

Limited Conservatorship Reform in California: Several Areas That Need Improvement

by Thomas F. Coleman

Education of Parents

Most limited conservatorships are initiated when parents or family members of an adult with a developmental disability file a petition with the Probate Court. Some 90% of these petitions are filed “pro per” which means the petitioner does not have an attorney.

The law does not require “pro per” petitioners to educate themselves about the duties of a conservator and the rights of a conservatee prior to initiating a limited conservatorship proceeding. In Los Angeles County, educational programs on these topics are not available.

Bet Tzedek Legal Services does offer a Self-Help Conservatorship Clinic, but this is not an educational forum. It is a class that helps people fill out forms. Legal issues are not discussed. Legal questions are not answered. It is strictly a form-filling service.

1. Attending an educational seminar on limited conservatorships should be required, before a petition is filed, for anyone who will be named in the petition as a proposed conservator. The Superior Court could contract with a nonprofit agency, such as Bet Tzedek, Regional Centers, or the County Bar Association, to conduct these seminars. Topics should include: (1) duties of conservators; (2) general rights of conservatees; (3) voting rights of adults with developmental disabilities; and (4) how to assess capacity of a proposed conservatee regarding the “seven powers,” especially on their ability to make social and sexual decisions.

Education of PVP Attorneys

Having court-appointed attorneys who are effective

advocates for limited conservatees is critical for the rights of adults with developmental disabilities to be protected.

Currently, PVP attorneys are not receiving adequate education and training on issues that often arise in limited conservatorship proceedings. For example, in 2013 there was only one training in Los Angeles County – 3 hours in duration – for PVP attorneys who handle limited conservatorship cases.

2. Attendance at a series of 3 to 5 hour classes should be required before an attorney is placed on the limited conservatorship PVP list. Once on the list, a 5 hour refresher and update class should be required each year in order to stay on the list. Topics should include: (a) constitutional rights of limited conservatees and how to protect those rights; (b) voting rights of limited conservatees and federal laws protecting voting rights of people with disabilities; (c) Americans with Disabilities Act and ADA accommodation requirements for the Probate Court and for PVP attorneys; (d) criteria for assessing client capacities on each of the “seven powers” and how to challenge assessments which are not scientifically valid or not supported by substantial evidence; (e) how to conduct a forensic interview of a client with a developmental disability; (f) ethical rules and professional standards governing the confidentiality of client communications to the PVP attorney and the confidentiality of information gathered by an attorney on behalf of his or her client; (g) how to understand, interpret, and use a “capacity declaration” submitted by a medical doctor or psychologist; (h) understanding the various types of intellectual and developmental disabilities and their impact on daily living and capacity for decisions (Autism Spectrum Disorder, Cerebral Palsy, Fragile X Syndrome, Down Syndrome, Epilepsy, Fetal Alcohol Syndrome, and Intellectual Disabilities (formerly

called Mental Retardation), among others.); (i) understanding various communication methods and behavioral characteristics (j) limits on time allocated to a case and when to ask for more; (k) standards for ineffective assistance of counsel (IAC) as applied to a limited conservatorship case; the right of a client to a “Marsden” hearing to ask for a new attorney or complain about an attorney’s performance; (l) appellate rights of clients, including habeas corpus to challenge an order due to IAC.

Replacing the PVP System

The current system for appointing, paying, and monitoring the performance of PVP attorneys is not doing what it should be doing. It gives the appearance of favoritism rather than fairness in the way attorneys are selected. It gives incentives to attorneys to please the judges who appoint them and pay them. And it does not have any quality assurance procedures.

Appointment of attorneys should be done on a fair rotational basis, selecting attorneys on lists that match their skills and training with the complexity of the case. Such lists can also note language abilities that match attorneys with clients who do not speak English. The person who selects the attorney should not have any direct connection with the judge who will make decisions in the case.

There should be some form of quality assurance oversight procedures. This should be done by an entity or person with knowledge of limited conservatorship advocacy and, again, by someone who is not working for the judges who hear such cases.

Payment of court-appointed attorneys should be based on the quality of performance and the quantity of work done. Recommendations for the amount of payment should come from someone knowledgeable about these types of cases. The judge who orders payment to a particular attorney should not be the judge who heard the case, so as not to create an appearance of conflict of interest created by payment decided by someone the attorney would not want to offend by objecting, demanding hearings, or advis-

ing the client to appeal.

3. A system similar to that operated by the Los Angeles County Bar Association for appointed attorneys in criminal cases should be adopted for use in conservatorship cases, both limited and general. The Indigent Criminal Defense Appointments Program has been operating successfully for several years. It achieves all three objectives mentioned above: a fair selection process, quality assurance procedures, and a payment method that removes incentives for pleasing judges rather than providing vigorous advocacy. The system could be called the Conservatorship Appointments Program. Perhaps it could be grafted to the current criminal appointments program so that it uses the same administrative mechanisms but with additional staff who have expertise in conservatorship litigation. The Conservatorship Appointments Program of the Los Angeles County Bar Association would select attorneys for specific cases, monitor performance and conduct quality assurance audits, provide trainings, and recommend payments.

Effective Advocacy by Attorneys

In the current system, PVP attorneys are acting in two or three different roles. They often serve as a de-facto court investigator and their reports are even used as substitutes for those of official Probate Investigators. They also may view themselves as the “eyes and ears of the court” with the aim of helping the court resolve cases. They also may act as an unofficial guardian-ad-litem, advocating for what they believe is in the best interest of the client.

4. Court appointed attorneys for limited conservatees should have one role only – vigorous advocacy for the client. They should advocate for what the client says he or she wants. Absent an express wish from the client on any particular issue, they should strongly defend and protect the rights of the client from being diminished or removed. They should be no different than privately retained attorneys. The client’s wishes and rights should come first. The fact that they are paid by county funds should not alter their undivided loyalty to the client.

Bet Tzedek

Bet Tzedek performs a valuable service by helping petitioners complete the paperwork needed to obtain an order and letters of administration for a limited conservatorship. However, in the process, the clinics may be inadvertently suggesting that petitioners unnecessarily take rights away from conservatees and improperly seek more authority than they truly need.

5. The Self Help Conservatorship Clinic should not suggest, directly or indirectly, that proposed limited conservatees are unable to complete an affidavit of voter registration (with or without help from someone else). The clinics also should not lump all “seven powers” together as a package deal, or group them together as an attachment to the petition. Each power should be listed separately, with a yes or no box next to it, so that each is considered separately by the petitioner.

Bet Tzedek sometimes provides direct legal representation to petitioners in conservatorship cases that are more complicated than usual. However, the organization does not provide attorneys to represent limited conservatees. The rationale for this policy is that limited conservatees can have court-appointed attorneys at county expense. However, sometimes PVP attorneys are not capable of, or simply do not provide effective representation. The blanket policy of not representing limited conservatees should be reconsidered.

6. Bet Tzedek should sometimes represent limited conservatees upon request in cases that offer an opportunity to create a precedent on important issues such as voting rights, social rights, or sexual rights of people with developmental disabilities. It should also represent limited conservatees, from time to time, in appeals that may set important policy precedents, or in writ proceedings to challenge ineffective assistance by PVP attorneys when that happens. Periodic involvement by such an outside organization, on behalf of limited conservatees, would be a beneficial addition to the Limited Conservatorship System.

Regional Centers

At this time, it appears that the only role that Regional Centers play in limited conservatorship cases is that of assessing the capacity of clients to make decisions regarding the “seven powers.” There is so much more these nonprofit organizations can do to protect the rights of their clients who they find themselves the subject of such a proceeding. And even in the role of assessing clients, there are ways Regional Centers can improve.

8. Regional Centers should file capacity assessment reports in a timely manner. Such reports are sometimes filed with the court weeks or even months after the court grants a petition. This is not an acceptable practice, either for the court or for the Regional Center.

9. Regional Centers should do more to protect the right to vote of their clients. Educational materials about the right to vote of people with developmental disabilities should be distributed a few months prior to a client turning 18. Group seminars about the right to vote should be conducted at least every two years, several months before the deadline for registration for a general election.

10. Regional Centers, perhaps through or with the assistance of their statewide association (ARCA) should consult with medical, psychological, and legal professionals to develop criteria and guidelines for assessing each of the seven powers. Training programs for Regional Center staff should be developed and implemented regarding these issues. It appears that currently there are no such guidelines or training programs being used.

11. Regional Centers should become acquainted with the various federal laws governing the right to vote as they apply to people with disabilities. These protections should be considered as Regional Center staff include in their assessment report an opinion on the capacity of the client to complete a voter registration affidavit, with appropriate help. Currently, Regional Center reports are silent on the issue of voting capacity.

Disability Rights California

A nonprofit legal services organization known as Disability Rights California receives state and federal money to protect the rights of people with developmental disabilities.

Some of this money is channeled to DRC through the State Department of Developmental Services. The annual budget of DRC is nearly \$20 million.

DRC employs a staff of Clients Rights Advocates whose role is to protect and advocate for the rights of Regional Center clients. Staff members are generally housed with Regional Centers, even though they are employed by DRC.

These Clients Rights Advocates currently play no role in the Limited Conservatorship System. Apparently this is so because such a role is not part of the contract of DRC with the State Department of Developmental Services. Perhaps this absence from contractual duties is why none of the CRA's housed in the seven Regional Centers in Los Angeles County attended the first conference on limited conservatorship sponsored by the Disability and Abuse Project.

12. Disability Rights California, and its Clients Rights Advocates, should play an active role in monitoring the Limited Conservatorship System and in advocating for Regional Center clients when their rights are threatened or are actually infringed. Clients Rights Advocates should be informed when social, sexual, marriage, or voting rights of Regional Center clients are in jeopardy. They should advise attorneys at DRC when this occurs and the attorneys should intervene, as an interested agency or as an amicus curiae in the trial court. DRC should also file a "next friend" appeal or writ when it learns that the constitutional rights of a limited conservatee have been violated or the conservatee has not received effective assistance of counsel. Such involvement by an outside agency funded by the Executive Branch of government would have a beneficial effect on the Limited Conservatorship System which, up to now, is not monitored by any agency outside of the Judicial Branch.

Los Angeles Superior Court

The Los Angeles Superior Court is aware of but has not cooperated with the study being conducted by the Disability and Abuse Project.

One short interview with the Presiding Judge of the Probate Court was granted. But subsequent requests of the Project for interviews with key personnel received no response. A formal request for information and access to records, per Rule 10.500, received a cursory response which mostly declined to provide information or access to records. The minimal information that was provided to the Project was ambiguous.

13. The Superior Court should welcome inquiries from advocacy organizations about its operations. Interviews should be granted. Information about fiscal matters, policy, procedure, and administrative practices should be shared without reluctance or resistance. More transparency is needed.

Adult Protective Services

Complaints of abuse of adults with developmental disabilities are reported to either Adult Protective Services (APS) or to the Sheriff. Each of these agencies cross reports complaints to the other, as required by law.

However, a top management official at APS has stated that APS is not required to cross report to the Probate Court in cases where the alleged victim is a limited conservatee. This may be done as a matter of "best practices" but the agency does not consider it to be mandatory.

14. The State Council on Developmental Disabilities, or a state legislator, should ask the Attorney General or the Legislative Council or both for an opinion on the APS duty to report to the Probate Court. If the opinion concludes that mandatory reporting is not required, then legislation should be introduced to make it mandatory. Limited conservatees need such additional protection.

Involvement by Other Agencies is Needed

15. The Limited Conservatorship System is not receiving attention from the Legislature, especially the judiciary committees in each house. It is not being monitored by the State Department of Developmental Services. Nor has the Department of Justice given this system any attention.

16. The State Council on Developmental Services has a mandate to protect the rights of children and adults with developmental disabilities, to monitor agencies that provide services to this constituency, and to seek systemic changes where needed. Despite this mandate, the State Council has not yet focused any of its attention or resources to the Limited Conservatorship System.

17. The Judicial Council of the State of California created a Task Force focusing on the General Conservatorship System in 2006. It is time for such an inquiry into the Limited Conservatorship System – and it should not require a series of articles in the Los Angeles Times for it to initiate such a review.



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Other Conference Materials:

www.disabilityandabuse.org/conferences
