

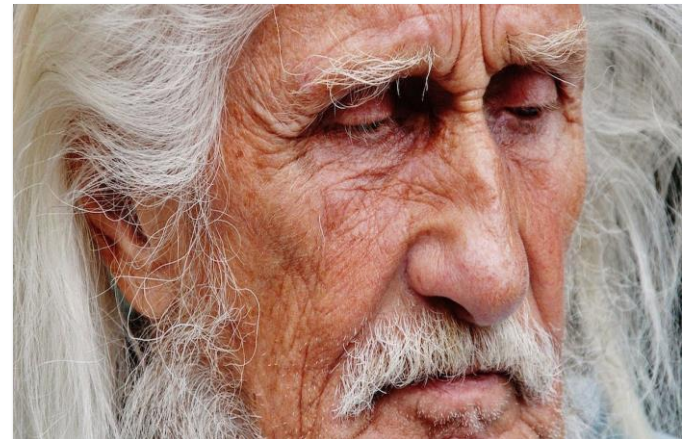


EXPLORATION OF ETHICS AND THE ELDERLY

COX LAW GROUP INC.

AGENDA FOR TODAY

- What is Ethics when applied to Elderly?
- Types of Challenges
- Practical Ways to Address





WHAT IS ETHICS?

Ethics or moral philosophy is a branch of philosophy that "involves systematizing, defending, and recommending concepts of right and wrong behavior"

THE TOUGH BALANCE

Protection is Needed

- Abuse, physical and financial on the rise
- Organized abuse is becoming more prevalent
- Pandemic contributed to systemic breakdown in follow up by social workers and law enforcement.

Preservation of Autonomy/Dignity

- More in vogue than protection at present
- Ideas like supported decision making and the elimination of conservatorship making legislative inroads and gaining in popularity
- New models of “helping” are needed.

WHAT IS HAPPENING IN THE CONSERVATORSHIP WORLD.....

- THIS MOVEMENT IS RELEVANT TO ALL INTERACTION WE HAVE WITH OUR OLDER POPULATION WHO MAY HAVE DIMINISHED CAPACITY, PARTICULARLY THE SHARED DECISION-MAKING MODEL BEING USED IN ORDER TO POSSIBLY AVOID CONSERVATORSHIP.

New Probate Code §1836: Conservatorship Alternatives Program

- **(a) The Judicial Council shall establish a conservatorship alternatives program within each self-help center in every state Superior Court.**
- **(b) The purposes of the conservatorship alternatives program are:**
 - **(3) To reduce the number of people who lose their rights under conservatorships.**



What is Supported Decisionmaking?

- Supported Decisionmaking (SDM) allows individuals with disabilities to make choices about their own lives with support from a team of people they choose. Individuals with disabilities choose people they know and trust to be part of a support network with decisionmaking.
- Considered an alternative to conservatorships: instead of having a conservator who makes decisions for the person, SDM allows the person with the disability to make their own decisions.

PROBATE CODE SECTION 1800:

Purpose of Chapter – New Section 1800(h)

- Ensure, to the greatest possible extent, that the conservatee is able to understand, make, and communicate their own, informed, choices while under conservatorship

Supported Decision Making

a) Supported Decision Making is a less restrictive alternative to conservatorship.

(1) New AB 1663 – New Probate Code Section 1836 Conservatorship Alternatives Program, purpose – to reduce the number of people who lose their rights in conservatorship.

(2) Supported Decision making allows individuals to make choices about their own lives with the support of a team of people they know and trust, as an alternative to conservatorship

More on supported decision making

(1)AB 1663 amended 416.7 and 416.19 of Health and Safety Code, Probate Code Sections 1456, 1800, 1800.3, 1812, 1821, 1835, 1850, 1860.5, 1863, 2113, and adds Probate Code Sections 1835.5, 1836, and 1861.5 and Division 11.5 commencing with Section 210000 to the Welfare and Institutions Code.

- All aimed at considering not only the best interests of the proposed conservatee but the expressed wishes also, and to ensure, to the greatest extent possible the conservatee is able to understand, make and communicate informed choices

W & I §21001(a): Definitions

- “Adult with a Disability”
 - Age-related
 - Intellectual or developmental disability
 - Cognitive disability
 - Communication disability
 - Psychiatric disability
 - Physical disability
 - Sensory disability
 - Learning disability
 - Cognitive impairment
 - Alzheimer’s disease
 - Chronic illness or condition

W & I §21001(b): Life Decisions

- Any decision that affects the adult:
 - Medical
 - Psychological
 - Financial
 - Educational
 - Living arrangement
 - Access to home and community-based services
 - Social
 - Sexual
 - Religious
 - Occupational

W & I §21005: SDM Agreement Components

- A List of areas in which the adult requests support
- A list of areas in which the supporter agrees to provide support
- Supporter agrees they are eligible
- Adult told about their right to file an abuse report
- Information and copies of what other agreements are in place for the adult

W & I §21005: SDM Agreement Components

- ADM agreement is to be signed by the adult and each supporter
- In the presence of two or more attesting and disinterested witnesses over the age of 18 or a Notary
- Review and updating required every two years or as needed

CONSERVATORSHIP?

Some people will require specialized mental health treatment and/or conservatorship to properly navigate legal and financial responsibilities.





PRACTICAL CONSIDERATIONS

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How do we help?

Practical Matters

- Legal Structure Can Provide Some Assistance
 - If capacity is diminished, as far as possible maintain a normal one to one relationship (ACTEC Model Rule 1:14)
 - How is this done?
 - Keep the elderly person's interests in mind
 - Be loyal to the elderly person first
 - Try to rely on the elderly person's direction
 - Consider possible undue influence

Remember the Presumption of Capacity

Presumption of Capacity: Probate Code § 810(a) states “for the purposes of this part, there shall exist a rebuttable presumption affecting the burden of proof that all persons have capacity to make decisions and to be responsible for their acts or decisions.”

Note under new Welfare and Institutions Code Section 21000, in determining capacity, the capacity of an individual should factor in any supported decision making that the person is using or could use in making a determination of capacity.

Probate Code § 810(b) states that having a mental or physical disorder alone does not affect the presumption of capacity.

Undue Influence

- Undue Influence Law (Effective January 2014) is defined as “excessive persuasion” that causes another person to act or refrain from acting by overcoming that person’s free will and results in inequity.
- Welfare and Institutions Code § 15610.70(a). The new law also states that “the intent of the Legislature is that this § supplement the common law meaning of undue influence without superseding or interfering with the operation of that law.”

Undue Influence

- California Welfare and Institutions Code § 15610.70(a) defines undue influence generally as “excessive persuasion that causes another person to act or refrain from acting by overcoming that person’s free will and results in inequity.” California Welfare and Institutions Code §§15610.70(a)(1)-(4) lists factors to be considered.
 1. The victim’s vulnerability, evidence of which may include “incapacity, illness, disability, injury, age, education, impaired cognitive function, emotional distress, isolation or dependency, and whether the influencer knew or should have known of the alleged victim’s vulnerability.”
 2. The influencer’s apparent authority, evidence of which may include “status as a fiduciary, family member, care provider, healthcare professional, legal professional, spiritual advisor, expert, or other qualification.”

More Factors – Undue Influence

1. The influencer’s conduct, evidence of which may include “(a) controlling necessities of life, medication, the victim’s interactions with others, access to information, or sleep; (b) use of affection, intimidation, or coercion; (c) initiation of changes in personal or property rights, use of haste or secrecy in effecting those changes, effecting changes at inappropriate times and places, and claims of expertise in effecting changes.”
2. The equity of the challenged result, evidence of which may include “the economic consequences to the victim, any divergence from the victim’s prior intent or course of conduct or dealing, the relationship of the value conveyed to the value of any services or consideration received, or the appropriateness of the change in light of the length and nature of the relationship.”

More Difficult Balancing

- Complete Loyalty to Elderly Person and Guarding Person from Undue Influence as an Ethical Duty balanced with allowing others to participate as decision makers to “support autonomy.”

Shared Decision Making

- How can we assure the person sharing the decision making is not the undue influencer?

Shared Decision-Making Agreement

- Shared Decision Maker cannot be convicted of fraud/elder abuse or restraining orders
- Practical Considerations/Background Checks?
- Professional Decision-Making Assistants?
A new cottage industry



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SUMMARY

Navigating a new world of preserving autonomy and dignity of our older populations and protecting our older population are two worthy goals which necessarily conflict with one another. Shared Decision Makers may help bridge the gap or may add to the concerns. All we can do is stay vigilant and assist to do what appears right in the situation.