JUDICIAL COUNCIL OF CALIFORNIA

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MEMORANDUM

Date
October 30, 2014

To
Probate and Mental Health Advisory Committee
Hon. John H. Sugiyama, Chair

From
Douglas C. Miller
Committee Counsel

Subject
Proposal of the Spectrum Institute for a recommendation by this Committee for creation of Limited Conservatorship Task Force (Action Required)

Action Requested
Please Review

Deadline
November 14, 2014

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At its last meeting in July, the committee discussed and considered a request, by Mr. Thomas F. Coleman, the Legal Director of the Disability & Abuse Project of the Spectrum Institute, for a recommendation from the committee that the Judicial Council and/or the Chief Justice create a Limited Conservatorship Task Force modeled after the Chief Justice's 2006–2007 Probate Conservatorship Task Force. The new task force would be authorized to study and make recommendations concerning limited conservatorships for developmentally disabled adults.

After discussion, the committee decided to assign the matter to a subcommittee for a recommendation to this committee at this meeting.

The Chair later decided to take a different approach. In part, this decision was based upon the fact that after the July meeting, Assembly Bill 1311 passed the Legislature, was signed by the Governor, and became law, as Stats 2014, ch 591, effective January 1, 2015. This legislation, originally an Assembly bill addressing the filling of vacancies in elective offices following recall

elections, was rewritten in the Senate, apparently on the recommendation of Mr. Coleman and his organization, the Spectrum Institute.[1] The revised version enacted the provisions on recall elections but also modified the Elections and Probate Codes to expressly provide that a (proposed) conservatee's inability to complete a voter's affidavit will not disqualify him or her from voting if the inability stems from his or her signature being affixed on the affidavit by initials or a signature stamp, or if his or her completion of the affidavit is accomplished "with the assistance of another person *pursuant to subdivision (d) of Section 2150 of the Elections Code*." (Italics added.) Section 2150(d) was not changed. That subdivision provided, and now provides, that "[i]f any person, including a deputy registrar, assists the affiant in completing the [voter's] affidavit, that person shall sign and date the affidavit below the signature of the affiant."[2]

Instead of the assignment of this matter to a subcommittee, the Chair decided to permit Mr. Coleman and the Spectrum Institute to address the full committee in support of a recommendation in favor of a task force in a public meeting governed by the new Public Meeting rule of court, California Rule of Court, rule 10.75.

Mr. Coleman has provided a written summary of his intended remarks. A copy of it immediately follows this memorandum.

The members of the committee may want to review the extensive material previously submitted by Mr. Coleman for our July meeting. The following links to the main pieces of information provided are as follows:

"Justice Denied": http://www.disabilityandabuse.org/conferences/justice-denied.pdf
Voting Rights: http://www.disabilityandabuse.org/conferences/voting-rights-of-conservatees.pdf

A copy of the Spectrum Institute's request to the federal Department of Justice to institute a federal civil rights action against the Superior Court of Los Angeles County for deprivation of conservatees' voting rights, previously distributed to the committee at its last meeting is linked

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[1] The Disability and Abuse Project of the Spectrum Institute is identified as in favor of the senate's revisions of the Assembly bill in the Assembly's Elections and Redistricting Committee's August 26, 2014 report concurring with the Senate amendments, and the Spectrum Institute's complaint with the United States Department of Justice for deprivation of voting rights of conservatees, discussed at this committee's last meeting, is mentioned in that report in support of the Senate amendments that added the disabled persons' voting provisions to the bill.

[2] Section 2150, before and after this change, does not address the effect of assistance of others on the affiant's ability to vote. The amended sections affecting conservatees' ability to vote are Elections Code 2208 and 2209, and Probate Cod sections 1823, 1826, 1828, 1851, and 1910. A copy of the chaptered version of AB 1311 follows this memorandum.

here: http:/www.disabilityandabuse.org/doj/complaint.pdf. The exhibits to the federal civil rights complaint are linked here: http://www.disabilityandabuse.org/doj/exhibit-cover-page.pdf. As of this writing, we have no information as to the fate of the Spectrum Institute's request to the Attorney General of the United States for action.

We are holding this meeting in the Judicial Council's meeting room in open session to give Mr. Coleman and his supporters an opportunity to address us in favor of his proposal. We will consider this matter beginning at 1:00 p.m. immediately after our luncheon break, regardless of where we are in the disposition of the committee's agenda at that time. The Chair has asked Mr. Coleman and his supporters to make their presentation within 20 minutes, extended as may be necessary to address questions committee members may have for him. Under rule 10.75(k), other members of the public may submit written comments up to one business day before the meeting and, security permitting, must be given an opportunity to make public comment on this item *before* this portion of the meeting begins. Staff will advise the Chair at the beginning of the meeting whether any requests from the public to address the committee have been received. The committee may also expect that members of the press may cover the public portion of the meeting, which is limited to consideration of this single item.

Staff inquired into the costs incurred by the Judicial Council and its staff for the Probate Conservatorship Task Force. A figure of $60,000 was provided, exclusive of staff time devoted to task force activities. Lead staff to that task force was provided by a regional director of the Judicial Council's staff agency, the Administrative Office of the Courts (AOC), and her assistant. The Task Force was divided into three subcommittees, each of which had an additional lead staff (including this committee's present lead staff). Five AOC staff members contributed considerable time and effort to this project in 2006 and 2007, with additional secretarial staff in the production of written materials. The full task force met twice in sessions open to the public or involving testimony from members of the public, and a third time to approve its final product. Subcommittees each met several times to draft proposals for inclusion in the final report, which was adopted by the Judicial Council on October 27, 2007, and contained 85 recommendations. If staff time were added to the figure given, the actual cost would easily be doubled or even tripled.

Disability & Abuse Project

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November 3, 2014

Hon. John H. Sugiyama
Chair, Probate and Mental Health
Advisory Committee

Dear Judge Sugiyama:

Thank you for providing me an opportunity to make a presentation to the Advisory Committee. My colleagues and I look forward to a favorable recommendation by the Committee for the creation of a task force to look into alleged deficiencies in the Limited Conservatorship System.

People with developmental disabilities who are named as potential conservatees deserve effective legal representation throughout such proceedings. They also deserve well informed participants in this system – judges, investigators, attorneys, Regional Center staff, and others – so that the administration of justice complies with constitutional and statutory mandates. It appears that systemic and operational flaws are precluding this from happening, at least in some parts of the state.

When major deficiencies in the general conservatorship system – affecting seniors and others with cognitive incapacities – were brought to the attention of the Chief Justice and the Judicial Council in 2006, the response of the judicial system was swift. A Probate Task Force was immediately formed to investigate problems in the system and to make recommendations for reform. The Task Force did its job and, as a result, court rules were modified and new statutes were enacted.

People with developmental disabilities deserve the same swift response as seniors received. A statewide Task Force on Limited Conservatorships should be created. To avoid any potential conflicts of interest, it should be composed of people who are not currently, or have not recently been, direct participants in the Limited Conservatorship System. It is their conduct that will be reviewed by he Task Force. A more appropriate role for current or recent participants would be to testify as witnesses at hearings, to submit materials to the Task Force, and to be interviewed by Task Force committees. The study should be conducted by people who do not have a direct stake in its conclusions.

You asked me to identify possible outcomes from such a Task Force. I have done so. I have also summarized the need for such a Task Force and the general areas of inquiry on which the Task Force should focus its attention. I look forward to discussing these issues, and answering any questions of Committee members, at the meeting.

Respectfully,

Thomas F. Coleman
Legal Director

Judicial Council of California

Probate and Mental Health Advisory Committee

Public Meeting
San Francisco
November 14, 2014

Statement of
Thomas F. Coleman
Legal Director
Disability and Abuse Project
Spectrum Institute

Contents

Task Force on Limited Conservatorships

(The Need for a Study)

My conclusion that the Judicial Council should create a statewide Task Force on Limited Conservatorships was the result of a long journey.

The journey began when I met Dr. Nora J. Baladerian in connection with my role as Executive Director of the Governor's Commission on Personal Privacy in 1980. One of my duties was to screen potential appointees to the Commission and it was in that capacity that Dr. Baladerian came to my office.

The Commission was charged with studying invasions of privacy of people in California and recommending ways to protect their privacy rights. This included three aspects of privacy – personal decision making, territorial privacy, and informational privacy.

I wanted to make sure that seniors and people with disabilities were included in the parameters of the study. As a mental health practitioner and therapist, Dr. Baladerian had experience in working with people with developmental disabilities. I recommended her for an appointment to the Commission, she was selected, and we worked together for more than two years.

The next step of my journey involved my work with the Attorney General's Commission on Racial, Ethnic, Religious, and Minority Violence. Over the course of several years as a Commissioner I learned about violence against people with disabilities, sometimes out of bias and sometimes just because they were perceived to be vulnerable.

Then came the Los Angeles City Task Force on Family Diversity. I conceived and developed the project, including recommending the 37 members. As its principal consultant, I served as its de-facto Executive Director. Dr. Baladerian served as co-chair of the Task Force. Together we insured that families who have members with disabilities were included in the study and that a section of the final report was devoted to such families.

The next step of my journey required me to take a major step into Dr. Baladerian's world of advocacy for people with developmental disabilities. She and I created a Disability, Abuse, and Personal Rights Project that focused heavily on a problem that most people do not want to discuss – physical, emotional, and sexual abuse of people with developmental disabilities.

The project was renamed the Disability and Abuse Project a few years ago. It was through this project that I learned about people with developmental disabilities being three to four times more likely to be victims of abuse than the generic population. I learned that by the time they reach 18, most people with developmental disabilities have been victims of abuse.

Over the past 32 years, I had taken small but significant steps to learn about people with developmental disabilities and how they are often victims of abuse and neglect. I also learned how their civil rights were often not protected or respected by the government.

It was not until 2012 that I had my first exposure to the Limited Conservatorship System. This was through my association with Dr. Baladerian.

She had been contacted by the brother of a limited conservatee. The brother believed that his sibling, let's call him Nicky, was being abused and neglected by the conservator who was also the caregiver. Repeated reports by the brother to the authorities got nowhere. Through "the grapevine" the brother heard about the advocacy of Dr. Baladerian. So he reached out to her for help. She, in turn, enlisted my help since this was likely to result in a legal and political battle with unresponsive agencies.

Dr. Baladerian and I jumped into action and within days Nicky was removed from the home by Adult Protective Services. When APS entered the home, they found Nicky lying helplessly on the floor of his bedroom where he barely was able to whisper the words "Help Me."

Nicky was immediately taken to the hospital where he remained for 10 days since he was severely underweight and had a major infection.

The Probate Court was notified since Nicky was a limited conservatee. A court investigator was appointed as was a PVP attorney. Unfortunately, neither the investigator nor the attorney ever contacted the brother who was in possession of detailed information about the abuse, including photos showing Nicky nearly naked and lying on the ground in the backyard in handcuffs.

The Probate Court took no action and the caregiver was allowed to remain as conservator. Because APS said they could not find another home for Nicky, he was released to the allegedly abusive home.

Within a few weeks Nicky was dead. The conservator wanted an immediate cremation but the brother demanded an autopsy. The coroner did not find that Nicky died of natural causes. Instead the cause of death was categorized as inconclusive.

The coroner's report stated that Nicky's kidneys failed due to over-medication. It also stated that interviews with neighbors revealed they would sometimes hear screams coming from the house, with Nicky's voice crying out "Help." Another statement said that Nicky had not been seen by his doctor for more than six months.

This was my first exposure to the Limited Conservatorship System. Nicky's case was recently referred to the Elder and Dependent Adult Death Review Team. We are awaiting the results of their investigation of the death and whether negligence by the conservator may have contributed to Nicky's premature demise. Nicky was only 36 years old when he died.

My second exposure to "the system" was in 2013, again through Dr. Baladerian. She was consulted by a parent for advice on what to do for her son, let's call him Craig, who was being forced by the Probate Court to visit with his father over the son's repeated objections. Dr. Baladerian asked me to look into the matter to see whether Craig's constitutional rights were being violated.

I reviewed the paperwork in the case and found numerous instances where Craig had told the court investigator, his own PVP attorney, and yes, even the judge in open court, that he did not want to visit with his father. Despite his protestations, the court entered an order requiring Craig to spend two days with his father every three weeks.

Craig, who had a part-time job, did volunteer work, and lived in his own apartment with a roommate and a caregiver, found ways to resist. Sometimes he would not be at home when his father came to the apartment. Sometimes Craig would lock the door to the apartment and not answer it when his father knocked at the door.

In response to Craig's self-help actions, the court order was modified to require the caregiver to corral Craig to prevent him from leaving the apartment prior to the arrival of his father. However, not satisfied with this partial measure, the professional conservators who managed Craig's case asked the court to remove Craig's right to make his own social decisions and to transfer complete authority over social decisions to the conservators. Despite Craig's objections, his PVP attorney surrendered Craig's social rights to the conservators. Thus, as it now stands, Craig is destined to social servitude for the rest of his life.

This was my second encounter with the Limited Conservatorship System. Despite my best efforts – communicating with the judge and the PVP attorney, supporting a petition to the Supreme Court, and highlighting Craig's case in reports and a conference – I was unable to change the outcome. I learned that "the system" does not respect the First Amendment rights of people with autism.

A third case came to the attention of Dr. Baladerian in 2013. This involved a young man with autism, let's call him Roy, who was the subject of a limited conservatorship proceeding. Roy, like Craig, had a mother who was supportive of her son retaining his social rights. She also wanted Roy, who had just turned 18, to be able to exercise his right to vote.

After a PVP attorney wanted to stipulate that Roy would visit his father (who lived on the other side of the country) the mother contacted Dr. Baladerian for guidance. Roy had repeatedly stated that he was afraid of his father and did not want to visit him. He also stated that he wanted to vote in the next presidential election. Unfortunately, the PVP attorney said that voting was inconsistent with the concept of conservatorship. He also would not advocate for Roy's stated wish not to visit his father.

Dr. Baladerian asked me to investigate the case. I did. After considerable legal research and repeated contacts with the PVP attorney – and a meeting with Roy at Dr. Baladerian's office – we were able to get the attorney to reluctantly agree that Roy would keep his social decision-making rights and that he would not be disqualified from voting. Without our intervention, I have no doubt that the outcome would not have been favorable.

These three cases caused me to wonder whether they were aberrations or whether there were systemic problems with the Limited Conservatorship System. I vowed to find the answer to that question, no matter how much work or how long it would take.

After hundreds of hours of research – looking at scores of court records in Los Angeles County, consulting participants in the system, attending PVP trainings, and convening two conferences with dozens of relevant agency personnel – I found the answer. Yes, there are systemic and operational problems with the Limited Conservatorship System.

I believe that virtually every aspect of the system is flawed. At least in Los Angeles County, the system seems to be running on "auto pilot" with no navigator to guide it and no mechanic to check for flaws that need to be repaired. The system operates like an assembly line, cranking out cases as efficiently as possible. Efficiency, not quality performance, seems to be the guiding principle.

The myriad deficiencies with the system have been documented in various essays and reports published by the Disability and Abuse Project over the past several months. (See "References" on page 16.)

These reports, and letters asking for intervention, have been sent to the Chief Justice, the Attorney General, the Director of the Department of Developmental Services, the Judiciary Committee of the Assembly, the Judiciary Committee of the Senate, the Board of Trustees of the State Bar of California, the Presiding Judge of the Los Angeles Superior Court, the Presiding Judge of its Probate Department, the Los Angeles County Public Defender, and the office of Los Angeles County Supervisor Mark Ridley Thomas.

We received an in-person meeting with the staff of Supervisor Ridley Thomas and with the staff of the Public Defender. Both offices said they would review the specific requests we made of them.

None of the other agencies responded to our letter or to our reports – except for the Chief Justice. The letter to the Chief Justice was sent to her in her capacity as Chairperson of the Judicial Council.

I received a communication from a staff attorney with the Rules Committee of the Judicial Council. I was informed that the Chief Justice asked the Chair of that committee to review our request for a statewide Task Force on Limited Conservatorships.

The Chair of the Rules Committee referred our request, and our reports, to its Probate and Mental Health Advisory Committee. The committee has placed our request on the agenda of a public meeting in San Francisco on November 14, 2014.

The fate of our request for a Task Force, and the eventual reform of the Limited Conservatorship System, now rests with this Committee.

Task Force on Limited Conservatorships

(Areas of Inquiry)

A resolution adopted by the Judicial Council to initiate this study should guide the Task Force to focus on the following areas if inquiry.

Guiding Legal Policies

The Limited Conservatorship System was created by statute in 1980. The system is currently governed by statutes in various codes (Probate, Government, Elections, etc.) and state and local court rules.

The Probate Code says that the limited conservatorship system must be consistent with the rights guaranteed to people with developmental disabilities by the Lanterman Act. The Lanterman Act says that people with developmental disabilities have the same statutory and constitutional rights as all other persons do under state and federal law.

Limited conservatees, therefore, have First Amendment rights to freedom of speech and association, the right to privacy including the right to sexual expression, the right to equal protection of the law, and the right to due process of law including the right to effective representation of counsel. Their right to vote is protected by federal laws, including a prohibition against the use of literacy tests in determining eligibility to vote.

They also have a federally protected right to be free of discrimination on the basis of disability. Government agencies and service providers have a duty to adopt reasonable modifications of policy to insure equal justice and equal access to services.

In advance of the first meeting of the Task Force, the staff of the Judicial Council should prepare a report for the members that briefly summarizes all statutes, court rules, appellate cases, and constitutional provisions that have particular application to people with developmental disabilities who are proposed or actual limited conservatees.

This knowledge base is essential and will help guide the work of the Task Force.

General Methodology

The Task Force should investigate the Limited Conservatorship System in California by:

- familiarizing itself with the guiding legal principles
- conducting surveys of agencies that participate in various aspects of the system
- interviewing individuals who participate in the system, such as probate judges, court investigators, public defenders, court appointed attorneys, self help clinic staff, Regional Center staff, conservators, and limited conservatees
- consulting with professionals who have expertise in forensic interviewing, disability accommodation, disability rights advocacy, and capacity assessments; and
- conducting public hearings in Northern and Southern California.

General Focus of the Study

The general focus of the Task Force should be to determine if there are systemic flaws, operational deficiencies, and budgetary limitations that contribute to a failure of the system to protect the statutory and constitutional rights of people with developmental disabilities.

Operational Demographics

It appears that those who operate the Limited Conservatorship System know very little about the demographics of that system. It is time to increase the level of awareness about the system, those who operate it, and those who are ordered to subjugate themselves to its jurisdiction.

How many adults does each of the Regional Centers serve as clients? How many of those adults are under conservatorship? Who determines which of these adults should become conservatees and which should not and what process is used to determine whether a petition is filed with the court or whether less restrictive alternatives are adequate?

How many adults in California are currently under a limited conservatorship? How many in each county? How many new cases are added to the "inventory" each year statewide and in each county?

How many new petitions are filed annually by petitioners without an attorney? How many are filed with the assistance of a self help clinic?

What is the average annual caseload of limited conservatorship cases for each Probate Court judge in each county?

What is the average annual caseload for each public defender in each county where public defenders represent limited conservatees and proposed limited conservatees? What is the average number of hours public defenders spend on each such case, including investigations, travel, and court time?

In counties where the public defender does not represent limited conservatees, who appoints the private attorneys? What is the average number of hours that such attorneys spend on a case, including investigations, travel and court time?

For the past five years, have court investigators been used in each county in all new filings? If not, why not? If not, who made the decision to stop using them and why? If they have been used, how many hours on average did they spend on each case in an initial filing? In a biennial review?

Complaints About the System

The Disability and Abuse Project has been complaining about all aspects of the system for many months. Have any other organizations complained about the system since it was instituted in 1980? Other individuals? If so, who are they and what were their complaints? If not, why not?

Members of the Task Force should review all written materials that specify alleged deficiencies in the system. This would include reports, essays, and letters to federal, state, and local officials. Such materials should be distributed to the members at the first meeting of the Task Force, with a request to read them prior to the next meeting.

Quality Assurance Controls

The Task Force should determine whether quality assurance controls exist for all operational aspects of the Limited Conservatorship System and whether they are adequate to insurance quality performance by all individuals and agencies participating in the system. This includes judges, attorneys, court investigators, Regional Center staff, and conservators.

Court Investigators

The Task Force should investigate the quality and effectiveness of the work of court investigators in limited conservatorship proceedings in each county. How are they trained, by whom, how often, and on what subjects? This could be determined by a survey and with training schedules and training materials submitted to the Task Force from each county.

How much time does each investigator spend on a new limited conservatorship case on average? Do they interview relatives of the second degree? Are all members of the household of the proposed conservator screened for criminal background, complaints with CPS and APS agencies, etc?

Attorneys for Limited Conservatees

Which counties use the services of the Public Defender to represent limited conservatees? Which counties appoint private counsel?

If Public Defenders are used, how many hours on average do they spend on each case? How are they trained and how often? By whom? Training materi-

als should be sent to the Task Force for review.

If private attorneys are appointed, do they apply to be placed on an appointments panel? What criteria exists for being placed on the panel? Who decides if the criteria are satisfied? Who decides which attorney is appointed to each case? Is the appointments system fair or are some attorneys getting a disproportionate number of appointments?

How often are the attorneys trained? By whom? What subjects are taught at the trainings? Agendas and training materials for the last three years should be submitted by each county to the Task Force for review.

How are the attorneys paid? By the county? If so, does the county have any quality assurance controls or criteria to require the level of performance to be adequate to meet statutory and constitutional standards for effective assistance of counsel?

How much time do private attorneys spend, on average, in limited conservatorship cases, including factual investigations, legal research, travel, communications, and court time?

The Task Force should examine the advocacy practices of attorneys for conservatees in terms of ethical duties, professional standards, and effective representation under due process requirements.

Are court appointed attorneys serving in a dual role of advocate for the client as well as de-facto court investigator (as has been the case in Los Angeles for several years)? Are they disclosing confidential information or sharing privileged work product with the court, the petitioner, or opposing counsel in violation of ethical rules? Are they advocating for the stated wishes or legal rights of the client or are they serving as de-facto guardians-ad-litem and advocating for the "best interests" of the client?

If a client does not want to visit a noncustodial parent, is the court-appointed attorney advocating for the First Amendment right of the client to avoid association with the parent, or is the attorney stipulating away the client's freedom of association by acting like this is a visitation dispute over a child in family court?

The Task Force should probe deeply into the practices of court-appointed attorneys because this is the most crucial aspect of the Limited Conservatorship System. Without adequate investigations by these attorneys and without diligent and meaningful advocacy for these clients, limited conservatees may be doomed to a life of social servitude or ongoing abuse by their conservators.

Regional Centers

The Task Force should determine whether Regional Centers are fulfilling their statutory duties. They are supposed to evaluate the capacity of each proposed limited conservatee in several areas of decision making: residence, education, finances, medical, social relationships, sexual activity, and marriage.

Each Regional Center is a separate nonprofit corporation so each one can make its own decisions on how to operate. Yet their statutory duties are mandated by state law – and the California Constitution specifies that laws of a general nature shall be uniform in operation.

Are the Regional Center mandates being conducted uniformly throughout the state? One way to insure uniform operation of the law is for the Department of Developmental Services (DDS) to issue regulations, provide oversight, and institute quality assurance controls over the Regional Centers on making capacity assessments of limited conservatees.

DDS enters into contracts with each of the 21 Regional Centers to authorize services mandated by statute and to provide funding for those services.

Has DDS included a provision in the contract with each Regional Center regarding the need for a conservatorship, whether less restrictive alternatives are available, and conducting capacity assessments in the various areas of decision making? If so, what does the contractual language say? How much

money is allocated to each Regional Center annually for this service? How many hours should be spent on the average limited conservatorship case?

Since each Regional Center has independent control over the manner of its capacity assessments, what type of criteria are used by each Regional Center for each type of assessment? What is the source of the criteria? What are the credentials of the staff member who makes the assessment at each Regional Center? What type of training has that staff member received? From whom? How often?

This is an area that should be the subject of a survey conducted by the Task Force. Regional Centers should be asked to answer these questions and to supply training materials, schedules and agendas of trainings on this process, and the names and credentials of the persons who conducted the trainings.

Self Help Clinics

In Los Angeles County, about 90 percent of new petitions are filed by petitioners who do not have an attorney. Most of these petitioners are referred to a self help clinic for assistance in completing the required forms. Other counties may also have self help clinics.

What a self help clinic tells petitioners and how the forms are completed can have ramifications on limited conservatees. The courts need the self help clinics in order to prevent court time from being wasted by petitioners who are unaware of procedural requirements or who fill out forms incorrectly.

Self help clinics are critical to court efficiency. And yet, self help clinics may also negatively affect the rights of proposed limited conservatees, especially if they directly or indirectly encourage petitioners to check off boxes on the petitions and supporting documents that are likely to result in the loss of rights to the adult in question.

How are the self help clinics selected in each county? Who decides how they will function? In Los Angeles County, Bet Tzedek has stated that it has a 90% "success rate" in getting petitions granted. But from the perspective of the proposed conservatee, "success" may be defined as a petition being denied or one of the powers not being granted to the petitioner.

By definition, self help clinics seem to have aligned themselves with the interests of petitioners. In Los Angeles, for example, Bet Tzedek states that it does not represent proposed limited conservatees. It either operates the self help clinic or directly represents petitioners. Therefore, the organization has a potential conflict of interest with respect to limited conservatees.

The Task Force should learn more about self help clinics, how they operate, what their contractual relationship is with the Probate Court, and whether their actions sometimes harm proposed limited conservatees. The self help clinic in Los Angeles, for example, was visually prompting petitioners to check off a box on the petition that was likely to result in the loss of voting rights of the proposed limited conservatee.

Disability Accommodation

The Americans with Disabilities Act and federal Rehabilitation Act require judges, court personnel, and attorneys to use practices and modify policies so that people with developmental disabilities receive equal justice and equal services.

Judges, investigators, and attorneys should be trained about each of the various types of developmental and physical disabilities they may come into contact with. They must know what accommodations they should make, in terms of physical, intellectual, psychological, and communication disability, in order to effectively interview litigants and clients, provide them a meaningful opportunity to communicate, and insure that their wishes are known and respected.

The Task Force should ask each county how attorneys and court personnel are trained to accommodate litigants with disabilities. How are judges

trained, how often, and by whom? The same should be determined for court investigators and court-appointed attorneys. Materials used to educate these participants on such issues should be obtained.

Voting Rights

Whether a proposed limited conservatee will be disqualified from voting is an issue that arises in these cases. State law authorizes a judge to enter an order disqualifying the adult in question from voting if the judge determines that the adult is not able to complete an affidavit of voter registration.

How the judge is supposed to determine this is not stated. However, the petition form approved by the Judicial Council asks the petitioner to make a factual assertion on this issue. The court investigator is also supposed to look into the ability of the proposed conservatee to complete the voter registration form.

In Los Angeles County, a form approved by the court and used by court-appointed attorneys provides a place for the attorney to disclose whether his or her client has such capacity. This form disregards the ethical problems inherent in an attorney disclosing adverse information to the court which will result in the client's loss of voting rights.

A judge in Los Angeles told court-appointed attorneys at a mandated training session that a proposed conservatee could not have his mother fill out the voter registration form for him. "That's not how it works," the judge quipped as the attorneys laughed. The clear implication was that a client would lose the right to vote unless the client could complete the voter registration form on his or her own accord.

The judge's remarks prompted the quick passage of a voting rights bill shortly thereafter. The bill clarified that a conservatee may not be disqualified from voting because the conservatee has someone assist him or her in completing an affidavit of voter registration. AB 1311 passed both houses of the Legislature in August and was signed into law by the Governor in September.

The Task Force should study how the voting rights issue is handled in each county. Perhaps a survey could be sent to the Probate Court, with a request that the Presiding Judge send sections of it to investigators and attorneys for conservatees.

As to the court itself, how many orders of disqualification are entered in limited conservatorship cases each year? What percent of all limited conservatorship cases result in a disqualification order? On what basis does the judge enter a disqualification order?

Is there an evidentiary hearing? If so, in what percent of cases is there a contested hearing on this issue? If there is no contested hearing, is it done by stipulation?

What criteria do court investigators use to determine if they should recommend that the proposed conservatee should be disqualified from voting or not? Do they receive training on this issue? If so, how often and by whom? They should supply the Task Force with the training materials.

Furthermore, the Task Force should consider the possibility that the statutory criteria (whether the person capable of completing an affidavit of voter registration) is a "literacy test" violating the federal Voting Rights Act. The Task Force should consider the possibility of recommending that the statute be repealed and that Probate Courts should not have the responsibility of disqualifying proposed conservatees from voting. Many states allow all people to vote, including people with developmental disabilities, even if they are under an adult guardianship.

Checks and Balances

Most parts of the judicial system have checks and balances built into them. In the criminal department, there is a prosecutorial agency (executive branch) and a public defender (executive branch) for indigent defendants. These executive branch agencies monitor the judicial branch and file appeals. Appeals are routine. These agencies also have the ability to challenge the judiciary in the political

arena, such as by seeking relief in the Legislature.

The same is true with respect to LPS conservatorships. The Office of Public Conservatorship (executive branch agency) investigates an LPS case. The District Attorney (executive branch agency) files the petition. The Public Defender (executive branch agency) defends the proposed conservatee. There are plenty of checks and balances to keep the system honest and to challenge judicial errors.

The Juvenile Delinquency Court also has a system of checks and balances. There is the District Attorney and either the Office of the Public Defender or the Office of the Alternate Defense Counsel. These are publicly funded agencies that have organizational strength and political power. Appeals are quite common in this system.

The Juvenile Dependency Court has its own set of checks and balances. DPSS investigates cases of abuse or neglect. County Counsel files a petition. In Los Angeles, nonprofit lawfirms represent parents. Each of these agencies has the ability to file appeals and to politically challenge any errors or abuses by the judiciary if they occur.

Unlike these other parts of the Superior Court system, there are no checks and balances in jurisdictions where the Public Defender is not used to represent clients in limited conservatorship cases. Such is the situation in Los Angeles County.

Cases are filed by individuals, most of whom do not have attorneys. There is no legal agency to represent petitioners. Cases are investigated by employees of the court, rather than by the Office of the Public Conservator as is done in LPS conservatorships. Proposed conservatees are represented by private attorneys who are appointed by the judges, paid through orders by the judges, reappointed to new cases by the judges (or not), and trained in seminars mandated and supervised by the judges.

It has often been said that these court-appointed attorneys are the "eyes and ears of the court" and in Los Angeles they have served as de facto court investigators. In Los Angeles and other counties that appoint individual attorneys to represent proposed conservatees, there are no institutional forces that can challenge errors by the system or abuses by the judges. Court-appointed attorneys are relieved as counsel as soon as the conservatorship is granted, and so even they lack the ability to file an appeal or represent the client on appeal.

Appeals are quite common in civil, family, probate, criminal, juvenile, and children's courts. These appeals keep the system honest. All participants know that their behavior and their decisions are subject to appellate review, which could result in a published appellate decision for the entire legal profession and the public to see. This knowledge effects the participants. Also, through appeals, errors can be corrected and the system can be improved.

Unfortunately, since there are almost never any contested hearings in limited conservatorship proceedings (at least in Los Angeles County), and virtually no appeals, there is never an opportunity for the Court of Appeal or Supreme Court to render an opinion about errors in this system.

If a Presiding Judge of Probate Court makes a fiscal decision that results in potential harm to limited conservatees (such as not using court investigators in new cases), there is no agency to challenge it.

The Limited Conservatorship System is operated on a local level, with each Presiding Judge making unreviewable decisions for his or her county. A system of checks and balances – on a regional and a statewide basis – needs to be introduced into this system.

Perhaps a Limited Conservatorship Ombudsperson should be created to monitor the Limited Conservatorship System statewide. On a local level, an advocate position could be added to the staff of each Area Board to monitor the system in the counties served by that Area Board.

The Task Force should inquire into these issues. A system of checks and balances is lacking.

Task Force on Limited Conservatorships

(Possible Outcomes)

A Judicial Council Task Force on Limited Conservatorships could stimulate reforms in the Limited Conservatorship System.

Such reforms would have many beneficial effects on the administration of justice to and for the intended beneficiaries of the system – people with developmental disabilities who need some formal assistance in making various major life decisions.

Some of the possible reforms are described here. These may or may not be the types of reforms, if any, recommended by the Task Force. However, its research, consultations, and public hearings may move the Task Force in the direction of reforms such as these.

Judicial Education

The Center for Judicial Education and Research would have a staff member attend the meetings and public hearings of the Task Force to learn first hand about any deficiencies in policy or operation of the Limited Conservatorship System.

Courses and curricula would be developed by the Center pertaining to the role of judges in administering justice in the Limited Conservatorship System. Core competency standards would be developed by the Center.

Courses would include information on all types of developmental disabilities, statutory and constitutional issues that do or should arise in limited conservatorship proceedings, and requirements of federal laws requiring disability accommodations and modification of court policies and operations to ensure equal access to justice by people with developmental disabilities.

Court rules would be adopted to require judges who hear limited conservatorship cases to have basic training on these issues before being assigned to process such cases in their courtrooms. Refresher and update trainings would be required biennially.

Court Investigators

The Center for Judicial Education and Research would develop curricula and courses for court investigators who are involved in limited conservatorship proceedings.

Core competency standards would be created to help insure that investigators have the skills necessary to interact with people with developmental disabilities, to ascertain their needs, to understand their wishes, and to insure that their rights are protected.

Investigators would be trained on matters such as statutory rights in the Lanterman Act, constitutional rights implicated in transferring decision making authority over matters such as marriage, social interactions, and sexual activities, and on federal voting rights protections.

Investigators would be trained on medical, psychological, and legal criteria involved in assessments of capacity over decisions involving residence, education, finances, medical, social contacts and sexual activity.

Investigators would be trained on how to effectively interview people with cognitive, emotional, psychological, and communication disabilities. Trainings would include the requirements of federal laws for disability accommodations and modification of policies to insure equal access to services and equal justice.

Investigators would also be trained on abuse of people with developmental disabilities, including risk reduction techniques, and appropriate and effective responses to allegations of abuse.

Court rules would be adopted to require mandatory attendance at the core competency trainings as well as attendance at refresher or update trainings biennially.

Regional Centers

Statutes would be enacted to insure that capacity assessments and reports by Regional Centers are conducted in a competent and thorough manner.

Such statutes would require the Department of Developmental Services to adopt regulations governing such capacity assessments, to include criteria for such assessments in contracts with Regional Centers, and to periodically conduct random audits of such assessments.

There would be statutory requirements that a Regional Center report filed with the Probate Court in a limited conservatorship proceeding would include a certification that: (1) staff had met in person with the client and a parent or guardian to discuss the need for a limited conservatorship; (2) less restrictive alternatives to conservatorship were explored and why they are not viable; and (3) criteria for capacity of the client to make decisions on each of the relevant areas were explained to the client and parent or guardian.

Statutes would also require core competency training for a designated staff person or persons at each Regional Center prior to such person or persons being certified by the Department of Developmental Services as being authorized to make capacity assessments and to file a report with the Probate Court in limited conservatorship proceedings. DDS would develop a capacity assessment certification training program for Regional Center employees.

The Probate Code would be amended to prohibit a judge from granting a petition for limited conservatorship until a Regional Center report has been filed with the court and all parties have had a reasonable opportunity to review the report and the court makes a finding that the report complies with statutory requirements.

Monitoring the System

Legislation would be passed to establish agencies within the Executive Branch to provide checks and balances for the Limited Conservatorship System – a system that currently exists exclusively within the Judicial Branch.

A Limited Conservatorship Ombudsperson would be created, perhaps within the Office of Human Rights and Advocacy of the California Department of Developmental Services. The Ombudsperson would monitor policy, operational, and fiscal aspects of the Limited Conservatorship System and bring any deficiencies to the attention of the Legislature and the Judiciary.

The Ombudsperson would review pending legislation that may affect the rights of limited conservatees and render an opinion on such legislation to the Legislature.

The Ombudsperson would also monitor and review any fiscal, policy, or operational changes to the system proposed by the Judicial Branch and render an opinion on such to the Judiciary.

The Ombudsperson would interact with and provide guidance to Limited Conservatorship Advocates employed by Area Boards of the State Council on Developmental Disabilities.

Statutes would be passed creating a position of Limited Conservatorship Advocate at each Area Board throughout the state. The Advocate would monitor the operations of the Limited Conservatorship System at courts in each county within the jurisdiction of the Area Board. Advocates would investigate complaints made by limited conservatees or by someone on their behalf and would to attempt to mediate such complaints with the interested parties.

Attorneys for Conservatees

Attorneys for limited conservatees or proposed limited conservatees play the most important role in

limited conservatorship proceedings. What they say and do affects the outcome of the case more than any other participant in the system. This is true regardless of whether the attorneys are Public Defenders or court-appointed private counsel.

Legislation should be passed that establishes core competency standards for attorneys who represent limited conservatees. These clients cannot evaluate the competence of their lawyers. They cannot shop and compare. They generally lack the ability to complain about deficient performance or to even know how or why to complain. They depend on "the system" to provide competent counsel.

There are no quality assurance controls for attorney competence or effective performance in the Limited Conservatorship System. There are also no *meaningful* criteria for eligibility to be appointed to such cases or *meaningful* standards for training programs to educate Public Defenders or private attorneys who represent these clients.

The Judicial Council and the State Bar of California should jointly develop core competency standards for Public Defenders and private attorneys in order for them to be allowed to represent limited conservatees. The Judicial Council and State Bar should also establish standards for training programs for such attorneys. If necessary, legislation should be passed to delegate such authority to the State Bar Association and require it to work in consultation with the Judicial Council.

Right now, each county decides whether limited conservatees are represented by Public Defenders or court-appointed private counsel. In either event, the county pays the fees for these legal services, either by funding a line item in the budget of the Public Defender or the by sending a check to private attorneys in response to a court order.

The supervisors in each county should be brought into the discussion about quality assurance controls for the legal services they are subsidizing. Perhaps the county would become an underwriter of local training programs. In any event, counties should not be funding legal services which, as it now stands, have no quality assurance controls.

Regardless of whether limited conservatees are represented by Public Defenders or court-appointed private counsel, there should be minimum performance standards. These standards should be the same throughout the state due to the constitutional requirement that laws of a general nature are uniform in operation.

The State Bar and the Judicial Council could jointly sponsor an analysis of the types of legal services that should be performed in the average limited conservatorship case and the number of hours that an attorney would generally need to spend to perform such services competently. This would help establish a benchmark for adequate legal services. Contested cases would obviously require more hours and compensation would be adjusted accordingly.

The process of appointing attorneys to individual cases is another area in need of reform. The Office of the Public Defender is appointed to represent proposed limited conservatees in some counties. That does not pose a problem in terms of potential conflicts of interest. The appointment of private counsel by Probate Court judges is another matter. In Los Angeles there is a Probate Volunteer Panel for PVP attorneys.

Court examiners, who work for the judges and take orders from the judges, assign attorneys to individual cases. Who decides to place an attorney's name on the PVP list was a question never answered by the court when I made an administrative records request of the Los Angeles Superior Court. I was told, however, there are no written instructions or guidelines for how the PVP appointments process operates.

Some PVP attorneys in Los Angeles, for example, depend in large measure on such appointments to make a living. There are about 150 attorneys on the PVP list. However, some receive 40 or more appointments per year while others receive just a few. This disparity does not seem consistent with a

fair rotational appointment process.

Judges have openly stated in PVP trainings that court-appointed attorneys are "the eyes an ears of the court." Other trainers readily admitted that these attorneys were being used as de-facto court investigators after a former Presiding Judge decided that court investigators would no longer be used in limited conservatorship cases in Los Angeles.

PVP attorneys in Los Angeles attend mandatory trainings at which they listen to speakers approved by the Presiding Judge and take instruction from Probate Court judges on how to represent clients. PVP attorneys are being told how to do their jobs by the very judges before whom they will appear.

The Probate Court establishes guidelines for paying these attorneys and individual judges enter orders for payment in specific cases.

Under this system, attorneys for limited conservatees know that it is the court that decides if they are on the panel, if they get appointed to a specific case, how much they will be paid, and whether they get appointed to future cases. They also know that they are expected to be "the eyes and ears of the court" and are expected to perform legal services in the manner in which they are instructed by judges and others selected by judges at the PVP trainings.

This system creates a potential, if not actual, conflict of interest. It tends to make the attorney more loyal to the court than to the client – a client who is unable to determine or understand whether the attorney is doing a good job of advocacy.

The system of judges being in control of who is on the panel, appointments, the amount of payment for services, and the trainings of attorneys, should be discontinued and replaced with something else.

One solution would be for state law to require that the Public Defender represent limited conservatees in all counties, with adequate funding for the right attorney-client ratio to meet minimum standards for competent representation in each case. Sufficient funding would also be provided for training of Public Defenders who represent such clients.

Another solution would be for an independent agency to handle recruitment, appointments to individual cases, setting compensation, training, and investigating complaints against individual attorneys. This could be similar to the Indigent Criminal Defense Appointments Program operated by the Los Angeles County Bar Association.

Another crucial issue is the need to clarify the role of attorneys representing limited conservatees. The client is an adult. Until the proposed conservatee is placed under a conservatorship, the client is presumed to be competent to make all decisions.

The role of attorneys representing adults in other types of proceedings – civil, criminal, or family – is clear. The attorney must advocate for their stated wishes of the client or defend their statutory and constitutional rights.

Information gathered by the attorney in the course of representation must be kept confidential unless disclosure is authorized by the client. The attorney may never advocate against the retention of rights by the client. Any stipulations waiving or surrendering rights must be approved by the client.

These rules do not seem to apply in Los Angeles County where PVP attorneys are routinely disclosing confidential information to the court and other parties and surrendering, rather than defending, the rights of the client – all without approval of the client. Attorneys have been instructed at mandated trainings that may advocate for what they, the attorneys, believe is in the client's best interests. Thus, attorneys have been authorized to act as a de-facto guardians ad litem.

Statutes and court rules are ambiguous as to the type of advocacy required of court-appointed attorneys. Some say that the attorney represents the conservatee. Others say that the attorney represents the interests of the conservatee. None say that the attorney advocates for the "best interests" of the

client. One court rule says that such attorneys have a secondary role of assisting the court in resolving the case.

Ethical standards and rules of professional conduct promulgated by the State Bar do not give a definitive answer.

There are no reported appellate cases in California that have *decided* this issue in the context of a case where the client is conscious. The closest case involved a conservatee who was in a coma. There are decisions in other states, however, which state that best interests advocacy for adult conservatees does not satisfy due process requirements.

Proposed limited conservatees are not children and should not be treated as such. The Lanterman Act specifies that people with developmental disabilities have the same statutory and constitutional rights as all other people.

Case law suggests that when a person has a statutory right to an appointed attorney, due process requires that such an attorney must provide effective assistance to the client. In the context of a proceeding where everyone else in the court room is promoting or deciding what they believe to be in the client's best interests – petitioner, court investigator, and judge – there should be one person who is advocating for the rights of the client to be retained and/or who advocates for the client's stated wishes.

Basic fairness would require that at least one person involved in the case would defend against the erosion of the client's rights – rights which the client has at the beginning of the proceeding.

One judge in Los Angeles recognized the distinction between a "rights retention" attorney and a "best interests" attorney. She would appoint two attorneys for each limited conservatee – one to advocate from each perspective – so that the court would have the benefit of advocacy and information free of a conflict of interest. This practice was discontinued when a new Presiding Judge decided that the cost of such conflict-free advocacy was too great.

The issue of "rights retention" versus "best interests" advocacy will not be definitively resolved until the California Supreme Court decides a specific case on this issue. Even then, it may take a decision by the United States Supreme Court since the federal constitutional right to due process is implicated in the resolution of this issue. Until then, the State Bar of California should give attorneys some guidance.

The Board of Trustees of the State Bar of California could appoint a blue ribbon panel to study the issue and render an opinion. The panel could consist of a member of the Ethics Committee of the State Bar, members of Ethics Committees of two local bar associations in various parts of the state, ethics professors from three law schools, and a retired justice of the Supreme Court or Court of Appeal.

Appeals

There are virtually no appeals taken by or on behalf of limited conservatees. That is why reported appellate decisions in such cases are rare.

If attorneys for conservatees are properly trained, and if they vigorously defend the rights of their clients, there may be more contested hearings. Such hearings would preserve issues for appeal.

When decisions adverse to the rights of a limited conservatee occur, attorneys should file a timely notice of appeal so that the right to appeal is not waived. However, in jurisdictions such as Los Angeles, court-appointed attorneys are generally relieved as counsel as soon as the judgement is entered. Therefore, these lawyers are no longer representing their clients during the 60 days in which a notice of appeal must be filed.

Clients with developmental disabilities generally would not be able to file a notice of appeal on their own and may not understand the meaning or purpose of an appeal. This alone creates a disincentive to appeals. Also, some orders adverse to the client may be the result of ineffective assistance of counsel. In such cases, the attorney would not be

inclined to file a notice of appeal to challenge his or her own deficient performance.

According to a recent published appellate decision, a parent who is a party to the proceeding lacks standing to file an appeal to challenge a ruling that aversely affects the rights of the limited conservatee but not the rights of the parent. In the case of *In re Gregory D.* (2013) 214 Cal.App.4th 62, the court eliminated the possibility of appeals by parents to challenge erroneous court rulings or deficient performance by the attorney for the limited conservatee.

However, there is an exception to the general rule of standing to appeal. Most states recognize the common law principle of "next friend" standing. A relative, friend, or other person concerned about a litigant who has diminished capacity is given standing to step in as an appellate guardian-ad-litem of sorts so that a violation of the litigant's rights can be remedied on appeal. This principle was not discussed or addressed in *In re Gregory D.*

The usual rules of standing should not apply when the constitutional or statutory rights of litigants with developmental disabilities have been infringed. A law should be enacted to clarify that the common law principle of "next friend" standing applies in appeals from orders in a limited conservatorship proceeding.

Also, when a limited conservatee files a notice of appeal on his or her own, or through a next friend, an attorney should be appointed by the Court of Appeal to represent the appellant, without cost, if the appellant qualifies financially. The California Appellate Project could work with the Judicial Council or the Administrative Office of the Courts to work out the procedures for such appointments. If necessary, new legislation could clarify the right of limited conservatees who are indigent to have a court-appointed attorney on appeal.

Self Help Clinics

At least in Los Angeles County, the overwhelming majority of petitioners (usually parents) do not have an attorney. They file the petition "in pro per."

Knowing that, without guidance, pro per petitioners make significant errors in the paperwork, which delays proceedings and wastes valuable court time, some courts have entered into agreements with nonprofit organizations that operate self help clinics. These clinics assist petitioners to complete the paperwork that is required to obtain a conservatorship for the adult in question.

In Los Angeles, a self help clinic is operated by Bet Tzedek. They do not represent proposed limited conservatees or give them advice. They are aligned with petitioners and help them to navigate through the legal processes involved in obtaining an order for a limited conservatorship.

Bet Tzedek does not give legal advice to these pro per petitioners. By their own definition, the self help clinic is merely a form-filling service.

Filing a petition or being appointed as a conservator is an awesome responsibility. Petitioners are setting in motion a process that can result in the loss of liberties of a proposed conservatee if the petition is granted. Delicate decisions must be made by the petitioner in deciding which allegations to make and which areas to seek the transfer of decision-making authority from the conservatee to the conservator.

Likewise, being appointed as a conservator is a huge responsibility – one that may last for many years. Conservators may be given authority to decide where the conservatee lives, whether the conservatee goes to school or not, what services the conservatee receives, who the conservatee socializes with, whether the conservatee is allowed to marry, and whether the conservatee has sex with another person or not.

Being appointed by the court, and being given authority by state statutes, a conservator is engaging in "state action" when decisions are made that curtail the constitutional rights of the conservatee. As a result, the state has some responsibility to

insure that the exercise of such "state action" is responsible and does not infringe a conservatee's federal constitutional rights under color of state law.

Since such a high percentage of petitioners are pro per, and most of them also become conservators, the role of these self help clinics should be expanded beyond that of a form-filling service.

Before the pro per petitioner ever receives the form-filling service, petitioners should be required to attend a seminar, in person, to educate them about the legal requirements of a conservatorship. For example, they should learn about the rights guaranteed by the Lanterman Act, that alternatives to conservatorship should be explored, what the criteria are for deciding whether a proposed conservatee has capacity to make decisions in each of the areas in question, the rights of a conservatee if the petition is granted, and the role and responsibilities of a conservator.

The Judicial Council should develop core competency standards for limited conservators and curricula and training materials for seminars of this nature.

Legislation should be passed to require pro per petitioners to attend such a seminar prior to filing a petition and a proposed conservator to attend one prior to being appointed as a conservator by the court.

Such seminars could be conducted by the same self help clinics that provide the form-filling service. The clinic could enlist the help of a local bar association to administer or participate in the seminars.

As it now stands, pro per petitioners can walk into a self help clinic and fill out the forms without really understanding the ramifications of what they are saying in the petition. This needs to be changed.

References

Reports:

Justice Denied: How California's Limited Conservatorship System is Failing to Protect the Rights of People with Developmental Disabilities

Voting Rights Complaint Filed with the United States Department of Justice

A Strategic Guide for Court-Appointed Attorneys in Limited Conservatorship Cases

With Liberty and Justice for All: The Sexual Rights of Adults with Developmental Disabilities

A Missed Opportunity: Training Program Fails to Help Attorneys Fulfill Ethical Duties and Constitutional Obligations to Clients with Developmental Disabilities

Conferences:

Conference One: Examining the System

Conference Two: Denial of Voting Rights

Essays:

Lanterman Act Rights; Searching Court Records; Probate Investigation Defects; Self Help Clinics; PVP Trainings - Part I; PVP Trainings - Part II; Voting Rights; Expanding the Role of the Regional Center; Legal Principles on Social Rights; Social Rights Advocacy; Areas Needing Improvement; Assembly Line Justice; Trauma-Informed Justice; Supported Decision Making

For access to these reports, conference materials, and essays, go to the website of the Disability and Abuse Project at:
http://disabilityandabuse.org/conservatorship-reform.htm

Probate and Mental Health Advisory Committee

As of November 1, 2014

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County of Contra Costa

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JUDICIAL COUNCIL STAFF TO THE COMMITTEE

Mr. Douglas C. Miller, Lead Staff
Senior Attorney
Legal Services
Judicial Council of California

Dear Mr. Coleman,

The Judicial Council's Probate and Mental Health Committee has modified its response to your request for a recommendation to the Judicial Council for the establishment of a task force to study limited conservatorships in this state, modeled after the Chief Justice's 2006 Probate Conservatorship Task Force. Instead of its referral of this issue to a subcommittee, the advisory committee has decided to consider your request at its meeting on Friday, November 14, 2014, in the Judicial Council's headquarters in San Francisco. This issue will be scheduled on the committee's agenda as a public matter under the new rule of court, rule 10.75, authorizing public meetings of Judicial Council advisory bodies, including this committee.

Your request will be scheduled at 1:00 p.m. on the 14th. You are invited to appear at the meeting at that time to address the committee in support of your request. The meeting will be held in the Judicial Council's Conference Center, where the council itself meets, on the 3rd floor of the State Building in the Civic Center of San Francisco, adjacent to the Civic Center Plaza, the Asian Art Museum, the San Francisco City Hall, the San Francisco Superior Court, and the federal courthouse. The address of the State Building is 455 Golden Gate Avenue, San Francisco, California It is located on a block bounded by McAllister Street (on the Plaza), Larkin Street, Golden Gate Avenue, and Polk Street, one block east of Van Ness Avenue.

We have scheduled your presentation for 20 minutes. You are free to arrange for others to appear with you and to address the committee, but the total time for your presentation remains limited to 20 minutes, and the number of persons who can attend is limited by the seating for the public and presenters available in the Conference Center. If you do plan to make arrangements for others to attend with you, please let us know the approximate number you have in mind, and the number and identity of those you plan to speak to the committee, so we can plan accordingly.

If you cannot attend the meeting in person, you may call in. If that is your preference, let us know and we will advise you of the telephone numbers.
We will also have public listen-only telephone numbers that persons interested in these issues may access. We will provide you with information and formal meeting notices, etc., before the meeting. You and any other member of the public may also make written comments up to one complete business day before the meeting.

We look forward to meeting you and the discussion of the issues you have raised.

Respectfully,

Douglas C. Miller
Senior Attorney
Legal Services | Leadership Services Division
Judicial Council of California

Assembly Bill No. 1311

CHAPTER 591

An act to amend Sections 2208, 2209, and 11302 of the Elections Code, and to amend Sections 1823, 1826, 1828, 1851, and 1910 of the Probate Code, relating to elections.

[Approved by Governor September 26, 2014. Filed with Secretary of State September 26, 2014.]

LEGISLATIVE COUNSEL'S DIGEST

AB 1311, Bradford. Recall elections and voter registration.

(1) Existing law prohibits a person from being registered as a voter except by affidavit of registration. If a court finds that a person is not capable of completing an affidavit of voter registration, as specified, existing law provides that a person shall be deemed mentally incompetent and disqualified from voting.

Existing law regulates the terms and conditions of conservatorships and creates various requirements for a court and a court investigator with regard to informing a proposed conservatee that he or she may be disqualified from voting if he or she is not capable of completing an affidavit of voter registration.

This bill would prohibit a person, including a conservatee, from being disqualified from voting on the basis that the person signs the affidavit of voter registration with a mark or a cross, signs the affidavit of voter registration with a signature stamp, or completes the affidavit of voter registration with the assistance of another person.

(2) Under existing law, if a vacancy occurs in an office after a recall petition is filed against the vacating officer, the recall election is required to proceed. The vacancy in that office is required to be filled as provided by law, but a person appointed to fill the vacancy holds office only until a successor is selected and qualifies for that office.

This bill would provide that upon the occurrence of a vacancy, the elections official for each county in which a section of the recall petition has been filed is required to immediately verify the signatures on the petition submitted to the elections official as of the date of the vacancy. If the elections official verifies that a sufficient number of signatures were filed as of the date of the vacancy, the recall election would be required to proceed. If the elections official verifies that an insufficient number of signatures, or no signatures, were filed as of the date of the vacancy, the recall election would not proceed and the vacancy in the office that is the subject of the recall election would be filled as otherwise provided by law. The bill would delete the requirement that a person appointed to fill the vacancy holds office only until a successor is selected and instead would

prohibit a person who was subject to a recall petition from being appointed to fill the vacancy in the office that he or she vacated or to fill any other vacancy in office on the same governing board for the duration of the term of office of the vacated seat.

The people of the State of California do enact as follows:

SECTION 1. Section 2208 of the Elections Code is amended to read:

2208. (a) A person shall be deemed mentally incompetent, and therefore disqualified from voting, if, during the course of any of the proceedings set forth below, the court finds that the person is not capable of completing an affidavit of voter registration in accordance with Section 2150 and any of the following apply:

(1) A conservator for the person or the person and estate is appointed pursuant to Division 4 (commencing with Section 1400) of the Probate Code.

(2) A conservator for the person or the person and estate is appointed pursuant to Chapter 3 (commencing with Section 5350) of Part 1 of Division 5 of the Welfare and Institutions Code.

(3) A conservator is appointed for the person pursuant to proceedings initiated under Section 5352.5 of the Welfare and Institutions Code, the person has been found not competent to stand trial, and the person's trial or judgment has been suspended pursuant to Section 1370 of the Penal Code.

(4) A person has plead not guilty by reason of insanity, has been found to be not guilty pursuant to Section 1026 of the Penal Code, and is deemed to be gravely disabled at the time of judgment as defined in paragraph (2) of subdivision (h) of Section 5008 of the Welfare and Institutions Code.

(b) If the proceeding under the Welfare and Institutions Code is heard by a jury, the jury shall unanimously find that the person is not capable of completing an affidavit of voter registration before the person shall be disqualified from voting.

(c) If an order establishing a conservatorship is made and in connection with the order it is found that the person is not capable of completing an affidavit of voter registration, the court shall forward the order and determination to the county elections official of the person's county of residence.

(d) A person shall not be disqualified from voting pursuant to this section on the basis that he or she does, or would need to do, any of the following to complete an affidavit of voter registration:

(1) Signs the affidavit of voter registration with a mark or a cross pursuant to subdivision (b) of Section 2150.

(2) Signs the affidavit of voter registration by means of a signature stamp pursuant to Section 354.5.

(3) Completes the affidavit of voter registration with the assistance of another person pursuant to subdivision (d) of Section 2150.

SEC. 2. Section 2209 of the Elections Code is amended to read:

2209. (a) For conservatorships established pursuant to Division 4 (commencing with Section 1400) of the Probate Code, the court investigator shall, during the yearly or biennial review of the conservatorship as required by Chapter 2 (commencing with Section 1850) of Part 3 of Division 4 of the Probate Code, review the person's capability of completing an affidavit of voter registration in accordance with Section 2150.

(b) (1) If the person had been disqualified from voting by reason of being incapable of completing an affidavit of voter registration, the court investigator shall determine whether the person has become capable of completing the affidavit in accordance with Section 2150 and subdivision (d) of Section 2208, and the investigator shall so inform the court.

(2) If the investigator finds that the person is capable of completing the affidavit in accordance with Section 2150 and subdivision (d) of Section 2208, the court shall hold a hearing to determine whether the person is in fact capable of completing the affidavit. If the person is found to be capable of completing the affidavit, the person's right to register to vote shall be restored, and the court shall so notify the county elections official.

(c) If the person had not been found to be incapable of completing an affidavit of voter registration, and the court investigator determines that the person is no longer capable of completing the affidavit in accordance with Section 2150 and subdivision (d) of Section 2208, the investigator shall so notify the court. The court shall hold a hearing to determine whether the person is capable of completing an affidavit of voter registration in accordance with Section 2150 and subdivision (d) of Section 2208. If the court determines that the person is not so able, the court shall order the person to be disqualified from voting pursuant to Section 2208, and the court shall so notify the county elections official.

SEC. 3. Section 11302 of the Elections Code is amended to read:

11302. (a) Except as described in paragraph (3) of subdivision (b), if a vacancy occurs in an office after a recall petition is filed against the vacating officer, the recall election shall nevertheless proceed.

(b) (1) Upon the occurrence of the vacancy, the elections official for each county in which a section of the recall petition has been filed shall immediately verify the signatures on the petition submitted to the elections official as of the date of the vacancy.

(2) If the elections official verifies that a sufficient number of signatures were filed as of the date of the vacancy, the recall election shall proceed.

(3) If the elections official verifies that an insufficient number of signatures, or no signatures, were filed as of the date of the vacancy, the recall election shall not proceed and a vacancy in the office that is the subject of the recall election shall be filled as otherwise provided by law.

(4) A person who was subject to a recall petition may not be appointed to fill the vacancy in the office that he or she vacated and that person may not be appointed to fill any other vacancy in office on the same governing board for the duration of the term of office of the seat that he or she vacated.

SEC. 4. Section 1823 of the Probate Code is amended to read:

1823. (a) If the petition is filed by a person other than the proposed conservatee, the clerk shall issue a citation directed to the proposed conservatee setting forth the time and place of hearing.

(b) The citation shall include a statement of the legal standards by which the need for a conservatorship is adjudged as stated in Section 1801 and shall state the substance of all of the following:

(1) The proposed conservatee may be adjudged unable to provide for personal needs or to manage financial resources and, by reason thereof, a conservator may be appointed for the person or estate, or both.

(2) Such adjudication may affect or transfer to the conservator the proposed conservatee's right to contract, in whole or in part, to manage and control property, to give informed consent for medical treatment, and to fix a residence.

(3) (A) The proposed conservatee may be disqualified from voting pursuant to Section 2208 of the Elections Code if he or she is not capable of completing an affidavit of voter registration in accordance with Section 2150 of the Elections Code.

(B) The proposed conservatee shall not be disqualified from voting on the basis that he or she does, or would need to do, any of the following to complete an affidavit of voter registration:

(i) Signs the affidavit of voter registration with a mark or a cross pursuant to subdivision (b) of Section 2150 of the Elections Code.

(ii) Signs the affidavit of voter registration by means of a signature stamp pursuant to Section 354.5 of the Elections Code.

(iii) Completes the affidavit of voter registration with the assistance of another person pursuant to subdivision (d) of Section 2150 of the Elections Code.

(4) The court or a court investigator will explain the nature, purpose, and effect of the proceeding to the proposed conservatee and will answer questions concerning the explanation.

(5) The proposed conservatee has the right to appear at the hearing and to oppose the petition, and in the case of an alleged developmentally disabled adult, to oppose the petition in part, by objecting to any or all of the requested duties or powers of the limited conservator.

(6) The proposed conservatee has the right to choose and be represented by legal counsel and has the right to have legal counsel appointed by the court if unable to retain legal counsel.

(7) The proposed conservatee has the right to a jury trial if desired.

SEC. 5. Section 1826 of the Probate Code is amended to read:

1826. Regardless of whether the proposed conservatee attends the hearing, the court investigator shall do all of the following:

(a) Conduct the following interviews:

(1) The proposed conservatee personally.

(2) All petitioners and all proposed conservators who are not petitioners.

(3) The proposed conservatee's spouse or registered domestic partner and relatives within the first degree. If the proposed conservatee does not have a spouse, registered domestic partner, or relatives within the first

degree, to the greatest extent possible, the proposed conservatee's relatives within the second degree.

(4) To the greatest extent practical and taking into account the proposed conservatee's wishes, the proposed conservatee's relatives within the second degree not required to be interviewed under paragraph (3), neighbors, and, if known, close friends.

(b) Inform the proposed conservatee of the contents of the citation, of the nature, purpose, and effect of the proceeding, and of the right of the proposed conservatee to oppose the proceeding, to attend the hearing, to have the matter of the establishment of the conservatorship tried by jury, to be represented by legal counsel if the proposed conservatee so chooses, and to have legal counsel appointed by the court if unable to retain legal counsel.

(c) Determine whether it appears that the proposed conservatee is unable to attend the hearing and, if able to attend, whether the proposed conservatee is willing to attend the hearing.

(d) Review the allegations of the petition as to why the appointment of the conservator is required and, in making his or her determination, do the following:

(1) Refer to the supplemental information form submitted by the petitioner and consider the facts set forth in the form that address each of the categories specified in paragraphs (1) to (5), inclusive, of subdivision (a) of Section 1821.

(2) Consider, to the extent practicable, whether he or she believes the proposed conservatee suffers from any of the mental function deficits listed in subdivision (a) of Section 811 that significantly impairs the proposed conservatee's ability to understand and appreciate the consequences of his or her actions in connection with any of the functions described in subdivision (a) or (b) of Section 1801 and identify the observations that support that belief.

(e) Determine whether the proposed conservatee wishes to contest the establishment of the conservatorship.

(f) Determine whether the proposed conservatee objects to the proposed conservator or prefers another person to act as conservator.

(g) Determine whether the proposed conservatee wishes to be represented by legal counsel and, if so, whether the proposed conservatee has retained legal counsel and, if not, the name of an attorney the proposed conservatee wishes to retain.

(h) (1) Determine whether the proposed conservatee is not capable of completing an affidavit of voter registration in accordance with Section 2150 of the Elections Code and may be disqualified from voting pursuant to Section 2208 of the Elections Code.

(2) The proposed conservatee shall not be disqualified from voting on the basis that he or she does, or would need to do, any of the following to complete an affidavit of voter registration:

(A) Signs the affidavit of voter registration with a mark or a cross pursuant to subdivision (b) of Section 2150 of the Elections Code.

(B) Signs the affidavit of voter registration by means of a signature stamp pursuant to Section 354.5 of the Elections Code.

(C) Completes the affidavit of voter registration with the assistance of another person pursuant to subdivision (d) of Section 2150 of the Elections Code.

(i) If the proposed conservatee has not retained legal counsel, determine whether the proposed conservatee desires the court to appoint legal counsel.

(j) Determine whether the appointment of legal counsel would be helpful to the resolution of the matter or is necessary to protect the interests of the proposed conservatee in any case where the proposed conservatee does not plan to retain legal counsel and has not requested the appointment of legal counsel by the court.

(k) Report to the court in writing, at least five days before the hearing, concerning all of the foregoing, including the proposed conservatee's express communications concerning both of the following:

(1) Representation by legal counsel.

(2) Whether the proposed conservatee is not willing to attend the hearing, does not wish to contest the establishment of the conservatorship, and does not object to the proposed conservator or prefer that another person act as conservator.

(*l*) Mail, at least five days before the hearing, a copy of the report referred to in subdivision (k) to all of the following:

(1) The attorney, if any, for the petitioner.

(2) The attorney, if any, for the proposed conservatee.

(3) The proposed conservatee.

(4) The spouse, registered domestic partner, and relatives within the first degree of the proposed conservatee who are required to be named in the petition for appointment of the conservator, unless the court determines that the mailing will result in harm to the conservatee.

(5) Any other persons as the court orders.

(m) The court investigator has discretion to release the report required by this section to the public conservator, interested public agencies, and the long-term care ombudsman.

(n) The report required by this section is confidential and shall be made available only to parties, persons described in subdivision (*l*), persons given notice of the petition who have requested this report or who have appeared in the proceedings, their attorneys, and the court. The court has discretion at any other time to release the report, if it would serve the interests of the conservatee. The clerk of the court shall provide for the limitation of the report exclusively to persons entitled to its receipt.

(o) This section does not apply to a proposed conservatee who has personally executed the petition for conservatorship, or one who has nominated his or her own conservator, if he or she attends the hearing.

(p) If the court investigator has performed an investigation within the preceding six months and furnished a report thereon to the court, the court may order, upon good cause shown, that another investigation is not necessary or that a more limited investigation may be performed.

(q) Any investigation by the court investigator related to a temporary conservatorship also may be a part of the investigation for the general petition for conservatorship, but the court investigator shall make a second visit to the proposed conservatee and the report required by this section shall include the effect of the temporary conservatorship on the proposed conservatee.

(r) The Judicial Council shall, on or before January 1, 2009, adopt rules of court and Judicial Council forms as necessary to implement an expedited procedure to authorize, by court order, a proposed conservatee's health care provider to disclose confidential medical information about the proposed conservatee to a court investigator pursuant to federal medical information privacy regulations promulgated under the Health Insurance Portability and Accountability Act of 1996.

(s) A superior court shall not be required to perform any duties imposed pursuant to the amendments to this section enacted by Chapter 493 of the Statutes 2006 until the Legislature makes an appropriation identified for this purpose.

SEC. 6. Section 1828 of the Probate Code is amended to read:

1828. (a) Except as provided in subdivision (c), prior to the establishment of a conservatorship of the person or estate, or both, the court shall inform the proposed conservatee of all of the following:

(1) The nature and purpose of the proceeding.

(2) The establishment of a conservatorship is a legal adjudication of the conservatee's inability properly to provide for the conservatee's personal needs or to manage the conservatee's own financial resources, or both, depending on the allegations made and the determinations requested in the petition, and the effect of such an adjudication on the conservatee's basic rights.

(3) (A) The proposed conservatee may be disqualified from voting pursuant to Section 2208 of the Elections Code if he or she is not capable of completing an affidavit of voter registration in accordance with Section 2150 of the Elections Code.

(B) The proposed conservatee shall not be disqualified from voting on the basis that he or she does, or would need to do, any of the following to complete an affidavit of voter registration:

(i) Signs the affidavit of voter registration with a mark or a cross pursuant to subdivision (b) of Section 2150 of the Elections Code.

(ii) Signs the affidavit of voter registration by means of a signature stamp pursuant to Section 354.5 of the Elections Code.

(iii) Completes the affidavit of voter registration with the assistance of another person pursuant to subdivision (d) of Section 2150 of the Elections Code.

(4) The identity of the proposed conservator.

(5) The nature and effect on the conservatee's basic rights of any order requested under Chapter 4 (commencing with Section 1870), and in the case of an allegedly developmentally disabled adult, the specific effects of each limitation requested in such order.

(6) The proposed conservatee has the right to oppose the proceeding, to have the matter of the establishment of the conservatorship tried by jury, to be represented by legal counsel if the proposed conservatee so chooses, and to have legal counsel appointed by the court if unable to retain legal counsel.

(b) After the court so informs the proposed conservatee and prior to the establishment of the conservatorship, the court shall consult the proposed conservatee to determine the proposed conservatee's opinion concerning all of the following:

(1) The establishment of the conservatorship.

(2) The appointment of the proposed conservator.

(3) Any order requested under Chapter 4 (commencing with Section 1870), and in the case of an allegedly developmentally disabled adult, of each limitation requested in such order.

(c) This section does not apply where both of the following conditions are satisfied:

(1) The proposed conservatee is absent from the hearing and is not required to attend the hearing under subdivision (a) of Section 1825.

(2) Any showing required by Section 1825 has been made.

SEC. 7. Section 1851 of the Probate Code is amended to read:

1851. (a) (1) If court review is required pursuant to Section 1850, the court investigator shall, without prior notice to the conservator except as ordered by the court for necessity or to prevent harm to the conservatee, visit the conservatee. The court investigator shall inform the conservatee personally that the conservatee is under a conservatorship and shall give the name of the conservator to the conservatee. The court investigator shall determine all of the following:

(A) Whether the conservatee wishes to petition the court for termination of the conservatorship.

(B) Whether the conservatee is still in need of the conservatorship.

(C) Whether the present conservator is acting in the best interests of the conservatee. In determining whether the conservator is acting in the best interests of the conservatee, the court investigator's evaluation shall include an examination of the conservatee's placement, the quality of care, including physical and mental treatment, and the conservatee's finances. To the extent practicable, the investigator shall review the accounting with a conservatee who has sufficient capacity. To the greatest extent possible, the court investigator shall interview individuals set forth in subdivision (a) of Section 1826, in order to determine if the conservator is acting in the best interests of the conservatee.

(D) (i) Whether the conservatee is not capable of completing an affidavit of voter registration in accordance with Section 2150 of the Elections Code and may be disqualified from voting pursuant to Section 2208 or 2209 of the Elections Code.

(ii) The conservatee shall not be disqualified from voting on the basis that he or she does, or would need to do, any of the following to complete an affidavit of voter registration:

(I) Signs the affidavit of voter registration with a mark or a cross pursuant to subdivision (b) of Section 2150 of the Elections Code.

(II) Signs the affidavit of voter registration by means of a signature stamp pursuant to Section 354.5 of the Elections Code.

(III) Completes the affidavit of voter registration with the assistance of another person pursuant to subdivision (d) of Section 2150 of the Elections Code.

(2) If the court has made an order under Chapter 4 (commencing with Section 1870), the court investigator shall determine whether the present condition of the conservatee is such that the terms of the order should be modified or the order revoked.

(3) Upon request of the court investigator, the conservator shall make available to the court investigator during the investigation for inspection and copying all books and records, including receipts and any expenditures, of the conservatorship.

(b) (1) The findings of the court investigator, including the facts upon which the findings are based, shall be certified in writing to the court not less than 15 days prior to the date of review. A copy of the report shall be mailed to the conservator and to the attorneys of record for the conservator and conservatee at the same time it is certified to the court. A copy of the report, modified as set forth in paragraph (2), also shall be mailed to the conservatee's spouse or registered domestic partner, the conservatee's relatives in the first degree, and if there are no such relatives, to the next closest relative, unless the court determines that the mailing will result in harm to the conservatee.

(2) Confidential medical information and confidential information from the California Law Enforcement Telecommunications System shall be in a separate attachment to the report and shall not be provided in copies sent to the conservatee's spouse or registered domestic partner, the conservatee's relatives in the first degree, and if there are no such relatives, to the next closest relative.

(c) In the case of a limited conservatee, the court investigator shall make a recommendation regarding the continuation or termination of the limited conservatorship.

(d) The court investigator may personally visit the conservator and other persons as may be necessary to determine whether the present conservator is acting in the best interests of the conservatee.

(e) The report required by this section shall be confidential and shall be made available only to parties, persons described in subdivision (b), persons given notice of the petition who have requested the report or who have appeared in the proceeding, their attorneys, and the court. The court shall have discretion at any other time to release the report if it would serve the interests of the conservatee. The clerk of the court shall make provision for limiting disclosure of the report exclusively to persons entitled thereto under this section.

(f) The amendments made to this section by the act adding this subdivision shall become operative on July 1, 2007.

(g) A superior court shall not be required to perform any duties imposed pursuant to the amendments to this section enacted by Chapter 493 of the Statutes 2006 until the Legislature makes an appropriation identified for this purpose.

SEC. 8. Section 1910 of the Probate Code is amended to read:

1910. (a) If the court determines the conservatee is not capable of completing an affidavit of voter registration in accordance with Section 2150 of the Elections Code, the court shall by order disqualify the conservatee from voting pursuant to Section 2208 or 2209 of the Elections Code.

(b) The conservatee shall not be disqualified from voting on the basis that he or she does, or would need to do, any of the following to complete an affidavit of voter registration:

(1) Signs the affidavit of voter registration with a mark or a cross pursuant to subdivision (b) of Section 2150 of the Elections Code.

(2) Signs the affidavit of voter registration by means of a signature stamp pursuant to Section 354.5 of the Elections Code.

(3) Completes the affidavit of voter registration with the assistance of another person pursuant to subdivision (d) of Section 2150 of the Elections Code.

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