# Capacity to Retain Counsel

By Thomas F. Coleman

The issue of capacity to retain counsel sometimes arises in civil proceedings. The issue could be raised by opposing counsel or by the court itself. Any attempt by the court or opposing counsel to deprive an adult of his or her right to be represented by counsel of choice has constitutional implications.

The issue of capacity to retain counsel was raised when a petition for conservatorship was filed against superstar Britney Spears in 2008 in the Los Angeles County Superior Court. Attorney Adam F. Streisand made an appearance on behalf of Ms. Spears.

Rather than allowing her to be represented by counsel of her own choosing, Judge Reva Geotz held a closed-door hearing on whether Ms. Spears lacked the capacity to retain counsel. Ms. Spears was not present in court. No testimony was taken. The court allowed Mr. Streisand to make a statement but then excluded him from rest of the closed proceeding. Samuel Ingham, an attorney previously appointed to represent Ms. Spears, stayed for the entire capacity hearing, apparently arguing that she lacked capacity tor retain counsel.

Based on a doctor's report, but without the benefit of retained counsel to examine the doctor as a witness or to present evidence favorable to Ms Spears on the issue, the court ruled that Ms. Spears lacked the capacity to retain private counsel. As a result, from that moment forward and for the next 12 years, she was represented by a lawyer foisted on her by the court. Ingham was paid exorbitant fees in the case, sometimes over $500,00 per year.

As a court-appointed attorney, Mr. Ingham had dual loyalties. He was supposed to represent Ms. Spears but he also had a duty to assist the court in the resolution of the matter to be decided. (Local Rule 4.125.) This local court rule creates a potential, if not actual, conflict of interest because it gives an appointed attorney two people to satisfy – the client and the judge. Furthermore, once an attorney is appointed, no other attorney may represent a conservatee or proposed conservatee. This undermines the right of a litigant to be represented by counsel of choice. (Local Rule 4.126.)

An attorney has duties "as a zealous advocate and as protector of his client's confidences." (*California State Auto Association v. Bales* (1990) 221 Cal.App.3d 227. The term "zealous advocacy" is associated with the California rules of professional conduct. See *In re Zamer G* (2007) 153 Cal.App.4th 1253, 1267 where the Court of Appeal speaks of "an attorney's duties of loyalty, confidentiality, and zealous advocacy." An attorney's duty to be a zealous advocate for a client is undermined by a court rule requiring the attorney to help the court secure a resolution of the matter in controversy.

There are two separate issues that arise when a question is raised about an individual's capacity to retain counsel. One is the ability of the individual to understand and make a

voluntary choice in the decision to hire a particular attorney. The other is whether the individual has the capacity to contractually agree to the amount of money that the attorney should be paid for legal services.

The first issue – exercising the right to representation by counsel of choice – is both statutorily and constitutionally protected. Since there is a presumption that individuals have capacity unless proven otherwise, undermining the right to chosen counsel should require an evidentiary showing that the litigant lacks a basic understanding of what an attorney does and who this attorney is or a showing that the individual's choice was not voluntary.

The other issue – how much the chosen attorney should be paid – is another matter entirely. (*In re Guardianship of Carpenter* (Ohio. Ct. App. 2016) 66 N.E.3d 272, 277, fn. 2.) This implicates the issue of capacity to contract or manage finances. If an evidentiary hearing adduces facts showing that the litigant lacks the capacity to contract or manage finances, then the court can respect the individual's right to retain an attorney of choice, but nonetheless use its authority to ensure that the fees paid to the attorney are reasonable. The latter can be done without disrespecting freedom of choice as to who the litigant's attorney will be.

Lack of capacity to contract does not negate someone's capacity to select an attorney, but merely their authority to contractually agree to the amount of the fees. In the case of Britney Spears, Judge Goetz mistakenly lumped these two issues together. She also violated the constitutional right of Ms. Spears to contest the matter and to have an evidentiary hearing at which he chosen attorney could present evidence on her behalf and cross-examine the medical expert who opined that she lacked capacity to retain Mr. Streisand.

An individual who is the target of a conservatorship petition has the right to due process throughout the proceeding. (*Conservatorship of Sanderson* (1980) 106 Cal.App.3d 611.) The Due Process in Competence Determinations Act, passed by the Legislature in 1998, creates a presumption that every adult has the capacity to make decisions, including the capacity to contract. (Probate Code Section 810.) The mere fact that an individual has a mental disability does not negate this presumption.

The Legislature has specifically addressed the right of *proposed conservatees* to retain private counsel. "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." (Probate Code Section 1828(a)(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." (Probate Code Section 1823(b)(iv)(6).) (Emphasis added.)

The right of proposed conservatees to retain counsel was discussed recently in a 2019 report issued by an advisory committee of the California Judicial Council. "The committee has not, however, found any support in statute, rule of court, or judicial decision for the court's position that a proposed conservatee necessarily lacks the ability to select an attorney or to initiate an attorney-client relationship or that lack of either of those abilities is a condition

of appointing counsel for a proposed conservatee under section 1470 or 1471. Indeed, the extent of a proposed conservatee's ability to manage personal affairs would seem, under sections 1800.3 and 1801, to be the ultimate issue of fact for the court's or jury's determination in a proceeding for appointment of a conservator." (*Report W19-08*: Probate and Mental Health Advisory Committee of the California Judicial Council)

Courts have construed legislation affirming the right of *adjudicated conservatees* to retain counsel to contest the conditions of a conservatorship or to petition for termination of a conservatorship.

Probate Code Section 1872 states: "Except as otherwise provided in this article, the appointment of conservator of the estate is an adjudication that the conservatee lacks the legal capacity to enter into or make any transaction that binds or obligates the conservatorship estate." Section 1871 makes an express exception to Section 1872. It states that a conservatee shall not be denied "the right to enter into transactions to the extent reasonable to provide the necessaries of life to the conservatee."

The question then arises as to whether retaining an attorney to represent a conservatee in a conservatorship proceeding is a "necessary of life." Appellate courts have answered that question in the affirmative.

As a basic principle, legal services have been held to constitute a "necessary of life." (*In re Marriage of Pallesi* (1977) 73 Cal.App.3d 424, 428.) While the Pallesi decision was rendered in the context of a marriage dissolution proceeding, the principle also applies to probate conservatorship proceedings.

"There is no doubt that legal services rendered an incompetent in proceedings looking toward restoration to capacity are necessaries, and a contract to pay the reasonable value thereof will be implied by law and may be enforced in suitable proceedings." (*Stone v. Conkle* (1939) 31 Cal.App.2d 348, 351.) The conservatee's estate is liable to pay for such services regardless of whether the attorney was hired by the conservatee or by a third party for the benefit of the conservatee.

State and federal courts have recognized that the right to be represented by retained counsel in civil proceedings is not dependent on statutory law. It is protected as a matter of constitutional due process.

This constitutional right was affirmed long ago by the California Supreme Court. "Although the right to be represented by retained counsel in civil actions is not expressly enumerated in the federal or state Constitution, our cases have long recognized that the constitutional due process guarantee does embrace such a right." *(Roa v. Lodi Medical Group, Inc.* (1985) 37 Cal.3d 920, 925.)

The United States Supreme Court has observed that the right to counsel of choice is not limited to the criminal arena. It applies to civil proceedings as well. "If in any case, civil or criminal, a state or federal court were arbitrarily to refuse to hear a party by counsel,

employed by and appearing for him, it reasonably may not be doubted that such a refusal would be a denial of a hearing, and, therefore, of due process in the constitutional sense." (*Powell v. Alabama* (1932) 287 U.S. 45, 69.)

Due process affords a litigant the right to notice and an opportunity to be heard when a court is considering the issue of his or her capacity to retain counsel. *(Guardianship of Carpenter, supra*, at p. 276.) "The arguments of counsel in the role of an advocate . . . are not evidence, and lawyers in making those arguments are not witnesses." (*Ibid*, p. 277.)

The right to present evidence is, of course, essential to the fair hearing required by the Due Process Clause." (*Jenkins v. McKeithen* (1969) 395 U.S. 411, 429.) So is the right to cross-examine hearsay declarants. (*In re Lucero* (22 Cal.4th 1227, 1244; *Long v. Long* (1967 ) 251 Cal.App.2d 732, 735-736.) As is the right to compel the attendance of witnesses. (*In re Malinda S.* (1990) 5 Cal.3d 368, 383-384.

Based on these statutory and constitutional provisions, and case law interpreting them, a court should be reluctant to interfere with the right of a civil litigant to be represented by counsel of his or her choice. This is so regardless of whether the litigant is a proposed conservatee or an adjudicated conservatee.

If the issue of incapacity to retain counsel does arise, a hearing on the matter should be bifurcated. The first question is whether the litigant understands the nature of the act of retaining an attorney. The party challenging the litigant's capacity would have to produce evidence that the litigant lacked a rudimentary understanding of who this attorney is and that his or her role is to advocate for the litigant's wishes and rights. Alternatively, there would need to be proof that the litigant's choice of this attorney was not voluntary. Absent an affirmative showing on either of these issues, the motion to remove chosen counsel should be rejected.

If the chosen attorney does remain on the case, the next question would be whether there is evidence that the litigant lacked the capacity to enter into a fee agreement with the attorney. If so, the attorney could still represent the litigant, but the court would set fees in an amount determined to be reasonable.

The right to representation by chosen counsel is fundamental to our system of justice. Imposing an unknown or unwanted attorney on a litigant undermines the litigant's confidence in the judicial process. Due process does not guarantee a particular outcome in a proceeding. However, it does guarantee a fair and just process. Denying the right of a litigant to counsel of choice gives the appearance, at least to the litigant, that the process is unjust. ♢ ♢ ♢

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