

Probate Conservatorships and Undue Influence

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Session Overview

Undue Influence:

What Undue Influence is, Guarding Against It and the Law of Undue Influence.

Probate Conservatorships and Undue Influence:

A Refresher on Probate Conservatorships and How Undue Influence plays a part in the practice.

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Who Commits Undue Influence

Undue Influence is utilized by entities as well as by individuals.

Entities include: Authoritarian Governments, Cults, Captors of Prisoners, etc.

Individuals include: Scammers, Domestic Violence Abusers, (Bad) Professionals, (Bad) Caregivers, (Bad) Family Members or Friends, etc.

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Undue Influence – The Formula

Who is the **influencer/abuser**?

The Abuser, a person or entity, wants something that someone else has, usually assets, and sees an opportunity to obtain them, by psychological manipulation.

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Undue Influence – The Formula

The **victim's** situation is often more complex.

The **victim** is a person, who, under the circumstances, cannot resist undue influence.

However, the **reason(s) why** the victim cannot resist undue influence can vary significantly.

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Undue Influence – The Formula

Why Victims Cannot Resist Undue Influence...

- They have **Diminished Capacity**: Dementia, TBI, Developmental Delay, etc.
- Their **Circumstances**: They are Alone (isolated), Infirm (ill), Old, Afraid, Reliant on Others for Necessities (food, medication, transportation, social activities), etc.
- They are extremely **kind and passive**.

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Guarding Against Undue Influence

Advance Planning:

Make sure that you and your loved ones have:

1. **Estate Plans** (Will, Trust, AHCD, POA, etc.).
2. Make sure you and your loved ones have a reliable **support network** (friends, family, activities, service providers, transportation, medical assistance, etc.).

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Guarding Against Undue Influence

Day to Day:

1. **Check in** on the people you care about (family, neighbors, clients, etc.).
2. **Confirm** that they have **reliable support** network (friends, family, activities, service providers, transportation, medical assistance, etc.).

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Guarding Against Undue Influence

Day to Day:

3. **Look for the signs of Undue Influence**

Vulnerability and the Signs of Actual Undue Influence.

- - Print and Use the **California Undue Influence Screening Tool (CUIST)**.
(Included in educational packet).

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Guarding Against Undue Influence

Vulnerability (CUIST - See Form):

Poor Health; Dependent on Others; Poor Hearing/Vision/Speaking; Poor Memory; Poor Communication/Understanding; Developmental Disability; Passivity; Grief/Anxiety/Fear/Depression; Language barriers; Isolation; Chaos; Influencer knows or should know.

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Guarding Against Undue Influence

Influencer's Authority/Power (CUIST - See Form):

Family; Caregiver; Professional (Legal, Spiritual, Healthcare, Realtor, Banker, Accountant, etc.); Legal (POA, Cor, Trustee, Rep Payee); Controls Finances; Landlord/Facil Manager; Salesperson; Access to Home or Private Documents/Info; etc.

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Guarding Against Undue Influence

Influencer's Actions or Tactics (CUIST -See Form):

Controls necessities (Food, Meds, etc.); Promises of Wealth; Claims Expertise; Involves Themselves in Their Victim's Lives; Controls Access to Info; Isolates Victim; Instills Trust in them and Fear of Others; Changes Residence or Trusted Advisors; Makes Requests; Uses affection/coercion; Rushes Victim; Solicits Gifts.

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Guarding Against Undue Influence

Unfair/Improper Outcome (CUIST - See Form):

Estate Losses (\$/Property); Change to Prior Intent (New: Beneficiaries, Signator); Excessive Gifts; Loss or Residence; Deterioration of Residence; Loss of Control of accounts/credit cards; Identity Theft; Physical Decline; Negative Emotional Changes; Loss of Wants/Rights; etc.

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Guarding Against Undue Influence

If you are Suspicious of Undue Influence:

- Use the **CUIST form** to Evaluate the Situation.
- Contact **APS**.
- Ask for a Law Enforcement **Wellness Check**.
- Involve **Family**.
- Contact their **Financial Institutions**. Put Caps on Actions.
- Trigger** Existing **Estate Plan**.
- Consider an **Estate Plan** (Capacity).
- Consider a **Conservatorship**.

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QUIZ QUESTION

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The Law of Undue Influence

WIC section 15610.70, Defines Undue Influence and Lists the Factors to Assess possible Undue Influence.

Definition: **Excessive persuasion that causes a person to act contrary to their free will, which leads to an inequitable result.**

Factors/Elements: 1) the **vulnerability** of the victim (and what **influencer knew or should have known**); 2) the influencer's seeming **authority**; 3) the **actions** used; and 4) the **equity of the result**.

- Probate Code section 86 confirms that the Probate Code has adopted the same standard as WIC section 15610.70.

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The Law of Undue Influence

Abuse of an Elder or Dependent Adult – WIC Section 15610.07.

- ▶ **Any** of the following:
 - ▶ (1) Physical abuse, neglect, abandonment, isolation, abduction, or other treatment with resulting physical harm or pain or mental suffering.
 - ▶ (2) The deprivation by a care custodian of goods or services that are necessary to avoid physical harm or mental suffering.
 - ▶ (3) Financial abuse, as defined in Section WIC 15610.30.

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The Law of Undue Influence

WIC section 15610.30: **Financial Abuse** of an elder or dependent adult occurs when **any** of the following apply:

- ▶ Taker **obtains or assists in obtaining property** for a wrongful use with the intent to keep and/or defraud.
- ▶ Doing the same **by Undue Influence** (WIC 15610.70)
- ▶ When the taker **knew or should have known** that this conduct was likely to be harmful to the elder or dependent adult.
- ▶ An **elder or dependent adult is deprived** of residence, employment, property rights, including by agreement, donative transfer, or testamentary bequest.

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The Law of Undue Influence

Treble Damages for Elder Abuse - Civil Code section 3345

- ▶ In general, Treble Damages can be obtained if it is determined that **elder abuse** has occurred against a victims that is:
 - ▶ **Senior citizen** (1761(f));
 - ▶ **Disabled person** (1761(g); and/or
 - ▶ **Veteran** (Govt Code 18540.4).

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The Law of Undue Influence

Removal of Trustee - Probate Code section 15642

A trustee may be removed for any number of relatively obvious reasons including Undue Influence.

Removal of Conservator – Probate Code section 2650

A Conservator may be Removed for acting Against the Interests of the Conservatee, Self Dealing, Gross Immorality, etc. - Similar to Undue Influence.

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The Law of Undue Influence

PC 21380: Changes to Estate Plans that Benefit Suspicious People are Presumed to be Fraudulent, or the product of Undue Influence.

Example: Drafters or Transcribers who are: **Fiduciaries, Care Custodians**, Employees, Co-Habitants, Work at a Law Firm, etc.

- ▶ Can be overcome by clear and convincing evidence.

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The Law of Undue Influence

A Person Need Not be Without Capacity to be Subject to Undue influence:

- ▶ PC 6104: Estate Plans procured by undue influence, are ineffective, regardless of one's mental capacity.

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The Law of Undue Influence

Penal Code section 368 makes it a **crime** to willfully steal, embezzle, defraud or misuse assets of a person over the age of 65 (or dependent adult).

--Depending on the age of the victim and the harm financial and or physical, the sentence can be up to 16 years in prison.

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QUIZ QUESTION

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What is a Probate Conservatorship?

A Protective Proceeding

▶ A Loving (Least Restrictive) Shield

- ▶ Any Cognitive Diagnosis
- ▶ Unable to Provided for Themselves
 - ▶ (PC 1801(a))
- ▶ Nearly Anyone May Petition
 - ▶ (PC 1820)



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Notice and Conservatorships

15+ Days: Most Filings and Parties.

--Filing: Petitions. Accountings. Etc.

--Parties: Family, Attorneys, Vet Admin, etc.

-- Family: 2nd Degree (Not Aunts/Uncles or Cousins (See Pet., Pg. 7)).

30+ Days: **Tri-Counties**: Limited (Develop Delay) Petitions.

Public Defenders to be served with ALL documents, at time of filing/lodging (Local Rule 10.02(O)(2)).

--Includes ALL documents: Proposed Order, Financial Decl., Confidential Docs, etc.

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Relevant Types of Capacity

- ▶ PC §812 **Contractual Capacity** -HIGH CAPACITY
 - ▶ Trusts, Etc.
- ▶ PC §§ 813 & 1881- **Medical Capacity**
 - ▶ Informed Consent=knowingly, intelligently or rational thought process
- ▶ PC §6100.5 – **Testamentary Capacity** - Low
 - ▶ Know Property & Relations – for Wills
- ▶ Fam C §300a - **Capacity to Marry** - EXTREMELY LOW (Rt in CA)

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Assessing Capacity

Mini Mental Exam (Attached)

- ▶ Follow instructions.
- ▶ Perfect Score is 30.
- ▶ Build your own Mini-Mini Mental Exam (no drawings?).
 - ▶ Say, “Can I ask some Game Show questions?”

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Conservator Duties/Powers-Person

Automatic Person Powers – General Cship:

PC 2351: General Powers over the Person of the Conservatee:

The conservator is in charge of the education, care, custody and control of the conservatee.

And More if ordered by the court.

END OF LIFE DECISIONS: The conservator is empowered to make medical decisions for the conservatee (PC 2355), including end of life (PC 4617).

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Conservator Duties/Powers-Person

Limited Cship (Devel Delay)- PC 2351.5(b), The Seven Powers:

- 1) Fix Residence.
- 2) Access to Confidential Records.
- 3) Consent or Withhold Consent to Marriage.
- 4) Right of Limited Conservatee to Contract.
- 5) To consent or withhold consent to medical treatment.
- 6) Thwart social or sexual relationships.
- 7) Educational Decisions.

***AUTOMATIC: Note, Cee gets Similar Powers even w/o the Seven Powers (PC 2351.5(a))**

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Conservator Duties/Powers-Estate

Automatic Powers – General & Limited Conservatorship, Estate Powers:

PC 2401: **Management and Control of the Estate**, utilizing *ordinary care and diligence*.

PC 2450: **Conservator may exercise estate powers** related to the conservatee.

PC 2451: Can **Collect Debts Owed** to the Cee.

PC 2451.5: **Perform Contracts, Purchase Personal Property, Employ an Attorney, Accountant and/or Financial Advisor**, etc.

If Need More, go to PC 2590/2591 - A long list (a-p) of specific estate powers the court CAN grant that enhance the conservator's authority (Item 24 in the Cor Apt Order).

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Conservator's Duties

PC 2113: The Cor is to **consult with the Cee**, and unless unreasonable, make decisions that **align with the Cee's wants**. The Cor is to support the Cee and attempt to maximize the **Cee's decision making and autonomy**.

PC 2401(c) (amended 2021) & PC 2351(d): Conservators **Must Avoid Conflicts and Self Dealing**.

*Note: The broad-based exception that would allow exceptions "authorization of the court," has been removed from the code (PC 2401(c)).

RoC 7.1059 (Not New): The conservator of the estate **MUST** avoid actual, and "the **appearance** of[,] conflicts of interest." There can be no self-dealing and there must be complete independence from all service providers.

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Rights Kept by the Conservatee

- To **Control Their Own Salary** (PC 1871 & 2601).
- If have **Allowance**, the ability to Spend as they Wish (PC 1871 & 2421).
- To Receive **Mail** and have Personal Telephone Calls (PC 2351).
- To have **Visits** with Family and Friends (PC 2351).
- To make or change a **Will** (PC 1871).
- Request Judge **Modify or Terminate** the Conservatorship (PC 1861.5).
- Have a Lawyer (Now get lawyer as a matter of course).
- To Get **Married** (PC 1900 – a Right in CA).
- To **Vote** (PC 1910).
- Make own **Healthcare Decisions** (Unless Crt Provides Power to Cor).

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Cee's Attendance at Hearing

The proposed conservatee **shall** be produced (PC §1825),

Unless:

- ▶ Out of state (Though, Zoom qualifies in our court).
- ▶ Medical "**inability**" supported by a physician's declaration
 - ▶ Cap Decl, GC-325, PC §1825 and § 1863
 - *Note: 1) emotional or psychological instability is not good cause.
Only good cause if "**likely** to cause **serious and immediate** psychological damage." 2) Doctors do not know the law.
 - Zoom: Virtual Appearances are now widely accepted.
 - Court of Appeal – Court Needs to Assess proposed Cee (Family Discord Case).

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PC 1800.3: Court Must Consider Less Restrictive Alternatives to a Cship

- PC 3200:** Medical Decision(s). Single Set of Medical Decisions.
- PC 3100:** Financial Decision. Single Set of Financial Decisions.
- In both of these circumstances, the petitioner would often be a "well spouse."
- Estate Plan:** Trust (Estate) and/or Advanced Healthcare Directive (AHCD - Person's Health)
- POA:** Estate and/or Person. Limits: Capacity, Withdraw.
- Authorizations/Releases:** Estate and/or Person. Limits: Info Only. Can withdraw.
- Representative Payee:** Soc. Sec. Limits: Can Withdraw.
- Supportive Decision Making:** Long Contract to allow supporter to assist.
- Psychiatric Advanced Directive:** Mental Health Release and Authorization. New.

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QUIZ QUESTION

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Bonding an Estate

PC 2320.1: If Estate Assets **Increase**, the Representative Must **Increase the Bond** to the Statutory Requirement.

- ▶ If the Estate Representative does NOT act, the Attorney for the Cor MUST apply (*Ex Parte*) to the court, to increase the Bond, or face liability (In *Stine v. Dell'Osso* (2014) [230 Cal. App. 4th 834](#)).

PC 2320 & 2321: The Court can waive or decrease Bond with a finding of **Good Cause**.

PC 2323: Also, the Court can waive bond if the estate will stay below the PC 2826 limits.

- ▶ \$15k estate value (less residence) + \$2k Income a month (less public benefits).
- ▶ Law not updated in decades. Court Typically Finds Good Cause to Waive Below \$50k.

Additional Ways to Reduce Bond: Blocked Accounts (Forms MC 355-358); No Power to Sell or Incumber Property; Pre-existing Trust; Good Cause Waiver.

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A Bit on Accountings

Use the **Summary of Account Form** (GC-400/GC-405) (PC 1061 and RoC 7.575)

- Custom Summaries leave out Code Required information, which creates **confusion and suspicion**.

Include **Odd Circumstances** and Histories in **Narrative**.

Accounting Due: A **Three Month lead time** to file accountings after End of Accounting Period.

- Court found this a reasonable lead time some years ago.

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A Bit on Accountings

PC 2628: No Accounting if Estate and Monthly Income (excluding residence) are below \$15k and \$2k (Respectively).

-- Code Not Updated In Decades. --**Good Cause to Waive** below \$50k.

Service of Biennial (every two year) Accounting:

PC 2621: Need only serve: Cee, Cor, Spouse/Dom Partner of Cee, Attorney for Cee, Those Requesting Special Notice.

--NOT Additional Family Members, NOR Beneficiaries.

Idea: Consider Serving Family to Keep the Peace.

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FEES

ANALYZING ACTIONS IN FEE PETITIONS

- Were billed actions **benefiting cee** or **self serving**? (CRC 7.702, 7.751)
- Did Action **minimized issues** or **expanded problem issues**?
 - Did actions serve the **Best Interests** of the Conservatee (PC 2645(b), CRC 7.751)
- What is the **ability of estate to pay?** (Estate vs Levitt (2001) 93 Cal App 4th 544.
 - If Fees are too much when compared to the value of the estate, they should probably be reduced.
 - Or, maybe the fees should become a lien.

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Litigation

- Litigation **should be avoided**, if possible.
 - - PC 2640 - 2642: Cee with an estate often pays all litigation costs and fees.
- Mediation** can be useful, but is expensive.
- Identify Issues and get **court order for specific discovery exchange**.
- The **right to a jury trial** lies with the conservatee only (PC 1827).
 - - **Who the Cor** should be is a **Q for Judge** (not jury) (PC 1812(a)).
- Note, it is possible for the court to have a **PC Section 810 bench hearing** to assess the client's **ability to request a jury trial**.
- Can get own Expert or **Court Appoint an Independent Expert (EV 730)**.

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Would a GAL Help?

NEED A GUARDIAN AD LITEM?

- Is there a conflict? Separate Litigation?
- Are there, perhaps, significant estate assets?
- ▶ Does the GAL possesses a necessary practice specialty?
- ▶ Would the cee benefit from a "best interest" attorney?
 - Note, lack of capacity must be determined before can appoint GAL (PC 1003).

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Transfer Conservatorships

PC 1981 - 2003: General Conservatorships (Dem, TBI, Stroke, etc.) **CAN be Transferred between states, into and out of California.** (Forms GC 360-363).

- This is by interstate agreement – the **Uniform Adult Guardianship and Protective Proceedings Jurisdiction Act** (UAGPPJA). Note: Though Most States have joined the pact, a few states have not. Check before you proceed.

PC 1981(7)(c)(2): Transfer rules do NOT apply to **Developmentally Delayed** based conservatorships.

When Can't transfer: Apply in other State and Report to CA Court and counsel. CA Court will terminate when need be.

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Terminating a Probate Conservatorship

-PC 1860-1865: **Petition.**

-PC 1861.5: If **Conservatee** wishes to **terminate** the conservatorship, the court **must** set a hearing

--As long as: There is **Good Cause** OR there has **not** been a termination hearing **in a year**.

-PC1863 (c): **At Termination Hearing**, the Court **MUST** terminate a conservatorship **unless** there is **clear and convincing evidence** that the challenged adult needs help AND a conservatorship is the least restrictive measure to provide that help.

-PC 1863 (h): If the **Cons and Cee agree** that a conservatorship is NOT the least restrictive measure to assist the challenged adult, the court **MAY** terminate the conservatorship, **without** an evidentiary hearing.

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Miscellaneous

Status Reports:

Local Rule 10.02(J)(2) (Status Report) vs PC 2351.2 (a)(2)(A) (Care Plan)

- Local Rule **Not Cleared** by Bar Leadership.
- Care Plans **Not Required** after first year (PC 2351.2).
- Q: Is a Status Report a Care Plan? Not in local rules.
- Local Rule Does NOT:
 - Include Code Requirement to **Redact Medical** Information (PC 2351.2(2)(B).
 - Exclude Limited Conservatorships, as code does (PC 2351.2(h)).
- Probate Notes create concern: Must Attorney Appear and bill hundreds of dollars?
- Court Finding **Good Cause** to Waive further service for now.
- *Will Address in the future.

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Miscellaneous

Regional Center Reports (PC 1827.5): The Regional Center (RC) MUST prepare reports on limited petitions EVEN IF The proposed developmentally delayed conservatee is NOT currently/yet connected to the RC.

*** The Ventura PD (and Amy Cannon) litigated the Issue (In Re Vianka Serrano).**

Uncooperative Banks: Financial Institutions are often not cooperative. They want their own forms filed and stamped.

Options:

- Explain problem to judge in court. -VERY COSTLY. NOT efficient.
- You or staff member go to bank with subpoena in pocket. **-Works every time.**

Sharing with Family Often Helps Avoid Conflicts: Medical Updates. Accountings.

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Miscellaneous

- ▶ **Restraining Orders:** File with Conservatorship Number in J6.
- ▶ **More Education:** LA Bar Association.
- ▶ PC 1205: **No Need to Notice** a Continued or Postponed Hearing, Unless Court Ordered.
 - ▶ But it is a good idea to do so.
- ▶ Local Rule 20.03-20.04, **Interpreter Request/Cancellation:** Now need to file request for interpreter (Form VN 250).
 - ▶ Two+ Days – Spanish; Ten+ Days – Other. AND Cancel 2+ Days.
 - ▶ Disappointing.
- ▶ **Saving Money/Effort:**
 - ▶ If Estate is simple, used infrequently and/or low in value, ask for court permission to use the **Informal Accounting - Blocked Account Form** (VN 267).

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Miscellaneous

PC 1471 - **Duty of Attorney: Now Strict Advocate.** More work for the Court.

- ▶ Approximately five years ago the law, that then allowed “best interest” representation of conservatees, changed. Now attorneys are strict advocates.
 - ▶ Therefore, there are MANY times that the representative cannot share their thoughts or findings.
 - ▶ As such, the **court must be aware** of this and **dive into the evidence.**

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Miscellaneous

Inventory and Appraisals: No longer a review hearing.
Responsibility Now on Court's Research Attorneys to make decisions or set calendar hearings.

- ▶ This Can Create Challenges:
 - ▶ Example: Set as a Large Estate with Calendared Accountings. Then the I & A shows that the assets, outside the already existing trust, are quite small.
 - ▶ Q: What financially efficient actions should be undertaken if the Research Attorneys do not vacate the account hearings or put the matter on calendar?

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Probate (Many Dx) Vs LPS (Mental Health)

Permanent (Until Further Court Order)

Annual Petition/Review

No Locked Placement

Locked Placement Authorized

--Unless Clinical Support of Unsafe Wandering & Court Order.

No Forced Psychotropic Medication

Involuntary Medication Authorized

Nearly Anyone May Petition

PG & Mental Hospital Doctors Control

Probate Court has Full Authority

Probate Court has no Authority over LPS

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Undue Influence and Probate Conservatorships



Wake UP!

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