Social Rights Advocacy for Adults with Autism

Forced Socialization of Conservatees is Never Acceptable

by Thomas F. Coleman

Adults with autism or other developmental disabilities often become the subject of a limited conservatorship proceeding. These adults may need legal protections and oversight to assist them in navigating through a complex and complicated world.

A parent may initiate a petition for limited conservatorship, asking the court to appoint them, or someone else, to make certain decisions on behalf of their adult child who has a developmental disability. The other parent, if there is one, has the right to participate in the court proceeding. The adult child has the right to have an attorney to represent his or her interests, independently of the parents.

Sometimes in the course of these proceedings, the issue of visitation becomes a point of contention. Who the conservatee or proposed conservatee will visit, how often, and under what conditions, are issues that may be hotly contested.

California law presumes that limited conservatees have the right to make decisions about whom to visit and under what conditions. It is only in extreme circumstances that a court will strip the conservatee of social decision-making rights and give authority to a conservator to make such decisions.

Parents of an adult with autism or other developmental disabilities may have their own agenda when it comes to visitation issues. That agenda may or may not be in the best interest of their adult child. That is why it is so important for conservatees to have their own independent attorney.

California law allows a judge to appoint an attorney to represent the interests of a conservatee. If the conservatee requests an attorney, the court *must* appoint such an attorney. When a request is made, the appointment of an attorney for the conservatee is no longer optional; it is mandatory.

Once an attorney is appointed, California law makes it clear that the conservatee has the right to *effective assistance* of counsel. This requires the attorney to perform reasonably competent services as a diligent and conscientious advocate.

If the attorney for the conservatee does not perform in such a manner, the conservatee is entitled to complain to the court and ask for another attorney. Once such a complaint is made, the court must conduct a hearing, outside of the presence of the other parties, to allow the conservatee to privately explain what his attorney's failings have been. (*People v. Hill*, California Court of Appeal, Fourth District, Div. Two, Case E054823, filed 9-11-13.)

The conservatee may also file a complaint with the state bar association or sue the attorney for malpractice. However, the meaningful exercise of the right to complain may require assistance by a friend-of-the-court or a court-appointed-special-advocate (CASA) since a conservatee has, by definition, limited abilities to be a self-advocate. (As it now stands, the CASA system is only used in dependency court for minors and not in probate courts.)

The First Amendment to the United States Constitution protects the freedom of speech of all persons, people with developmental disabilities included. The due process clause of the Fourteenth Amendment protects the freedom of association. Comparable clauses in the California Constitution protect these rights as well.

The right of an adult with a developmental disability to make social decisions falls under the protection of these constitutional provisions. Courts may not restrict such rights without affording a conservatee procedural due process of law, which means there must be a hearing to determine whether the facts warrant such a restriction.

Even then, a court may only restrict such rights if there is a compelling need to do so, and even then, may only use the least restrictive means necessary to accomplish the compelling objectives.

These procedural and substantive constitutional rights are meaningless if the attorney appointed to represent the conservatee stipulates away those rights or does not demand a hearing. Constitutional rights are worthless if they are thrown away or abandoned by a conservatee's attorney.

In order to provide *effective* assistance, competent counsel representing a conservatee must investigate the facts, interview his or her client, and allow the client to participate in strategic decisions.

Investigating the facts would include obtaining and reviewing all documents pertaining to the client's level of competency, such as educational records. Interviewing the client's therapist and the Regional Center case worker would be necessary. To understand the client's abilities, the attorney should visit the residence, place of work, school, and interview people who regularly interact with the client.

If the client has a communication disability, the attorney should investigate how the client communicates with others at school or home. The attorney should avail himself or herself of any adaptive technology that is available to assist the attorney and client to communicate with each other.

Failure to use available adaptive communication technology would be a violation of the client's rights under the Americans with Disabilities Act and could subject the attorney to discipline or liability. It could also be the basis for a complaint to the judge who appointed the attorney, or for an appeal.

An attorney for a conservatee should never tell the court that his or her client lacks capacity to make decisions or lacks the ability to communicate if, in fact, this is not the case. If such a representation is inadvertently made to the court, it should be corrected as soon as possible.

A diligent and conscientious advocate would always oppose any order or proposed settlement that fails to respect the client's right to say yes or no to any specific visitation scheduled for any given date.

If a visitation schedule is presented for the sake of orderliness, the attorney for the conservatee should create a record, preferably in open court, that the client has been informed of the right to reject all visitation or to say yes or no to some visits. When a visitation date arrives, the client should know that there is a right to reject such visitation, even at the last minute. If a visit is in progress, the client should know there is a right to terminate the visit and to ask to be returned home in a reasonably timely manner.

It is only if a conservatee is informed of these rights, on the record, that the conservatee's constitutional rights to freedom of speech and freedom of association are truly being protected.

Forced social contacts should be no more permissible than would be forced sexual encounters. Any adult, conservatee or not, has the right to veto a sexual relationship or to terminate one that started off as voluntary. No one, not even a judge, has the right to force or indirectly pressure a conservatee to have a sexual encounter against his or her will. Forced social contacts should be off limits as well.

Any stipulation or agreement that attempts to override a conservatee's *ongoing* authority to reject or terminate any specific visit or social interaction should be deemed void in violation of public policy.

Conservatees are entitled to have an attorney acting as a diligent and conscientious advocate, which requires an investigation of the facts, communications with the client, using appropriate adaptive communication technology, and vigorous protection of the client's social decision-making rights.

The weakest link in the constitutional chain that safeguards due process and freedom of association for adults with autism or other developmental disabilities is the right to competent counsel. This link needs to be monitored and strengthened.

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