JUDICIAL COUNCIL OF CALIFORNIA

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September 10, 2019

Hon. Gavin Newsom
Governor of California
State Capitol, First Floor
Sacramento, California 95814

Subject: Senate Bill 303 (Wieckowski) – Request for Veto

Dear Governor Newsom:

The Judicial Council respectfully requests your veto on SB 303 because it tilts the balance away from the court appointed conservator by placing the conservatee's welfare into the control of a person who was not selected as the conservator and does not serve the interests of the conservatee, and who owes no legal or enforceable duty to the conservatee. The bill is also likely to encourage unnecessary and even frivolous litigation without providing corresponding benefits to the conservatee.

The conservatorship system is premised on the importance of a court-appointed conservator, who, upon appointment by clear and convincing evidence that a conservatorship of the person is necessary, swears an oath to perform the duties of the office according to law, owes a duty of undivided loyalty to the conservatee, must maintain all appropriate records, and, as called upon by the court, must report to the court issues, progress, and expenditures, to exercise the statutory powers and perform the statutory duties consistent with that undivided loyalty to the conservatee.

Legal obstacles to the conservator's exercise of powers and duties, like those in SB 303, have at least two deleterious effects: They prevent the conservator from acting in what the conservator has determined are the conservatee's best interests, and they effectively give authority to someone who has not been selected by the court by clear and convincing evidence, has not sworn an oath to uphold the law, and does not owe the conservatee any fiduciary duty to make determinations in the conservator's place.

When we're talking about the sale of a home, as is the case with SB 303, this "someone" is usually a family member who may have interests that conflict with those of the conservatee. Maybe their interest is in preserving the value of the estate so there will be an inheritance. Maybe their interest in keeping the home in the estate is so they can live there. Under SB 303, it becomes far too easy for that someone, if the conservatee mentions wanting to go home or not wanting to move, to make that statement the overriding interest "on behalf of the conservatee." On its face, this claim of "on behalf of the conservatee" would seem fair. After all, who wants to move or be separated from their home? But if the conservator is performing their duties properly, their responsibility is to balance *all* of the conservatee's interests to determine what's best, and *not* take into consideration how nice/convenient/advantageous it would be for the heirs if the family home remained part of the estate.

In our value system as enshrined in Probate law, life is given priority over liberty, and liberty over property. To this end, then, Probate Code section 2420 requires the conservator to use the income of the estate for the support and maintenance of the conservatee; health, safety, and welfare, life over property. If that income is insufficient for that purpose, then the conservator is authorized to sell personal and real property of the estate for that purpose; life over property. The personal residence is privileged because it is usually the least restrictive placement for the conservatee; liberty over property. But if the conservatee's health, safety, and welfare don't allow the conservatee to live in the residence any longer, then the conservatee can be moved to a more restrictive placement (least restrictive to meet their needs per the Probate Code); life over liberty. If the income and other real and personal property in the conservatee's estate can't pay for the care needed to protect the conservatee's health, safety, and welfare, then the conservator has *a duty* to sell the home and use the proceeds to pay for that care; life over property.

Placing restrictions, such as those embodied in SB 303, on selling a conservatee's current or former residence turns this value system upside down, valuing property over life. The residence is preserved in the conservatee's estate at the cost of the conservatee's well-being. And this will almost always be done at the insistence of a person with an interest in the property.

In a hearing to determine whether removal of the conservatee from the personal residence is appropriate, existing law permits the presumption to be overcome by a preponderance of the evidence. SB 303 would raise this standard to clear and convincing evidence. While raising the standard might reduce the number of conservatees moved from their homes, it will almost certainly increase the number of conservatees who remain in inappropriate, potentially unsafe homes. These conservatees would face precisely the risks to their health, safety, and welfare that the appointment of a conservator was intended to mitigate in the first place. In other words, the elevated standard would unreasonably interfere with the conservator's ability to perform the sworn duties of the office as required by the court, could make it difficult for the conservator to properly exercise their legal duties, and increase rather than reduce harms to the conservatee.

Raising the standard of proof also increases an objector's chances of success in stopping a conservator from exercising their duties, *independent of the merits of the objection*. This incentivizes legal challenges which would increase the number of objections, subjecting a conservator's performance of duties to the whim of a relative or "interested person." Many conservatorships arise from competition for personal advantage among the conservatee's family members or from the court's findings that a conservatee has no qualified family members to provide for the conservatee's best interests. Unfortunately, many family members oppose appointed conservators for reasons unrelated to the conservatee's best interests.

The Judicial Council also has concerns about many of the proposed limits on the conservator's authority to sell the conservatee's personal residence. Existing law already places strict conditions on such a sale. The conservator may sell the conservatee's property only if the income of the estate is insufficient for the comfortable and suitable support and maintenance of the conservatee; the sale is necessary to pay specified debts; or, the sale is to the advantage, benefit, and best interest of the conservatee or the estate. Increasing the procedural obstacles to the sale of a conservatee's personal residence, as SB 303 would, is likely to make the sale take longer and cost more. When that conservatee can no longer live safely in that home *and* needs the proceeds of the sale to provide for their comfortable and suitable support and maintenance in an appropriate residence, procedural delays would place the conservatee's physical welfare at unnecessary risk. SB 303's constraints on sales could force conservatees who are no longer able to live safely in their homes to nevertheless maintain ownership, and without the proceeds of the sale, conservators may be forced to place their conservatees in care facilities that do not provide the "comfortable and suitable support and maintenance" required by law. From the perspective of the courts, the restrictions in SB 303 may do more to protect the financial interests of the conservatee's family members and less to protect the conservatee.

Finally, if, at any time during the conservatorship, there is reason to question the conservator's loyalty or care, actions for breach of duty and remedies are available without jeopardizing the health and welfare of the conservatee.

For these reasons, the Judicial Council requests your veto on SB 303.

Should you have any questions or require additional information, please contact Andi Liebenbaum at 916-323-3121.

Sincerely,

Mailed on September 12, 2019

Cory T. Jasperson
Director, Governmental Affairs

CTJ/AL/yc-s
cc: Hon. Bob Wieckowski, Member of the Senate
Ms. Linda Kincaid, Founder, CEDAR (Coalition for Elder and DisAbility Rights)
Mr. Anthony Williams, Legislative Affairs Secretary, Office of the Governor
Mr. Martin Hoshino, Administrative Director, Judicial Council of California

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TANI G. CANTIL-SAKAUYE
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July 17, 2019

Hon. Bob Wieckowski
Member of the Senate
State Capitol, Room 4085
Sacramento, California 95814

Subject: Senate Bill 303 (Wieckowski), as amended July 11, 2019 – Oppose

Dear Senator Wieckowski:

The Judicial Council regretfully opposes SB 303 on the grounds that it significantly impairs the Probate Court's authority to order or approve actions as needed for the protection of a probate conservatee's best interests, and because the bill is likely to encourage unnecessary and even frivolous litigation without providing corresponding benefits to the conservatee.

A. General Protections

Existing law provides extensive protections for a person subject to a probate conservatorship petition. The court must make two threshold determinations, by clear and convincing evidence, before appointing a conservator for a person. First, the court must find that the person is unable to perform certain everyday activities critical to personal well-being or financial management. (See Prob. Code, § 1801(a)–(c), (e).) Second, the court must expressly find that a conservatorship is necessary, that is, that granting the conservatorship is the least restrictive alternative needed to protect the proposed conservatee. (*Id.,* § 1800.3(a) & (b).) The elevated standard of proof reflects the Legislature's recognition that a conservatorship severely restricts a conserved person's liberty and is justified only to meet critical needs and then only when no less restrictive measures would suffice.

The protections do not end if the court appoints a conservator.

(1) A conservator must take an oath and, unless it is waived by the court, file a bond. (Prob. Code, §§ 2300, 2320.)
(2) The conservatee owes fiduciary duties of loyalty and care solely to the conservatee, and the performance of all legal duties is subject to the regulation and control of the court. (*Id.,* §§ 2101, 2102.)
(3) Most significantly, the conservator is required to "accommodate the desires of the conservatee" unless doing so would violate the conservator's fiduciary duties or impose an unreasonable expense on the estate. (*Id.,* § 2113.)

The court, at and after appointment of the conservator, has broad discretion to limit the powers of the conservator. (See Prob. Code, §§ 2351(b) (person), 2450(b) (estate).) The court must review a conservatorship periodically (*id.,* § 1850), and a conservator of the estate must file periodic accountings (*id.,* § 2620). The court may impose a broad selection of remedies on a conservator who breaches a fiduciary duty. (*Id.,* §§ 2401.3–2401.7.) Finally, the court may remove a conservator for any of several enumerated reasons, including a determination that removal would be in the conservatee's best interests. (*Id.,* § 2650.)

It is important to note that conservatorships are often required when a court finds that a conservatorship is the least restrictive means of aiding a conservatee given the failures or inabilities of the conservatee's family to provide adequate care and protection.

B. Protections for the Conservatee's Personal Residence

Once a court has gone to the extreme lengths to appoint a conserverator, existing law charges a conservator of the person with establishing the conservatee's residence. If the chosen residence is in California, the conservator does not need the court's permission but, again, the residence must be the least restrictive appropriate residence that is available and necessary to meet the conservatee's needs and that is in the conservatee's best interests. (Prob. Code, § 2352(b).) Significantly, the law presumes that the conservatee's personal residence at the time the petition is filed is the least restrictive appropriate residence for the conservatee. (*Id.,* § 2352.5(a).) In a hearing to determine whether removal of the conservatee from the personal residence is appropriate, existing law permits the presumption to be overcome by a preponderance of the evidence. (*Ibid.*)

SB 303 would raise this standard to clear and convincing evidence. While raising the standard required to overcome the presumption to one of clear and convincing evidence might possibly reduce the number of conservatees moved from their homes prematurely or even unnecessarily, it will almost certainly increase the number of conservatees who remain in inappropriate, potentially unsafe homes. These conservatees would face precisely the risks to their health, safety, and welfare that the appointment of a conservator was intended to mitigate in the first

place. The elevated standard would unreasonably interfere with the conservator's ability to perform the sworn duties of the office as required by the court, could make it difficult for the conservator to properly exercise their legal duties, and increase rather than reduce harms to the conservatee.

In addition, raising the standard of proof increases an objector's chances of success in stopping a conservator from exercising their duties, independent of the merits of the objection. This incentivizes legal challenges which would increase the number of objections, subjecting a conservator's performance of duties to the whim of a relative or "interested person." As the Legislature well knows, many conservatorships arise from competition for personal advantage among the conservatee's family members or from the court's findings that a conservatee has no qualified family members to provide for the conservatee's best interests. Unfortunately, many family members oppose appointed conservators for reasons unrelated to the conservatee's best interests. If there is reason to question the conservator's loyalty or care, actions for breach of duty and remedies are available. SB 303 tilts the balance away from the court-appointed conservator and places the conservatee's welfare in the hands of a person who already was not determined by the court to serve the interests of the conservatee by clear and convincing evidence, and who owes no duty to the conservatee.

Significantly, an increase in objections would necessarily lead to a corresponding increase in hearings. Delays caused by both the need to set and notice the hearings coupled with courts' limited resources would place conservatees' health and welfare at unjustified risk while the hearings are pending.

The Judicial Council also has concerns about many of the proposed limits on the conservator's authority to sell the conservatee's personal residence. Existing law already places strict conditions on such a sale. A conservator of the estate must use "ordinary care and diligence" to manage and control the conservatee's estate. (Prob. Code, §§ 2401(a).) The conservator must use the income of the estate for "the comfortable and suitable support [and] maintenance of the … conservatee," taking into account the value of the estate and the conservatee's "condition of life." (*Id.,* § 2420(a).) The conservator may sell the conservatee's property only if the income of the estate is insufficient for the comfortable and suitable support and maintenance of the conservatee; the sale is necessary to pay specified debts; or the sale is to the advantage, benefit, and best interest of the conservatee or the estate. (*Id.,* § 2541(a)–(c).)

Increasing the procedural obstacles to the sale of a conservatee's personal residence, as SB 303 would, is likely to make the sale take longer and cost more. When that conservatee can no longer live safely in that home *and* needs the proceeds of the sale to provide for their comfortable and suitable support and maintenance in an appropriate residence, procedural delays would place the conservatee's physical welfare at unnecessary risk, which is contrary to the duty of the conservator and the court to act in the best interests of the conservatee. For example, this bill's

constraints on sales could force conservatees who are no longer able to live safely in their homes to nevertheless maintain ownership. Without the proceeds of the sale, conservators may be forced to place their conservatees in care facilities that do not provide the "comfortable and suitable support and maintenance" required by statute and are not therefore in the conservatee's best interests. From the perspective of the courts, the restrictions in SB 303 may do more to protect the interests of the conservatee's family members (either to continue living in the conservatee's home or to succeed to the interest in the home upon the conservatee's death) and less to protect the conservatee.

The council also believes that requiring the conservator to establish a compelling need for the sale, also by clear and convincing evidence would delay, if not prevent, conservators from taking action in their conservatees' best interest. The higher standard will again encourage litigation of otherwise uncontroversial sales of personal residences, make the litigation more costly, time-consuming, and difficult to resolve all to the conservatee's detriment, and limit both the conservator's and the court's abilities to perform their legal and fiduciary duties to protect the vulnerable persons in their charge.

For these reasons, the Judicial Council must oppose SB 303.

Should you have any questions or require additional information, please contact me at 916-323-3121.

Sincerely,

Submitted by portal on July 17, 2019

Andi Liebenbaum
Attorney

AL/yc-s
cc: Ms. Linda Kincaid, Founder, CEDAR (Coalition for Elder and DisAbility Rights)
Mr. Anthony Williams, Legislative Affairs Secretary, Office of the Governor
Mr. Martin Hoshino, Administrative Director, Judicial Council of California