

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA
FIRST APPELLATE DISTRICT
DIVISION 1

In Re the Conservatorship of: ELISABETH

No. A161175

Petitioner,

(Solano County
Superior Court No.
FCR050359)

v.

THE SUPERIOR COURT OF SOLANO COUNTY,

Respondent;

JESSE and JOSEPH

Real Party in Interest;

SHIRLEY

Real Party in Interest.

**PETITIONER ELISABETH REPLY TO REAL PARTIES IN
INTEREST,
PRELIMINARY OPPOSITION FOR WRIT OF PROHIBITION
AND/OR MANDATE**

TO THE HONORABLE PRESIDING JUSTICE AND HONORABLE
ASSOCIATE JUSTICES OF THE COURT OF APPEAL OF THE STATE
OF CALIFORNIA, FIRST APPELLATE DISTRICT:

ARGUMENT

The Opposition claims that what occurred in the trial court was a
“hearing.” It was not. Verbal statements of counsel and declarations do
not an evidentiary hearing make. Rather, a hearing requires that all parties

be given notice, the ability to call witnesses and present evidence, and the ability to cross-examine. Petitioner was denied all three of these fundamental due process rights.

It must be emphasized, that people with developmental disabilities have the same constitutional rights as all other citizens and residents of California, including the right to make choices in their own lives, including but not limited to where and with whom they live. (Cal. Welf. & Inst. Code § 4502(j).) Since probate conservatorship proceedings place fundamental liberties at risk, proposed conservatees are entitled to due process of law in these proceedings. (*Conservatorship of Sanderson* (1980) 106 Cal.App.3d 611.)

Petitioner was deprived of these fundamental rights when her request for an evidentiary hearing was denied. The Opposition apparently argues that Petitioner waived the right to an evidentiary hearing by failing to object to the submitted declaration – this argument fails and is disingenuous. Petitioner objected, multiple times, to being removed from her home – a home where she has lived for many years. Petitioner further requested an evidentiary hearing. Those two statements, taken together, sufficiently put court and counsel on notice that Petitioner was not willing to submit the matter for decision based solely on hearsay declarations. Nothing more should be required of counsel in order to preserve a proposed conservatee’s due process right to an evidentiary hearing as prescribed by Probate Code § 2253.

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, pursuant to Probate Code section 2352.5, 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. “In any *hearing* to determine if removal of the conservatee from the conservatee’s personal residence is appropriate, that presumption may be overcome by clear and convincing *evidence*.” (Cal. Prob. Code § 2352.5, emphasis added.)

This presumption was never overcome by the Opposition. Section 2352.5 contemplates that a proposed conservatee has the right to a *hearing* before a removal order is entered. “A hearing denotes an opportunity to be heard and to adduce testimony from witnesses. Moreover, parties in civil proceedings have a due process right to cross-examine and confront witnesses.” (*In re James Q.* (2000) 81 Cal.App.4th 255, 263, citing *In re Malinda S.* (1990) 51 Cal.3d 368, 383, fn. 16.) When the right to a hearing is afforded by statute, due process gives a proposed conservatee procedural and evidentiary rights over and above the mere filing of briefs, declarations, and oral argument.

In creating a presumption in favor of the proposed conservatee remaining in their original residence, and requiring clear and convincing evidence to support an order of removal, the Legislature has established a clear policy disfavoring removal and requiring a high level of evidence to rebut this presumption. The Supreme Court recently clarified the meaning of the standard of clear and convincing evidence:

The precise meaning of ‘clear and convincing proof’ does not lend itself readily to definition. It is, in reality, a question of how strongly the minds of the trier or triers of fact must be convinced that the facts are as contended by the proponent. . . . Where clear and convincing proof is required, the proponent must convince the jury or judge, as the case may be, that it is *highly*

probable that the facts which he asserts are true.
He must do more than show that the facts are probably true.

(*Conservatorship of O.B.* (2020) 9 Cal.5th 989, 998–999, emphasis added.)

The Opposition’s reliance on hearsay declarations do not reach the threshold of “clear and convincing proof,” and Petitioner’s objection to the move and instance on an evidentiary hearing made that abundantly clear.

Further, when Petitioner demanded an *evidentiary hearing*, the Respondent Court was put on notice that Petitioner was insisting on all the elements of a hearing that due process guaranteed her. By ignoring this request and entering the removal order based on hearsay in declarations, the Respondent Court violated Petitioner’s constitutional right to due process of law. Therefore, a writ should issue requiring the Respondent Court to vacate the order and give Petitioner an evidentiary hearing with all the constitutionally-required attributes that due process guarantees her.

Lastly, regardless of the strength or weakness¹ of the caselaw cited in the original writ petition, the fact remains that as a matter of due process Petitioner was entitled to an evidentiary hearing at which witnesses could be presented in her favor and during which the declarants of the Opposition could be called and cross-examined. This process may have shown the court that a less restrictive alternative was available to serve whatever objective the court had in mind. By denying counsel’s request for an evidentiary hearing, the trial court violated Petitioner’s constitutional right to present evidence in Opposition to the removal petition. “The right to

¹ The Opposition’s focus on the supposed weakness of the Petitioner’s cited caselaw highlights and important fact – no cases cite or analyze Probate Code § 2253. As such, Petitioner respectfully requests that this Court find in Petitioner’s favor and issue a published decision to assist future conservatees.

present evidence is, of course, essential to the fair hearing required by the Due Process Clause.” (*Jenkins v. McKeithen* (1969) 395 U.S. 411, 429.)

CONCLUSION

Respondent Court violated Petitioner’s fundamental due process rights by failing to adhere to the procedures outlined in Probate Code section 2253. Petitioner sufficiently preserved her due process rights by objecting to both the proposed move and specifically requesting an evidentiary hearing. Nothing was waived.

Accordingly, Petitioner respectfully requests that this Court grant the petition and:

1. Issue a peremptory writ of mandate in the first instance, directing Respondent Court to vacate the order removing Petitioner, Elisabeth Hicks from her former residence;
2. And/alternatively, this Court issue a preemptory writ of mandate, directing Respondent Court to hold an evidentiary hearing as demanded by Probate Code section 2253(c) if a change of residence is still requested; and
3. This Court grants such other and further relief as may be appropriate and just.

DATED: November 2, 2020

Respectfully submitted,
ELENA D’AGUSTINO
PUBLIC DEFENDER

/s/ Octavio Joseph Reyes
OCTAVIO JOSEPH REYES
Deputy Public Defender

Attorneys for Petitioner
ELISABETH H

CERTIFICATE OF COMPLIANCE

In accordance with Rules 8.204(c) and 8.486(a)(6) of the California Rules of Court, I certify that this Petition and Memorandum contains 1,239 words, including footnotes, which is within the 14,000-word limit. This word count comes from Microsoft Word's word count.

Dated: November 2, 2020

/s/ Octavio Joseph Reyes
OCTAVIO JOSEPH REYES