

## SAMPLE ARGUMENTS FOR A BRIEF OPPOSING A CONSERVATORSHIP UNDER CALIFORNIA LAW

### ***Standard Of Proof Required To Impose A Conservatorship***

Under California law, a conservator including a limited conservatorship may be appointed “for a person who is unable to provide properly for his or her personal needs for physical health, food, clothing, or shelter.” (Cal. Prob. Code § 1801(a), (d).) However, “[n]o conservatorship of the person ... shall be granted by the court unless the court makes an express finding that the granting of the conservatorship is the least restrictive alternative needed for the protection of the conservatee.” (Prob. Code § 1800.3(b); *see also* Prob. Code §§ 1800.3(a).) The standard of proof for the trial court is clear and convincing evidence. (Prob. Code § 1801(e).)

Thus, to impose a conservatorship, California law requires that the trial court find, based upon clear and convincing evidence: (1) that the individual is “unable to provide properly for his or her personal needs”; and (2) that no less restrictive alternative is available, such that granting the conservatorship is necessary. The statutory standard is based upon principles of substantive due process established under the federal and state Constitutions. (See *O’Connor v. Donaldson* (1975) 422 U.S. 563, 575-76 [95 S.Ct. 2486] [“A State cannot constitutionally confine without more a nondangerous individual who is capable of surviving safely in freedom by himself or with the help of willing and responsible family members or friends.”]; *Conservatorship of Early* (1983) 35 Cal.3d 244, 251-54.)

### ***Importance of Assessing Capacity Based on Functional Ability and Existing Supports***

The required factual questions cannot be answered merely by reviewing the results of an IQ assessment, or by investigating the neuro-psychological functioning of the proposed conservatee.<sup>1</sup> Central to the inquiry of whether a conservatorship is the “least restrictive alternative” is whether the individual – together with the support systems that are in place – is able to manage their personal needs:

[P]roof that a[n adult] with an intellectual disability *needs* a guardian must exclude the possibility of that person’s ability to live safely in the community supported by family,

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<sup>1</sup> A traditional neuropsychological assessment may not be helpful in assessing whether a person with an intellectual disability requires a conservatorship due to their inability, even with supports, to provide for their personal needs. The State of Missouri has developed an assessment tool designed to assist with identifying a person’s ability to make decisions and to manage key areas of life with and without supports. In the Jenny Hatch matter, C. Rick Ellis, Ed.D., conducted an assessment focused on Ms. Hatch’s ability to make decisions, and her history of making decisions, with supports. (UMKC Institute for Human Development, MO Guardianship: Understanding Your Options and Alternatives, Appendix 1, p. 32, at <http://moguardianship.com/MO%20Guardianship%20RESOURCE%20GUIDE%20rev%20Sept%20%202013.pdf>; Jenny Hatch Justice Project, Excerpt from Dr. Rick Ellis Testimony, at [http://jennyhatchjusticeproject.org/docs/justice\\_for\\_jenny\\_trial/jhjp\\_trial\\_testimony\\_excerpt\\_ellis.pdf](http://jennyhatchjusticeproject.org/docs/justice_for_jenny_trial/jhjp_trial_testimony_excerpt_ellis.pdf); see also Amy Metevia, Sept. 1, 2015 Transcript at 18 “[T]here are other declarations from job -- Michael's supervisor -- internship supervisor and friends expressing that the level that he's working at, also leaders of organizations he works with, and people who have known him a lot of his life and just given the activities he's involved in and his level of functioning that -- that he might not have tested. It appears he did not. The test results do not show his actual level of functioning what he's actually doing in life would be the best indicator.”.)

friends and mental health professionals.

(*In re Guardianship of Dameris L.* (N.Y. Surrog. Ct.) 38 Misc.3d 570, 578 (emphasis in original); accord *In re Peery* (Supr. Ct. Penn. 1999) 556 Pa. 125, 128 [727 A.2d 539] [“The Court need not look to whether Ms. Peery can manage her personal financial resources or meet essential requirements for health and safety on her own. Rather, the proper inquiry is whether Ms. Peery has in place a circle of support to assist her in making rational decisions concerning her personal finances and to meet essential requirements of health and safety.”]; see also *Early*, 35 Cal.3d at 254 [“We conclude [that] the definition of the phrase ‘gravely disabled’ as a condition in which the person is ‘unable to provide for his basic personal needs for food, clothing, or shelter ...’ ... was intended to encompass a consideration of whether the person could provide these basic needs with or without the assistance of willing and responsible family members, friends, or other third parties.”].)

Assessing an individual with an intellectual disability *with* their community supports in place is further consistent with the principles endorsed by Congress in enacting the Americans with Disabilities Act in 1990. (See, e.g., 42 U.S.C. § 12131(b) [defining “qualified individual with a disability” as one who meets essential eligibility requirements “with or without reasonable modifications to rules, policies, or practices, the removal of architectural, communication, or transportation barriers, or the provision of auxiliary aids and services”]; see also *Olmstead v. L.C. ex rel. Zimring* (1999) 527 U.S. 581, 600 [finding that unjustified institutional isolation of persons with disabilities is a form of discrimination prohibited by the ADA].)

### ***Response To Parents Who Would Like A Young Person To Spend More Time With Them***

In addition to being an individual with an intellectual disability, Mr./Ms. [X] is an “emerging adult.” Emerging adulthood is a developmental phase during which individuals are very self-focused as they explore their new adult identities. It is not unusual for emerging adults to separate from one or both parents: nearly one quarter of parents report that they wish to have more contact with their young adult children. (Jeffrey Jensen Arnett, Ph.D. and Joseph Schwab, The Clark University Poll of Parents of Emerging Adults (Sept. 2013) 6, at <https://www.clarku.edu/clark-poll-emerging-adults/pdfs/clark-university-poll-parents-emerging-adults.pdf>.)

### ***Introducing Supported Decision-Making As An Alternative***

There are tools available to the Court and to the [X] family to help ensure that Mr./Ms. X can continue to live and thrive without a conservatorship. For example, Mr./Ms. X can enter into a more formalized supported decision-making agreement with his/her supporters. Under such an arrangement, a person with a disability selects supporters who will assist him or her in making decisions, including by helping him understand options, responsibilities, and consequences. Supported decision-making protects the civil liberties of the individual, and allows the person to practice decision-making, and expand their capacity to make independent choices. Numerous models are available, including one adopted by the state of Texas earlier this year.<sup>2</sup>

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<sup>2</sup> See Texas Supported Decision-Making Agreement Act, Tex. Estates Code, § 1357.001 et seq. (eff. Sept. 1, 2015); Supported Decision-Making Agreement, at <http://www.tcdd.texas.gov/wp-content/uploads/2015/10/Supported->

### ***Conclusion***

No one of us is an island. “We all depend, to varying degrees on the assistance of others (e.g., parents, mechanics, the farmer, the tailor) to make our way in the world.” (*Early*, 35 Cal.3d at 251.) “Where willing and responsible others are able to assist a person in providing his or her basic personal needs the person is not, in our view, ‘truly unable to take care of [himself or herself].’” (*Id.*) Moreover, we all make mistakes, and our choices do not always advance our best interests.

In assessing whether an individual with an intellectual disability requires a conservatorship – a “Draconian loss of liberty,” *see Dameris L.*, 38 Misc.3d at 576 – it is essential that the person’s ability to meet their basic personal needs be assessed with their supports in place. Nor should conservatorship be imposed upon persons with intellectual disabilities simply because their decisions are not what an interested and even loving third party would choose for them.