

C A S C I

California Association of Superior Court Investigators

Summary of comments regarding the Omnibus Conservatorship and Guardianship Reform Act 2006

(Summarized by Heather C. Tackitt, Madera County- CASCI President)

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On Thursday, May 10, 2007, CASCI included a roundtable discussion workshop as part of the 30th Annual CASCI statewide training. Daniel Pone, Senior Staff Attorney for the Administrative Office of the Courts, participated both as a Keynote Speaker on May 9, 2007 and assisted in the roundtable discussion on May 10, 2007. As part of the roundtable, we collected comments from the participants and had them share their opinions. The following is a summary of the listed Concerns and Suggestions.

The yellow highlights bring attention to the main issues and some important notes and conclusions. The blue highlights in the Suggestion section mark CASCI members suggestions (majority of comments) for adding to AB 1727 (Clean-up legislation)

Main concerns:

1. **More CI staff and clerical expenses** (i.e. clerical = more mailings, more copies of reports)
2. **Confidentiality/Right to Privacy of Medical information will be breached if CI's have to discuss case with non-parties** (i.e. friends, neighbors.) The concern is having confidential medical information in the reports and having this information disseminated to third parties. **THIS WAS A MAIN CONCERN VOICED BY THE MEMBERS.** Here is an excerpt from a CASCI member e-mail (Tom Gafney, San Bernardino County) that summarizes the concerns and current law very well.

E-mail reads as:

At the CASCI conference you asked for comments about the new law, and you mentioned PIRT so often that I couldn't resist. It seems that I and most of the others at the conference objected to the parts of the law that applied to the investigators, especially about the parts that required disclosure of what we thought was private information. My thoughts are not exhaustive, and may contain errors, but at least they may expose the legislature to our concerns, and perhaps they may lead to some revision of the statutes. Use what you like.

Introduction

The California Constitution provides us with a right of privacy. This right protects against the disclosure of sensitive or confidential information and preserves the right to make personal decisions or to conduct personal business without observation or interference. While this privacy right is not absolute, it may be infringed only if there is a competing interest that is authorized, legitimate and beneficial.

The new conservatorship law, as it relates to court investigators, requires us to expand our interview list. Now we must interview not only the conservatee, but also the conservator, the conservatee's spouse or domestic partner, the conservatee's relatives within the first degree and sometimes within the second degree, the conservatee's neighbors and friends.

In soliciting observations and opinions from these people, it seems that at a minimum the court investigator must disclose that there is a conservatorship pending and that the court may determine that a relative, friend or neighbor lacks the capacity to provide for his personal needs or to manage his financial resources.

Also, the court investigator later must distribute his report to an expanded list of recipients, to the conservatee, the conservatee's spouse or domestic partner, and to relatives within the first degree. This report contains confidential, private information such as medical diagnoses, medications and financial information.

The court investigators believe that these disclosures violate a conservatee's right of privacy and that these interviews and disseminations should not be required.

Discussion

"All people are by nature free and independent and have inalienable rights. Among these are ... pursuing and obtaining ... privacy." [California Constitution, Article 1, §1]

The privacy right stated in the California Constitution protects against invasion by private citizens as well as by the state. [Chantiles v. Lake Forest II Master Homeowners Assn., 37 CA 4th 914 (1995)]

Invasion of privacy can be justified by a competing interest; it is not an absolute right [P. v. Luiria, 86 CA 4th 513 (2001)]. Legitimate interests derive from legally authorized and socially beneficial activities of government and private entities. Conduct alleged to be an invasion of privacy is to be evaluated based on the extent to which it furthers legitimate and important competing interests. [P. v. Martinez, 88 CA 4th 465 (2001)]. [See also, Hooser v. S. Ct., 84 CA 4th 997 (2000)]

Legally recognized privacy interests are generally of two classes: (1) "informational privacy" interests in precluding the dissemination or misuse of sensitive or confidential information; and (2) "autonomy privacy" interests in making intimate personal decisions or conducting personal activities without observation, intrusion or interference. [Tom v. San Francisco, 120 CA 4th 674 (2004)]

The right of privacy protects against the unwarranted, compelled disclosure of various private or sensitive information regarding one's personal life, including his financial affairs, medical history, and confidential personal information. [Tien v. S. Ct., 139 CA 4th 528 (2006) {hn4}]

The right of persons not adjudicated incompetent to give or to withhold consent to medical treatment is protected by the common law of this state and by the constitutional right to privacy. [Edward W. v. Lamkins, 99 CA 4th 516 (2002)]

Personal financial information is protected. [Burkle v. Burkle, 135 CA 4th 1045 (2006)]

A party to an action may assert the privacy rights of third parties. [Tien v. S. Ct., 139 CA 4th 528 (2006) {fn7}] [TG: for example, a conservator for a conservatee???)

“The provision that a ‘responsible relative’ be informed of the eight items constituting ‘informed consent’ before the treatment be administered is a violation of the patient’s right of privacy and the right to confidentiality established by {W&IC} section 5328. The disclosure of the nature and seriousness of the patient’s disorder is a clear infringement of the patient’s right of privacy and no countervailing state interest is apparent. Because no standing to assert the patient’s rights is granted to the relative, it is doubtful (that) this disclosure furthers the protection of patients’ rights or prevents unnecessary treatment. Thus the requirement of such disclosure is an unconstitutional invasion of the patient’s right to privacy.” [Aden v. Younger, 57 CA 3rd 662 (1976) {hn11}] [Note: this case arose under the W&IC and involved notice to relatives about convulsive shock treatment to mentally ill patients. It appears to me, though, that a court could apply the rationale to a probate conservatorship case, too]

There is no physician-patient privilege in a proceeding to place a person or his property under the control of another because of his alleged mental or physical condition. [Evidence Code §1004]. This exception to the privilege covers cases such as the appointment of a conservator under the Probate Code. In these cases, the proceedings are being conducted for the benefit of the patient and he should not have a privilege to withhold evidence *that the court needs in order to act properly for his welfare*. [Law Revision Commission Comment to §1004].

{TG: It appears that the privilege [Evid. C. §994] applies to the disclosure of confidential information to relatives or neighbors or friends of the conservatee, but that the privilege does not apply to the disclosure of confidential information to the court.}

More issues associated with CONFIDENTIALITY concerns:

- a. May have to “water-down reports”
 - b. May ruin the relationship we have with c’tor and we may not be viewed as neutral.
3. **Need for Uniform forms to be used throughout the state. (Note: This is already being worked on with a working group of CASCI members and PMHC members regarding accounting forms. Prb. Code 2620)**
 4. **AOC Conservatorship Handbook and Video needs to be updated.**
 5. **Due Diligent search requirements?? To what degree do we have to show we attempted to locate friends, family etc...**
 6. **Do the Temp Reports have to be full investigations? (Note: I believe Dan Pone answered No to this inquiry.)**
 7. **Are we authorized to do CLETS on family members and proposed conservators? (Answer is Yes – Penal Code Section 111.5 In order to have legal access, you must first complete a CLETS /NCIC training stressing policy, regulations, and liability issues. Contact your courts’ CLETS Terminal coordinator or Law Enforc. T.C. for dates and details. CLETS - Penal Code 11105(a)(1) – The Dept. of Justice shall maintain state summary criminal history information. CLETS - Penal Code 11105(b)(1) -The Attorney General shall furnish such information to “the courts of the state.” As agent of court/judge, you have right to access.**

Law Enforcement Reports – Ca. Rule of Court 5.220 (e)(2)(A) - As agent of court, you have right to access. Present proper ID & put request in writing. Compliance is normally very swift. They may not fax reports if child molestation or rape is at issue. You may have to pick up in person.

8. **Making unannounced visits may cost too much and be too timely if the conserved is not there. (There were multiple e-mails about this as well)**
 - a. How many attempts?
 - b. Leave a card ? (Like CPS)
 - c. Do we make similar attempts to contact all the 2nd degree family and friends?
 - d. Can we have the court waive requirement for unannounced visit? Reasons are because some counties have a radius of 2 hour drive time and if they arrive and conserved not available, resources are wasted.
9. **Time frame for Temp. reports are difficult to adhere to.**
10. **Needing more staff and therefore. more equipment and office space (i.e. computers, faxes, work space that allows for confidentiality)**
11. **Who will review to make sure the Cons. Petition is complete before CI's go out on the initial visit?**
12. **No new funds so we can't plan for changes or new staffing.**

SUGGESTIONS:

The highlights in Blue are what the majority of the CASCI members would like to see added to the “clean-up” Legislation AB 1727

1. **FUNDING, FUNDING, FUNDING for STAFFING, STAFFING, STAFFING:**
 - a. **New CI's , Prob. Examiners and Clerical**
2. **Do the Temp report and give to Judge only. They can be more “check-box” in nature and the first full Inv. Report will be for all parties.**
3. **Create a good screening form to include all information on how to contact all 1st and 2nd degree family and friends (i.e. names, phone numbers, e-mails etc...) This should be given before expected to conduct temp. Investigation. *(Note: This can be done at the local level.)***
4. **Repeal requirement to interview neighbors.**
5. **Add : New law should say Interview only 1st degree relatives and any family members who had active participation in the c-tee's life.**

6. **Add: Make it allowable to set appointments** for visit with c-tee because of resources that may be wasted.
7. Do the temp. report and first general report simultaneously. No requirement of two separate reports.
8. Rotate the CI who will respond to do temp Report (i.e. CI of the Week type of rotation) That same CI will retain report through first annual review. *(Note: This can be done on a local level)*
9. **Add and ask that this be part of the Cal. State Rule of Court: Get Order Appointing Investigator from all Judges at the earliest stage (before doing Temp. Invest.)** because we will be better able to get people to cooperate.
10. **Add: Allow Judges to grant CI's more time to conduct a temporary investigation when necessary.**
11. **Allow Local Rule of Court to implement some of these suggestions and give Judge some discretion.**
12. Regarding Confidentiality/Right to Privacy - If discussing case with neighbors remains a requirement, CI's not permitted to discuss medical information. *(Note: The OCGA does not require any CI to disclose medical information to third parties. Adherence to right to privacy should be followed.)*
13. **Regarding Confidentiality/Right to Privacy – If 1st and 2nd degree relatives are to get copy of reports, the Medical and CLETS information shall be included only in the Judge, Probate Division copies** (or maybe expanded to the Petitioner and any Joined parties copies) but never to additional friends and neighbors.
14. **For better financial protections – Add: CI can ask to look at different estates at the same time** from one Private Fiduciary so CI can screen for potential “Ponzie schemes” (take from one estate, deposit in one to get through accounting reviews)
15. **AOC creation of new updated Conservatorship Handbook and Video.**