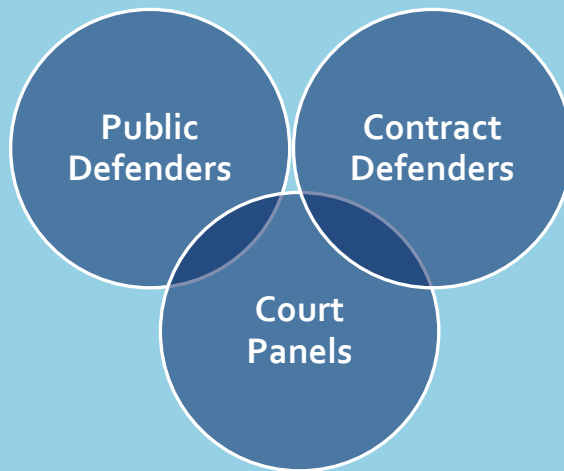


Funding and Fees Review Project

Reporting on the Use of Public Funds and
the Seizure of Private Assets to Pay for
Legal Services in Conservatorships

PART ONE

Public Funding of Legal Services in Conservatorship Proceedings



Thomas F. Coleman
Legal Director
Spectrum Institute

John DiPietro – Research Associate
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Executive
Summary

Sept. 7, 2021

AB 1194 Incorporates the Right to Counsel Provisions of SB 724

This report makes numerous references to Senate Bill 724 which strengthens the right to counsel for conservatees and proposed conservatees. Just days before the release of this report, the substance of SB 724 was incorporated into Assembly Bill 1194. This report is being released on September 7. The legislative session is adjourned on September 10. Because there was no opposition to either bill, it is anticipated that both houses of the legislature will pass AB 1194 before the session ends. As a result, the bill should be on the governor's desk by September 11, be signed into law by October 10 and become effective on January 1, 2022.

Wherever reference in this report is made to SB 724, it is actually referring to the right to counsel provisions of AB 1194.

Many thanks to the principal author (Assemblymember Low), principal co-author (Senator Allen), and another co-author (Senator Laird) for carrying this legislation to fruition.

This report was produced by Spectrum Institute,
a nonprofit private operating foundation with
tax exempt status under federal law.



Website:

<https://spectruminstitute.org/>

Executive Summary:

<https://spectruminstitute.org/public-funding-summary.pdf>

Report:

<https://spectruminstitute.org/public-funding-report.pdf>

Preface

The Time for Change is Now



Indigent legal defense services in probate conservatorship proceedings are provided through a fragmented patchwork of local providers. Mandated by the state, counties fund legal services by government lawyers, nonprofit organizations, or private lawfirms. Most of the delivery systems lack transparency or meaningful accountability. The attorneys who defend clients with mental and developmental disabilities in these cases do not have formal performance standards to guide them. Because appeals are rare, appellate courts are deprived of an opportunity to issue published opinions correcting systemic flaws and calling out judicial abuses or attorney malpractice. Access to justice is therefore largely a matter of chance in probate conservatorship proceedings.

In contrast, indigent legal defense services in adult criminal, juvenile delinquency, and child dependency proceedings are highly regulated. In all of these areas of law, attorneys have clearly defined performance standards. There are a fair number of appeals, thereby allowing appellate courts to routinely establish binding precedents that create guardrails protecting litigants from deficient practices and unjust results.

The time has come for officials to provide checks and balances for conservatorship legal services – just as they have done for adults and juveniles accused of crimes and for children and parents whose family relationships are placed in jeopardy. Seniors and people with disabilities also deserve zealous and competent legal defense services.

Changes need to be made *now* to provide adequate funding, impose caseload limits, adopt performance standards, and implement quality assurance controls. Without significant improvements, access to justice in conservatorship proceedings may continue to be nothing more than an illusory promise for tens of thousands of seniors and people with disabilities.



Foreword

There is Much Work to be Done

by Tony Chicotel

A familiar refrain in conservatorship law practice is that conservatorship is not meant to be an adversarial process; rather, it should be collaborative and result in the “best interests” of the proposed conservatee. As happens a lot in conservatorship matters, this refrain disregards the proposed conservatee’s perspective.

For an average conservatee, conservatorship is absolutely adversarial. From the outset of the case, conservatorship is a significant imposition. The proposed conservatee is served with papers, probed with personal questions asked by strangers, and has their life and decisions examined in a public forum. The proposed conservatee’s personal freedoms are at stake: their right to control their health care, choose where they live, how they spend their money, and who they associate with. If conservatorship is granted, the conservatee is relegated to the legal status of a child and there will almost certainly be no appeal.

Often, a proposed conservatee’s only hope for avoiding conservatorship or for at least avoiding an overbroad conservatorship, is their defense attorney. All of the other players in a conservatorship case: the judge, court investigator, conservator, conservator’s attorney, and guardian ad litem, are charged with pursuing the best interests of the proposed conservatee. The defense attorney, on the other hand, performs the singular and crucial role of fighting for the conservatee’s preferences. Without a robust defense, conservatorship fails the due process requirements designed to lead the case to the “right” result.

Good conservatorship defense, which is essential to honoring the constitutional rights of proposed conservatees, covers a large number of important concerns: scrutinizing capacity determinations, cross-examining witnesses, forcing the conservator to meet their burden, and pushing for less restrictive alternatives, in addition to considering the conservatee’s placement, the extent of the conservator’s powers, and who would best serve as a conservator. Overworked and underprepared defense attorneys cannot adequately address all of these concerns.

Many years ago, I researched over 300 conservatorship files in ten different courts and found that only 1% of all cases went to trial, despite the fact that the conservatee actively opposed

the conservatorship at least 25% of the time. Even more telling, proposed conservatees who had an attorney were slightly *more* likely to be conserved than proposed conservatees who had no attorney at all. This naturally leads to wondering what exactly the defense attorneys are adding to the conservatorship process.

Thanks to the groundbreaking research of the Spectrum Institute, we know that conservatorship defense is set up to be second-rate in many parts of the state. We know the county-provided conservatorship defense attorneys are not generally hired because of demonstrated competence but rather because they are inexpensive. Working cheap is often a proxy for poor quality. We also know the defense attorneys have huge caseloads that stretch them thin, diminish the quality of their work, and erode the zealous advocacy meant to be their true value-add. Finally, we know many of the contracted conservatorship defense attorneys have little training and guidance as well as discordant missions,* causing significant variation in the quality of defense throughout the state. The Spectrum Institute has exposed the state's recipe for injustice.

There is much work to be done to improve the quality of conservatorship defense in California. These efforts will be pivotal to the conservatorship reform movement that is growing throughout the state. It is high time for the state to improve the quality of conservatorship defense and make the conservatorship system more just.

Tony Chicotel is the Senior Staff Attorney with California Advocates for Nursing Home Reform. For the last 15 years he has worked as a staff attorney for the organization. His primary roles at CANHR have included counseling and representing long term care consumers and advocating for statutory and regulatory policy improvements. His areas of expertise include nursing home residents rights, dementia care, capacity and decision making, and conservatorships. Prior to working at CANHR, he was a rights attorney for older residents of San Diego and Imperial Counties at Elder Law & Advocacy, a legal services organization. He saw over 1,000 clients annually regarding a wide variety of legal subjects, including conservatorship. Representing proposed conservatees in conservatorship cases was part of his practice. Tony Chicotel is the author of [California Conservatorship Defense: A Guide for Advocates](#).

*** Email to Spectrum Institute regarding conservatorship defense in Lake County**

“Here is the 2017 contract that I signed regarding provision of Conservatorship representation to Lake Indigent Defense LLP (LID). A copy of the LID contract with the County of Lake is attached. Note that LID is primarily concerned with Defense of Criminal cases. Conservatorships are a ‘minor’ consideration in both the county and the criminal defense bars view.” – Mary Heare Amodio (August 25, 2021)

Ms. Heare Amodio is responsible for conservatorship and probate matters with LID. She is also the current president of the Lake County Bar Association.



Suggestions for Improvement

- Set Caseload Limits with Appropriate Funding
- Create an Office for Conservatorship Defense

“Jurisdictions are reluctant to do so but I think setting a case cap and making sure appropriate funding is allocated for the number of cases handled would be a huge improvement. However, I do see some merit in a separate office that does this work within the county because it is different than core criminal defense practice that public defenders primarily specialize in. It could also remain a function of the public defender with training and perhaps making sure there is proper cross training and having it be an assignment that is occupied for a longer period of time.”

Brendon Woods - August 25, 2021



Key Findings

- ✓ The quality of legal services for seniors and adults with mental or developmental disabilities in probate conservatorship proceedings may vary widely among counties.
- ✓ There is a lack of transparency and accountability by providers of conservatorship indigent legal defense services. Funding decisions for these services are made by elected county supervisors. Unlike many other constituencies with political power, adults ensnared in conservatorship proceedings largely lack the ability to lobby or influence these politicians.
- ✓ Standards for legal defense services in these cases are governed by state law. Inadequate funding by counties may make it impossible for attorneys to deliver the quality of services to which the clients are constitutionally and statutorily entitled.
- ✓ Further investigation, including auditing, of these legal services programs is necessary.
- ✓ Shifting funding responsibility from counties to the state may be constitutionally required.

The State's Imprint on Legal Services

Probate conservatorship proceedings are a function of state statutes. Cases are processed by state courts. Judges in the cases are state employees. State laws require or authorize the appointment of attorneys in these cases. State mandates require counties to provide or fund indigent legal defense services in these cases. Attorneys who deliver these legal services are licensed by the State Bar. State law requires them to abide by the state constitution as they fulfill their duties as lawyers. The Supreme Court has adopted Rules of Professional Conduct with standards to which these attorneys must conform. Given these parameters, it is clear that state "laws of a general nature" form the foundation and contours of conservatorship indigent legal defense services.

Local Implementation of Legal Services

Supervisors in each county have three

alternatives to provide indigent legal defense services in probate conservatorship proceedings: (1) 22 counties use a county public defender department; (2) 24 counties contract with law firms often referred to as contract public defenders; and (3) 12 counties allow the superior courts to appoint attorneys from panels or on an ad hoc basis in individual cases and then pay the attorneys pursuant to a court order.

Lawyers providing conservatorship legal services in some county departments have excessive annual caseloads ranging from 350 to 450 clients. Caseloads of other county public defender departments are unknown due to the refusal of department heads to share information in response to public records requests.

Some county public defender departments lack materials to guide attorneys in delivering these legal services. No county public defender has disclosed performance standards or caseload limits in response to

public records requests for them.

Agreements between counties and contract public defenders vary greatly. Some have detailed performance standards while most are vague or silent on this matter. Some have specific mandates prohibiting disability discrimination in the delivery of services. Some are silent on this issue. Some authorize performance audits by county officials but there is no evidence that such audits ever occur.

Lack of Uniformity Raises Constitutional Concerns

The California Constitution requires that laws of a general nature are uniform in operation. Because recipients of legal services in each county are similarly situated, they are entitled to equal protection in terms of the quality of these services. Due process requires attorneys, no matter where they are located, to provide clients with effective and competent representation. Due to a lack of transparency and accountability, no evidence has been discovered to show that these constitutional mandates are being fulfilled in actual practice.

Further Investigation is Needed

The study of publicly-funded conservatorship indigent legal defender services conducted by Spectrum Institute has raised more questions than it has provided answers. County departments, county contractors, and court-operated programs have no incentive to share information that might disclose deficiencies in their operations.

The 70,000 adults living under ongoing conservatorship orders, and the 5,000 or more adults who are targeted by new

conservatorship petitions annually – and their families and supporters – are entitled to full disclosure about the policies and practices of the providers of these services. County taxpayers are also entitled to know if they are funding legal services that are deficient or that violate state and federal laws governing such services.

Because the funding and delivery of such legal services are fragmented and localized, there is currently no state oversight of such services. Each county operates independently, with political and financial considerations guiding the decisions of county supervisors. Chief public defenders are political appointees, with the exception of one county that elects the public defender.

California's method of delivering indigent legal defense services in probate conservatorship proceedings is long overdue for an audit. The "system" if it can be called that, has been operating on "auto pilot" for decades.

The judiciary committees of both houses of the Legislature can conduct oversight hearings. With direction from the Legislature, the State Auditor could conduct such audits in a sample of counties. The State Bar, with direction and oversight by the Supreme Court, could do the same. At the local level, civil grand juries in any or all of the 58 counties could investigate conservatorship indigent legal defense programs as part of their agenda for next year. The California Grand Jury Association has already been alerted to this problem and has been asked to encourage local civil grand juries to take up this matter. Many civil grand juries have investigated deficiencies in the services of county public guardian departments and some have issued reports documenting major defi-

ciencies. They could do the same for indigent legal defense services in probate conservatorship proceedings, especially when those services are provided by county public defender departments or by contract public defenders with county funds.

Federal Intervention May Be Necessary

A complaint against the Los Angeles Superior Court for ADA non-compliant legal defense services by the panel of attorneys operated by the court is pending with the United States Department of Justice for investigation. The DOJ could open an investigation into that complaint but broaden it statewide due to evidence from this and other reports indicating that people with disabilities are receiving deficient legal services – services which are vital to their liberty interests and about which they have no recourse to complain.

Shifting Funding to the State May Be Constitutionally Required

Funding for local schools formerly was provided by local governments. Because the tax base and financial abilities varied greatly among school districts due to the wealth of residents, some schools were well funded while others were not. This had a significant impact on the quality of education students received – all because of where their parents happened to live.

In a landmark case in the 1970s, the California Supreme Court declared that local funding of public schools was unconstitutional. Education is a fundamental constitutional right of young people in California. State law mandates they attend school. Receiving a good or poor education as a child has lifelong effects. Based on the principle of equal protection and the

constitutional requirement that laws of a general nature are uniform in operation, the Supreme Court declared that the State of California must assume responsibility for funding public schools and must distribute the funds equitably.

A shift in funding from counties to the state occurred about two decades ago for indigent legal services in juvenile dependency cases. These proceedings involve children who have been taken from their parents due to alleged abuse or neglect. Since fundamental rights are involved in such family separations, the appointment of counsel for children and for indigent parents is constitutionally required. State legislators, partly due to federal financial incentives and mandates in child welfare proceedings, shifted responsibility to the state to provide such legal services. As a result, a higher degree of uniformity of quality of such services was achieved, regardless of what area of the state a family lived. The Legislature and the Judicial Council imposed caseload limits and performance standards for the attorneys paid by state funds in these cases. Quality assurance controls and monitoring mechanisms were developed.

The time may have come for such a shift in funding for indigent legal services in conservatorship proceedings. These cases also jeopardize liberty and place fundamental constitutional rights at risk. They also may cause family separations.

Allowing local political and financial considerations to determine the level of funding for conservatorship indigent legal defense services may violate the same constitutional principles that caused the California Supreme Court to require a shift from local to state funding of the public education of children.

Distribution & Recommendations

California Supreme Court

with a renewed [request](#) for the Court to convene a Workgroup on Conservatorship Right to Counsel Standards

California Legislature

with [requests](#) to pass AB 1194 (right to counsel) and AB 625 (caseload study) and to direct the Judicial Council to study options for shifting the funding of indigent legal defense services in probate conservatorships from counties to the state similar to dependency cases

California Judicial Council

with a [request](#) to amend court rules to clarify that courts must provide accommodations to litigants with known cognitive disabilities that prevent meaningful participation in a case and that appointment of counsel may be a necessary accommodation for such litigants to ensure access to justice

California State Bar

with a [request](#) to conduct a quality assurance audit of a sample of cases in three counties – one with public defender representation, one with contract public defender representation, and one with a court-appointed counsel program – to evaluate whether indigent legal defense services in probate conservatorship proceedings are being conducted in a manner consistent with the requirements of due process, rules of professional conduct, and disability nondiscrimination laws, and to report its findings to the Supreme Court

State Public Defenders Association

with [requests](#): to adopt guidelines, consistent

with ABA and California State Bar indigent legal defense principles, for caseload limits for conservatorship defense attorneys; to develop performance guidelines for conservatorship indigent defense counsel consistent with the outline contained in this report

California County Executives

with a [request](#) to convene a team consisting of the public defender, county counsel, and risk manager to develop performance standards, caseload limits, and monitoring mechanisms to ensure that county-funded indigent legal defense services in probate conservatorship proceedings conform to constitutional and statutory requirements, state and federal non-discrimination mandates, and rules of professional conduct with the dual purpose of improving the quality of services for recipients of legal services and reducing the county's risk of liability for substandard services

Civil Grand Juries

with a [request](#) that they review indigent legal defense programs operated by public defender departments and contract public defenders to determine whether there are caseload limits, performance standards, and quality assurance monitoring to ensure that recipients of such services receive effective assistance of counsel as required by federal and state law

United States Department of Justice

with a [request](#) to take action on pending complaints regarding ADA non-compliant legal services in probate conservatorship proceedings in Los Angeles County and to open a formal statewide investigation into deficient legal services being provided to litigants with serious cognitive and communication disabilities in such cases

Overview

Spectrum Institute has been studying legal services in the context of probate conservatorship proceedings for several years. The Funding and Fees Review Project builds on previous reports that called into question whether conservatees and proposed conservatees are receiving the quality of legal representation to which they are entitled by the constitutional guarantee of due process and the equal access promises of federal and state disability nondiscrimination laws.

The deeper we have explored the intricacies of the probate conservatorship system, the more cause there has been for concern that these guarantees and promises are not being implemented by those who fund or provide legal services – especially to indigent adults who cannot afford private legal counsel. Ironically, indigent respondents in these cases must rely on legal defense services being provided to them by the same government that conducts these legal proceedings which place their cherished freedoms in jeopardy.

Our research has found no evidence that public funds are being used to support legal defense services that provide these vulnerable adults with effective assistance of counsel or that the attorneys who deliver these services are consistently complying with ethical duties and professional standards.

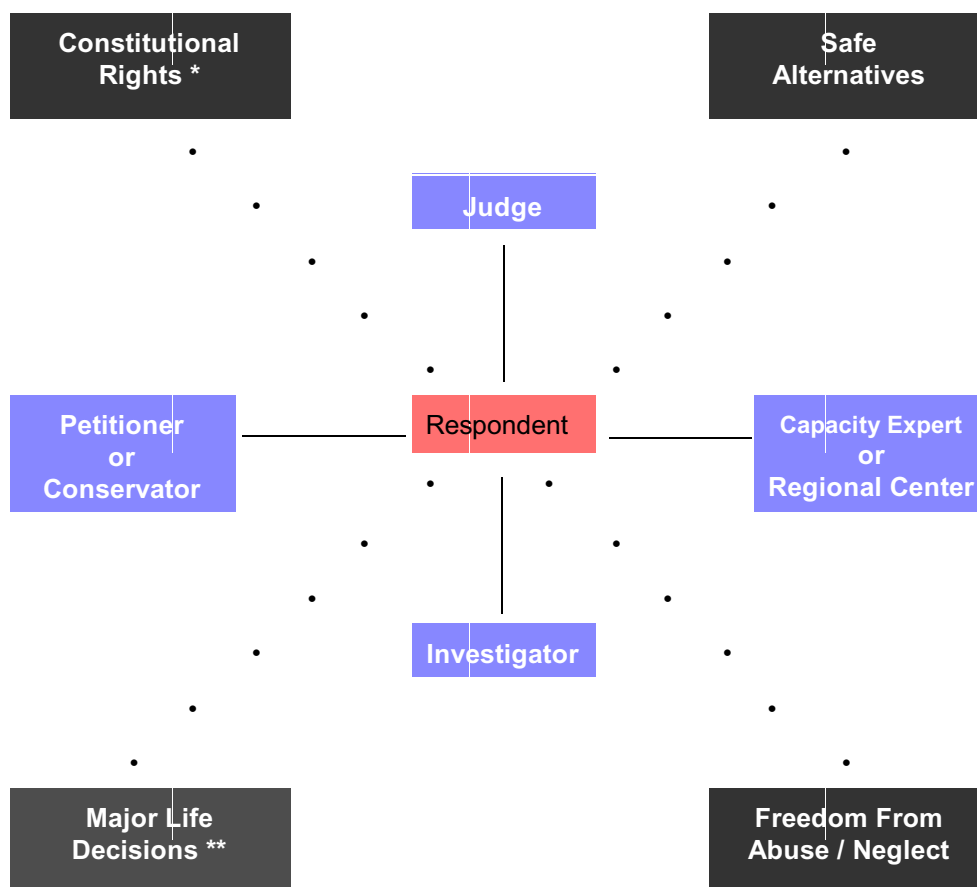
This study raises more questions than it provides answers. It reinforces suspicions from previous research that public funds are supporting service delivery methods that lack transparency, have no accountability, and that are devoid of meaningful performance standards to guide the lawyers on whom clients with significant disabilities depend to defend their fundamental rights.

The time has come for the officials who license the attorneys (State Bar), who promulgate the rules of professional conduct (Supreme Court), who fund indigent defense services (county governments), and who enforce disability nondiscrimination protections (United States Department of Justice and California Department of Fair Employment and Housing) to fulfill their duties to protect involuntary litigants who depend on them to ensure that they will receive access to justice. To that end, this report is being transmitted to these officials. It is also being sent to the Legislature to emphasize that SB 724 is a necessary, but not sufficient, step in the right direction.

State rather than local funding of these legal services ultimately may be necessary – with performance standards and monitoring attached – to ensure that conservatorship legal services are provided uniformly throughout the state so that all indigent adults receive due process and equal protection of the law.

Participants & Issues in Probate Conservatorships

Appointing and Funding Competent Counsel is a Necessary ADA Accommodation to Ensure that Respondents with Cognitive Disabilities Have Access to Justice



Respondents with cognitive disabilities are unable to represent themselves in conservatorship proceedings. Appointing an attorney is a necessary accommodation under the Americans with Disabilities Act to enable a respondent to have meaningful participation in a case. Once an attorney is appointed, counsel must provide *effective* advocacy services. To ensure effective assistance of counsel, courts that appoint counsel and counties that fund these legal services both have obligations to adopt ADA-compliant performance standards, require proper training of the attorneys, and create methods to monitor their actual performance. The duty of courts and counties regarding appointment, training, and monitoring of ADA-accommodation attorneys stems from Title II of the ADA, Section 504 of the Rehabilitation Act of 1973, Government Code Section 11135, Welfare & Institutions Code Section 4502, and implementing regulations.

Advocacy services of an appointed attorney include: examining capacity assessments in all areas of decision making, determining whether less restrictive and safe alternatives are viable, vetting the proposed conservator, insisting on a care plan that provides safety and reduces the risk of abuse, and making sure that the judge, petitioner, guardian ad litem (GAL) or court investigator, capacity experts, and conservator follow statutory directives. A respondent is unable to perform these essential functions without an attorney.

** Constitutional rights include intimate association (sex), the right to travel, the right to marry, the right to contract, the right to vote, and freedom of choice in personal decisions. ** Major life decisions include choices regarding residence, occupation, education, medical care, social life, finances, etc.*

Thomas F. Coleman, Legal Director, Spectrum Institute
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About the Project

Research for this project began nearly two years ago. It was focusing on the seizure of the private assets of conservatees to pay for the legal fees of attorneys appointed by the court to represent them as well as paying for the fees of the attorneys for their adversaries, namely, petitioners and conservators. The awards of attorney fees made by judges often seemed excessive. The method of assessing fees seemed rather arbitrary. The courts that are supposed to conserve the assets of vulnerable adults were presiding over a “fee for all” that was depleting rather than preserving these funds.

In the process of doing this research, it became apparent that the problem of funding legal services in conservatorship proceedings was not limited to conservatees with assets. There is also a problem with the manner in which public funds are being used to pay for legal services for indigent adults who are conservatees or proposed conservatees. Issues of under funding of public defenders, excessive caseloads, and deficient legal services for indigent adults also needed to be addressed. Added to the mix is the problem of the judges who decide cases managing legal service programs involving the very attorneys who appear before them in cases and who depend on future appointments from the judges for an income stream.

With limited time and staffing, the question was which area to tackle first: the “fee for all” that harms people with assets or the deficient services which harm those without assets. The legal director decided that in this case the priority would be given to indigent defense services. The equally important problem of the seizure of private assets would come later.

Individuals with personal or professional experience helpful to this study were invited to serve as advisors to the project. Some had personally experienced the pain often associated with probate conservatorship proceedings. Others are government officials whose constituents are sometimes entangled in these cases. A former superior court judge accepted the invitation as did attorneys who have defended the rights of proposed conservatees. The draft of this report was sent to the advisors to review and provide comment to the project director. The full list of advisors appears at the end of this report.

The project was managed and the report was written by attorney Thomas F. Coleman, legal director of Spectrum Institute. He was assisted by John DiPietro, an attorney who formerly represented municipal governments. Benjamin Dishchyan, a summer intern from Loyola Law School in Los Angeles, provided valuable assistance with the investigation.

Once this first report on public funding is distributed, the research on the second report on the seizure of private assets will resume. We anticipate that the second report will be ready for release in the spring of 2022.

About the Author

Criminal Defense • Civil Rights Advocacy • Conservatorship Reform

The affinity of Thomas F. Coleman for criminal defense advocacy began in 1972 during his second year of law school. Tom and students from several schools in Los Angeles formed the nation's first gay law student association. They met at the Gay and Lesbian Community Center. Their mentor was attorney [Stephen Lachs](#).*

Steve was the supervising public defender at the arraignment division of the Los Angeles Municipal Court. This was during an era when undercover vice officers would arrest thousands of men each year in Los Angeles for verbal conversations about noncommercial sex or for engaging in consenting sex out of public view. If convicted of lewd conduct, the men would have to register as sex offenders (like child molesters or rapists), would lose their jobs and professional licenses, and sometimes be jailed.

With Steve's help, Tom and another law student started an arraignment intervention project through which they gathered statistics to prove that the lewd conduct law was being enforced in a discriminatory manner against men in a homosexual context. It was rarely used to arrest men for heterosexual speech or conduct. They also developed arguments that the lewd conduct law was unconstitutionally vague and the solicitation portion violated freedom of speech and thus the law should be invalidated.

This [study](#) and these arguments later became the basis for the landmark decision of the California Supreme Court voiding the solicitation aspect of the law and reinterpreting the lewd conduct portion in a manner that made enforcement by undercover vice officers nearly impossible. Tom was the attorney who won that case. (*Pryor v. Municipal Court* (1979) 25 Cal.3d 238) That was after six years of criminal

defense work representing clients who were targeted for arrest and prosecution under this homophobic and oppressive statute.

Tom's criminal defense work shifted to the appellate level in 1985 when he started accepting appointments from the Court of Appeal to represent clients in felony appeals. This included convictions for crimes such as murder, robbery, burglary, and other serious felonies. Tom handled dozens of criminal appeals until 1999 when the primary focus of his law practice shifted to [civil rights advocacy](#).

Since 2012, Tom's attention has been directed to probate conservatorship cases in which the liberty of adults with mental and developmental disabilities are placed at risk. He has done extensive research, writing, and educating in this area of the law and has [published](#) many commentaries and policy reports.

Tom has been consulted by private attorneys and public defenders, filed amicus curiae briefs in conservatorship appeals, and has conducted bar association webinars. He developed model [jury instructions](#) for use in the rare cases that go to trial. Lawyers who have consulted Tom have graciously expressed their [appreciation](#).

Tom is currently a member of the California Public Defender Association.

* Former public defender Stephen Lachs, now a retired Superior Court Judge, is an advisor to the [Funding and Fees Review Project](#). Santa Barbara deputy public defender Susan Sindelar is also a project advisor. The first phase of the project focuses heavily on conservatorship defense services by county public defenders, contract public defenders, and court-appointed counsel.

Advisors to the Funding & Fees Review Project



Attorney Brook Changala challenged the payment of fees to a court-appointed attorney who was arguing against the client's wishes. He sees systemic problems in the fee-award process.



Roz Alexander-Kasparik was only allowed to be the conservator for her fiancé David Rector after the court depleted David's assets with payments of fees to the conservator and attorneys.



Attorney Evan Nelson saw Catherine Dubro's assets being drained when at one point there were five attorneys being paid from her estate, while Catherine herself had no attorney.



Sharon Holmes saw Theresa Jankowski suffer "legalized extortion" when lawyers wanted hundreds of thousands of dollars in fees in exchange for a dismissal of her conservatorship case.



Attorney Ben Bartlett is a member of the Berkeley City Council. He is working with constituents to reform conservatorship proceedings in the probate court in Alameda County.



Deputy Public Defender Susan Sindelar has handled scores of conservatorship cases. She brings to the fee study the perspective of a legal advocate who is paid from county funds.



Attorney Cheryl Mitchell is an academic and legal educator with a passion for justice. She would like to see systemic reforms in the way that attorney fees are calculated and awarded.



Antony Chicotel is a staff attorney with California Advocates for Nursing Home Reform. He is the author of *California Conservatorship Defense: A Guide for Advocates*.



Alameda County Supervisor Nate Miley is an honorary member of the team. He will participate through his representative to identify solutions to the attorney fee problem.



Alameda County Public Defender Brendon Woods (photo) is represented on the team by John Plaine, the attorney assigned to the office's probate conservatorship desk.



Dr. Gloria Duffy, CEO of the Commonwealth Club of California, personally witnessed her mother's assets being depleted by ongoing court-authorized attorney fee awards.

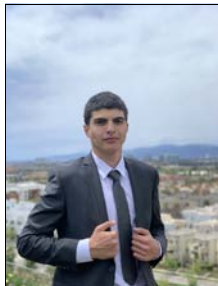


Hon. Stephen Lachs, a former public defender and retired superior court judge, brings to the study the perspective of a jurist with 20 years of experience on the bench.

Research Associates



Attorney John Adam Di Pietro is a research associate for the Funding & Fees Review Project. He is working closely with the project's legal director to investigate how public funds are being used to provide indigent legal defense services in probate conservatorship proceedings. He will continue assisting the project as it moves into phase two to study how assets of seniors and people with disabilities are being confiscated to pay fees for attorneys in these cases. His background in municipal law brings a unique perspective to the study. John's legal practice for the past 44 years has involved legal representation of businesses as well as local governments.



After earning a B.B.A. in finance from Loyola Marymount University, Ben Dishchyan made the decision to attend law school. He recently completed his first-year as a law student at Loyola Law School in Los Angeles. Prior to attending law school, Ben worked in the elder care industry, placing elders in affordable board and care facilities that met their medical and personal demands. Being a licensed insurance broker, he also has knowledge in the sales and consulting of the insurance market. Ben has been assisting the study by researching the workings of and gathering information from indigent legal service programs in all 58 counties in California.

Project Director



Attorney Thomas F Coleman is directing the Funding & Fees Review Project. Prior to formally launching the project, Tom spent nearly a year gathering research materials and legal precedents that should guide and govern the assessment and awarding of attorney fees in probate conservatorship cases. That information will help guide phase two of the study. He is the author of a report containing the findings and recommendations for phase one of the study which focuses on the use of public funds for indigent legal defense services. Tom's background involves nearly five decades of civil rights advocacy.

Comments From
Rosalind Alexander Kasparik
Advisor to the Funding and Fees Review Project

The report demonstrates that you and your legal colleagues get the problem and have some very well-considered ways to solve the guardian/conservator morass. This work is so important. I'm glad that Spectrum Institute has undertaken its study. David's spirit is too. My comments and concerns are not legal. They are general in scope and personal in detail.*

National Problem. I know you're focused on the state of California because each state has its own probate rules. I've always wondered why there aren't national/federal rules for probate conservatorship proceedings. That there's no federal oversight to meaningfully assist in our dire situations was one of the most disheartening discoveries David and I made. I called our Congresspersons and Senators naively assuming there was an oversight commission on elder abuse that involved finding and punishing guardian and fiduciary conservator abuses. There wasn't one. Could the DOJ form such a commission to be led by the work already undertaken and committed to by the advocates at Spectrum Institute?

Attorney Disinterest. Adults ensnared in conservatorship proceedings also lack the ability to find willing attorneys to act on their behalf and that of their loved ones. This was my first insurmountable hurdle that plagued and hurt us until Tom Coleman came along to volunteer his help. I paid two lawyers who both quit and did little or nothing to help David or me. We couldn't find a decent lawyer to protect even the most human of David's rights in the nursing home system. The lawyers all told me they were powerless to move David out of the most harmful of those places because I had no standing, and the Guardian Ad Litem had the court's support because she was appointed by the court.

Shift to State Funding. It's brilliant to align conservatorship legal services with education

protections and rights. I hope your audience for this report sees that brilliance.

Post-Adjudication Phase. I'm glad you mention post-adjudication cases and their nebulous import to those charged with protecting people with severe disabilities. When the nursing home gave away David's bed, to get David out of a Scripps Mercy hospital holding office and released to my care, David' doctors and the lawyers at Scripps Hospital had to write letters requesting that the judge revise her orders. The judge refused to do that without Guardian Ad Litem's approval. The Guardian Ad Litem left David in a hospital office that had been converted to a makeshift room for three weeks. She refused to answer my calls, refused to respond to the proposed order an empathetic lawyer from church had prepared. In fact, she did nothing "post-adjudication" on David's case until I carried the proposed order to her office and sat—refusing to leave—until she saw me and did her job which was supposed to be helping David.. I waited all day. She came out of her office at 5:30 p.m., and said she'd read and sign off on the proposed orders. She then left David in the hospital office for another three days. David was obviously not a priority for her or the judge. I'm glad you included the "zealous advocacy" reference in your discussion of SB 724.

** Rosalind's comments arise from her experience with a conservatorship in which she and her fiancé, David Rector, were entangled for several years in San Diego.*

Comments From
Attorney Cheryl Mitchell
Advisor to the Funding and Fees Review Project

Freedom of Religion. One topic that was omitted in the discussion of constitutional rights is freedom of religion. This comes up a lot of the guardianship cases I am reviewing in Washington State. Guardians routinely deny their incapacitated persons the right to attend church services, to have visitors from their religious institutions, and to engage in religious practices. In cases where religions have prohibitions on consumption of types of food (e.g., some Jewish persons do not eat milk and meat together in the same meal, they do not eat pork products, etc.) the guardians frequently ignore these religious rules and prohibitions. Some guardians think these rules are "ridiculous."

Judicial Bias. One thing that I have observed over and over again in guardianship (conservatorship) cases is that judges appear to believe that all guardians are kind, loving, compassionate and benevolent persons and that guardianship is a panacea that will solve all of the problems a person may have. In the infamous Nevada case of guardian April Parks, the court commissioner said something like, "I love these guardians who are social worker-types." This was a quote from the story published in *The Atlantic Magazine*. I was struck by it because it demonstrated just how out-of-touch the court commissioner was with what actually happens in these cases.

Public Defender Reimbursement. I was surprised to learn that in California public defenders represent persons who are unable to afford an attorney in conservatorship cases. I have a question: Are public defenders or other attorneys appointed when a person is truly indigent, or are there rules about just what

assets a person can have? In our state, attorneys are appointed for individuals who are subject to guardianship petitions when it would be a hardship for the person to hire an attorney. In many of these cases, the alleged incapacitated people own houses, but not much else. If they had to pay an attorney it would mean that they would be required to sell the house or take out a mortgage. In fact, in one case here, the guardian ad litem, who had been appointed at public expense, argued just that. She wanted the case converted to private-pay at a higher rate than the public-pay rate and she argued repeatedly that the elderly woman should be required to take out a mortgage (which the woman could not make monthly payments on) or sell her house.

Need to Educate. There is a California attorney, Bill Handel, who has a radio talk show. I think that it is a daily show, but it is only played here on Saturday evenings, so that's the only time I hear it. Bill Handel is like Don Rickles the comedian, in that he constantly pokes fun at those who call him for legal advice. Someone called him and told him that the caller's relative was fighting a conservatorship petition and the relative was being represented by the public defender. Mr. Handel ridiculed the caller, saying that public defenders never become involved in representing people in conservatorship cases. So clearly, there are a lot of people, including attorneys in California, who are totally unaware of the way in which the guardianship-conservatorship system works. There is a great deal of education that needs to be done.

Cheryl Mitchell is an attorney in Washington State.

Portions of Bill Relevant to Right to Counsel and Zealous Advocacy

AMENDED IN SENATE SEPTEMBER 3, 2021

CALIFORNIA LEGISLATURE—2021–22 REGULAR SESSION

ASSEMBLY BILL

No. 1194

Introduced by Assembly Member Low

~~(Coauthors: Senators Allen and Laird)~~

(Principal coauthor: Senator Allen)

(Coauthor: Senator Laird)

February 18, 2021

An act to ~~add Sections 6563 and 6584.5 to~~ *amend Section 6580 of, and to add Section 6563 to,* the Business and Professions Code, and to amend Sections 1051, *1460, 1471,* 1826, 1850, 1850.5, 1851, 1851.1, *1860, 1860.5, 1862, 1863,* 2250, ~~2250.4,~~ 2250.6, 2253, 2401, 2620, 2623, 2640, 2641, and 2653 of, to add Sections 1851.6 and 2112 to, and to add and repeal Section 1458 of, the Probate Code, relating to conservatorship.

LEGISLATIVE COUNSEL'S DIGEST

AB 1194, as amended, Low. Conservatorship.

This bill would, instead, require the court to appoint the public defender or private counsel if the conservatee or proposed conservatee has not retained legal counsel and does not plan to retain legal counsel. The bill would generally require the court to allow representation by an attorney for whom a conservatee, proposed conservatee, or person alleged to lack legal capacity expresses a preference, even if the attorney is not on the court's list of court-appointed attorneys, unless the counsel *cannot provide zealous advocacy* or has a conflict of interest. The bill would specify that the role of legal counsel for a conservatee, proposed conservatee, or person alleged to lack legal capacity is that of a ~~zealous~~ *zealous, independent* advocate, observing specified legal requirements.

23 *SEC. 6. Section 1471 of the Probate Code is amended to read:*

24 1471. (a) If a conservatee, proposed conservatee, or person
25 alleged to lack legal capacity is unable to retain legal counsel and
26 requests the appointment of counsel to assist in the particular
27 matter, whether or not that person lacks or appears to lack legal
28 capacity, the court shall, at or before the time of the hearing,
29 appoint the public defender or private counsel to represent the
30 ~~interest of that person in the following proceedings under this~~
31 ~~division:~~

32 (1) A proceeding to establish or transfer a conservatorship or
33 to appoint a proposed conservator.

34 (2) A proceeding to terminate the conservatorship.

35 (3) A proceeding to remove the conservator.

36 (4) A proceeding for a court order affecting the legal capacity
37 of the conservatee.

38 (5) A proceeding to obtain an order authorizing removal of a
39 temporary conservatee from the temporary conservatee's place of
40 residence.

1 ~~(b) If a conservatee or proposed conservatee does not plan to~~
2 ~~retain has not retained legal counsel and has not requested the~~
3 ~~court to appoint does not plan to retain legal counsel, whether or~~
4 ~~not that person lacks or appears to lack legal capacity, the court~~
5 ~~shall, at or before the time of the hearing, appoint the public~~
6 ~~defender or private counsel to represent the interests of that person~~
7 ~~in any proceeding listed in subdivision (a) if, based on information~~
8 ~~contained in the court investigator's report or obtained from any~~
9 ~~other source, the court determines that the appointment would be~~
10 ~~helpful to the resolution of the matter or is necessary to protect the~~
11 ~~interests of the conservatee or proposed conservatee. (a).~~

12 (c) In any proceeding to establish a limited conservatorship, if
13 the proposed limited conservatee has not retained legal counsel
14 and does not plan to retain legal counsel, the court shall
15 immediately appoint the public defender or private counsel to
16 represent the proposed limited conservatee. The proposed limited
17 conservatee shall pay the cost for that legal service if ~~he or she is~~
18 ~~they are~~ able. This subdivision applies irrespective of any medical
19 or psychological inability to attend the hearing on the part of the
20 proposed limited conservatee as allowed in Section 1825.

16 (d) If a conservatee, proposed conservatee, or person alleged to
17 lack legal capacity expresses a preference for a particular attorney
18 to represent them, the court shall allow representation by the
19 preferred attorney, even if the attorney is not on the court's list of
20 a court-appointed attorneys, and the attorney shall provide zealous
21 representation as provided in subdivision (e). However, an attorney
22 who ~~has a~~ *cannot provide zealous advocacy or who has any* conflict
23 of interest with respect to the representation of the conservatee,
24 proposed conservatee, or person alleged to lack legal capacity shall
25 be disqualified.

26 (e) The role of legal counsel of a conservatee, proposed
27 conservatee, or a person alleged to lack legal capacity is that of a
28 ~~zealous advocate~~, *zealous, independent advocate representing the*
29 *wishes of their client*, consistent with the duties set forth in Section
30 6068 of the Business and Professions Code and the California
31 Rules of Professional Conduct.


32 (f) In an appeal or writ proceeding arising out of a proceeding
33 described in this section, if a conservatee or proposed conservatee
34 is not represented by legal counsel, the reviewing court shall
35 appoint legal counsel to represent the conservatee or proposed
36 conservatee before the court.

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