Supreme Court No. S254938

In the Supreme Court of the State of California

Conservatorship of O.B.

O. B., Appellant

vs.

T.B., et al., Respondents

Court of Appeal No. B290805
Santa Barbara Superior Court No. 17PR00325

APPLICATION FOR PERMISSION TO FILE AMICI CURIAE BRIEF; BRIEF OF AMICI CURIAE SPECTRUM INSTITUTE, TASH, AND SIBLINGS LEADERSHIP NETWORK

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APPLICATION FOR PERMISSION TO FILE BRIEF

TO THE HONORABLE CHIEF JUSTICE:

Pursuant to California Rules of Court, Rule 8.520(f), the organizations identified below respectfully request permission to file the attached amici curiae brief. This application is being filed within 30 days of the time specified for filing of the reply brief on the merits and is therefore timely pursuant to Rule 8.520(f)(2).

I. The Interest of Amici Curiae

Resolution of the issue specified in the order granting review will create a legal precedent affecting many more individuals than those who are parties to this case. A decision on the standard of appellate review for orders of probate conservatorships will affect tens of thousands of proposed conservatees who are cited by petitions for general conservatorships and petitions for limited conservatorships in the years and even decades to come.

There are two classes of proposed conservatees whose rights will be affected by the Court's decision in this case. Individuals who are affected in *general conservatorship proceedings* are seniors with cognitive challenges associated with aging, as well as individuals of any adult age who have cognitive challenges due to illnesses or injuries. Individuals who are affected in *limited conservatorship proceedings* are adults with developmental disabilities. Amici curiae wish to assist the Court in understanding how proposed conservatees in both types of conservatorship proceedings may be affected by the precedent that will be created by the Court's decision in this case.

Spectrum Institute is a nonprofit foundation that advocates for the rights of people with disabilities, including promoting greater access to justice in probate conservatorship proceedings. The organization's focus has been primarily on improving the administration of justice in limited conservatorship proceedings involving adults with intellectual and developmental disabilities.

The organization has engaged in a variety of research, educational, and advocacy projects focused on the limited conservatorship system in California. It has produced many reports and commentaries documenting its findings and sharing its recommendations with the judiciary, legal profession, legislators, administrative agencies, and the general public regarding the rights of seniors and people with developmental disabilities in conservatorship and guardianship proceedings.[1] It has also engaged in a variety of advocacy activities to cure defects in the probate conservatorship system in California and to improve access to justice for seniors and people with developmental disabilities in conservatorship and guardianship proceedings in states throughout the nation. These advocacy efforts have involved requests, petitions, and complaints submitted to a wide range of federal and state officials and agencies during the last five years.[2]

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[1] See "Digital Law Library on Guardianship and Disability Rights" online at: http://spectruminstitute.org/library/

[2] These officials and agencies have included the United States Department of Justice (ADA complaint for voting rights violations against limited conservatees by the judicial branch in California and a complaint for deficient legal services by court-appointed attorneys in limited conservatorship proceedings in the Los Angeles Superior Court); the Judiciary Committee of the United States Senate (requests to amend federal legislation to protect not only seniors but also people with developmental disabilities); the Chief Justice

(continued...)

Due to its ongoing research endeavors, educational projects, and advocacy activities on behalf of people with developmental disabilities in limited conservatorship proceedings, Spectrum Institute is able to provide an informed perspective to this Court on the potential impact its decision in this case may have on this class of vulnerable adults in future cases.

TASH is an international leader in disability rights advocacy. TASH works to promote the human rights of people with disabilities through advocacy, research, education, professional development, and policy reform. TASH has a chapter in California.

The Siblings Leadership Network is a national organization providing siblings of individuals with disabilities the information, support and tools to advocate with their brothers and sisters and to promote the issues important to

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[2](...continued)
of the California Supreme Court in her capacity as Chair of the Judicial Council (several communications, including a request to convene a Task Force on Limited Conservatorships); the California Supreme Court (request to amend the Code of Judicial Ethics to clarify that it is unethical for judges to manage and control legal services programs involving attorneys who appear in their courts); California Judicial Council (request to modify court rules to require additional training requirements for attorneys who represent conservatees and proposed conservatees in probate conservatorship proceedings); Judiciary Committee of the California Senate (request to conduct oversight hearing to investigate the violation of rights of people with disabilities in limited conservatorship proceedings); Department of Developmental Services (request to provide oversight and guidance to regional centers in connection with their role in conducting assessments of proposed limited conservatees and submitting reports to judges in these proceedings); Sacramento Superior Court (ADA complaint for failure to appoint attorneys to represent proposed conservatees in a significant number of proceedings); Department of Fair Employment and Housing (ADA complaint against the Sacramento Superior Court for failing to appoint attorneys for proposed conservatees). Many of these advocacy activities are described online at:
http://www.disabilityandabuse.org/whats-new.htm

them and their families. The organization believes that individuals with disabilities have the same rights as all members of society to dignity, respect and the opportunity to grow and to be productive members of their communities. The organization has a chapter in California.

These organizations are concerned that probate courts are not giving serious consideration to the use of supported decision-making as a less restrictive alternative to an order of conservatorship. They believe that an order of conservatorship should be tailored to take into consideration the specific abilities and needs of proposed conservatees and should promote independence to the greatest degree possible. Clear and convincing evidence should be required to show that less restrictive alternatives are truly not available and that a proposed conservatee lacks the capacity to make decisions in each area of decision-making that is restricted by an order of probate conservatorship.

Because the liberty and personal autonomy of people with developmental disabilities are infringed by an order of conservatorship, these organizations believe that a heightened standard of review should be employed to evaluate the legality of a conservatorship order being challenged by a probate conservatee. They believe that a form of strict scrutiny should be used to review orders of a lower court restricting a conservatee's right to make decisions regarding the choice of residence, medical care, contractual and financial matters, educational interests, social interactions, sexual intimacy, and marriage. Judicial encroachments on fundamental rights should be evaluated with strict scrutiny on appeal.

II. How the Brief Will Assist the Court

The issue before this Court – the correct standard of appellate review

for determining the sufficiency of evidence to support an order granting a probate conservatorship – is purely a matter of law. This is an issue to be decided *de novo* by this Court.

In the first instance, the Court will be guided by directives from the California Constitution regarding appellate review. Since the right to appeal is purely statutory, the Court will also be guided by statutes regarding civil appeals and probate orders. To the extent that these statutes are ambiguous regarding the specific issue to be decided on review in this case, the Court will also indulge in statutory construction. In doing so, it will be guided by legislative intent. Finally, since an order granting a petition for probate conservatorship infringes on the liberty of proposed conservatees, constitutional considerations will also guide the Court in establishing the appropriate standard of review. This brief addresses all of these matters.

In determining an issue of law, especially as it involves statutory construction and constitutional consideration, a court may review extrinsic materials to assist it in resolving the legal question at hand. Among the materials a court may consider are scholarly articles, policy reports, and research studies, not only to determine legislative intent but also to understand the impact its decision may have on society.

Amici Curiae have reviewed dozens of statutes and appellate cases relevant to the resolution of the issue before this Court, as well as dozens of studies and reports that will give the Court the "big picture" about the probate conservatorship system – and its two subsystems (general and limited conservatorship proceedings). This brief will refer to those extrinsic materials in ways that are relevant to a proper resolution of the issue under review.

According to an *Amicus Guide* published by the League of California

Cities, amicus curiae briefs tend to fall into one of four categories.[3]

The first is the "me too" brief, which simply says the writer agrees with the perspective presented by one of the parties. This is not a "me too" brief.

The second kind of brief comes from a organization whose perspective is different from, and perhaps broader than, that of the parties. Such briefs can alert the court to *potential consequences* (intended and unintended) of deciding the case a particular way. Such briefs do this by explaining the *practical realities* of how things work. This brief serves both of these functions.

The third kind of brief comes from those who have a *great depth of knowledge* in the subject area before the court. Such briefs can alert the court to the consequences of a particular analysis and the practical effects the decision could have. They may fill gaps in the analysis or research that is provided by the parties. Because of the extensive research and advocacy done by Spectrum Institute pertaining to seniors and people with developmental disabilities in probate conservatorships, this brief will give the Court the benefit of extensive knowledge in these areas that otherwise will be absent from judicial deliberations in this case.

The fourth kind of brief is what might be called a true "friend" of the court brief. It comes from someone who has information and knowledge to share with the court. The individual does not have a stake in the outcome but has an interest in the development of the law in a given area. While amici curiae do not themselves have a stake in the outcome, the classes for whom we advocate certainly do.

Therefore, it would seem appropriate to categorize this brief as falling

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Amicus Guide (2017 Edition), League of California Cities. This document is found online at: http://www.cacities.org/amicusguide

into the second and third types of amicus curiae briefs.

III. Certifications

No Party Assistance. Pursuant to California Rules of Court, rule 8.520(f)(4), counsel for amici confirm that no party to this case, or their attorneys have authored this brief in whole or in part. Nor did any party, their counsel, person, or entity make a monetary contribution to the preparation or submission of this brief.

Word Count. Counsel for amici confirm that its brief (including the text of arguments and footnotes) contains 13,869 words.

IV. Abstract of Argument

The only issue before this Court is a question of law regarding the proper standard for appellate review of challenges to the sufficiency of evidence supporting an order of probate conservatorship. Whether there was sufficient evidence in this particular case was not a question presented in the order granting review.

The only direct controversy in this case involves the standard of review that should be used to determine the sufficiency of evidence involving the order of conservatorship issued by the superior court under the Probate Code. This Court should not render an advisory opinion regarding other types of controversies involving statutes contained in other codes.

The standard of review involves a question of law that is reviewed *de novo* by this Court. What was decided by the trial court and by the Court of Appeal in this case are not binding or relevant at this juncture.

The right to appeal is purely statutory. Therefore, ascertaining the standard for review primarily involves matters of statutory construction and

legislative intent, subject to any constraints that may be imposed by the California Constitution or the United States Constitution.

The statutes applicable to appeals from probate conservatorship orders do not directly specify the standard for appellate review of the sufficiency of evidence to support such orders. Although the Probate Code and the Code of Civil Procedure are silent on this subject, the Code of Civil Procedure does give an appellate court wide latitude when it comes to reviewing factual determinations made by the superior court in situations where there has not been a jury trial. The California Constitution empowers the Legislature to delegate such authority to appellate courts. While the Constitution specifies that reversals for procedural errors are allowed only if there has been a miscarriage of justice, there is no constitutional provision restricting the authority of an appellate court to reverse a judgment based on its independent determination that the judgment is not supported by sufficient evidence.

Statutory construction is purely a matter of law. In construing a statute that is vague or ambiguous on the subject at hand – which is the situation here – courts should attempt to ascertain legislative intent. In doing so, courts may consider extrinsic sources of information, including legislative history materials, legislative testimony, discussions by learned writers in treatises and law reviews, materials that contain economic or social facts, and publications containing expressions of viewpoints.

Also, in cases of uncertain meaning, courts may consider the consequences of a particular interpretation, including its impact on public policy. Courts should construe statutes so as to avoid potential constitutional infirmities. Where the risk to constitutional rights is significant, courts should construe the statute to minimize the risk.

The arguments in the brief and the references and authorities on which

they are based, indicate that it is not appropriate for a Court of Appeal to use the same standard of review in appeals challenging probate conservatorship orders as it uses in reviewing the sufficiency of evidence to support a judgment for money damages. Probate conservatorship proceedings do not involve ordinary disputes over money or property. Instead, they encroach on fundamental liberties and restrict important constitutional rights.

Legislative intent favors the use of a heightened standard of scrutiny in such appeals. Since the probate conservatorship system lacks any significant accountability, thus elevating the risk of error in conservatorship proceedings, constitutional considerations also favor stricter scrutiny in conservatorship appeals. The brief fully explains these arguments.

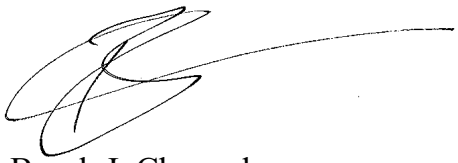
V. Prayer

For all of the foregoing reasons, permission is requested to file this amici curiae brief with the Court so that it may be considered as a part of the Court's analysis of the issue identified in the order granting review.

Dated: July 1, 2019

Respectfully submitted:

Thomas F. Coleman
Attorney for Amici Curiae



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BRIEF OF AMICI CURIAE

Argument

I. INTRODUCTION

Although this case involved a legal dispute in the Court of Appeal over whether a superior court order granting a petition for a limited conservatorship was supported by clear and convincing evidence, the question before this Court is more limited. It focuses solely on an issue of law applicable to probate conservatorship proceedings *generally*. Resolution of that matter will affect two distinct classes of litigants who will be involved in probate conservatorship proceedings in the coming years and decades.

A. Procedural Facts

This case involves an appeal from a judgment of the Santa Barbara County Superior Court granting a petition for a limited conservatorship under the Probate Code. The court's judgment has several components involving various mandatory factual findings.

As a prerequisite to granting the petition, the court found: (1) the limited conservatee is an adult with developmental disabilities; (2) she is unable to properly provide for her health, food, clothing, and shelter; (3) there is no form of medical treatment for which she has the capacity to give informed consent; and (4) granting the conservatorship is the least restrictive alternative needed for her protection.

After granting the petition based on these findings, the court immediately took additional actions in furtherance of its primary order granting a limited conservatorship. These ancillary actions included: (1) imposing restrictions on the limited conservatee's right to make decisions regarding her

residence, her right to contract, her right to make medical decisions, and her right to make educational decisions; and (2) appointing limited co-conservators to administer the conservatorship.

The limited conservatee appealed, challenging the sufficiency of evidence to support the judgment below.

The Court of Appeal affirmed the judgment, finding that it was supported by substantial evidence. The court used a deferential standard of review for sufficiency of evidence that traditionally has been used in civil appeals involving money damages.

B. Grant of Review

The limited conservatee filed a petition for review with this Court. Review was granted to determine if the standard of review for sufficiency of evidence supporting orders imposing a probate conservatorship should require a higher level of scrutiny than the standard used by the Court of Appeal.

This Court limited review to one issue only: "On appellate review in a conservatorship proceeding of a trial court order that must be based on clear and convincing evidence, is the reviewing court simply required to find substantial evidence to support the trial court's order or must it find substantial evidence from which the trial court could have made the necessary findings based on clear and convincing evidence?"

1. The Issue Under Review Is a Matter of Law

The issue before this Court involves a determination of the correct standard of review in appellate challenges to the sufficiency of evidence to support an order of probate conservatorship. The standard of review is a question of law. (*Coastal Envtl. Rights Found. v. Cal. Reg'l Water Quality Control Bd.* (2017) 12 Cal. App. 5th 178, 188.) Such a question is reviewed *de novo*. (Ibid.)

2. The Case Can Be Remanded for Reconsideration Under the Correct Standard of Review

The order granting review is limited to an issue that is purely a matter of law. Review was not granted to determine whether the evidence presented in the trial court constituted substantial evidence in this case. Presumably, if this Court finds that the Court of Appeal used the wrong standard of review, it will remand the matter to the Court of Appeal for reconsideration using the standard specified this Court's opinion.

When the Supreme Court reverses a judgment of the Court of Appeal for an error of law that may have affected its decision, the matter is remanded to the Court of Appeal for further proceedings consistent with the opinion of the Supreme Court. (*People v. Breverman* (1998) 19 Cal.4th 142, 179; accord: *People v. Cahill* (1993) 5 Cal.4th 479, 510.) This would include a remand to determine the sufficiency of evidence in this case. *(Cordova v. City of Los Angeles* (2015) 61 Cal.4th 1099, 190 Cal.Rptr.3d 850, 859.)

3. This Court Should Focus Solely on the Context of Probate Conservatorships

The order granting review focused on the standard for "appellate review in a *conservatorship proceeding*." (Emphasis added) It did not ask for briefing on the standard for appellate review in any other context in which clear and convincing evidence is required by statute or case law.

After review was granted in this case, one legal commentary suggested that the issue to be resolved "has great importance for punitive damages cases because, as readers of this blog are aware, California plaintiffs must prove all the prerequisites for a punitive damages award by clear and convincing evidence." (*California Punitive Damages: An Exemplary Blog*, "Supreme Court of California grants review to resolve split over application of 'clear and

convincing' evidence standard," May 2, 2019)[4]

A search of California statutes that require clear and convincing evidence reveals there are 13 codes containing 227 statutes that require such a showing for one purpose or another. They involve competing interests in disputes regarding diverse matters such as child custody, parentage, harassment, parole, foster care, and punitive damages.

None of these codes are involved here. Therefore, this Court would be rendering an advisory opinion if it were to engage in any discussion beyond conservatorship proceedings conducted under the Probate Code.[5]

II. THE ISSUE ON REVIEW IS PURELY A LEGAL MATTER

A. The Standard of Review for Sufficiency of Evidence for a Probate Conservatorship Order Is a Question of Law

The question posed in the order granting review involves the burden of proof or burden of persuasion that an appellant has in a conservatorship case on appeal. Whatever standard of review is ultimately used, it is the appellant who has the burden to show that the order is not supported by substantial evidence. (*Adoption of C.* (2008) 164 Cal.App.4th 1004, 1010-1011.) On

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Online at:
http://www.calpunitives.com/2019/05/supreme-court-of-california-grants.html

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The rendering of advisory opinions falls within neither the functions nor the jurisdiction of this Court. (*People ex Rel. Lynch v. Superior Court* (1970) 1 Cal.3d 910, 912.) This Court does not resolve abstract legal issues. *(Pacific Legal Foundation v. California Coastal Comm.* (1982) 33 Cal.3d 158, 170.) "Even in circumstances when an issue involves significant public interest, California courts adhere to the even older, and more important, judicial policy against issuing advisory opinions." (*City of Santa Monica v. Stewart* (2005) 126 Cal.App.4th 43, 68-70.)

appeal, an appellant has the burden of establishing error. *(In re Marriage of Cochran* (2001) 87 Cal.App.4th 1050, 1056.)

Ascertaining the correct burden of proof "is a pure question of law." (*Cooley v. Superior Court* (2002) 29 Cal.4th 228, 250, fn. 11; (*Cox v. L.A. Unified School District* (2013) 218 Cal.App.4th 1441, 1444.) It is an issue that is reviewed *de novo*. (Ibid.)

1. Courts May Refer to Extrinsic Materials in the Process of Deciding Questions of Law

As argued below, the right to appeal is purely statutory. As such, the ground rules for appeals, such as the standard for review and the showing needed on appeal to reverse a judgment, are primarily matters governed by statute. If relevant statutes are ambiguous on these issues, a court must attempt to ascertain legislative intent. This is a matter to be reviewed independently by this Court. (*Pineda v. Williams-Sonoma* (2011) 51 Cal.4th 524, 529.)

In construing statutes, this Court may turn to extrinsic aids to assist in the process of interpretation. (*Murphy v. Kenneth Cole Protc* (2007) 40 Cal.4th 1094, 1103.) Extrinsic aids that guide statutory construction may include a wide range of matters. (*In re Marriage of Alter* (2009) 171 Cal.App.4th 718, 732.)

Such aids may include reference to the objectives to be achieved by the statute, the evils to be remedied, the legislative history, and public policy**.** *(Pennisi v. Dept. of Fish and Game* (1979) 97 Cal.App.3d 268, 273.)

In addition to documents pertaining to the legislative history of relevant statutes, the wider historical circumstances of their enactment also may be considered in ascertaining legislative intent. (*Dyna-Med, Inc. v. Fair Employment and Housing Comm*. (1987) 43 Cal.3d 1379, 1387.)

Legislative testimony, analysis, argument, or action are appropriate

matters for judicial consideration in determining legislative intent. *(McDowell v. Watson* (1997) 59 Cal.App.4th 1155, 1161, fn. 5.)

An appellate court may consider publications as an aid to determine what the law is. In determining *de novo* what the law is, appellate courts routinely consider materials that were not introduced in the lower court, including publications expressing viewpoints and generalized statements about the state of the world. These are considered not as a substitute for evidence but as an aid to the court's work of interpreting, explaining, and forming the law. (*Cabral v. Ralphs Grocery Co.* (2011) 51 Cal.4th 764, 776, fn. 5.) A request for judicial notice is not necessary for the court to consider such publications.[6] (Ibid.)

2. Courts May Consider the Consequences of Deciding a Matter of Law One Way or Another

In deciding a question of law, this Court may consider the impact of an interpretation on public policy, for "[w]here uncertainty exists consideration should be given to the consequences that will flow from a particular interpretation." (*Meja v. Reed* (2003) 31 Cal.4th 657, 663; accord: *Wells v. One2One Learning Foundation* (2006) 39 Cal.4th 1164, 1190.)

As the seriousness of consequences increases to litigants in a particular type of legal proceeding, a stricter standard of proof may be required. (*Conservatorship of Sanderson* (1980) 106 Cal.App.3d 611, 619.) Just as this is true for establishing a standard of proof in the trial court, so too should be it be for setting the standard of review on appeal. Both determinations send

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For example, when this Court was interpreting a statute criminalizing certain forms of consenting adult behavior and speech, it's opinion referred to three studies cited in an amicus curiae brief. (*Pryor v Municipal Court* (1979) 25 Cal.3d 238, 252, fn. 8.)

a signal to the bench and the bar about the importance of getting the judgment correct due to the impact that an erroneous judgment will have on those whose lives and liberties are involved.

This Court considered the consequences of an erroneous judgment in a proceeding severing a parent-child relationship when it ruled that an elevated standard of proof is required in such proceedings. (*In re Angelica P*. (1981) 28 Cal.3d 908.) So too should it consider the consequences of an erroneous judgment to the classes of vulnerable adults involved in probate conservatorship proceedings.

3. Courts Focus on the Type of Proceeding, Not a Specific Case, in Deciding the Burden of Proof

In establishing the proper burden of proof, courts consider the type of proceeding *generically* and the *class of people* affected, not an individual case or the specific litigants involved in it. (*Santosky v. Kramer* (1982) 455 U.S. 745, 757; *California Teachers Assn. v. State* (1999) 20 Cal.4th 327, 345.)

The United States Supreme Court has never approved a case-by-case determination for the proper standard of proof for a given proceeding.

"Standards of proof, like other 'procedural due process rules[,] are shaped by the risk of error inherent in the truth-finding process as applied to the *generality of cases*, not the rare exceptions.' *(Mathews* v. *Eldridge*, 424 U.S., at 344 (emphasis added). Since the litigants and the fact-finder must know at the outset of a given proceeding how the risk of error will be allocated, the standard of proof necessarily must be calibrated in advance. Retrospective case-by-case review cannot preserve fundamental fairness when a class of proceedings is governed by a constitutionally defective evidentiary standard." This language has been cited with approval by this Court. (*California Teachers Assn, supra*, at p. 345)

The same reasoning should apply when establishing the appellate standard of review for sufficiency of evidence in probate conservatorship proceedings since this determination affects the burden placed on conservatees to establish reversible error.

4. Statutes Should Be Construed to Avoid Constitutional Problems

Two decades ago, the Court of Appeal was faced with the task of deciding the appropriate burden of proof that should apply to child guardianship proceedings. Relevant statutes were silent on this issue. The court looked beyond the issue of legislative intent and pondered constitutional implications. In doing so, the court noted that statutes should be construed, if possible, to avoid constitutional problems that may arise under a particular interpretation. (*Guardianship of Stephen G.* (1995) 40 Cal.App.4th 1418, 1425.) The same cautionary approach should be used here.

B. Knowledge about the Probate Conservatorship System and How It Operates in Practice Will Help This Court Better Understand the Context in Which It Is Deciding this Important Question of Law

Since the clear and convincing burden of proof applies to all probate conservatorship proceedings, regardless of whether they are classified as "general" or "limited," the question presented on review focuses on probate conservatorship proceedings generically. The decision of this Court, therefore will affect people with developmental disabilities who are adjudicated to be limited conservatees as well as seniors and others who are adjudicated to be general conservatees. As a result, it is helpful for this Court to understand how both general and limited conservatorship proceedings operate in practice.

Some 13 years ago, the Legislature found that "the conservatorship

system in California is fundamentally flawed and in need of reform."[7] Unfortunately, that same statement could be made today. In fact, as many of the reports, studies, commentaries, and complaints referenced in ths brief indicate, the system may be in worse shape today than it was back then.[8]

The history of California's conservatorship system was summarized very well in a background paper written by a legislative analyst in 2005, prior to the passage of Assembly Bill 1363 the following year. The paper explained:[9]

> "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

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This quote is taken from legislative findings contained in subdivision (g) of Section 2 of Assembly Bill 1363, known as the "Omnibus Conservatorship and Guardianship Reform Act of 2006." Many of the necessary reforms have never been implemented due to the failure of the Legislature to fund them.

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Noting that "complex deficiencies in the system" are harming conservatees, a legislative report predicted such systemic deficiencies were likely to increase over time. (Report, p. 1) "Assembly Judiciary Committee," (1-9-06). https://leginfo.legislature.ca.gov/faces/billAnalysisClient.xhtml?bill_id=200520060AB1363 As the extrinsic sources of information referenced in this brief show, that prediction has come true.

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"Better Protection for Our Most Vulnerable Adults: Is It Time to Reform the Conservatorship Process?", Report of Assembly Judiciary Committee (2005) https://ajud.assembly.ca.gov/sites/ajud.assembly.ca.gov/files/reports/1205%20Conservatorship%20background.pdf

> 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. In 1980, California created a 'limited conservatorship' for 'developmentally disabled adults.' Under a 'limited conservatorship,' the court limits the conservator's power so as to preserve the maximum amount of independence and self-sufficiency for the conservatee."

Limited and general conservatorships are treated much the same throughout the Probate Code.[10] The sections that follow explain how general and limited conservatorship proceedings operate in practice and highlight differences between the two types of proceedings.

California's method of intervention to protect vulnerable adults who are unable to care for their basic needs has been evolving over the decades. Reforms first occurred in 1957 when the system shifted from "guardianship" to "conservatorship." Then the law was changed in 1977 to give a court investigator a role in the process and allow for the appointment of an attorney to represent persons targeted by these proceedings. This was supposed to provide additional protection to conservatees and proposed conservatees. The

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"The current statutory framework integrates limited conservatorship proceedings into the general conservatorship provisions of division 4 of the code. Unless otherwise specified, provisions addressing conservatorships apply to both general and limited conservatorships. When the Legislature has chosen to treat limited conservatorship proceedings differently, it has interpolated specific sections or subdivisions into the general statutory scheme." *Invitation to Comment: W19-08*," Probate and Mental Health Advisory Committee, Judicial Council , p. 4. https://www.courts.ca.gov/documents/W19-08.pdf The clear and convincing evidence requirement is one of those provisions that applies to both general and limited conservatorship proceedings. (Prob. Code § 1801(e).)

Legislature acted again in 1980 by enacting some progressive reforms to better meet the needs of adults with developmental disabilities. That is when the limited conservatorship system was created.[11] Additional reforms occurred in the wake of some Los Angeles Times stories revealing ongoing abuses in the probate conservatorship system.

This ongoing "progressive" evolution of the conservatorship system may look good on paper, but the reality of how it operates in practice is something quite different. Studies and reports over the past few years reveal a system that continues to ignore the rights of seniors and people with disabilities – a system that is failing to meet the stated goals and expectations of probate statutes, state and federal nondiscrimination laws, and constitutional protections that should inform and guide the practices of the judges and attorneys who operate this system.

"It is one thing to be progressive on paper, quite another to make sure reality matches the words. After all, rights can be ignored; they can be waived; and sometimes they can turn into a caricature of themselves."[12] Whether rights have any muscle is an empirical question. What follows is information about the realities of how the probate conservatorship system is operating in practice.

1. General Conservatorships: Proceedings for Seniors and Others with Cognitive Challenges

Probate Code Section 1801(a) authorizes a superior court judge to

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"Losing It in California: Conservatorships and the Social Organization of Aging," 73 Wash. Univ. Law Quarterly 1501 (1995). https://openscholarship.wustl.edu/cgi/viewcontent.cgi?article=1691&context=law_lawreview

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"Losing It in California, supra," at p. 1512.

appoint a conservator of the person for any adult "who is unable to provide properly for his or her personal needs for physical health, food, clothing, or shelter." Subdivision (b) authorizes appointment of a conservator of the estate "for a person who is substantially unable to manage his or her own financial resources or resist fraud or undue influence." Subdivision (c) authorizes a conservator of the person and estate to be appointed for anyone who meets the criteria of both subdivision (a) and (b). However, neither form of conservatorship may be ordered "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."[13] (Prob. Code § 1800.3, subd. (b).)

A probate conservatorship proceeding is initiated by the filing of a petition. (Prob. Code § 1820.) It may be filed by the proposed conservatee, a relative, a friend, an government agency, or by any other interested person. (Ibid.) The petition asks for a conservatorship of the person, estate, or both. (Prob. Code § 1821.)

Notice of the proceeding, including the date and time of a hearing on the petition, must be sent to certain relatives of the proposed conservatee. (Prob. Code § 1822.) The clerk must issue a citation to the proposed conservatee with the date and time of the hearing. (Prob. Code § 1823.) A copy of the petition shall also be served on the proposed conservatee. (Prob. Code § 1824.) With certain limited exceptions, the proposed conservatee "shall be produced at the hearing." (Prob. Code § 1825.)

The court investigator is obliged to conduct an investigation, including

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This provision became law on January 1, 2008. (Stats. 2007, Ch. 553, Sec. 6) http://www.leginfo.ca.gov/pub/07-08/statute/ch_0551-0600/ch_553_st_2007_ab_1727

of the proposed conservatee, petitioners, proposed conservators, and close relatives. (Prob. Code § 1826.) The investigator must issue a report to the court indicating, among other things, whether the proposed conservatee has "mental function deficits" that would interfere with his or her ability to understand the consequences of actions taken in connection with functions described in Section 1801(a) [properly providing for personal needs] or (1801(b) [unable to manage financial resources or resist undue influence].

The court shall hear and determine the matter according to the law pertaining to civil cases (Prob. Code § 1827.) except that the standard of proof for establishing a probate conservatorship "shall be by clear and convincing evidence." (Prob. Code § 1801(e).)

Unlike in limited conservatorship proceedings where the proposed conservatee *must* be represented by counsel, there are loopholes in general conservatorship proceedings that allow proposed conservatees to have no legal representation throughout these complicated legal proceedings.

The Probate Code places the burden on proposed conservatees in general conservatorship proceedings to request counsel in order for the right to an attorney to apply.[14] (Prob. Code § 1471(a).) If no request for counsel is

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Placing such a burden on individuals who have actual or apparent cognitive and communication disabilities is itself an obstacle that interferes with access to justice in these proceedings. Unfortunately, despite the professed policy of the judicial branch to ensure "equal and full access to the judicial system" for people with disabilities (Rule 1.100(b), California Rules of Court), court rules place the burden on people with disabilities to make a request in order to be entitled to necessary disability accommodations. (Rule 1.100(c).) Court rules are silent on the duty of courts to provide accommodations, including appointment of counsel, without a request. The failure of a court to do so, even without a request, may violate its duty as a public entity under Title II of

(continued...)

made, the court is required to appoint counsel only if it determines, from any source of information, that such appointment is necessary to protect the interests of the proposed conservatee. (Prob. Code § 1471(b).)

Although general probate conservatorships involve questions regarding an individual's mental capacity to care for his or her basic needs (Prob. Code § 1801(a).) and usually involve determinations about an individual's legal capacity to make significant decisions affecting his or her well-being (Prob. Code §§ 810-813.), a medical capacity declaration is generally not required by statute.

Not only may proposed conservatees contest a general conservatorship proceeding and insist on an evidentiary hearing, they may also demand a jury trial. (Prob. Code § 1823(b)(7).) However, in reality, contested evidentiary hearings seldom occur.[15] Jury trials in general conservatorship proceedings are

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[14](...continued)
the Americans with Disabilities Act, to accommodate *known* disabilities that may interfere with a litigant's ability to have meaningful participation in the proceeding. Thus, a significant number of proposed conservatees are required to represent themselves in probate conservatorship proceedings. This undermines their ability to have meaningful participation in the proceedings.

[15]
In a study of 60 conservatorship cases in the San Francisco Superior Court in 2007, not one of them had a contested evidentiary hearing. "Conservatorship Reform in California: Three Cost-Effective Recommendations," Goldman School of Public Policy, University of California- Berkeley (May 2009) http://www.canhr.org/reports/2009/09ConservReformReport.pdf This is consistent with a study done by Spectrum Institute of limited conservatorship cases processed in the Los Angeles Superior Court in 2013. Of the 83 cases reviewed, nearly 100% of them were granted without an evidentiary hearing. "Searching for Clues: Putting Together Pieces of the Limited Conservatorship Puzzle by Examining Court Records" (Spectrum Institute, 2014) (continued...)

virtually nonexistent.[16]

Statistics about the number of general conservatorships filed annually in California are difficult to find. The same is true about the number of active general conservatorships of the person or estate or both that are currently being supervised by California courts. The Judicial Council does not routinely survey local courts for this data.[17]

Information about general conservatorship proceedings obtained by the Legislature in 2005 suggested that, at that time, there were as many as 44,000 active cases statewide, with approximately 5,500 new cases being filed each year.[18] Information from the San Diego Superior Court suggests that the

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[15](...continued)
http://disabilityandabuse.org/conferences/searching-court-records.pdf

16

Data shows that for all types of probate proceedings in fiscal year 2016-2017 (estates, guardianships, and conservatorships), there was only one jury trial conducted in California. "Probate (Estates, Guardianships, Conservatorships) – Methods of Disposition, by County" (2018 Court Statistics Report, p. 168) https://www.courts.ca.gov/documents/2018-Court-Statistics-Report.pdf

17

According to a recent government report, current statewide statistics on the number of probate conservatorships are not available because there is no statewide database. "The Role of the Courts in Protecting California's Increasing Aging and Dependent Adult Population," (Background Paper for the Senate Committee on Judiciary, March 24, 2015) p. 18. https://sjud.senate.ca.gov/sites/sjud.senate.ca.gov/files/background_paper_conservatorship_oversight.pdf

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AB 1363, Analysis, Assembly Appropriations Committee (January 19, 2006) https://leginfo.legislature.ca.gov/faces/billAnalysisClient.xhtml?bill_id=200520060AB1363 This estimate is consistent with a Judicial Council report which suggested there were 5,600 general petitions for conservatorship filed statewide in fiscal year 2005-2006, with about 45,000 active cases in June (continued...)

number of new petitions has been increasing annually.[19]

There appears to be no data on the proportion of probate conservatorship cases in the state that are general versus limited. However, data from two counties indicate that there are considerably fewer general conservatorships than limited conservatorships. For example, information provided by the San Diego Superior Court to the Senate Judiciary Committee in 2105 indicates that 58% of the court's 3,900 active cases involve limited conservatorships.[20]

The Los Angeles Superior Court reported that it had 16,400 active probate conservatorship cases in 2017. Only 37% of those cases involved general conservatorships.[21] If that ratio of general conservatorship cases were to apply to new petitions as well as active cases, then it would be fair to estimate that about 740 new petitions for general conservatorships are filed

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[18](...continued)
2006. "Court Effectiveness in Conservatorship Case Processing," Report to the Legislature (January 2008)
https://www.courts.ca.gov/documents/case_process.pdf

19

There were 313 new probate conservatorship petitions filed in San Diego in 2011. In 2013, there were 374 new petitions. This is a 19% increase. "Filing Statistics of the Superior Court of California, County of Orange: FY 2011-2013", p. 6.
https://www.occourts.org/media/pdf/filing-and-workload-information.pdf

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"The Role of the Courts in Protecting California's Increasing Aging and Dependent Adult Population," (Background Paper for the Senate Committee on Judiciary, March 24, 2015) p. 18.
https://sjud.senate.ca.gov/sites/sjud.senate.ca.gov/files/background_paper_conservatorship_oversight.pdf

21

This data was obtained through an administrative records request to the court.
http://spectruminstitute.org/amicus/2017-data-los-angeles-conservatorships.pdf

annually in Los Angeles.[22]

Because of systemic flaws and funding deficiencies, very few of these cases ever make it to trial. Since appeals by probate conservatees are unusual, there is almost no appellate oversight of the general conservatorship system by the Court of Appeal or by this Court. As explained in a subsequent section of this brief that focuses on accountability, there is no administrative oversight within the judicial branch or involvement by the executive branch.

The general conservatorship system *does* run efficiently, that much is true. However, access to justice for general conservatees and oversight of the judges and attorneys who operate the system are sorely lacking.

2. Limited Conservatorships: Proceedings for Adults with Intellectual and Developmental Disabilities

Limited conservatorship proceedings were created by the California Legislature in 1980. They may only be used for adults who have developmental disabilities. Because many limited conservatorships are established when a young person turns 18 or shortly thereafter, many limited conservatorships may remain active on the court's dockets for decades.

The judicial branch has no statewide data on the number of active limited conservatorship cases. There also is no data from the judicial branch on the number of new limited conservatorship petitions that are filed annually in California. Estimates, therefore, come from other sources.

The Department of Developmental Services has reported that 47,246

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"Searching for Clues: Putting Together Pieces of the Limited Conservatorship Puzzle by Examining Court Records," Spectrum Institute (2014) – See attached letter from the Los Angeles Superior Court dated April 14, 2014, indicating that about 2,000 new probate conservatorship petitions are filed annually with the court.
http://spectruminstitute.org/amicus/searching-court-records.pdf

adults with developmental disabilities were probate conservatees in 2018. That number is up from 45,645 in 2017.[23]

Surprisingly, not all of these adults are *limited* conservatees. That is because some petitioners who seek a conservatorship over an adult with a developmental disability file a petition for a general conservatorship rather than a limited conservatorship.[24]

The judicial branch does not have statewide data for the number of petitions filed annually for limited conservatorships. That information, therefore, is estimated by extrapolating data from other sources. Spectrum Institute has estimated that 1,200 limited conservatorship petitions are filed each year in Los Angeles.[25] It is also estimated that Los Angeles accounts for

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This data was obtained by Spectrum Institute pursuant to a public records request made to DDS in 2019. The number of active conservatorship cases is calculated by subtracting the category "no conservator/guardian" and subtracting the category "court/dependent child" from the category "total" (representing all adult regional center clients throughout the state whether they are conserved or not).
http://spectruminstitute.org/amicus/2017-2018-dds-data-on-conservatees.pdf

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When a petition is filed for a limited conservatorship, the petitioner must notify the regional center, which then has a duty to evaluate the proposed conservatee and file a report to the court with its findings and recommendations. This takes time, causes delay, and may result in recommendations not to the liking of the petitioner. Also, when a limited conservatorship proceeding is initiated, the court *must* appoint counsel for the person who is the target of the proceeding. When petitioners file for a general conservatorship for an adult with a developmental disability, judges in some counties are not appointing counsel for the proposed conservatee.

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This information was obtained from a presentation made by Bet Tzedek which
(continued...)

about 30% of conservatorships of adults with developmental disabilities statewide.[26] Therefore, it is possible that as many as 4,000 limited conservatorship petitions are filed in California each year.

Limited conservatorship proceedings are initiated in a similar manner as general conservatorships. A petition is filed by a relative or interested party. Close relatives are given notice. The proposed conservatee is cited with notice of the hearing and served with a copy of the petition. The case is set for a hearing. A court investigator *should* interview petitioners, the proposed conservatee, proposed conservators, close relatives and then submit a report.

The same findings must be made by the court before a petition can be granted. Prior to establishing a limited conservatorship of the person, the court must find that the proposed limited conservatee is unable to provide properly for his or her personal needs for physical health, food, clothing, or shelter. For a limited conservatorship of the estate, a finding must be made that the

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[25](...continued)
operates a self-help clinic assisting petitioners seeking conservatorships. http://spectruminstitute.org/amicus/self-help-presentation.pdf Reviews of court files in Los Angeles by Spectrum Institute revealed that a considerable number of petitions were filed without the assistance of Bet Tzedek. As a result, the estimate of new petitions filed annually was rounded up to 1,200 to account for these non-assisted petitions. "Searching for Clues: Putting Together Pieces of the Limited Conservatorship Puzzle by Examining Court Records" (Spectrum Institute, 2014)
http://disabilityandabuse.org/conferences/searching-court-records.pdf

[26]
This information was provided by DDS in response to a public records request made by Spectrum Institute in December 2014. See: "Justice and Equality: Improving the Functions of the Department of Developmental Services in Limited Conservatorship Proceedings," p. 13, a Report from Spectrum Institute to DDS (January 16, 2017)
http://spectruminstitute.org/amicus/dds-report-1.pdf

individual is substantially unable to manage his or her own financial resources or resist fraud or undue influence. As for a general conservatorship, the court must make an express finding that the granting of the conservatorship is the least restrictive alternative needed for the protection of the conservatee.

Limited conservatorship proceedings differ from general conservatorships in a few ways. First, there is a statutory requirement that an attorney *must* be appointed to represent a proposed limited conservatee. (Prob. Code § 1471(c).) Furthermore, a petitioner *must* notify the regional center of the hearing. (Prob. Code § 1822(e).) The regional center *must* evaluate the proposed conservatee and submit a report to the court with its findings and recommendations. (Prob. Code § 1827.5.)

Limited conservatorship proceedings also differ from general conservatorships in another significant way. By statute, a limited conservatee retains rights in several areas of decision-making unless the petitioner seeks those powers and the court expressly grants such a request when an order granting the petition is entered. These powers include access to confidential records and papers of the conservatee, as well as the authority to make decisions regarding residence, marriage, contracts, medical care, education, sexual relations, and social contacts. (Prob. Code § 2351.5.)

Although these special legal protections associated with limited conservatorship proceedings look good on paper, the procedural and substantive rights of adults with developmental disabilities that are codified in statutes are often not respected or protected in probate conservatorship proceedings.

III. THE CALIFORNIA CONSTITUTION AND RELEVANT STATUTES GIVE THIS COURT WIDE LATITUDE IN SELECTING THE APPROPRIATE STANDARD FOR REVIEWING THE SUFFICIENCY OF EVIDENCE OF AN ORDER GRANTING A PROBATE CONSERVATORSHIP

The judicial power of the state is vested in the Supreme Court, courts of appeal, and superior courts. (Cal. Const, art. VI, Sec. 1.) Courts of appeal have appellate jurisdiction over superior court proceedings as specified by statute. (Cal. Const., art. VI, Sec. 11(a).) The Supreme Court may review the decision of a court of appeal in any cause. (Cal. Const., art. VI, Sec. 12(a).)

Appellate courts review cases for two types of errors: procedural errors that may have affected the result, and insufficiency of evidence.[27]

The Constitution specifies when an appellate court may reverse for procedural errors. (Cal. Const., art. VI, § 13.) There is no similar limitation for reversals due to insufficiency of evidence. Quite the contrary, when there has not been a jury trial, the Constitution gives an appellate court a broad grant of authority to make independent evidentiary findings. (Cal. Const., art. VI, § 11.)

From a constitutional perspective, this Court is not constrained in establishing appellate standards of review for determining the sufficiency of evidence to support an order of the superior court.

The right to appeal is purely statutory. (*Conservatorship of Gregory D.* (2013) 214 Cal.App.4th 62, 67.) An appeal may be taken from an order made appealable by the Probate Code. (Code of Civ. Proc. § 904.1.) This includes an order granting or refusing to grant letters of conservatorship. (Prob. Code §1301) It also includes an order affecting the right of a conservatee to enter

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These two types of error are explained on the website of the judicial branch. See "Appeals Process" at: https://www.courts.ca.gov/12431.htm?print=1

into various financial transactions. Granting or refusing to grant an order authorizing or directing the actions is also appealable. (Prob. Code § 1300.)

With respect to such appealable orders, the next issue is the authority of an appellate court to affirm or reverse them. Code of Civil Procedure Section 906 gives a reviewing court the authority to review a verdict, decision, or any intermediate decision which involves the merits or which substantially affects the rights of a party. Section 906 further specifies that on appeal, a reviewing court may affirm, reverse, or modify any order or judgment appealed from and may direct "the *proper* order or judgment to be entered." (Emphasis added) The term "proper" is not defined by statute.

From a statutory perspective, the authority of a reviewing court is very broad in terms of reviewing and reversing an order or judgment. The only limitation seems to be that affirming or reversing or modifying an order or judgment ultimately must cause a "proper" order or judgment to be entered. The term "proper" is obviously very vague.

One limitation on the broad grant of authority to appellate courts under Section 906 is the constitutional limitation that *procedural* errors may only be reversed if a "miscarriage of justice" has occurred. (Cal. Const., art. VI, § 13.) Thus, there is a requirement that procedural errors may only cause reversal if an appellant can show prejudice.

But there are no such restrictions on the authority of appellate courts to reverse an order or judgment for insufficiency of evidence. A lack of substantial evidence is not a procedural error. Failure of evidence is more foundational. An order or judgment that lacks sufficient evidence would be arbitrary and capricious and thus violate due process.

Thus when it comes to appeals alleging insufficiency of evidence, both constitutional and statutory law give appellate courts plenary authority to

review this issue. (Cal. Const., art. VI, § 11; Code of Civ. Proc. § 910.)

Since the right to appeal is purely statutory and relevant statutes are vague as to the standard of appellate review for alleged insufficiency of evidence to support an order of probate conservatorship, this Court may look to extrinsic aids in deciding this question of law. Such aids include materials showing legislative intent in the field of probate conservatorships, as well as constitutional considerations associated with proceedings that restrict fundamental liberties and infringe on basic constitutional rights.

IV. A SINGLE STANDARD OF REVIEW MAY NOT SUFFICE FOR ALL ASPECTS OF A CONSERVATORSHIP ORDER

An order granting a probate conservatorship is multi-faceted. It has three parts. The first part, which is jurisdictional, is premised on factual findings that enable the court to assume jurisdiction over the proposed conservatee. The second part, which is ancillary, involves additional factual determinations that are necessary to remove certain decision-making rights that would otherwise remain with a conservatee despite an order granting a conservatorship. The third part, which actuates the first two parts, involves the selection of a person to act as a conservator to implement the court's orders and statutory directives.

When an appeal is filed from an order granting a probate conservatorship, all three parts of the judgment are potentially implicated. Whether an appellate court reviews one or all three parts largely depends on how an appellant frames the issues on appeal.

An argument on appeal that the judgment below is not supported by sufficient evidence is rather vague. Presumably, without further clarification, it could be assumed that the appellant is challenging the sufficiency of

evidence to support the judgment and all of its component parts. However, even if that were true, the standard for reviewing the sufficiency of evidence of the judgment of the superior court in a probate conservatorship proceeding may vary depending on the specific component of the order being reviewed.

In a general conservatorship proceeding, the factual findings necessary for the first part of the order – the part that gives the court jurisdiction to take over control of the life of the proposed conservatee – require evidence: (1) that the proposed conservatee is an adult; and (2) that he or she is unable to provide for his or her personal needs regarding health, food, clothing, or shelter; and (3) granting the conservatorship is the lease restrictive alternative needed for the protection of the proposed conservatee. All three elements must be supported by sufficient evidence. In a limited conservatorship case, the court must also find that the proposed conservatee is a person with a developmental disability.

Once jurisdiction has been assumed by the court because these factual findings have been satisfied with sufficient proof, the court then decides what specific limitations, if any, it will make on decision-making rights that otherwise would remain with the conservatee.

This part of the order might involve transferring authority to whoever is chosen to be the conservator to make decisions on one or more of the following subjects: place of residence, medical care, education, contracts, social contacts, sexual activities, and marriage. Although they may be made at the same hearing, those are determinations that follow, not precede, the assumption of jurisdiction over the proposed conservatee by the court.

The third part of the conservatorship order involves a determination of who is selected to serve as the conservator or limited conservator. An order of conservatorship is not self-executing. Someone must be chosen by the court

to implement the constellation of orders on a day-to-day basis moving forward.

The Legislature has clearly specified that the appointment of a conservator pursuant to Section 1801 "shall be by clear and convincing evidence." (Prob. Code § 1801(e).) This is premised on case law holding that, due to serious restrictions on personal liberties that are caused by an order of probate conservatorship, constitutional considerations require a higher standard of proof than that used in civil cases imposing money damages. (*Conservatorship of Sanderson, supra,* at p. 620.)

At the time *Sanderson* was decided, the Probate Code did not specify the standard of proof required to establish a conservatorship. The court noted that although probate conservatorships are considered civil cases, and ordinary civil cases only require proof by a preponderance of evidence, constitutional considerations required a higher level of proof. In deciding that clear and convincing evidence should be required to support an order of conservatorship, the court considered both the infringements on liberty and the stigma created by conservatorship orders.

The first part of the conservatorship order – the part in which the court assumes jurisdiction over the proposed conservatee – clearly must be supported by clear and convincing evidence. Following the ruling in *Sanderson*, the Legislature has so specified. (Prob. Code § 1801(e).)

It remains an open question as to whether clear and convincing evidence is required to support orders made under part two or part three of a multi-faceted conservatorship order.[28] Clear and convincing evidence should

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[28] In the related context of conservatorships under the Lanterman-Petris-Short Act (LPS), the Court of Appeal suggested, but did not decide, that clear and convincing evidence would be required not only for the foundational findings (continued...)

be required to support orders that may restrict choice of residence, medical care, contracts, education, social contacts, sexual activities, and marriage – all of which touch on basic constitutional rights.[29]

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.)[30] Where, as in the case under review, a probate court restricts the right of an *adult* to make his or her own educational decisions, constitutional issues can be raised.[31] 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

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[28](...continued)
necessary to establish a LPS conservatorship, but also to support separate determinations imposing disabilities that remove the conservatee's authority to make certain kinds of decisions. (*Conservatorship of Christopher A*. (2006) 139 Cal.App.4th 604, 612.)

[29]
Each of these areas involves constitutional "choice rights." "Rights to and Not to," California Law Review, Vol. 100, Issue 4 (August 2012)

[30]
Restrictions on living arrangements may also violate the right of privacy under the California Constitution. *(City of Santa Barbara v. Adamson* (1980) 27 Cal.3d 123.)

[31]
The right to a public education is a fundamental right under the California Constitution. (*Steffes v. California Interscholastic Federation* (1986) 176 Cal.App.3d 739, 746.)

Cal.App.3d 1, 9-10; *Lawrence v. Texas* (2003) 539 U.S. 558.)

The same is true for an order under part three selecting a conservator. Such an order essentially makes a conservatee legally obligated to obey the directives of the person selected by the court to control all or major portions of the conservatee's life. Such an order infringes on the personal autonomy aspect of the constitutional right of privacy. Courts do have the authority to restrict an individual's autonomy, but doing so implicates constitutional issues. Among them are First Amendment concerns regarding compelled association or forced listening. Once the court selects a conservator, that person may be involved in the life of a conservatee on a daily basis. A conservatee may be required to spend considerable time with the conservator and may be compelled to listen to and speak with the conservator. The First Amendment protects individuals from compelled speech and forced association. (*Wilkins v. Daniels* (6th Cir. 2014) 744 F.3d 409, 414.)[32]

In addition to the constitutional considerations that apply to part two and part three of an order establishing a probate conservatorship, there are constitutional concerns that apply to the jurisdictional or foundational part of the order as well. A stigma is imposed and liberty is curtailed by part one of the order, thus creating the need for a greater burden of proof. (*Conservator-*

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See: "Reaffirming the Right of People with Disabilities to Freedom of Association," Spectrum Institute (2014) http://disabilityandabuse.org/social-rights-essay.pdf / And see: "The First Amendment Right Against Compelled Listening," Boston Univ. Law Rev., Vol. 89, p. 939 (2009) https://repository.law.miami.edu/cgi/viewcontent.cgi?article=1292&context=fac_articles / Also see: "Legal Principles Governing Attempts to Restrict the Social Rights of Conservatees," Spectrum Institute (2014) http://disabilityandabuse.org/conferences/legal-principles.pdf

ship of Sanderson, supra.)

When a probate conservatee appeals from an order establishing a conservatorship and generically challenges the sufficiency of evidence to support the order, the standard of review on appeal should involve a heightened level of scrutiny – more so than an appellate review of evidence to support a judgement imposing money damages. Appellate courts are quite deferential when reviewing ordinary civil judgments for sufficiency of evidence.[33] But an order establishing a conservatorship is not an ordinary civil judgment involving the transfer of money or liability in a business transaction. A conservatorship order is highly personal and, by definition, restricts personal autonomy and fundamental liberties. For this reason, customary judicial deference to a trial court is not warranted.

When court orders that restrict fundamental constitutional rights are reviewed on appeal, a heightened standard of scrutiny is necessary. *(People v. Alvarez* (2001) 88 Cal.App.4th 1110, 1115.) In terms of an appeal that *generically* challenges the sufficiency of evidence to support an order establishing a conservatorship, this Court should require that the Court of Appeal to use a standard requiring substantial evidence from which the trial court could have made the necessary findings – under all three parts of the order – based on clear and convincing evidence.

However, the opinion of this Court should not imply that this particular formula for appellate review would be sufficient to evaluate constitutional

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The normal standard of review in ordinary civil appeals is quite deferential. In such cases, an appellate court essentially "defers to the trier of fact." (*Cahill v. San Diego Gas and Electric Co.* (2011) 194 Cal.App.4th 939, 958.)

issues that also may be raised on appeal.[34] For example, when constitutional grounds are raised to challenge the sufficiency of evidence to support orders restricting freedom of choice with respect to one's residence, to contract, to make medical decisions, to socialize or not, to have sexual relations, or to marry, an appellate court may be required to engage in even stricter scrutiny than is used to evaluate a generic claim of insufficiency of evidence to support the basic order establishing a conservatorship.[35]

As this Court decides the specific and narrow issue presented in the order granting review, it should carefully explain that its decision on that issue

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The appeal in the case under review *generically* challenged the order below for insufficiency of evidence. Appellant did not raise constitutional issues challenging specific portions of the order. Therefore, the standard of review to evaluate claims of insufficiency of evidence to support specific orders restricting particular constitutional rights – association, travel, speech, medical decision, marriage, sexual intimacy, contractual freedom, etc. – is not an issue before this Court. Therefore, since such challenges may be raised in future appeals, it would be prudent for the opinion of this Court to acknowledge that stricter appellate scrutiny may be necessary in those situations than in the case at hand. Future appellants may allege on appeal that orders of the probate court are unconstitutional as applied. (*Punsly v. Ho* (2001) 87 Cal.App4th 1099, 1107.) This may require an appellate court to strictly scrutinize the sufficiency of evidence to support the order to ensure that the evidence shows it was tailored to serve a compelling need. (*Ibid*.) Strict scrutiny may also be needed when an appellant alleges that the restrictions imposed in the conservatorship order were constitutionally overbroad in violation of the First Amendment. (*People v. Pointer* (1984) 151 Cal.App4th 1128, 1139.)

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The imposition of special disabilities or restrictions under part two of a conservatorship order is a matter that requires separate scrutiny, over and above a review of part one of the order that establishes a conservatorship. Substantial evidence must exist to support each disability or restriction that is imposed. (*Conservatorship of George H.* (2008) 169 Cal.App.4th 157, 165; *Conservatorship of Christopher A*., *supra*, at p. 612.)

does not preclude different, and perhaps even stricter standards, for appellate review of portions of a conservatorship order that may be constitutionally challenged.

The opinion of this Court should caution that intermediate appellate courts may need to use a bifurcated approach to reviewing conservatorship orders depending on whether part one, part two, or part three of the order is challenged – especially if constitutional issues are raised on appeal to challenge all or portions of the order.[36] The decision of the Court in this case should not preclude intermediate appellate courts from fashioning a stricter standard of review if, and when, the issues raised by an appellant so require.[37]

V. SINCE AN ORDER ESTABLISHING A CONSERVATORSHIP INFRINGES ON BASIC RIGHTS, DUE PROCESS REQUIRES SEVERAL FACTORS TO BE EVALUATED IN SETTING THE PROPER STANDARD OF REVIEW ON APPEAL

Even if special restrictions are not imposed, an order establishing a general conservatorship places someone in charge of "the care, custody, and control" of a conservatee. (Prob. Code § 2351.) The same is true for a limited conservatorship. (Prob. Code § 2351.5.)

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"Vexed and Perplexed: Reviewing Mixed Questions of Law and Fact on Appeal," Colorado Lawyer, March 2018, p. 24.

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For example, sometimes when a plausible First Amendment challenge is made, an appellate court makes an independent review of the record, giving deference only to credibility determinations made by the trier of fact. (*In re George T* (2004) 33 Cal.4th 620, 632.) Accordingly, in appropriate circumstances an appellate court may defer to the probate court's credibility determinations regarding witnesses, but will make an independent examination of the whole record. (Ibid.)

A. The Personal Interests at Stake are Significant

Having one's life placed under the control of another person, and being placed into the custody of that person, involves a huge infringement on human liberty. (*Conservatorship of Sanderson*, supra, at p. 619.) That is why the Legislature, following a judicial ruling on the subject, has specified that a petitioner must show the need for such an intrusion by clear and convincing evidence. That is a very high standard of proof, and justifiably so.

The "clear and convincing evidence" test requires a finding of high probability, based on evidence that is so clear as to leave no substantial doubt. (*Sheehan v. Sullivan* (1899) 126 Cal. 189, 193; *In re Angelica P*. (1981) 28 Cal.3d 908, 919; *Conservatorship of Wendland* (2001) 26 Cal.4th 519, 552.)

In addition to the constitutional safeguard of clear and convincing evidence, the Legislature has also added an additional statutory protection – an express finding by the court that a conservatorship is the least restrictive alternative needed for the protection of the conservatee. (Prob. Code § 1800.3.)

In 1972, the voters of this state enshrined the right of privacy into the California Constitution. It was placed among other inalienable rights, such as life, liberty, and the pursuit of happiness. (Cal. Const., art. I, § 1.) This constitutional amendment is not limited to protecting informational privacy rights. "Autonomy privacy" is also protected as an inalienable right. *(Ortiz v. Los Angeles Police Relief Assn*. (2002) 98 Cal.App.4th 1288, 1301.)

Where a case involves an obvious invasion of an interest fundamental to personal autonomy, a "compelling interest" must be present to overcome the vital privacy interest. (*Hill v. National Collegiate Athletic Assn*. (1994) 7 Cal.4th 1, 34.) But do trial courts apply this test in actual practice in probate conservatorship proceedings? Will probate courts approach the resolution of these cases with the utmost care as they administer justice in a system without

any checks and balances – a "closed system" where the judges and attorneys are not accountable to anyone but themselves?[38]

B. The Risk of Error Is So Significant in Trial Courts that a Higher Standard of Review on Appeal Is Necessary

Where the risk to constitutional rights is significant, courts should construe statutory provisions to minimize the risk and thereby avoid constitutional problems. (*Conservatorship of Wendland*, *supra*, at p. 548; *Conservatorship of Christopher A*., *supra*, at pp. 610-611.) That admonition should guide this Court in its evaluation of the issue currently under review.

In evaluating the proper burden of proof in trial court proceedings, courts consider due process principles. (*Santosky v. Kramer, supra*.) When significant liberty interests are at stake in a proceeding, the nature of the process that is due turns on the balancing of three factors. *(Kramer, supra*, 455 U.S. at p. 754; *Cal. Teachers Assn. v. State , supra,* at p. 345.)

The first factor involves the private interests that are affected by the proceeding. As explained above, a probate conservatorship proceeding places personal liberty and fundamental constitutional rights at risk. This suggests that a higher standard of proof is necessary.

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A legislative report once observed that the probate conservatorship system is "a closed system" that had allowed abuses to go undetected for far too long. Conservatees, family and friends testified they had no place to turn to when the system failed them. (AB 1363: Assembly Floor Analysis – Jan. 25, 2006) Another report noted systemic deficiencies that were harming conservatees. It predicted that the systemic deficiencies would continue. (AB 1363: Assembly Judiciary Committee Analysis – Jan. 9, 2006) Both reports can be found at: https://leginfo.legislature.ca.gov/faces/billAnalysisClient.xhtml?bill_id=200520060AB1363# Unfortunately, as discussed in a subsequent section of this brief focusing on accountability, the system is still closed and there are no checks and balances to minimize the risk of error.

The second factor considers the risk of error inherent in the state's chosen procedure. There is a serious risk of error in the current probate conservatorship system. This is a "closed system" where the judges and attorneys have virtually no accountability to a higher authority.

Therefore, the second factor also indicates that a higher standard of proof is necessary, not only in the trial court, but especially on appeal since the trial courts are generally unaccountable in cases where vulnerable litigants cannot complain or push back.

C. There Are No Countervailing Government Interests to Support a More Deferential Standard of Review on Appeal

The third factor examines any countervailing governmental interests that would support a less onerous burden of proof. In probate conservatorship proceedings the government has an interest in protecting vulnerable adults who are unable to care for their basic needs and who cannot make significant life decisions. This government interest is served when an order of conservatorship is granted for someone who *truly* cannot function without such intervention *and* when no less restrictive alternative is available.

A judge is the one who makes this determination. But in order to avoid an erroneous decision – one that stigmatizes an individual, infringes on liberty, and restricts fundamental constitutional rights – a judge must rely on the litigants and court personnel to thoroughly investigate the matter, consider all viable alternatives, and present accurate and complete information to the judge. As explained below, that type of a thorough and thoughtful process is not happening in the probate conservatorship system in California.

Judges have large caseloads which put pressure on them to push cases through the system. Court budgets were slashed several years ago and have not been restored to a level sufficient to afford due process and access to

justice. Court investigators are often not involved in the process.

Public defenders have huge caseloads which may cause them to give inadequate attention to these cases. Court-appointed attorneys are not properly trained to handle these specialized cases. They have no performance standards to which they must adhere. Some local court rules give these attorneys a dual role, one of which is to act as a *de facto* court investigator. Due to the nature of their disabilities, proposed conservatees cannot complain when their attorneys fail to provide effective representation. That is because they don't realize they are being short changed and they don't know how to complain.

Because of these and other systemic deficiencies, the state interest in opening conservatorships for those who are *truly* in need, and not for others, is not being served.

A second government interest involves cost. The cost of heightened scrutiny on appeal is minimal. The government is not a party to probate conservatorship appeals, so there is no increased cost to any government agency. The role of the government in these appeals involves the appellate justices and their staff. Since they presumably already read the factual record to determine if there is sufficient evidence, the cost should not increase if an appellant's burden of proving error is decreased. Cost increases to the government, on the other hand, are significant if an order that is not supported by sufficient evidence is affirmed on appeal. The trial court may be required to provide supervision for the appellant for years, perhaps decades. The costs of such supervision, periodic reviews, and potential contested hearings over any variety of matters, would be significant to the government. Thus, the government has a strong interest in minimizing the risk of erroneously granting probate conservatorships.

The government has yet another stated interest in probate conservator-

ship proceedings – one that favors stricter scrutiny during appellate review of an order challenged for insufficiency of evidence. As public entities, courts have strong interest in providing access to justice to these vulnerable adults as required by Title II of the Americans with Disabilities Act (ADA).[39] *(Tennessee v. Lane* (2004) 541 U.S. 509.) The United States Supreme Court has acknowledged that courts have historically denied people with disabilities access to justice. (Ibid.) In passing the ADA, congressional findings regarding pervasive and ongoing historical discrimination against this class of Americans, and the need for special legal protections, is another indicator that public policy favors heightened judicial scrutiny when the rights of people with disabilities are restricted. (*Martin v. Voinovich* (1993) 840 F. Supp. 1175, 1209-1210.)

Knowing that adults with serious disabilities could not effectively represent themselves in these proceedings, courts should be appointing competent and well-trained attorneys to provide effective advocacy services to ensure these vulnerable litigants have meaningful participation and effective communication in these cases.[40]

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In view of the governmental interest in ensuring that rights of people with disabilities are restricted only as necessary, courts should be careful to ensure that the ADA's integration mandates are properly applied in conservatorship proceedings. (*Olmstead v. L.C. ex rel. Zimring* (1999) 527 U.S. 181.) See: "Rethinking Guardianship (Again): Substituted Decision Making a Violation of the Integration Mandate of Title II of the Americans with Disabilities Act," University of Colorado Law Review, Vol. 81, p. 157 (2010) http://lawreview.colorado.edu/wp-content/uploads/2013/11/10Salzman-FINAL_s.pdf

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As explained in the section of this brief on accountability, this is not (continued...)

In addition to declarations of legislative intent in the Probate Code favoring independence and minimizing intrusion into the lives of seniors and other adults who have cognitive challenges, the Lanterman Act contains a strong statement of public policy to protect the statutory and constitutional rights of people with developmental disabilities and to ensure that they live in the least restrictive environment. (Welf. & Inst. Code § 4502.)

The Legislature has instructed government entities that receive state funds used to serve people with developmental disabilities to respect the choices of such individuals and to provide them with opportunities to exercise decision-making skills. (Welf. & Inst. Code § 4502.1) Probate courts receive state funds. Limited conservatorship proceedings serve the needs of this population. Therefore, pursuant to these governmental purposes, the state has a strong interest in having stricter scrutiny of alleged error in these proceedings. There is not a state interest to advance a deferential standard of review for alleged insufficiency of evidence in these cases.

This Court incorporated the clear and convincing standard into its review of evidence in a conservatorship case in the past.[41] So, in a way, this Court has already answered the question that it posed in the order granting review.

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[40](...continued)
happening. Some courts do not appoint counsel in a significant number of cases. The judicial branch has not adopted performance standards for the attorneys who are appointed. When trainings have been provided to court-appointed attorneys, they have been seriously deficient.

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Referring to the definition of clear and convincing evidence which requires a finding of high probability so clear as to leave no substantial doubt, this Court wrote: "Applying that standard here, we ask whether the evidence . . . has that degree of clarity . . ." *Conservatorship of Wendland, supra*, at p. 552)

VI. USING A HEIGHTENED STANDARD FOR APPELLATE REVIEW FOR SUFFICIENCY OF EVIDENCE WILL PROMOTE A GREATER DEGREE OF ACCOUNTABILITY IN THE PROBATE CONSERVATORSHIP SYSTEM

In addition to considering the type of private interests at stake and any countervailing governmental interests, the risk of error inherent in a particular type of proceeding is central to determination of whether due process requires a heightened standard of proof. In other words, when constitutional rights are implicated in a legal proceeding, there is a greater need for more probative judicial scrutiny. (*Conservatorship of Christopher A., supra*.)

Furthermore, in establishing a standard of review for proceedings that target people with cognitive and communication disabilities, this Court should keep in mind that discrimination against people with disabilities is a historical reality that continues to be a serious and pervasive social problem. (*Trautz v. Weisman* (1993) 819 F. Supp. 282, 295.) Proposed conservatees should be considered a "sensitive class" of people who should be entitled to heightened judicial scrutiny when they appeal from orders restricting their liberty. (*Breen v. Carlsbad Mun. Schools* (2005) 138 N.M. 331.)

California statutes governing appeals from conservatorship orders are silent as to the standard of appellate review that should be used to evaluate sufficiency of evidence to support an order creating a probate conservatorship. In cases of uncertain meaning, this Court may consider the consequences of a particular interpretation, including its impact on public policy. (*Wells v. One2One Learning Foundation, supra,* at p. 1190.)

Using the normal deferential standard of review for sufficiency of evidence in ordinary civil cases would send a signal to trial and appellate courts that probate conservatorship cases are of no greater concern to society, or to the judicial branch, than judgments for money damages.

The consequences of such a signal being sent from this Court to the bench and the bar could make a system that is already bad even worse. Before answering the question posed in the order granting review, this Court should consider the historical circumstances of people with cognitive disabilities, the impact its decision will have on public policy, and the consequences it may have on conservatorship proceedings and the vulnerable adults who are targeted by these proceedings. (*Meja v. Reed, supra*.)

A. Accountability is Essential to Our System of Justice

There are three types of judicial accountability: *institutional* accountability; *behavioral* accountability; and *decisional* accountability.[42] None of these forms of accountability exist in the probate conservatorship system.

A judicial system that lacks accountability is not based on the rule of law. Such an *ad hoc* system has no place in our constitutional democracy. The California Constitution envisions a legal system with checks and balances. Both the Constitution and enabling legislation contemplate that any potential for an abuse of power by trial court judges or attorneys would be minimized through appellate and administrative oversight.

Errors and abuses in individual cases are minimized because judges and attorneys know that appeals can be filed and *are* filed in a significant number of cases. The judges and attorneys know that their actions and inactions may be reviewed by a higher authority. This knowledge has a prophylactic effect.

Superior courts, as entities, know that their policies and practices may be subject to review when parties aggrieved by them complain to the Judicial Council or to the Legislature. Institutional accountability keeps local courts

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"Rescuing Judicial Accountability from the Realm of Political Rhetoric," 56 Case Western Reserve Law Review 911 (2006) at p. 914.

from stepping too far out of bounds. This system of appellate and administrative accountability assumes that individuals who are harmed in individual cases, or classes of people who are adversely affected by court policies and practices, have the ability to complain to higher authorities.

That assumption is misplaced when it comes to individual harm and systemic flaws in the probate conservatorship system when people with cognitive and communication disabilities are the victims. Most of them do not know when they are being harmed by the court or an attorney. They lack the ability, as individuals or as a class, to push back or complain.

Judicial accountability is essential to our system of checks and balances. It is critical to the functioning of our constitutional democracy. "An unaccountable court system has a difficult time being perceived as legitimate and maintaining the trust and respect of the citizenry."[43]

Because of the lack of accountability of the probate conservatorship system, it is not surprising that state and local organizations and concerned citizens have been rising up and complaining to the media and public officials about systemic and systematic abuses by judges and attorneys in these proceedings.[44]

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"Judicial Accountability Must Safeguard, Not Threaten, Judicial Independence: An Introduction," 86 Denver Univ. Law Rev. 1 (2008) at p. 1. http://static1.1.sqspcdn.com/static/f/276323/26217988/1431377158467/v86_i1_oconnor.pdf?token=48voeCiWaZ1qj2GXWxbBQMgYfZI%3D

44

Media attention to voting rights abuses: http://spectruminstitute.org/votingrights/; Federal voting rights complaint: http://disabilityandabuse.org/doj/; Reform activities in Alameda County: http://spectruminstitute.org/path/ http://spectruminstitute.org/path/The%20Guardians%20Invitation.pdf ;

(continued...)

Former Supreme Court Justice Sandra Day O'Connor once explained the role of judicial accountability this way: "Put simply, judges must be accountable to the public for their constitutional role of applying the law fairly and impartially."[45]

B. The Conservatorship System Lacks Checks and Balances

Spectrum Institute has been studying the probate conservatorship system in California for several years. In addition to reviewing the statutory scheme and sparse case law, we have reviewed government reports and other publications that have analyzed this system. We have also conducted our own independent research of court records as well as the practices of judges and

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[44](...continued)
Rally in Santa Monica: http://spectruminstitute.org/amicus/santa-monica-rally.pdf; Complaint in Sacramento for not appointing attorneys for conservatees: http://spectruminstitute.org/Sacramento/; Reform activities in San Diego, Los Angeles, Sacramento, and San Francisco: http://pursuitofjusticefilm.com/; Class action complaint with DOJ against the Los Angeles Superior Court: https://www.latimes.com/local/lanow/la-me-ln-federal-complaint-attorneys-violated-disabilities-act-20150627-story.html Op-ed outreach to the bench and bar: http://www.disabilityandabuse.org/daily-journal-compendium.pdf Complaint to the California Department of Fair employment and Housing: http://spectruminstitute.org/Sacramento/dfeh-inquiry-letter.pdf; Outreach to the state Attorney General: http://www.disabilityandabuse.org/Becerra.pdf and http://www.disabilityandabuse.org/arc-letter-to-becerra.pdf; Complaint to HHS: http://www.disabilityandabuse.org/dooley-letter-2.pdf; Orange County: https://www.ocregister.com/2019/01/03/supporters-hold-paddle-out-for-justice-in-memory-of-betty-lou-lamoreaux-orange-countys-first-female-superior-court-judge

[45] "The Use of Judicial Performance Evaluation to Enhance Judicial Accountability, Judicial Independence, and Public Trust," 86 Denver Univ. Law Rev. (2008), p. 8. https://www.law.du.edu/documents/denver-university-law-review/v86_i1_brody.pdf

attorneys who process cases through this system. An entire library of materials has developed out of this research.

1. There is Very Little Appellate Oversight

For most types of legal proceedings, there is a considerable degree of accountability that occurs through the appellate process. There are thousands of appeals filed by defendants in criminal cases and by aggrieved litigants in civil proceedings and juvenile cases each year in California.[46]

Judges and attorneys know that appeals are quite common in most types of cases. Participants know their actions are being recorded and that the record may eventually be reviewed by a panel of appellate judges and be scrutinized by counsel on appeal.

Such knowledge not only may have an effect on the performance of participants in individual cases,[47] it also creates ongoing systemic accountability for the criminal, civil, and juvenile divisions of the superior court.[48]

46

"Summary of Filings – Courts of Appeal – Fiscal Years 2015-16 and 2016-17," 2018 Court Statistics Report, Table 4, p. 53. https://www.courts.ca.gov/documents/2018-Court-Statistics-Report.pdf

47

One study showed that when judges know they are being watched, their performance changes. "Impact of Court Monitoring on DWI Adjudication," Report of the United States Department of Transportation (December 1990) https://www.ncbi.nlm.nih.gov/pubmed/1558625. Another study concluded that accountability produces better organizational performance "Accountability and Employee Performance," Centria University of Applied Sciences (April 2018) https://www.theseus.fi/bitstream/handle/10024/147663/Tsafack_%20Kelly.pdf?sequence=1&isAllowed=y

48

A recent study shows that accountability has a positive effect on systems. "The Impact of Accountability on Organizational Performance in the United States Government," 39 Review of Public Personnel Administration 1 (2019). (continued...)

Unfortunately, there is virtually no appellate accountability for limited conservatees and very little for general conservatees. In comparison to the normal flow of appeals in other types of legal proceedings, appeals by limited conservatees appear to be quite rare and appeals by general conservatees are rather uncommon.[49]

A recent review of an appellate database found: "[A]lthough appeals are not uncommon by LPS conservatees, by minors in juvenile dependency cases, and by minors in juvenile delinquency cases, and while they are somewhat uncommon by general probate conservatees, appeals by limited conservatees from probate conservatorship orders are uniquely rare.[50]

The lack of appellate accountability for the probate conservatorship system makes administrative accountability even more imperative.

2. There is Absolutely No Administrative Oversight

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.

An Assembly Floor Analysis, noted earlier in this brief, 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

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[48](...continued)
https://journals.sagepub.com/doi/abs/10.1177/0734371X16682816?journalCode=ropa

[49]
"Legal System Without Appeals Should Raise Eyebrows," Daily Journal (Feb. 10, 2015) http://spectruminstitute.org/amicus/no-appeals.pdf

[50]
"Limited Conservatorship Appeals Compared with Other Types of Appeals: A Review of Appellate Cases by Spectrum Institute," (May 14, 2019) http://spectruminstitute.org/amicus/comparison-of-appeals.pdf

exists today.

Then 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, the Task Force studied the conservatorship system for about 18 months. It issued a report – mostly focused on seniors in general conservatorships of the person or estate – that was more than unflattering to the conservatorship system and those who operate it.[51]

The Final Report of the Task Force described a system that was out of control and operating on auto pilot. A subsequent report issued the following year acknowledged that the Judicial Council did not have basic data about probate conservatorships because there was no statewide case management system in place.[52] This problem continues to exist today.[53]

Fast forward to 2015 when the Legislature conducted another oversight hearing. A background report for that hearing, also noted earlier in this brief, spoke of a backlog of mandated reviews by probate court investigators. In some courts the investigations were overdue by several years.

The problem of overloaded court investigators continues to this day. A

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Probate Conservatorship Task Force, Final Report (Sept. 18, 2007) https://www.courts.ca.gov/documents/102607itemD.pdf

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"Probate Conservatorship Task Force Recommendations to the Judicial Council: Status of Implementation," p. 4. (Dec. 9, 2008) https://www.courts.ca.gov/documents/120908item10.pdf

53

"Conservatorships in Crisis: Civil Rights Violations and Abuses of Power," White Paper, CEDAR, p. 4. (Sept. 2015) https://aaapg.net/white-paper-on-conservatorship-in-california-by-linda-kinkaid/

study in Los Angeles County in 2014 found that caseloads were unrealistically high.[54] To save money, judges decided to stop using investigators in limited conservatorship cases despite a law requiring investigations to be done in all such cases. This was allowed to occur because local judges have been accountable to no one for such financial decisions.

3. Executive Branch Participation is Lacking

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 the particular type of proceeding.

With respect to criminal proceedings, the office of the district attorney is involved in all felony cases. The office of the public defender is involved in many of them. The same is true for juvenile delinquency proceedings.

With respect to juvenile dependency proceedings, a child welfare agency is involved in all such cases. That office is represented by the county counsel. Thus two executive branch agencies can monitor the policies and practices of juvenile dependency courts. This creates systemic accountability for the judges and private attorneys involved in these cases.

When it comes to LPS conservatorship proceedings, they can only be initiated by the office of the public guardian. (*County of Los Angeles v. Superior Court* (2014) 222 Cal.App.4th 434, 443.) That office is represented by the county counsel. This creates a degree of ongoing systemic monitoring

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"Ten Is Not Enough: Probate Investigators Cannot Comply with Legislative Mandates," Spectrum Institute, May 9, 2014.
http://spectruminstitute.org/amicus/probate-investigator-deficit-new.pdf

and judicial accountability in these proceedings.

In contrast, seldom is an executive branch agency involved in a probate conservatorship proceeding in any manner.[55] Most petitioners are private individuals, often relatives of the proposed conservatee. (*County of Los Angeles, supra.*) They either represent themselves or have a private attorney. The office of the public defender is involved in such proceedings in only a few counties. In limited conservatorship proceedings, neither the Department of Developmental Services nor a client rights advocacy agency have any formalized role in monitoring the system or individual cases.[56]

In most superior courts throughout the state, proposed conservatees are either required to represent themselves or the court appoints a private attorney to represent them. Most court-appointed attorneys in conservatorship proceedings handle only a few such cases per year. They have no financial incentive or institutional strength to put "the system" in check when court policies or judicial practices show a pattern of illegality or abuse.[57] They may

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In a small percentage of such cases, a petition is filed by the office of the public guardian.

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"Thinking Ahead Matters," a report by the Coalition for Compassionate Care of California (2014)
http://spectruminstitute.org/amicus/thinking-ahead-matters.pdf

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There are no statutes or court rules requiring local courts to appoint attorneys by lottery or on a fair rotational basis. Giving local judges such wide discretion in operating a court-appointed attorney program lends itself to favoritism. This can give attorneys an incentive to seek favor with the local judge in order to keep an income stream coming. Pushing back against or challenging illegal or abusive court policies or practices could have financial repercussions. A study of all cases handled in the central division of the Los

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want to be seen as "collaborators" so judges will continue to appoint them in future cases.[58]

The participation of an executive branch agency in a particular type of proceeding creates a degree of accountability in the judicial process. Unfortunately, that source of accountability is not present in general and limited conservatorship proceedings.

4. Probate Judges Are Not Accountable

As noted above, judges who process limited conservatorship cases have virtually no appellate accountability and those who preside over general conservatorship proceedings have very little. Reports from the legislative and judicial branches noted above make it clear that local judges and the courts in which they preside have no administrative accountability either.

The judges have no institutional checks or push back from executive branch agencies. They have no administrative oversight from the Judicial Council. The attorneys they appoint on individual cases have financial disincentives to raising objections regarding the practices of the probate court.

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[57](...continued)
Angeles Superior Court in 2012 found that some of the 200 attorneys on the approved panel received 30 to 40 appointments per year while others received only two or three. Something was clearly wrong with the appointment process. "Searching for Clues," (Spectrum Institute - 2014)
http://spectruminstitute.org/amicus/searching-court-records.pdf
The finding of this study showing favoritism was confirmed at a luncheon presentation at which the presiding judge of the probate division spoke. "System for Appointing PVP Attorneys Needs an Overhaul" (Spectrum Institute – April 20, 2015)
http://spectruminstitute.org/amicus/pvp-lunch-seminar-summary.pdf

[58]
"Conservatorship Reform in California," University of California - Berkeley (May 2009) at p. 11. http://spectruminstitute.org/amicus/2009-study.pdf

Local judges have the power to control the speed at which conservatorship cases are removed from their dockets because they have the power to appoint attorneys and to approve or deny fee claims. In some counties, the judges not only appoint the attorney and decide who gets reappointed to new cases, they also manage the training programs of these attorneys.

Judges are managing and even coaching the advocacy practices of attorneys who appear before them or the courts in which they preside. They sometimes blacklist attorneys who are on an appointment panel.[59]

The power of judges to appoint, pay, coach, and blacklist court-appointed attorneys in probate conservatorship cases raises serious ethical issues – issues that so far have not been addressed by this Court.[60]

5. Court-Appointed Attorneys Are Not Accountable

The risk of error in conservatorship proceedings would be reduced if appointed attorneys had performance standards, were properly trained, were not beholden to the judges for future appointments, were monitored, and if they provided their clients with effective representation.

In some types of proceedings, such as criminal, juvenile delinquency, or dependency cases, all these factors are present. Unfortunately, in conservatorship proceedings they are not – and as a result seniors and people

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"System for Appointing PVP Attorneys Needs an Overhaul" (Spectrum Institute – April 2015)
http://spectruminstitute.org/amicus/pvp-lunch-seminar-summary.pdf

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"The Domino Effect: Judicial Control of Legal Services: A Report to the California Supreme Court on the Code of Judicial Ethics" (Spectrum Institute - 2018) http://spectruminstitute.org/ethics/

with disabilities are shortchanged.[61]

Unlike some states,[62] California does not have performance standards for attorneys who represent respondents in probate court proceedings. The Probate Code is vague. The Rules of Professional Conduct are generic. California Rules of Court are silent on this subject.[63] Some local court rules give appointed attorneys dual roles, asking them to be both court investigators

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In several counties, proposed conservatees are required to represent themselves. Considering the nature and extent of their disabilities, this seems preposterous. And yet, in the Sacramento Superior Court and courts in some nearby counties, counsel is not appointed for a significant number of proposed conservatees. http://spectruminstitute.org/Sacramento/

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"Performance Standards Governing the Representation of Indigent Adults in Guardianship Proceedings," Massachusetts Assigned Counsel Manual. http://spectruminstitute.org/amicus/massachusetts-performance-standards.pdf "Maryland Guidelines for Court-Appointed Attorneys in Guardianship Proceedings," Maryland Rules of Procedure, Title 10. http://spectruminstitute.org/amicus/maryland-duties-and-training.pdf

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A judicial branch advisory committee has concluded that the Judicial Council lacks authority to establish such standards. It is therefore curious that it has such guidelines for juvenile defense attorneys. See: http://spectruminstitute.org/amicus/effective-representation-juveniles-1.pdf; It is also curious that it has directed local courts to adopt juvenile court standards for legal representation. http://spectruminstitute.org/amicus/effective-representation-juveniles-2.pdf The committee believes that only the Legislature or the Supreme Court may adopt performance standards for attorneys. (PMHAC Report – W19-08) https://www.courts.ca.gov/documents/W19-08.pdf Neither this Court nor the Legislature has yet to take such action for appointed attorneys in conservatorship proceedings. A model for ADA-compliant performance standards is available. http://spectruminstitute.org/white-paper/

and advocates.[64]

Various studies indicate that many appointed attorneys are not acting as zealous advocates and defenders.[65] A study done at the University of California in 2009 observed that, perhaps due to disincentives built into the system, court-appointed attorneys were colluding with petitioners and conservators in an attempt to be seen as "team players."[66]

Studies by Spectrum Institute show deficient training programs for appointed attorneys,[67] and document a pattern of ineffective representation in the largest superior court in the state.[68] The studies formed the basis for

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"Proposals to Modify the California Rules of Court," Spectrum Institute (May 1, 2015), p. 17, fn. 63; http://spectruminstitute.org/full-report.pdf "California Conservatorship Defense: A Guide for Advocates," CANHR (2010), pp. 7-10. http://www.canhr.org/publications/PDFs/conservatorship_defense_guide.pdf

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See Introduction to "California Conservatorship Defense, supra," which refers to "tepid advocacy" by court-appointed lawyers, due in part to local court rules that invite attorneys to step outside of their role as advocates and defenders. http://www.canhr.org/publications/PDFs/conservatorship_defense_guide.pdf

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"Conservatorship Reform in California, supra," , p. 11. http://spectruminstitute.org/amicus/2009-study.pdf

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See: "A Missed Opportunity," Spectrum Institute (Sept. 20, 2014) and reviews of other trainings. http://disabilityandabuse.org/pvp-training/index.htm Inadequate education and experience of appointed counsel has also been noted by the Probate and Mental Health Advisory Committee of the Judicial Council. PMHAC Report – W19-08, supra, at p. 3. A report issued in 2014 noted that education of probate judges and appointed attorneys is severely lacking. See excerpts from "Thinking Ahead Matters": http://spectruminstitute.org/amicus/thinking-ahead-matters.pdf

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(continued...)

complaints to the federal Department of Justice regarding systemic ADA violations in a legal services program operated by that court.[69] The complaints are still pending with the department's Civil Rights Division.[70]

CONCLUSION

The Court of Appeal used an erroneously deferential standard of review in this case. Instead, it should have scrutinized the record to determine if there was substantial evidence from which the trial court could have made the necessary findings based on clear and convincing evidence.[71]

Using this higher standard of review in conservatorship appeals will help minimize the risk of error in proceedings which occur in a legal system that lacks any meaningful accountability. Requiring a higher standard will send a signal to the bench and bar that the rights of seniors and people with disabilities have great value in our society and should be respected by trial

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[68](...continued)
"Efficiency Versus Justice," Spectrum Institute (August 17, 2015)
http://spectruminstitute.org/amicus/efficiency-vs-justice.pdf

[69]
Class complaint:
http://spectruminstitute.org/amicus/full-class-complaint.pdf
and individual complaint:
http://spectruminstitute.org/amicus/gregory-complaint.pdf

[70]
See: http://spectruminstitute.org/complaint-status.pdf

[71]
An even more probing standard of review may be necessary in future appeals where aspects of an order establishing a conservatorship are challenged on constitutional grounds.

courts and protected by appellate courts.[72]

Although steps should be taken to ensure greater administrative accountability in the conservatorship system, this case provides an opportunity to minimize the risk of error by requiring greater appellate accountability.

Dated: July 1, 2019

Respectfully submitted:

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The overuse of conservatorships and underutilization of less restrictive alternatives are not issues unique to California. They are problems of national significance. "Turning Rights into Reality: How Guardianship and Alternatives Impact the Autonomy of People with Intellectual and Developmental Disabilities," Report of the National Council on Disability (June 10, 2019) https://ncd.gov/sites/default/files/NCD_Turning-Rights-into-Reality_508_0.pdf

PROOF OF SERVICE

I am over the age of 18 years of age, and am not a party to the within action; my business address is 555 S. Sunrise Way, Suite 205, Palm Springs, CA 92264. On the date herein below specified, I served the foregoing document, described as set forth below on the interested parties in this action by placing true copies thereof enclosed in sealed envelopes, at Palm Springs, CA, addressed as follows:

DATE OF SERVICE: July 1, 2019

DOCUMENT SERVED: APPLICATION FOR PERMISSION TO FILE AMICI CURIAE BRIEF; AMICI CURIAE BRIEF

PERSONS SERVED:
See Attachment A

I caused such envelope(s) with postage thereon fully prepaid to be placed in the United States mail at Palm Springs, CA.

PROOF OF SERVICE BY ELECTRONIC SERVICE

I additionally declare that I electronically served the a courtesy copy of this document to the Supreme Court through the Court's e-submission program.

I declare under penalty of perjury that the foregoing is true and correct. Executed on July 1, 2019, at Palm Springs, CA.

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