

SENATE JUDICIARY COMMITTEE
Senator Thomas Umberg, Chair
2021-2022 Regular Session

SB 1005 (Wieckowski)
Version: February 14, 2022
Hearing Date: March 29, 2022
Fiscal: No
Urgency: No
AWM

SUBJECT

Conservatorship: sale of personal residence

DIGEST

This bill revises the provisions authorizing the sale of a conservatee’s real property to specifically include the power to consent and agree to partition the personal residence or other real or personal property of the estate, and the power to bring an action for partition of the personal residence or other real or personal property of the estate; and subjects the partition of the conservatee’s present or former personal residence to the same conditions as would be applicable to the sale of the residence under existing law.

EXECUTIVE SUMMARY

In California, if an adult is unable to manage their financial matters, a conservator of the estate may be appointed by a court to manage the adult’s financial matters. If the adult is unable to manage their medical and personal decisions, a conservator of the person may be appointed. Similarly, a guardian of the estate or person may be appointed for a minor child. The courts are tasked with maintaining oversight over conservatorships and guardianships, to ensure that conservators and guardians are acting in the best interests of their charges.

In 2019, the Legislature enacted SB 303 (Wieckowski, Ch. 847, Stats. 2019), which increased the evidentiary and procedural safeguards for when a conservator or guardian wishes to sell the conservator or ward’s current or former place of residence. SB 303 requires a conservator or guardian to provide certain information relating to the sale to the court before committing significant resources to the sale, and to prove, by clear and convincing evidence, that the sale is in the conservatee or ward’s best interest. SB 303 did not, however, similarly increase the evidentiary burden or procedures for entering into a partition action for the conservatee or ward’s residence – even though partition actions frequently result in the sale of the property. This bill is intended to

close that potential loophole by imposing the same safeguards on a conservator or guardian's proposed action to partition the conservatee or ward's residence.

This bill is sponsored by the Trusts and Estates Section of the California Lawyers Association. There is no known opposition.

PROPOSED CHANGES TO THE LAW

Existing law:

- 1) Provides procedures by which parties who share an interest in real and/or personal property may petition the court to partition the property, which may include the sale of the property and distribution of its proceeds. (Code Civ. Proc., pt. 2, tit. 5, §§ 872.010 et seq.)
- 2) Establishes the Guardianship-Conservatorship Law, which governs the establishment of certain guardianships and conservatorships. (Prob. Code, div. 4, pts. 1-4, §§ 1400 et seq.)
- 3) Authorizes the appointment of a conservator of a person's estate for a person who is found, by clear and convincing evidence, to be substantially unable to manage their own financial resources or resist fraud or undue influence. (Prob. Code, § 1801.)
- 4) Authorizes a conservator of an estate to take various actions relating to the estate property for the benefit of the conservatee. (Prob. Code, div. 4, pt. 4, ch. 6, §§ 2400 et seq.)
- 5) Requires a guardian or conservator to obtain a court order authorizing them to bring an action against the other cotenants for partition of any property in which the ward or conservatee has an undivided interest.
 - a) The court may issue the order ex parte or in response to a petition filed by the guardian or conservator.
 - b) The guardian or conservator need not obtain a court order before bringing a partition action when:
 - i. The court has already expressly issued an order authorizing a partition and set-off to the estate; or
 - ii. The ward or conservatee, or the guardian or conservator in that capacity, is made a defendant in a partition action, the guardian or conservator may defend the action without the authorization of the court. (Prob. Code, §§ 2463, 2500.)
- 6) Establishes a presumption that the personal residence of a conservatee at the time the conservatorship proceeding begins is the least restrictive appropriate residence for the conservatee; in a hearing to determine whether the conservatee should be

removed from their personal residence, that presumption can be overcome by clear and convincing evidence to the contrary. (Prob. Code, § 2352.5(a).)

- 7) Provides that, except for the sale of a conservatee's present or formal personal residence, a conservator's sale of estate property are required to be conducted with the authorization, confirmation, or direction of the court, as specified. (Prob. Code, § 2540(a).)
- 8) Provides that, before a conservator may sell the conservatee's present or former personal residence, the conservator must inform the court of the following:
 - a) That the sale has been proposed and that the proposed sale has been discussed with the conservatee;
 - b) whether the conservatee supports or opposes the sale;
 - c) why the sale is necessary;
 - d) whether the conservatee has the ability to live in the home; and
 - e) why other alternatives, including in-home care services, are not available. (Prob. Code, § 2540(b).)
- 9) Permits the court, in its discretion, to require the court investigator to discuss the proposed sale with the conservatee. (Prob. Code, § 2540(b).)
- 10) Requires the conservator to provide court with the notice set forth in 6) before the conservator commits significant resources to the proposed sale, unless the conservator can establish that the conservatee has the capacity to, and unequivocally does, consent to the sale, or that exigent circumstances required the conservator to commit resources to the sale prior to court approval. (Prob. Code, § 2540(c).)
- 11) Authorizes a guardian or conservator to sell real or personal property of the estate in the following cases:
 - a) Where the income of the estate is insufficient for the comfortable and suitable support, maintenance, and education of the ward or conservatee or of those legally entitled to support, maintenance, or education from the ward or conservatee;
 - b) Where the sale is necessary to pay specified debts; or
 - c) Where the sale is for the advantage, benefit, and best interest of the ward or conservatee, the estate, or those legally entitled to support, maintenance, or education from the ward or conservatee. (Prob. Code, § 2541.)
- 12) Provides that, notwithstanding the factors in item 10), a court may authorize a conservator to sell a conservatee's present or former personal residence only if the court finds by clear and convincing evidence that the conservator demonstrated a compelling need to sell the residence for the benefit of the conservatee. (Prob. Code, § 2541.5.)

- 13) Provides that a court may make an order granting a conservator with certain powers to act without prior court authorization, including to sell the personal residence of the conservatee without confirmation of the court of the sale.
- a) Any sale of the conservatee's personal residence remains subject to the limitations set forth in 8)-10). (Prob. Code, §§ 2590-2591.)
 - b) A conservator seeking an order granting the power to sell the conservatee's personal residence without court authorization must demonstrate to the court that certain aspects of the sale, including the price and estimated tax consequences, are in the best interests of the conservatee. (Prob. Code, § 2591.5.)

This bill:

- 1) Provides that, in a partition action by the conservator where the subject property is the conservatee's present or former personal residence, the conservator's power to bring the action are subject to the statutory limitations on the sale of a personal residence set forth in 5)-12), above.
- 2) Provides that the requirements relating to a conservator's need to obtain a court authorization for the sale of a conservatee's personal residence, including the court's discretion to require an investigator's visit, also apply to an action for partition of a conservatee's present or former personal residence.
- 3) Provides that the cases in which a guardian or conservator may sell the real or personal property of a ward or conservator are also the cases in which a conservator's consent to, or action for, partition of real or personal property of the estate.
- 4) Provides that the circumstances in which a conservator may obtain pre-authorization from the court to sell the conservatee's present or former personal residence also apply to the conservator's consent to, or action for partition of, the conservatee's present or former residence; and that any such pre-authorization is also subject to the statutory limitations set forth in 5)-12), above.

COMMENTS

1. Author's comment

According to the author:

Understanding the value of living at home, the Legislature enacted statutory protections to prevent the unnecessary sale of a conservatee's home, as many California conservatorships involve elderly conservatees who live at home or could return home after a limited stay at a hospital or facility. The personal

residence of a conservatee when a conservatorship proceeding begins is presumed to be the least restrictive appropriate residence, and a conservator cannot sell a conservatee's present or former personal residence unless, among other things, the court finds by clear and convincing evidence that the conservator demonstrated a compelling need to do so for the benefit of the conservatee.

While it safeguards the sale of the conservatee's personal residence, current law does not always protect against the disposition of the conservatee's personal residence. The Probate Code empowers a conservator to bring an action for or agree to the partition of a conservatee's property, which may include the conservatee's personal residence and almost always results in a sale rather than a physical division. As written, the Probate Code does not explicitly impose the same protective restrictions on a conservator who moves forward with the partition of a conservatee's personal residence as it does on a conservator who sells the conservatee's personal residence. This omission has created a loophole in the law and a vulnerability in the Legislature's efforts to protect the personal residences of California conservatees.

2. This bill applies the safeguards for the sale of a conservatee's residence to the partition of a conservatee's residence

A conservator acts as the fiduciary of their conservatee and is tasked with exercising ordinary care and diligence in managing the conservatee's estate.¹ To ensure that someone is watching the watchers, conservators remain under the control and continuing jurisdiction of the courts for the duration of the guardianship or conservatorship.² A court with jurisdiction over a conservatorship may exercise its oversight by intervening sua sponte to prevent abuses,³ and a conservator must obtain court approval before entering into specific transactions relating to the conservatee's property.

One area in which the court is required to conduct particular oversight is the sale of a conservatee's residence. A conservator may sell a conservatee's current or former residence only where the sale is necessary to pay specified debts of the conservatee, or where the sale is otherwise in the conservatee's best interest.⁴ A conservator seeking to sell a conservatee's current or former residence must provide the court with certain information relating to the proposed sale, and the court may approve the sale only if it

¹ Prob. Code, §§ 2101, 2401. This bill and this analysis's discussion of it also applies to the guardian-ward relationship; because few wards are in a position to own a personal residence, the discussion refers only to conservatees.

² Prob. Code, § 2102; *Conservatorship of Presha* (2018) 26 Cal.App.5th 487, 497-498.

³ Prob. Code, § 1850(b).

⁴ Prob. Code, § 2541.

finds by clear and convincing evidence that the conservator demonstrated that there is a compelling need to sell the residence for the benefit of the conservatee.⁵

Three years ago the Legislature enacted SB 303 to increase the safeguards around the sale of a conservatee's personal residence.⁶ That bill, among other things, raised the conservatee's evidentiary burden for the sale from a preponderance of the evidence to clear and convincing evidence, and required a conservator to provide the court notice of the proposed sale before committing significant resources to the sale.⁷

SB 303 left a potential loophole, however, in the heightened safeguards surrounding the sale of a conservatee's personal residence. Under current law, a conservator must obtain a court order before commencing a partition action relating to the conservatee's residence, but the conservator need not prove by clear and convincing evidence that the action is in the best interest of the conservatee.⁸ Additionally, the statutes governing the sale of a residence do not unambiguously apply to circumstances where a conservator agrees to the partition of the conservatee's residence, such as in a partition action where the conservatee is a defendant.⁹

This bill is intended to close the potential partition loophole. Specifically, it extends the existing requirements relating to the sale of a conservatee's residence to a conservator's (1) agreement to partition the conservatee's residence, or (2) request to bring a partition action relating to the conservatee's residence. The bill also modifies the existing statute governing a conservator's partition action on behalf of the conservatee to clarify that, if the action relates to the conservatee's residence, the action is subject to the same requirements as a proposed sale of the conservatee's residence.

SUPPORT

None known

OPPOSITION

None known.

RELATED LEGISLATION

Pending Legislation: AB 1062 (Mathis, 2021) requires a guardian or conservator to provide notice to all persons who received notice of the guardianship or conservatorship before abandoning valueless property, and provides that, if a guardian

⁵ *Id.*, §§ 2540, 2541.5.

⁶ See SB 303 (Wieckowski, Ch. 847, Stats. 2019).

⁷ *Ibid.*

⁸ Prob. Code, § 2463.

⁹ See *id.*, § 2463(c) (conservator may defend a partition action without authorization of the court).

or conservator of the estate becomes a successor trustee while the ward or conservatee is alive, the estate shall remain subject to the jurisdiction of the court. AB 1062 is pending before the Senate Judiciary Committee.

Prior Legislation:

SB 303 (Wieckowski, Ch. 847, Stats. 2019) (1) authorized the sale of a conservatee's present or former personal residence only upon a finding from the court that the conservator demonstrated a compelling need to sell the residence for the benefit of the conservatee, and (2) prohibited compensation to a guardian, conservator, or attorney from government program funds designated for a ward or conservatee.

SB 156 (Beall, 2013) would have prohibited a guardian or conservator from being compensated from the estate for any costs or fees, including attorney's fees, incurred in defending the compensation in the petition, if the court reduces or denies the compensation requested in the petition. Governor Brown's veto message stated, "I believe that judges exercise their discretion under existing law governing compensation for defense costs in a fair and balanced way. Nevertheless, the bill could have improved the process had the last amendment to the bill not eliminated the three qualifying criteria under which a judge could award some or all of the defense costs. I cannot sign this bill without them."

AB 1363 (Jones, Ch. 493, Stats. 2006), among other things, prohibited, in conservator/guardian fee petition litigation, the conservator/guardian from receiving compensation from the estate for any costs or fees incurred in unsuccessfully opposing an objection to the fee petition, as specified.