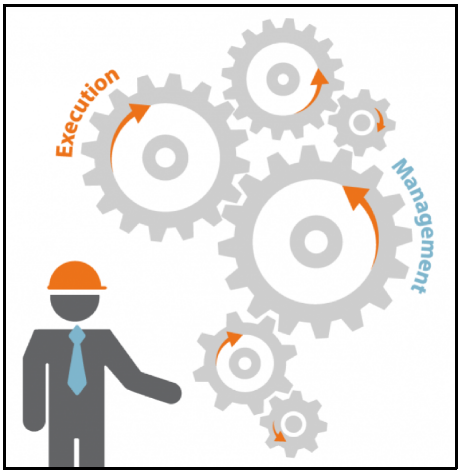
What Access to Justice Would Look Like in Probate Conservatorship Proceedings if the ADA is Actually Implemented

By Thomas F. Coleman

It is supposed to be difficult to have someone ordered into a conservatorship – and for good reason. Fundamental rights are placed at risk the moment a petition for conservatorship is filed. Once those rights are taken away, an adult may never get them back. Conservatorship is a big deal – and it should be!

Most Americans take adult life for granted. Once we turn 18, we are legally independent. We make all of our own decisions. We choose where to live and how to live. We select our roommates and friends. We can visit with relatives or ignore them. We spend our own money as we wish, whether it is cautiously or recklessly. After all, it's our own money.



Life without conservatorship is filled with decision-making, regardless of whether the choices are big, little, or somewhere in-between. They are our decisions to make. We decide whether to go to school or take a job. To live a highly social life or to be reclusive. To live in the city or out in the countryside.

A pre-conservatorship life is filled with choices. Do we want to have a partner, to marry, or remain single? Do we want to have sex every day or once a month or never? These are our choices to make.

When it comes to our health, each individual decides whether to have a healthy diet or to consume junk food. To drink lots of water or lots of soda. We decide whether to go to the doctor or to a faith practitioner. To see a medical doctor, a chiropractor, or an acupuncturist.

If our parent, child, sibling, friend, or neighbor does not like the choices we make, we can simply tell them to mind their own business. The constitution protects our privacy and autonomy.

When a petition for conservatorship is filed, all of this is placed in jeopardy. Whether due to illness, injury, or declining age, when our capacity to make our own decisions is challenged in court, we can face the prospect of being reduced to the status of a child – with someone else making decisions for us. In some cases, that "someone" may turn out to be a complete stranger who is designated by the court to be our "conservator." The freedoms we once took for granted can disappear at the stroke of the judicial pen.

That is why the granting of a conservatorship is supposed to be difficult. For all practical purposes, the loss of these cherished freedoms may turn out to be virtually irreversible. Some have called it "civil death." In some cases, convicted felons have more rights in prison than an adult who has been ordered into a conservatorship.

Statutory Requirements

At the time a petition for conservatorship is filed with the probate court, the law presumes that the

target of the conservatorship has capacity to make all of his or her own decisions. The law says that the burden of proof is on the petitioner to show, by clear and convincing evidence, that the alleged incapacitated person is unable to care for his or her own basic needs.

A capacity declaration must be filed by a doctor to inform the court as to whether the individual can make informed medical decisions. Allegations must be made, and evidence must be presented, that the individual lacks decision-making capacity in each of several areas beyond medical: residence, finances, educational, marital, social, and sexual. The petitioner must prove, by clear and convincing evidence, that no less restrictive alternative is available to protect the individual from harm.

The individual should be appointed an attorney. The attorney should provide effective legal representation to the individual – testing the sufficiency of the petitioner's evidence, developing evidence favorable to the retention of rights, asking for the appointment of an expert to evaluate capacity in each area of decision-making, exploring community supports, services, and benefits that may allow the individual to retain his or her rights.

The individual should personally appear in court so that the judge can observe him or her in real time. Even if the evidence overwhelmingly supports the granting of a conservatorship, that does not end the inquiry. Then the focus shifts to who should be appointed as conservator.

The wishes of the individual in question should take priority. Plus, there should be a serious inquiry into the qualifications of anyone who is nominated as conservator. There should be a background check. The quality of the proposed residential placement and the background of the residents and service providers should be checked.

If the proposed conservatee is an adult with a developmental disability, the regional center is supposed to be notified of the proceeding. The regional center is supposed to conduct an evaluation of the individual and submit a report to the court along with recommendations as to which of seven "powers" should be granted to the conservator and which should be retained by the proposed conservatee.

If the proposed conservatee does not want a conservatorship, or believes a less restrictive alternative would suffice, or opposes the terms of the conservatorship, or objects to the person nominated as conservator, then he or she is entitled to a trial. A jury trial can be demanded so that a panel of his or her peers can decide the outcome. If the individual objects to the ultimate outcome, he or she has the right to file an appeal.

This is how the probate conservatorship "system" is theoretically supposed to operate – even without any reference to additional protections afforded to proposed conservatees under the Americans with Disabilities Act. But how it really operates is quite another matter. As it turns out, the conservatorship process is more like a "machine" than a "system." A system is supposed to have checks and balances. The probate conservatorship process in California does not.

Current Deficiencies

ADA Assessment. When a petition for conservatorship is filed, the superior court is placed on notice that the individual in question has significant cognitive and communication disabilities. The court becomes aware that the person has special needs that may require an assessment by the court as to any accommodations that should be provided under the ADA to help ensure that the individual has effective communication and meaningful participation in the proceeding. Despite having such knowledge, the reality is that the court does nothing with this information. The

court does not conduct an ADA inquiry or assessment without a specific request. This is a failure of duty by the court.

Notice to Relatives. The petitioner is supposed to serve the proposed conservatee with a citation and a notice should be sent to all close relatives such as a spouse, domestic partner, parents, adult children, and siblings. In fact, in many cases such relatives report they were never given notice of the proceedings.

Appointment of Counsel. If a petition for a limited conservatorship is filed for an adult with a developmental disability, an attorney is automatically appointed to represent the adult in the proceeding. If a petition seeks a general conservatorship, appointment of counsel is not automatic in many superior courts throughout the state.

In Sacramento and surrounding counties, for example, attorneys are not appointed for a significant number of adults in general conservatorship proceedings. These adults are therefore required to represent themselves – a function they clearly are not able to do in an effective manner.

In Alameda County, the public defender is appointed for proposed conservatees who are indigent or who have developmental disabilities. In all other cases – cases where the proposed conservatee has assets – a nonprofit organization known as Legal Assistance for Seniors is appointed as counsel.

Role of Counsel. As a matter of due process, once counsel is appointed the client is entitled to an attorney who should provide *effective* assistance. This requires the attorney to be a diligent and conscientious advocate. The Rules of Professional Conduct require all attorneys to advocate for the stated wishes of the client, to perform services competently, and to adhere to ethical duties of loyalty and confidentiality.

Despite these constitutional, professional, and ethical mandates, in some courts the judges expect the attorneys to be the "eyes and ears of the court" and to act more as a court investigator or guardian ad litem than a zealous advocate for the client's wishes and defender of the client's constitutional and statutory rights.

In some places, such as Los Angeles, the superior court has a rule that gives the court-appointed attorney a dual role – to represent the proposed conservatee while at the same time helping the court resolve the case. In a written opinion, the presiding judge of the probate court in Los Angeles has stated that an appointed attorney may advocate for what he or she believes is in the "best interests" of the proposed conservatee, even if this assessment conflicts with what the client wants. The opinion says that the attorney may act similar to the manner in which an attorney represents a child in a family law case.

Regional Center Report. If a petition is filed for a limited conservatorship, the regional center receives notice of the proceeding and is supposed to conduct an evaluation and issue a report to the court. Some parents file for a general conservatorship as a way to avoid participation in the proceeding by the regional center. Regional centers are not given guidance from the Department of Developmental Services on their role in conservatorship proceedings. Each regional center acts independently, some doing a good job and others doing a poor job on this score.

In some regional centers, workers who perform this evaluation and reporting function are not properly trained. They lack the qualifications to do so. Some judges consider regional center reports to be worthless. State law allows a regional center client or authorized representative to request an Individual Program Plan (IPP) review whenever a significant event occurs in the life of the client. A petition for a conservatorship is obviously such an event.

The review is a person-centered planning process, with a multi-disciplined team, to develop a plan of action to enable the client to remain as independent as possible. The client is entitled to have a qualified professional participate in the IPP review process. Despite the availability of this important function, court-appointed attorneys are not requesting an IPP review for proposed conservatees.

Capacity Assessments. The only assessment that is required in every case is that of capacity to make medical decisions. A medical doctor, psychologist, or faith healer is supposed to conduct such an evaluation. Although the court may make a determination in each case as to whether the proposed conservatee has or lacks the capacity to make decisions on finances, residence, education, marriage, social contacts, and sexual relations, it is rare that a qualified professional ever conducts an assessment in these areas of decision-making. Although a court-appointed attorney can request such an evaluation by a qualified professional under Evidence Code Section 730 – and the county will pay for this evaluation for indigent clients – this is almost never done.

Less Restrictive Alternatives. The law prohibits a judge from ordering a conservatorship if there is a less restrictive alternative (LRA) that would be sufficient to protect the adult from harm and yet preserve as much freedom as possible. Would a trust work for finances? A medical power of attorney for medical care? A supported decision-making arrangement for personal matters such as where to live, social contacts, and sexual relationships?

The supposed goal of the conservatorship process is to promote independence and protect freedoms while at the same time minimizing the risk of abuse or neglect. Finding supports, services, and benefits – and one or more individuals to assist the adult – in avoiding a conservatorship should be a top priority for all participants in the proceeding. And yet, this seems to be a footnote at best in a process that seems fixated on putting people into conservatorships. The court could ask Adult Protective Services for a LRA assessment. The court-appointed attorney could insist on an IPP for this purpose for a regional center client or the appointment of an expert under Evidence Code Section 730 for LRA planning for an adult with other types of cognitive disabilities. But a serious LRA evaluation and planning process is not occurring in most probate conservatorship proceedings.

Personal Presence. A proposed conservatee is entitled to be personally present in court for all proceedings. A judge would be much better able to assess the individual's functional abilities by witnessing how that person behaves in the courtroom. Effective communication and meaningful participation in a legal proceeding are difficult, if not impossible, without personal presence.

With the technology we have today, even if an individual wants to avoid the stress of a courtroom, arrangements should be made for every proposed conservatee to be present in court via iPhone or Skype or some similar type of technology. Proposed conservatees should see and hear, in real time, what others are saying about them and what plans others are proposing for their lives. There is really no excuse for the court and court-appointed attorneys not insisting on participation of the proposed conservatee in these proceedings through appropriate technology.

Vetting Conservators and Placements. Even when the need for a conservatorship is clear and there are no arguably meritorious issues to explore regarding less restrictive alternatives, there is still much work to do in the conservatorship planning process. Someone must be selected to act as conservator and a decision must be made regarding a residential placement for the proposed conservatee. The individual in question

should be able to choose or veto a proposed conservator. His or her preference should be given priority. The proposed conservator should be thoroughly vetted by the court investigator and by the court-appointed attorney or his or her investigative staff. Relatives should be consulted. The home should be visited. Neighbors interviewed. The proposed conservatee's physician and dentist should be contacted for their observations and recommendations.

If the proposed conservatee is a regional center client, the service coordinator and vendors who provide services should be interviewed. If the proposed conservatee is still in school – as many are until they turn 22 – school records should be reviewed and teachers should be consulted.

Seniors and adults with developmental disabilities are at risk of abuse. Perpetrators may be family members, household members, or people in their network of support. A thorough investigation of the proposed conservatee and proposed placement setting should be done before a court order is entered. Once a conservator is appointed and a placement occurs, the conservatee is at the mercy of the conservatee and subject to the risks associated with the placement.

As things now occur, this type of a thorough vetting process is not occurring in probate conservatorship proceedings. It is generally assumed that the placement is safe, the conservator is good, and that all will be well. Since the court is obligated to provide protection to conservatees, and since court-appointed attorneys are supposed to protect their client's rights, operating under such assumptions should not be allowed.

Court Investigators. The Probate Code contemplates that a court investigator will review the petition and supporting documents, interview the proposed conservatee to advise them of their rights and determine their wishes, interview the proposed conservator, interview relatives of the proposed conservatee, and evaluate the proposed placement. The investigator is supposed to file a report to the court and make an objective recommendation on whether a conservatorship is necessary and, if so, who should be appointed to act as conservator.

The reality is that sometimes the court investigator is appointed to conduct an investigation and sometimes not. Investigators may have caseloads that are unrealistically high. In some places, such as Los Angeles, when there were budget problems, the judges simply cut out this function altogether for certain categories of cases. Unless challenged by the public defender or court-appointed attorneys, the superior court is not accountable to anyone for whether court investigators are used, their caseloads, their qualifications or training, or whether their recommendations are even considered.

Trials and Appeals. A proposed conservatee is entitled to have a trial if he or she opposes a conservatorship, the terms of a conservatorship, or the person nominated to act as conservator. This can be a court trial or a jury trial. Court trials are infrequent. Jury trials are rare. The public defender or court-appointed attorney usually stipulates to an outcome and is therefore responsible for the lack of a trial. If the conservatee objects to the conservatorship, the person appointed as conservator, or any terms of the conservatorship, he or she may file a notice of appeal. However, due to the nature of his or her disabilities, the conservatee generally will not understand the right to appeal, or why they should appeal, or how to appeal.

Especially when the public defender or court-appointed attorney has not performed competently or has improperly surrendered the client's rights, the attorney has a conflict of interest. The attorney will not want to appeal to challenge his or her own deficient performance. Thus, appeals by conservatees are rare to nonexistent. As a

result, the normal correction process that occurs through appeals in criminal, civil, family, and juvenile cases does not occur in probate conservatorship cases. The superior court, public defender or court-appointed attorney, and other participants are therefore insulated from any accountability through the appellate process.

Conservators. If the petition is granted, a conservator will be appointed. This could be a family member, the public guardian, or a professional fiduciary. Often, once the appointment is made, the public defender or court-appointed attorney will be relieved as counsel. If so, then from this point forward the conservatee has no attorney to defend his or her rights. The conservatee's life is then under the control of the conservator.

If a conservatorship of the estate has been granted, the conservator will make financial decisions for the conservatee and can collect income, spend money, and sell assets as the conservator deems necessary. Professional fiduciaries get paid from the income and assets of the conservatee. They can hire an attorney to assist in the administration of the conservatorship and to represent the conservator in any subsequent litigation. The fees of the conservator and his or her attorney can diminish the estate considerably.

One would think that the public defender or court-appointed attorney would demand accountings and challenge fees that seem unreasonable, but that is often not so. In fact, attorneys for the conservatee, such as those employed by Legal Assistance for Seniors, are themselves making money when protracted litigation occurs.

Between the fees charged by the conservator, conservator's attorney, and LAS attorney, the estate can be diminished by $700 or more per hour when these fees are combined. This poses a disincentive to many conservatees who may want to challenge the actions of conservators. Any such challenge, and ensuring court hearings, could cost the conservatee tens of thousands of dollars.

Periodic Reviews. Under the Probate Code, court investigators are supposed to conduct an annual review at the end of the first year of the conservatorship. They should conduct a home visit, interview the conservatee, interview the conservator, and report to the court on the welfare of the conservatee. Biennial reviews are supposed to be conducted every two years after that. This is all done on the honor system since the court is accountable to no one as to whether such reviews actually occur of whether they occur in a timely manner.

With budget shortfalls or high case loads, in some counties the annual review is skipped or the biennial reviews are done several years late. Since the court-appointed attorney has usually been relieved from the case by then, there is no one to challenge these negligent practices.

ADA Compliant Practices

The ADA requires the service provider to take steps to ensure that the service recipient has effective communication and meaningful participation in the service despite his or her disability. Reasonable steps must be taken to accommodate the individual, through appropriate supports and services, to have equal access to the services.

In a conservatorship proceeding, the service being provided by the court is the administration of justice through the adjudication of a specific case involving the person with the disability. The administration of justice in the case involves activities inside a courtroom as well as activities of various participants outside of court.

Through state law or court order, other service providers are involved in the administration of

justice. This includes the court's ADA coordinator, court staff, the public defender or other court-appointed attorneys, regional center staff, capacity assessment professionals, experts appointed under Evidence Code Section 730, the conservator, and sometimes a guardian ad litem.

The judge who presides in the case is responsible for ensuring that activities inside of the courtroom comply with the requirements of the ADA. Since it appoints many of these participants to the case, the superior court itself, as an entity, is responsible for ensuring that their services are ADA compliant. In addition, these service providers are also responsible for ensuring that the service recipient – the conservatee or proposed conservatee – has effective communication and meaningful participation in the service being provided.

As public entities, some of these service providers have obligations under Title II of the ADA and Government Code Section 11135. As private businesses or professionals, others have obligations under Title III of the ADA and Civil Code Section 51.

Unfortunately, most of these participants – judges, court personnel, attorneys, experts, regional center staff – are completely unaware of what the ADA requires of them in terms of providing accessible services to litigants who have serious cognitive and communication disabilities. The court and its ADA coordinators, and other participants generally think only about accommodations for mobility disabilities and sign language interpreters for people who are deaf or hard of hearing.

No standards have been adopted by the court or other participants, and no training has been done for them, on what policies and practices are necessary to comply with the ADA in connection with conservatorship proceedings.

In terms of ADA compliance in conservatorship proceedings – considering the wide array of serious cognitive and communication disabilities experienced by all conservatees and proposed conservatees – there are no easy answers. An evaluation would need to be done in each case as soon as the petition is filed. An interactive process would have to be initiated by the court's ADA coordinator, in consultation with proposed conservatee and designated family member, and perhaps in consultation with the public defender or court-appointed attorney.

This process would need to be initiated without a formal request by anyone since the filing of the petition has placed the court on notice that it now has before it an involuntary litigant who, without appropriate accommodations, will not be able to effectively communicate or meaningfully participate in the proceeding. Current court policies do not acknowledge the need to initiate such an interactive process even without a request.

Service providers, whether the court or court-appointed attorneys, may not discriminate against proposed conservatees on the basis of disability. Equal access to services is required. A proposed conservatee is entitled to the full panoply of services that are reasonably necessary to help them retain their rights and to avoid a conservatorship or to ensure that the terms of the conservatorship are fair and reasonable.

If a statutory scheme provides for seven steps in a conservatorship process, a proposed conservatee is entitled to use all seven steps. When the Rules of Professional Conduct and constitutional requirement of due process provide for zealous advocacy of the client's stated wishes, effective representation, and adherence to ethical duties of loyalty and confidentiality, the client is entitled to no less. This is so even though the client's disability may preclude him or her from understanding their rights or complaining when they are violated.

Everyone would understand that disability discrimination occurs when a merchant consistently always gives the right change to customers without disabilities but shortchanges those with developmental disabilities. Everyone knows that it would be illegal discrimination for a butcher to give Grade A hamburger to non-disabled customers who pay for such but to give Grade B hamburger to elderly customers who won't know the difference due to their cognitive challenges. Shortchanging clients – either in terms of quantity or quality – because their disability prevents them from realizing what is happening or from complaining about it would be a form of disability discrimination.

The conservatorship process has been consistently shortchanging seniors and people with disabilities – by either skipping available procedures that might help them retain some or all of their freedoms, or by delivering services that are poor in quality. The judges know these litigants will not appeal. The attorneys know they will not file complaints with the State Bar.

Therefore, if budget cuts or high case loads require cutting corners in some types of cases, this is often where the cutting occurs. And in those cases where the fees may be quite lucrative, the opposite may occur. Performing unnecessary services or overcharging for services are unlikely to result in audits or complaints because these seniors are often unable to notice the problem or are unable to complain.

Litigants *without* disabilities are entitled to utilize all statutory protections that are available, as well as procedures that are required by due process of law. Since they can and often do complain if they are shortchanged, they often get what they deserve even if it is only after they complain. But litigants with cognitive and communication disabilities are at a disadvantage. They generally won't notice they are being shortchanged. They usually won't be able to complain.

Therefore, in order to ensure they have meaningful access to the proceedings, without discrimination, a system of checks and balances must be built into the conservatorship process. Attorneys need performance standards, training, and a method of accountability. In turn, these attorneys can then make sure that all of the other participants in the system are performing adequately and that proposed conservatees are not being shortchanged – either by steps being skipped or by poor quality services being performed.

The issue is not solely about achieving a just result. Unfair results will occur. That's what appeals are for. The issue is about a fair process – one with adequate checks and balances to ensure access to justice for litigants with disabilities. The details of what each participant should do to ensure access to justice is something that still needs to be developed.

Suffice it to say that the current process in California conservatorship proceedings needs major overhaul. Let's start in Alameda County.

A good first step would be for the Board of Supervisors to authorize a Conservatorship Justice Project to be operated by Office of the District Attorney. The Board should also convene an Advisory Committee on Conservatorship Justice. The committee would make recommendations to the Board, the District Attorney, and all agencies that participate in the conservatorship process on how to improve access to justice to seniors and people with disabilities who are involved in these proceedings.

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