

Capacity to Waive Rights

The federal and state constitutions provide that no person shall be deprived of life, liberty, or property without due process of law. In proceedings to establish a conservatorship of the person, the liberty of a proposed conservatee is placed at risk, while property rights are jeopardized when a conservatorship of the estate is sought. Therefore, in either situation a proposed conservatee is entitled to due process protections. ([Conservatorship of Sanderson](#) (1980) 106 Cal.App.3d 611)

In addition to constitutional requirements, parties to civil cases have statutory due process rights ([In re Elizabeth T.](#) (1992) 9 Cal.App.4th 636, 640) The statutory provisions enacted by the Legislature governing the establishment of probate conservatorships are a starting point to determine what process a proposed conservatee is due in these proceedings.

When a petition for a probate conservatorship is filed, the clerk of the court is required to send the proposed conservatee a citation which, among other things, informs the individual of his or her procedural rights. (Probate Code [Section 1823](#))

Among these protections are: “[T]he right to appear at the hearing and to oppose the petition, and in the case of an alleged developmentally disabled adult, to oppose the petition in part, by objecting to any or all of the requested duties or powers of the limited conservator.” (Section 1823(b)(5)) The proposed conservatee also has “[T]he right to choose and be represented by legal counsel and has the right to have legal counsel appointed by the court if unable to retain legal counsel.” (Section 1823(b)(6))

The statutory right to oppose the petition includes the constitutional right to confront and cross-examine witnesses. These due process rights apply to conservatorship proceedings even though they are civil in nature. ([In re Donald R.](#) (1987) 195 Cal.App.3d 703, 712) Due process also entitles a civil litigant the right to call witnesses and present evidence. ([Elkins v. Superior Court](#) (2007) 41 Cal.4th 1337, 1357)

Of course, constitutional and statutory rights can be waived. Any such waiver must be made knowingly and voluntarily. Quite fundamental is having the capacity to waive these rights.

In juvenile dependency proceedings where custody of a child is at issue, court rules allow for a parent to waive his or her right to a contested hearing, to confront and cross-examine witnesses, and to present evidence. (California Rules of Court, [Rule 5.682](#)) After waiving these rights, the parent can admit the allegations or agree to submit the matter for a decision based on documents only. However, before accepting such waivers, the court must inquire to ensure the parent understands these rights. The court must also determine whether the waivers are knowing and voluntary. If the waivers are submitted in writing rather than made orally in open court, the waiver form must be signed by the parent and the parent’s attorney.

It is noteworthy that in probate conservatorship proceedings, where significant liberty and property interests are at stake, there is no similar court rule. There is no requirement for the court to inquire personally of the proposed conservatee regarding a waiver of his or her rights. Instead, the court may accept hearsay statements of a court investigator that the proposed conservatee was advised of his or her rights and does not want an attorney, does not want to appear in court, or does not want to contest the petition for conservatorship. ([Section 1826](#))

In some cases, there is no court investigator appointed and thus no court investigator report. In those situations, the court may rely on the hearsay statement of a court-appointed attorney that the proposed conservatee is waiving his or her rights and is not contesting the petition. ([San Diego County v. John L.](#) (2010) 48 Cal.4th 131) In the *John L* case the Supreme Court was assuming that counsel had fully informed the client of his rights, that the client understood those rights, and that the rights were knowingly and voluntarily waived. While such assumptions may have been warranted in that case, reports of negligent representation by many court-appointed attorneys in probate conservatorship proceedings cast serious doubt on the validity or reliability of such assumptions in these proceedings.

Many probate conservatorship attorneys are not properly trained in how to communicate effectively with clients who have dementia or developmental disabilities that seriously interfere with understanding and communication. Most attorneys have not received training in the ADA accommodation requirements for the use of supports and services to ensure effective communication and meaningful participation in a court proceeding. Without such training and experience, purported waivers of statutory and constitutional rights by a senior with moderate or severe dementia, or an individual with a serious intellectual or developmental disability, should be highly suspect.

It should be remembered that prior to a waiver of rights being considered by the court, evidence has been produced that the proposed conservatee has serious problems understanding, remembering, deliberating, and/or communicating. The alleged disabilities are so serious that the court is being asked to appoint someone to take control of their personal or financial decisions.

In petitions for conservatorship of the person, it is likely that a sworn medical capacity declaration has been filed indicating that the individual cannot give informed consent to *any* medical procedure. If that is true, then how likely is it that the individual can give an intelligent waiver of his or her constitutional rights to a trial, to confront and cross-examine witnesses, and to present evidence?

In petitions for conservatorship of the estate, facts may have been presented in the petition and supplemental materials that the individual is not able to resist undue influence. If that is true, then how likely is it that the individual can resist direct assertions or subtle hints from a family member or even a court investigator that the individual should not oppose the petition?

Rules of Professional Conduct prohibit an attorney from settling a case or waiving the right to a hearing without express prior approval from the client. ([Rule 1.2](#)) This rule applies to all clients, even those with diminished capacity. The Supreme Court was asked to create a separate rule for such clients but declined to do so. So an attorney must receive the express consent of a proposed conservatee before the attorney can waive them on behalf of the client in court.

When counsel advises a court that a litigant is waiving his or her rights, the waiver should be adequately documented to assure the court that the litigant was aware of applicable constitutional rights and knowingly and intelligently waived them. ([In re Moss](#) (1985) 175 Cal.App.3d 913, 926) Such an assurance is just as vital, if not more so, when the litigant does not have an attorney.

A determination of whether there has been an intelligent waiver of constitutional rights depends on the circumstances of each case. (Moss, p. 926) The background and experience of a litigant should be considered. Cognitive disabilities would be an important factor in this evaluation.

Waivers of constitutional rights must be done with sufficient awareness of relevant circumstances and likely consequences. The validity of such waivers cannot be presumed from a silent record. A waiver of rights must be based on something other than speculation.

To be truly voluntary and intelligent in a constitutional sense, a waiver is valid only if a litigant is aware of his or her rights and the consequences of the waiver. (*In re Hop* (1981) 29 Cal.3d 82, 91) This would include the nature of a conservatorship, its probable duration, and the conditions under which the individual will be living while under an order of conservatorship.

The failure of a proposed conservatee to affirmatively demand his or her right to an attorney or a hearing does not constitute a knowing and intelligent waiver. It would be fundamentally unfair to place on someone with serious cognitive or communication disabilities the burden of asserting their rights in order to avoid an implied waiver of them. (*Hop*, p. 91)

It should be emphasized that [Title II](#) of the Americans with Disabilities Act and California Government Code [Section 11135](#) require courts to ensure that litigants with significant disabilities receive the accommodations necessary to maximize effective communication and meaningful participation in a judicial proceeding. The court may delegate the implementation of this responsibility to court staff or an appointed attorney, but ultimately it is the court that is responsible for ensuring compliance with these statutory obligations.

The process of approving a waiver of rights is part of the proceeding and therefore subject to ADA requirements. The court must take reasonable steps to inquire into the process by which the waiver occurred. Who informed the litigant of his or her rights? What was said and in what words? What evidence is there that the litigant understood those rights? What evidence is there that the purported waiver was knowing and voluntary?

More fundamental is the need for an inquiry by the court as to whether the litigant even had the capacity to waive his or her rights. Unfortunately, the way in which waivers of rights are presently occurring in probate courts throughout the state, it appears that capacity to waive rights is assumed. Such an assumption is misplaced unless there are assurances that the waiver process was ADA compliant and there is evidence about the method of communication that was used and the level of understanding of the litigant about those rights.

The Judicial Council should study the issue of capacity of conservatees and proposed conservatees to waive statutory and constitutional rights with a view toward adopting a rule for probate conservatorship proceedings similar to Rule 5.682 in juvenile dependency proceedings. The Judicial Council should consult with the Department of Aging and the Department of Developmental Services regarding the capacity of seniors with cognitive disabilities and adults of all ages with intellectual and developmental disabilities to understand the nature of conservatorship proceedings, the consequences of an order of conservatorship, the role of and importance of an attorney in such proceedings, and the ability of such adults to withstand direct or subtle pressures to waive their rights. The Department of Fair Employment and Housing enforces Section 11135 regarding the ADA duties of public entities, including the courts, and therefore should be consulted as well.