



# Planning for the special needs of elders and differently abled

## A LOOK AT CONSERVATORSHIPS AND ESTATE-PLANNING TOOLS TO CREATE THE PROTECTIONS NEEDED

Once upon a time there was a Californian named Sam. Sam was born with cerebral palsy and experiences high-functioning autism and other sensory differences in abilities. Sam was born in 1960 and is 60 years old. Sam has been diagnosed with Parkinson's accompanied by early onset dementia. Sam's brother Bob has been his informal financial and personal representative. Sam inherited the family's Thousand Oaks home outright in 2019 where he has lived for most of his life. Since the parents' passing, Sam has been living in this home with minimal supportive assistance until a recent fall required that Sam receive additional care and supervision. Sam has moved to local Board and Care.

Unfortunately, Sam and Bob have some concerns. They have shared that Sam identifies as a woman, although the sex assigned at birth was male. Sam has reported that the caregivers are treating him physically and mentally negatively because of Sam's gender identification. His brother reports their neglect has caused bed sores and unexplained bruises and lacerations on Sam's body. Intervention legally may be required to protect and advocate for Sam.

Bob has no formal or legal authority to make or assist on Sam's medical or financial behalf. Bob does not know how to proceed to advocate for Sam with the Board and Care.

The following issues, options and alternative tools available to Sam and Bob discussed below are helpful in protecting the interests and advocating for the differently abled (more commonly "disabled" – editor) and later elder clients throughout their lives. The goal is to improve our client or loved one's quality of life, without jeopardizing governmental or other benefits, to provide peace of mind for all.

Special-needs families and multi-generational planning can make a difference every day and into the future. Families and parents with special-needs members have expressed their needs because they were not afraid to ask tough questions. Below is a check list for beginning a planning and protection strategy:

### **SPECIAL NEEDS ESTATE PLANNING CHECKLIST**

- Do I have a vision of the lifestyle I want to provide for my loved one?
- Have I set goals and objectives for myself that will help me achieve my vision?
- Have I considered who will take my place when I am no longer able to provide the level of care required?
- Have I discussed the responsibilities of caring for my loved one with the person I want to be their guardian/conservator when I am no longer able?
- Has that individual accepted the position of guardian/conservator with a full understanding of my wishes and the responsibilities it entails?
- Do I have a plan in place that will safeguard against the loss of public benefits in the event my loved one receives an inheritance, money judgment, or large gift?
- Do I have a Special Needs Trust in place?
- If so, is the Special Needs Trust updated to reflect my most current goals?
- Is the trust adequately funded, to ensure my loved one will be taken care of for the remainder of his or her life?
- If not, have I considered alternative trust-funding methods, such as life insurance?
- Have I written a letter of intent, outlining my wishes, to supplement the Special Needs Trust?
- Did I, my loved one, or someone with signing power open an ABLE Account on his or her behalf to allow for \$15,000?

- Have I aligned myself with a professional advisor and an estate-planning attorney who specializes in planning for dependents with special needs?

- Have I clearly communicated with my loved one's siblings regarding their roles, their responsibilities, and my expectations?

- Do I have peace of mind, knowing that my child or loved one will have the quality of life he or she deserves once I am gone?

### **What issues will Sam face today and in the future if no planning is done?**

The first issue for Sam is the personal and financial decisions now and in the future as the diseases progress and whether they will interfere with these abilities. The greatest concern for most families is the susceptibility of Sam to outside and inside predators and influences, and at this point, the care community.

What tools do Sam and his family have today and, in the future, to prevent abuse and allow the protections and care needed for Sam's lifetime? Does Sam have the capacity and ability to designate and appoint a financial and personal agent to act on his behalf today or in the future as Sam's abilities change? Will Sam continue to be willing to allow someone to act on their behalf and are there outliers in their life? If a legal action is initiated to protect Sam and enforce rights, is Sam able to negotiate the process.

### **What common tools are available for the differently abled or elderly?**

A tool is a conservatorship and there are many types that may fit the circumstances. In 1980, California established a limited conservatorship, specifically for developmentally disabled adults. The *limited conservator* has

responsibility for the care, custody, and control of the *limited* conservatee. When Sam turned 18 the only options for families were to disinherit their loved ones to protect the governmental benefits or require a child become as an adult a “ward of the state.” The family could have considered a limited conservatorship but that likely was not considered in 1980 when Sam was 20 years old.

### Overview of the types of conservatorship

- Conservatorship of the Person
- Conservatorship of the Estate
- Limited Conservatorship
- LPS Conservatorship (mental illness)

### What is a probate conservatorship?

A probate conservatorship is a judicial procedure in which someone (a conservator) is appointed to manage another person’s (the conservatee’s) financial and/or personal affairs, sometimes both. The establishment of a conservatorship restricts the conservatee’s powers over financial and personal care decisions. To secure a conservatorship, the client completes petition paperwork, a court investigator is appointed, an attorney is appointed to represent the conservatee, and a court hearing will be conducted.

The difference between a probate and limited conservatorship are that they are exact opposites or mirror images of the other. A probate conservatorship or regular probate is commonly used for adults or elders who’ve lost capacity later in their lives and can include the many forms of dementia. The proceeding removes all rights of the conservatee and is not a functional task test but rather an illness and extent-of-illness determination. In contrast, the limited conservatorship is for developmental or intellectually disabled adults, may allow some rights to be retained and the limited conservatorship takes away no rights except those specified by the court. Neither probate or limited conservatorship can force a conservatee to take medications nor can they be required

to be in a lock-down facility against their will. However, a secure perimeter may be acceptable without extra intervention and powers granted by the court. Under a probate conservatorship, the right to lock-down can be granted at a higher level of inquiry and necessity.

### What is available for the mentally ill family members?

The mental health conservatorship or Lanterman Petris Short (LPS) conservatorship used in California gives a conservator the legal power and responsibility to oversee the comprehensive medical treatment over the conservatee who has a serious mental illness. The LPS conservatorship is very different than the probate and limited conservatorship. LPS is initiated by the state through the appointed psychiatric team usually after a psychiatric hold or crisis. A person must be a harm to self, others and/or gravely disabled and he/she must also be seriously mentally disabled.

What is the usual process in seeking an LPS Conservatorship? NAMI Guide describes it as follows:

- First, the person who exhibits harm to self or others is placed on a 72-hour hold, also known as a 5150 hold. This usually occurs by someone calling the police or the County Mental Health Crisis Team. The police can make sure the person is contained so as not to harm anyone, while assessing the situation. The Crisis Team may be able to clinically evaluate the individual. If appropriate, either party can make an application for a 72-hour hold, and transport the person to a psychiatric hospital.
- In the hospital, the psychiatrist who evaluates the person may accept the person for a “5150” or 72-hour hold. If necessary, they can later initiate a “5250” or a 14-day hold to continue the treatment for stabilization. A 14-day hold must have a Probable Cause hearing within four working days.

The Probable Cause hearing is generally held in the hospital. Many times, families are not aware of this

hearing until after it has taken place.

- To hold the person for an additional 30 days of observation, a writ hearing must be held at the court. The court may grant the 30-day hold (aka Temporary Conservatorship or “T-Con”), so the doctor can proceed with the LPS Conservatorship hearing.
- It is the psychiatrist who initiates the LPS Conservatorship request with the office of the Public Guardian.
- The public guardian will visit and evaluate the patient and make a recommendation to the court to either proceed or dismiss the LPS Conservatorship case.
- It is important to contact the public guardian and submit the two pages, suggested at the beginning, to them. Also, be sure to give a copy of these to the psychiatrist as soon as the person is taken to the hospital. If you don’t know which hospital the person will be in then you might give those papers to the police or Crisis Team to deliver to the hospital.
- An estate or probate conservatorship is initiated through the public guardian’s office and not by the psychiatrist.  
(From *LPS GUIDELINES NAMI Ventura County Guide 2021* <https://namiventura.org/wp-content/uploads/2020/04/LPSGuidelines.pdf>)

### What is a limited conservatorship?

A limited conservatorship applies to developmentally disabled adults only. It is a protective proceeding held in the superior court of the adult conservatee’s county of residence. A formal appointment of a conservator (often a parent) grants “limited” personal and (sometimes) financial powers to the conservator to act for the conservatee.

A limited” conservatorship has nothing to do with size but rather its focus is on authority and autonomy. Certain rights are taken from the conservatee and given to the conservator. These rights may be changed as and if tasks are able to be managed by the conservatee over time, if ever.

The conservatee must be developmentally disabled before the age of 18 (extended to 26) and assigned

to a Regional Center. The difference in ability must be continuous and not likely to go away. It may not be just physical nor just mental illness but includes:

- intellectually challenged or intellectually disabled
- autism
- cerebral palsy
- epilepsy

Public Policy supports and promotes individual autonomy. The focus, unlike in probate or LPS conservatorships, is task based and is not diagnosis based. The higher the functioning, the fewer powers will be granted or limited.

The “Big Seven” powers under PC 2351.5 are:

- Decide where the conservatee will reside
- Examine and access confidential records and papers of the conservatee
- Give or withhold consent to marry or enter into a domestic partnership
- Sign a contract for the conservatee and control the right to contract
- Give or withhold consent for medical treatment or procedures
- Manage or control the social/sexual affairs of the conservatee
- Make decisions related to the education and vocational training of the conservatee
- Ability to vote or not by the conservatee is also made part of this hearing.

Most limited conservatorships are over the “Person Only” commonly because the conservatorship of Estate may not be necessary. The parent or conservator can easily manage the governmental benefits such as social security and SSDI if register as a representative payee.

### **What is the limited conservatorship timeline, process and overview?**

The process of establishing a limited conservatorship will take approximately three to four months. First, we must gather all necessary information and draft a Petition for Appointment of Probate Conservator. At present the court requires a \$465 filing fee (plus a \$30 court reporter’s fee in Ventura County) for this

filing. After the Petition is filed, the court will set a date for hearing, generally six to eight weeks after receiving the documents.

### **Probate investigator’s visit**

After the Petition is filed, but before the hearing date, the court will assign a “Probate Investigator” to your case. The investigator will call you and arrange to visit your home, in order to make sure it is an appropriate living situation for your child (or proposed conservatee). This is a required step in the process, which will include an interview and inspection of the residence and all parties. The investigator charges a statutory fee of approximately \$650.

### **Attorney for the conservatee**

Court-appointed counsel is mandatory to represent the conservatee. In Los Angeles County, a “PVP Attorney” will be appointed to represent the proposed conservatee. The PVP Attorney will arrange a visit to your home and will want to speak with the proposed conservatee privately, at least for a small portion of the interview. In Ventura County, a Deputy Public Defender is appointed to represent the proposed conservatee. The Deputy Public Defender may arrange an advance visit or may meet the conservatee on the day of the court hearing.

### **Doctor’s capacity declaration**

Also, before the hearing date, the child’s pediatrician will need to complete the medical form: “Capacity Declaration for Conservatorship GC-335.” Once the doctor completes the form, it will be filed with the court.

### **Regional Center report**

If the loved one is a Regional Center client, and resides in a jurisdiction requiring the grant of a limited conservatorship, the court will give notice to the Regional Center and their case worker of the conservatorship proceeding and will provide a copy of the petition to the Regional Center at

least 30 days before the hearing date. Then a qualified individual at the Regional Center will submit a written report to the judge, giving their opinion on whether the conservatorship is appropriate. It is very rare that the Regional Center will have any objection to the conservatorship, but this is a legal requirement which must be satisfied. It is not unusual that the Regional Center will recommend five of the seven powers.

### **Viewing the video**

If in Ventura County, the final piece of homework before the hearing date will be for the conservator to view an educational video on conservatorships called, “With Heart: Understanding Conservatorships” at one of the court’s self-help legal access centers.

### **The court hearing**

On the day of the hearing the conservator and conservatee will be expected to attend (at this writing by video). After appointment of the conservators, a certified Letters of Conservatorship will be issued by the Court, which will serve as proof to any third party of the decisions the conservator can make on the conservatee’s behalf.

### **Conservatorship care plan**

As a follow-up to the initial hearing, after 60 days have elapsed, the conservator will be required to file a three-page form called a Conservatorship Care Plan.

### **Post-appointment**

Once appointed, the conservator will be required to file an annual then biennial status report and care plan with the court and accountings if a conservator of the estate is granted.

### **Inventory and appraisal**

Subsequent to the filing of the care plan, the conservator will be required to file an inventory of the conservatee’s “estate,” meaning any cash or valuable belongings he or she may own. This

includes any checking or savings accounts, as well as accrued SSI checks which have not already been spent. If the conservatee owns stock or a home, then the court requires that an independent appraiser (called a "probate referee") assign a value to the property. If the conservatee only has cash and ordinary belongings, no appraiser is necessary.

### Accountings

After the inventory and appraisal have been submitted, the conservator will be under the continuing supervision of the courts but will not have any filing requirements until one year after the initial letters of conservatorship were issued. After one year has elapsed, the conservator is required to file an accounting for any money coming into our going out of the conservatorship estate. This becomes a biennial requirement thereafter. However, if there is less than \$15,000 in the conservatorship estate, the conservator may file a request for waiver of accounting and be excused from this requirement.

### Acting as conservator

Once the conservatorship is established, the conservator will have the authority to make medical decisions to receive and manage money or benefits on his or her behalf, and to protect him or her from contracting or consenting to things he or she may not understand.

### What non-judicial options are available for Sam?

An Advance Health Care Directive and Financial Durable Power of Attorney is available to Sam to assist in making medical

and financial decisions. These important tools are available to all competent adults. To use this tool, Sam must have capacity to understand the powers he is delegating and the ability to choose the agent to manage these life issues. Each of these documents can be springing into action or may be effective immediately. These documents can be easily created and instituted, but, these documents can be revoked, can be countermanded, some places question and/or some institutions demand their own form(s) and the loved one may not at that time be able or equipped to execute a form at a later date.

In an emergency, the Regional Center can make emergency healthcare decisions for a client.

### Could Sam, if competent, create a Revocable Living Trust to protect his home?

Sam, if competent, can execute a Revocable Living Trust to appoint a trustee to action on his behalf with him, for him or in place of him. In conjunction with the Advanced Healthcare Directive and the Power of Attorney for Finances, this trust may hold his home that he owns and inherited. Under the Medi-Cal rules presently, the home is not a countable asset; he may decide who will receive this asset when he passes and if in a trust at the time of his death will not be subject to Medi-Cal recovery.

### How can a first-party Special Needs Trust help Sam?

If Sam receives a direct inheritance or if he receives a monetary settlement that may affect benefits, Sam can use

this type of trust to protect benefits. The terms of the protections require estate recovery for amounts of Medi-Cal advanced for Sam.

### How can a third-party Special Needs Trust help Sam?

Sam's parents could have left the family home and other assets for Sam's benefit in a Special Needs Trust to provide for his care and his needs. The funds in this trust and the home, even if sold, would not affect Sam's governmental benefits, would be under the control of a Trustee that would not have required Sam to create a Trust, would not affect his benefits if the house were sold, and a conservatorship may not be necessary since the asset is managed for Sam.

### Summary

Sam, with the aid of his brother Bob, can, if able, enter into estate-planning tools and create the protections needed. If not competent, then the limited conservatorship may be the best tool to protect Sam's well-being, self-identity, provide financial and medical supports and protect Sam from abuse and neglect.

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