evidence Code Section 730. ([Conservatorship of Scharles](#) (1991) 233 Cal.App.3d 1334) But the burden to request such an assessment is on the proposed conservatee in a general conservatorship proceeding. Without a request such an assessment will not occur.

Just the opposite occurs in a limited conservatorship proceeding. Limited conservatorships are only allowed for adults with developmental disabilities. If a petitioner files for a limited conservatorship, then even if the order is granted, the limited conservatee retains certain enumerated rights unless the court makes a specific finding to the contrary. ([Section 2351.5](#)) Among the rights automatically retained is the authority to make decisions regarding residence. ([Section 2351.5](#)(b)(1)) The petitioner, however, may specifically ask for this authority to be included in the limited conservatorship order. If such a request is made, then the issue of the capacity of the proposed limited conservatee to select his or her residence becomes an issue to be determined by the court.

Under current standard procedures, in limited conservatorship proceedings the issue of capacity to make decisions regarding residence is unlikely to receive a professional assessment other than by a regional center employee. A review of [regional center practices](#) suggests that many employees lack the qualifications and training necessary to make reliable capacity assessments of this sort.

The Legislature has recognized the importance of allowing conservatees to remain in the homes they had prior to the initiation of a conservatorship proceeding. To that end, a presumption exists that the personal residence at the time the proceeding was commenced is the appropriate placement when an order of conservatorship is granted. ([Section 2352.5](#))

The issue of capacity to select one's own residence – considering the constitutional rights that are at stake – has not been given the importance it deserves. In general conservatorships, the issue is generally swept under the judicial rug. Too often the issue is all but ignored. The default procedure of transferring the power to fix residence occurs without any capacity assessment determination being made is inconsistent with the requirements of due process. The law should be changed to make the retention of the right to fix residence the default result, absent a specific request in the petition for the transfer of such authority. When such a request is made, a professional assessment of such capacity should be required, just as a medical capacity assessment is currently mandated before a court takes away a person's right to manage his or her own medical care.

If a survey were taken of adults as to which right was more important – the right to select one's residence or the right to make medical decisions – it is hard to say which would be given priority. People would probably say they are equally important. But current law does not treat them as such.

In terms of the issue of capacity to fix residence for adults with developmental disabilities, the limited conservatorship system makes the default position that the adult retains that right unless incapacity on that issue has been established by evidence. The problem, however, is that a petitioner can bypass this protection for limited conservatees simply by filing a petition for a *general* conservatorship.

Protections of this sort should not be left to the whim of a petitioner. The law should be amended so that any petition for a probate conservatorship involving an adult with developmental disabilities should be deemed to be a limited conservatorship proceeding regardless of how the petition is denominated. The procedural protections afforded to proposed limited conservatees should be afforded to adults with developmental disabilities regardless of the box that someone checks in the petition. Once a court becomes aware that the proposed conservatee has developmental disabilities, substance should take precedence over form and the matter should be handled as though it were a limited conservatorship proceeding..