Better Protection for Our Most Vulnerable Adults: Is it Time to Reform the Conservatorship Process?

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"GUARDIANS FOR PROFIT:" ABUSES IN THE EXISTING SYSTEM. As a child, Helen Jones helped her family survive the Great Depression by collecting coal along railroad tracks in Nebraska. During World War II she was a real-life "Rosie the Riveter" who served her country by taking a job in the defense industry. Not surprisingly, she values her independence. Today, at 87, both her person and her estate are controlled by a court-appointed conservator. According to Helen, she never knowingly consented to this arrangement. Her neighbors and her legal aid attorney claim that Helen is alert, responsible, and "self-sufficient." Yet the conservator has reportedly spent $200,000 of Helen's $560,000 estate – at a rate of about $84,000 per year – mostly on things Helen never wanted. (For example, the conservator paid her own sister $1,550 to paint Helen's house.) The conservator doles out an allowance to the once-independent Helen and decides which doctors she will see. The conservator reportedly has ignored some of Helen's most important wishes concerning how her estate should be spent. Helen told a funeral director, for example, that she wanted to pay for her brother's funeral and expressly stated that she did not want him cremated. Because Helen was not authorized to spend her own money, the funeral director consulted the conservator. Contrary to Helen's express wishes, the conservator had the brother cremated.

Emmeline Frey was 93 and suffering from dementia by the time that a San Diego probate court appointed a professional conservator to manage her $1 million estate. The court-appointed conservator hired her own son, a former car salesman, as a financial advisor. She gave him $500,000 of Emmeline's estate to invest. The conservator's son collected his commissions, paid for by the estate, even though his investments squandered $100,000 of Emmeline's money. Although court staff informed the presiding probate judge about the son's questionable investments, the judge reportedly did nothing. When asked later about his inaction, the judge claimed that he did not remember the case given that he handled as many as 100 cases per day. Given that volume, the judge admitted, he "probably missed some things."

The troubling stories of Helen Jones and Emmeline Frey are just two of many reported in a timely and compelling series by the *Los Angeles Times*.[1] According to the *Times*, there are about 500 "professional conservators" in California who earn a living by managing the affairs of multiple conservatees. The *Times* estimated that these professional conservators oversee $1.5 billion in assets for at least 4,600 adults. No doubt, as the *Times* acknowledged, many private conservators do their job with integrity and

[1] Robin Fields, Evelyn Larrubia, and Jack Leonard, *Guardians for Profit* series, *Los Angeles Times*, November 13-17, 2005.

professionalism and provide an invaluable service to elderly and disabled persons who are unable to care for themselves or protect their assets. Nonetheless, the *Los Angeles Times* series demonstrates that there is enough abuse in the system to warrant systemic and perhaps even bold reforms. Moreover, the series also suggests that not all of the problems can be blamed solely on private conservators. Some of the most egregious actions described in the series were apparently approved by the courts. At the very least, the series suggest that the courts have sometimes, and some contend frequently, failed to fulfill their statutory obligations to monitor conservatorships.

In an editorial following the series, the *Los Angeles Times* called for comprehensive reforms that will "turn this abusive system into the honest guardianship it was meant to be."[2] Most notably, the *Times* editorial called for training and licensing requirements, bringing conservators under the purview of the Department of Consumer Affairs, and a disciplinary process independent of the courts. The *Times* also stressed that the courts – which in theory oversee the work of conservators – are too underfunded and understaffed to provide meaningful supervision.

To better understand the need for such broad reform, the remainder of this background paper examines the process of appointing and regulating conservators, the problems in existing law, and prior legislative efforts to reform the process. It concludes by identifying a number of options for reforming the current system.

EXISTING LAW

Types of Conservatorship and Guardianship: California adopted its first "conservatorship" statute in 1957. Prior to that time, the court appointed a "guardian" for any person, child or adult, who was deemed "incompetent" to manage his or her daily affairs. In a "guardianship of the person," the guardian took charge of the "ward's" basic needs, including food, shelter, and medical care. In "a guardianship of the estate," the guardian managed the ward's money, property, and financial affairs. In most instances, both types of guardianship existed simultaneously. After 1957, the law distinguished between a "guardianship," created for a minor, and a "conservatorship," created for an adult. In 1967, under the Lanterman-Petris-Short Act, California created a special adult conservatorship for persons who were considered "gravely disabled" by reason of mental illness or chronic alcoholism and subject to confinement in a locked psychiatric facility.[3] In 1980, California created a "limited conservatorship" for "developmentally disabled adults." Under the "limited conservatorship," the court limits the conservator's power so as to preserve the maximum amount of independence and self-sufficiency for the conservatee.[4] In addition, California law provides for the appointment of a Public Guardian for any person "who requires a guardian or conservator and there is no one else who is qualified and willing to act."[5]

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[2] Editorial, *Deserving of care,* Los *Angeles Times*, November 17, 2005.
[3] Welf. & Inst. Code sections 5330 *et seq.*
[4] Probate Code sections 1801(d), 1828.5, and 1830.
[5] Probate Code section 2920.

The following discussion, like the *Times* series, focuses primarily on the private conservators appointed under the Probate Code. It does not cover minors under guardianship or persons under a Lanterman-Petris-Short conservatorship.

Appointment and Supervision by the Courts: As noted above, the California Probate Code establishes a body of law that permits a probate judge to appoint a conservator to act on behalf of a person who is unable to adequately provide for his or her personal needs (a "conservator of the person") or incapable of managing his or her property or other financial assets (a "conservator of the estate").[6] In most instances, the court appoints a closely related family member, most typically a spouse or adult child. However, while existing law gives preference to family members, the court may appoint a private conservator.[7] The private conservator is usually a professional who provides the service for a fee and handles multiple conservatees. Under existing law, the private conservator may file a petition with the court requesting appointment.[8] In some cases, the conservator may have been "nominated" by the conservatee if the conservatee has "sufficient capacity at the time to form an intelligent preference."[9] However, if no nomination has been made, the conservator may still be appointed by showing, through clear and convincing evidence, that the conservatee lacks the capacity to act in his or her best interest.[10] In addition, the conservatee and relevant family members must be notified at least fifteen days prior to the hearing on the petition.[11]

The court may also appoint a "temporary conservator" to serve pending the appointment of a permanent conservator. The temporary conservatorship may not exceed thirty days unless the court for good cause extends the time pending a final determination.[12] Unless the court orders otherwise, the temporary conservator has only those powers and duties that are necessary to provide for temporary care of the conservatee and to preserve and protect the property of the conservatee from loss or injury.[13] However, while the powers granted to the temporary conservator are somewhat more limited, the procedure for appointing a temporary conservator provides fewer opportunities for the prospective conservatee to be heard. For example, under a temporary conservatorship, the court investigator only has a duty to interview the conservatee if the court so directs.[14] A proposed temporary conservatee is entitled to only five days notice of the proceeding, but the court may waive notice for good cause.[15] By contrast, in a permanent conservatorship proceeding, the proposed conservatee is entitled to 15 days notice and there is no provision permitting the court to waive notice for good cause.[16]

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[6] Probate Code sections 1800 *et seq.*
[7] Probate Code sections 1811-12.
[8] Probate Code sections 1820-21.
[9] Probate Code section 1810.
[10] *See* Probate Code section 1801(e) on the required standard of proof.
[11] Probate Code sections 1822-24.
[12] Probate Code sections 2250 and 2257.
[13] Probate Code section 2252.
[14] Probate Code section 2253(b).
[15] Probate Code section 2250(c).
[16] Probate Code section 1822-24.

Registration Requirements: Until fairly recently, professional conservators were only required to register with the local county court.[17] Since 1999, however, state law has required that all professional conservators and guardians who petition the court for appointment, as well as those already serving at the time of the enactment, must also register with a statewide registry maintained by the California Department of Justice (DOJ) and re-register every three years.[18] Family members and public guardians are among those who are exempted from the registration requirement.[19] The DOJ is required to make all information in the registry available to the court for any purpose, and to make certain information available to the public upon request. All persons who register must file a declaration that includes their educational and professional background; the aggregate value of the conservatee's assets; the names of any other conservatees served by the conservator, and whether or not the registrant has been removed for cause or resigned as a conservator, guardian, or trustee and the circumstances surrounding the removal or resignation.[20]

In theory, the court is prohibited from appointing anyone who is not in the registry, unless that person is a family member or is otherwise exempted from the requirement.[21] However, in emergency situations, where there is an imminent threat to the conservatee or his or her estate, the court may appoint a conservator without consulting the statewide registry or requiring registration prior to appointment.[22] In addition, the court is supposed to report to the registry any instances in which a conservatorship has been terminated and the reasons for the termination.[23] Persons who violate registration requirements, either by failing to register or submitting false information, are subject to fine and possible removal from the registry.[24]

Review of Established Conservatorships: Once appointed by the court, the conservator has a fiduciary duty to exercise reasonable care and diligence in administering the estate solely in the interest of the conservatee.[25] For a professional conservator, the standard of care would be measured against that of another professional. In addition, what constitutes "reasonable" or "ordinary" care and diligence is determined by the circumstances of the particular estate, so that the conservator must take account of the conservatee's age and health in the management of assets.[26]

For its part, the court has an obligation to ensure that this fiduciary duty is met. In theory, the probate court oversees and periodically reviews the work of the conservator. Once established, the conservatorship must be reviewed by the court one year after the

[17] Probate Code sections 2340 *et seq.*
[18] Probate Code section 2850.
[19] Probate Code section 2854.
[20] Probate Code section 2850.
[21] Probate Code sections 2851 and 2354.
[22] Probate Code section 2853.
[23] Probate Code section 2852.
[24] *Id.*
[25] *Conservatorship of Leftkowiz* (1996) 50 Cal. App. 4th 1310, 1313-1314 (interpreting Probate Code sections 2101 and 2401).
[26] Probate Code section 2401(a).

initial appointment and every two years thereafter.[27] The review consists of, among other things, a report filed by a court investigator who is required to visit the conservatee personally as part of the review process. The court is also required to review documents submitted by the conservator. The conservator must initially submit an inventory and appraisal of the estate within 90 days of appointment, or whenever estate property is subsequently discovered or acquired.[28] Second, the conservator must submit an accounting of the assets of the estate one year after appointment and not less than every two years thereafter.[29]

The Role of the Court Investigator: Court investigators play a key role in both the initial appointments and in the subsequent biennial reviews. After a petition for conservatorship has been filed, but prior to the hearing on the petition, the court investigator must interview the proposed conservatee personally and assess the claims made in the petition.[30] To the extent possible, the investigator must determine whether the conservatee suffers from the incapacities alleged, whether the conservatee wishes to contest the conservatorship, whether the conservatee prefers a different conservator, and whether the conservatee desires and would benefit from the appointment of legal counsel. The investigator must then submit his or her findings in a written report to the court at least five days prior to the hearing.[31] Once the conservatorship is established, the court investigator participates in the initial one-year review and the subsequent two-year reviews. As part of the review, the court investigator must visit the conservatee personally to determine whether the conservator is acting in the best interest of the conservatee, whether the conservatee is still in need of conservatorship, and whether the conservatee wishes to petition the court for termination of the conservatorship. The court investigator may also personally visit the conservator or other persons to ensure that the conservator is acting in the best interests of the conservatee.[32] As discussed below, however, the supervisory role played by the courts and court investigators is sadly and dangerously more formal than real due to understaffing and a growing caseload.

Recent Legislative Reforms: The following are some of the recent reforms that have been passed by the Legislature.

1. *Preventing fraud and abuse*: A number of recent reforms have targeted specific forms of abuse of the conservator's power. For example, AB 1950 (Pacheco) prohibits a guardian or conservator from using assets from the conservatee's estate to purchase goods or services from any entity in which the conservator has a financial interest or otherwise using assets for the personal benefit of the conservator (excepting, of course, the reasonable fees that the conservator charges for his or her legitimate services on behalf of the conservatee).[33] AB 1286 (Pacheco) prohibits the court from waiving the bond requirement in

[27] Probate Code section 1850(a).
[28] Probate Code sections 2600-2613.
[29] Probate Code section 2620.
[30] Probate Code section 1826.
[31] *Id.*
[32] Probate Code section 1851.
[33] Stats. 2000, Ch. 565.

conservatorship cases without good cause.[34] SB 140 (Bowen)[35] and AB 3036 (Corbett)[36] strengthen annual accounting requirements and procedures. SB 1742 (Hughes),[37] AB 1517 (Canciamilla)[38], and AB 2687 (Canciamilla)[39] authorize public guardians to take control of property belonging to an elderly person if there is significant danger that such property would be lost through waste or misappropriation. SB 620 (Scott) provided a number of provisions to protect seniors from unfair annuities practices.[40]

2. *State Registry:* As discussed above, AB 925 (Hertzberg) created the Statewide Registry.[41] An important purpose of the registry is to allow persons to investigate a prospective conservator to ensure that he or she has met registration requirements. In addition, a person can find out whether or not a prospective conservator has been terminated or otherwise sanctioned for abusing his or her power, but only after first making a written request for the information.[42] However, the registry has reportedly not worked as planned, in part because of the failure of the courts to always report termination cases to the registry.

3. *Educational Requirements*: Just last year, AB 1155 (Liu) required the Judicial Council to adopt court rules establishing minimum educational requirements for private conservators and private guardians. These requirements will become effective this January 1, 2006.[43] Under the rules developed by the Judicial Council, a private conservator must have some combination college education (ranging from a 2-year to 4-year degree) and practical experience. The precise combination of education and experience varies according to the subject matter of the degree and the nature of the experience.[44] The rules do not apply to family members or private conservators who had an established practice before AB 1155 was enacted.

FAILED EFFORTS AT REFORM: In addition to the recent enactments discussed above, a number of recent reform bills have either failed in the Legislature, or, when passed, been vetoed by the Governor. Most of these bills sought to address particular problems of elder and dependent adult abuse within the existing system.[45]

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[34] Stats. 2001, Ch. 563.
[35] Stats. 2001, Ch. 359.
[36] Stats. 2002, Ch. 1115.
[37] Stats. 2000, Ch. 813.
[38] Stats. 2001, Ch. 232.
[39] Stats. 2004, Ch. 888.
[40] Stats. 2004, Ch. 547.
[41] Stats. 1999, Ch. 409.
[42] Probate Code section 2850.
[43] Stats. 2004, Ch. 625.
[44] *See* California Rules of Court Rule 7.1010 (relating to private professional guardians) and Rule 7.1060 (relating to private professional conservators).
[45] *See e.g.* SB 163 (Hughes, 1999) (to create pilot projects to combat financial abuse of elders); AB 2253 (Jackson, 2000) (to authorize financial institutions to report suspected financial abuse of elder); (continued)

The most ambitious reform efforts have attempted to create a comprehensive system for licensing and regulating private conservators. In 1996, SB 1823 (Marks) initially sought a system of regulation and licensing, but was amended to merely tweak the definition of private conservators and to require conservators to supply certain additional information when filing a petition for conservatorship. Governor Wilson vetoed the bill, claiming that it did not provide any protections that were not already provided by existing law (apparently referring to the formal requirements for court supervision in the Probate Code). SB 1881 (O'Connell, 2000) also began as an effort to create a licensing system; it too was weakened by amendments and vetoed by Governor Davis. As originally conceived, SB 1881 (the proposed Professional Fiduciaries Act) would have created a licensing board under the purview of the Department of Consumer Affairs (DCA).

PROBLEMS WITH THE EXISTING SYSTEM & THE ROLE OF THE COURTS: In the various committee analyses, that have thus far looked at the issue of licensure of conservators, there is a strong suggestion that licensing and increased regulation is not needed because existing law already provides for a comprehensive system of conservatorship regulation (mostly carried out by the courts under the provisions of the Probate Code). However, as the *Los Angeles Times* series forcefully demonstrated, existing oversight requirements, even if adequate in theory, are far too often not being effectively enforced. In large part, this reflects the fact that most of the burden of supervision falls to the courts.

Yet it appears that at least up until the present, courts are not adequately meeting their oversight responsibilities. According to information uncovered by the *Times*, limited resources mean that, as a practical matter, the courts must perform their supervisory roles in a perfunctory manner at best. Consider the following:

1. Staff levels have remained constant while the elderly population has skyrocketed. While the number of conservatorship petitions filed in Los Angeles County has increased by 38% in the past decade, the number of court investigators has remained the same. This meant that last year only ten court investigators handled over 1400 new conservatorship cases. Nor is the problem restricted to Los Angeles County. In San Diego, for example, nearly 1400 elderly conservatees are past due for visits, and about 900 of them have not been seen in three years – despite the statutory obligation that court investigators visit conservatees as part of the required two-year review. Given that the number of elderly is expected to double in California by the year 2030, the backlogs will only get worse unless staffing levels are substantially increased.

2. In theory, existing law requires conservators to submit to the courts an initial inventory of the estate within 90 days of appointment and accountings of the

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(footnote 45, continued from page 6) SB 986 (Scott, 2003) (to require conservators to file annual accounting statements with the courts); SB 1475 and SB 1305 (both, Vasconcellos, 2004) (to create various elder abuse assessment and prevention programs).

estate assets one year after appointment and not less than every two years thereafter.[46] In addition, the conservator must obtain court approval for the sale, transfer, or any other transactions involving assets of the estate.[47] Yet, according to the series, the courts have signed off on highly questionable expenditures and transactions. Indeed, what is most striking about the examples provided by the *Times* is that the most egregious cases of malfeasance and negligence involved transactions that the court approved, apparently with little consideration or investigation beyond a cursory perusal of the filed documents.

3. The courts' apparent inability to fulfill their obligations under existing law can also be seen in the operation of the state registry which, according to the series, is not being used as planned. For example, one of the articles reported that individuals who have had a conservatorship terminated have not always been reported to the registry – as is required by the statute.[48] In other cases, it appears that judges have appointed conservators without consulting the state registry as required, even though they may have consulted their local registry.

THE SERIES DID NOT CONSIDER FAMILY-MEMBER CONSERVATORSHIPS: Although the *Times* series focused on the problems associated with private conservators and the courts' inability to adequately supervise them, the series has less to say about other problems. For example, one article in the series reported that private conservators accounted for only about 15% of the conservatorships in Southern California.[49] In the vast majority of the more than 5,000 conservatorship petitions filed in California each year, the court appoints a family member to serve as conservator. While it may be nice to assume that family members can be trusted not to exploit their loved ones, the reality is more complicated. A study of conservatorship cases in San Mateo County in the 1980s for example commented that the files "reveal ugly family squabbles" and suggested that family members can behave as unconscionably or incompetently as for-profit conservators.[50] Whether a family member or a private professional, the conservator is regulated almost exclusively by the courts under existing law. The *LA Times* series certainly raises profound questions as to whether the courts are adequately equipped for this role.

OPTIONS FOR REFORM: One thing seems certain - No one reform will fix the existing system. The following is a list of options for reform of the conservatorship system in California:

[46] Probate Code sections 2610-15, 2620.
[47] Probate Code sections 2450-2507, 2540-72.
[48] Probate Code section 2852(b).
[49] Robin Fields, Evelyn Larrubia, and Jack Leonard, *Guardians for Profit: When a Family Matter Turns into a Business, Los Angeles Times*, November 13, 2005.
[50] *See* Lawrence Friedman and Mark Savage, *Taking Care: The Law of Conservatorship in California*, 61 S. Cal. L. Rev. 273 (1988).

Better Court Oversight: On paper the Probate Code provides a number of mechanisms by which the court can monitor a conservatorship, but in practice these provisions seem inadequate. One important area of reform, therefore, should seek to increase court involvement so that it can meaningfully perform its statutory duty. Such reforms might include the following:

- Require *annual review hearings* on the conservatorship. After the initial review, current law requires only a biennial review. Moreover, this review only requires the court investigator to submit a report to the court. In its place, the law should be changed to require *hearings* before the court – with conservator, family members, and conservatee (if possible) attending.

- Require accountings *annually* (rather than only biennially after the first accounting). In addition the accountings should be accompanied by supporting documentation, such as bank statements or brokerage account statements.

- Require courts to perform spot audits of the accounting, as well as audits for cause similar to an IRS audit.

- Authorize court investigators to perform unannounced visits and investigations in addition to regularly scheduled investigations for which the conservator might prepare.

- Make explicit that the court investigator should be an *advocate* of the conservatee.

- Require court to provide assistance to family members who are serving as conservators, for family members or friends.

Licensing and Regulation: Under current law, the only requirement for appointment as a conservator is registration with the statewide registry. As of January 1, 2006, the Rules of Court will require additional educational requirements, as discussed above. However, given the important issues at stake, private conservators should be licensed and regulated in the same manner as other professions that have a fiduciary relationship with clients (such as lawyers or certified accountants). The licensing could be done either by a state agency or by a licensing board established within the Department of Consumer Affairs. In addition, the Attorney General should be given the power to enforce regulations and requirements. An effective system of licensing and regulation could replace both the statewide registry and the county registries.

Creation of an Ombudsman to Establish Systematic Oversight: To supplement the ongoing, statutorily required work of the court investigator, an Ombudsman's office could be created within the Department of Aging or some other appropriate agency or department. Whereas the court investigator makes regular periodic investigations, the Ombudsman would investigate complaints made by, or on behalf of, conservatees as they arise. This would provide a place to turn to for help to prevent abuse for conservatees or

their family and friends. If prosecutorial action were needed, the Ombudsman could notify the Attorney General.

Improve Training of Other Parties: Although licensing can ensure adequate training of private conservators, educational requirements (including continuing education) are appropriate for others in the system, including probate judges, court attorneys, court investigators, and public guardians. In addition, although family members who act as conservators cannot be expected to meet the same requirements as professional conservators, at least some limited educational tools – such as a short seminar or a video produced by the courts – could be provided to family members.

Prevent Abusive Practices Through Uniform Standards: Establish statewide, uniform standards on the powers and limitations of conservators. For example, such reforms might include standard hourly rates and fees, along with procedural safeguards before estate property can be sold, leased, or transferred. Other reforms might include uniform bond requirements and strict limitations on when, if at all, bond requirements may be waived. These standards should apply to all conservators, including family members.

Increase Resources For Courts and Public Guardians: One of the clearest conclusions to be drawn from the *Times* series is that inadequate funding prevents the courts and other public officials from meeting the requirements of existing law. A number of reforms might be considered in this regard:

- To decrease the number of private conservatorships that the probate court must supervise, the Public Guardian could be required to take cases of *all* needy adults who meet specified criteria. Currently, according to the series, Public Guardians turn down a substantial number of requests for conservatorship for lack of staff.

- In addition, the Public Guardian could take the cases of middle income groups for a fee comparable to that of the private professional conservator. Since the Public Guardian, unlike the private conservator, would not realize a profit, surplus funds could be used to help fund the low income cases.

- Finally, if the court staff, including judges, attorneys, and investigators are to effectively carry out their responsibilities, staffing must be increased to match expected increases in the number of elderly persons in the population.

PROPOSED OMNIBUS LEGISLATION: A number of lawmakers are likely to be considering legislation to address many of the problems identified by the *Los Angeles Times* and in this background paper. In particular, Assemblyman Dave Jones, Chair of the Assembly Judiciary Committee, is amending AB 1363 to contain nearly all of the options for reform set forth above. A copy of the amendments being placed in the legislation is attached. This comprehensive, omnibus conservatorship reform bill will be heard by the Legislature next month.