

# Alternatives to Conservatorship, AB 1663 and AB 1194

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# Alternatives to Conservatorship

- ▶ Advance Healthcare Directives
- ▶ Estate Planning Documents
- ▶ Representative Payee Programs
- ▶ Guardian ad litem
- ▶ Supported Decision Making



# Estate Planning Documents

- ▶ Advanced Health Care Directive
- ▶ Power of Attorney for Finance
- ▶ Springing Power of Attorney
- ▶ Living Trust
- ▶ Special Needs Trust



# Power of Attorney

- ▶ Person maintains decision-making power with the assistance of trusted individuals
- ▶ Can provide legal and/or financial assistance
- ▶ Durable POA
  - ▶ Surrogate decision maker is able to continue to do so as long as the POA exists
- ▶ Springing POA
  - ▶ Only comes into effect when an event occurs, such as a determination of incapacity
- ▶ Medical POA (also called an Advanced Health Care Directive)
- ▶ A POA can be “limited” such that the powers only apply for a specific decision and do not carry over into other aspects of a person’s life

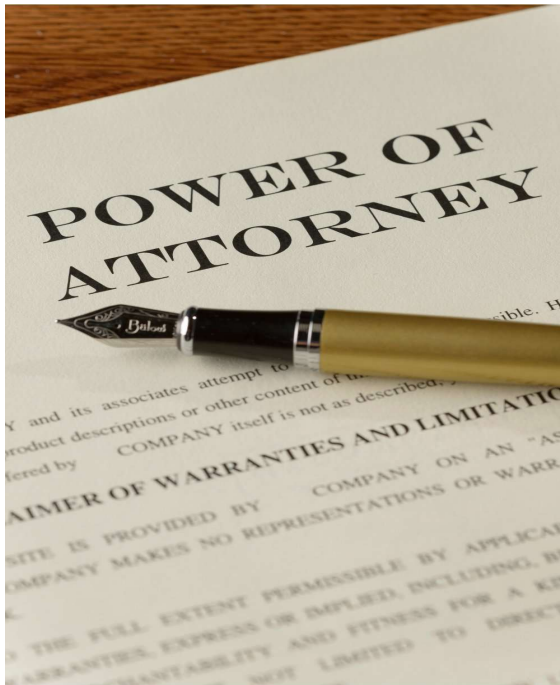


# Advanced Healthcare Directives

- ▶ Benefits
  - ▶ Allows an individual to designate a Power of Attorney for Health Care/alternate decision-maker in the event that they are unable to give consent
  - ▶ Allow an individual to memorialize their preferred level of care, including end of life decisions
- ▶ Limitations
  - ▶ Powers are limited to Healthcare decisions only, and only in the event that an individual is unable to give consent
  - ▶ Directive can only be executed by a competent person



# Limitation of Powers of Attorney



- ▶ They can be revoked
- ▶ Must be executed by a competent person
- ▶ Powers are limited to the specific type of POA
- ▶ No court oversight
- ▶ Power are concurrent powers (the attorney-in-fact cannot prevent or limit the independent exercise of power by the principal/grantor)

# Living Trust

- ▶ Powers
  - ▶ Allows for distribution of assets without having to go through the lengthy and potentially expensive probate process
  - ▶ Allows for the designation of a successor trustee in the even of the trustee's incapacity.
- ▶ Limitations
  - ▶ Must be executed by a competent person and can only be revoked or modified by the grantor, if they have legal capacity
  - ▶ The trust instrument may establish how assets are managed and distributed during a beneficiary's lifetime, but main purpose is to distribute assets after death
- ▶ Oversight
  - ▶ No court oversight, only beneficiaries can compel the trustee to account for how assets are managed and distributed.

# Special Needs Trust

- ▶ Purpose
  - ▶ Allows a disabled individual maintain to government benefits such as Medi-Cal and SSI without the trust assets being considered as resources
- ▶ First-Party Trust
  - ▶ Set up by parent, legal guardian, or the court for the benefit of a disabled person
  - ▶ Beneficiary must be under the 65 years of age when the trust is established/funded
  - ▶ Beneficiary must be classified as Social Security Disabled
  - ▶ Usually funded by a beneficiary's inheritance or settlement
  - ▶ Trust is irrevocable and assets cannot be taken by creditors\*
- ▶ Third-Party Trust
  - ▶ Set up and funded by a separate grantor (such as a parent, grandparent or guardian)
  - ▶ No age restriction for establishing the trust
  - ▶ Grantor can establish these trusts during their lifetime or can set it up in their will, in what is called a testamentary trust
  - ▶ Can be revocable in some cases

# Special Needs Trust

- ▶ Limitations
  - ▶ Funds can only be used to supplement, but not supplant public benefits
  - ▶ Distributions of funds cannot be given directly to the beneficiary without being considered income
  - ▶ Trust must be established and funded before the beneficiary reaches the age of 65
- ▶ Oversight
  - ▶ None, unless a court takes jurisdiction of the trust, in conjunction with an established conservatorship.

# Representative Payee Programs

- ▶ Purpose
  - ▶ Allows an individual or public entity, such as the Public Guardian or the Veteran's Administration (VA) to manage the income and pay expenses on behalf of an individual
- ▶ Limitations
  - ▶ Usually limited to the management of public benefits, such as social security, supplemental security income or VA benefits
  - ▶ In the absence of a conservatorship, an individual must voluntarily participate in these programs
  - ▶ Cannot be used to manage large estates
- ▶ Oversight
  - ▶ Social Security Administration relies on annual self-reporting of the representative payee to determine if public benefits are being administered appropriately.
  - ▶ The U.S. Department of Veteran's Affairs provides oversight and periodic accounting reviews for any individual or public entity who is appointed as a VA Fiduciary

# Guardian ad litem (GAL)

- ▶ A guardian ad litem (GAL) is a person appointed by the court who stands in the place of person with a disability to handle a specific court case.
- ▶ A GAL is able to hire an attorney and make decisions in a lawsuit for a plaintiff, defendant, petitioner, respondent, or other party who is unable to understand or make decisions in the case.
- ▶ A GAL only provides legal assistance in a specific legal matter to make sure that a person's best interests are protected (such as a civil suit, divorce proceeding, probate of an estate), they are not appropriate for ongoing legal issues.



# Supported Decision-Making

- ▶ Process that allows people with disabilities or impairments to receive support from a trusted person, while retaining the ability to make their own decisions.
- ▶ The person with a disability chooses the people who support them, which can include family, friends, agency staff or professionals.
- ▶ The supporting persons help the person with a disability consider their options, understand, and communicate decisions.
- ▶ Supported decision making gives the disabled person the ability to make their own informed decisions without involving the courts or designating this power to an agent or attorney-in-fact.

# California's Legal Framework

- ▶ AB 1663 (Effective January 2023) recognizes SDM as a legal alternative to conservatorship.
- ▶ Codified by Welfare and Institutions Code 21000, et seq.
- ▶ Courts must consider SDM before approving conservatorships.
- ▶ Individuals can use a Supported Decision-Making Agreement (SDMA) to designate supporters.
- ▶ Agreements are voluntary, revocable, and tailored to the individual's needs.

# Supported Decision-Making

- ▶ Supported Decision-Making can provide assistance in the areas of:
  - ▶ Special Education and Educational Decisions/IEP
  - ▶ Life Planning/Transition Planning/Independent Living Goals/Supportive Living Skills
  - ▶ Medical Decisions, End of Life
  - ▶ Managing Finances and Assets, Estate Planning
  - ▶ Navigating and Applying for Public Benefits (MediCal/Medicare, SSI/SSA)
  - ▶ Vocational Rehabilitation (VR), Individual Plan for Employment
  - ▶ Home and Community Based Services (HCBS)
  - ▶ Developing Individual Centered Plans (ICP), Person Centered Plans (PCP), Individual Program Plan (IPP)

# Key Components of Supported Decision Making (SDM)

- ▶ **Decision-Maker:** Person making their own decisions with support.
- ▶ **Supporters:** Trusted individuals assisting with information gathering and communication.
- ▶ **Supported Decision Making Agreement:** Document outlining areas of support, supporter roles, and communication preferences.
- ▶ **Collaboration** and trust are essential for effective SDM.

# Who is Eligible to Create a SDM Agreement?

- ▶ **Developmentally Disabled Adults**
- ▶ **Older Adults with a disability or age related disability including:**
  - ▶ Dementia
  - ▶ Alzheimer's
  - ▶ Major Neurocognitive Disorder
  - ▶ Cognitive, communication, psychiatric, sensory or learning disabilities
  - ▶ Chronic illness or condition
  - ▶ Competency is presumed unless determined otherwise



# Who Can be a Supporter?

- An adult who meets the requirement
- Supporters are subject to existing obligations and prohibitions that protect adults with disabilities
- Civil or criminal penalties for malfeasance are not limited
  - Includes fraud, abuse, neglect, breach of fiduciary duty, coercion, mistreatment
- Supporters have potential liability under the Elder Abuse and Dependent Adult Civil Protection Act for bad acts



# Requirements of a Supporter

- **Supporters Must:**
- Support and implement the direction, will, and preference of the adult with a disability
- Respect the values, beliefs, and preferences of the adult with a disability
- Act honestly, diligently and in good faith
- Act within the scope identified by the adult with a disability
- Maintain the confidentiality of any information obtained by the supporter unless disclosure is specifically authorized

# Requirements of Supporter

## **Supporters must not:**

- Coerce the adult with a disability
- Unless otherwise specifically authorized:
  - May not make a decision for or on behalf of the adult with a disability
  - Sign documents on behalf of the adult with a disability
- May not have a conflict of interest

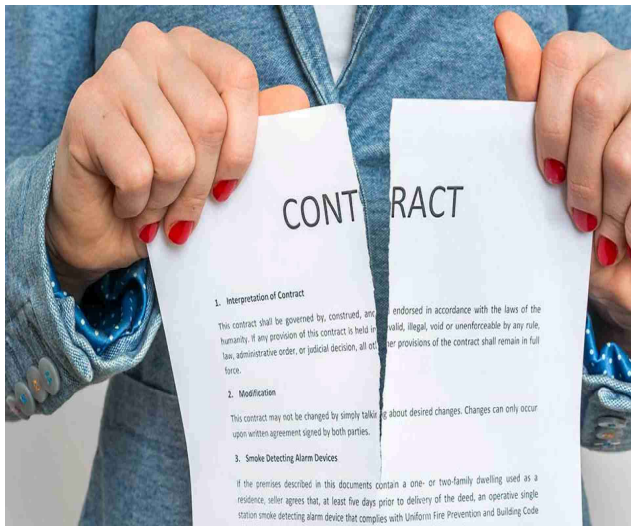


# Supported Decision Making

- ▶ The adult may act independently of the SDM agreement
- ▶ A SDM agreement cannot be used by a court as evidence of a lack of capacity
- ▶ The adult is entitled to have one or more supporters participate in meetings
- ▶ A third party may only refuse the presence of one or more supports if there is a believe that there is fraud, coercion, or abuse



# Termination of SDM Agreement



- ▶ May be terminated by the terms of the agreement (i.e., an end date)
- ▶ By the death of the adult with a disability
- ▶ Supporters are no longer eligible to be a supporter
- ▶ Any party to the agreement can provide written or oral notice of their intent to terminate the agreement
- ▶ An adult with a disability can terminate the agreement by destroying or defacing the agreement

# Supported Decision-Making WIC 21000 Et seq.

- ▶ Section 21000 Legislative Findings and Declaration
- ▶ Section 21001 Definitions
- ▶ Section 21002 Supported Decision-Making Agreement
- ▶ Section 21004 Right of Adult with Disability to have one or more adults attend a meeting or discussion
- ▶ Section 21005 Requirements for Supported Decision-Making agreements
- ▶ Section 21006 Supported Decision-Making Agreement Termination
- ▶ Section 21007 Applicability to CARE court proceedings or to a CARE supporter
- ▶ Section 21008 Development of educational information or training materials on Supportive Decision making.

# Resources and Support in California

- State Council on Developmental Disabilities: Toolkits and training.
- The Arc of California: Advocacy and support for disability rights.
- UC Davis MIND Institute: Research and education materials.
- Support Without Courts: Guides and templates for SDMAs.
- Local Area Agencies on Aging (AAA): Community resources and elder support programs.

# Resources for Sample SDM Agreements

- ▶ [https://www.aclu.org/sites/default/files/field\\_document/aclu\\_supported\\_decision-making\\_agreement.pdf](https://www.aclu.org/sites/default/files/field_document/aclu_supported_decision-making_agreement.pdf)
- ▶ <https://www.vcba.org/wp-content/uploads/2024/04/1-SDM-Agrmnt-Sam-H-2024.pdf>
- ▶ <https://health.ucdavis.edu/media-resources/mind-institute/documents/pdfs/sdm-how-to-make-aclu.pdf>
- ▶ [https://www.altaregional.org/sites/main/files/file-attachments/english\\_sdm\\_community\\_training\\_-\\_powerpoint.pdf?1723746610](https://www.altaregional.org/sites/main/files/file-attachments/english_sdm_community_training_-_powerpoint.pdf?1723746610)
- ▶ <https://disabilityvoicesunited.org/wp-content/uploads/2020/10/8-To-Go-SDMA.pdf>

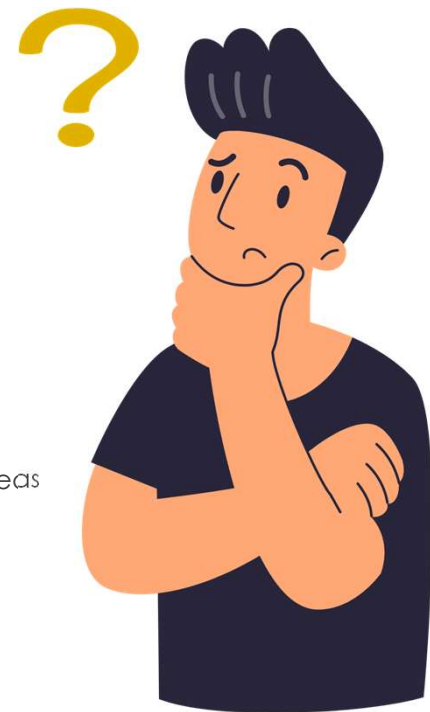
# Supported Decision-Making

## ▶ Pros

- ▶ Least Restrictive Alternative to Conservatorship
- ▶ Allows Individual the freedom of self-determination and maximizes independence
- ▶ Does not restrict or limit the rights of a person with a disability or impairment
- ▶ Ensures decisions reflect the individuals values and preferences
- ▶ Does not involve the courts
- ▶ Can delay or prevent the need for conservatorship

## ▶ Cons

- ▶ Individuals must be higher functioning and voluntarily accept services.
- ▶ Community Agencies that provide Supportive Decision-making services may not be available in all areas
- ▶ Services provided by public agencies may be limited to individuals with a specific diagnoses
- ▶ There may be certain agencies or businesses that will not recognize or accept these agreements (banks, health care providers, etc.)
- ▶ Lack of oversight



# Summary of Changes from AB 1663

- ▶ Regional centers can no longer serve as conservator. They can only serve as a designee of DDS. DDS must establish procedures for this, including a process for an appeal to DDS.
- ▶ The 12 hours of mandatory annual training for probate attorneys and probate examiners must now include alternatives to conservatorship
- ▶ Review investigations now must also address the expressed wishes of the conservatee, whether the conservatee has regained or could regain abilities and capacity with or without supports, whether the conservatee continues to need a conservatorship, and whether less restrictive alternatives could be tried.
- ▶ Alternatives to conservatorship that must be evaluated before granting a conservatorship now include supported decision-making
- ▶ Conservatorships of developmentally disabled adults must now always be limited conservatorships unless the conservator is seeking locked placement and/or administration of psychotropic medications.
- ▶ The confidential supplemental information form must now add the following details concerning alternatives to conservatorship: length and duration of attempted alternatives, and why the alternatives do not meet the conservatee's needs. Supported decision-making must be evaluated in addition to the existing issues.
- ▶ The conservatee's rights form must be updated to include information on the procedures to terminate or modify conservatorship. It must also describe the conservator's obligations to accommodate the desires of the conservatee, maximize the conservatee's autonomy, support the conservatee in making decisions, and inform the conservatee of decisions made on their behalf.

## Summary of Changes, cont.

- ▶ Court self-help in each county must establish a conservatorship alternatives program to assist in providing information about, and implementing, conservatorship alternatives, including supported decision-making.
- ▶ The court must provide a personalized document to the conservatee within 30 days after establishment of conservatorship and every year thereafter providing enumerated information, including contact information for the conservator, court investigator, conservatorship alternatives program representative, the person to petition to end or change conservatorship, and the rights of the conservatee (customized based on the current orders of the court).
- ▶ Findings of clear and convincing evidence to maintain conservatorship at a termination hearing must be made on the record, but if the conservator and conservatee agree to terminate and termination is uncontested, a termination order can be made without the need to conduct an evidentiary hearing.
- ▶ If the conservatee expresses a wish to terminate, the court must appoint counsel and set a hearing unless a similar hearing has occurred in the last 12 months and the court does not find good cause to set the hearing.
- ▶ Supported decision-making is implemented at WIC 21000 et seq. It is a vehicle for a principal to authorize someone to be present with them to help them make specific decisions. The "agent" does not have any authority, but acts only in a supportive role.

# AB 1194 and Statutory Changes to Service of Medical/CLETS information

- ▶ AB1194 added Probate Code 1826(c)(2), which expressly addresses the confidentiality of the CLETS / Medical Supplement to a report under 1826. Before this statutory change, we provided these supplements for 1826 reports, but used 1851(b)(2) to specify which parties were entitled to access of the report.
- ▶ However, the list of parties in 1826(c)(2) are not the same as those in 1851(b)(2). Under 1851, the conservatee, conservator, and their counsel are entitled to the report. Under 1826, only the conservatee and their counsel are so entitled. Thus, conservators and their counsel are no longer entitled to CLETS / Medical supplements for 1826 reports.



# AB 1194 and Mental Function Deficits

- ▶ Before the court grants a conservatorship, the court must find by clear and convincing evidence that the conservatee has mental function deficits that significantly impair their ability to understand and appreciate the consequences of their actions in connection with providing properly for their personal needs for physical health, food, clothing, or shelter (person powers) or managing their financial resources or resisting fraud or undue influence (estate powers). See Probate Code 810 et seq., 1801. The only exception is when a conservatee voluntarily requests a conservatorship. Probate Code 1802.
- ▶ Probate Code 1821 requires the petitioner to complete the petition and the Confidential Supplemental Information form to provide this data. However, petitioners rarely identify mental function deficits. Instead, at best they usually focus solely on ADLs or IADLs that the proposed conservatee cannot complete independently. They fail to identify why the conservatee is unable to do so.
- ▶ For many years, Probate Code 1826 has required the investigator to determine whether the proposed conservatee suffers from mental function deficits that significantly impair their capacity as to require a conservatorship. However, this requirement is qualified, and is “to the extent practicable or possible.”

# AB1194, AB 1663 and Mental Function Deficits

- ▶ Until AB1194, this requirement did not apply to review investigations. But, that bill added language to 1851(a)(1)(C)(i) concerning meeting “the criteria for appointment of a conservator of the person.” This is an indirect reference to the same mental function deficit evaluation. AB1194’s requirements were conditioned on funding which has not been received. However, AB1663 modified Probate Code 1800€ to require that court investigators consider, during the course of review investigations, the “expressed wishes of the conservatee; whether the conservatee has regained or could regain abilities and capacity with or without supports; and whether the conservatee continues to need a conservatorship.”
- ▶ Evaluating whether the conservatee continues to need a conservatorship is essentially the same as what AB1194 conditionally added. But, AB1663 is not conditioned on funding. So, AB1663’s change effectively implements this portion of AB1194 without requiring funding.
- ▶ Section 1826 allows the investigator’s determination to be based on either from the investigator’s observations or from medical records.

# AB 1194, AB 1663, and Least Restrictive Alternatives

- ▶ Probate Code 1800.3 requires the court to make “an express finding that the granting of the conservatorship is the least restrictive alternative needed for the protection of the conservatee” before granting a conservatorship. AB1663 added to this requirement by expressly requiring the court to “consider the person’s abilities and capacities with current and possible supports, including, but not limited to, supported decision making agreements, as defined in Section 21001 of the Welfare and Institutions Code, powers of attorney, designation of a health care surrogate as set forth in Section 4711, and advance health care directives.” Probate Code 1800.3(c).
- ▶ Probate Code 1821 requires the petitioner to supply information about this in the Confidential Supplemental Information form, but this is rarely completed properly.

# AB 1194, AB 1663, and Least Restrictive Alternatives

- ▶ A Probate Code 1826 investigation must analyze the issue of least restrictive alternatives with current and possible supports since the investigator must “Review the allegations of the petition as to why the appointment of the conservator is required and, in making the determination, ...refer to the supplemental information form submitted by the petitioner and consider the facts set forth in the form that address each of the categories specified in subparagraphs (A) to (E), inclusive, of paragraph (1) of subdivision (a) of Section 1821. (Section 1821(a)(1)(C) addresses alternatives to conservatorship.)



# AB 1194 and AB 1663 and Least Restrictive Alternatives

- ▶ For review investigations, AB1194 added a requirement to analyze whether conservatorship remains the least restrictive alternative. However, this requirement was contingent on funding, which has not been received. AB1663 instead modified 1850(a)(2) to require that review investigations include, when possible, a discussion with the conservatee and finding about “less restrictive alternatives to conservatorship as set forth in Section 1800.3.” It also modified 1800(e) to require that review investigations including consideration of “whether the conservatee has regained or could regain abilities and capacity with or without supports; and whether the conservatee continues to need a conservatorship.” So, again AB1663 effectively implemented this change from AB1194 without making it contingent on funding.

# AB 1194, AB1663, and Modification of Powers and Duties

- ▶ Implicit in the analysis of whether conservatorship is the least restrictive alternative is a review of whether the powers requested are appropriate, excessive, or insufficient for the protection of the conservatee. Since a “least restrictive” analysis is required for both 1826 and 1850 investigations, evaluation of the powers and duties is also required.
- ▶ AB1194 made this an express requirement for review investigations. It amended 1851 (a)(2) to require a determination whether “the terms of the appointment order should be modified to reduce or expand the conservator’s powers and duties to ensure that the conservatorship is the least restrictive alternative needed for the conservatee’s protection.” This change was contingent on funding that has not been received. But, again, AB1663 effectively sidestepped the funding issue by modifying 1850(a)(2) to require a finding “whether the conservator or conservatee wishes to modify” the conservatorship.
- ▶ So, an analysis of the appropriateness of powers and duties of the conservator is now required in the course of an investigation.



# AB 1663 and Decision-Making

- ▶ Another focus of AB1663 was the rights of a conservatee to be involved in the decision-making process of the conservator. It amended Probate Code 1800 to add subsection (h), expressing legislative intent to “[ensure], to the greatest possible extent, that the conservatee is able to understand, make, and communicate their own, informed, choices while under conservatorship.”
- ▶ This though was likely behind the change to Probate Code 1812 concerning legislative priority for appointment, making “the conservatee’s stated preference” the most important factor besides being in the best interests of the conservatee and qualified.

# AB 1663 and Decision-Making

- ▶ Even after appointment, AB1663 clarifies that the conservatee's right to be involved in decision-making does not cease. Probate Code 2113 already required a conservator to “accommodate the desires of the conservatee. AB1663 amended this to add the following:
- ▶ “To the greatest extent possible, the conservator shall support the conservatee to maximize their autonomy, support the conservatee in making decisions, and, on a regular basis, inform the conservatee of decisions made on their behalf. In determining the desires of the conservatee, the conservator shall consider stated or previously expressed preferences, including preferences expressed by speech, sign language, alternative or augmentative communication, actions, facial expressions, and other spoken and nonspoken methods of communication.”
- ▶ The bill tied review investigations into this change by adding to Probate Code 1800(e) that the investigator shall consider “the expressed wishes of the conservatee.” When read in conjunction with subsection (h) and the remainder of AB1663, this is a directive for the investigator to evaluate whether the expressed wishes of the conservatee are properly being taken into consideration by the conservator by involving the conservatee in the decision-making process.

# AB 1663 and Personalized List of Rights and Contact List

- ▶ AB1663 also added Probate Code 1835.5, which created a new duty for the court to provide information to a conservatee concerning (a) contact information for various individuals, and (b) a personalized list of rights that the conservatee retains. This list must be provided within 30 days after appointment, and annually thereafter.



# AB 1194 and Requirements that are not currently mandated

- ▶ Additional requirements such as reporting fiduciary misconduct to the Professional Fiduciaries Bureau, requiring a court investigator to investigate ex parte communications regarding a fiduciary's performance of their duties and responsibilities, 1051 (e) was added to the probate code stating that a Superior Court shall not be required to perform any duties imposed by the new code section 1051 until the Legislature makes an appropriation identified for this purpose.
- ▶ Similarly, the provisions requiring two visits by a court investigator when there is a general petition for conservatorship and a temporary petition, the provision requiring temp investigations, six month reviews and annual reviews, are not required until the Legislature makes an appropriation identified for this purpose.
- ▶ The amended duties added to section 1826, including the requirement that court investigations gather and review relevant medical reports regarding the proposed conservatee from the proposed conservatee's primary care physician and other relevant mental and physical care providers, is also not required until the Legislature makes an appropriation for this purpose.
- ▶ The added section 1851.6 which states that, "Any interested person, as defined in Section 48 or any person entitled to receive notice pursuant to Section 1822, if they have personal knowledge of a conservatee, may petition the court to investigate an allegation of abuse, as defined by Section 15610.07 of the Welfare and Institutions Code, of the conservatee by a conservator. The court shall investigate all such allegations that establish a prima facie case of abuse. If the court investigator has performed an investigation within the preceding six months and reported the results of that investigation to the court, the court may order, upon good cause shown, that a new investigation is not necessary or that a more limited investigation is sufficient," is also not required until the Legislature makes an appropriation for this purpose.

Questions?



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