

First Supplement to Memorandum 84-71

Subject: Study L-500 - Durable Power of Attorney

A letter from William E. Fox, Paso Robles attorney, urges "when a person who is of sound mind, acting through counsel, executes a Durable Power of Attorney, voluntarily, that no court should have jurisdiction to appoint a conservator until the Durable Power of Attorney is set aside on some legal or equitable grounds." A copy of this letter is attached as Exhibit 1.

There are two difficulties with this suggestion. First, the durable power of attorney may not cover all aspects of the proposed conservatee's estate, and the appointment of a conservator of the estate may be necessary to manage the portion of the proposed conservatee's estate that is not subject to the durable power of attorney. Second, a conservator of the person may be necessary in case the proposed conservatee needs a conservator of the person and the durable power of attorney covers only property matters or covers only health matters. Even assuming that the durable power of attorney covers all property and all personal matters, the staff believes that existing law is adequate to deal with the concerns expressed by Mr. Fox.

A conservatorship can be established only if "the need therefor is established to the satisfaction of the court." (Prob. Code § 1800). This precludes the establishment of a conservatorship unless the court determines that one is needed because the durable power is insufficient in some respect. In addition, the petitioner for a conservatorship must establish that the proposed conservatee is "a person who is substantially unable to manage his or her own financial resources or resist fraud or undue influence." (Prob. Code § 1801.) The petition must allege "supporting facts" to establish both of these requirements. See Petition for Appointment of Conservator (Form Approved by Judicial Council of California, Revised Effective January 1, 1981).

A well advised principal can nominate in the power of attorney a conservator should one be required in the future. The court must appoint the person nominated unless the court determines that the appointment of the nominee is not in the best interests of the proposed conservatee. (Prob. Code § 1810.) This would reduce the motivation of

a person other than the attorney in fact to petition for establishment of a conservatorship. In this connection, the recently enacted provisions for a Statutory Short Form Power of Attorney (property matters) and Statutory Form Durable Power of Attorney for Health Care both contain a provision permitting the principal to nominate an individual to serve as conservator if one is to be appointed for the principal.

If a conservatorship is established, that does not automatically revoke the durable power of attorney. However, if the conservator is charged with the management of all of the principal's property or all of the principal's property except specified exclusions, the attorney in fact is accountable to the conservator as well as the principal. (Civil Code § 2402.)

There are two independent methods provided to the conservator to revoke or affect the powers of the attorney in fact:

(1) The conservator "has the same power to revoke or amend the power of attorney that the principal would have had if he or she were not incapacitated; but if a conservator is appointed by a court of this state, the conservator can revoke or amend the power of attorney only if the court in which the conservatorship proceeding is pending has first made an order authorizing or requiring the [conservator] to revoke or amend the durable power of attorney and the revocation or amendment is in accord with the order." (Civil Code § 2402.) This provision is taken from the Uniform Durable Power of Attorney Act, but California has added the requirement of a court order before the conservator is authorized or required to revoke or amend the durable power. The California provision protects the durable power more than the Uniform Act which does not require a court order before the conservator can revoke or amend the durable power.

(2) Section 2412 of the Civil Code permits the conservator to petition the court (of the county where the attorney in fact is resident--Civil Code § 2414) for any one or more of the following purposes:

(a) Determining whether the power of attorney is in effect or has terminated.

(b) Passing on the acts or proposed acts of the attorney in fact.

(c) Compelling the attorney in fact to submit his or her accounts or report his or her acts as attorney in fact to the principal, the spouse of the principal, the conservator of the person or the estate of the

principal, or to such other person as the court in its discretion may require, if the attorney in fact has failed to submit an accounting and report within 60 days after written request from the person filing the petition.

(d) Declaring that the power of attorney is terminated upon a determination by the court of all of the following:

(1) The attorney in fact has violated or is unfit to perform the fiduciary duties under the power of attorney.

(2) At the time of the determination by the court, the principal lacks the capacity to give or to revoke a power of attorney.

(3) The termination of the power of attorney is in the best interests of the principal or the principal's estate.

The staff believes that the existing law outlined above is designed to maintain a durable power of attorney in effect unless a court determines it should be terminated. The power of attorney is not terminated by the establishment of a conservatorship; a court order must be obtained before the durable power of attorney can be terminated. We believe that the existing law represents a proper balancing of the interest in maintaining a durable power of attorney in effect and the interest in terminating the power when it is being abused or was given when the principal lacked capacity to give it.

Respectfully submitted,

John H. DeMouilly
Executive Secretary

WILLIAM E. FOX
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TELEPHONE (805) 238-9571

August 13, 1984

California Law Revision Commission
Room D-2, 4000 Middlefield Road
Palo Alto, California 94303

Re: Durable Power of Attorney

Gentlemen:

I am writing you in reference to the new Durable Power of Attorney.

I represented a client who is at the present time past ninety years of age and who has two stepsons, one that she is very fond of and the other she tolerates.

The one stepson of whom she is very fond was taking care of her business affairs and they consulted me in reference to making suitable arrangements for her in the event she became incompetent and could not do anything for herself or make a decision regarding any medical treatment.

Of course, I recommended that a "Durable Power of Attorney" be prepared for that purpose. Thereafter, a "Durable Power of Attorney" was duly executed and recorded and her several bank accounts were transferred to show that relationship.

Two or three months later, the stepson who is a resident of the State of Nevada came to town and hired a lawyer in San Luis Obispo who proceeded to file a petition to have himself appointed Conservator of her person and estate. My client was outraged at her stepson's action and, on her behalf, I filed objections to the petition, which the Court overruled and set the matter for trial within fifteen days from the date of hearing, notwithstanding my objections.

Because my client had just had a complete hip joint replacement and because of her ill health, the doctor stated in his affidavit that it would be injurious to her health for her to be involved in any litigation, so I had to file a petition to have the stepson that she was living with appointed the Conservator of her person and estate.

I am enclosing herewith a photocopy of the Court Investigator's Report regarding the first petition that was filed by the stepson

from Nevada. At that particular time, my client was in the Paso Robles Convalescent Center and, as far as I know, no one else was present at the time the Court Investigator interviewed her. I am also enclosing a photocopy of the doctor's Declaration regarding her physical condition.

I am a retired Judge of the Superior Court of Los Angeles County and have an a-v rating, and was admitted to the Bar in 1927. If my client had been able to go to Court or even to have her deposition taken, she certainly would not have a Conservator of her person and estate.

I feel that when a person who is of sound mind, acting through counsel, executes a Durable Power of Attorney, voluntarily, that no court should have jurisdiction to appoint a conservator until the Durable Power of Attorney is set aside on some legal or equitable grounds.

I consider this a very serious situation when an elderly person can be forced to give up their independence, when they are not able to defend themselves.

I trust that your Honorable Commission will give this your earnest consideration for the protection of the elderly.

Yours very truly,


William E. Fox

WEF:hc
Enclosures

SUPERIOR COURT OF THE STATE OF CALIFORNIA IN AND FOR THE COUNTY OF SAN LUIS OBISPO	FOR COURT USE ONLY (ENDORSED) FILED MAY 16 1984 FRANCIS M. COONEY, COUNTY CLERK By FRANCES H. PARSONS COUNTY CLERK
CONSERVATORSHIP OF THE <u>X PERSON X</u> ESTATE OF: HELEN L. WILSON	CASE NUMBER: 20014 HEARING DATE: 5-21-84
COURT INVESTIGATOR'S REPORT PRIOR TO APPOINTMENT OF CONSERVATOR	

CONSERVATEE HELEN L. WILSON TELEPHONE 805/238-4637
c/o Paso Robles Convalescent Center
 PRESENT ADDRESS 321 - 12th Street, Paso Robles, CA 93446

CONSERVATOR Ralph O. Wilson TELEPHONE _____
 PRESENT ADDRESS 723 Brick Drive, Henderson, Nevada

CONSERVATOR _____ TELEPHONE _____
 PRESENT ADDRESS _____

ATTORNEY FOR PETITIONER GAYLE PERON TELEPHONE 805/541-3208
1042 Palm Street, San Luis Obispo, CA 93401

ADVISEMENT OF RIGHTS

The court investigator personally interviewed the proposed conservatee on

May 1, 1984 at Paso Robles Convalescent Center

Date

Location

and informed him or her of the following:

1. The contents of the citation;
2. The nature, purpose, and effect of the proceeding;
3. The right to oppose the proceeding;
4. The right to attend the hearing;
5. The right to have the matter tried by a jury; and
6. The right to be represented by legal counsel or to have legal counsel appointed by the court if unable to retain legal counsel.

DETERMINATIONS

The court investigator has determined that it appears the proposed conservatee

- 1. X is ___ is not able to attend the hearing;
- 2. ? is ? is not willing to attend the hearing;
- 3. X does ___/dd/yy wish to contest the proceeding;
- 4. X does ___/dd/yy object to the proposed conservator;

Prefers Rollo Wilson to act as conservator;

- 5. *? does ? does not wish to be represented by counsel;

Proposed conservatee has retained _____

*? Proposed conservatee requests counsel be appointed.

Proposed conservatee's statement concerning the appointment of counsel; _____

- 6. X is ___/dd/yy/capable of completing an Affidavit of Voter Registration.

FACTS AND OBSERVATIONS

1 Helen Wilson is 90 years of age, her birthdate being February 12, 1894
 2 She has been a patient in this facility since June 27, 1983 and is under the
 3 care and treatment of James M. McGillis, M.D. The diagnosis is: Arterio-
 4 sclerotic cardio-vascular disease and Hypertension. Paso Robles Convalescent
 5 Center is a skilled nursing facility licensed by the State of California.

6 *Mrs. Wilson was most distraught over the petition before the court.
 7 She wants only Rollo Wilson to assist with the management of her affairs.
 8 She would not make a statement about the appointment of an attorney. She
 9 objects to the proposed conservator and does not want him involved in her
 10 affairs.

11 I spoke to Rollo Wilson on May 16, 1984 and he advised that he is
 12 handling Helen Wilson's affairs under a Durable Power of Attorney which is
 13 duly recorded in the County Records office and plans to continue in this
 14 manner.

I CERTIFY UNDER PENALTY OF PERJURY THAT THE FOREGOING IS TRUE AND CORRECT.

Respectfully submitted,

Les Berg

Court Investigator

1 PROOF OF SERVICE BY MAIL

2 STATE OF CALIFORNIA, COUNTY OF SAN LUIS OBISPO

3 I am a resident of the county aforesaid; I am over the age of
4 eighteen years and not a party to the within entitled action; my
5 business address is: 1070 Palm Street, San Luis Obispo, CA 93408.

6 On May 16, 1984, I served the within COURT
7 INVESTIGATOR'S REPORT on the interested parties in said action; by
8 placing a true copy thereof enclosed in a sealed envelope with
9 postage thereon fully prepaid, in the United States mail at
10 San Luis Obispo, California addressed as follows:

11
12 Helen L. Wilson
13 c/o Paso Robles Convalescent Center
14 321 - 12th Street
15 Paso Robles, CA 93446

16
17 Ralph O. Wilson
18 723 Brick Drive
19 Henderson, Nevada

20
21 Gayle Peron
22 1042 Palm Street
23 San Luis Obispo, CA 93401

24 Executed on May 16, 1984, at San Luis Obispo,
25 California.

26 I declare, under penalty of perjury, that the foregoing
27 is true and correct.
28



Leo Berg
Court Investigator

ATTORNEY OR PARTY WITHOUT ATTORNEY (Name and Address): WILLIAM E. FOX P. O. Box 1756 Paso Robles, CA 93447		TELEPHONE NO.: (805) 238-9571	FOR COURT USE ONLY
ATTORNEY FOR (Name): Petitioner Helen L. Wilson		<p style="text-align: center;">(ENDORSED) FILED</p> <p style="text-align: center;">MAY 29 1984</p> <p style="text-align: center;">FRANCIS M. COONEY, COUNTY CLERK By FRANCES R. PARSONS DEPUTY CLERK</p>	
SUPERIOR COURT OF CALIFORNIA, COUNTY OF SAN LUIS OBISPO			
STREET ADDRESS: County Government Center MAILING ADDRESS: CITY AND ZIP CODE: San Luis Obispo, CA 93408 BRANCH NAME:			
CONSERVATORSHIP OF THE <input checked="" type="checkbox"/> PERSON <input checked="" type="checkbox"/> ESTATE OF (NAME): HELEN L. WILSON		Proposed Conservatee	
DECLARATION OF MEDICAL OR ACCREDITED PRACTITIONER		CASE NUMBER: 20014	

I, (name): **NATHAN BARRETT**, hereby state:

1. a. I am a duly licensed medical practitioner, and the proposed conservatee is under my treatment. My office is located at (address):
**1400 Las Tablas Road
Templeton, CA 93465**
- b. I am an accredited practitioner of a religion whose tenets and practices call for reliance on prayer alone for healing, which religion is adhered to by the proposed conservatee. The proposed conservatee is under my treatment. My office is located at (address):
2. The proposed conservatee is unable to attend the court hearing on the petition for appointment of a conservator set for (date): **June 4, 1984** and will continue to be unable to attend a court hearing until (date): for the foreseeable future because of medical inability. Supporting facts are stated below stated in attachment 2.

On the 5th day of May, 1984, Helen L. Wilson had a complete hip replacement. By reason of the fact that she is over the age of 90 years and suffers from a congestive heart condition, diverticulitis and rheumatoid arthritis, and is extremely nervous, she is not able to appear in court. It would be harmful to her health for her to be involved in any litigation.

I declare under penalty of perjury under the laws of the State of California that the foregoing is true and correct and that this declaration is executed on (date): **May 25, 1984**. at (place): **Templeton, California**.

Nathan Barrett, M.D.

(Signature of declarant)
Nathan Barrett, M.D.

Emotional or psychological instability shall not be considered good cause for the absence unless, by reason of the instability, attendance at the hearing is likely to cause serious and immediate physiological damage to the proposed conservatee.