

Part Two: How Regional Centers Should Perform Conservatorship Assessments and How the State Should Fulfill Its Oversight Duties

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Statutory and contractual duties of regional centers for conservatorship assessment services, and the corresponding oversight responsibilities of the Department of Developmental Services, were discussed in Part One of these dual commentaries.

Regional centers have a duty to assess clients involved in limited conservatorship proceedings in accord with statutory requirements. They submit reports to the probate court containing their findings and recommendations on issues that will be discussed in detail below.

The department provides funding to regional centers to perform services in a manner specified in contracts between DDS and the regional centers. As explained in Part One, there is a provision requiring regional center services to be conducted in compliance with state and federal laws. Such laws include statutes in the Probate Code and Welfare and Institutions Code dealing with conservatorship assessments, as well as ADA requirements in the Government Code.

These contracts require regional centers to have annual performance objectives and to specify steps to be taken to ensure contract compliance. These provisions imply that, as a signatory to the contracts and funding source for these services, that DDS will monitor contract compliance. From statements made by DDS in response to public records requests, as well as in a face-to-face meeting with representatives of Spectrum Institute, it appears that DDS has not been fulfilling its oversight responsibilities in connection with conservatorship assessment and reporting services by regional centers.

The time has come for DDS to start fulfilling its obligations to provide guidance to and conducting monitoring of the conservatorship assessment and reporting services of all 21 regional centers.

At a recent in-person meeting, a representative of the department indicated that under current law DDS does not have authority to provide guidance to regional centers regarding these services. In addition to the statutory and contractual provisions set forth in Part One that show otherwise, there is explicit language in the Probate Code indicating that DDS has authority to provide such guidance.

Making reference to conservatorship assessment reports, Probate Code Section 1821 mentions “guidelines adopted by the State Department of Developmental Services for regional centers” Even without such explicit language, DDS clearly has monitoring responsibilities, but this phrase should dispel any possible doubt regarding the authority of DDS to issue guidelines.

Having laid the foundation for statutory and contractual duties of DDS and regional centers pertaining to conservatorship assessment and reporting services, the next step is to explain what contractual and statutory compliance would look like – both for regional centers in performing these services and for DDS in fulfilling its guidance and monitoring responsibilities.

As a foundational matter, it is essential to understand the procedural context in which regional center assessment and reporting services occur. A brief description of the pleadings and procedures in the limited conservatorship process will help.

Petition

A conservatorship proceeding is initiated by the filing of a petition with the superior court. Usually

it is handled through the probate division or by the clerk and judge who process probate cases.

Here we are focusing only on petitions asking for a conservatorship of an adult who has intellectual and developmental disabilities. A petition may be filed by a spouse, relative, or any interested person, government agency or official. (Probate Code Section 1820)

The petition specifies whether a general conservatorship or limited conservatorship is being requested, who should be appointed as conservator, and why the conservatorship is necessary. If a limited conservatorship is being sought, the petition must also specify which of seven powers the court is being asked to transfer to the conservator and the corresponding limitations on the civil rights of the proposed conservatee. (Probate Code Section 1821)

Medical Capacity Declaration

A medical capacity declaration must be filed if the petition asks the court to transfer medical decision-making authority to the conservator. Judicial Council form GC-335 is used for this purpose.

The assessment may be done by a physician or psychologist. The practitioner renders an opinion only on whether the proposed conservatee lacks the ability to give informed consent to any form of medical treatment.

There is no mechanism in place to monitor the quality of these medical capacity assessments.

Notice to Regional Center

If the proposed conservatee is a person with a developmental disability, the regional center must be given notice of the proceeding at least 30 days before any hearing occurs on the petition. (Probate Code Section 1822(e)) This requirement applies to all conservatorship petitions, regardless of whether a general or limited conservatorship is being requested.

Appointment of Counsel

In any proceeding to establish a limited conservatorship, the court shall immediately appoint an attorney to represent the proposed conservatee. (Probate Code Section 1471(c)) Appointment of counsel in such proceedings is mandatory.

If the petition seeks to establish a general conservatorship, appointment of counsel for the proposed conservatee is not mandatory unless the person requests appointment of counsel. If no request is made, appointment of counsel is left to the discretion of the court. (Probate Code Section 1470)

One regional center has reported that upwards of 80 percent of clients in conservatorship proceedings do not receive counsel because the petitioner has filed for a general conservatorship, thereby bypassing the statutory requirement for mandatory appointment of counsel. In these cases the court has obviously decided not to exercise its discretion to appoint counsel. The extent to which other regional centers have the same experience with clients not having counsel appointed in conservatorship cases is unknown.

Audits of cases in Los Angeles County shows that many court-appointed attorneys provide the most minimal of services. They review the petition, talk to the petitioners, spend a very short amount of time with their client, and review the regional center report and court investigator report. Most of them do not interview relatives or friends of the client, nor do they speak with the client's doctor or teacher or service providers.

Although these attorneys could request a regional center to conduct a special Individual Program Plan (IPP) review, they never do. Even though they could ask the court to appoint an expert or experts under Evidence Code Section 730 to evaluate the client's capacities in some or all of the decision-making areas in question, or to evaluate the viability of less restrictive alternatives to conservatorship, they don't do that either.

In many cases I have audited, attorneys spend five or fewer hours from start to finish. There are almost never any objections or motions filed, and contested hearings are rare. Appeals don't occur.

An attorney practicing in probate court in one Northern California county explained that the public defender represents respondents in limited conservatorship cases there. He reported that the public defender meets his clients for the first time in the courthouse on the day of the hearing and spends just a few minutes with the client before appearing in the courtroom. There is no way that such limited interaction provides access to justice for the client.

Trainings of court-appointed attorneys in Los Angeles County are severely deficient. There are no performance standards for the attorneys, nor is there any monitoring of the quality of legal services provided by the attorneys to these clients.

Court Investigator

A court investigator must, at a minimum, interview the proposed conservatee, the petitioners, the proposed conservators, and relatives of the first degree which includes parents and children. (Probate Code Section 1826)

The investigator is required to review the supplemental information form submitted by the petition and consider whether the facts therein show: (1) that the proposed conservatee lacks the ability to care for his or her own basic needs; (2) whether alternatives to conservatorship are viable; and (3) whether the proposed conservatee can handle his or her own finances and whether he or she is able to resist fraud or undue influence. (Probate Code Section 1826(a)(4)(b))

The investigator shall determine if the proposed conservatee wishes to contest the conservatorship or objects to the proposed conservator or prefers someone else to be conservator. (Probate Code Section 1826(a)(5) and (6))

To the extent practicable, the investigator shall consider whether he or she believes that the proposed conservatee has any mental function deficits affecting the ability to contract, marry, or make medical decisions, or that impair his or her ability to appreciate and understand the consequences of decisions regarding finances or basic needs. (Probate Code Section 1826(a)(4)(B))

The investigator shall file a report to the court at least five days before the hearing concerning all of the foregoing matters, as well as whether the proposed conservatee wishes to have counsel appointed. (Probate Code Section 1826(a)(11))

The extent to which a court investigator is able to fulfill the duties set forth in these statutes will depend, in large measure, by his or her caseload. This will vary from court to court.

Testimony of the presiding judge of the probate court in Los Angeles before the Senate Judiciary Committee in 2015 indicated that investigators are so overloaded that they can only spend one day a week in the field. With this in mind, the number of open cases (10,394 limited, 6,006 general) for which they have responsibility to conduct annual or biennial reviews, plus a deluge of new cases each year, would require them to make nine home visits on that one day. Thus, investigators lack the ability to conduct a quality investigation in conservatorship cases.

Qualifications for being a court investigator are minimal. (Rule 10.777 of the California Rules of Court) An investigator must have a bachelor of arts or bachelor of science degree in social science, behavioral science, liberal arts, or nursing. A minimum of two years work experience is required in casework or investigations in a legal, financial, law enforcement, or social services setting. These requirements may be waived by courts with eight or fewer judges.

Continuing education requirements specify that court investigators shall have training in elder and dependent adult abuse, but the quality and extent

of such training is unknown. They are also required to have training in interviewing persons with “mental function or communication deficits” but the quality and extent of such training is also unknown. (Rule 10.478)

Local courts are responsible for tracking compliance with these educational requirements. (Rule 10.474(e)) Such monitoring may or may not occur.

Even though court investigators are supposed to give an independent and neutral evaluation of cases, the fact still remains that they work for the court. Therefore, if it chooses to, the court can minimize the role of these investigators in limited conservatorship cases – for financial reasons or otherwise.

Since there is no central administrative oversight by the state, virtually never any appeals, and no executive branch agency to monitor what the local courts do, minimizing or eliminating the role of court investigators would go unchallenged.

For example, in recent years the Los Angeles Superior Court entirely eliminated the use of court investigators for initial filings in limited conservatorship proceedings. Individual court-appointed attorneys did not challenge this action by the court. Instead they participated in it.

The court would ask the court-appointed attorney and the petitioner to stipulate that the report of the attorney would be used instead of an investigator’s report. An audit that I conducted of a significant sample of cases showed that such stipulations were routine. Unfortunately, the investigations of court-appointed attorneys were minimal and their reports were shallow, and therefore were not an adequate substitute for reports by court investigators.

Regional center reports became even more important during this era of waivers of court investigator reports – an era that lasted for several years in Los Angeles. Whether such a cost-saving tactic was used by courts in other parts of the state is unknown.

Court investigators are paid out of the budgets of the local superior courts. The beneficiaries of these investigative services – people with developmental disabilities – had no way to push back against these cuts or to complain that they were depriving these involuntary litigants of access to justice, thereby violating the ADA.

Judicial Duties

A judge is assigned to each conservatorship case. A petition for a conservatorship may only be granted by the judge if there is clear and convincing evidence that the proposed conservatee is unable to care for his or her basic needs. (Probate Code Section 1801) The court must find that a conservatorship is the least restrictive alternative for the protection of the conservatee. (Probate Code Section 1800.3(b))

At the hearing, the judge must decide whether to transfer any of the seven powers from the proposed conservatee to the conservator, there must be clear and convincing evidence. The court shall define the powers and duties of the limited conservator so as to permit the developmentally disabled adult to care for himself or herself or to manage his or her financial resources commensurate with his or her ability to do so. (Probate Code Section 1828.5(e))

A limited conservatorship may be utilized only as necessary to promote and protect the well-being of the individual, shall be designed to encourage the development of maximum self-reliance and independence of the individual, and shall be ordered only to the extent necessitated by the individual’s proven mental and adaptive limitations. The conservatee of the limited conservator shall not be presumed to be incompetent and shall retain all legal and civil rights except those which by court order have been designated as legal disabilities and have been specifically granted to the limited conservator. (Probate Code Section 1801(d))

In making these determinations, the court receives information from the petitioner, court investigator, attorney for the proposed conservatee (if one has

been appointed), and the regional center (assuming proper notice has been given, which sometimes is not the case).

Generally, the only professional opinion submitted by the petitioner is a medical capacity declaration showing that the proposed conservatee lacks the capacity to make informed medical decisions. Professional evaluations of capacity in the other six areas of decision-making are not required and therefore are usually not submitted by a petitioner.

While court investigators may include their personal belief as to capacity in one or more of these areas in their reports, investigators lack the qualifications to render a professional opinion on the proposed conservatee's capacity to make decisions on finances, education, residence, marriage, social contacts, or sexual practices.

Although attorneys can ask for appointment of a professional to evaluate capacity in each of the seven areas in question, or to evaluate the viability of less restrictive alternatives, audits in Los Angeles County show that they never do.

Therefore, when the court is evaluating evidence on capacity and less restrictive alternatives, it almost never has the opinion of an expert on any matter other than the proposed conservatee's capacity to make informed medical decisions. Even then no one monitors whether the physician has experience treating or evaluating patients with intellectual and developmental disabilities or whether the physician spent enough time with the patient – using available accommodations and supports – to conduct a thorough evaluation.

A high volume of cases and huge case loads also affect the ability of judges to pay proper attention to each limited conservatorship case. For example, the acting presiding judge of the probate court in Los Angeles recently told a gathering of attorneys at a seminar that he is faced with 80 cases on his docket when he sits down at his desk in the morning. Then another 80 cases the next day, and the next. Imagine the pressure on judges to keep cases

moving and the relief they feel when cases are settled without the need for an evidentiary hearing.

It is with all of this in mind that the focus is turned to the importance of the regional center's assessment and reporting services in these cases. Judges would benefit from having a thorough report from a regional center based on a properly conducted assessment.

Regional Center Assessments

If they are done properly, regional center conservatorship assessment and report services would be vital to the integrity of conservatorship proceedings. Assessments done by qualified individuals would fill an evidentiary gap in proceedings that too often operate in a perfunctory manner.

Current Practices

My own audits of court files in Los Angeles have revealed that regional center reports are not always used by judges. In some cases when a regional center report has not been filed in a timely manner, a judge will grant a conservatorship without it.

In an interview with the presiding judge of the probate court in Los Angeles I was told that some judges do not have high regard for regional center reports. He gave an example as to why. Many reports recommend that the right to marry be retained by the proposed conservatee but that the power to enter into contracts be taken away. The judge said this does not make sense. Marriage is an important contract with significant financial and other ramifications.

Other information about current practices is contained in a thesis paper written by Barbara Imle for her Master in Arts Degree in Social Practice at California State University San Marcos. The 2016 paper is titled "California's Double-Edge Sword: Exploring Regional Centers, Limited Conservatorship Policies, and Implications for Adults with Intellectual and Developmental Disabilities."

This appears to be the first study to survey all 21 regional centers on their conservatorship assessment and reporting services. Considering the contractual obligations of regional centers to DDS, this is something that DDS should have done long ago and something which should have been updated by DDS periodically.

Sixteen of the 21 regional centers completed a survey sent to them by Imle. Ten of them completed a follow-up interview. The study was designed to elicit information about internal policies and trainings regarding the regional center's role in conservatorship proceedings.

Some of the findings of the study raise serious concerns that some clients are not receiving access to justice as required by the ADA. They also demonstrate that state statutes on conservatorship assessments are not operating uniformly throughout the state as required by the California Constitution. (Article IV, Section 16) The lack of uniformity – with clients in some areas getting the full benefit of the law, while clients in other areas are not, raise additional concerns of disability discrimination and denial of equal protection of the law.

The findings of the study show that among participating regional centers:

- * 87% require a meeting with the client prior to making recommendations to the court.
- * 68% include the client's wishes in their assessment and report.
- * 60% reported that a majority of limited conservatorships request all seven powers, with another 20% saying that half of the requests are for all seven powers.
- * 53% require that all powers being requested be discussed with the client.
- * 44% require training on limited conservatorships for service coordinators and managers.

Among the most common issues mentioned by regional center representatives in open-ended survey answers and interviews were:

- * 62% mentioned the lack of guidelines for conservatorship assessment and reporting services. They reported that their role in conservatorships is unclear and they mentioned a lack of streamlined requirements and expectations as a problem.
- * 62% reported that budget constraints limit their involvement in conservatorship cases.
- * 56% reported that clients, families, schools and advocates are lacking access to quality resources on conservatorships and alternatives or that families are unable to afford fees associated with conservatorships.
- * 44% reported that local schools strongly push or even scare families into seeking conservatorships at the age of 18.

Five of the responding regional centers reported the majority of conservatorship cases they see are for general and not limited conservatorships. One respondent said that in 2015 they received notices of 58 limited conservatorship petitions as compared with 187 general conservatorship petitions.

The thesis paper commented on this, stating that this regional center "explained that this is a way families get around having Regional Centers provide the courts with an assessment," adding that requests for a general conservatorship are also a way of avoiding a public defender being appointed to represent the regional center client.

With all the conversations occurring about supported decision-making, it seems amazing that only one of the 16 participating regional centers said that it discusses SDM in the conservatorship assessment process. With the other 15 respondents, SDM was not an active consideration.

The thesis paper stated: "Budget constraints are also reflected in the fact only 44% of participants

reported that training is mandatory for service coordinators and managers. Not having a designated budget for probate-related activities is setting up the Regional Centers to fail as advocates because they are not able to create the tools they need to be successful.”

The paper added: “This is an example of the discretion each Regional Center has because they are at liberty to decide how many company resources they are willing to spend on conservatorship proceedings. The law requires they complete an assessment, but no law ensures that each Regional Center puts the same amount of time and consideration into these reports. This creates conflict due to economic restraints and leads to institutions prioritizing cost efficiency over individual needs This results in alienation as clients are seen as a number, or object and not a human, which means that services are not individualized.”

The paper also commented on the failure to conduct assessments tailored to the needs of each client, stating: “Findings show that 12 participating Regional Centers (80% of respondents) report that more than half, or the majority of limited conservatorship requests are for all seven powers. Such findings should serve as red flags that policies are not being implemented as they were intended, as limited conservatorships were specifically designed to protect the rights of this population (Hunsaker 2008); but general conservatorship requests continue to be made. These findings uncover a strong disconnect between the intent of the law and its actual impact. My research reflects that the majority of conservatorship requests are for all 7 powers which reflects a major contradiction as they were created with the intent to *limit* the power held by the conservator (Hunsaker 2008) and thus does not follow CDT’s tenant of preserving the rights of people with disabilities.”

Developing Uniform Protocols

Once a regional center receives notice that a client is a respondent in a conservatorship proceeding,

someone should be designated to take the lead in coordinating the required assessment and writing the report to the court as required by Probate Code Section 1827.5(a).

The lead person should receive training on both legal requirements and clinical assessment practices. To ensure uniformity of policy and practice, DDS should issue regulations or guidelines on the assessment and reporting process.

Conservatorship assessments must be done by a qualified individual. Information shall be obtained from the client, relatives, friends, advocates, and service providers. The information is used to submit findings and recommendations to the court on whether: (1) a conservatorship is necessary; (2) less restrictive alternatives have been considered and whether they are viable or not; and (3) any of the seven powers should be transferred to the conservator or whether the client should retain rights in some or all of the seven areas.

The person assigned to gather the information and write the report need not have the qualifications to render a professional opinion on these issues. He or she must identify and retain professionals who are qualified, review relevant records, and interview the individuals listed above. A thorough records review, consultation with qualified professionals, and interview of all relevant persons, will form the basis of a proper and thorough report.

Records to be reviewed should include: (1) The most recent few IPP reports and updates; (2) the most recent few IEP reports if the client is or recently was in school; (3) reports from service providers; and (4) any clinical or professional reports involving the client.

The report writer should also obtain and review a copy of the petition for conservatorship, confidential questionnaire, medical capacity declaration, and any supplemental materials submitted to the court by the petitioner.

Once these documents have been obtained, it

would be appropriate for an IPP review to be initiated. “For all active cases, individual program plans shall be reviewed and modified by the planning team, through the process described in Section 4646, as necessary, in response to the person’s achievement or changing needs.” (Welfare and Institutions Code Section 4636.5(b)) The filing of a conservatorship petition indicates such a need.

The statutory purpose of the IPP process coincides with the type of assessment needed for a conservatorship proceeding: “Gathering information and conducting assessments to determine the life goals, capabilities and strengths, preferences, barriers, and concerns or problems of the person with developmental disabilities.” (Welfare and Institutions Code Section 4646.5(a)(1))

Assessments pursuant to an IPP process “shall be conducted by qualified individuals.” (Welfare and Institutions Code Section 4646.5(a)(1))

In connection with conservatorship proceedings where the Director of DDS is nominated to act as the conservator, the Legislature has specified the qualifications necessary for the individuals who conduct the relevant assessments.

A regional center report must include a current diagnosis of the client’s physical condition “prepared under the direction of a licensed medical practitioner” and “a report of his current mental condition and social adjustment prepared by a licensed and qualified social worker or psychologist.” (Health and Safety Code Section 416.8)

There is no reason why lesser qualifications are permissible for regional center assessments when someone else is designated as conservator. An assessment is not done for the benefit of the conservator, but for the benefit of the proposed conservatee and the judge who will consider the assessment in making a ruling on the petition.

Once all of the records are reviewed, interviews conducted, assessments are done by qualified individuals, and the IPP review process is com-

plete, the report to the court can be written.

It is not appropriate to get deeper into the details now of how a proper and thorough conservatorship assessment and report should be done. Uniform policies and procedures should be created through a collaboration of regional centers (perhaps by ARCA) with DDS.

DDS Guidance and Monitoring

The department has a statutory responsibility to ensure that regional center services comply with state and federal laws. That is why funding from DDS to regional centers has strings attached.

There are relevant clauses in these contracts requiring regional centers to comply with state statutes, which necessarily includes statutes regulating conservatorship assessment services. Contractual provisions require annual performance objectives as well as specifying steps to be taken to ensure contract compliance.

The time has come for DDS to start fulfilling its obligations to provide guidance to and conducting monitoring of the conservatorship assessment and reporting services of all 21 regional centers.

If inadequate funding is one of the impediments to regional centers providing such services in compliance with applicable state and federal laws – including the ADA – then regional centers and ARCA should work with DDS to secure additional funding. In the meantime, DDS should develop guidelines and monitoring mechanisms in consultation with ARCA, self-advocates, parent-advocates, disability service organizations, and disability rights agencies and organizations. ♦♦♦

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