

Jury Trials Are an Elusive Right for Proposed Conservatees

By Thomas F. Coleman

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The California Legislature has declared the right to a trial by jury in both civil and criminal cases to be a “cherished right” that is a “fundamental component of the American legal system.” Assembly Concurrent Resolution No. 118, March 12, 1998. The right to a jury trial is enshrined in the state constitution. Cal. Const., art. I, Section 16.

However, a trial by jury is not an absolute right in every case. Jury trials are not constitutionally required in cases that are essentially equitable in nature. *Nationwide Biweekly Administration, Inc. v. Superior Court* 9 Cal.5th 279 (2020) That is why most cases in probate court, such as will contests, are tried by a judge rather than a jury.

Notwithstanding this constitutional limitation, the Legislature has provided that in probate conservatorship proceedings – cases in which fundamental liberties are at stake – a proposed conservatee may demand a jury trial. Probate Code Section 1827.

A petition for a conservatorship of the person seeks to strip a proposed conservatee of the right to make decisions regarding his or her residence, medical care, marriage, sexual relationships, and/or social contacts. A petition for a conservatorship of the estate asks the court to remove a proposed conservatee’s right to make financial decisions.

These are rights worth fighting for. With a court trial, the rights of the proposed conservatee depend on the ruling of just one person – the judge. With a jury trial, the proposed conservatee retains his or her decision-making rights unless the petitioner convinces nine people to render a verdict based on clear and convincing evidence that the proposed conservatee is unable to care for his or her personal or financial needs even with third party assistance.

From a logical point of view, there is a strategic advantage for a proposed conservatee to demand a jury trial. A jury makes it statistically harder for the petitioner to prevail and easier for the proposed conservatee to retain his or her rights.

Probate conservatorship proceedings generally involve seniors with cognitive challenges, adults with a brain deficiency from an illness or injury, or adults with developmental disabilities.

There are more than 5,000 probate conservatorship cases filed each year in California. One would think that a fair share of these cases would be decided by juries. Perhaps five to ten percent. But that is not the case.

The number of jury trials in probate conservatorship cases in California is slightly more than zero. A review of court statistics for 2016-2017 showed only one jury trial in probate courts throughout the entire state. “Probate (Estates, Guardianships, Conservatorships) – Methods of Disposition, by County” (2018 Court Statistics Report, p. 168) Judicial Council reports for other years showed the number of jury trials in the state’s probate courts ranging from zero to three annually.

Attorneys representing petitioners and objectors cannot demand a jury trial. Only a proposed conservatee can. But they don’t.

I asked Lisa MacCarley, a seasoned practitioner in estates and conservatorships, about the lack of jury trials in probate conservatorship cases. This is what she said. “I have been representing clients in probate courts throughout Southern California for over 25 years. In all that time, I have never seen or heard of a jury trial in a conservatorship case.”

I probed deeper, asking Ms. MacCarley if she had an



explanation for the absence of jury trial demands. She pointed to systemic problems.

In counties where the public defender doesn't handle conservatorships, these involuntary litigants are represented by court-appointed attorneys. In Los Angeles, these lawyers have been given a conflicting mandate by a local court rule to help the judges resolve the cases.

Moreover, many of these attorneys are dependent on further appointments for their income stream. The judges appoint them to cases, authorize the amount of fees they are paid, and also decide if they receive appointments in future cases. The attorneys know that the judges discourage trials in general, and jury trials especially, because they take up too much judicial time and create a backlog on an already overloaded docket. Thus, no jury trial demands are ever made.

In counties where the public defender represents proposed conservatees there is a different disincentive for demanding a jury trial. Such demands are almost never made by public defenders due to their heavy caseloads. Even though many of these public lawyers are excellent litigators, they don't have the time for a multi-day jury trial in a conservatorship case.

Ms. MacCarley's explanation for a lack of jury trials may be correct, but I have come up with an additional reason why attorneys for proposed conservatees avoid them. The lawyers are intimidated by the unsettled state of case law in probate conservatorships – a situation caused by a lack of appeals.

In all cases, jurors are told their duty is to decide the facts from the evidence admitted at trial and then apply those facts to the law as they have been instructed by the court. For most civil cases, the Judicial Council has approved a set of jury instructions. This template makes the legal component of a jury trial relatively easy for lawyers and judges.

Despite the existence of general conservatorships since the 1950s and limited conservatorships since the 1980s, the Judicial Council has never found time to create a set of jury instructions for these cases. As a result, trial lawyers would have to develop proposed jury instructions on their own. This takes time and

time is money. Writing on a blank slate also poses a risk of submitting erroneous instructions which could result in malpractice liability.

Thus, the lack of approved jury instructions creates another disincentive for lawyers to demand a jury trial. To remove this obstacle, I recently developed a set of model instructions for such cases. The guidebook is titled "Proposed Jury Instructions for Probate Conservatorship Cases: A Practice Guide for California Attorneys." It is available online without cost.

The guidebook is based on several years of research into constitutional law, statutes, and judicial precedents that apply to probate conservatorship proceedings. The first edition focuses on limited conservatorships of the person. It also includes practice tips on preparing for trial. Future additions will add sections on limited conservatorships of the estate and general conservatorships of the person and the estate.

This new primer for attorneys is being submitted to the Judicial Council with a request for the agency to devote the necessary resources to update its *California Approved Civil Instructions* manual, also known as CACI, to include a set of approved instructions for the four types of probate conservatorship cases.

If the Judicial Council were to update the manual, one disincentive for jury trial demands would be removed. The other systemic obstacles mentioned by Ms. MacCarley will require additional actions by all three branches of government.

It does not take a genius to deduct that something is wrong with a court system where there is only one jury trial out of 5,000 cases filed annually. Members of the bench and bar should feel uncomfortable with this statistic. I know that I am. ◇◇◇

Thomas F. Coleman is the legal director of Spectrum Institute – a nonprofit organization promoting conservatorship reforms in California and guardianship reforms nationally. Contacted him by email at: tomcoleman@spectruminstitute.org.

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