

The ADA, Capacity Assessments, and Less Restrictive Alternatives to Conservatorship

Readings for the Capacity Assessment Workgroup

Before a judge can order an adult to be placed into a conservatorship, the Probate Code requires the judge to find that less restrictive alternatives are not available and viable. Such a determination must be based on evidence. That evidence is elicited in a variety of ways, including through a capacity assessment process conducted by qualified professionals..

The consideration of less restrictive alternatives is not just a requirement of state law, there are also federal statutory and constitutional mandates that come into play.

Federal due process requires that before the state can curtail fundamental constitutional rights – such as the right to choose where to live, whether and when to have sex, whether to marry, whether and where to travel, etc – the state must demonstrate a compelling state interest and that the restriction is narrowly tailored to meet that state interest.

The Americans with Disabilities Act also comes into play. The ADA is one way that Congress has chosen to implement the requirements of due process when the state is restricting the life of someone with a disability. The process of imposing restrictions on a person’s life – in this case through a conservatorship proceeding – must meet the standards of the ADA.

The requirements of the ADA must be considered in the process of establishing a conservatorship, as well as the result to be achieved by such a proceeding. The integration mandate of the Supreme Court’s *Olmstead* decision should apply to conservatorship proceedings. Likewise, the requirement that the court proceeding – a government service that is subject to the requirements of Title II of the ADA – must ensure that the proposed conservatee is provided accommodations to maximize the possibility that he or she has effective communication and meaningful participation throughout the conservatorship proceeding. This would include the process used to determine a person’s capacity to make decisions and whether less restrictive alternatives are available and feasible.

This set of reading materials includes discussions of how the ADA applies to legal proceedings. One guidance memo from the United States Department of Justice (DOJ) focuses on the application of the ADA to the criminal justice system. The other applies the ADA to the child welfare system. The commentaries explain how those guidance memos are relevant to conservatorship proceedings.

The third document discusses how the integration mandate of the *Olmstead* decision applies to guardianship (conservatorship) proceedings and why *Olmstead* requires a serious exploration of less restrictive alternatives in such proceedings. This would include a consideration of supported decision-making arrangements.

The next set of reading materials, which will be sent in about two or three weeks, will focus specifically on the concept of supported decision-making as a required element of the capacity assessment process in probate conservatorship proceedings.

Probate Code Section 1800.3(b)

No conservatorship of the person or of the estate shall be granted by the court unless the court makes an express finding that the granting of the conservatorship is the **least restrictive alternative** needed for the protection of the conservatee.

Government Code Section 11135

(a) No person in the State of California shall, on the basis of sex, race, color, religion, ancestry, national origin, ethnic group identification, age, mental disability, physical disability, medical condition, genetic information, marital status, or sexual orientation, be unlawfully denied full and equal access to the benefits of, or be unlawfully subjected to discrimination under, **any program or activity that is conducted, operated, or administered by the state** or by any state agency, is funded directly by the state, or receives any financial assistance from the state. Notwithstanding Section 11000, this section applies to the California State University. [**Comment: conservatorship proceedings are an activity conducted by the state.**]

(b) With respect to discrimination on the basis of disability, programs and activities subject to subdivision (a) shall meet the protections and prohibitions contained in Section 202 of the federal Americans with Disabilities Act of 1990 (42 U.S.C. Sec. 12132), **and the federal rules and regulations adopted in implementation thereof**, except that if the laws of this state prescribe stronger protections and prohibitions, the programs and activities subject to subdivision (a) shall be subject to the stronger protections and prohibitions. [**Comment: Conservatorship proceedings must meet the protections afforded by the ADA and by DOJ regulations implementing the ADA.**]

DOJ Guidance Memo to Criminal Justice Agencies

<http://spectruminstitute.org/judicial-council/ada/30-doj-guidance-memo.pdf>

In January 2017, the Department of Justice issued a guidance memo to assist state criminal justice agencies, including state courts, in fulfilling their ADA duties with respect to persons involved with the criminal justice system who have intellectual and developmental disabilities. The guidance memo explains that courts and other justice agencies must: “Make reasonable modifications in policies, practices, or procedures when necessary to avoid disability discrimination in all interactions with people with mental health disabilities or I/DD, unless the modifications would fundamentally alter the nature of the service, program, or activity. The reasonable modification obligation applies when an agency employee knows or reasonably should know that the person has a disability and needs a modification, even where the individual has not requested a modification, such as during a crisis, when a disability may interfere with a person’s ability to articulate a request. Since the ADA applies to all services of courts, this memo is relevant to all legal proceedings in which a person with a developmental disability is involved as a participant. **This is especially relevant to conservatorship proceedings where literally every respondent has cognitive or communication disabilities that are severe enough to warrant the filing of a petition so that someone may be appointed to take control of their lives.**

DOJ and HHS Guidance to Courts

<http://spectruminstitute.org/judicial-council/ada/31-doj-hhs-ada-guidance-to-courts.pdf>

In August 2015, the Department of Justice and the Department of Health and Human Services issued a joint memo providing guidance to court systems and related entities processing child welfare proceedings involving parents with disabilities. The memo explains how the Americans with Disabilities Act and Section 504 of the Rehabilitation Act apply to such proceedings. **This document focuses on portions of the guidance memo and explains how they are relevant to conservatorship proceedings in California.** The guidance explains that state court proceedings are state activities and services for purposes of Title II and Section 504. Therefore, in order to comply with these laws, it may be necessary for a court to provide an aide or other assistive services so that someone with a disability may participate fully in a court event. Nowhere in the guidance is there any mention that a *request* for assistance is required in order for ADA duties to arise.

Law Review: Olmstead, the ADA, and Least Restrictive Alternative

<http://spectruminstitute.org/olmstead-ADA-and-LRA.pdf>

(Excerpt from article) Building on the reasoning in the Supreme Court's decision in *Olmstead v. L.C.* 527 U.S. 581 (1999), and subsequent decisions interpreting the Americans with Disabilities Act's integration mandate, this Article argues that by limiting an individual's right to make his or her own decisions, guardianship marginalizes the individual and often imposes a form of segregation that is not only bad policy, but also violates the Act's mandate to provide services in the most integrated and least restrictive manner. After discussing why recent reforms of state guardianship laws have proven inadequate, this Article conceptualizes guardianship as a form of disability-based discrimination and argues that *Olmstead* and the integration mandate are legitimately applied to the guardianship context. Therefore, the article argues that courts must seriously explore and use less restrictive alternatives to guardianship (conservatorship) when they are available and viable. **Thus, the inclusion of supported decision-making options as a way to enable proposed conservatees to make some or all of their own decisions, would be a required component of a capacity assessment process in a conservatorship proceeding.**

Federal Due Process Principles that Apply to Capacity Assessments

Giving a conservator authority to restrict a conservatee's place of residence implicates constitutional rights of travel and association. (*People v. Bauer* (1989) 211 Cal. App.3d 937, 944.) Where a probate court restricts the right of an *adult* to make his or her own educational decisions, constitutional issues can be raised. The right to make medical decisions is constitutionally protected. (*People v. Petty* (2013) 213 Cal.App.4th 1410.) So is the right to marry. (*Obergefell v. Hodges* (2015) 135 S. Ct. 2584, 2600.) The right to contract is constitutionally guaranteed by Article I, Section 1 of the California Constitution. (*People v. Davenport* (1937) 21 Cal.App2d 292, 296.) Constitutional rights are also implicated by orders restricting the sexual choices of conservatees. (*Foy v. Greenblott* (1983) 141 Cal. App.3d 1) Government actions that infringe fundamental constitutional rights must not only serve a compelling state interest, they must use the least restrictive means to achieve the intended goal.. (*R.A.V. v. St. Paul*, 505 U.S.377 (1992) If a person's capacity to make some or all of his major life decisions can be enhanced to an acceptable level through the use of less restrictive means than a conservatorship, then the state does not have a compelling interest in removing the person's right to make decisions in that area of capacity.