

The Path Forward

to Justice in Conservatorships



A Report to Alameda County
Supervisor Nathan A. Miley

Spectrum Institute
January 16, 2019

www.spectruminstitute.org/path



On January 11, 2019, Alameda County Supervisor Nate Miley convened a forum focusing on the need for conservatorship reform in California.

The morning session began with a screening of the documentary film *The Guardians* and was followed by a panel presentation featuring several individuals involved in conservatorship reform in California and guardianship reform throughout the United States.

An afternoon roundtable discussion was led by Supervisor Miley, attorney Thomas F. Coleman of the Spectrum Institute, and attorney Tony Chicotel of the California Advocates for Nursing Home Reform. Participants included representatives from the Alameda County Superior Court, District Attorney, Public Defender, County Counsel, and Public Guardian-Conservator. This report was developed as a follow up to the roundtable.



Tom Coleman - Spectrum Institute

January 15, 2019

Supervisor Nate Miley
Alameda County
Board of Supervisors

Re: The Path Forward

Dear Nate,

I have prepared a report focusing on steps toward conservatorship reform – both in Alameda County and in California.

The forum that you sponsored was very helpful in showing both individual injustices and systemic problems.

The afternoon roundtable showed: (1) a willingness of relevant agencies to listen and learn; and (2) the need for hard data on what is really happening during the conservatorship process. It appears that officials and agencies involved in the process have not been paying close attention to the system itself. They just process cases. Statistics on cases, procedures, and outcomes seem to be lacking. So we really need your staff to follow up with these agencies on getting the answers to the questions posed in the handout materials.

This system is complex and the problems are entrenched. This cannot be easily fixed. It will take time, resources, and commitment.

The report I have written suggests that the Office of the District Attorney should take the lead. Although they are not directly involved in the conservatorship process, that office has the jurisdiction to investigate what is happening with each agency that is involved and to make recommendations to the Board of Supervisors and these agencies on how the process can be improved – indeed how it must be modified to conform to the requirements of the ADA and relevant state laws.

Please review this report. If you think it has merit, please share it with Nancy O'Malley. Once she reviews it, perhaps we can schedule a meeting in Oakland so that all three of us, and Tony Chicotel if he is available, can discuss it further.

Thank you for showing an interest in these issues and for beginning your "due diligence" with respect to the need for conservatorship reform.



Tom Coleman
Legal Director
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(818) 482-4485

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Board of Supervisors

Nathan A. Miley
Supervisor, District 4

For Immediate Release
January 10, 2019

Contact: Paul Sanftner
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Press Release

Private Film Screening & Panel Discussion: THE GUARDIANS Documentary

*Invitation only to view the film that exposes the scope of the systemic abuse
of some of the most vulnerable members of our society*

OAKLAND, CA – Supervisor Nate Miley continues his legacy of prioritizing the advocacy and safety of seniors by hosting a private screening of THE GUARDIANS - a thought-provoking documentary which investigates allegations of corruption within the Nevada Guardianship and Family Court systems - on Friday, January 11, 2019 at 9:30 a.m. at the Alameda County Administration Building Board of Supervisors Chambers (Fifth Floor – 1221 Oak Street, Oakland).

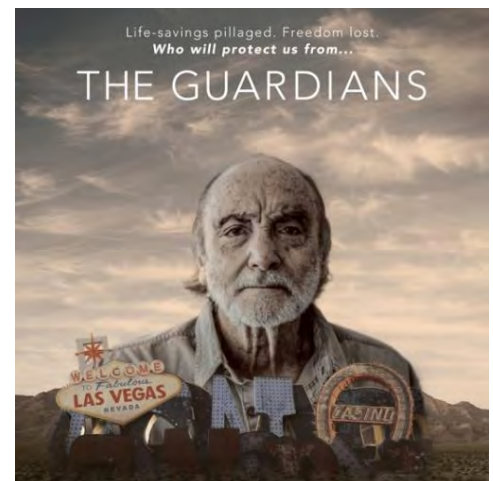
For decades, Supervisor Miley has been a champion for seniors. As the founder and president of United Seniors of Oakland and Alameda County - a community organization dedicated to empowering seniors - he recognizes first-hand the importance of raising awareness around elder abuse. By hosting a private film screening and panel discussion, Supervisor Miley hopes to shed light on California cases involving guardianship fraud. Specifically, Friday's discussion will highlight a recent indictment in Las Vegas, where a guardian was charged with stealing from hundreds of clients over a half a million dollars from 2011 to 2016.

"The elderly population have already been through enough challenges in their lives. What sickens me is that they're being victimized by the very government system that was sworn to protect them," stated Supervisor Miley, and he is not alone in his concern. Other local leaders also have voiced the need for more guardianship reform.

"We need a system to support people by giving those help, not one that takes over their lives, strips them of fundamental rights, and drains their estates by paying exorbitant fees to conservators and attorneys in endless litigation," said Tom Coleman, a discussion panelist and founder Spectrum Institute, a non-profit that specializes elder advocacy in the court system.

Supervisor Miley seeks to elevate this issue by bringing together those closely with those working in and impacted by the guardianship system. As such, a subsequent panel discussion will conclude the film screening event. Below is the list of panelists.

- Cynthia Perriliat, Executive Director of [Alameda County Care Alliance](#)
- Benjamin Bartlett, [Berkeley City Councilmember](#)
- Richard Calhoun and Linda Kincaid, Founders of [Coalition for Elder & Disability Rights](#) (CEDAR)
- Rick Black, Director of [Center for Estate Administration Reform](#) (CEAR)
- Terry Williams, Founder of [Citizen4Justice.com](#), featured in THE GUARDIANS
- Julie Belshe, [Kasem Cares Foundation](#), featured in THE GUARDIANS
- Thomas F. Coleman, Attorney and Founder of [Spectrum Institute](#)





Supervisor Nate Miley Presents: Screening & Discussion of THE GUARDIANS

Friday, January 11, 2019

Alameda County Board of Supervisors Chambers

1221 Oak Street, 5th Floor, Oakland

9:30 AM – 1:15 PM

"THE GUARDIANS is a revealing investigative documentary set in Las Vegas, Nevada that exposes allegations of corruption within the Nevada Guardianship and Family Court systems involving the legal kidnapping of elderly people. The film shines a light on a lucrative business that drains seniors' life-savings and robs them of their freedoms." <http://www.guardiansdocumentary.com/>

AGENDA

Doors Open for Seating	9:30 AM – 9:45 AM
Opening Remarks by Supervisor Nate Miley	9:45 AM – 10:00 AM
Screening of THE GUARDIANS	10:00 AM – 11:45 AM
Panel Discussion (Lunch Provided)	11:45 AM – 1:00 PM

Moderator: **Cynthia Perrilliat**, Executive Director of Alameda County Care Alliance
Panelists: **Benjamin Bartlett**, Berkeley City Councilmember • **Richard Calhoun** and **Linda Kincaid**, Founders of Coalition for Elder & Disability Rights (CEDAR) • **Rick Black**, Director of Center for Estate Administration Reform (CEAR) • **Terry Williams**, Founder of Citizen4Justice.com, featured in THE GUARDIANS • **Julie Belshe**, Kasem Cares Foundation, featured in THE GUARDIANS • **Thomas F. Coleman**, Founder of Spectrum Institute, Attorney

PLEASE SUBMIT COMMENT CARDS TO BE READ BY THE MODERATOR

Closing Remarks & Acknowledgements by Supervisor Nate Miley	1:00 PM – 1:15 PM
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Supervisor Nate Miley Presents: Screening & Discussion of THE GUARDIANS



PANELIST INFORMATION



BEN BARTLETT
BERKELEY CITY COUNCIL,
DISTRICT 3

Ben Bartlett is a member of the Berkeley City Council, whose core mission is to defend the powerless. Ben has passed more than 60 measures including a first-in-the-nation plan to house the homeless in prefabricated modular micro-units, and a first-in the-nation law divesting from companies involved with Trump's border wall and banning local police cooperation with ICE.

Ben is a fifth generation Berkeley native, environmental lawyer, and respected community leader. Ben's mission is to leverage industry and government to deliver innovation, expand opportunity, and protect the environment.

Ben is the son of community activists, and at a young age he learned the value of community and the necessity of progress. Those values of innovation and inclusion continue to inform Ben's policies.



**LINDA KINCAID & RICHARD CALHOUN, COALITION
FOR ELDER & DISABILITY RIGHTS (CEDAR)**

Linda Kincaid and Richard Calhoun founded the Coalition for Elder & Disability Rights (CEDAR). AB 937 (2013) was the legislative response to unlawful isolation of Linda's mother. AB 937 amended California Probate Code 2351 to clarify that conservatees have the right to visitors, phone calls, and personal mail. Richard sponsored SB 1191 (2018). SB 1191 amended California Penal Code 368.5 to clarify that abuse is a crime, and law enforcement has exclusive responsibility for criminal investigations.



RICK BLACK,
CENTER FOR ESTATE
ADMINISTRATION REFORM
(CEAR)

Rick and his wife were first exposed to fraudulent guardianships and probate exploitation in June 2013. The family lost over \$1 million. Motivated by the experience, Rick built a coalition of over 50 families who lost over \$40 million from 2010-2015 due to fraudulent adult guardianships in Nevada.

Rick left his job as an executive of a global textile company in early 2015 to devote himself fulltime volunteering for guardianship reforms and to assist other families. Rick has investigated over 500 suspected fraudulent guardianship cases nationally and counseled over 1,200 families. He coined the phrase "isolate the victim, defame legitimate family, and liquidate the estate" to describe the hallmarks of fraudulent guardianships and probate fraud. Rick's efforts have freed dozens from fraudulent guardianships nationwide.



Terry Williams is an American social scientist, analyst and consultant specializing in legal research relating to elder, family and social phenomena. As a former legal assistant and real estate agent, Ms. Williams discovered a criminal enterprise running straight through the courts of Las Vegas, operating under the guise of legitimate guardianship. Having called the matter to the attention of numerous law enforcement agencies and having become a highly sought after journalistic source, Ms. Williams debuts her findings in both the New Yorker article entitled, *The Takeover - How the Elderly Lose Their Rights*, as well as THE GUARDIANS documentary, a riveting feature-length film evidencing a racketeering operation targeting wealthy seniors, the disabled and their families whose chief purpose is to intercept generational and legacy wealth using the legal system.

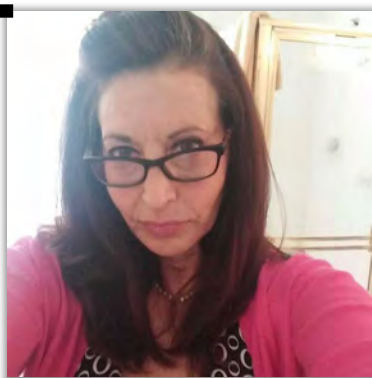
TERRY WILLIAMS, FEATURED IN
THE GUARDIANS

Throughout his 45 years as a civil rights attorney, Thomas F. Coleman has advocated for a variety of causes and minority populations, including cases and projects promoting justice and equal rights for people with intellectual and developmental disabilities.

For the past six years, Coleman has directed the Disability and Guardianship Project of Spectrum Institute. Starting with a focus on California, Coleman's advocacy for guardianship reform has broadened to become a national cause. Coleman's advocacy efforts for guardianship reform have been acknowledged with awards from The Arc of California and from TASH, an international disability rights organization.



THOMAS F. COLEMAN,
SPECTRUM INSTITUTE



Julie Belshe's parents were legally kidnapped from their home via a private guardianship in August 2013, beginning a five-year journey through Family Court and The Regional Justice Center Court in Nevada. After countless hearings, the court restored their civil and constitutional rights so they could go and live with Julie and her family, where they reside today.

Choosing not to be a victim but a survivor, Belshe found her purpose at 48 years old, and now dedicates her life to supporting people who are experiencing different stages of elder abuse and isolation. She runs the helpline at Kasem Cares Foundation, sharing her knowledge to help others understand their rights and navigate through the nightmares of elder abuse and isolation.

JULIE BELSHE, FEATURED IN
THE GUARDIANS

Rev. Cynthia Carter Perrilliat, MPA, is Co-Founder and Executive Director of the Alameda County Care Alliance (ACCA), a faith & community-based program in partnership with local clinical, academic, and community organizations. Rev. Cynthia is responsible for the overall success of the ACCA Advanced Illness Care Program, which helps persons needing advanced illness care and their caregivers address spiritual, advanced care planning, health, and social needs by linking them to resources in the community.

Rev. Perrilliat holds a BA degree in Business Administration from the University of Toledo and an MPA degree from Cal State University East Bay with a focus in organizational change and healthcare. She serves as a Minister of the gospel at the Allen Temple Baptist Church, Oakland, CA.



MODERATOR
CYNTHIA CARTER PERRILLIAT,
ALAMEDA COUNTY CARE
ALLIANCE



Disability and Guardianship Project
Disability and Abuse Project

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December 23, 2018

Supervisor Nathan A. Miley
Board of Supervisors
Alameda County
1221 Oak Street, Suite 536
Oakland, CA 94612

Re: Conservatorship Reform

Dear Supervisor Miley:

It has come to our attention that you are convening an educational event focused on the need for reform of the probate conservatorship system in California. We commend you for this. Political leadership on this issue is rare.

We have been studying all aspects of the probate conservatorship system in this state for some five years now. Based on legal research and factual investigations, we have concluded that the conservatorship system is badly broken. All moving parts of the system are failing. Many participants – whether in the private or public sectors – are not fulfilling their constitutional and statutory duties. This includes judges, judicial administrators, court investigators, court-appointed attorneys, public defenders, capacity assessment experts, regional centers, and conservators. State legislators are not fulfilling their oversight responsibilities either. One short oversight hearing every ten years is not enough.

We have tried to engage public officials about this massive problem for several years. This includes officials at the federal, state, and local levels of government. It includes officials in all three branches of government. The response mostly has been that of avoidance, denial, or delay.

We do not point to a problem – and we have pointed to many – without offering specific solutions. Despite the fact that we have done most of the work for these officials by identifying problems and offering solutions, the response has been minimal.

This is why it is so refreshing to see a local public official taking the initiative to shine a light on the broken conservatorship system. Acknowledgment is just the first step of a long reform process that could take many years, even with support from officials in the three branches of state government. If there continues to be resistance or deliberate indifference, as now exists, it could take even longer.

We highly recommend that you and other officials who attend this private movie screening and educational forum should become familiar with our reform efforts. That is best accomplished by browsing through our website and reading materials that capture your interest.

For a sample of what we have been doing, I recommend the following sections of our websites:

- 1) The “what’s new” page describing our advocacy activities:
<http://disabilityandabuse.org/whats-new.htm>
- 2) Our Digital Law Library on Guardianship and Disability Rights:
<http://spectruminstitute.org/library/>
- 2) A recent report submitted to the California Supreme Court:
<http://spectruminstitute.org/ethics/>
- 3) Reform recommendations submitted to the Chief Justice:
<http://spectruminstitute.org/steps/>
- 4) A complaint to the Sacramento Superior Court:
<http://spectruminstitute.org/Sacramento/>
- 5) A presentation made in South Korea to the World Congress on Adult Guardianship:
<http://disabilityandabuse.org/spotlight-on-california.pdf>
- 6) Our complaints to the United States Department of Justice:
<http://spectruminstitute.org/doj/>
- 7) A report to the Judiciary Committee of the California Senate:
<http://spectruminstitute.org/judiciary-report.pdf>
- 8) A proposal made to the California Judicial Council:
<http://spectruminstitute.org/attorney-proposals/>
- 9) The draft of a new bill that would improve the performance of court-appointed attorneys:
<http://disabilityandabuse.org/right-to-counsel-bill.pdf>

This is just a sample of what we have been doing. These proposals would achieve modest but much needed reforms. But what really must occur is a complete overhaul of the probate conservatorship system – one that keeps many, if not most, seniors and people with disabilities out of court and instead using an assisted decision-making alternative. That type of a system is being developed in Australia. <https://sydneyhealthlaw.com/tag/assisted-decision-making/> We need a system to support people by giving them help, not one that takes over their lives, strips them of fundamental rights, and drains their estates by paying exorbitant fees to conservators and attorneys in endless litigation.

If you or any other elected or appointed official in California would like to discuss these matters further, we are available to work with you to move California forward to a better future for seniors and people with disabilities.

Respectfully,



Thomas F. Coleman
Legal Director

p.s. We would be very grateful if you would communicate with Los Angeles County Supervisor Sheila Kuehl to share with her what you are doing in Northern California to identify and expose these problems. We could use a champion for conservatorship reform here in Los Angeles County.



A Path for Conservatorship Reform

Moving Beyond Awareness

Movies like *Edith + Eddie*, *The Guardian*, and *Pursuit of Justice* capture attention, but what next? Here are some concrete steps that conservatorship reform advocates should insist be taken.

Complaints about the probate conservatorship system in California have been mounting for years. Systemic deficiencies and a lack of accountability have created a pattern and practice of civil rights violations and financial abuse by many participants in probate conservatorship proceedings. Such practices harm seniors and people with disabilities.

Individual complaints have been ineffective. So far, organized efforts to create reform have yielded few results. One of the main reasons for such intransigence is that no single official is in charge of the conservatorship system.

Conservatorship proceedings are presided over by judges in each of the 58 counties. There is no statewide judicial administration, management, or oversight. Local probate courts act like fiefdoms. Legislative oversight is absent. The executive branch plays no role in the conservatorship system.

These systemic deficiencies and individual injustices will continue unabated until public pressure causes elected officials to take notice and work together for *comprehensive* reforms. In the interim, each of these officials can play a part in promoting measures to fix some of the most obvious deficiencies in the system.

The column on the right identifies state and federal officials who can help reform the conservatorship system in California. The key elements of such reform would involve: statewide judicial management; monitoring by an executive branch agency; accountability by the 58 county courts; performance standards for attorneys assigned to represent clients; and responsive and thorough investigations by federal and state law enforcement agencies.

Chief Justice of California – implement [proposals](#) submitted by Spectrum Institute to improve access to justice in probate conservatorship proceedings.

Governor – request the Fair Employment and Housing Council to open an inquiry and hold [hearings](#) into civil rights violations in conservatorship proceedings.

Legislature – [enact a law](#) to: (1) require an attorney for respondents in all conservatorship proceedings; (2) specify that attorneys must act as zealous advocates; (3) direct the State Bar to adopt attorney performance standards.

Attorney General – convene a [civil rights summit](#) on probate conservatorships, with participation by conservatees, family members, advocates, and judges.

Health and Human Services Agency – direct the Department of Developmental Services to [oversee regional centers](#) in connection with their role in probate conservatorship proceedings.

State of California – the Legislature, Governor, and Chief Justice should convene a commission to review guardianship reforms in [other nations](#), with recommendations for comprehensive reform in California.

Congress – fund a unit in the DOJ to investigate alleged [violations](#) of federal law, including the ADA, committed by courts and court-appointed personnel in guardianship and conservatorship proceedings.

County Supervisors – authorize a pilot project for a nonprofit organization to [represent](#) conservatees and proposed conservatees similar to the [program](#) operated by the Legal Aid Center of Southern Nevada.

District Attorneys – amend [Gov. Code § 11135](#) to authorize district attorneys to investigate and civilly prosecute alleged ADA violations by public entities.

Thomas F. Coleman, Legal Director
Spectrum Institute
www.spectruminstitute.org/path

Conservatorship Reform in Alameda County

Questions and Answers on the Path Forward

Some 60,000 or more seniors and people with disabilities are living under court-imposed conservatorships in California. Many of them reside in Alameda County. Thousands of new petitions are filed annually in courts throughout the state, perhaps hundreds of them in Alameda.

Fundamental rights have been taken from these individuals by probate court judges. The authority to make basic decisions regarding residence, medical care, finances, and lifestyle choices has been transferred to another adult pursuant to court order – sometimes to a complete stranger. The assets of these adults may be drained through protracted litigation, with court-appointed attorneys and professional fiduciaries using these cases for a steady stream of income.

There is a growing chorus of complaints about unfair proceedings and unjust results in these cases. Some complaints come from seniors and people with disabilities themselves. Some are raised by their family members who feel victimized by the overreaching control of the probate courts. Other complaints are leveled by advocacy organizations that have identified a pattern and practice of disability discrimination and violations of due process in these proceedings.

The calls for reform are increasing in both frequency and intensity. Persistent demands from a growing network of advocates have prompted an educational forum in Oakland, California on January 11, 2019. The event is hosted by Alameda County Supervisor Nathan Miley. A panel discussion will be held following the screening of *The Guardians*, a documentary film focusing on abuses by probate courts in Nevada. Civil rights violations in the conservatorship system in California were the subject of another

documentary film – *Pursuit of Justice* – released in March 2018.

Awareness, complaints, and generalized demands for reform are one thing. Real and lasting change is another. The latter requires detailed knowledge of how the current system works, where systemic deficiencies exist, and who is responsible for allowing them to continue. Such change also requires reform advocates to specify what adjustments in policy and practice need to occur and identify which officials need to take action to accomplish such results.



The following questions are designed to elicit information that will pinpoint the various sources of the systemic deficiencies that are contributing to the unfair process and unjust results we see in all too many probate conservatorship proceedings. Eliciting this information requires that elected and appointed officials and their staff members are both cooperative and candid.

Supervisor Nathan Miley has been asked to schedule meetings with the following officials to initiate a process that will elicit answers to some very basic questions: county auditor, public defender, Legal Assistance for Seniors, probate presiding judge, probate court investigator, court ADA officer, registrar of voters, local regional center director, adult protective services, and a nearby fair employment and housing office.

The legal director of Spectrum Institute has offered to meet with these officials, advise them of various concerns, and present them with these questions – the answers to which will help identify possible solutions. The most important step now is to schedule the meetings so that we can get answers to these important questions.

Probate Presiding Judge

Open Cases. How many open probate conservatorships are there? Limited conservatorships?

New Petitions. How many new petitions were filed in 2017? How many granted? Denied or dismissed? How many jury trials? How many appeals were filed by conservatees that year?

Attorneys. In how many of the new cases in 2017 was the Public Defender appointed? In how many new cases was Legal Assistance for Seniors appointed? Does the court have a contract with LAS? How does LAS get paid for cases when it is appointed? Who sets the fees for these attorneys? What is the current fee structure for these cases? What procedure exists to handle complaints that lawyers from either of these legal services programs are not performing properly?

Judges. Which judges are currently hearing probate conservatorship cases? Who decides which judge gets assigned to hear a particular case? What training or educational requirements exist for judges to be eligible for an assignment to hear probate conservatorship cases? For the current judges who are assigned to hear these cases, what training has each received regarding elder or dependent adult abuse and on forensic assessment of capacity to make decisions?

Experts. For probate conservatorship cases, in how many cases in 2017 were experts appointed under Evidence Code Section 730 to assess the capacity of a proposed conservatee? Are experts routinely appointed to evaluate whether less restrictive alternatives are feasible?

Public Defender

Staff. How many attorneys are currently assigned to represent clients in probate conservatorship cases? Do they handle other types of cases as well, or only conservatorship cases? What is the case load for each of these attorneys?

Performance. Do these attorneys keep track of their time on each case? What is the average

amount of time (per attorney) on cases in 2017? Does the office have performance standards for these attorneys? If so, when were they adopted and by whom? Is there any mechanism to monitor or review the performance of these attorneys? How many appeals were filed in 2017?

Statistics. How many total cases were handled by the office in 2017? What percent of petitions were granted? How many jury trials? How many appeals were filed by conservatees that year?

Training. Does the office have a training program that attorneys must take prior to handling these cases? Is training done in person, by video, with written materials, or by all of these methods? Who are the trainers? Who selects the trainers? What subject matters are covered in the trainings? Is there in-service training as well? How often does in-service training occur?

Budget. How much money did the Board of Supervisors allocate to the P.D.'s in 2017 for probate conservatorship cases? Does the office have a written agreement with the county for these services? Are there quality assurance controls associated with this budget item? Does the office agree that its services will comply with the ADA or Section 504 of the Rehabilitation Act? Does the county conduct any performance audits in connection with these cases?

Legal Assistance for Seniors

The same questions that are raised for the Public Defender also apply to this organization. Additional questions are set forth below.

When did LAS first enter into a contract with the county to provide legal aid services for respondents in probate conservatorship cases? Was it a competitive bidding process? Has the county ever done an audit of these services or otherwise monitored the quality of services provided to seniors in these proceedings?

Probate Court Investigator

Staff. How many full-time investigators are

assigned to work on probate conservatorship cases? How many investigators work part-time? How many support staff are there?

Case Loads. How many total cases, whether guardianships, adoptions, conservatorships, or others, does each investigator have responsibility for at any given time?

Annual Reviews. Are investigators assigned to every new conservatorship case? How many first-year annual reviews were done by court investigators in 2017 in conservatorship cases? How many biennial reviews were done in such cases in 2017? Is there a backlog in annual reviews? Is there a backlog in biennial reviews?

Developmental Disabilities. As part of their duties for new cases, do court investigators routinely read IEP reports and IPP reports for proposed conservatees with developmental disabilities? Are grandparents and siblings routinely interviewed? Are neighbors of the proposed conservatees routinely interviewed?

Voting Rights Reinstatements. SB 589 requires reinstatement of voting rights for any conservatee who can express a desire to vote. Did investigators ask conservatees about this issue in annual reviews and biennial reviews in 2017? In how many cases were recommendations made to reinstate the voting rights of conservatees?

Training. Are staff required to take training prior to being assigned to serve the court as a probate investigator? If so, are the trainings in person, by video, by written materials, or by all of these methods? Is there in-service training for existing staff? How often? What topics are covered in the trainings? Is the issue of abuse included in these trainings? Is there training on what investigators must do to comply with the Americans with Disabilities Act as they interact with people with cognitive and communication disabilities?

ADA Officer

Staffing. How many staff assist the court in complying with Title II of the ADA in connection with probate conservatorship proceedings?

Performance Standards. Does the court have performance standards for ADA officers to guide them in assessing the types of accommodations that conservatees and proposed conservatees may need in order to have effective communication and meaningful participation in conservatorship proceedings? If so, who adopted the standards?

Training. Does the court require staff who are assigned to ADA compliance duties to have training in Title II mandates? Is there specific training on identifying the types of accommodations that may be needed by litigants with cognitive and communication disabilities to ensure they have effective communication and meaningful participation in conservatorship proceedings? Are ADA officers trained on the obligations of the court pursuant to Government Code Section 11135? Do the court's ADA officers attend professional conferences? If so, how often?

Monitoring. What mechanisms does the court have for monitoring whether its ADA officers are actually complying with the requirements of the ADA?

Public Guardian-Conservator

How many petitions for probate conservatorships did this office file in 2017? On how many cases was it appointed that year as conservator? How many investigators do they have for probate conservatorship cases? What process do they have for finding and evaluating less restrictive alternatives? How often do they visit their conservatees?

Registrar of Voters

SB 589 Implementation. Prior to the passage of SB 589, the probate court frequently entered orders disqualifying probate conservatees from voting. The standards for disqualification were drastically changed by SB 589. Court investigators should be inquiring into the desire to vote of conservatees and notifying the court so that it can order voting rights reinstated and notify the Registrar of Voters. How many reinstatement orders did the Registrar receive from the court in 2017? What communications have occurred between the court and the Registrar since SB 589 was enacted?

Regional Center Director

DDS Guidance. A regional center has a statutory duty to evaluate clients when it becomes aware that a petition for conservatorship has been filed and must then transmit a report to the court. What guidance, training, or supervision is being provided by the Department of Developmental Services to the Regional Center of the East Bay in connection with this service?

Clients in Conservatorships. How many clients of the regional center are currently in a probate conservatorship in Alameda County? How many new petitions were filed for clients in Alameda in 2017? Were regional center reports filed with the court for each of these clients? Are petitions for *limited* conservatorships always filed for clients, or do parents or other petitioners sometimes file for a *general* conservatorship instead?

IPP Service. A regional center client is entitled to have an IPP review whenever a significant event occurs or is about to occur that will affect the life of the client. How many IPPs were held in 2017 specifically for conservatorship planning or to assess less restrictive alternatives?

Training. Are staff who work on conservatorship evaluations and reports required to take any specialized training for these functions? If so, is there a formal training program? Are there training materials? Are all conservatorship evaluations done by a qualified professional, such as a psychologist or licensed social worker?

Budget. Are conservatorships mentioned in the regional center contract with DDS? Is there a line item in the regional center budget for this?

Adult Protective Services

Interaction with Probate Court. Does the court, Public Defender, or Public Guardian-Conservator ever ask APS to assess proposed conservatees for less restrictive alternatives to conservatorship? If so, how frequently? If not, why not?

Conservatorship Cases. In how many cases in 2017 was a report received by APS for alleged

abuse or neglect of a conservatee in Alameda County? In how many cases did APS report suspected abuse or neglect to the Alameda court investigator's office in 2017? In how many cases did court investigators refer cases to APS for investigation that year? Does APS consider judges and court investigators to be mandatory reporters of elder or dependent adult abuse?

Training. Do workers have training on ADA compliance when interacting with victims of suspected abuse or neglect who have cognitive disabilities? Is there training on interviewing persons with developmental disabilities? On signs of abuse of people with such disabilities?

DFEH Office

Government Code Section 11135. This law authorizes the Department of Fair Employment and Housing to investigate complaints of ADA violations committed by public entities. The superior court is a public entity under Title II of the ADA. DFEH has an office in Fremont.

Complaint Process. Does the Fremont office have a process for receiving and processing complaints that a superior court has violated the ADA or Government Code Section 11135?

Staff. Is a staff person at the Fremont office trained regarding the duties of public entities, including courts, to ensure that recipients of services have effective communication and meaningful participation in those services?

County Auditor

How are county funds used in conservatorship proceedings? How much for the public defender? For court-appointed experts? Do these funds have quality assurance controls attached? Does the county do ADA compliance monitoring?

Thomas F. Coleman
Legal Director
Spectrum Institute

www.spectruminstitute.org/path

County Jurisdiction in Probate Conservatorship Proceedings

By Thomas F. Coleman

The superior court is a state entity. So are its employees, such as court investigators and ADA coordinators. The county government has no *direct* jurisdiction over the superior court and its employees.

The county also has no jurisdiction over private parties who petition for probate conservatorships or over the attorneys who represent petitioners. Likewise, the county has no direct jurisdiction over private parties, including professional fiduciaries, who are appointed as conservators. Also, in cases involving adults with developmental disabilities, the county has no direct jurisdiction over regional centers which are involved in conservatorship proceedings.

Finally, the county has no direct jurisdiction over Legal Assistance for Seniors (LAS), an organization under contract with the superior court to provide legal services to conservatees and proposed conservatees who are not indigent. LAS attorney fees are paid from the assets of its clients and not by the county.

To summarize, the county has no direct jurisdiction over: judges; court investigators; court ADA coordinators; private party petitioners and their attorneys; private party conservators, including professional fiduciaries; regional centers; LAS and its attorneys.

HOWEVER, the county *does* have *direct* jurisdiction over other agencies and individuals involved in probate conservatorship proceedings. It has direct authority over the Public Defender, the office which represents indigents and adults with developmental disabilities involved in these proceedings. The county also has direct jurisdiction over Adult Protective Services, whose mission includes helping vulnerable adults remain independent and outside of conservatorships if feasible. It also has direct jurisdiction over the Public Guardian-Conservator, an office that sometimes files petitions for probate conservatorships and that sometimes is appointed as a conservator. It also has direct jurisdiction over the County Counsel, which advises and represents APS and the Public Guardian-Conservator.

Also, the county has *indirect* jurisdiction over experts who are appointed in these proceedings under Evidence Code Section 730 to perform evaluations or other services for litigants who are *indigent*. This is the power of the purse string. The county can impose quality assurance controls on the funding of these experts – especially to ensure that the services are ADA compliant. The court appoints, but the county

pays when the service recipient is indigent. Therefore, the county has authority to impose quality assurance controls on these county-funded services.

To summarize, the county has direct or indirect jurisdiction over: the Public Defender and its attorneys (direct); the APS agency and its workers (direct); the office of the Public Guardian-Conservator and its employees (direct); the office of the County Counsel and its lawyers and staff (direct); Evidence Code 730 experts for indigents (indirect via quality controls).

Because the county government does have such extensive jurisdiction in several important parts of the “probate conservatorship system,” the county has more than a role; it has a *responsibility* to ensure that its portions of the system comply with applicable state and federal laws. This includes Title II of the ADA which requires public entities to ensure that service recipients with disabilities (all respondents in conservatorship proceedings) have effective communication and meaningful participation in those services (including all aspects of these legal proceedings).

The role of the Public Defender is to ensure that all of the legal rights of its clients are protected. That includes making sure that all participants in the proceedings – judges, investigators, ADA coordinators, regional center, private parties, etc – obey the law in these proceedings. Therefore, since the Public Defender is a county agency, the county itself has a duty to make sure the Public Defender makes formal objections or files notices of appeal if these individuals or agencies are not following applicable laws. Therefore, while the county has direct jurisdiction over only several participants in these proceedings, it has *indirect* jurisdiction – through the advocacy duties of the Public Defender – to ensure that the entire system is functioning properly for the indigent clients who are represented by the Public Defender.

Considering the county’s duties and jurisdiction, it is appropriate that Alameda County Supervisor Nathan Miley has convened a forum to address these issues. Many thanks to Supervisor Miley for exercising such leadership by initiating an educational process that, over time, should stimulate necessary reforms.

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Library Outreach Volunteer Effort

Connecting Conservatees with Library Services

A Project of the Berkeley Public Library
in cooperation with the County of Alameda

Some residents of the County of Alameda are living under an order of conservatorship. These are seniors and adults with disabilities who require special care and attention under supervision of the Alameda County Superior Court in a conservatorship. The nature of their physical, communication, or cognitive disabilities may interfere with their ability to use the services of public libraries in their communities.

Library services can enhance literacy, provide education, and offer entertainment and social interaction to those who can utilize them. They should be made more available to people with disabilities. In addition to the benefits described above, regular contact with a library volunteer may also have the effect of preventing isolation and reducing the risk of abuse.

Berkeley City Councilmember Ben Bartlett and Alameda County Supervisor Nathan Miley are local public officials who have demonstrated a sincere interest in improving the lives of seniors and people with disabilities who are living under an order of conservatorship. They are aware of the problem of isolation and the risk of abuse to members of this vulnerable population. Spectrum Institute is a nonprofit organization focusing on ways to reduce the risk of abuse of people with disabilities and to enhance and protect the rights of adults living under an order of conservatorship. With these facts in mind, Spectrum Institute is making this proposal to Councilman Bartlett and Supervisor Miley.

It is proposed that the City of Berkeley authorize a pilot project to be known as the Library Outreach Volunteer Effort, or "The L.O.V.E. Project." The project would be conducted in cooper-

ation with the Alameda County Social Services Agency. The Regional Center of the East Bay should also be asked to participate, as should the Alameda County Superior Court.

The L.O.V.E. Project would recruit volunteers to assist probate conservatees to use the services of the Berkeley Public Library. They would periodically meet a conservatee at the library for an hour session or longer, or they would bring library materials to a conservatee at his or her place of residence. Volunteers would be screened through the library's Volunteer Program or Adult Protective Services (APS). They would receive an orientation from either APS or the Regional Center of the East Bay on topics such as communication with people with cognitive disabilities, and issues regarding abuse of seniors and vulnerable adults, including identifying the signs and symptoms of abuse and when and how to report suspected abuse. The Disability and Abuse Project of Spectrum Institute would provide education and training materials on these subjects to the Project.

If the Project is successful in Berkeley, it could expand to include other city libraries in Alameda County and become a model for other counties.

United States Supreme Court Justice Louis D. Brandeis once said that "Sunlight is said to be the best of disinfectants." The L.O.V.E. Project would help bring more sunlight into the lives of seniors and people with disabilities who are living in conservatorships.

Spectrum Institute
Disability and Abuse Project
www.disabilityandabuse.org

Conservatorship Justice Project

of the Alameda County District Attorney

The Conservatorship Justice Project is a function of the Consumer Protection Section of the Alameda County District Attorney's Office. The purpose of the project is to protect conservatees and proposed conservatees from unlawful discrimination and to improve the administration of justice in probate conservatorship proceedings in the Alameda County Superior Court.

Under Government Code Section 26500.5, "The district attorney may sponsor, supervise, or participate in any project or program to improve the administration of justice." Among the constitutional and statutory mandates of the Alameda County District Attorney is to "Initiate civil actions involving protection of consumers." (Strategic Mission and Vision, Budget Presentation, Fiscal Year 2017-2018) Its civil rights enforcement functions include civilly prosecuting ADA violations of the Unruh Civil Rights Act. Its criminal law enforcement functions include the prosecution of elder and dependent adult abuse, including financial, physical, and emotional abuse.

Pursuant to Section 26500.5, and with authorization from the Board of Supervisors, the District Attorney is initiating a Conservatorship Justice Project. The project will: (1) review the functions of the public entities and private sector businesses and organizations involved in the conservatorship process to determine how they impact the state and federal rights of conservatees and proposed conservatees as consumers and recipients of services; (2) identify any systemic procedural problems in the conservatorship process or in the functions of the various public and private entities involved in the process; (3) recommend changes in policies and practices to improve the administration of justice in probate conservatorship proceedings; (4) receive and investigate specific complaints for alleged violations of Civil Code Section 51 and civilly prosecute such violations if appropriate; (5) receive complaints for ADA violations of Government Code Section 11135 and refer them to the Department of Fair Employment and Housing or other relevant agencies for investigation; and (6) issue an annual report to the Board of Supervisors on the activities of the project.

The District Attorney welcomes the formation of an Advisory Committee on Conservatorship Justice to be convened by the Board of Supervisors and chaired by a member of the Board. Public members of the committee would be appointed by the Board of Supervisors. Ex Officio members should include a representative from the Superior Court, Public Defender, Public Guardian-Conservator, Legal Assistance for Seniors, and Regional Center of the East Bay. The advisory committee should invite the Department of Fair Employment and Housing to participate as a liaison.

The Conservatorship Justice Project will regularly consult with nonprofit advocacy organizations such as the Spectrum Institute and the California Advocates for Nursing Home Reform.

This proposal is submitted to Alameda County Supervisor Nathan Miley and District Attorney Nancy O'Malley by the Spectrum Institute. It is submitted with a memorandum titled: "The ADA and Ensuring Access to Justice in Probate Conservatorship Proceedings in Alameda County." It is appropriate that the project be sponsored by the District Attorney since that office is not involved in conservatorship proceedings and can therefore be objective in its review of systemic issues and in the investigation or referral of complaints. (January 13, 2019) www.spectruminstitute.org/path

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

By Thomas F. Coleman

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

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

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

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

When it comes to our health, each individual decides whether to have a healthy diet or to consume junk food. To drink lots of water or lots

of soda. We decide whether to go to the doctor or to a faith practitioner. To see a medical doctor, a chiropractor, or an acupuncturist.

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

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

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

Statutory Requirements

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



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

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

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

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

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

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

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

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

Current Deficiencies

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

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

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

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

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

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

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

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

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

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

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

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

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

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

The supposed goal of the conservatorship process is to promote independence and protect freedoms while at the same time minimizing the risk of abuse or neglect. Finding supports, services, and benefits – and one or more individuals to assist the adult – in avoiding a conservatorship should

be a top priority for all participants in the proceeding. And yet, this seems to be a footnote at best in a process that seems fixated on putting people into conservatorships. The court could ask Adult Protective Services for a LRA assessment. The court-appointed attorney could insist on an IPP for this purpose for a regional center client or the appointment of an expert under Evidence Code Section 730 for LRA planning for an adult with other types of cognitive disabilities. But a serious LRA evaluation and planning process is not occurring in most probate conservatorship proceedings.

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

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

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

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

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

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

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

Court Investigators. The Probate Code contemplates that a court investigator will review the petition and supporting documents, interview the proposed conservatee to advise them of their rights and determine their wishes, interview the proposed conservator, interview relatives of the

proposed conservatee, and evaluate the proposed placement. The investigator is supposed to file a report to the court and make an objective recommendation on whether a conservatorship is necessary and, if so, who should be appointed to act as conservator.

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

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

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

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

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

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

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

Between the fees charged by the conservator, conservator's attorney, and LAS attorney, the estate can be diminished by \$700 or more per hour when these fees are combined. This poses a disincentive to many conservatees who may

want to challenge the actions of conservators. Any such challenge, and ensuring court hearings, could cost the conservatee tens of thousands of dollars.

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

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

ADA Compliant Practices

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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The ADA and Ensuring Access to Justice in Probate Conservatorship Proceedings in Alameda County

What Laws and Procedures Apply?

The Americans with Disabilities Act prohibits discrimination on the basis of disability against employees, applicants for employment, and persons who receive the services of government entities or private businesses. Title I applies to private employers. Title II applies to state and local public entities. Title III applies to public accommodations operated by private businesses or nonprofit organizations.

Litigants with disabilities who are involved in probate conservatorship proceedings in California are recipients of government services. They may also be recipients of services provided by private businesses or nonprofit organizations that are involved in these proceedings.

Government agencies who are or may be involved in probate conservatorship proceedings include the superior court and its employees and agents, the county public defender, the county public guardian-conservator, and the county adult protective services. Nonprofit organizations that may be involved in probate conservatorship proceedings include law firms such as Legal Assistance for Seniors (LAS) and the Regional Center of the East Bay. Private businesses that may be involved include licensed professional fiduciaries who are appointed to act as conservators.

Public entities have their own independent obligations under Title II of the ADA, as do private businesses and nonprofit organizations under Title III. However, as the Title III ADA Technical Assistance Manual explains: “Where public and private entities act jointly, the public entity must ensure that the relevant requirements of Title II are met; and the

private entity must ensure compliance with Title III.” <https://www.ada.gov/taman3.html>

Courts are public entities subject to the mandates of the ADA. (Tennessee v. Lane (2004) 541 U.S. 509) The departments of the County of Alameda that perform functions in conservatorship proceedings are also considered to be public entities under Title II. <https://www.ada.gov/taman2.html#II-1.2000> Organizations such as LAS and the Regional Center are private entities with obligations under Title III of the ADA, as are professional fiduciaries appointed by the court to act as conservators.

The superior court has adopted a local court rule appointing LAS to cases where the litigants are not indigent and do not have developmental disabilities. (Rule 7.820) The court also has a contractual arrangement with LAS. As a result, LAS is governed by Title III, but under Title II the court is also responsible for ensuring that LAS services comply with Title II since LAS is performing a function delegated to it by a public entity. LAS is considered a “service establishment” under Title III.

Likewise, the Regional Center is not purely a private actor. It is performing functions in these proceedings that are mandated by the California Legislature, is under contract with the Department of Developmental Services (DDS), and receives state and federal funds that subsidize its services. The Regional Center has independent obligations under Title III of the ADA. It is considered a “social service center establishment” under Title III. However, independent of the Regional Center’s Title III obligations, the State of California has a duty to ensure that the state-

mandated services the Regional Center performs in conservatorship proceedings also comply with Title II. The Department of Developmental Services would perform this oversight function.

Title II Obligations

Public entities may not discriminate on the basis of disability against recipients of their services. Once a public entity knows that a service recipient has a disability that may interfere with the ability to have full access to its services, the entity has an obligation to take pro-active steps to address the situation to alleviate the potential inaccessibility.

Knowledge of the disability, and its potential interference in equal access to services, is sometimes acquired by the entity when it receives a request for accommodations or modifications of the entity's regular policies and practices. However, a request for accommodation is not needed to trigger the entity's duties under Title II. Knowledge that a disability exists and that it may interfere with equal access to services can come from any source.

In a conservatorship proceeding, for example, such knowledge is virtually automatic upon the filing of a petition. Facts alleged in the petition put the court and all participants in the proceedings on notice that a conservatee or proposed conservatee has significant cognitive or communication disabilities that may render them unable to care for their own basic needs. Facts are alleged that put everyone on notice that the litigant is so disabled that he or she lacks the capacity to make basic life decisions due to the nature and severity of these cognitive challenges. Therefore, virtually every proposed conservatee has rights under Title II of the ADA and the court and other governmental participants have obligations to ensure those rights are protected. Again, these obligations apply even without request once the governmental entity becomes aware of the

nature and extent of the litigant's disabilities.

In terms of Title II, a public entity has two primary obligations. One is to ensure that the litigant has effective communication in the service being received. The other is to ensure the litigant has meaningful participation in the service. In terms of conservatorship proceedings, public entities that play a role in them must take pro-active measures to assess the ADA needs of the litigant and to provide the necessary supports and services to ensure effective communication and meaningful participation in the proceedings, including ancillary services that may need to be provided outside of the court house itself.

Title III Obligations

The ADA requires that a public accommodation provide an equal opportunity to participate in or benefit from the serviced being offered. A public accommodation must reasonably modify its policies, practices, and procedures, to avoid the denial of equal access to services.

It should be noted that litigants with disabilities in conservatorship proceedings are not seeking to participate in services being offered to the general public. In fact, they are not seeking the services of LAS or the Regional Center, or of professional fiduciaries. These services are being foisted on them. They have no choice but to participate in these services.

These service providers are signing contracts, or accepting funds, or receiving court appointments to provide services specifically to people with serious cognitive and communication disabilities. Therefore, the service itself is a disability-related service. As such, reasonable accommodations to ensure effective communication in the service and meaningful participation in the service is part of the service by definition. These service providers know, from the start, that the

recipients of their services have special needs that will require special accommodations in order to ensure meaningful participation in the services.

California State Law

California has a state-law equivalent of Title II of the ADA and Title III of the ADA. Title II is incorporated into Government Code Section 11135. Title III is incorporated into Civil Code Section 51 et seq.

Section 11135 prohibits the denial of full and equal access to the benefits of any program or activity conducted, operated, or administered by any entity funded by the state or that receives financial assistance from the state. The statute specifies that such state-operated or state-funded entities must comply with the protections and prohibitions under Title II of the ADA. The state Department of Fair Employment and Housing has authority to investigate complaints filed with it and to civilly prosecute violations of Section 11135.

Section 51 is part of a series of statutes known as the Unruh Civil Rights Act. The Act prohibits business establishments of any kind whatsoever from engaging in various types of discrimination in the delivery of services. Subdivision (f) of Section 51 declares that a violation of the right of any individual under ADA is a violation of this section. In effect, Section 51 is the state's equivalent of Title III of the ADA. The Unruh Act also applies to services provided by nonprofit organizations. (Board of Directors v. Rotary Club of Duarte (1987) 481 U.S. 537; Ibister v. Boys' Club of Santa Cruz (1985) 40 Cal.3d 72.)

Whenever there is reasonable cause to believe that any person is engaged in conduct that is intended to deprive someone of the rights protected by Section 51, Section 52 authorizes the victim or the district attorney to bring a civil action in an appropriate court by filing with it a complaint.

Administrative Complaints

Federal DOJ. In addition to civil actions that can be filed in court by conservatees or proposed conservatees whose rights are violated under the ADA, the victim of discrimination or someone on his or her behalf may file an administrative complaint with the United States Department of Justice. A complaint may be filed for Title II violations committed by the superior court or any public entity involved in the conservatorship process. A complaint may be filed for Title III violations by LAS, the Regional Center, or professional fiduciaries acting as conservators.

State Agencies. In addition to civil actions that can be filed in court by conservatees or proposed conservatees whose rights are violated under the ADA as incorporated into Section 11135, the victim of discrimination or someone on his or her behalf may file an administrative complaint with the state Department of Fair Employment and Housing. A complaint may also be filed with the agency that funds or authorizes the services, e.g., a complaint may be filed with the superior court for ADA violations by LAS, or with DDS for ADA violations by the Regional Center.

District Attorney. In addition to civil actions that can be filed in court by conservatees or proposed conservatees whose rights are violated under Title III of the ADA as incorporated into Section 51, an administrative complaint can be filed with the local district attorney invoking that agency's authority to investigate and civilly prosecute violations by businesses and nonprofit organizations that engage in discrimination in the delivery of services. This would include alleged violations by LAS, the Regional Center, or professional fiduciaries acting as conservators.

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