

The Right to Counsel Needs a Legislative Fix

By Thomas F. Coleman

For several years I have been studying the probate conservatorship system in California. After extensive legal research, many interviews, and several audits of scores of cases, I have concluded that access to justice in these proceedings is illusory without a meaningful right to counsel.

The system looks good on paper. However, in actual practice it is terrible. The rights of seniors and other adults with disabilities are being routinely violated in probate conservatorship proceedings.

Less restrictive alternatives are not seriously considered. Professional capacity assessments are not being conducted in most areas of decision-making. Some proposed conservatees never appear in court. Many individuals are not provided with an attorney.

The biggest take away from my research is quite clear. If each conservatee and proposed conservatee had a well-trained and competent attorney who provided legal services as a zealous advocate, a new era of accountability would significantly reduce the systematic errors, omissions, and abuses that have been occurring on a routine basis.

What is keeping this era of accountability on the distant horizon? Why is access to justice out of the reach of the 5,000 or so vulnerable adults who are targeted by newly filed conservatorship petitions each year? Why are the other 60,000 or so of them who are living under an order of conservatorship doomed to accept their fate without the ability to challenge illegal court orders?

The answer is simple. They are not guaranteed the right to a competent attorney who will advocate for and defend them with the same care and vigor that attorneys do for non-disabled litigants who privately retain them in other types of civil cases.

The cause of this problem is easily identifiable. The probate code does not explicitly affirm the right of such litigants to retain an attorney of their choice, nor does it mandate the appointment of counsel if they can't retain one. The law currently does not specify that such attorneys must act as zealous advocates. There are not existing performance standards to guide the advocacy practices of these attorneys. The law does not expressly require the appointment of counsel for conservatees on appeal.

The failure of the conservatorship system to provide competent counsel to conservatees at each and every critical stage of the proceeding is not theoretical. It impacts real people in very significant ways.



When 34 year-old conservatee Michael P. was removed from the home of his parent-conservators in 2012, an attorney was appointed to represent him by the court in Lancaster. Due to a half-baked investigation by the lawyer, Michael was returned home. Just a few weeks later, he died under circumstances the coroner found concerning. Had there been performance standards for appointed attorneys, a more thorough investigation might

have saved Michael from a premature death.

That same year, 26 year-old Gregory D. was in the midst of a visitation dispute initiated by his father in Los Angeles – a parent whom Gregory said he feared. His court-appointed attorney surrendered Gregory's constitutional right to freedom of association by agreeing, over Gregory's objection, to an order requiring Gregory to spend every third weekend with his father. During those visits, Gregory was forced to attend church services – something Gregory despised.

Gregory's mother appealed, arguing that the order should be reversed as a violation of her son's First Amendment rights. Of course, the attorney who

surrendered Gregory's rights did not file an appeal to challenge his own flawed advocacy. Instead of appointing an attorney to represent Gregory on appeal, the appellate court dismissed the appeal, ruling that Gregory's mother lacked standing to appeal for her son. Had Gregory been provided an attorney on appeal, the court would have reached the merits of the issues and Gregory could have been freed from this ongoing forced visitation.

The following year, 19 year-old Stephen L. was drawn into a conservatorship proceeding in Los Angeles. His court-appointed attorney made allegations to the court that would have resulted in Stephen losing the right to vote – a right that Stephen had indicated he wanted to keep. The only reason Stephen was not disenfranchised was because the attorney reluctantly withdrew his allegations after intervention by Spectrum Institute. The jeopardy to Stephen's right to vote would not have occurred had the law specified that appointed attorneys must advocate for the stated wishes of their clients.

About the same time, 59 year-old David R. was not as fortunate as Stephen. David, a former producer with National Public Radio, was stripped of his right to vote by a judge in San Diego. The appointed attorney did not seek to protect David from disenfranchisement. A few years later, when David asked the court to reinstate his right to vote, the court did not appoint an attorney for him. It was only through media exposure and persistent outside agitation that David regained his right to vote. Had attorney performance standards existed, David likely would never have lost his right to vote in the first place.

Consider 81 year-old Theresa J. When she was forced to participate in conservatorship proceedings in Los Angeles, Theresa hired an attorney. The court refused to acknowledge her chosen lawyer. Over Theresa's objection, another attorney was appointed to represent her. He ignored Theresa's opposition to a conservatorship and instead advocated for one. Had California law specifically affirmed the right of proposed conservatees to retain counsel, or had performance standards existed, these transgressions never would have happened.

The case of 80 year-old Katherine D. is instructive. About three years ago, the Alameda County Superior Court conducted probate conservatorship proceed-

ings without appointing an attorney to represent Katherine, despite the fact that her dementia precluded her from representing herself and defending her estate. Even though she had a pre-arranged trust, Katherine and her estate were placed under the control of a conservator.

Ashley E., a 26-year-old autistic woman, was ordered into a conservatorship earlier this year. Ashley did not appear in court and the public defender she was assigned never once met her. Ashley's case cries out for performance standards.

Violations of the right to counsel are widespread. Two years ago, a whistle-blower report revealed that in Sacramento and surrounding counties, proposed conservatees routinely are not being provided with an attorney. When attorneys are appointed, many of them perform incompetently.

The problem at the appellate level is a policy failure. No statute or court rule specifically directs the Court of Appeal to appoint counsel when it learns that a conservatee does not have a lawyer on appeal.

The right to counsel for conservatees, both in the trial court and on appeal, should be spelled out in statute. The role of such attorneys should be defined and performance standards should be developed. There can be no access to justice for conservatees without the assistance of competent counsel.

The Legislature should pass the right-to-counsel bill being developed by Spectrum Institute. It is endorsed by various seniors and disability rights organizations. The Judicial Council should support the bill and the governor should sign it into law.

The right of conservatees to competent counsel at every stage of conservatorship proceedings should be affirmed by all three branches of government. The time to fix this problem is now.

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