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Update Your Conservator Nomination Regularly

Increase the chance that the Court will select your nominated Conservator by updating your estate plan regularly.

In May 2022, the client came to me with what appeared to be a solid case. (We shall call the client "Norma.") Norma's mother nominated her as the preferred Conservator in 2002. Mom's estate plan was iron-clad. And, all the children agree that mom had full capacity and strong willpower in 2002, so questions of undue influence and legitimacy were off the table. But things did not go as expected!

Rules about Conservator Nomination

Proposed Conservatees may nominate their conservators. (Prob. Code, § 1810.) They must make the nomination either with the petition for conservatorship or in writing before that petition. (Prob. Code, § 1810.) For this reason, most estate plans that many lawyers create include a section nominating the Conservator.

Why people would want to nominate a conservator is simple. A small portion of our population will develop dementia. It is an exception rather than the rule, but it is possible! You can leave the person in control of your care up to chance or pick who is in charge. Most people prefer to choose who should be in charge in the unlikely event that their mental health fails.

The Unexpected Exception to Rules on Conservator Nomination

What most people don't know, and what most lawyers forget to discuss, is that Probate Code section 1810 also gives the court discretion to ignore the conservatee's nomination: "The court shall appoint the nominee of the conservator

unless the court finds that the appointment of the nominee is not in the best interest of the proposed conservatee.” (Italics added.)

How this Impacted Norma’s Mom

Both Norma and her brother filed petitions for conservatorship. Mom’s health declined quickly. Dementia set in in 2016. Mom started hallucinating. She’d see insects crawling over the walls and imaginary people rummaging through her closets. Mom also began suspecting “ghosts” of stealing her personal belongings. The doctors also diagnosed Mom with Alzheimer’s Disease.

In 2018, Norma’s brother kidnapped Mom and started conservatorship proceedings. In response, Norma filed a petition for conservatorship as well. She had the 2002 Estate Plan, which nominated her, and she was confident that the Court would support her application.

In addition to being chosen as the preferred Conservator, Norma also had more than 30 years of professional experience as a Licensed Vocational Nurse, which she specifically used in the care of elderly persons in situations like her mother. She also had an annual income of over \$100,000, which meant that she had additional financial resources to provide support. These facts made her a superior candidate.

However, the Court cited “the best interest of the proposed conservatee” when it broke from the Estate Plan and surprised all present with its ruling for the brother.

Why the Court Decided Against Norma even though she was a Nominated Conservator

The Court found that Mom had full capacity in 2002, but almost 20 years had passed since Mom created that document. Because nearly two decades had passed, the Court found that “too much has changed,” which was sufficient reason for the Court to disregard the Estate Plan.

Norma still had a more robust application because of her qualifications, but she and her brother differed on one key issue: whether or not to pursue a civil case that Mom started in 2018. Norma believed that the case was frivolous due to Mom’s dementia. Her brother thought the Conservator should try the case on its merits

regardless of whether Mom started it while delusional. The Court decided that it was in the best interest of the proposed conservatee to move forward with the civil case, even if the case had no merit.^[1] Because of this difference in opinion on the active civil case, Norma lost the Conservatorship petition. The Court appointed her brother as Conservator of the Estate and Conservator of the Person.

Norma's mom is now being cared for by a truck driver who has limited financial resources and limited valuable skills that would be useful in caring for an older woman with Alzheimer's Disease. Things might have been better for Norma's Mom if Norma's Mom had done one thing differently.

What Norma's Mom could have done to Ensure Better Care

Before throwing out the nomination, the Court first found that the 2002 Estate Plan was "too old" and that "too many events have transpired since 2002," which might change Mom's decision. Mom could have made her election more solid by updating her estate plan every five years, as most attorneys recommend.

If Mom had updated her estate plan regularly, the Court would have had a nomination within the past five years. The Court could not have found that "too much time had passed."

It is important to remember that the Court still retains complete discretion concerning the nomination of a conservator. However, having a more recent nomination would have made deviating from the Estate Plan more difficult for the Court.

Contact: The Estate Planning, Probate, and Tax Group advises individuals and employers of all sizes on laws that impact their interest and represents them in any disputes that arise. If you have any questions regarding this article, contact Jared Clemence, at (559) 248-4820 or jclemence@ch-law.com.

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^[1] In finding that the civil case ought to be tried on the merits, the Court was not lending support for the civil case. The Probate Court expressly withheld judgment or opinion on the merits of that case, but added that the Probate Court is not the place for such decisions and that the Civil Court was the best place to make those arguments. Because the Probate Court could not weigh in on the case merits, it chose to err on the side of caution by choosing the Conservator who would allow those arguments to be made.