Mental Health Project
Disability and Guardianship Project

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July 21, 2021

California Supreme Court
350 McAllister St, Room 1295
San Francisco, CA 94102

ADMINISTRATIVE DOCKET

Re: Convening a Workgroup on Conservatorship Right to Counsel Standards

To the Court:

Public confidence in the fairness of the conservatorship system in California has been steadily eroding. This is occurring due to increased media scrutiny of the manner in which judges and probate attorneys process these cases.

All too often vulnerable adults are placed into conservatorships without regard to the availability of less restrictive protective measures. Quite frequently conservatorship proceedings result in a huge depletion of assets to pay for the fees of attorneys for petitioners, conservators, and attorneys appointed to represent these adults.

Judges and attorneys who operate these protective proceedings have been getting bad press for many years. Then Chief Justice Ronald George was able to diminish public outrage when he convened a Probate Conservatorship Task Force in 2007. Unfortunately, this well-meaning gesture changed very little in the systemically flawed conservatorship process due to the failure of the Legislature to fund most of the reforms suggested by the Task Force.

This Court was recently advised that systemic problems with the conservatorship system are as great today as they were in 2007. (*Conservatorship of O.B.* (2020) 9 Cal.5th 989 - Amicus Curiae Brief of Spectrum Institute, pp. 64-74) Virtually every moving part of the system is not functioning as the Legislature intended. Instead of each case being assessed carefully by judges, and proposed conservatees receiving a proper legal defense of their liberty and property, the cases are processed with assembly-line efficiency. As explained in the Amicus Curiae Brief, the pattern and practice of errors, omissions, and abuses by judges is the result of a lack of accountability due to complacency by court-appointed attorneys who go along to get along rather than providing clients with effective advocacy.

Spectrum Institute has been studying the operations of the conservatorship system in California for more than seven years. Auditing dozens of case files. Interviewing proposed conservatees and their families. Meeting with judges. Attending training programs for court-appointed attorneys. Consulting with public defenders. Comparing the procedures contemplated by relevant statutes and mandated by due process with what is actually occurring in practice. The result of this research shows a well-intentioned system in theory

that in reality is an efficiently run process that moves only in one direction – toward an order of conservatorship. The reason for such a "cookie cutter" approach to conservatorship proceedings is a lack of transparency and accountability for judges and appointed attorneys.

Research suggests that fewer than 10% of probate conservatorship petitions in California are denied and that petitions to terminate conservatorships are filed infrequently. Contrast this with outcomes in Nevada where robust advocacy by the Legal Aid Center of Southern Nevada resulted in 25% of initial petitions being denied last year, either as unwarranted or because less restrictive protective measures were available. Some 25% of the Center's caseload in 2020 involved successful termination petitions. All because of zealous advocacy.

This Court was recently informed that the lack of concern for less restrictive alternatives in California is so obvious that a finding on this issue is pre-printed on the Judicial Council form for the conservatorship order. A judge does not even have to check a box on the form. (*Conservatorship of O.B.*, 2d Civil No. B290805, Request for Depublication)

The purpose of this communication is not to educate this Court of the wide range of problems with the probate conservatorship system, the ongoing violation of due process rights of conservatees and proposed conservatees, and the failure of judicial branch leaders to address these problems. The justices of this Court, members of the Judicial Council, and management of the State Bar have been repeatedly advised of these problems through a steady stream of letters and reports for several years. (Communications to California Judicial Branch About Systemic Problems in Conservatorships: 2014 - 2020) Members of the bench and bar have also learned about flaws in the probate conservatorship system through dozens of commentaries published by the Daily Journal legal newspaper from 2015 to the present. (Disability and the Law: A Compendium of Commentaries - June 1, 2021)

Despite such warnings to leaders in the judicial branch, not much has been done to address these problems. Action should be taken now – before public confidence in the ability of the judiciary to administer the conservatorship system with fairness drops any further.

Although all parts of the conservatorship system are in disarray, the underlying source of this dysfunctional situation is the systematic violation of the right to counsel. As the body overseeing the State Bar and the entity that promulgates the Rules of Professional Conduct, this Court has authority to investigate and remedy violations of the due process right of conservatees and proposed conservatees to effective assistance of counsel.

If each individual with funds has an attorney of choice or those without assets have a competent and loyal appointed attorney, the flaws in the conservatorship system will be corrected in due course. When judges or other parties in these proceedings are not following the law, attorneys will raise objections, file motions, demand evidentiary hearings, cross-examine witnesses, produce favorable evidence, and even insist on jury trials. There would be an appropriate number of appeals which would give appellate courts an opportunity to publish opinions instructing trial courts and attorneys on what is permissible and what is not. As things now stand, contested hearings are unusual, court trials are few and far between, jury trials are virtually nonexistent, and appeals are rare. All because attorneys are not appointed at all or those who are appointed – whether public defenders or court-appointed

private attorneys – routinely are surrendering the rights of their clients and settling cases due to high case loads, financial considerations, or as a result of direct or implicit judicial pressure to clear overloaded court dockets. Contested proceedings are strongly discouraged.

This Court should convene a Workgroup on Conservatorship Right to Counsel Standards to address the pervasive violations of the right to counsel that occur on a regular basis throughout the state. Members of the workgroup should not be probate court "insiders" who would not be able to objectively evaluate the status quo. These insiders can be interviewed or submit written testimony to ensure that their views are considered. Objective and neutral members of the workgroup could include appellate justices, retired superior court judges who are not serving as mediators or otherwise in litigation, professors of judicial and legal ethics, a public defender from a county where the public defender's office does not handle probate conservatorships, researchers who have published articles or reports on the conservatorship system, a member of the Commission on Aging and the State Council on Developmental Disabilities, a member of the State Bar's Council on Access and Fairness, the chairperson of the Fair Employment and Housing Council, and others with a commitment to justice.

The mandate of the workgroup would be to investigate violations of all aspects of the right to counsel with the goal of making recommendations for improvement in actual practice. Areas of inquiry should include issues such as: the right to an attorney of choice; mandatory appointment of counsel for those without one; the role of counsel as a loyal advocate; the lack of performance standards for appointed counsel; the caseloads of public defenders; the adequacy of county funding for conservatorship legal defense services; the role of the public defender for adjudicated conservatees in "life of the case" representation; local court rules that give counsel a dual role; the ethics of judges operating legal services programs; the adequacy of training programs; the lack of quality assurance controls; the adequacy of funding for legal services for indigents; the lack of accessibility of conservatees and proposed conservatees to the State Bar's complaint system; the failure to appoint attorneys on appeal for conservatees; and the adequacy of training of appellate counsel.

This time-limited workgroup would issue a report to the Supreme Court with recommendations for the establishment of standards to protect the right to effective assistance of counsel for conservatees and proposed conservatees through: (1) amendments to the Rules of Professional Conduct to clarify the role of appointed counsel for litigants in such cases; (2) the establishment of performance standards such as has been done in Massachusetts and Maryland for adult guardianships and has been done in California for counsel for parents and children in dependency cases; (3) clarification of the Rules of Judicial Ethics to address ethical concerns with judges operating legal services programs for court-appointed attorneys; (4) modifications to the complaint system of the State Bar to make it more accessible, directly or indirectly, to litigants with cognitive disabilities; (5) amendments to the California Rules of Court to prohibit local court rules that give appointed counsel a dual role or that interfere with litigants exercising their right to retain an attorney; (6) amendments to the Standards of Judicial Administration to advise judges that appointment of counsel may be a necessary modification or accommodation for litigants with cognitive disabilities, even without request, in order to fulfill the court's duties as a public entity under state and federal disability nondiscrimination laws; and (7) new legislation to protect these and other elements of the right to counsel for litigants with disabilities.

This Court's attention is drawn to some excerpts from a recent article published by the Trusts and Estates Section of the California Lawyer's Association. ("A Lawyer is a Lawyer is a Lawyer," *Trusts and Estates Quarterly*, Vol 25, Issue 1 (2019))

> "Although attorneys have a general obligation to be zealous advocates for their clients, attorneys appointed to represent proposed conservatees in probate courts are routinely encouraged, and even required, to provide the courts with reports regarding their clients. The contents of those reports often violate the attorneys' duty to be a zealous advocate."
>
> "[T]he practice of requiring or encouraging appointed attorneys to report to the court about what the attorney believes is in the best interests of the proposed conservatee should be ended, and California should instead follow state-wide, uniform procedures that encourage appointed attorneys to fulfill their duty to act solely and only as zealous advocates for their clients."
>
> "The attorney who files a report with the court regarding his or her interactions with a client, describing his or her conclusions about the case which might differ from the client's, or describing communications with the client, violates both the duty of confidentiality and the duty of loyalty."

This Court and the Chief Justice sometimes convene workgroups to study pressing issues. For example, this Court convened a Jury Selection Workgroup last year. Three years ago, it convened a California Attorney Practice Analysis Working Group. The Chief Justice has convened four workgroups since 2016: Bias in Court Proceedings; Homelessness, Prevention of Discrimination and Harassment; and Pretrial Detention Reform.

California has about 70,000 adults currently living under an order of probate conservatorship, with approximately 7,000 new petitions being filed annually. Evidence indicates that for many, if not most of them, the right to counsel has been violated or seriously compromised.

Convening a Workgroup on Conservatorship Right to Counsel Standards will not only help identify ways to strengthen the right to counsel for this vulnerable population, it will also send a signal to the public that leaders in the judicial branch are committed to improving the administration of justice in probate conservatorship proceedings.

Respectfully submitted:

Thomas F. Coleman
Legal Director, Spectrum Institute
State Bar No. 56767
tomcoleman@spectruminstitute.org

cc: Jorge E. Navarrete, Supreme Court Administrator
Sean M. SeLegue, Chair, State Bar Board of Trustees

Endorsements

The following organizations join this request to the California Supreme Court to convene a Workgroup on Conservatorship Right to Counsel Standards.

The National Coalition for a Civil Right to Counsel is an association of individuals and organizations committed to ensuring meaningful access to the courts for all. Founded in 2003, its mission is to expand recognition and implementation of a right to counsel for low-income people in civil cases that involve basic human needs. NCCRC has over 300 participants and 200 partners in 40 states. http://civilrighttocounsel.org/

Founded by former Democratic congressman and disability rights icon Tony Coelho, The Coelho Center for Disability Law, Policy & Innovation brings together all of the schools and colleges within Loyola Marymount University. It collaborates with the disability community to cultivate leadership and advocate innovative approaches to advance the lives of people with disabilities. https://www.lls.edu/coelhocenter/

Since 1983, California Advocates for Nursing Home Reform (CANHR), a statewide nonprofit 501(c)(3) advocacy organization, has been dedicated to improving the choices, care and quality of life for California's long term care consumers. Through direct advocacy, community education, legislation and litigation it has been CANHR's goal to educate and support long term care consumers and advocates regarding the rights and remedies under the law, and to create a united voice for long term care reform and humane alternatives to institutionalization. http://canhr.org/

Mental Health Advocacy Services (MHAS) advances the legal rights of low-income individuals with mental health disabilities and empowers them to maximize their autonomy, achieve equity, and secure the resources they need to thrive. MHAS provides free legal services for low-income people, offers training for consumers, families, and advocates, and engages in impact litigation to end discrimination and to promote civil rights. https://www.mhas-la.org/

The Autistic Self Advocacy Network is a 501(c)(3) nonprofit organization run by and for autistic people. ASAN was created to serve as a national grassroots disability rights organization for the autistic community, advocating for systems change and ensuring that the voices of autistic people are heard in policy debates and the halls of power. Its staff works to advance civil rights, support self-advocacy in all its forms, and improve public perceptions of autism. https://autisticadvocacy.org/

Different Brains® strives to encourage understanding & acceptance of individuals who have variations in brain function and social behaviors known as neurodiversity. Its mission has 3 pillars: to mentor neurodiverse adults in maximizing their potential for employment and independence; to increase awareness of neurodiversity by producing interactive media; and to foster the next generation of neurodivergent self-advocates

Sage Eldercare Solutions helps Bay Area families care for their loved ones with expert services that provide for the highest level of individualized care. It also helps families find solutions and care for loved ones living with dementia—and adapting those solutions over time to meet the changing physical and cognitive abilities of its clients. https://www.sageeldercare.com/

LGBTQ Attorneys and Allies is a section of the Long Beach Bar Association. It was created to work with other legal professionals and non-LGBTQ attorneys and focuses on networking, education, and community events to promote and foster diversity. The section has co-sponsored webinars for attorneys on a variety of issues involving probate conservatorship proceedings. The most recent webinar, *Flaws & Fixes*, included proposed reforms to strengthen the right to counsel for conservatees and proposed conservatees.

TASH Founded in 1975, TASH is an international leader in disability advocacy. TASH's mission is to advance equity, opportunity and inclusion for people with disabilities, including those with the most significant support needs, in the areas of education, employment, and community living through advocacy, research, and practice. TASH supports the right of people with disabilities to receive the effective assistance of counsel which will help ensure access to justice in probate conservatorship proceedings. https://tash.org/

Kasem Cares is a nonprofit foundation with a mission to raise awareness about elder abuse with a specific focus, through its affiliates, to promote the passage of legislation to prevent isolation of elders by guardians, conservators, and others who have control over the lives of vulnerable seniors. The Kasem Cares visitation bill has been adopted in 12 states with another 9 states passing a version of it. https://www.kasemcares.org/

Attachments

Communications to California Judicial Branch About Systemic Problems in Conservatorships

2014 - 2021

Letters, Complaints, and Reports Alerted Judicial Officers, Generally Without Meaningful Responses

The following is a list of communications sent by Spectrum Institute to judicial officers in all levels of trial and appellate courts, as well as to the Judicial Council, for the past seven years alerting them to systemic flaws in the probate conservatorship system. These communications did not involve individual cases but rather invoked the administrative jurisdiction of various courts and judicial branch entities and officers.

The communications asked for investigations and remedial actions to improve access to justice for adults with cognitive and developmental disabilities who are involuntary litigants in proceedings that affect their fundamental liberties. They asked for more transparency and accountability by the judges who run the conservatorship system and the protection courts that have taken control of the lives of some 70,000 conservatees and that process about 7,000 new conservatorship petitions annually.

Recipients of these communications included the California Supreme Court, Chief Justice, Judicial Council, First and Second District Court of Appeal, Los Angeles County Superior Court, Alameda County Superior Court, and Sacramento County Superior Court.

Many communications focused on violations of the right to counsel for conservatees and proposed conservatees, including: failure of judges to appoint counsel for litigants with known cognitive disabilities in Sacramento and other counties; inadequate and misleading training programs for court-appointed counsel in Los Angeles; judicial ethics violations by court-managed legal services programs throughout the state; a local court rule in Los Angeles that creates an ethical conflict of interest for appointed counsel; a local court rule in Alameda that creates a monopoly for a private law firm; lack of accessibility for conservatees to the complaint and discipline system of the State Bar; lack of performance standards for court-appointed counsel throughout the state; failure to appoint counsel on appeal for litigants with known cognitive disabilities; no quality assurance controls or monitoring of the performance of court-appointed attorneys; failure of attorneys to comply with the ADA; and a pattern and practice of ineffective assistance of counsel for indigent litigants in Los Angeles.

Communications to the Chief Justice (2014 - 2020)

15 letters:
https://disabilityandguardianship.org/2014-2020-chief-justice-letters.pdf

Communications to the Supreme Court (2015 - 2021)

9 letters, essays, reports, and briefs:
https://disabilityandguardianship.org/2015-supreme-court-letter.pdf
https://disabilityandguardianship.org/2016-supreme-court-essay.pdf
https://disabilityandguardianship.org/2017-letter-and-enclosures.pdf
https://disabilityandguardianship.org/2018-ethics-report.pdf
https://disabilityandguardianship.org/2019-amicus-brief.pdf
https://disabilityandguardianship.org/2019-supreme-court-ada-notice.pdf
https://disabilityandguardianship.org/2018-supreme-court-letter.pdf
https://disabilityandguardianship.org/2021-op-ed-complaint-system-accessibility.pdf
https://disabilityandguardianship.org/2021-state-bar-ada-alert.pdf

Communications to the Judicial Council (2014 - 2021)

16 letters and reports:
https://disabilityandguardianship.org/2021-jc-data-report.pdf
https://disabilityandguardianship.org/2019-ada-compliance.pdf
https://disabilityandguardianship.org/2015-training-proposals.pdf
https://disabilityandguardianship.org/2015-2018-justice-hull.pdf
https://disabilityandguardianship.org/2014-proposal-to-pmhac.pdf
https://disabilityandguardianship.org/2014-2015-judge-sugiyama.pdf

Communications to the State Bar (2014 - 2021)

21 letters, essays, emails, and reports:
https://disabilityandguardianship.org/state-bar-outreach.pdf

Commentaries (2015 -2021)

30 commentaries in the Daily Journal by Thomas F. Coleman
https://disabilityandguardianship.org/daily-journal-compendium.pdf
1 commentary in the Daily Journal by Hon. Clifford Klein (ret.)
https://disabilityandguardianship.org/klein-commentary.pdf
1 commentary in the California Trusts and Estates Quarterly
https://hplawsd.com/wordpress/wp-content/uploads/2019/07/A-Lawyer-is-a-Lawyer.pdf

Conservatorship

Courts should not be a vehicle for elder financial abuse

By Gloria Duffy

Over the past two decades, elder abuse has not only been recognized as an ethical problem in our society, but as a clear danger for some of our seniors. In California, if an elder is experiencing physical, emotional or financial abuse, family members or others may go to court to protect the senior.

County probate courts establish conservatorships for individuals who cannot look after themselves, appointing a person to watch over and care for them. Unfortunately, this system creates further ethical dilemmas and opportunities for abuse of seniors through the court system itself. Current law permits the senior's funds to be tapped to pay for the legal fees of anyone who questions or objects to the protections. Without strong oversight from the courts, attorneys can profit from this by running up huge fees representing contrary family members and even financial abusers, depleting or exhausting the funds needed for the senior's care.

In 2010, a sibling and I had to go to court, to obtain a conservatorship for my mom. There were serious issues with her health, medical care, hoarding, identity theft, tax payments and misappropriation of her funds. In 2013, the court appointed me as my mom's conservator. I serve without compensation and not only care for her but also attempt to "conserve" her assets by protecting her from financial abuse.

But protecting her assets has proved almost impossible, under current court rules. Over the past 10 years, 14 attorneys have exploited our need to go to court to protect my mom and comply with tax and other laws, running up large bills through specious legal activities. This "elder financial abuse by other means" is particularly serious in counties that do not require attorneys to justify, and courts to examine, how their fees protect a person or their estate.

When a senior has some assets, and attorneys know their bills won't be examined, two or three attorneys from the same firm may jump in, unethically inflating their legal bills. They charge fees for talking to one another, and for having multiple attorneys review the same documents.

In our case, even a non-family vexatious litigant got into the act, scamming the court and our family by posing as a paralegal and requesting compensation through the court. As with all the other legal bills, the court granted his request, because no justification of the fees was required.

All those attorneys have also run up bills for the court-appointed attorney representing my mom and for my attorney, who must respond to the abundant, spurious and always unsuccessful litigation they file. My mom, a completely disabled 97-year-old with around-the-clock care needs, is responsible for paying all these bills.

To counteract this, judges can dismiss attorneys, as has happened twice in my mom's case. But the best protection is strict "local rules of court" that require attorneys to justify their fees as benefiting the protected person's estate.

Santa Clara County recognized this problem, after some notable cases a decade ago. Since 2012, local rules of court in Santa Clara County require that "a petition for compensation of a guardian, conservator, trustee, and counsel, or for counsel for a conservatee or ward, must be accompanied by a complete statement of the services rendered, an explanation of the value or benefit of those services to the estate, and the total amount requested for such services, made under penalty of perjury and executed by the person rendering the services."

Then the judge must examine whether the fees actually benefit the protected person and their estate.

No such stringent local rules of court exist in Alameda, Contra Costa, San Francisco or San Mateo counties, or most other counties statewide. This must be corrected. To stop the kind of abuse that is occurring, county presiding judges, the statewide Judicial Council and the state Legislature must institute local rules of court that prevent financial exploitation through the courts, ideally creating a statewide standard.

From an ethical standpoint, one thing is clear. When they are called upon to protect vulnerable seniors, the courts should not be a vehicle for elder financial abuse.

Gloria Duffy is president and CEO of The Commonwealth Club. This op-ed is based on a presentation to the Silicon Valley Ethics Roundtable, whose input informed and improved it.

ALTA CALIFORNIA
REGIONAL CENTER

2241 Harvard Street, Suite 100, Sacramento, CA 95815. Tel (916) 978-6400

March 17, 2017

Thomas F. Coleman
Legal Director
Spectrum Institute
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Northridge, CA 91324

Mr. Coleman:

I am the Legal Services Manager of Alta California Regional Center (ACRC), a nonprofit corporation organized and existing pursuant to the laws of the State of California and contracted with the State of California to provide services and supports to individuals with developmental disabilities. Part of my responsibility at ACRC is to manage and provide oversight of conservatorships of regional center clients, including reviewing newly proposed conservatorships and monitoring clients under existing conservatorships. Based upon my years of experience in this role, I believe that the current conservatorship law and procedures in California are insufficient to protect the rights of individuals with developmental disabilities.

At our agency, for example, approximately 80% of our conserved clients are under general conservatorship, and not, as you might imagine under limited conservatorship, an arrangement which was designed specifically for Californians with developmental disabilities. And the law and probate courts treat general and limited conservatorships quite differently.

For example, proposed general conservatees are not provided a court-appointed attorney, as are proposed limited conservatees. Further, the Probate Code does not require the regional center to assess the proposed conservatee and file an assessment report for general conservatorship petitions, whereas this is mandatory for limited conservatorship petitions. The net result is that in general conservatorships, the probate courts are deprived of objective test data reflecting the proposed conservatee's level of intellectual and adaptive functioning, as well as the regional center's recommendations regarding conservatorship, in making these incredibly important decisions.

Moreover, I have concerns over the qualifications and focus of the court-appointed attorneys assigned our clients for limited conservatorship petitions. I have personally met court-appointed attorneys who represent themselves as Spanish speaking whose Spanish is so poor that they are unable to communicate with their Spanish-speaking clients. More concerning is the lack of familiarity and training of court-appointed attorneys about individuals with developmental disabilities and their rights. It is my understanding that an individual's attorney should advocate for the client to retain

his/her civil rights. In practice, the court-appointed attorneys I have seen nearly always support removal or restriction of their own client's civil rights. I'm unaware of why this should be different for an individual with a developmental disability.

Additionally, petitioners and their attorneys are often unaware of the legal requirement to serve a copy of conservatorship petitions on the regional center at least 30 days prior to the conservatorship hearing. Savvy courts will not allow conservatorship hearings to proceed until after they receive proof the regional center has served at least 30 days before the hearing. However, I have seen multiple instances of courts granting conservatorship petitions without the regional center receiving notice, much less recommendations—this typically occurs in smaller counties.

Also, in my opinion, the presumption of attorneys and probate courts that parents and family members are always suitable conservators for their relatives with developmental disabilities should be reversed for our clients' protection. In my experience, even the most well-meaning and loving family member, once given conservatorship authority, can easily make decisions which unduly restrict the rights of the conservatee, and at worst, can seriously compromise the individual's health and safety. And the court's statutory biennial review of conservatorships (which does not always occur) has historically been insufficient to prevent this type of abuse.

Finally, conservatorship is not the least restrictive method of providing assistance and protection to individuals with developmental disabilities. Probate Code Section 1821(a)(3) requires conservatorship petitions to list all "alternatives to conservatorship considered by the petitioner or proposed conservator and reasons why those alternatives are not available." In reality, petitioners can simply check a checkbox on the petition form and need provide no explanation whatsoever of why the alternatives were not available. ACRC continues to recommend that clients and families consider and exhaust the use of less restrictive methods for providing assistance and protection to individuals with developmental disabilities before even considering seeking conservatorship. Such alternative methods include, but are not limited to, supported decision making, regional center funded services and supports, the regional center planning team process, powers of attorney, written consents for disclosure of records/information, and assignments of educational decision making rights. I note, however, that local school districts, juvenile dependency courts, and probate attorneys do not share this perspective.

Should you have any questions in this regard to this letter, please do not hesitate to contact me.

Sincerely,

Robin M. Black

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Disability and Guardianship Project

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September 23, 2019

Ms. Rebecca Bond
Disability Rights Section
Civil Rights Division
Department of Justice
950 Pennsylvania Avenue , NW
Washington, DC 20530

Re: Update on ADA Compliance by the State of California

Dear Ms. Bond:

The State of California is systematically violating Section 504 of the Rehabilitation Act of 1973 and Title II of the Americans with Disabilities Act. These violations are occurring in judicial proceedings involving litigants with disabilities. The violations are particularly serious and acute with respect to seniors who have cognitive challenges and adults with intellectual and developmental disabilities involved in probate conservatorship proceedings.

We brought this problem to the attention of the DOJ in 2014 when we filed a voting rights complaint and again in 2015 when we filed a complaint involving deficient legal services that deprive people with disabilities access to justice in court proceedings. The investigation by the DOJ in the first complaint resulted in significant movement toward ADA compliance by the State of California in terms of the voting rights of conservatees. The second complaint is still under review by the DOJ.

Despite our best efforts over the past few years to inform elected officials in all three branches of government about ongoing ADA violations in the probate conservatorship system, not much has changed. Since these officials cannot claim ignorance of the problem, the failure to take corrective actions can best be described as willful indifference. While the primary source of the problem is the judicial branch, officials in the legislative and executive branches are contributing to the situation by failing to take any corrective action.

Tomorrow we are presenting the Judicial Council of California a report titled: "ADA Compliance: A Request to the California Judicial Council to Clarify the *Sua Sponte* Obligations of Courts to Ensure Access to Justice." This report focuses on a problem more generic than the probate conservatorship system. It involves Rule 1.100 and educational materials published by the Judicial Council that misinform judicial officers and court personnel about their affirmative obligations under the ADA and Section 504. This rule and these materials indicate that unless a disabled litigant makes a specific request for an accommodation that courts have no obligation to provide one.

The rules and materials are silent as to the *sua sponte* obligations of courts to provide accommodations for known disabilities that interfere effective communication and meaningful participation in court proceedings and activities associated with such proceedings. The report asks the Judicial Council to take immediate action to amend court rules and educational materials to bring

them into compliance with federal law. Such remedial action will likely cause judges to reconsider current practices that violate the access-to-justice mandates of the ADA and Section 504.

With respect to the probate conservatorship system, we have not only alerted officials in all three branches of government about the ADA violations we have identified, both in policies and practices, but we have made practical suggestions as to what they can do to bring the State of California into compliance with federal law. Appoint qualified and competent attorneys for all conservatees and proposed conservatees. Stop requiring many of them to represent themselves as is done in some counties. Properly train court-appointed attorneys so they are equipped to provide advocacy and defense services that ensure effective communication and meaningful participation for their clients. Develop performance standards so that ADA-compliant legal representation is required rather than voluntary. Devise ways to make the benefits of the State Bar complaint procedure accessible to litigants whose cognitive disabilities preclude them from filing complaints against attorneys who violate ethics or provide ineffective representation. Cure the judicial ethics problem of having the judges who hear these cases also operate the legal services programs that supply the attorneys who appear before them in these cases. Have judges decide cases, not coach conservatorship attorneys on what actions they should take or not take in defending their clients.

While this information may help inform our pending ADA complaints with the DOJ, please do not construe this as a new complaint. This communication and the accompanying materials are for information purposes only – at least at this time. We want to give the Judicial Council, the Supreme Court, and officials in the other branches of government some time to review this new report and take corrective action regarding rule 1.100 and related educational materials.

We also want to give them a some time to respond to the more specific problem of failure to appoint attorneys for conservatees and deficient legal services when attorneys are appointed. However, the pace at which corrective action is taken for the rule 1.100 problem and the conservatorship legal services problem should be quicker than the pace at which a new rule was developed for mandatory training for court-appointed attorneys in conservatorship proceedings. We asked for remedial action in November 2014. A new rule is bring adopted tomorrow – nearly five years later. As laudable as the new training rule may be, the delay in formulating and adopting it is unacceptable.

If the Judicial Council, Supreme Court, and State Bar do not take affirmative steps to address these ADA violations with all deliberate speed, we will approach the DOJ again. However, the next time we bring these matters to your attention we will be making a formal request for your assistance. Unfortunately, since civil rights enforcement agencies in California have declined to address these systemic ADA violations by the judicial branch, it appears that federal intervention may ultimately be necessary to secure access to justice for people with disabilities in California judicial proceedings.

Respectfully,

Thomas F. Coleman
Legal Director
tomcoleman@spectruminstitute.org

cc: Governor Gavin Newsom
Chief Justice Tani Cantil-Sakauye
Assembly Speaker Anthony Rendon
Senate President Eleni Kounalakis

U.S. Department of Justice
Civil Rights Division

Disability Rights Section - NYA
950 Pennsylvania Ave, NW
Washington, DC 20530

June 21, 2019

VIA EMAIL

Thomas F. Coleman
Legal Director
Disability & Abuse Project
2100 Sawtelle Boulevard
Suite 204
Los Angeles, CA 90025
tomcoleman@earthlink.net

Re: *Complaint Filed with the Department of Justice Regarding Court-Appointed Attorneys in Limited Conservatorship Proceedings*

Dear Mr. Coleman:

This letter is to acknowledge that the Department of Justice received your complaints alleging violations under the Americans with Disabilities Act regarding court-appointed attorneys in limited conservatorship proceedings before California courts. The Department has taken no action with your complaint and it remains pending for review.

If you have any questions or additional relevant information, please feel free to contact Elizabeth Johnson at 202-307-3543 or by email at elizabeth.johnson@usdoj.gov.

Sincerely,

Elizabeth Johnson, Disability Rights Section,
Civil Rights Division

Since 1958
LEGAL AID CENTER
of Southern Nevada

2020 Report

Adult Guardianship Advocacy Program and Minor Guardianship Advocacy Program

Executive Summary

In 2015, the Nevada Supreme Court created the Commission to Study the Creation and Administration of Guardianships in Nevada's Courts after allegations of exploitation, neglect and other abuses of persons in guardianship became widely known. The Commission's report, which concluded in September of 2016, recommended statutory and policy changes in guardianship. The 2017 Nevada Legislature enacted numerous guardianship reforms to address the problems identified by the Commission. NRS 159.0485, which became effective on January 1, 2018, mandates that counsel be appointed to represent a proposed protected person in every guardianship matter. Since that time, the guardianship court has appointed Legal Aid Center to represent every person facing guardianship in Clark County if they are unable to retain their own counsel.

Legal Aid Center provides client-directed representation to those facing guardianship, meaning the attorney follows the individual's direction and works to achieve their goals. When the individual is unable to form a traditional client-attorney relationship, the attorney represents the individual's statutory, civil and constitutional rights. The Legal Aid Center Guardianship Advocacy Program (GAP) attorneys have quickly become experts in the field of guardianship law. The GAP unit currently consists of fourteen attorneys, five legal assistants and two legal advocates.

Goal of Representation

The purpose of Legal Aid Center's legal representation in adult guardianships action is to provide the following:

- To ensure that the least restrictive alternative to guardianship is explored and selected before guardianship is considered so as to maximize the independence and legal rights of those who would otherwise be placed under guardianship.
- To provide a voice in court proceedings for seniors and individuals with disabilities who want to contest a guardianship, either because it is deemed unnecessary or because the guardian is abusing their power.
- To protect and represent the due process rights of seniors and individuals with disabilities who are currently saddled with an inappropriate guardian who ignores their needs, exploits them, and/or overbills them.
- To advocate the wishes of seniors and individuals with disabilities in a guardianship action when they want to remain in their home, or, when this is not possible, live in a place of their choosing where they feel safe and comfortable.
- To stop guardians from unilaterally liquidating the property, keepsakes, and heirlooms of a person under a guardianship.
- To ensure that seniors or individuals with disabilities are fully able to communicate their wishes directly to the guardianship court and have those wishes acted upon.
- To recover the property and/or funds of an individual under guardianship through the civil law process when these assets were improperly taken by a guardian.

In 2019, and following the success of the Guardianship Advocacy Program, Legal Aid Center of Southern Nevada was asked to consider developing a similar advocacy program for minors under guardianship. Legal Aid Center accepted our first minor guardianship case in early 2020 after hiring our first minor guardianship attorney. The Minor Guardianship Advocacy Program (MGAP) now consists of a team of four attorneys and one legal assistant. These cases often involve custody and parental rights matters, as well as abuse and neglect issues. These attorneys advocate for their minor clients by ensuring that their voices and wishes are heard and considered and their legal interests are protected. In 2020, our minor guardianship attorneys litigated a very impressive eleven evidentiary hearings.

Representation

Below is a chart showing the numbers of individuals represented in 2020 in GAP and MGAP.

Adult Guardianship Advocacy Program Cases				Minor Guardianship Advocacy Program Cases			
2020	Total Opened	Total Closed	Total Active End of Month	2020	Total Opened	Total Closed	Total Active End of Month
Jan	84	96	1,510	Jan	4	0	6
Feb	75	64	1,555	Feb	9	0	15
Mar	61	55	1,595	Mar	19	0	34
Apr	51	41	1,608	Apr	10	0	44
May	42	29	1,608	May	22	0	66
Jun	62	45	1,654	Jun	32	8	95
Jul	58	66	1,663	Jul	30	16	109
Aug	54	42	1,677	Aug	49	6	152
Sep	61	51	1,678	Sep	55	15	192
Oct	65	46	1,700	Oct	51	18	225
Nov	49	46	1,720	Nov	48	21	252
Dec	48	71	1,704	Dec	24	53	223
Totals:	710	652		Totals:	353	137	

In 2020, our GAP attorneys worked on **2,598** protected person cases and **361** minor guardianship cases.

Outcomes

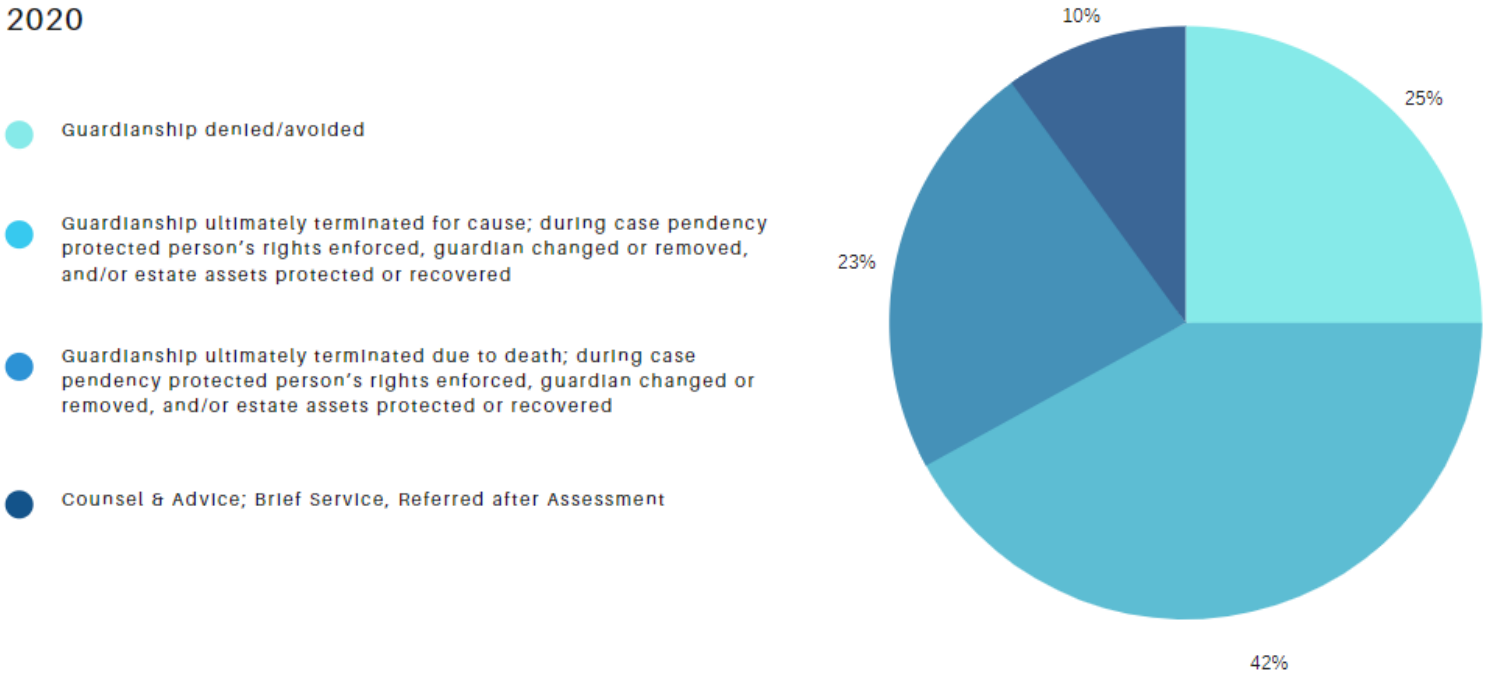
Below are the outcomes for the 652 adult guardianship cases closed in 2020. Guardianship was either denied or avoided in 25% of the cases handled. These cases reflect Legal Aid Center attorneys' ability to identify less restrictive alternatives to guardianship for the proposed protected person or to establish that a guardianship was not necessary. Another 23% of the cases were terminated for cause after the guardianship was granted because the protected person had recovered from a medical event or developed skills and support systems such that they no longer

needed a guardian to manage their affairs. Finally, 42% of the adult cases were terminated due to death and during the pendency of the guardianship, the guardian was changed or removed, assets were protected and rights were enforced.

In the Minor Guardianship Advocacy Program, the Legal Aid Attorneys enforced the rights of minors in 136 closed cases which often meant that the minor's wishes as to the guardianship or the guardian were heard and considered before the court granted the guardianship. These cases included circumstances where minors were in favor of the proposed guardianship, but requested visitation orders to allow them to maintain relationships with parents and other family members. This number also reflects denial of guardianship when the guardianship petition was filed in an attempt to avoid custody or dependency proceedings.

Adult Guardianship Statistics

2020



To: Senate Judiciary Committee
Re: Support for SB 724
Date: April 6, 2021

On behalf of The National Coalition for a Civil Right to Counsel (NCCRC), I write to express our support for SB 724, which would strengthen the right to counsel in probate conservatorship proceedings.

The NCCRC, organized and funded in part by the Public Justice Center, is an association of individuals and organizations committed to ensuring meaningful access to the courts for all. Founded in 2003, our mission is to encourage, support, and coordinate advocacy to expand recognition and implementation of a right to counsel for low-income people in civil cases that involve basic human needs such as mental and physical health. At present, the NCCRC has over 500 participants and partners in 41 states, many of whom are in California.

At present, automatic appointment of counsel only occurs in limited conservatorship proceedings; for full conservatorships, the protected person is appointed counsel only upon request or via a discretionary decision by the judge that "appointment would be helpful to the resolution of the matter or is necessary to protect the [person's] interests." The amended SB 724 rectifies this by specifying the court is to appoint counsel for any protected person who has not retained counsel.

This is the appropriate approach: to treat all types of guardianships and conservatorships the same, regardless of whether the protected person has a developmental disability or whether the conservatorship is temporary or permanent in nature. In all scenarios, the protected persons are equally vulnerable and often incapable of understanding the need for appointed counsel. In fact, counsel is automatically appointed in other similar types of California proceedings. See e.g. Cal. Health & Safety Code § 416.95 (requiring appointment of counsel where State petitions for guardianship or conservatorship of adult developmentally disabled person); Cal. Welf. & Inst. Code § 5465 (requiring appointment of public defender or other attorney in proceeding authorized in certain counties to establish conservatorship due to "serious mental illness or substance abuse disorders"); Cal. Welf. & Inst. Code § 5365 (requiring appointment of public defender or other attorney for conservatorships of "gravely disabled persons"). Moreover, more than half the states currently require the automatic appointment of counsel for all protected persons for all types of guardianship/conservatorship proceedings without requiring a request, demonstrating that this is the accepted best practice.

The proposed bill would implement best practices in California while safeguarding the fundamental rights of protected persons, and we urge you to support it.

Sincerely,

John Pollock
Coordinator, NCCRC

TASH

Equity, Opportunity, and Inclusion for People with Disabilities since 1975

February 22, 2019

To Whom It May Concern:

On behalf of TASH, I write to express our support for the Spectrum Institute's proposed bill to provide effective assistance of counsel in probate conservatorship proceedings.

Founded in 1975, TASH advocates for human rights and inclusion for people with significant disabilities and support needs – those most vulnerable to segregation, abuse, neglect and institutionalization. TASH works to advance inclusive communities through advocacy, research, professional development, policy, and information and resources for parents, families and self-advocates. The inclusive practices TASH validates through research have been shown to improve outcomes for all people.

At present, automatic appointment of counsel only occurs in limited conservatorship proceedings. Cal. Prob. Code §§ 1471(c). For full conservatorships, the conservatee is appointed counsel only upon request or via a discretionary decision by the judge that "appointment would be helpful to the resolution of the matter or is necessary to protect the [person's] interests." Cal. Prob. Code §§ 1471(a), 1470(a). It is our position that with respect to the right to appointed counsel, California law should treat all types of guardianships and conservatorships the same, regardless of whether the person has a developmental disability or whether the conservatorship is temporary or permanent in nature. In both scenarios, the proposed wards in both scenarios are equally vulnerable and often incapable of understanding the need for appointed counsel. In fact, counsel is automatically appointed in other types of California guardianship proceedings. See e.g. Cal. Health & Safety Code § 416.95 (requiring appointment of counsel where State petitions for guardianship or conservatorship of adult developmentally disabled person); Cal. Welf. & Inst. Code § 5465 (requiring appointment of public defender or other attorney in proceeding authorized in certain counties to establish conservatorship due to "serious mental illness or substance abuse disorders"); Cal. Welf. & Inst. Code § 5365 (requiring appointment of public defender or other attorney for conservatorships of "gravely disabled persons"). Moreover, more than half the states currently require the automatic appointment of counsel for all wards for all types of guardianship/conservatorship proceedings without requiring a request, demonstrating that this is the accepted best practice. The proposed bill would implement this best practice in California, and we urge you to support it.

Thank you for your consideration in this matter.

Sincerely,

Ruthie-Marie Beckwith

Ruthie-Marie Beckwith, PhD
Executive Director

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Autonomy, Decision-Making Supports, and Guardianship

Joint Position Statement of AAIDD and The Arc

(right to a state-paid trained attorney acting as a zealous advocate appears under "systems issues")

Statement

All individuals with intellectual and/or developmental disabilities (I/DD)[1]have the right to recognition as persons before the law and to enjoy legal capacity on an equal basis with individuals who do not have disabilities in all aspects of life (United Nations Convention on the Rights of Persons with Disabilities (UN CRPD), 2006). The personal autonomy, liberty, freedom, and dignity of each individual with I/DD must be respected and supported. Legally, each individual adult or emancipated minor is presumed competent to make decisions for himself or herself, and each individual with I/DD should receive the preparation, opportunities, and decision-making supports to develop as a decision-maker over the course of his or her lifetime.

Issue

• Current trends presume the decision-making capacity of individuals with I/DD and the preservation of legal capacity as a priority for all people needing assistance with decision-making.
• Like their peers without disabilities, individuals with I/DD must be presumed competent; they must also be assisted to develop as decision-makers through education, supports, and life experience. Communication challenges should not be misinterpreted as lack of competency to make decisions.
• Individuals with I/DD should have access to supports and experiences to learn decision-making skills from an early age and throughout their lifetimes in educational and adult life service systems.
• Families should have access to information about all options for assisting their family member to make decisions over the life course.
• All people, with and without disabilities, have a variety of formal and informal processes available to enact their decisions and preferences, including healthcare proxies and advance directives.
• Less restrictive means of decision-making supports (*e.g.,* health-care proxies, advance directives, supported decisionmaking, powers of attorney, notarized statements, representation agreements, etc.) should be tried and found to be ineffective in ensuring the individual's decision-making capacity before use of guardianship[2] as an option is considered.
• Where judges and lawyers lack knowledge about people with I/DD and their human rights, poor advocacy and tragic legal outcomes often result. Financial incentives frequently benefit professionals and guardianship corporations, often to the detriment of individuals with I/DD and their families.
• Serving in the dual roles of guardian and paid service provider or paid advocate creates a conflict of interest or the appearance of a conflict of interest. Such conflicts must be mitigated or avoided.
• Some statutory privacy measures have made it more difficult for those assisting other individuals to have access to their records, make decisions, or both. Thus, to obtain or modify needed medical care, services, and supports, an individual with I/DD may be adjudicated to be incompetent and subjected to guardianship. This result conflicts with the legal presumption of competence and with principles of autonomy, decision-making supports, presumption of competence, and the use of less restrictive alternatives.

The appointment of a guardian is a serious matter for three reasons: (1) It limits an individual's autonomy, that is, the individual's agency over how to live and from whom to receive supports to carry out that choice; (2) It transfers the individual's rights of autonomy to another individual or entity, a guardian; and (3) Many individuals with I/DD experience guardianship as stigmatizing and inconsistent with their exercise of adult roles and responsibilities.

Position

The primary goals in assisting individuals with I/DD should be to assure and provide supports for their personal autonomy and ensure equality of opportunity, full participation, independent living, and economic self-sufficiency (Americans with Disabilities Act, 1990, section 12101 (a)(7); Individuals with Disabilities Education Act, 2004, section 1400 (c)(1)). Each individual adult and emancipated minor is legally presumed competent to make decisions for himself or herself and should receive the preparation, opportunities, and decision-making supports to develop as a decision-maker over the course of his or her lifetime. All people with I/DD can participate in their own affairs with supports, assistance, and guidance from others, such as family and friends. People with I/DD should be aware of and have access to decision-making supports for their preferred alternatives.

- If legal limitations on autonomy are necessary, then National Guardianship Association or equivalent standards that are consistent with the values expressed in this position statement should be followed. If any restrictions on autonomy are legally imposed, each individual has the right to the least restrictive alternative, due process protections, periodic review, ongoing training and supports to enhance autonomy and reduce reliance on approaches that restrict individual rights, and the right to ultimately seek to restore rights and terminate the restriction when possible.
- Information and training about less restrictive alternatives to guardianship should be available to people with I/DD, their family members, attorneys, judges, and other professionals.
- If the use of a guardianship becomes necessary, it should be limited to the fewest restrictions necessary for the shortest amount of time and tailored to the individual's specific capacities and needs.
- Strict monitoring must be in place to promote and protect the autonomy, liberty, freedom, dignity, and preferences of each individual even when placed under guardianship.
- Regardless of their guardianship status, all individuals with I/DD should be afforded opportunities to participate to the maximum extent possible in making and executing decisions about themselves. Guardians should engage individuals in the decision-making process, ensuring that their preferences and desires are known, considered, and achieved to the fullest extent possible.
- Regardless of their guardianship status, all individuals with I/DD retain their fundamental civil and human rights (such as the right to vote and the right to make decisions related to sexual activity, marriage and divorce, birth control, and sterilization) unless the specific right is explicitly limited by court order.

Systems Issues

- States should provide systematic access to decision-making supports for all individuals with I/DD.
- An individual (other than a family member) should not serve in dual roles as guardian and as paid advocate or paid service provider for an individual.
- An organization should avoid serving in dual roles as guardian and as paid advocate or paid service provider for an individual.
- Organizations that serve in dual roles of guardian and paid advocate or paid service provider must have written policies and organizational separations in place to mitigate conflicts of interest. These organizations should support efforts to develop independent guardianship organizations.
- Financial incentives that benefit professionals or guardianship corporations should never drive guardianship policy or result in expensive and unnecessary costs to individuals or their families.
- Appointment of a guardian of the person, the person's finances, or both, should be made only to the extent necessary for the legal protection and welfare of the individual and not for the convenience or preferences of the family, the service system, or others.
- Individuals with I/DD must have access to all the accommodations and supports, including communication supports, they need to demonstrate their competency at initial evaluations for guardianship and at all periodic reviews of any guardianship.

• State laws should be reformed to prioritize less restrictive alternatives to full and plenary guardianship, including without limitation informal supports, supported decision-making, limited (and revocable) powers of attorney, health care proxies, trusts, and limited guardianships that are specifically tailored to the individual's capacities and needs. These alternatives should always be considered first. Use of these alternatives can help an individual who may have limited capacity to consent to satisfy statutory privacy or other requirements and to have records released to a person or entity designated as the individual's agent or provider of support and services. If used at all, any restrictions on the individual's rights and decision-making powers should be confined to those areas in which the individual demonstrates a need for assistance that exceeds what can be provided through a less restrictive alternative.

• Laws should be reformed to require that less restrictive options are tried and found to be ineffective to ensure the individual's autonomy before full (plenary) guardianship is even considered. Alternatives and related procedures to change overly restrictive forms of any existing guardianship, including restoration of rights and termination of any guardianship, must be available under state law.

• Since guardianship represents a transfer of rights and the responsibility for exercising them, adequate safeguards must be in place to protect those rights. These safeguards include procedural due process (including without limitation **the right to counsel** representing the interests of the individual, impartial hearing, appeal, and burden and quantity of proof) must protect the individual's autonomy. The state must also ensure that the individual is informed and retains as much decision-making power as possible. The **state should pay the costs** of providing these due process protections and not impose the costs on families or on individuals with I/DD.

• Members of the **judiciary, attorneys, and other professionals need training and education** on alternatives to guardianship for individuals with I/DD, and they must **zealously advocate for preserving the substantive and procedural rights** of all individuals with I/DD.

• If a guardian is to be appointed, the preferences and assent of the individual with I/DD with respect to the identity and function of the proposed guardian should be considered.

• The appointment of a guardian should be appropriately time-limited in order to provide regular periodic review of the individual's current capabilities and functioning and whether a less restrictive alternative is now indicated. The reviews should include an independent professional assessment by a highly qualified examiner of the individual's functioning with necessary accommodations and communication supports. All costs of the review should be paid by the state and not imposed on individuals with I/DD or their families.

• Guardianship should include a person-centered plan of teaching and/or supports for decision making so the individual with I/DD will have opportunities to learn and practice the skills needed to be autonomous and to direct his or her own life. Understanding the nature and purpose of guardianship and understanding that most people with I/DD can manage their own affairs with assistance and guidance should be part of transition planning in schools and of any curriculum or procedures that prepare the individual's person-centered plan for adulthood. Schools should not give legal advice to students and families, and should provide students and families with information about less restrictive alternatives to guardianship.

• The ultimate goal of any such curriculum or procedures should be to ensure the individual's autonomy to the maximum extent possible, individualize decision-making supports for the individual, and ensure that the individual has maximum access to equal opportunity, independent living, full participation, and economic self-sufficiency, each with supports that take into account the individual's capacities and needs.

Guardian Responsibilities

• Guardians should be knowledgeable about decision-making and other types of supports, services, and systems that can significantly affect the individual's autonomy, supports, and quality of life. Moreover, guardians must be committed to the individual's well-being and avoid any appearance or actual lack of commitment to the individual. They must know and understand the

individual's needs and wishes and act in accordance with them whenever possible and whenever any action will not negatively affect the individual's health, safety, financial security, and other welfare.
• Family members are often preferable choices when a guardianship is ordered and the family members meet these standards of knowledge, they do not have conflicts of interest (other than also serving as a paid advocate or paid service provider), and the individual with I/DD does not object to the family member's appointment as guardian.
• Guardians shall defer to the individual's preferences when decisions do not jeopardize the individual's health, safety, financial security, and other welfare.

Oversight

• States should adopt a set of minimum standards for all guardians and require training and technical assistance for all guardians.
• Professional guardians (those who both serve two or more people who are not related to each other and also receive fees for these services) should, at a minimum, be registered, and preferably licensed or certified by the state, either directly or through delegation to an appropriate independent professional organization. They should also have the appropriate education and skills. They should be independent from and not be receiving payment for providing other services to the individual.
• Guardians shall be legally accountable for all of their decisions and other actions with respect to the individual. Their decisions and other actions must be subject to the reporting and review procedures of the appropriate state court or other agency.

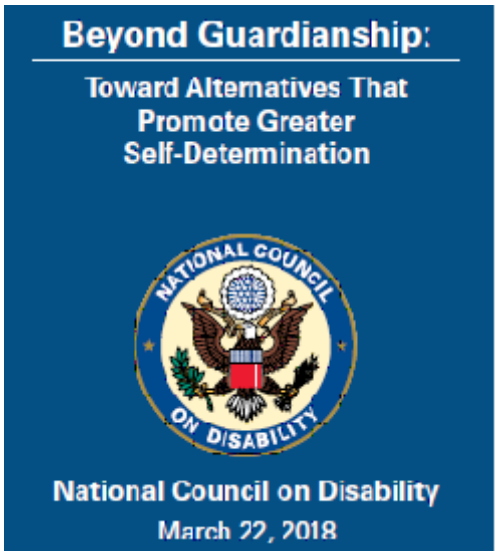
[1] "People with intellectual disability (ID)" refers to those with "significant limitations both in intellectual functioning and in adaptive behavior as expressed in conceptual, social, and practical adaptive skills. This disability originates before age 18", as defined by the American Association on Intellectual and Developmental Disabilities (AAIDD) in its manual, *Intellectual Disability: Definition, Classification, and Systems of Supports* (Schalock et al., 2010), and the Diagnostic and Statistical Manual of Mental Disorders, 5th Edition (DSM-5), published by the American Psychiatric Association (APA, 2013). "People with developmental disabilities (DD)" refers to those with "a severe, chronic disability of an individual that- (i) is attributable to a mental or physical impairment or combination of mental and physical impairments; (ii) is manifested before the individual attains age 22; (iii) is likely to continue indefinitely; (iv) results in substantial functional limitations in 3 or more of the following areas of major life activity: (I) Self-care, (II) Receptive and expressive language, (III) Learning, (IV) Mobility, (V) Self-direction, (VI) Capacity for independent living, (VII) Economic self-sufficiency; and (v) reflects the individual's need for a combination and sequence of special, interdisciplinary, or generic services, individualized supports, or other forms of assistance that are of lifelong or extended duration and are individually planned and coordinated," as defined by the Developmental Disabilities Assistance and Bill of Rights Act 2000. In everyday language people with ID and/or DD are frequently referred to as people with cognitive, intellectual and/or developmental disabilities.

[2] Terminology for guardianship and guardians differs by state and can include tutor, conservator, curator, or other comparable terms.

Adopted:

American Association on Intellectual and Developmental Disabilities
Board of Directors
March 16, 2016

The Arc
Board of Directors
April 10, 2016



Federal Agency Speaks Out on the ADA, Due Process, and Right to Counsel in Guardianships

A new report by the National Council on Disability calls on the United States Department of Justice to issue guidance to state courts on their legal obligations under the Americans with Disabilities Act in guardianship cases.

The proposals are consistent with and advance similar recommendations made over the last few years by the Disability and Guardianship Project of Spectrum Institute.

For information on the Disability and Guardianship Project, go to: http://pursuitofjusticefilm.com/

Recommendations:

- The DOJ, in collaboration with the HHS, should issue guidance to states (specifically Adult Protective Services [APS] agencies and probate courts) on their legal obligations pursuant to the ADA. Such guidance should address NCD's position that: 1) the ADA is applicable to guardianship proceedings; 2) the need for assistance with activities of daily living or even with making decisions does not give rise to a presumption of incapacity; and 3) guardianship should be a last resort that is imposed only after less restrictive alternatives have been determined to be inappropriate or ineffective.

Recommendations:

- The Elder Abuse Prevention and Prosecution Act (P.L. 115-70) calls upon the Attorney General to publish best practices for improving guardianship proceedings and model legislation relating to guardianship proceedings for the purpose of preventing elder abuse. The Attorney General's model legislation should incorporate the UGCOPAA, including its provisions for preventing unnecessary guardianships.
- To ensure that due process requirements are met, it is especially important that alleged incapacitated individuals facing guardianship have qualified, independent legal representation that will advocate for the individual's desired outcome, especially if that person expresses a desire to avoid guardianship or objects to the proposed guardian. However, many courts lack sufficient resources to fund this type of representation and families often find that such representation is cost-prohibitive. Federal grant money should be made available to help promote the availability of counsel.
- The state court improvement program referenced throughout these recommendations should include improvements to the restoration process. DOJ should publish guidance regarding the right to restoration and best practices.

To access the NCD report online, go to:
https://ncd.gov/newsroom/2018/federal-report-examines-guardianships

WINGS
ACTION TOOLS

Right to and Role of Counsel*

An important issue for WINGS is the right to and role of counsel in *guardianship* proceedings. Stakeholders could conduct research, spur education and training, or advocate for changes in statute or court rule.

Counsel can:

- ✓ make the difference between a guardianship and a less-restrictive option, between a full and limited order, between a restoration of rights and continuation in a guardianship that may be unnecessary or overbroad;
- ✓ make the voice of the individual subject to guardianship heard; and
- ✓ promote a care plan according to the individual's values and preferences.

Your WINGS could focus on specific counsel issues in guardianship proceedings, including:

- ✓ right to counsel for individuals alleged to need a *guardian*;
- ✓ role of counsel for such individuals;
- ✓ role of the *guardian ad litem;*
- ✓ role of counsel for petitioners;
- ✓ right to counsel for individuals subject to guardianship (post-appointment);
- ✓ role of counsel for individuals subject to guardianship (post-appointment).

This Action Tool includes:

- ✓ Stakeholder Action Strategies;
- ✓ Key Background;
- ✓ Resources (with links to access information quickly).

*Italicized terms are used generally and may be different in your state. Words in blue are hyperlinks to important resources.

Ten WINGS Stakeholder Action Strategies

Here are ideas for WINGS action on the right to and role of counsel. Whatever path your WINGS chooses, be sure to build in evaluation outcome measures.

- ✓ Talk About It: Where Do We Stand. Structure a panel discussion with judges, court staff, the bar association, legal services, and the protection and advocacy agency on where the state stands and what gaps exist.

- ✓ Conduct a File Study. Is there any state data or research on guardianship counsel issues? Consider a limited research project or file study to determine the need for representation in practice.

- ✓ Educate Lawyers and Judges. Promote continuing legal and judicial education programs about the role of counsel, including implementing ABA Model Rule 1.14 on the ethics of representing "clients with diminished capacity."

- ✓ Advocate for Statutory and Rule Changes on Right to Counsel. Study your state's statutory provisions on right to counsel for an individual alleged to need a guardian, including mandatory court appointment and payment for representation of indigent clients. Is there a need to clarify or strengthen these provisions?

- ✓ Advocate for Statutory and Rule Changes on Role of Counsel. Consider revising statute or court rules to clarify the role of counsel in:
  - representing an individual alleged to need a guardian;
  - representing a petitioner;
  - serving as guardian ad litem; or
  - representing an individual already subject to guardianship.

- ✓ Strengthen Pro Bono Assistance. Support efforts to promote pro bono representation in guardianship proceedings.

- ✓ Increase Legal Services. Determine the extent of legal aid involvement in guardianship, and how it can be increased.

JUDICIAL COUNCIL OF CALIFORNIA
ADMINISTRATIVE OFFICE OF THE COURTS
455 Golden Gate Avenue
San Francisco, California 94102-3688

Report

TO: Members of the Judicial Council

FROM: Probate Conservatorship Task Force
Hon. Roger W. Boren, Chair
Christine Patton, Regional Administrative Director, 415-865-7735, christine.patton@jud.ca.gov

DATE: September 18, 2007

SUBJECT: Final Report of the Probate Conservatorship Task Force (Action Required)

Issue Statement

The administration and management of probate conservatorship cases in the state of California was recently placed under scrutiny through a series of *Los Angeles Times* articles that raised concerns that some conservatees were being subjected to abusive practices. Of particular concern were the inappropriate granting of temporary conservatorships on ex parte petitions, lack of proper oversight of accountings, abusive practices of private professional conservators including improper billings, lack of sufficient notice to conservatees and their families, and inadequate protections of the rights of conservatees. Although there are courts and counties with exemplary programs, many others do not appear to be able to provide the services and oversight necessary to ensure that conservatees are protected and receive proper care and treatment. This inability is often due to a lack of resources and, in some cases, gaps in existing statutes, rules, and guidelines.

Recognizing these challenges, in January 2006 the Chief Justice established the Probate Conservatorship Task Force and charged it with conducting a top-to-bottom review of the probate conservatorship system in California. Over its term, the task force studied conservatorship practices in jurisdictions within and outside the state and developed recommendations for courts, judicial partners, and the community support system for the protection and benefit of conservatees. The task force recommendations that follow in summary form are presented and discussed

in detail in the attached final report, *Recommended Practices for Improving the Administration of Justice in Probate Conservatorship Cases*.

The 85 task force recommendations include items that will necessitate further study and review, changes in legislation or rules of court, and preparation of training materials and guidelines for the courts. Staff has identified steps the council may take in order to implement the task force's recommendations.

Recommendation

The Probate Conservatorship Task Force recommends that the Judicial Council, effective immediately:

1. Receive and accept the final report from the Probate Conservatorship Task Force;

2. Direct the Administrative Director of the Courts to refer the task force recommendations to the appropriate advisory committee, Administrative Office of the Courts (AOC) division, or other entity for review and preparation of proposals to be considered through the normal judicial branch processes; and

3. Direct the Administrative Director of the Courts to report progress to the council on the implementation of recommendations by December 2008.

Rationale for Recommendations

The Probate Conservatorship Task Force engaged in a comprehensive process to address the key issues affecting the management of conservatorship cases in California. The process began with two public hearings to gather information on the public's perceptions and actual experiences in the probate conservatorship system. Participants included conservatees, families, conservators, justice partners, advocacy groups, and the community. The task force then studied conservatorship practices within and outside the state to determine which ideas could be adopted in California to improve the probate conservatorship system. Using the expertise within the task force membership, which consisted of judicial officers, court probate staff, attorneys, justice partners, advocacy groups, and other public members, each idea was thoroughly discussed as to the efficacy and practical application within the current conservatorship system as well as how to attain the optimal probate conservatorship system of the future.

The task force realized that many of the recommendations would require additional funding from outside sources and some recommendations would necessitate a substantial change in the culture and practice of superior courts and their justice partners. The task force did not want these factors to dictate whether a

recommendation would be forwarded to the council; rather, the task force saw its charge as being one to make recommendations for the best possible system within which conservatees would have the greatest level of protection, resulting in a system that would warrant a high level of public trust and confidence. Although these changes may take time, the improvement in the lives of conservatees through improving the oversight and management of the cases within the courts' control is not only the duty of the judicial branch but essential to the strength of the communities that we serve.

The task force's recommendations seek to attain several goals:

1. Ensure that temporary conservatorships are not unnecessarily granted;

2. Make notice requirements more informative and effective;

3. Ensure that the conservatorship is the least restrictive alternative for the conservatee;

4. Ensure adequate access to information for all of the interested participants;

5. Make increased and better use of short- and long-term care plans;

6. Ensure that there is a system to prevent fraud and improper handling of conservatees' assets;

7. Ensure that the conservatee is being taken care of properly through personal visitation;

8. Ensure that all participants are aware of, and are protecting, the conservatee's rights;

9. Obtain and allocate adequate funding on statewide and local levels for all entities that support the conservatorship process;

10. Adequately train and educate conservators, attorneys, court staff, and judicial officers;

11. Expand self-help services to include help for conservators and families of conservatees;

12. Ensure that conservatees' rights are adequately protected through representation of counsel; and

13. Ensure adequate oversight of both nonprofessional and private professional conservators.

The rationales underlying these major objectives are discussed below.

Ensuring that temporary conservatorships are not granted unnecessarily
The task force proposes a series of recommendations to ensure that the court has sufficient and timely information before granting a temporary conservatorship. These include creation of a standardized ex parte application and order, authorization of disclosure of medical information, due diligence to find relatives, and required follow-up hearings. Not only was this of great concern expressed at the public hearings, it also is imperative that the court have critical information when making a decision to place a person under conservatorship, even temporarily.

Increased notice requirements
The task force recommends expanding the information required on notices and including notice of reports to the conservatee, while allowing for an exemption under certain circumstances. This will help the conservatee and affected family members to understand the proceedings and will enhance confidence in the judicial system while balancing privacy rights of the conservatee.

Least restrictive alternative declarations
The task force recommends that proceedings for the establishment of temporary and general conservatorships include declarations of why a conservatorship is the least restrictive alternative and why the specific powers granted to the conservator are not overly restrictive. This will ensure that the court investigator, attorney, and conservator have explored all alternatives and have requested the least restrictive means necessary to protect the conservatee while preserving his or her liberty when possible.

Access to information
The task force recommends several proposals to ensure that information flows freely between courts, attorneys, regional centers, court investigators, and probate examiners. The requirement that written reports be submitted by attorneys at the same time that the investigators' reports are due prompted concern in the public comments, because it was thought that such a requirement would increase costs and lessen efficiency**.** However, the task force feels strongly that, although oral reports may be accepted in certain circumstances, written reports provide information that court investigators need to provide sufficient and timely feedback to the courts.

Care plans
The task force recommends that a care plan be submitted in each conservatorship case. Pending legislation—Senate Bill 800 (Corbett)—would codify this requirement. The task force recommendation goes further by requiring that an estimate of fees be included, that the council develop a form to be used statewide, and that the plan be served within 90 days on all interested persons and entities. This will ensure that the elements of the care plan are met and that courts have the information they need to evaluate the plan throughout the years.

Fraud detection in accountings
Misappropriation of funds and inappropriate fees were of great concern to the persons who testified at the public hearings. To give the court better tools for reviewing accountings and the financial transactions that occur within a conservatorship, the task force recommends including the development of a Web-based accounting system, use of fraud detection software programs, more involvement of investigators in watching for irregularities, and use of guidelines for granting fee requests. These recommendations will help protect conservatees' assets under court supervision.

Minimum visitation requirements
The welfare of the conservatee is of utmost importance, especially since conservatees are often unable to speak up for their rights. The task force recommends that conservators or qualified representatives make personal visits at least once per month. This recommendation met with some opposition in the comments, because it would engender increased costs and in many cases it would not be helpful nor would it add anything to the oversight of the situation. Other entities, however, were concerned that a monthly visitation was not frequent enough. The task force feels strongly that many of the allegations of abuse and neglect would be investigated and remedied if conservatees had regular visits, whether they reside in nursing homes or at their personal residences. The recommendation of yearly visits to conservatees of the estate also is reasonable because the responsibility of managing a conservatee's property warrants a personal visit at least on an annual basis so that the conservatee has an opportunity to discuss issues in a personal setting.

Conservatee rights and protections
The task force recommends developing a conservatee "bill of rights." A conservatee bill of rights and other protections will ensure not only that the conservatee is given notice of his or her rights under the law but also will inform the conservator and the conservatee's family of what is expected of them in relation to the conservatorship. Under a conservatorship, the conservatee is deprived of basic liberty rights, and it is imperative that the rights and protections

that are put in their place under the law are clearly outlined so all interested parties are aware of their responsibilities toward the conservatee and the court.

Adequate funding
The task force is aware that in order to implement many of the recommendations, and to provide the oversight necessary for the protection of the conservatees in the system, adequate resources must be made available on a local and statewide basis. Trial courts should evaluate the allocation of current resources to the probate conservatorship system within their own jurisdictions and make changes if necessary and possible. The Judicial Council should take into consideration the need for priority funding, if possible, to encourage courts to put resources into this vital area of probate conservatorship management. On a state level, the council should continue to seek funding outside of the state appropriations limit to enable the courts to implement new legislation, including the Omnibus Conservatorship and Guardianship Reform Act of 2006 and additional proposals that improve the welfare of conservatees.

Training and education
Although the Omnibus Act includes many training and education requirements for judicial officers and court staff, the task force recommendations enhance those requirements to include training for outside counsel. Probate assignments in general and conservatorship matters in particular often are given to judges with no prior experience and rotated on a short-term basis. The task force recommends that in order for judicial officers and staff to provide adequate oversight of these types of cases, they must become familiar with the laws and processes.

Expansion of self-help services
For family members or friends who become conservators, there is a need for education and assistance regarding what is expected of them, for the protection of the conservatee and the conservator. Currently there are very few self-help facilities at the local level that include conservatorship aid. The task force recommends that this area of assistance be made available on a local and statewide basis.

Automatic appointment of counsel for conservatees
The task force recommends automatic appointment of counsel for conservatees in all cases. Conservatees are vulnerable members of society who have been placed under the control of a conservator with oversight duty placed squarely on the superior court. Our current justice system mandates the appointment of counsel where vulnerable parties and defendants risk the loss of liberty and property, not only minors under wardship of the court but also criminal defendants, whether accused of a felony or misdemeanor. Conservatees are similarly vulnerable, if not more so. Their entire lives and dignities are in the hands of others, including where

they live, what their money is spent on, who they see, where they travel, and what property they are allowed to possess. Under current law, the court has discretion to appoint an attorney for a conservatee, the costs of which are paid from the conservatee's assets, if possible, or at the expense of the county or court.[1] To implement this recommendation to require appointment of counsel in every case, a feasibility study would have to be made and funding identified for those conservatees who could not afford the cost. In exploring this idea further, alternatives should be considered, such as "unbundling" of attorney services, allowing limited appearances for matters that require an attorney, or the development of a managed counsel program such as the Dependency Representation, Administration, Funding, and Training (DRAFT) project in the dependency counsel area. The task force realizes this recommendation may take years to implement, but the protections afforded to conservatees would be well worth the time and expense in quality of life, better oversight, and increased attention given to the conservatee.

Administration of probate conservatorship matters

The task force suggests several ways the AOC and the superior courts can better manage the administration of the probate conservatorship system statewide and within the court environment, including reallocating resources when necessary, assigning judicial officers to conservatorship cases for all purposes, coordinating annual reviews and accountings, and making support services available to families, similar to the services available in family law matters. The task force feels strongly that this area of judicial management has long been neglected and, at the least, needs a thorough review by each individual superior court to ensure that the conservatees under its responsibility are being afforded the greatest protection possible.

Nonprofessional and private professional conservator oversight

The Omnibus Act includes a new state body to license and oversee private professional conservators, the Professional Fiduciaries Bureau, within the jurisdiction of the Department of Consumer Affairs.[2] However, the task force feels that the courts have a duty and ability to provide more thorough oversight in individual cases within their jurisdictions. The task force makes several recommendations in this area, including mandating that private professional conservators place their registration information on each document submitted for filing with the court, the court be informed as to how the private professional conservator became involved in the case, and criminal and credit background checks be required for all proposed conservators, private or otherwise. The

[1] See recommendation 52, "Responsibility for payment of appointed counsel fees," Judicial Council of Cal., Probate Conservatorship Task Force, *Recommended Practices for Improving the Administration of Justice in Probate Conservatorship Cases*, p. 21.

[2] Bus. & Prof. Code, §§ 6501 and 6510.

The Demographic Imperative: Guardianships and Conservatorships

An increasing number of persons with diminished capacity are poised to transform American institutions, including the courts. What can state courts do to prepare to meet this challenge?

Adopted December 2010

Conference of State Court Administrators

- Developing coordination between the courts that appoint guardians and the Social Security representative payment system[36] to ensure appropriate services and enhance monitoring and training;
- Exchanging key data elements among courts, adult protective services and care providers to strengthen performance measurement; and
- Creating information technology and case management systems to track guardianship cases and flag potential abuses.

Information about these activities is available from studies that have been conducted, or from courts that have implemented best practices. A valuable resource is NCSC's Center for Elders and the Courts at www.eldersandcourts.org. As the task forces consider their agendas and work plans, they may also want to review practices states have successfully implemented. As discussed below, if federal funding is allocated for the creation of a national guardianship court improvement program, the statewide guardianship task forces and their activities would be subsumed into that program. However, because of the uncertainty of funding for such a national program and the urgent need to address court guardianship issues, each state is strongly encouraged to establish a task force.

2. Provision of Technical Assistance

The NCSC should be the lead provider of technical assistance in matters related to the implementation of recommendations contained in this white paper. Working with other organizations, such as the National Guardianship Association and the American Bar Association, as appropriate, the NCSC, through its Center for Elders and the Courts (CEC), should seek funding aimed at improving the collection and reporting of data, the use of technology, judicial and court staff training, and state task force assistance. Given the work of its Center for Elders and the Courts, the NCSC is in a unique position to ensure that states receive the most current and relevant information about guardianship programs and best practices, and also to provide consulting services to task forces seeking assistance with their initiatives. The NCSC should also develop national performance measures for guardianship cases. Its *Courtools*—with modifications for the guardianship process—can serve as a foundation for performance measures.

3. Appointment of Counsel

Courts should ensure that the person with alleged diminished capacity has counsel appointed in every case to advocate on his or her behalf and safeguard the individual's rights.[37] Appointed counsel should be trained to explain the consequences of guardianship in a manner the person can understand; ensure there is no less restrictive alternative to guardianship which will provide the desired protection; ensure due process is followed; ensure the petitioner proves the allegations in the petition to the standard required in the jurisdiction; confirm the proposed guardian is qualified to serve;