

Capacity Assessments in California Conservatorship Proceedings

Improving Clinical Practices and Judicial
Procedures to Better Protect the Rights
of Seniors and People with Disabilities



A Report to the Chief Justice,
Governor, and Legislature

EXECUTIVE SUMMARY

Thomas F. Coleman
Legal Director
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July 1, 2020

<https://spectruminstitute.org/capacity/>



Disability and Guardianship Project

1717 E. Vista Chino A7-384, Palm Springs, CA 92262
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July 1, 2020

Hon. Tani Cantil-Sakayue
Chief Justice of California / Chairperson of the Judicial Council
350 McAllister Street
San Francisco, CA 94102

Re: *Capacity Assessments in California Conservatorship Proceedings*
A Report to the Chief Justice, Governor, and Legislature

Dear Chief Justice / Madam Chairperson:

The enclosed report is being sent to you in your administrative capacity as Chief Justice of the California Supreme Court and as Chairperson of the California Judicial Council. Please share this report with members of both of these entities since some of its recommendations are directed to each of them.

The people of the State of California will be celebrating Independence Day on July 4. Independence has great meaning not only for a nation such as the United States of America, but also for the individuals who collectively form and govern it. Having said that, there are tens of thousands of seniors and people with developmental and other disabilities in California who are not in a position to celebrate their independence. These individuals lost their personal autonomy when superior court judges entered orders taking away many of their freedoms. Thousands of others whose cases are in pre-adjudication stages also have no grounds for celebration. Their cherished liberties have been placed in jeopardy with no guarantee they will receive access to justice during the legal process.

The issue of legal capacity for decision-making forms the very foundation on which the probate conservatorship system rests. Unfortunately, the enclosed report – based on 15 months of analysis of constitutional requirements, statutory standards, and judicial, legal, and professional practices – shows this foundation to be fundamentally flawed. Current capacity assessment standards and practices need a thorough review by officials in all three branches of state government.

Recommendations in the report have been made to guide state officials on ways to bring this foundational aspect of the conservatorship system into conformity with the requirements of due process and the mandates of state and federal nondiscrimination laws. We urge you, the governor, and leaders in the legislative branch to take the necessary actions to bring about such a result.

Respectfully,

Thomas F. Coleman
Legal Director

cc: Governor Gavin Newsom
Assembly Speaker Anthony Rendon; Senate President Pro-Tem Toni Atkins



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July 1, 2020

Governor Gavin Newsom
Attn: Ms. Ana Matosantos
1303 10th Street, Suite 1173
Sacramento, CA 95814

Re: *Capacity Assessments in California Conservatorship Proceedings*
A Report to the Chief Justice, Governor, and Legislature

Dear Governor Newsom:

With this letter we are transmitting to you the above-entitled report. It is also being sent to leaders in the other two branches of government.

This report is intended to assist the State of California in developing ways to improve clinical practices and judicial procedures to better protect the rights of seniors and people with disabilities in probate conservatorship proceedings. The enclosed letter to the Chief Justice provides additional context to current shortcomings in these proceedings and the need to adopt major reforms.

There is a role for you as governor and for several executive branch agencies and departments under your supervision to play in this reform process. We therefore urge your legal affairs secretary to review the report and for your cabinet secretary to share it with the following officials: Director of the Department of Developmental Services (and the Secretary of the Health and Human Services Agency); Director of the Department of Fair Employment and Housing (and the Secretary of the Business, Consumer Services and Housing Agency); and the Director of the Department of Aging.

Because several recommendations in the report will require new legislation to be passed, we also encourage your legislative affairs secretary to review the report.

We would be pleased to have conversations with your staff or with the above-mentioned department directors or agency secretaries about how to best implement the recommendations in this report.

Respectfully,

Thomas F. Coleman
Legal Director

cc: Chief Justice
Assembly Speaker, Senate President Pro-Tem



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July 1, 2020

Hon. Anthony Rendon, Assembly Speaker
State Capitol, Room 219
Hon. Toni Atkins, Senate President Pro Tem
State Capitol, Room 205
Sacramento, CA 95814

Re: *Capacity Assessments in California Conservatorship Proceedings*
A Report to the Chief Justice, Governor, and Legislature

Dear Speaker and President Pro Tem:

With this letter we are transmitting the above-entitled report to the Legislature. The report is also being sent to leaders in the other two branches of government.

This report is intended to assist the State of California in developing ways to improve clinical practices and judicial procedures to better protect the rights of seniors and people with disabilities in probate conservatorship proceedings. The enclosed letter to the Chief Justice provides additional context to current shortcomings in these proceedings and the need to adopt major reforms.

There is a major role for the Legislature to play in this reform process. The report recommends the passage of seven pieces of new legislation. We, therefore, encourage you to share the report with the most relevant legislative committees and special committees.

In the Assembly, the report should be reviewed by members and staff of the following standing committees: Judiciary; Aging and Long Term Care; Human Services. It should also be reviewed by the Select Committee on Intellectual and Developmental Disabilities.

In the Senate, the report should be reviewed by members and staff of the following standing committees: Judiciary; Health; Human Services. It should also be reviewed by the Select Committee on Mental Health.

We would be pleased to have conversations with the chairpersons and staff of these committees and select committees about crafting legislation to implement the recommendations in this report.

Respectfully,

Thomas F. Coleman
Legal Director

cc: Chief Justice Tani Cantile-Sakauye
Governor Gavin Newsom

Prologue

In response to a series of articles published by the Los Angeles Times in 2005 exposing rampant abuses in the probate conservatorship system, the legislative and judicial branches of government initiated investigations.

After some oversight hearings were conducted, an Assembly report found that probate conservatorship proceedings were operating in a “closed system” that had allowed abuses to go undetected for too long. That same closed system exists today.

Chief Justice Ronald George responded to the newspaper stories by convening a Probate Conservatorship Task Force in January 2006. Taking testimony, consulting experts, and reviewing records, members studied the conservatorship system for 18 months. A report was issued – mostly focusing on seniors in general conservatorships of the person or estate – that was very unflattering to the conservatorship system and those who operate it.

The report described a system that was out of control. A subsequent report acknowledged that the Judicial Council did not have basic data about probate conservatorships because there was no statewide case management system in place. This problem continues today.

The regular involvement of an executive branch agency in legal proceedings brings a degree of accountability to the judicial system. Unlike an individual litigant who is involved in one case only, an agency may be involved in scores of cases and therefore can monitor what is systematically occurring in those cases. This routinely happens in criminal and child welfare proceedings. It also occurs in mental health conservatorships. Unfortunately, that source of accountability is generally lacking in probate conservatorship cases.

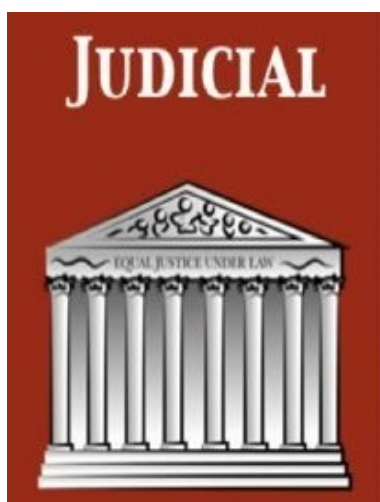
The information that appears above is taken from an amicus curiae brief filed by Spectrum Institute in a conservatorship case under review by the California Supreme Court. Much of the brief calls the court’s attention to the broken conservatorship system – one in which the actions and inactions of unaccountable judges and attorneys determine the fate of thousands of seniors and people with disabilities each year.

This report focuses on one part of probate conservatorship proceedings – a part that should be at the core of each case and which should be handled with the utmost professionalism and concern for due process. That part is the capacity assessment process.

If this part of conservatorship proceedings were to be done properly – following statutory directives and constitutional imperatives – the rest of the process would improve and just results would occur more frequently. But in order for that to happen, government officials who are responsible for how conservatorship cases are processed would have to acknowledge deficiencies in policy and practice and then take steps to address them.



The Legislature has established the policies under which the conservatorship system operates. It also funds most aspects of the system. The chairpersons of the judiciary committees in the Assembly and Senate are the legislative leaders who could hold hearings to identify systemic deficiencies in conservatorship proceedings and solicit testimony for improvements in conservatorship policies and practices. The chairpersons of the fiscal committees of both chambers are the key legislators who can identify funding deficiencies that contribute to a lack of due process or unjust results for seniors and people with disabilities whose lives are upended by these proceedings.



The Chief Justice leads the judicial branch. She presides over the Supreme Court which promulgates rules of ethics for judges and rules of professional conduct for attorneys. With her leadership, the Supreme Court could modify these rules to address some of the major deficiencies in conservatorship proceedings. The Chief Justice is also the chairperson of the Judicial Council. That body promulgates procedural rules for legal proceedings, including conservatorship proceedings, and adopts standards for judicial education. With leadership from the Chief Justice, the Judicial Council could adopt new rules and standards to address many of the deficiencies in judicial practices that occur all too frequently in probate conservatorship proceedings.



The Governor is in charge of the executive branch. Departments in that branch are mostly missing in action when it comes to helping seniors and people with disabilities get a fair shake in conservatorship proceedings. That can be changed. The Governor could direct several state entities to become more involved in protecting the rights of conservatees and proposed conservatees. There is much that could be done by the Department of Aging, Department of Developmental Services, Department of Consumer Affairs, the Department of Fair Employment and Housing, and Department of Social Services. These actions could be coordinated by the Health and Human Services Agency and the Business, Consumer Services, and Housing Agency.

This report calls on officials in all three branches to study this report and formulate actions to improve the conservatorship system, including the capacity assessment process.

Foundational Considerations

1. Persons with disabilities enjoy legal capacity on an equal basis with others in all aspects of life. (Article 12, United Nations Convention on the Rights of Persons with Disabilities.)
2. People with developmental disabilities have the same constitutional rights as all other citizens and residents of California, including the right to make choices in their own lives. (Cal. Welf. & Inst. Code § 4502.)
3. There shall exist a rebuttable presumption affecting the burden of proof that all persons have the capacity to make decisions and to be responsible for their acts or decisions.” (Cal. Prob. Code § 810.)
4. Since probate conservatorship proceedings place fundamental liberties at risk, proposed conservatees are entitled to due process of law in these proceedings. (*Conservatorship of Sanderson* (1980) 106 Cal.App.3d 611.)
5. 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* (1992) 505 U.S.377.)
6. A conservatorship is not allowed 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. (Prob. Code § 1800.3, subd. (b).)
7. The Americans with Disabilities Act applies to guardianship proceedings. The need for assistance with activities of daily living or even with making decisions does not give rise to a presumption of incapacity. Guardianship should be a last resort that is imposed only after less restrictive alternatives have been determined to be inappropriate or ineffective. (2018 Policy Statement, National Council on Disability.)
8. Probate conservatorship proceedings operate in a “closed system” that allows abuses to go undetected. (AB 1363, Assembly Floor Analysis, Jan. 25, 2006.)
9. The Judicial Council does not have data on probate conservatorships because there is no statewide case management system in place. (Probate Conservatorship Task Force, Final Report, Sept. 18, 2007.)
10. Self-examination is difficult and often risky. Nonetheless, it is essential for reasoned progress. A recent national survey commissioned by the American Bar Association (ABA) Commission on Law and Aging notes that basic guardianship data is unavailable, “offering courts, policymakers, and practitioners little guidance for improving the system.” Policymakers are unable to make informed policy and practice decisions without an adequate knowledge base of what exists and what trends are evident. (Judge David Hardy, Second Judicial District Court, Washoe County, Nevada.)

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About Spectrum Institute

Spectrum Institute is a nonprofit operating foundation incorporated in California in 1987. It has tax exempt status under section 501c3 of the Internal Revenue Code. Through research, education, and advocacy, the organization promotes justice, equal rights, and respect for human diversity. Over the years, Spectrum Institute has championed a variety of human rights issues and causes: protecting the right of personal privacy; combating hate crimes against sexual minorities; promoting respect for family diversity; challenging discrimination on the basis of marital status and sexual orientation; stopping the abuse of teenagers by boarding schools and boot camps; promoting risk reduction and developing effective responses to the physical, sexual, and emotional abuse of people with intellectual and developmental disabilities; and advocating for systemic reforms to the probate conservatorship system in California and the adult guardianship systems in other states.

About the Report

This report is the culmination of 15 months of research, writing, and collaboration. Likely the most comprehensive study ever done on state standards and assessment practices involving decision-making capacities, the report offers dozens of recommendations to officials in California to improve this area of the law. Current legal standards and capacity assessment practices are sorely outdated. Seniors and adults with intellectual and developmental disabilities deserve to have their rights protected by judges, attorneys, and professionals who are involved in legal proceedings that place their freedoms at risk based on allegations of incapacity. This report documents deficiencies in current policies and practices and provides recommendations to address those deficiencies. It gives public officials the information they need to make the necessary adjustments to ensure that such legal proceedings comply with the requirements of due process and are conducted in a manner consistent with state and federal laws prohibiting discrimination on the basis of disability.

About the Author



Thomas F. Coleman is the founder of Spectrum Institute and serves as its legal director. The primary focus of his 47-year career as an attorney has been improving the administration of justice and securing equal rights for disadvantaged populations. In addition to his advocacy in state and federal courts and his lobbying efforts in Congress and state legislatures, Coleman has written numerous public policy reports on a wide range of topics involving access to justice and the protection of civil and constitutional rights.

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