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Conservatorship Legal Services Project

Funding and Fees Review

Progress Report to the Review Team
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by Thomas F. Coleman

Spectrum Institute announced the formation of an Attorney Fee Review Team on December 28, 2020. The review was intended to focus on two types of attorney fees in probate conservatorship cases.

The first area of inquiry was fees to attorneys being paid, pursuant to court order, from the assets of conservatees and proposed conservatees. These fees are paid to attorneys appointed to represent conservatees and proposed conservatees, as well as fees paid to attorneys for petitioners, temporary conservators, permanent conservators, guardians ad litem, and other interested parties. The second area involved fees paid to attorneys appointed to represent indigent conservatees and proposed conservatees that are paid with county funds.

The study was intended to review publicly-funded and privately-funded legal services in these proceedings. The initial objective was to document the quantity and fairness of fund allocations, whether public or private, being

spent on legal services in conservatorship cases. However, as the initial research phase has been unfolding, it is clear that the quality of legal services also should be examined. A quantitative/qualitative analysis is needed.

Spectrum Institute enlisted a team of advisors to review various reports and recommendations to be produced by the legal director. The advisors would give feedback as well as initiate their own independent recommendations. No reports have been sent to the advisors yet since the initial research phase is still in process.

Attorney John Di Pietro joined the Review Team as a research associate in February 2021. He and I have met in person each week for the past 10 weeks to analyze and discuss materials relevant to this study. Much of our time so far has focused on the issue of publicly-funded legal services for conservatees and proposed conservatees. Starting in June, we will have Ben Dishchyan, a student from Loyola Law School in Los Angeles, to assist us in evaluating the privately-funded dimension of legal fees

and services in probate conservatorship proceedings.

In terms of public funding of legal services for indigents, John and I compared the juvenile dependency system with the probate conservatorship system. More than 20 years ago, legal services for children and indigent parents caught up in child dependency proceedings were funded by the counties – just like legal services for conservatees and proposed conservatees are today. Then a major shift occurred. With court reorganization and changes in funding sources, appointed attorneys in dependency courts were deemed to be part of “court operations” and therefore part of the state budget. Superior courts are state entities. Each has a venue for a county, but these are state courts.

As a result of this change, judges could no longer tap into county budgets to pay for court-appointed attorneys who represented children or parents in these proceedings. Each superior court had to include a line item in each annual budget to pay for these legal services. Even though the state was paying these costs, there was no centralized administration for these legal services. Each court did its own thing. There was no way for the Judicial Council, which distributed state budget money to the superior courts, to have quality assurance controls.

Then a pilot project – DRAFT – was created. It is the Dependency, Representation, Accountability, Funding, and Training Program. It is being operated by the Judicial Council. For participating courts, which is optional, the DRAFT program handles recruitment, training, performance standards, setting fee rates and guidelines, etc. Judges in participating courts decide cases. They no longer have to administer a legal services program. Over the years, more courts opted to participate. DRAFT now handles legal services for children and indigent

parents in dependency cases in 20 counties.

At first John and I thought this might be a good model for legal services for indigent adults in conservatorship proceedings. It would eliminate the problem of local judges directly or indirectly controlling what the appointed attorneys do in individual cases. They would no longer have the power of the purse string and could no longer influence the actions of these attorneys by controlling their income stream. But then we discovered another problem. Huge case loads.

The program allows the nonprofit organizations that hire these attorneys to assign too many cases to them. Each attorney is allowed to have nearly 200 open cases at any given time. John and I realized that attorneys overloaded with too many cases could not provide effective representation as required by the constitutional requirement of due process.

DRAFT is not a model we would want to see used in probate conservatorship cases. The existing system has its own problems to be sure. In counties with public defenders providing the services to conservatees and proposed conservatees, there is a problem with understaffing. It would not make sense to replace the public defender system funded by county governments, to a DRAFT program funded by the state. First of all, shifting the funding from counties to the state would require heavy political lifting and a long battle of the budgets. Secondly, even if that hurdle is overcome, there is likely to be overworked attorneys with unmanageable case loads if the DRAFT model is adopted.

John and I decided that DRAFT was a dead-end street. It was worth the time to explore, but we want something that improves the quality of publicly-funded legal services. A DRAFT-style program for conservatorships does not do that.

So we have been studying some of the existing publicly-funded models that exist. There are several. In at least 20 counties, a local county Public Defender department represents conservatees and proposed conservatees. In some others, especially some of the small counties, the county contracts public defender services to a private law firm.

In San Diego County, there is an Office of Assigned Counsel within but ethically walled off from other parts of the Public Defenders office. OAC handles funding of appointed counsel assigned to represent indigent conservatees or proposed conservatees. We first thought this model might be promising. But it turned out to be another dead end.

OAC is nothing more than a bill paying service for the county. OAC does not recruit, train, or supervise appointed attorneys. It does not assign them to individual cases. It just pays fee claims that are approved by the judges and forwarded to OAC for payment. It just as easily could be a clerk in the county office of finance that does this. To have a separate division of the public defenders office to handle this accounts payable function seems odd, if not wasteful of attorney resources.

In San Diego County, three judges in the probate division of the superior court operate a panel of attorneys who get assigned to individual cases. Assignments should be done on a rotational basis, but that is what was supposed to happen in Los Angeles. Supposed to happen. In fact, in Los Angeles County the judges have favorites and not-so-favorites. Some get assigned to three cases per year, while others get 60. Rotational? Not really.

There is no way to tell how the judges in San Diego assign cases to attorneys in real life. Each judge handles the assignments in his or her own courtroom. The provides too much

leeway for manipulation. San Diego's OAC model is not something this Funding and Fee Review Project should recommend as a model.

The court appointed counsel (CAC) program in Los Angeles is another method of providing publicly-funded legal services to indigent adults in conservatorship proceedings. I have studied that system for several years. It is something to be dismantled, not emulated. I have written extensively about the flaws in that system. Let me briefly summarize.

The probate division judges control the legal services program. It is funded by the county, which simply pays individual attorneys as ordered by the judges. The county funds the program with no strings attached. There are no quality assurance controls or accountability, either for the attorneys or for the judges. The county just pays the bills – with one proviso. The judges have been told to keep the costs down or the supervisors might take control of the program away from the judges and start funding the public defenders office to provide these legal services. The presiding judge of the probate division warned the attorneys to minimize their hours or they could lose an income stream. I have done audits of the indigent cases. Attorneys who put in the fewest hours get the most indigent appointments. So they make money by running an assembly line.

Also, there is a local court rule that gives appointed attorneys a dual role. Represent the client but . . . and this is a big but . . . help the judges resolve cases. Even though this dual role creates a conflict of interest, no attorney has pushed back. Doing so could result in retaliation – fewer appointments in the future. One presiding judge told attorneys that some judges put certain attorneys on a blacklist, instructing the probate examiner's office not to assign them to cases in that judge's courtroom.

Another problem with assigning private attorneys to individual cases has to do with follow up if the petition for conservatorship is granted. In Los Angeles, the practice is for the judge to relieve the attorney as counsel for the conservatee the moment the conservatorship order is signed. From that point forward, the conservatee has no attorney.

The conservatee, a person adjudicated to lack capacity on many levels, may remain in a conservatorship for many years – without an attorney. The conservatee is helpless to challenge the conservatorship care plan when it is filed six months after the conservatorship is granted. The conservatee is helpless to challenge illegal or overbearing actions of a conservator, such as denying visits with family members. The conservatee is helpless to blow the whistle when the court investigator fails to conduct a review of the case every two years as required by law.

The conservatee also has no one to help them seek a termination of conservatorship or to request modifications of its terms. So relieving private counsel as attorney of record when the conservatorship is granted has adverse consequences that can last for years.

We recently learned that one of the benefits of having the department of public defender represent conservatees and proposed conservatees is that the appointment continues for the life of the case. The conservatee always has someone to contact for legal advice or help. We have verified that the “life of the case” appointment occurs in public defender offices in Santa Barbara, Ventura, Siskyou, Napa, Nevada, Yolo, Sonoma, Orange, Santa Clara, Solano, and Marin.

I recently attended a several-hour probate conservatorship training program conducted by the California Public Defenders Association. I

also presented my own webinar for the Long Beach Bar Association. Public defenders from several counties attended the webinar. There is something to be said about having an attorney in a conservatorship case who is on a salary and therefore has no incentive to please a judge to keep his or her income stream coming.

We will continue to explore options for publicly-funded legal services programs. Clark County, Nevada has a Legal Aid program that is promising. Part of our focus will be on finding ways to reduce case loads by convincing supervisors to provide more funding for more staffing. One incentive for doing so is to avoid ADA complaints being filed because counties are willfully funding deficient legal services for disabled adults. Such a complaint has already been filed with the U.S. Department of Justice and more can be filed with California’s civil rights agency.

As if the publicly-funded part of the study is not challenging enough, we will soon start to explore the privately-funded component of the funding and fee problem. Having a law student intern on board will help. But we also want members of the review team who have experiences with excessive attorney fees in these proceedings to share the details with us.

It is likely that this study – now called the Funding and Fees Review Project – may last for many more months. We need to get this right. To do so, we must do thorough legal research and factual investigations.

I am grateful for the weekly collaboration with attorney John Di Pietro. I am anticipating the upcoming assistance from law student intern Ben Dishchyan. And I am looking forward to receiving suggestions information on personal experiences from members of the Funding and Fees Review team.