Regional Center Conservatorship Assessments

The Need for Guidance and Oversight from the Department of Developmental Services

A Report by
Spectrum Institute

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April 6, 2017

SUMMARY

Regional centers have a statutory duty to assess clients who are respondents in conservatorship proceedings. This duty includes issuing a report to the probate court with findings and recommendations about whether a conservatorship is necessary because less restrictive alternatives are not viable. Recommendations are also made as to whether rights in seven specific areas should be restricted by the court.

The Department of Developmental Services provides funding to regional centers. Contracts between DDS and regional centers specify that the services of regional centers shall comply with state and federal statutes. Among the statutes that apply to regional center services are the Americans with Disabilities Act and the corresponding equivalent in state law. Provisions of the Probate Code and Welfare and Institutions Code also regulate conservatorship assessment and reporting services conducted by regional centers.

These contracts specify that the performance of regional centers will be evaluated by DDS and that regional centers are required to supply program and fiscal information to enable DDS to evaluate the level of performance. If DDS ever has reasonable cause to believe that a regional center is violating the requirements of the ADA, the director shall notify the regional center and also file a complaint with the state Department of Fair Employment and Housing. Violations of the ADA by DDS are reportable to the United States Department of Justice and the Department of Health and Human Services.

The California Constitution specifies that laws of a general nature shall be uniform in operation. Statutes regulating regional center conservatorship assessment and reporting services are not being implemented uniformly throughout the state. Although the Legislature contemplated that DDS would issue guidelines to regional centers for such assessment services, DDS has not done so. Nor has DDS provided training materials or programs to regional centers on this subject. DDS has not instituted quality assurance controls for these services, nor it is monitoring them in any manner.

Officials at DDS apparently believe, however mistakenly, that the department has no authority or duty to provide guidance to or oversight of the conservatorship assessment and reporting services of regional centers. The ongoing lack of guidance, training, and oversight has contributed to continuing violations of the statutory and constitutional rights of regional center clients, including the denial of full access to services and meaningful access to justice – deficiencies violating the ADA.

This report is intended to get the attention of DDS, as well as the Health and Human Services Agency which oversees the department. DDS should take significant steps to provide the guidance and engage in the oversight that the law requires. Such actions should be done in consultation with the Association of Regional Center Agencies, in addition to self advocates, parent advocates, disability services agencies, and disability rights groups.

DDS and HHS should move forward to fulfill these responsibilities with all deliberate speed.

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Part One: State Agency Guidance and Oversight is Needed for Conservatorship Assessments and Reports by Regional Centers

By Thomas F. Coleman
April 3, 2017

The Department of Developmental Services has a statutory obligation to ensure that regional centers provide services that comply with applicable state laws. (Welfare and Institutions Code Section 4629) The department must take corrective action when it has reason to believe that regional centers are providing services that are not in compliance with the Americans with Disabilities Act. (Welfare and Institutions Code Section 11136)

Pursuant to its statutory obligations, DDS has included provisions in its contracts with regional centers that require them to provide services in compliance with state and federal statutes. This commentary identifies state statutes that establish the framework for regional centers to conduct conservatorship assessments and issue reports to the probate courts for people with developmental disabilities who are involved in such proceedings, and for DDS oversight.

After a petition for limited conservatorship is filed, the court decides whether a conservatorship is necessary, and if so, who should be appointed as conservator. The court must also decide whether to grant the petitioner's request to assume control over decisions in any of seven areas if such a request is included in the petition.

Probate Code Section 2351.5 specifies that a limited conservator does not have powers in any of seven specified areas unless specifically requested in the petition and specifically granted by the court in its order granting the petition.

The seven areas are: (1) To fix the residence or specific dwelling of the limited conservatee; (2) Access to the confidential records and papers of the limited conservatee; (3) To consent or withhold consent to the marriage of, or the entrance into a registered domestic partnership by, the limited conservatee; (4) The right of the limited conservatee to contract; (5) The power of the limited conservatee to give or withhold medical consent; (6) The limited conservatee's right to control his or her own social and sexual contacts and relationships; (7) Decisions concerning the education of the limited conservatee.

Probate Code Section 1800 declares that it is the intent of the Legislature in enacting statutes pertaining to conservatorships and limited conservatorships that the following are done in such proceedings: (a) Protect the rights of persons who are placed under conservatorship; (b) Provide that an assessment of the needs of the person is performed in order to determine the appropriateness and extent of a conservatorship and to set goals for increasing the conservatee's functional abilities to whatever extent possible; (c) Provide that the health and psychosocial needs of the proposed conservatee are met; and (d) Provide that community-based services are used to the greatest extent in order to allow the conservatee to remain as independent and in the least restrictive setting as possible.

Probate Code Section 1801 states that a conservator of the person may be appointed for someone who is unable to properly care for his personal needs for physical health, food, clothing, or shelter. Section 1800.3 states that such a conservatorship shall not be granted 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. Section 1801(e) states that the standard of proof for appointment of a conservator is clear and convincing evidence.

Probate Code Section 1827.5(a) specifies that proposed limited conservatees shall be assessed by regional centers when a petition is filed to establish a limited conservatorship and that a written report shall be submitted to the court containing the findings and recommendations of the regional center. Subdivision (c) states that the report shall include a description of the specific areas, nature, and degree of disability of the proposed limited conservatee. The findings and recommendations of the regional center are not binding on the court.

Welfare and Institutions Code Section 4646.5 gives further instruction on how assessments shall be conducted by a regional center. The assessment must be done by a qualified individual. In conducting an assessment, information shall be taken from the client, as well as his or her parents, relatives, friends, advocates and service providers. In other words, the Legislature contemplates an assessment to be done by a professional who is qualified to evaluate and make recommendations in the areas being assessed. The Legislature also contemplates that the source of information for an assessment shall come from a wide range of people involved in the life of the proposed conservatee.

Welfare and Institutions Code Section 4629 requires DDS to include clauses in its contracts with regional centers to: (1) perform services in compliance with relevant statutes; (2) include annual performance objectives; and (3) specify steps to be taken to ensure contract compliance.

Although there is a generic provision in these contracts requiring compliance with state and federal laws, there is no specific reference to statutes regulating conservatorship assessment and reporting services. Also lacking is any specific mention of annual performance objectives for these services, or steps to ensure compliance with laws regulating such assessment and reporting services. These generic provisions are sufficient, but more specific reference to these issues would be helpful.

Information obtained from DDS through public records requests indicates that DDS does not provide regional centers with performance standards for conservatorship assessments, or offer training materials or training programs. Likewise, DDS does not monitor regional centers to ensure compliance with state statutes pertaining to conservatorship assessments and reporting services or compliance with ADA requirements that clients have meaningful access to these services.

To comply with its oversight responsibilities pursuant to relevant federal and state laws, and to comply with its obligation to ensure that regional centers are meeting their contractual agreements with DDS, the department must take steps to: (1) develop performance standards for conservatorship assessment and reporting services by regional centers; (2) conduct training and provide educational materials on the issues involved in providing such services; (3) define who is qualified to conduct assessments in each of the seven areas under review in limited conservatorship proceedings; (4) define the diagnostic criteria for capacity in each of these seven areas; (5) establish annual performance objectives on these issues; (6) specify steps to be taken by regional centers to ensure contract compliance; and (7) establish effective monitoring mechanisms by DDS to ensure compliance by regional centers with applicable laws requiring ADA-compliant limited conservatorship assessment services.

This framework should guide regional centers in fulfilling their duties to provide conservatorship assessment and reporting services, and should help DDS better fulfill its regulatory and oversight role. Details on *how* regional centers and DDS should fulfill these duties is found in Part II of this commentary. DDS and the Association of Regional Center agencies should use this information to develop performance standards, training materials, and effective monitoring mechanisms. ◊◊◊

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Part Two: How Regional Centers Should Perform Conservatorship Assessments and How the State Should Fulfill Its Oversight Duties

By Thomas F. Coleman
April 5, 2017

Statutory and contractual duties of regional centers for conservatorship assessment services, and the corresponding oversight responsibilities of the Department of Developmental Services, were discussed in Part One of these dual commentaries.

Regional centers have a duty to assess clients involved in limited conservatorship proceedings in accord with statutory requirements. They submit reports to the probate court containing their findings and recommendations on issues that will be discussed in detail below.

The department provides funding to regional centers to perform services in a manner specified in contracts between DDS and the regional centers. As explained in Part One, there is a provision requiring regional center services to be conducted in compliance with state and federal laws. Such laws include statutes in the Probate Code and Welfare and Institutions Code dealing with conservatorship assessments, as well as ADA requirements in the Government Code.

> The time has come for DDS to start fulfilling its obligations to provide guidance to and conducting monitoring of the conservatorship assessment and reporting services of all 21 regional centers.

These contracts require regional centers to have annual performance objectives and to specify steps to be taken to ensure contract compliance. These provisions imply that, as a signatory to the contracts and funding source for these services, that DDS will monitor contract compliance. From statements made by DDS in response to public records requests, as well as in a face-to-face meeting with representatives of Spectrum Institute, it appears that DDS has not been fulfilling its oversight responsibilities in connection with conservatorship assessment and reporting services by regional centers.

At a recent in-person meeting, a representative of the department indicated that under current law DDS does not have authority to provide guidance to regional centers regarding these services. In addition to the statutory and contractual provisions set forth in Part One that show otherwise, there is explicit language in the Probate Code indicating that DDS has authority to provide such guidance.

Making reference to conservatorship assessment reports, Probate Code Section 1821 mentions "guidelines adopted by the State Department of Developmental Services for regional centers . . . ." Even without such explicit language, DDS clearly has monitoring responsibilities, but this phrase should dispel any possible doubt regarding the authority of DDS to issue guidelines.

Having laid the foundation for statutory and contractual duties of DDS and regional centers pertaining to conservatorship assessment and reporting services, the next step is to explain what contractual and statutory compliance would look like – both for regional centers in performing these services and for DDS in fulfilling its guidance and monitoring responsibilities.

As a foundational matter, it is essential to understand the procedural context in which regional center assessment and reporting services occur. A brief description of the pleadings and procedures in the limited conservatorship process will help.

Petition

A conservatorship proceeding is initiated by the filing of a petition with the superior court. Usually

it is handled through the probate division or by the clerk and judge who process probate cases.

Here we are focusing only on petitions asking for a conservatorship of an adult who has intellectual and developmental disabilities. A petition may be filed by a spouse, relative, or any interested person, government agency or official. (Probate Code Section 1820)

The petition specifies whether a general conservatorship or limited conservatorship is being requested, who should be appointed as conservator, and why the conservatorship is necessary. If a limited conservatorship is being sought, the petition must also specify which of seven powers the court is being asked to transfer to the conservator and the corresponding limitations on the civil rights of the proposed conservatee. (Probate Code Section 1821)

Medical Capacity Declaration

A medical capacity declaration must be filed if the petition asks the court to transfer medical decision-making authority to the conservator. Judicial Council form GC-335 is used for this purpose.

The assessment may be done by a physician or psychologist. The practitioner renders an opinion only on whether the proposed conservatee lacks the ability to give informed consent to any form of medical treatment.

There is no mechanism in place to monitor the quality of these medical capacity assessments.

Notice to Regional Center

If the proposed conservatee is a person with a developmental disability, the regional center must be given notice of the proceeding at least 30 days before any hearing occurs on the petition. (Probate Code Section 1822(e)) This requirement applies to all conservatorship petitions, regardless of whether a general or limited conservatorship is being requested.

Appointment of Counsel

In any proceeding to establish a limited conservatorship, the court shall immediately appoint an attorney to represent the proposed conservatee. (Probate Code Section 1471(c)) Appointment of counsel in such proceedings is mandatory.

If the petition seeks to establish a general conservatorship, appointment of counsel for the proposed conservatee is not mandatory unless the person requests appointment of counsel. If no request is made, appointment of counsel is left to the discretion of the court. (Probate Code Section 1470)

One regional center has reported that upwards of 80 percent of clients in conservatorship proceedings do not receive counsel because the petitioner has filed for a general conservatorship, thereby bypassing the statutory requirement for mandatory appointment of counsel. In these cases the court has obviously decided not to exercise its discretion to appoint counsel. The extent to which other regional centers have the same experience with clients not having counsel appointed in conservatorship cases is unknown.

Audits of cases in Los Angeles County shows that many court-appointed attorneys provide the most minimal of services. They review the petition, talk to the petitioners, spend a very short amount of time with their client, and review the regional center report and court investigator report. Most of them do not interview relatives or friends of the client, nor do they speak with the client's doctor or teacher or service providers.

Although these attorneys could request a regional center to conduct a special Individual Program Plan (IPP) review, they never do. Even though they could ask the court to appoint an expert or experts under Evidence Code Section 730 to evaluate the client's capacities in some or all of the decision-making areas in question, or to evaluate the viability of less restrictive alternatives to conservatorship, they don't do that either.

In many cases I have audited, attorneys spend five or fewer hours from start to finish. There are almost never any objections or motions filed, and contested hearings are rare. Appeals don't occur.

An attorney practicing in probate court in one Northern California county explained that the public defender represents respondents in limited conservatorship cases there. He reported that the public defender meets his clients for the first time in the courthouse on the day of the hearing and spends just a few minutes with the client before appearing in the courtroom. There is no way that such limited interaction provides access to justice for the client.

Trainings of court-appointed attorneys in Los Angeles County are severely deficient. There are no performance standards for the attorneys, nor is there any monitoring of the quality of legal services provided by the attorneys to these clients.

Court Investigator

A court investigator must, at a minimum, interview the proposed conservatee, the petitioners, the proposed conservators, and relatives of the first degree which includes parents and children. (Probate Code Section 1826)

The investigator is required to review the supplemental information form submitted by the petition and consider whether the facts therein show: (1) that the proposed conservatee lacks the ability to care for his or her own basic needs; (2) whether alternatives to conservatorship are viable; and (3) whether the proposed conservatee can handle his or her own finances and whether he or she is able to resist fraud or undue influence. (Probate Code Section 1826(a)(4)(b))

The investigator shall determine if the proposed conservatee wishes to contest the conservatorship or objects to the proposed conservator or prefers someone else to be conservator. (Probate Code Section 1826(a)(5) and (6))

To the extent practicable, the investigator shall consider whether he or she believes that the proposed conservatee has any mental function deficits affecting the ability to contract, marry, or make medical decisions, or that impair his or her ability to appreciate and understand the consequences of decisions regarding finances or basic needs. (Probate Code Section 1826(a)(4)(B))

The investigator shall file a report to the court at least five days before the hearing concerning all of the foregoing matters, as well as whether the proposed conservatee wishes to have counsel appointed. (Probate Code Section 1826(a)(11))

The extent to which a court investigator is able to fulfill the duties set forth in these statutes will depend, in large measure, by his or her caseload. This will vary from court to court.

Testimony of the presiding judge of the probate court in Los Angeles before the Senate Judiciary Committee in 2015 indicated that investigators are so overloaded that they can only spend one day a week in the field. With this in mind, the number of open cases (10,394 limited, 6,006 general) for which they have responsibility to conduct annual or biennial reviews, plus a deluge of new cases each year, would require them to make nine home visits on that one day. Thus, investigators lack the ability to conduct a quality investigation in conservatorship cases.

Qualifications for being a court investigator are minimal. (Rule 10.777 of the California Rules of Court) An investigator must have a bachelor of arts or bachelor of science degree in social science, behavioral science, liberal arts, or nursing. A minimum of two years work experience is required in casework or investigations in a legal, financial, law enforcement, or social services setting. These requirements may be waived by courts with eight or fewer judges.

Continuing education requirements specify that court investigators shall have training in elder and dependent adult abuse, but the quality and extent

of such training is unknown. They are also required to have training in interviewing persons with "mental function or communication deficits" but the quality and extent of such training is also unknown. (Rule 10.478)

Local courts are responsible for tracking compliance with these educational requirements. (Rule 10.474(e)) Such monitoring may or may not occur.

Even though court investigators are supposed to give an independent and neutral evaluation of cases, the fact still remains that they work for the court. Therefore, if it chooses to, the court can minimize the role of these investigators in limited conservatorship cases – for financial reasons or otherwise.

Since there is no central administrative oversight by the state, virtually never any appeals, and no executive branch agency to monitor what the local courts do, minimizing or eliminating the role of court investigators would go unchallenged.

For example, in recent years the Los Angeles Superior Court entirely eliminated the use of court investigators for initial filings in limited conservatorship proceedings. Individual court-appointed attorneys did not challenge this action by the court. Instead they participated in it.

The court would ask the court-appointed attorney and the petitioner to stipulate that the report of the attorney would be used instead of an investigator's report. An audit that I conducted of a significant sample of cases showed that such stipulations were routine. Unfortunately, the investigations of court-appointed attorneys were minimal and their reports were shallow, and therefore were not an adequate substitute for reports by court investigators.

Regional center reports became even more important during this era of waivers of court investigator reports – an era that lasted for several years in Los Angeles. Whether such a cost-saving tactic was used by courts in other parts of the state is unknown.

Court investigators are paid out of the budgets of the local superior courts. The beneficiaries of these investigative services – people with developmental disabilities – had no way to push back against these cuts or to complain that they were depriving these involuntary litigants of access to justice, thereby violating the ADA.

Judicial Duties

A judge is assigned to each conservatorship case. A petition for a conservatorship may only be granted by the judge if there is clear and convincing evidence that the proposed conservatee is unable to care for his or her basic needs. (Probate Code Section 1801) The court must find that a conservatorship is the least restrictive alternative for the protection of the conservatee. (Probate Code Section 1800.3(b))

At the hearing, the judge must decide whether to transfer any of the seven powers from the proposed conservatee to the conservator, there must be clear and convincing evidence. The court shall define the powers and duties of the limited conservator so as to permit the developmentally disabled adult to care for himself or herself or to manage his or her financial resources commensurate with his or her ability to do so. (Probate Code Section 1828.5(e))

A limited conservatorship may be utilized only as necessary to promote and protect the well-being of the individual, shall be designed to encourage the development of maximum self-reliance and independence of the individual, and shall be ordered only to the extent necessitated by the individual's proven mental and adaptive limitations. The conservatee of the limited conservator shall not be presumed to be incompetent and shall retain all legal and civil rights except those which by court order have been designated as legal disabilities and have been specifically granted to the limited conservator. (Probate Code Section 1801(d))

In making these determinations, the court receives information from the petitioner, court investigator, attorney for the proposed conservatee (if one has

been appointed), and the regional center (assuming proper notice has been given, which sometimes is not the case).

Generally, the only professional opinion submitted by the petitioner is a medical capacity declaration showing that the proposed conservatee lacks the capacity to make informed medical decisions. Professional evaluations of capacity in the other six areas of decision-making are not required and therefore are usually not submitted by a petitioner.

While court investigators may include their personal belief as to capacity in one or more of these areas in their reports, investigators lack the qualifications to render a professional opinion on the proposed conservatee's capacity to make decisions on finances, education, residence, marriage, social contacts, or sexual practices.

Although attorneys can ask for appointment of a professional to evaluate capacity in each of the seven areas in question, or to evaluate the viability of less restrictive alternatives, audits in Los Angeles County show that they never do.

Therefore, when the court is evaluating evidence on capacity and less restrictive alternatives, it almost never has the opinion of an expert on any matter other than the proposed conservatee's capacity to make informed medical decisions. Even then no one monitors whether the physician has experience treating or evaluating patients with intellectual and developmental disabilities or whether the physician spent enough time with the patient – using available accommodations and supports – to conduct a thorough evaluation.

A high volume of cases and huge case loads also affect the ability of judges to pay proper attention to each limited conservatorship case. For example, the acting presiding judge of the probate court in Los Angeles recently told a gathering of attorneys at a seminar that he is faced with 80 cases on his docket when he sits down at his desk in the morning. Then another 80 cases the next day, and the next. Imagine the pressure on judges to keep cases moving and the relief they feel when cases are settled without the need for an evidentiary hearing.

It is with all of this in mind that the focus is turned to the importance of the regional center's assessment and reporting services in these cases. Judges would benefit from having a thorough report from a regional center based on a properly conducted assessment.

Regional Center Assessments

If they are done properly, regional center conservatorship assessment and report services would be vital to the integrity of conservatorship proceedings. Assessments done by qualified individuals would fill an evidentiary gap in proceedings that too often operate in a perfunctory manner.

Current Practices

My own audits of court files in Los Angeles have revealed that regional center reports are not always used by judges. In some cases when a regional center report has not been filed in a timely manner, a judge will grant a conservatorship without it.

In an interview with the presiding judge of the probate court in Los Angeles I was told that some judges do not have high regard for regional center reports. He gave an example as to why. Many reports recommend that the right to marry be retained by the proposed conservatee but that the power to enter into contracts be taken away. The judge said this does not make sense. Marriage is an important contract with significant financial and other ramifications.

Other information about current practices is contained in a thesis paper written by Barbara Imle for her Master in Arts Degree in Social Practice at California State University San Marcos. The 2016 paper is titled "California's Double-Edge Sword: Exploring Regional Centers, Limited Conservatorship Policies, and Implications for Adults with Intellectual and Developmental Disabilities."

This appears to be the first study to survey all 21 regional centers on their conservatorship assessment and reporting services. Considering the contractual obligations of regional centers to DDS, this is something that DDS should have done long ago and something which should have been updated by DDS periodically.

Sixteen of the 21 regional centers completed a survey sent to them by Imle. Ten of them completed a follow-up interview. The study was designed to elicit information about internal policies and trainings regarding the regional center's role in conservatorship proceedings.

Some of the findings of the study raise serious concerns that some clients are not receiving access to justice as required by the ADA. They also demonstrate that state statutes on conservatorship assessments are not operating uniformly throughout the state as required by the California Constitution. (Article IV, Section 16) The lack of uniformity – with clients in some areas getting the full benefit of the law, while clients in other areas are not, raise additional concerns of disability discrimination and denial of equal protection of the law.

The findings of the study show that among participating regional centers:

* 87% require a meeting with the client prior to making recommendations to the court.

* 68% include the client's wishes in their assessment and report.

* 60% reported that a majority of limited conservatorships request all seven powers, with another 20% saying that half of the requests are for all seven powers.

* 53% require that all powers being requested be discussed with the client.

* 44% require training on limited conservatorships for service coordinators and managers.

Among the most common issues mentioned by regional center representatives in open-ended survey answers and interviews were:

* 62% mentioned the lack of guidelines for conservatorship assessment and reporting services. They reported that their role in conservatorships is unclear and they mentioned a lack of streamlined requirements and expectations as a problem.

* 62% reported that budget constraints limit their involvement in conservatorship cases.

* 56% reported that clients, families, schools and advocates are lacking access to quality resources on conservatorships and alternatives or that families are unable to afford fees associated with conservatorships.

* 44% reported that local schools strongly push or even scare families into seeking conservatorships at the age of 18.

Five of the responding regional centers reported the majority of conservatorship cases they see are for general and not limited conservatorships. One respondent said that in 2015 they received notices of 58 limited conservatorship petitions as compared with 187 general conservatorship petitions.

The thesis paper commented on this, stating that this regional center "explained that this is a way families get around having Regional Centers provide the courts with an assessment," adding that requests for a general conservatorship are also a way of avoiding a public defender being appointed to represent the regional center client.

With all the conversations occurring about supported decision-making, it seems amazing that only one of the 16 participating regional centers said that it discusses SDM in the conservatorship assessment process. With the other 15 respondents, SDM was not an active consideration.

The thesis paper stated: "Budget constraints are also reflected in the fact only 44% of participants

reported that training is mandatory for service coordinators and managers. Not having a designated budget for probate-related activities is setting up the Regional Centers to fail as advocates because they are not able to create the tools they need to be successful."

The paper added: "This is an example of the discretion each Regional Center has because they are at liberty to decide how many company resources they are willing to spend on conservatorship proceedings. The law requires they complete an assessment, but no law ensures that each Regional Center puts the same amount of time and consideration into these reports. This creates conflict due to economic restraints and leads to institutions prioritizing cost efficiency over individual needs . . . . This results in alienation as clients are seen as a number, or object and not a human, which means that services are not individualized."

The paper also commented on the failure to conduct assessments tailored to the needs of each client, stating: "Findings show that 12 participating Regional Centers (80% of respondents) report that more than half, or the majority of limited conservatorship requests are for all seven powers. Such findings should serve as red flags that policies are not being implemented as they were intended, as limited conservatorships were specifically designed to protect the rights of this population (Hunsaker 2008); but general conservatorship requests continue to be made. These findings uncover a strong disconnect between the intent of the law and its actual impact. My research reflects that the majority of conservatorship requests are for all 7 powers which reflects a major contradiction as they were created with the intent to *limit* the power held by the conservator (Hunsaker 2008) and thus does not follow CDT's tenant of preserving the rights of people with disabilities."

Developing Uniform Protocols

Once a regional center receives notice that a client is a respondent in a conservatorship proceeding, someone should be designated to take the lead in coordinating the required assessment and writing the report to the court as required by Probate Code Section 1827.5(a).

The lead person should receive training on both legal requirements and clinical assessment practices. To ensure uniformity of policy and practice, DDS should issue regulations or guidelines on the assessment and reporting process.

Conservatorship assessments must be done by a qualified individual. Information shall be obtained from the client, relatives, friends, advocates, and service providers. The information is used to submit findings and recommendations to the court on whether: (1) a conservatorship is necessary; (2) less restrictive alternatives have been considered and whether they are viable or not; and (3) any of the seven powers should be transferred to the conservator or whether the client should retain rights in some or all of the seven areas.

The person assigned to gather the information and write the report need not have the qualifications to render a professional opinion on these issues. He or she must identify and retain professionals who are qualified, review relevant records, and interview the individuals listed above. A thorough records review, consultation with qualified professionals, and interview of all relevant persons, will form the basis of a proper and thorough report.

Records to be reviewed should include: (1) The most recent few IPP reports and updates; (2) the most recent few IEP reports if the client is or recently was in school; (3) reports from service providers; and (4) any clinical or professional reports involving the client.

The report writer should also obtain and review a copy of the petition for conservatorship, confidential questionnaire, medical capacity declaration, and any supplemental materials submitted to the court by the petitioner.

Once these documents have been obtained, it

would be appropriate for an IPP review to be initiated. "For all active cases, individual program plans shall be reviewed and modified by the planning team, through the process described in Section 4646, as necessary, in response to the person's achievement or changing needs." (Welfare and Institutions Code Section 4636.5(b)) The filing of a conservatorship petition indicates such a need.

The statutory purpose of the IPP process coincides with the type of assessment needed for a conservatorship proceeding: "Gathering information and conducting assessments to determine the life goals, capabilities and strengths, preferences, barriers, and concerns or problems of the person with developmental disabilities." (Welfare and Institutions Code Section 4646.5(a)(1))

Assessments pursuant to an IPP process "shall be conducted by qualified individuals." (Welfare and Institutions Code Section 4646.5(a)(1))

In connection with conservatorship proceedings where the Director of DDS is nominated to act as the conservator, the Legislature has specified the qualifications necessary for the individuals who conduct the relevant assessments.

A regional center report must include a current diagnosis of the client's physical condition "prepared under the direction of a licensed medical practitioner" and "a report of his current mental condition and social adjustment prepared by a licensed and qualified social worker or psychologist." (Health and Safety Code Section 416.8)

There is no reason why lesser qualifications are permissible for regional center assessments when someone else is designated as conservator. An assessment is not done for the benefit of the conservator, but for the benefit of the proposed conservatee and the judge who will consider the assessment in making a ruling on the petition.

Once all of the records are reviewed, interviews conducted, assessments are done by qualified individuals, and the IPP review process is complete, the report to the court can be written.

It is not appropriate to get deeper into the details now of how a proper and thorough conservatorship assessment and report should be done. Uniform policies and procedures should be created though a collaboration of regional centers (perhaps by ARCA) with DDS.

DDS Guidance and Monitoring

The department has a statutory responsibility to ensure that regional center services comply with state and federal laws. That is why funding from DDS to regional centers has strings attached.

There are relevant clauses in these contracts requiring regional centers to comply with state statutes, which necessarily includes statutes regulating conservatorship assessment services. Contractual provisions require annual performance objectives as well as specifying steps to be taken to ensure contract compliance.

The time has come for DDS to start fulfilling its obligations to provide guidance to and conducting monitoring of the conservatorship assessment and reporting services of all 21 regional centers.

If inadequate funding is one of the impediments to regional centers providing such services in compliance with applicable state and federal laws – including the ADA – then regional centers and ARCA should work with DDS to secure additional funding. In the meantime, DDS should develop guidelines and monitoring mechanisms in consultation with ARCA, self-advocates, parent-advocates, disability service organizations, and disability rights agencies and organizations. ◊◊◊

Thomas F. Coleman is the Legal Director of Spectrum Institute – a nonprofit organization promoting equal rights and justice for people with intellectual and developmental disabilities.

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April 1, 2017

Director Nancy Bargmann
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Re: Next Steps in DDS Oversight of Regional Center Conservatorship Assessment Services

Dear Director Bargmann:

As you know, Dr. Nora J. Baladerian and I and various advisors to Spectrum Institute met with representatives of the Department of Developmental Services on March 27, 2017. We were pleased that Kristopher Kent, Assistant Secretary of the Health and Human Services Agency, participated in the meeting. It was unfortunate that you were not able to attend.

The conversation at that meeting stimulated me to do additional research into the duties of DDS to provide guidance to and oversight of regional centers in connection with their assessment and reporting services for clients involved in limited conservatorship proceedings. The enclosed materials are the product of that research.

1. Commentary on authority of state and federal agencies to intervene if ADA violations occur
2. Statutory duties of DDS and regional centers regarding conservatorship assessments
3. Clauses in existing contracts between DDS and regional centers on these issues
4. ADA Title II regulations regarding DDS grievance procedures for ADA violations
5. Authority of DDS to monitor regional center services for ADA compliance

After you and Assistant Secretary Kent have had an opportunity to review these materials, I would like us to continue the conversation that began at the meeting on March 27. I hope that future interactions will be collaborative, constructive, and designed to improve the oversight activities of DDS in connection with the conservatorship assessment and reporting services of regional centers.

It may be appropriate to have the Association of Regional Center Agencies included in future conversations on these issues. The participation of ARCA could be helpful as we move toward ensuring that clients receive the full benefit of ADA-compliant conservatorship assessment services.

Respectfully submitted:

Thomas F. Coleman
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State and Federal Civil Rights Agencies Can Intervene When DDS Funds Regional Center Services That Violate the ADA

By Thomas F. Coleman
April 1, 2017

Regional centers receive state funding through contracts with the Department of Developmental Services (DDS). This funding pays for various types of services provided to individuals with intellectual and developmental disabilities.

These contracts require regional centers to render services "in accordance with applicable federal and California statutes." Government Code Section 11135 requires agencies receiving state funds to comply with the Americans with Disabilities Act in the delivery of services. Probate Code Section 1827.5(a) requires regional centers to use a qualified individual to conduct assessments and submit reports to the probate court for clients who are respondents in limited conservatorship proceedings. Welfare and Institutions Code Section 4646.5 describes how assessments shall be conducted.

Clients will only receive the full benefit of properly performed services, as required by the ADA, if regional centers use a qualified professional to conduct an assessment in each of the seven areas of decision-making and solicit the views of the full list of informants listed in Section 4646.5. Cutting corners to save time or money, knowing that clients cannot complain due to the nature of their disabilities, is a form of disability discrimination under the ADA.

Normal complaint procedures are not available to clients in conservatorship proceedings because they don't know their rights, and even if they did they would not be able to initiate or participate in a complaint procedure. Therefore, it is necessary for DDS to monitor compliance by regional centers with Section 11135, Section 1827.5(a), and Section 4646.5. Failure to perform this monitoring function becomes a Title II ADA violation by DDS.

It appears that DDS is not providing guidance or engaging in oversight of regional centers with respect to their conservatorship assessment and reporting services. This must be corrected.

Spectrum Institute recently had a meeting in Sacramento with representatives of DDS and the state Health and Human Services Agency. DDS suggested that it lacked the authority to regulate and monitor regional centers in connection with their conservatorship assessment and reporting duties. This position is plainly wrong and is contrary to current law.

Welfare and Institutions Code Section 4629 requires DDS to enter into contracts with regional centers. The contracts must include provisions requiring regional centers to render services in accord with applicable laws. The statutes mentioned above are applicable laws. The contracts must include annual performance objectives and shall specify steps to be taken to ensure contract compliance. The contracts place regional centers under an obligation to comply with the ADA (Section 11135).

By denying its responsibility to provide guidance and oversight to regional centers for these conservatorship assessment and reporting services, DDS is failing to conduct the oversight service contemplated by the Legislature. It is essential for DDS to perform this function in order to ensure that clients receive proper services from regional centers in this regard.

The remedy? Spectrum Institute may initiate an internal grievance procedure with DDS as authorized by Title II of the ADA. If that fails, a class-based complaint may be filed with the state Department of Fair Employment and Housing under Section 11135. If that fails, a complaint may be filed with the federal Department of Justice or the Department of Health and Human Services for systemic ADA violations.

Many regional centers are not conducting conservatorship assessments as required by law. DDS needs to conduct its own investigation to verify the extent of compliance or noncompliance by each regional center. Corrective actions should then follow. ◊◊◊

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Statutory Duties of DDS and Regional Centers Regarding Limited Conservatorship Assessments and Reports to the Probate Court

California Welfare and Institutions Code Section 4629

(a) The state **shall** enter into five-year contracts with regional centers, subject to the annual appropriation of funds by the Legislature.
(b) The contracts **shall include** a provision requiring each regional center to render services **in accordance with applicable provision of state laws** and regulations.
(c)(1) The contracts **shall** include annual performance objectives . . .
(2) **In addition** to the performance objectives developed pursuant to this section, the department **may specify** in the performance contract additional areas of service and support that require development or enhancement by the regional center. . .
(d) Each contract with a regional center **shall** specify steps to be taken to ensure contract compliance . . .

Comment: Probate Code Section 1827.5 is an applicable state law that must be complied with by regional centers.

Probate Code Section 1827.5(a)

In the case of any proceeding to establish a limited conservatorship for a person with developmental disabilities, within 30 days after the filing of a petition for limited conservatorship, a proposed limited conservatee, with his or her consent, **shall be assessed** at a regional center **as provided in Chapter 5** (commencing with Section 4620) of Division 4.5 of the Welfare and Institutions Code. The regional center shall submit a written report of its findings and recommendations to the court.

Comment: How "assessments" shall be conducted is defined in the following provision in Section 5 of Division 4.5 of the Welfare and Institutions Code.

Welfare and Institutions Code Section 4646.5

Assessments shall be conducted **by qualified individuals** and performed in natural environments whenever possible. Information **shall be taken from** the **consumer**, his or her **parents** and other **family members**, his or her **friends**, **advocates**, authorized **representative**, if applicable, **providers** of services and supports, **and** other **agencies**. The assessment process shall reflect awareness of, and sensitivity to, the lifestyle and cultural background of the consumer and the family.

Clauses in Contracts Between DDS and Regional Centers Regarding Client Assessments and Reports to Probate Courts in Limited Conservatorships

12. Control Requirements

The Contractor shall comply with all California statutes, laws, and regulations applicable to nonprofit corporations. Contractor shall also **render services** to persons with developmental disabilities **in accordance with applicable federal and California statutes**, regulations, ARC v. DDS (1985) 38 Cal.3d. 384 and the terms of this contract.

Comment: Probate Code Section 1827.5(a) is a state statute that defines service duties of regional centers in connection with limited conservatorship proceedings. Government Code Section 11135 is a state statute that requires any entity that is funded by the state to comply with Title II of the federal ADA. Title II requires that recipients of services must have meaningful participation in such services and receive the full benefit of them. Therefore, it would be a violation of section 11135 if a regional center did not conduct a limited conservatorship assessment as specified by section 1827.5(a) (by a qualified professional and in a manner as described by section 4646.5).

15. Nondiscrimination

a. Contractor agrees to develop, implement, and maintain a nondiscrimination program as required pursuant to applicable State of California laws and regulations, including Title 2, California Code of Regulations (Cal. Code Regs., tit. 2), Section 8101 et seq.

b. During the performance of this contract, the recipient, Contractor and its subcontractors **shall not deny the contract's benefits** to any person on the basis of religion, color, ethnic-group identification, sex, age, physical or mental disability, nor shall they discriminate unlawfully against any employee or applicant for employment because of race, religion, color, national origin, ancestry, physical handicap, **mental disability**, medical condition, marital status, age (over 40), or sex. Contractor shall ensure that the evaluation and treatment of employees and applicants for employment are free of such discrimination.

c. **Contractor shall comply with** the provisions of the Fair Employment and Housing Act (Government Code, Section 12900 et seq.), the regulations promulgated thereunder (Cal. Code Regs., tit. 2. Section 7285.0 et seq.), the provisions of **Sections 11135**-11139.5, Article 9.5, Chapter 1, Part 1, Division 3, Title 2 of the Government Code, and the regulations or

standards adopted by the awarding state agency to implement such article.

Comment: Failure of a regional center to conduct an assessment for a limited conservatorship in accord with the requirements of Section 1827.5 and section 4646.5 would be a denial of benefits and denial of meaningful participation in the service activity in violation of Section 11135 and the ADA.

Article V: Evaluation

a. **Contractor Evaluation** The Contractor's performance under this contract will be evaluated. Accordingly, the State, through its authorized representatives, reserves the right to use evaluation methods, including observations, inspections, interviews and other assessment techniques selected by the State.

Comment: This clause gives DDS the authority to evaluate the performance of a regional center in connection with its assessment and report to a probate court in a limited conservatorship proceeding.

1. **Information Requests**

During the term of this contract, the State may require Contractor to furnish program and fiscal information, as the State deems necessary to assess Contractor's status or performance relative to Contractor's fiscal and/or program operations. Prior to requesting such information, the State shall confer with ARCA as to the most efficient and effective means for collecting the information.

Comment: This clause gives DDS the authority to require a regional center to provide information to DDS about its assessment and reporting services in connection with limited conservatorship proceedings.

Final Comment: *No new statutes need to be passed by the Legislature. Regional centers already have statutory duties to perform limited conservatorship assessments and file reports to the probate courts, and these duties are built into existing contracts with DDS. Likewise, DDS has statutory and contractual obligations to make sure these assessment and reporting services are done properly – in accord with state and federal laws. Everything is explicit. No "underground" regulation would occur when DDS fulfills these existing duties. In fact, failure to perform its oversight and monitoring function could deny people with disabilities full access to these services, thereby subjecting DDS to the filing of complaints with and investigations by DFEH and appropriate federal agencies for violation of the ADA and Section 11135.*

Americans with Disabilities Act
Title II Regulations

Part 35 Nondiscrimination on the Basis of Disability in State and Local Government Services (as amended by the final rule published on August 11, 2016)

§ 35.107 Designation of responsible employee and adoption of grievance procedures

(a) *Designation of responsible employee.* A public entity that employs 50 or more persons shall designate at least one employee to coordinate its efforts to comply with and carry out its responsibilities under this part, including any investigation of any complaint communicated to it alleging its noncompliance with this part or alleging any actions that would be prohibited by this part. The public entity shall make available to all interested individuals the name, office address, and telephone number of the employee or employees designated pursuant to this paragraph.

(b) *Complaint procedure.* A public entity that employs 50 or more persons shall adopt and publish grievance procedures providing for prompt and equitable resolution of complaints alleging any action that would be prohibited by this part.

§ 35.170 Complaints

1. (a) *Who may file.* An individual who believes that he or she **or a specific class of individuals** has been subjected to discrimination on the basis of disability by a public entity may, by himself or herself or by an authorized representative, file a complaint under this part.

§ 35.190 Designated Agencies.

(b) The Federal agencies listed in paragraph (b)(1)-(8) of this section shall have responsibility for the implementation of subpart F of this part for components of State and local governments that exercise responsibilities, regulate, or administer services, programs, or activities in the following functional areas.

(3) *Department of Health and Human Services*: All programs, services, and regulatory activities relating to the provision of health care and social services . . .

(e) When the Department [of Justice] receives a complaint directed to the Attorney General alleging a violation of this part that may fall within the jurisdiction of a designated agency or another Federal agency that may have jurisdiction under section 504, the Department may exercise its discretion to retain the complaint for investigation under this part.

Authority of DDS to Monitor Regional Center Services for ADA Compliance

11135.

(a) No person in the State of California shall, on the basis of sex, race, color, religion, ancestry, national origin, ethnic group identification, age, mental disability, physical disability, medical condition, genetic information, marital status, or sexual orientation, be unlawfully denied full and equal access to the benefits of, or be unlawfully subjected to discrimination under, any program or activity that is conducted, operated, or administered by the state or by any state agency, is funded directly by the state, or receives any financial assistance from the state. Notwithstanding Section 11000, this section applies to the California State University.
(b) With respect to discrimination on the basis of disability, programs and activities subject to subdivision (a) shall meet the protections and prohibitions contained in Section 202 of the federal Americans with Disabilities Act of 1990 (42 U.S.C. Sec. 12132), and the federal rules and regulations adopted in implementation thereof, except that if the laws of this state prescribe stronger protections and prohibitions, the programs and activities subject to subdivision (a) shall be subject to the stronger protections and prohibitions.
(c) The protected bases referenced in this section have the same meanings as those terms are defined in Section 12926.
(d) The protected bases used in this section include a perception that a person has any of those characteristics or that the person is associated with a person who has, or is perceived to have, any of those characteristics.

11136.

Whenever a state agency that administers a program or activity that is funded directly by the state or receives any financial assistance from the state has reasonable cause to believe that a contractor, grantee, or local agency has violated the provisions of Section 11135, Part 2.8 (commencing with Section 12900) of this code, Section 51, 51.5, 51.7, 54, 54.1, or 54.2 of the Civil Code, or any regulation adopted to implement these sections or Article 1 (commencing with Section 12960) of Chapter 7 of this code, the head of the state agency, or his or her designee, shall notify the contractor, grantee, or local agency of such violation and shall submit a complaint detailing the alleged violations to the Department of Fair Employment and Housing for investigation and determination pursuant to Article 1 (commencing with Section 12960) of Chapter 7 of this code.

11137.

If it is determined that a contractor, grantee, or local agency has violated the provisions of this article, pursuant to the process described in Section 11136, the state agency that administers the program or activity involved shall take action to curtail state funding in whole or in part to such contractor, grantee, or local agency.

ADA Title II Guidance from the U. S. Department of Justice is Instructive to Participants in the Limited Conservatorship System

by Thomas F. Coleman
January 16, 2017

Title II of the Americans with Disabilities Act prohibits public entities from discriminating on the basis of disability against recipients of the services of such entities. Title II applies to state and local government entities, including state and local courts. The service that courts provide is the administration of justice. Title II requires public entities to modify policies and practices, when appropriate, to provide necessary accommodations to people with disabilities to ensure they have meaningful access to the services of such entities.

The United States Department of Justice posted a Technical Assistance Publication on its website on January 11, 2017, to provide guidance to criminal justice agencies on how to comply with Title II of the ADA in the administration of their programs and delivery of their services. Much of what is said in that publication is relevant to the administration of justice by courts and ancillary personnel (court investigators, court-appointed attorneys, and guardians ad litem) in conservatorship proceedings. As a result, I am providing some excerpts from that publication here, with comments on how they are relevant to the need for compliance with the ADA in the administration of justice, and provision of legal services, in limited conservatorship proceedings.

Application of Title II to Public Entities

Quote: "Title II of the Americans with Disabilities Act (ADA) protects individuals with mental health disabilities and intellectual and developmental disabilities (I/DD) from discrimination within the criminal justice system. Pursuant to the ADA, state and local government criminal justice entities—including police, courts, prosecutors, public defense attorneys, jails, juvenile justice, and corrections agencies—must ensure that people with mental health disabilities or I/DD are treated equally in the criminal justice system."

Comment: Replace "criminal justice system" with "limited conservatorship system" and change "public defense attorneys" to "court-appointed attorneys" and the relevance of this mandate to judges and attorneys in the limited conservatorship system is clear.

General Requirements

Quote: "Title II of the ADA provides that no qualified individual with a disability shall, because of that disability, be excluded from participation in, denied the benefits of, or subjected to discrimination in the services, programs, and activities of all state or local government entities, including law enforcement, corrections, and justice system entities. Such services, programs, and activities include: Interviewing and questioning witnesses, victims, or parties, negotiating pleas, assessing individuals for diversion programs, conducting arraignment, setting bail or conditions of release, taking testimony, sentencing, providing notices of rights, determining whether to revoke probation or parole, or making service referrals, whether by prosecutors and public defense attorneys, courts, juvenile justice systems, pre-trial services, or probation and parole services."

Comment: A conservatorship court is a justice system entity. An attorney appointed to represent a proposed conservatee is the equivalent of a public defense attorney. A court investigator is the equivalent of a pre-trial service provider or a probation service provider. Investigators and attorneys in conservatorship proceedings also conduct interviews, assess individuals, and

provide notices of rights. Attorneys also negotiate dispositions. Therefore, the ADA mandates mentioned in this guidance memo are applicable to similar services in limited conservatorship proceedings.

Modifications and Accommodations

Quote: "Under Title II, state and local government entities must, among other obligations . . . Make reasonable modifications in policies, practices, or procedures when necessary to avoid disability discrimination in all interactions with people with mental health disabilities or I/DD, unless the modifications would fundamentally alter the nature of the service, program, or activity. The reasonable modification obligation applies when an agency employee knows or reasonably should know that the person has a disability and needs a modification, even where the individual has not requested a modification, such as during a crisis, when a disability may interfere with a person's ability to articulate a request."

Comment: The need to make modifications of policies and practices in order to ensure meaningful participation in public services does not depend on a request from someone with a disability if a representative of a public entity knows the person has a disability and needs a modification. Judges, court investigators, and court-appointed attorneys in limited conservatorship proceedings know, by virtue of the allegations in a petition, that the proposed conservatee likely has serious cognitive and/or communication disabilities that require some form of accommodation in order for the person to participate in the proceeding in a meaningful way. They therefore have a duty to conduct an assessment of the person's needs and to develop a disability accommodation plan.

Effective Communication

Quote: "Under Title II, state and local government entities must, among other obligations . . . Take appropriate steps to ensure that communication with people with disabilities is as effective as communication with people without disabilities, and provide auxiliary aids and services when necessary to afford an equal opportunity to participate in the entities' programs or activities. Even when staff take affirmative steps to ensure effective communication, not everyone will understand everything in the same way and there will necessarily be a spectrum of comprehension across the population based on many factors, including but not limited to age, education, intelligence, and the nature and severity of a disability. Public entities are not required to take any action that would result in a fundamental alteration in the nature of a service, program, or activity, or undue financial and administrative burdens."

Comment: The very nature of conservatorship proceedings involves the need to assess a person's capacity to make decisions and to care for his or her own basic needs. By definition, the people who are intended to receive the benefit of judicial and legal services in these proceedings are individuals with cognitive and communication disabilities. Therefore, it cannot be reasonably argued that providing the necessary supports and services needed for effective communication would fundamentally alter the nature of the service, i.e., the administration of justice. Maximizing the potential for effective communication with proposed conservatees may be difficult, but it is essential to do so in order to interview and assess the intended beneficiaries of these judicial and legal services.

Training

Quote: "Appropriate training can prepare personnel to execute their ADA responsibilities in a manner that . . . respects the rights of individuals with disabilities; ensures effective use of criminal justice resources; and contributes to reliable investigative and judicial results."

Comment: Training of judges, investigators, and court-appointed attorneys is also necessary in the limited conservatorship system so they can execute their ADA responsibilities.

Analysis of Policies and Practices

Quote: "Criminal justice entities have reviewed their policies, practices, procedures, and standing orders to ensure that they do not discriminate against people with mental health disabilities or I/DD. For example, entities have collected, aggregated, and analyzed data regarding individuals served by the entity and outcomes to determine whether people with disabilities are subjected to bias or other discrimination. Where potential discrimination has been found, entities have taken necessary corrective measures, such as revising policies and procedures; refining quality assurance processes; and implementing training."

Comment: In some states the judicial branch has established a statewide task force or advisory committee to review policies and practices in guardianship or conservatorship systems. For example, this has occurred in Pennsylvania, Nevada, Washington, and some other states. However, to my knowledge none of these entities has included a review of the compliance or noncompliance of the system with the ADA. The California State Bar has recently shown an interest in access to justice for individuals with disabilities in the limited conservatorship system. However it has not yet proposed a formal action plan to assess and address this issue.

Observations and Conclusions

A search of the website of the U.S. Department of Justice for information or publications on the ADA and guardianship or conservatorship proceedings yields no results. Apparently, the DOJ has not yet issued any guidance memos or technical assistance manuals on this topic.

A DOJ website search also turned up no results for complaints filed against state or local agencies that administer such proceedings. No litigation by the DOJ or settlement agreements on this topic can be found on its website.

I am aware of one formal investigation which was opened by the DOJ and which is pending. It was filed against the Los Angeles Superior Court by my own organization – Spectrum Institute – for ADA violations involving the voting rights of people with developmental disabilities in limited conservatorship proceedings.

I am also aware of a second complaint against the Los Angeles Superior Court – also filed by Spectrum Institute – for ADA violations due to deficient legal services by court-appointed attorneys in limited conservatorship proceedings. The complaint names the court as the source of the problem since it is the court that appoints the attorneys and mandates their training. It also highlights the lack of quality assurance controls by the local entity that funds the legal services, and the lack of standards by the state entity that promulgates rules for legal proceedings.

That complaint was filed in June 2015 and has been pending with the DOJ for 18 months now. The DOJ has placed considerable resources into the investigation of this complaint. However, there has been no indication yet as to what, if any, responsive action it may take.

The application of the ADA to guardianship and conservatorship proceedings is a topic that needs further development. Little attention has been given to people with intellectual and developmental disabilities and how to ensure they have access to justice in these proceedings.

Until there is formal action taken by the DOJ – in the form of investigations, settlements, litigation, guidance memos, or technical assistance manuals – participants in the limited conservatorship system may find instruction in other relevant publications and materials. This is one of them.

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Individual Program Plan (IPP) for Limited Conservatorships: An Essential Advocacy Tool for Court-Appointed Attorneys

by Thomas F. Coleman

A procedure known as an IPP is available for court-appointed attorneys in limited conservatorships. Although requesting an IPP review will improve the prospects of a favorable outcome for clients, attorneys have not been making such requests. Using an IPP procedure will not increase costs for the probate court, so judges should endorse it.

Before explaining how an IPP review would work in this context, a discussion of the history and purposes of limited conservatorships is appropriate.

- ✓ Available but unused procedure
- ✓ Improves outcome for client
- ✓ Needed for effective advocacy
- ✓ May save the court money
- ✓ Should be used in each case

Limited Conservatorships

The California Legislature established a system of limited conservatorships for adults with developmental disabilities in 1980. The new system grew out of the disability rights and de-institutionalization movements of the 1970s. (CEB, California Conservatorship Practice, Section 22.1, at p. 1061 (2005))

The newly-created limited conservatorship system was designed to serve two purposes.

"First, it provides a protective proceeding for those individuals whose developmental disability impairs their ability to care for themselves or their property in some way but is not sufficiently severe to meet the rigid standards of Prob. Code § 1801(a)-(b) for creation of a general conservatorship. Second, in order to encourage maximum self-reliance and independence, it divests the limited conservatee of rights, and grants the limited conservator powers, only with respect to those activities in which the limited conservatee is unable to engage capably." (Id., at Section 22.2, p. 1061)

The rights of people with developmental disabilities found in the Lanterman Act were incorporated by the Legislature into the limited conservatorship system which is regulated by the Probate Code.

"A limited conservatorship may be utilized only as necessary to promote and protect the well-being of the individual, shall be designed to encourage the development of maximum self-reliance and independence of the individual, and shall be ordered only to the extent necessitated by the individual's proven mental and adaptive limitations. The conservatee of the limited conservator shall not be presumed to be incompetent and shall retain all legal and civil rights except those which by court order have been designated as legal disabilities and have been specifically granted to the limited conservator. The intent of the Legislature, as expressed in Section 4501 of the Welfare and Institutions Code, that developmentally disabled citizens of this state receive services resulting in more independent, productive, and normal lives is the underlying mandate of this division in its application." (Probate Code Section 1801)

Role of Appointed Attorneys

The Probate Code specifies that when a limited conservatorship petition is filed, the proposed conservatee is entitled to be represented by an attorney in the proceeding.

"In any proceeding to establish a limited conservatorship, if the proposed limited conservatee has not retained legal counsel and does not plan to retain legal counsel, the court shall immediately appoint the public defender or private counsel to represent the proposed limited conservatee." (Probate Code Section 1471)

"Implicit in the mandatory appointment of counsel is the duty of counsel to perform in an effective and professional manner." (Conservatorship of Benvenuto (1986) 180 Cal.App.3d 1030, 1037, fn. 6) An attorney appointed to represent a conservatee must vigorously advocate on the client's behalf. (Conservatorship of John L. (2010) 48 Cal.4th 131)

Once a statutory right to counsel has been conferred, "a proposed conservatee has an interest in it which is protected by the due process clause of the Constitution." (Conservatorship of David L. (2008) 164

Cal.App.4th 701, 710)

These precedents confirm that adults who are subjected to a limited conservatorship proceeding not only have a statutory right to appointed counsel, but have a constitutional right under the due process clause of the United States Constitution to receive effective assistance of counsel. This article explains how an IPP is an essential component of effective advocacy in these proceedings.

When an attorney is appointed to represent a client with a developmental disability after a petition for a limited conservatorship is filed, the attorney knows the client has special needs. Along with this knowledge comes special obligations for the attorney.

Allegations in the petition put the attorney on notice that the client may have a variety of disabilities that interfere with the client's ability to make decisions, to communicate, and to adapt behavior to social norms. The disabilities may involve mobility, communication, cognitive, or emotional limitations.

To provide the client with effective representation, an attorney should immediately request a variety of documents from the client's regional center. This would include the most recent IPP as well as any clinical evaluations or reports the regional center has about the client. The attorney should have a conversation with the client's case manager to determine the types of communication or other accommodations the attorney will need to use in order to have meaningful interaction with the client. If the client is still enrolled in school, the most recent Individual Educational Plan (IEP) should also be obtained.

A review of the petition, IPP, IEP, and other regional center documents, coupled with a conversation with the case manager, should give the attorney enough information to develop a preliminary plan for making attorney-client interactions as effective as possible.

The attorney should be mindful that the outcome of the limited conservatorship proceeding could effect the client for many years. The proceeding begins with a legal presumption that the client has capacity to make all decisions in his or her life. The Lanterman Act and Probate Code specify that the client has a legal interest in keeping as many rights as possible and in obtaining the supports and services necessary to exercise those rights. It is the duty of the attorney to protect those rights to the extent the client has the capacity, with or without support, to make decisions in each of seven areas.

It is not the duty of the attorney for a proposed limited conservatee to prove anything. The petitioner has the burden of proof.

A limited conservatorship "shall be ordered only to the extent necessitated by the individual's *proven* mental and adaptive limitations." (Probate Code Section 1801)

Proposed conservatees need an attorney to make sure the petitioner and the court investigator demonstrate, with *clear and convincing proof*, that: (1) a conservatorship is necessary; (2) lesser restrictive alternatives have been explored and why they will not work; (3) the proposed conservatee is unable to make decisions, even with help, in any of the areas where authority will be transferred to the conservator; and (4) the person seeking such authority is the best person to be appointed conservator.

Clear and convincing proof requires a finding of high probability, based on evidence so clear as to leave no substantial doubt, sufficiently strong to command the unhesitating assent of every reasonable mind. (Conservatorship of Wendland (26 Cal.4th 519, 552.) That is a very high standard.

To provide effective representation to a proposed limited conservatee, an attorney must conduct an independent investigation on the four critical issues mentioned above. Fortunately, an investigative tool is available and it is without cost to the attorney. It is called an IPP or Individual Program Plan.

Requesting an Individual Program Plan

A regional center client or an authorized representative may request an IPP review at any time. (Welfare and Institutions Code Section 4646.5(b)) Once such a request is made, a review meeting must be scheduled within 30 days.

The statutory purpose of the IPP process coincides with the type of assessment needed for a conservatorship proceeding: "Gathering information and *conducting assessments* to determine the life goals, capabilities and strengths, preferences, barriers, and concerns or problems of the person with developmental disabilities." (Welfare and Institutions Code Section 4646.5(a)(1))

Assessments pursuant to an IPP process "shall be conducted by qualified individuals." (Welfare and Institutions Code Section 4646.5(a)(1))

The attorney should send a letter to the regional center requesting a formal IPP review: (1) to assess whether the client lacks the capacity to make independent decisions in each of several areas – residence, confidential records, education, medical,

contracts, marriage, and social and sexual decisions; (2) if capacity is found to be lacking, then to assess whether the client would have capacity to make decisions in any of these seven areas with appropriate supports and services; and (3) if the answer to question 2 is yes, to identify the types of supports or services that would enable the client to engage in supported decision making so that conservatorship would be unnecessary or would enable the client to keep decision-making rights in one or more of the seven areas.

The letter should specify that the assessment should only be done by a "qualified individual" as required by law. The Legislature has indicated that conservatorship assessments may be done by a licensed medical practitioner, or by a licensed *and qualified* social worker or psychologist. (Health and Safety Code Section 416.8) Whether professionals are qualified to conduct such an assessment would depend on the extent of their training in this area.

The attorney should include in the letter the names of individuals, such as parents or others, who the client wants to attend the IPP review meeting. The meeting should occur after the assessment report has been submitted to the attorney and the regional center. Ideally, the professional who conducted the assessment should be at the meeting to answer questions, even if only by telephone.

Since the process of the court has been invoked by the filing of the petition, an updated IPP agreement cannot be signed and implemented without court review. If the petition is withdrawn or dismissed, the client would be able to sign the IPP update. If the case is set for a hearing, or if a conservator is appointed, the court could approve the updated IPP or the conservator would be able to sign it after letters of conservatorship have been issued.

If the regional center declines to appoint a qualified individual to conduct an assessment, or if there is a disagreement about whether the regional center will provide the supports and services necessary for supported decision making, the attorney has procedural options to resolve the dispute.

The attorney could file an administrative appeal on behalf of the client under the fair hearing procedure. Alternatively, the attorney could ask the probate court to issue an order to show cause directing the regional center to provide the service or to appear in court to show cause why it should not do so.

Regional centers are authorized by statute to conduct an assessment of the specific areas, nature, and degree of disability of the proposed conservatee and to submit a report to the court with findings and recommendations. (Probate Code Section 1827.5(c)) Since the law requires that assessments for IPP purposes must be done by "qualified individuals," an assessment for a court proceeding should be done by a *qualified* professional as well.

Current practices for regional center assessments, at least in Los Angeles County, are very informal. Methods vary from one regional center to another. Criteria and trainings for assessments are lacking. Sometimes reports are filed *after* a conservatorship order is granted. Requests by attorneys for IPP reviews would improve the process considerably.

In Los Angeles, local court rules require attorneys who represent proposed limited conservatees to be "familiar with the role of the regional center." (Rule 4.124) There must be a purpose underlying this rule. Presumably having such knowledge enables attorneys to utilize the services of a regional center in the context of a limited conservatorship case.

There would be no cost to the probate court for IPP reviews requested by attorneys. Regional centers would pay for staff time, capacity assessments, and supported decision making services if needed. The attorneys would spend a few additional hours on a case, but those fees would be paid by the county and would not come from the court's own budget.

Ongoing court supervision of a conservatorship case can be expensive over time. An IPP review may determine that appropriate services for supported decision making completely obviate the need for a conservatorship. The possibility of eliminating ongoing court supervision should itself cause judges to endorse this available, but not utilized, IPP review process in conservatorship cases.

With so much riding on the outcome, effective representation requires attorneys to request an IPP review and an assessment of capacities by a qualified professional. This should become a standard practice for all court-appointed attorneys in limited conservatorship cases. Judges who appoint such attorneys should not just support it, they should require it. ◊◊◊

Attorney Thomas F. Coleman is the Executive Director of the Disability and Guardianship Project of Spectrum Institute. *www.spectruminstitute.org*
See also: A Strategic Guide for Court-Appointed Attorneys in Limited Conservatorship Cases.

ALTA CALIFORNIA
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March 17, 2017

Thomas F. Coleman
Legal Director
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Mr. Coleman:

I am the Legal Services Manager of Alta California Regional Center (ACRC), a nonprofit corporation organized and existing pursuant to the laws of the State of California and contracted with the State of California to provide services and supports to individuals with developmental disabilities. Part of my responsibility at ACRC is to manage and provide oversight of conservatorships of regional center clients, including reviewing newly proposed conservatorships and monitoring clients under existing conservatorships. Based upon my years of experience in this role, I believe that the current conservatorship law and procedures in California are insufficient to protect the rights of individuals with developmental disabilities.

At our agency, for example, approximately 80% of our conserved clients are under general conservatorship, and not, as you might imagine under limited conservatorship, an arrangement which was designed specifically for Californians with developmental disabilities. And the law and probate courts treat general and limited conservatorships quite differently.

For example, proposed general conservatees are not provided a court-appointed attorney, as are proposed limited conservatees. Further, the Probate Code does not require the regional center to assess the proposed conservatee and file an assessment report for general conservatorship petitions, whereas this is mandatory for limited conservatorship petitions. The net result is that in general conservatorships, the probate courts are deprived of objective test data reflecting the proposed conservatee's level of intellectual and adaptive functioning, as well as the regional center's recommendations regarding conservatorship, in making these incredibly important decisions.

Moreover, I have concerns over the qualifications and focus of the court-appointed attorneys assigned our clients for limited conservatorship petitions. I have personally met court-appointed attorneys who represent themselves as Spanish speaking whose Spanish is so poor that they are unable to communicate with their Spanish-speaking clients. More concerning is the lack of familiarity and training of court-appointed attorneys about individuals with developmental disabilities and their rights. It is my understanding that an individual's attorney should advocate for the client to retain

his/her civil rights. In practice, the court-appointed attorneys I have seen nearly always support removal or restriction of their own client's civil rights. I'm unaware of why this should be different for an individual with a developmental disability.

Additionally, petitioners and their attorneys are often unaware of the legal requirement to serve a copy of conservatorship petitions on the regional center at least 30 days prior to the conservatorship hearing. Savvy courts will not allow conservatorship hearings to proceed until after they receive proof the regional center has served at least 30 days before the hearing. However, I have seen multiple instances of courts granting conservatorship petitions without the regional center receiving notice, much less recommendations—this typically occurs in smaller counties.

Also, in my opinion, the presumption of attorneys and probate courts that parents and family members are always suitable conservators for their relatives with developmental disabilities should be reversed for our clients' protection. In my experience, even the most well-meaning and loving family member, once given conservatorship authority, can easily make decisions which unduly restrict the rights of the conservatee, and at worst, can seriously compromise the individual's health and safety. And the court's statutory biennial review of conservatorships (which does not always occur) has historically been insufficient to prevent this type of abuse.

Finally, conservatorship is not the least restrictive method of providing assistance and protection to individuals with developmental disabilities. Probate Code Section 1821(a)(3) requires conservatorship petitions to list all "alternatives to conservatorship considered by the petitioner or proposed conservator and reasons why those alternatives are not available." In reality, petitioners can simply check a checkbox on the petition form and need provide no explanation whatsoever of why the alternatives were not available. ACRC continues to recommend that clients and families consider and exhaust the use of less restrictive methods for providing assistance and protection to individuals with developmental disabilities before even considering seeking conservatorship. Such alternative methods include, but are not limited to, supported decision making, regional center funded services and supports, the regional center planning team process, powers of attorney, written consents for disclosure of records/information, and assignments of educational decision making rights. I note, however, that local school districts, juvenile dependency courts, and probate attorneys do not share this perspective.

Should you have any questions in this regard to this letter, please do not hesitate to contact me.

Sincerely,

Robin M. Black

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