Time to End Disability Stigmas in Judicial Opinions

By Thomas F. Coleman
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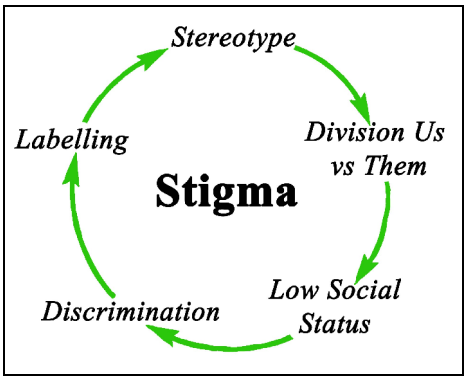
A well-reasoned appellate opinion came to my attention the other day. Its conclusion upheld the social decision-making rights of adults with developmental disabilities who are living under an order of conservatorship.

The opinion by Division Two of the 4th District Court of Appeal held that a superior court judge lacked the authority to order a woman with cerebral palsy to visit with and undergo therapy with her father over the woman's objection. *Conservatorship of Anna N.* E070210 (Dec. 4, 2020). The opinion noted that a conservatorship proceeding involving an adult with developmental disabilities is unlike a custody dispute in family court involving a minor. A parent does not have a legal right to visitation with an unwilling adult child.



The opinion based its reasoning on California statutes and judicial precedents. It did not reach the merits of the constitutional arguments raised by the appellant.

I liked the result as well as the reasoning of the opinion. At first glance, the only problem I saw with it was the fact that the opinion was ordered "not to be published in the official reports." As a result, it could not be cited as precedent in future conservatorship cases that might involve the issue of forced visitation with a parent.

Administrative regulations vaguely suggest that adults with developmental disabilities should have freedom of choice in visitation. The publication of the opinion in Anna's case would clarify the matter. (The Spectrum Institute has since requested publication and other disability rights organizations will do so next week.)

But something else was wrong with the court's opinion – the caption of the case used stigmatizing language. The caption refers to Anna as "an Incompetent Person."

The use of such pejorative language should be corrected – especially if the opinion will be certified for publication. Even if it remains unpublished, that derogatory label should be removed. First, out of respect for Anna's dignity. But also because scores of judges and attorneys could be subliminally influenced to accept such terminology if they read the unpublished opinion in online services such as Westlaw, Casetext or Lexis/Nexis.

I am confident that the panel of justices who issued the opinion in this case meant no disrespect. The substance of the opinion showed that the court is sensitive to the rights of people with developmental disabilities. Perhaps the court, like me, may have been affected by an unconscious disability bias.

The issue of implicit bias has been the recent focus of the Legislature and the Judicial Council. Assembly Bill 242 was passed by the Legislature in 2019. It authorized the Judicial Council to develop training on implicit bias with respect to characteristics such as mental and physical disabilities.

The Judicial Council acted on this bill earlier this year by approving a court rule requiring

judicial training on unconscious bias. A new subdivision has been added to Rule 10.469, effective Jan. 1, 2021, requiring that all justices, judges, and subordinate judicial officers "must participate in education on unconscious bias."

Legal terminology referring to people with disabilities has been evolving for decades.

"Feebleminded, moron, mentally deficient, retarded, handicapped – these are words that have been used in society and the law to describe people with disabilities." Meg E. Ziegler, "Disability Language: Why Legal Terminology Should Comport with a Social Model of Disability," 61 *Boston College Law Rev*. 1183 (2020).

The California Legislature took a respectful step forward when it adopted the probate conservatorship statutory scheme in 1957. Prior to that, the adult guardianship system authorized a court to appoint a guardian for any person who was deemed "incompetent" to manage his or her daily affairs. "Better Protection for Our Most Vulnerable Adults: Is It Time to Reform the Conservatorship Process," *Report of Assembly Judiciary Committee* (2015).

Under the current statutory scheme, an order of conservatorship is entered for an adult who is unable to properly care for his or her personal needs or finances and a less restrictive alternative is not available to protect the individual from harm. Pejorative labels are not used to describe a probate conservatee.

Judicial Council forms in conservatorship cases do not use stigmatizing terms. The petition form (GC-310) refers to the adult in neutral language as a "proposed conservatee." The form a judge signs to grant a conservatorship (GC-340) refers to the individual as a "conservatee."

The U.S. Supreme Court signaled a shift in judicial attitudes when it declared that the court would no longer use the term "mentally retarded" but instead would refer to the identical phenomenon as an "intellectual disability." *Hall v. Florida*, 134 S.Ct. 1986, 1990 (2014). The judicial and legislative branches of government in California took similar actions that same year. *People v. Boyce*, 59 Cal.4th 672, 717, fn. 24 (2014); Stats 2012, ch. 448)

"The term 'mentally retarded' is an epithet." *T.J. v. Superior Court*, 21 Cal.App.5th 1229, 1246, fn. 10 (2018). So is the phrase "an Incompetent Person." It is inappropriate, and totally unnecessary, for the judiciary to label an adult with a developmental disability in that manner. Such terminology should not appear in future appellate opinions, published or not.

Only seven states use the term "incompetent person" to label an adult in a guardianship or conservatorship. Some say "person with a disability." Others refer to a "protected person." There is a growing judicial recognition of the need "to replace any terms that have pejorative or derogatory connotations with suitable and respectful alternatives" when referring to people with developmental disabilities. *State v. Linares*, 393 P.3d 691, n.1 (N.M. 2017).

In response to my delayed awareness of the problem with the opinion in this case, the Mental Health Project of Spectrum Institute filed a supplemental letter asking the court, on its own motion, to remove the derogatory language from the caption. The suggestion is pending. ◊◊◊

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