SENATE JUDICIARY COMMITTEE
Senator Thomas Umberg, Chair
2021-2022 Regular Session

SB 724 (Allen)
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Urgency: No
JT

SUBJECT

Guardianships and conservatorships

DIGEST

This bill (1) activates numerous provisions related to the judicial oversight of conservatorships that courts are not currently required to implement, and (2) seeks to enhance the legal representation of conservatees or proposed conservatees.

EXECUTIVE SUMMARY

Following a 2005 *Los Angeles Times* investigative series that exposed numerous abuses by probate conservators, a major reform effort was undertaken. While some important changes were made, the Great Recession scuttled much of the effort's momentum, leaving numerous potential reforms unrealized, including some reforms related to judicial oversight of conservatorships that were enacted in 2006 but defunded in 2011.

A national spotlight is on conservatorships again. Investigative journalism, Congressional inquiries, documentaries, podcasts, and even a recent major motion picture have explored abusive practices across the country. But the focal point of late has been the conservatorship of Britney Spears, the pop icon who has been under the legal control of her father for over a decade even though she has continued to tour and produce records, raking in tens of millions of dollars. Reformers argue that her legal entanglements are indicative of widespread abuses and systemic failures.

This bill activates the dormant 2006 reforms and seeks to invigorate the legal representation of conservatees or proposed conservatees by (1) making legal counsel mandatory in specified hearings and appeals, (2) giving the person their choice of counsel, and (3) specifying that the role of legal counsel is that of a zealous advocate. The author argues that the status quo impermissibly privileges expediency over liberty and that these changes are necessary to restore balance and protect vulnerable individuals. The bill is supported by advocates for reform and has no known

opposition. Clarifying, technical, and conforming amendments are proposed on page 18.

PROPOSED CHANGES TO THE LAW

Existing law:

1) Authorizes a court to appoint a conservator of the person or estate of an adult, or both. (Prob. Code § 1800.3(a).)[1] Requires that the conservatorship be the least restrictive alternative needed for the protection of the conservatee. (*Id.* at (b).)

2) Provides that a conservator of the person may be appointed for a person who is unable to provide properly for their personal needs for physical health, food, clothing, or shelter. (§ 1801(a).) A conservator of the estate may be appointed for a person who is substantially unable to manage their own financial resources or resist fraud or undue influence. (*Id.* at (b).)

3) Provides that the court may appoint private legal counsel for a ward, a proposed ward, a conservatee, or a proposed conservatee in specified proceedings if the court determines the person is not otherwise represented by legal counsel and that the appointment would be helpful to the resolution of the matter or is necessary to protect the person's interests. (§ 1470(a).)

4) Provides that if a conservatee, proposed conservatee, or person alleged to lack legal capacity is unable to retain legal counsel and requests the appointment of counsel to assist in the hearing, regardless of whether the person lacks or appears to lack legal capacity, the court must appoint the public defender or private counsel to represent their interest, in a proceeding to:
    a) establish or transfer a conservatorship or to appoint a proposed conservator;
    b) terminate the conservatorship;
    c) remove the conservator;
    d) seek a court order affecting the legal capacity of the conservatee; or
    e) obtain an order authorizing removal of a temporary conservatee from the temporary conservatee's place of residence. (§ 1471(a).)

5) If the person does not request an attorney but the court determines that the appointment of an attorney would be helpful to the resolution of the matter or necessary to protect the interest of the conservatee or proposed conservatee, requires the court to appoint a public defender or private counsel to represent the interests of that person in those proceedings. (*Id.* at (b).)

[1] All further section references are to the Probate Code unless otherwise indicated.

6) Under the State Bar Act, regulates the practice of law in California. (Bus. & Prof. § 6000 et seq.) Enumerates the duties of attorneys, which include the duty to: (1) maintain the respect due to the courts of justice and judicial officers; (2) counsel or maintain those actions, proceedings, or defenses only as appear to the attorney to be legal or just; (3) employ for the purpose of maintaining the causes confided to them those means only as are consistent with truth; (4) maintain inviolate the confidence of their clients, and at every peril to themselves to preserve the secrets of their clients; (5) not to encourage either the commencement or the continuance of an action or proceeding from any corrupt motive of passion or interest; (6) never to reject, for any consideration personal to themselves, the cause of the defenseless or the oppressed. (Bus. & Prof. Code § 6068(a), (c)-(e), (g), (h).)

7) Makes certain several provisions relating to judicial oversight of conservatorships optional until the Legislature makes an appropriation for these purposes.

This bill:

1) Deletes the funding contingencies described in 7), above, thereby making those provisions relating to judicial oversight of conservatorships mandatory.

2) Makes appointment of counsel mandatory for all hearings described in 4), above.

3) Provides that an attorney must be appointed for the person in an appeal or writ proceeding of one of those proceedings, in order to advocate for their rights, interests, and stated wishes before the court.

4) Provides that if a conservatee, proposed conservatee, or person alleged to lack legal capacity expresses any preference for a particular attorney to represent them, the court must allow representation by the preferred attorney, even if the attorney is not on the court's list of appointed attorneys.

5) Provides that the role of legal counsel of a conservatee or proposed conservatee is that of a zealous advocate.

COMMENTS

1. Author's statement

The author writes:

> SB 724 advances the due process rights of conservatees and proposed conservatees by providing them with the guarantee of legal counsel, the clear right to choose an attorney of their preference, and requiring that their attorney be a zealous advocate on their behalf. The legislation also effectuates the

implementation of numerous California Probate Code reforms that were passed by the Legislature but suspended by a lack of funding 15 years ago.

While it may be expedient, there is cost to liberty if a conservatee appears before the court without legal representation. There is a cost—and arguable unconstitutionality—to restricting a conservatee's right to be represented by counsel of their choosing. And there is a cost to permitting attorneys for conservatees to ignore their clients' wishes and instead advocate for what they perceive as their clients' best interests.

2. Probate conservatorships

Before 1957, a guardianship petition was the only means by which a person could obtain the right to manage the affairs of a person adjudged to be "incompetent" or "insane." Because of the stigma associated with these labels, people who needed help managing their affairs were often reluctant to seek a guardianship. To avoid this stigma and help a broader class of people who did not necessarily need help in all facets of their life, this Committee, analyzing a State Bar Association proposal, argued for the creation of a new protective relationship, known as a conservatorship, under procedures set forth in the Probate Code. (*See Bd. of Regents v. Davis* (1975) 14 Cal.3d 33, 38 n.5; Stats. 1957, Ch. 1902.)

The Probate Code authorizes appointment of a "conservator of the person" if clear and convincing evidence shows that the conservatee cannot provide properly for their physical health, food, clothing or shelter needs. (§ 1801(a).) A "conservator of the estate" may be appointed by a court for a person who is substantially unable to manage their own financial resources or to resist fraud or undue influence. (§ 1801(b).) The conservatorship cannot be granted unless it is the least restrictive alternative needed for the protection of the conservatee. (§ 1800.3(b).) A relative, friend, public official, nonprofit agency, or professional conservator may petition the court to be appointed conservator of an individual, triggering an investigation followed by a hearing in which the proposed conservatee has the right to a jury trial. (§ 1827.) A probate conservator generally has no power to place the conservatee in a locked facility or to authorize the administration of psychotropic medications, unless the conservatee has dementia and the court grants the conservator special powers in this regard. (§§ 2356(a) & 2356.5; *Conservatorship of B.C.* (2016) 6 Cal.App.5th 1028, 1035.) Probate conservatorships last until the conservatee dies or until terminated by the court, but are reviewed regularly by the investigator and the court. (§§ 1850-51, 1860.)

3. Conservatorship abuses and legislative responses

The recent movie *I Care a Lot* depicts a predatory court-appointed guardian who dupes a credulous judge and colludes with an unscrupulous doctor to serially target vulnerable elderly people of means, forcibly removing them from their homes, shipping

them off to far-flung nursing homes to be sedated, neglected, and sequestered. Meanwhile, she speedily loots her victims' assets and sells their personal residences, pocketing much of the proceeds, all under the color of law. While the storyline becomes sardonically farfetched, the premise borrows directly from recent headlines.[2]

Investigations across the country, particularly in warm climates with large populations of wealthy retirees, have revealed widespread abuses of guardianship systems.[3] As the Baby Boomer generation ages, the coming "silver tsunami" heralds an unprecedented shift in wealth—estimates have since ranged as high as 68 trillion dollars[4]—that will pass from one generation to the next.

In 2005, the *Los Angeles Times* published an award-winning series of articles highlighting flaws in California's conservatorship system.[5] The *Times* articles included stories of private conservators who misused the system to get appointed inappropriately and then either steal or mismanage the conservatee's assets; public guardians who did not have the resources to help vulnerable individuals in need of assistance; probate courts that lacked sufficient resources to provide adequate oversight to catch the abuses; and a system that provided no recourse for those who needed help. The *Times* editorial that ran at the end of the series exhorted courts and elected officials to "turn this abusive system into the honest guardianship it was meant to be."[6]

In response to the series, the Assembly and Senate Judiciary Committees convened an oversight hearing that included testimony from victims harmed by the system as well as representatives from the courts, the bar, court investigators, public guardians, professional conservators, and groups representing seniors. "All participants, without exception, agreed that the system was significantly underperforming and, as a result, harming conservatees and their loved ones. In addition, the witnesses agreed that the problems were only likely to increase exponentially as the baby boom population ages, with a significant increase in the population suffering from Alzheimer's disease or similarly disabling diseases."[7]

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[2] Gonzales, Erica *Rosamund Pike Thanked 'America's Broken Legal System' for Inspiring* I Care a Lot, (Mar. 1, 2021) https://www.harpersbazaar.com/culture/film-tv/a35680171/i-care-a-lot-true-story/ (as of Mar. 2, 2021). In particular the movie draws from the marauding depredations of guardians in Clark County, Nevada. (*See* Aviv, Racheal, How the Elderly Lose Their Rights (Oct. 2017) New Yorker, https://www.newyorker.com/magazine/2017/10/09/how-the-elderly-lose-their-rights (as of Mar. 2, 2021); *The Guardians* (2018) documentary.)

[3] Weiner, Rex *Inside the Battle for Britney Spears* (Dec. 19, 2019) Los Angeles Magazine, available at https://www.lamag.com/mag-features/the-battle-for-britney-spears/ (as of Mar. 2, 2021).

[4] *Id. See also* Sheng, Ellen *The $68 trillion transfer of wealth in America is evaporating amid crisis* (Nov. 5, 2020) CNBC website, https://www.cnbc.com/2020/11/05/68-trillion-transfer-of-wealth-in-america-is-evaporating-amid-crisis.html (as of Apr. 6, 2021).

[5] Robin Fields, Evelyn Larrubia, and Jack Leonard, *Guardians for Profit* series (Nov. 13-17, 2005) *Los Angeles Times.*

[6] *Deserving of Care* (Nov. 17, 2005) Los Angeles Times, https://www.latimes.com/archives/la-xpm-2005-nov-17-ed-conservators17-story.html (as of Mar. 28, 2021).

[7] Assembly Floor analysis of AB 1363 (Jones, Ch. 293, Stats. 2006), as amended Aug. 24, 2006, at 2-3.

In early 2006, then-Chief Justice Ron George appointed a Probate Conservatorship Task Force to evaluate the courts' role in the conservatorship system and to make recommendations for reform, if necessary.[8] Composed of representatives from the courts, advocacy organizations, the Attorney General, legislative staff, practitioners in the conservatorship area, conservators, and other judicial officers, the Task Force held several public hearings and released its final report in October of 2007. The report detailed 85 recommendations and included items that needed further review, additional funding, changes in legislation or rules of court, and preparation of training materials and guidelines for the courts.

Meanwhile, the Legislature passed the Omnibus Conservatorship and Guardianship Reform Act of 2006, a package of bills to reform the conservatorship system. SB 1116 (Scott, Ch. 490, Stats. 2006) imposed requirements related to the sale of a conservatee's personal residence. SB 1550 (Figueroa, Ch. 491, Stats. 2006) established the Professional Fiduciaries Act for the licensing and oversight of professional fiduciaries. SB 1716 (Bowen, Ch. 492, Stats. 2006) expanded the scope of evaluations conducted by court investigators and established a protocol for ex parte communication with the court about a conservatorship. AB 1363 (Jones, Ch. 493, Stats. 2006) reformed certain aspects of the courts' oversight of conservatorships.[9]

However, after the Great Recession hit, SB 78 (Committee on Budget and Fiscal Review, Ch. 10, Stats. 2011) was enacted to suspend superior court duties added by the 2006 reforms until the Legislature makes an appropriation for these purposes, which to date has not occurred. Thus, it is possible that some of the same abuses that took place before the 2006 Act could still be occurring today and that courts simply lack the oversight resources to detect these abuses. As described below in Comment 5, this bill removes those funding contingencies, thereby activating those reforms.

A 2012 *Mercury News* series exposed a problem that conservatees and wards may have exorbitant fee petitions. The article reported that "a six-month investigation by this newspaper found a small group of [Santa Clara] [C]ounty's court-appointed personal and estate managers are handing out costly and questionable bills -- and charging even more if they are challenged. The troubling trend is enriching these private professionals—working as conservators and trustees—and their attorneys, with eye-popping rates that threaten to force their vulnerable clients onto government assistance to survive."[10] In response, the Legislature passed SB 156 (Beall, 2013), which sought to

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[8] Jud. Council of Cal. Admin. Off. of Cts., Rep., *Final Report of the Probate Conservatorship Task Force* (Oct. 26, 2007) https://www.courts.ca.gov/documents/102607itemD.pdf (as of Mar. 28, 2021).

[9] In 2008, the Task Force reported that 22 of its recommendations had been implemented through various means, including the Omnibus Act described above. Jud. Council of Cal. Admin. Off. of Cts., Rep., *Probate Conservatorship Task Force Recommendations to the Judicial Council: Status of Implementation* (Dec. 9, 2008) https://www.courts.ca.gov/documents/120908item10.pdf/ (as of Mar. 28, 2021).

[10] Karen de Sá, *Santa Clara County's court-appointed personal and estate managers are handing out costly and questionable bills*, Mercury News (June 30, 2012).

limit the fees that a conservator or guardian could collect. That legislation, however, was vetoed by the Governor, who noted that the process could be improved. That year, the Legislature also passed AB 937 (Wieckowski, Ch. 127, Stats. 2013), which clarified the personal rights of conservatees, including the right to receive visitors, phone calls, and mail.

And in 2015, this Committee held a hearing entitled "The Role of the Courts in Protecting California's Increasing Aging and Dependent Adult Population." The hearing included two panels on conservatorships: one addressing the judicial perspective that included a probate judge, court administrators, and a government affairs attorney. The other panel represented the perspectives of conservators and conservatees. The background paper for the hearing identified outstanding issues, best practices, and potential reforms.[11]

More recently, a 2018 *Orange County Register* story described advocates' complaints about the conservatorship system, including concerns raised by the sponsor of this bill:

> [C]ritics complain that some of the professionals are out to pad their own fees until the money is gone or substantially drained. They relate incidents of the elderly and disabled being isolated from their families by conservators, paying exorbitant professional fees for substandard care and seeing life savings and real estate holdings disappear while judges do nothing.
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> "Conservatorships are imposed (by judges) in minutes with nary a nod toward due process," said Linda Kincaid, co-founder of the Coalition for Elder and Disability Rights, based in Northern California. "Once the conservatorship is in place, there is essentially no court oversight or accountability. Conservators and their agents are free to exploit and abuse with impunity."[12]

While many of the most headline-grabbing examples of conservatorship abuses involve the depletion of sizeable estates by predatory conservators, academics and advocates have been sounding the alarm about how conservatorships are used to escalate the displacement of low-income individuals and communities of color in gentrifying neighborhoods.[13] "The worst abuses are now occurring in cities where professional conservators are targeting the elderly who reside in gentrifying neighborhoods, working hand in hand with realtors, developers, and sometimes members of feuding

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[11] *The Role of the Courts in Protecting California's Increasing Aging and Dependent Adult Population* (Mar. 24, 2015) Senate Judiciary Committee https://sjud.senate.ca.gov/sites/sjud.senate.ca.gov/files/background_paper_conservatorship_oversight.pdf (as of Apr. 6, 2021).

[12] Tony Saavedra, *Money-draining probate system "like a plague on our senior citizens,"* Orange County Register (September 23, 2018).

[13] Video, Panel: *The California Landscape: Confronting the Conservatorship Crisis*, REPAIR website, http://repairconnect.org/california-landscape-confronting-conservatorship-crisis (as of Mar. 1, 2021).

families to gain legal control. They can then remove the old folks from their homes—often against their will—institutionalize them, and rapidly acquire and flip aging housing stock."[14] SB 303 (Wieckowski, Ch. 847, Stats. 2019) ameliorated this problem by imposing a higher standard for the sale of a conservatee's personal residence and limitations on the amount of compensation that may be paid to a guardian, conservator, or attorney from a ward's or conservatee's government benefits.

4. The conservatorship of Britney Spears

Following the advocacy efforts of a grassroots movement associated with the #FreeBritney handle and a recent *New York Times* documentary entitled "Framing Britney Spears," the pop superstar's conservatorship has come under scrutiny. The documentary revisits Britney's childhood in a small Louisiana town, her meteoric rise to fame in the late 1990s as a teenager, and her public breakdown in the mid-2000s. Stalked by paparazzi, her personal struggles and tumultuous love-life were obsessively chronicled and dissected in media coverage that today scans as misogynistic. After multiple public incidents of seemingly erratic behavior, she was involuntarily hospitalized for mental health evaluation and treatment.

In 2008, Britney's father was appointed as conservator of Britney's estate and person, giving him control over her finances and medical decisions.[15] Probate conservatorships are typically used for elderly individuals with dementia. But during her conservatorship, the now-39-year-old has produced hit records, gone on tour, headlined one of the most lucrative Vegas residencies ever, launched new business ventures, and made guest appearances on TV shows.[16] At the outset of the conservatorship, her estate was worth under $3 million.[17] It is now worth an estimated $60 million.[18]

In 2019, Britney ceased performing.[19] Britney has attempted to have her father, who also serves as her business manager, removed from the role of conservator; her attorney informed the court that Britney will not perform again while her father oversees her.[20] The Los Angeles Superior Court rejected Britney's request to remove her father from

[14] *Inside the Battle for Britney Spears*, *supra*, note 3.
[15] Laura Newberry, *Britney Spears hasn't fully controlled her life for years. Fans insist it's time to #FreeBritney* (Sep. 18, 2019) *Los Angeles Times*, https://www.latimes.com/california/story/2019-09-17/britney-spears-conservatorship-free-britney (as of Apr. 4, 2021). An attorney was appointed as co-conservator to help manage the singer's financial assets; he relinquished these duties. (*Id.*)
[16] Betancourt, Bianca, *Why Longtime Britney Spears Fans Are Demanding to #FreeBritney* (Feb. 25, 2021) *Harper's Bazaar*, available at https://www.harpersbazaar.com/celebrity/latest/a34113034/why-longtime-britney-spears-fans-are-demanding-to-freebritney/ (as of March 2, 2021).
[17] *Lawyer for Britney Spears' father responds to fans over conservatorship* (Feb. 25, 2021), The Guardian, available at https://www.theguardian.com/music/2021/feb/25/britney-spears-jaime-spears-conservatorship-lawyer (as of March 2, 2021).
[18] *Id.*
[19] *Id.*
[20] *Id.*

her conservatorship, but Bessemer Trust, a wealth management and investment advisory firm, has been appointed as co-conservator of her estate.[21]

Of particular relevance to this bill, Britney also attempted to hire her own attorney, a veteran estate and trust litigator.[22] Despite conflicting medical reports about her mental health, Britney was deemed to lack the capacity to hire her own attorney.[23] Advocates of reform argue something is self-evidently rotten in a system that forces Britney, over her own apparent objections, to pay over $1 million a year to an assemblage of professionals that includes people she has attempted to replace, as well as the attorneys and professionals assisting those people in thwarting that attempt,[24] all in the name of serving her best interests. Others point out that caution is warranted in drawing any firm conclusions about an individual's private struggle with mental health challenges; indeed, although Britney has sought a different conservator, it is not clear that she wants out of the conservatorship.

5. <u>Activates dormant 2006 reforms by eliminating funding contingencies</u>

As noted above, when the Great Recession hit, the Legislature suspended many of the superior court duties added by the 2006 reforms until an appropriation is made for these purposes, which to date has not occurred. Thus, it is possible that some of the same abuses that took place before the 2006 reforms could still be occurring today and that courts simply lack the oversight resources to detect these abuses. This bill would strike the funding contingencies from these sections, thereby making them mandatory.

In broad strokes, these funding-contingent provisions do the following:

- Authorize courts, in response to ex parte communications regarding fiduciaries or conservatees or wards, to refer the issue to a court investigator to take appropriate action. (§1051.)
- Require the court investigator to, in addition to the proposed conservatee, interview the proposed conservator, the petitioner, the proposed conservatee's registered partner and relative within the first degree, and, to the greatest extent possible, relatives within the second degree, neighbors, and, if known, close friends, before the hearing. (§ 1826(a)(A)-(C).)
- Require, when a person who is the subject of a temporary conservatorship becomes the subject of a general petition for a conservatorship, that a second visit be made to the person and the report address the effect of the temporary conservatorship on the proposed conservatee. (*Id.* at (f).)
- Require periodic reviews of the conservatorship by the court six months after the initial appointment and one year after the appointment and annually thereafter,

[21] *Why Longtime Britney Spears Fans Are Demanding to #FreeBritney*, *supra*, note 16.
[22] *Inside the Battle for Britney Spears*, *supra*, note 3.
[23] *Id.*
[24] *Id.*

unless the court determines the conservator is acting in the best interests of the conservatee. (§ 1850(a).) Authorize the court, on its own motion or upon request by any interested person, to take appropriate action, including ordering a review of the conservatorship or an accounting of the assets of the estate. (*Id.* at (b).)

- Establish periodic reviews of limited conservatorships for developmentally disabled adults. (§ 1850.5.)
- Require the court's investigation to include an examination of the conservatee's placement, quality of care, including physical and mental treatment, and the conservatee's finances, as well as interviews with specified individuals, (§ 1851(a)(1)(C).) Require that a conservator make available, upon request of the court investigator, all books and records, including receipts and expenditures of the conservatorship. (*Id.* at (a)(3).) Require that the findings of the court investigator be mailed to the conservatee's spouse or registered domestic partner, their relatives in the first degree, or if there are no such relatives, to the next closest relatives, unless the court determines the mailing will harm the conservatee. (*Id.* at (b)(1).)
- Require, in the context of a petition to establish a temporary conservatorship or guardianship, that notice, along with a copy of the petition, be personally delivered to the proposed conservatee or ward and on persons required to be named in the petition. (§ 2250(e).) If the temporary conservatorship is granted ex parte, provides for a hearing on a petition to terminate the temporary conservatorship that may occur before the general petition for appointment of a conservator. (*Id.* at (h).)
- Require a proposed temporary conservatee to attend the hearing except in specified cases. (§ 2250.4.)
- Require court investigators for temporary conservatorship petitions to interview specified people; inform the proposed conservatee about temporary conservatorships and their right to attend the hearing, have it tried by jury, and be represented by legal counsel; determine the needs and wishes of the proposed conservatee; and report this information to the court. (§ 2250.6(a)-(c).) Require the investigator, if it appears that the temporary conservatorship is inappropriate, within two court days, provide a written report to the court so the court can consider taking appropriate action on its own motion. (*Id.* at (d).)
- Give the court more discretion in issuing orders related to the investigation of a temporary conservator's propose to place the conservatee somewhere other than their residence. (§ 2253(b).)
- Require the filing of specified documentation and information along with each required court accounting from a guardian or conservator. (§ 2620(c).) Provide that accountings are subject to random or discretionary, full or partial review by the court. (*Id.* at (d).)

The author writes:

> SB 724 also enacts a slate of previous reforms to existing probate statutes that are currently suspended. Collectively, these provisions robustly expand the duties of court investigators; give courts greater latitude to review existing conservatorships; establish regular reviews of limited conservatorships for adults with developmental disabilities; require—with few exceptions—the in person attendance of proposed conservatee at hearings; and provide for better documentation and oversight of a conservatee's assets. These reforms have sat dormant, even though they've been in statute, for 15 years. The time to breathe life into them is now.

Of the various reforms the Legislature is contemplating, these simple but consequential changes are the low-hanging fruit. To be sure, they will likely necessitate additional funding—the estimated costs of implementing these provisions in 2006 was $23 million, a figure that is likely to be higher today—to ensure that courts are able to fully implement the provisions. But from a policy perspective, activating the reforms the Legislature has already vetted and approved are a crucial first step in any reform effort.

In support, the Coalition for Elder & Disability Rights writes:

> Court investigators are the "eyes and ears" of the court. Judges almost always follow the recommendations of court investigators. The legislature's intent was for court investigators to interview conservatees' families and friends. Reports should address conservatees' needs and the resources available to meet those needs.
>
> The Conservatorship and Guardianship Reform Act of 2006 specified that court investigators **must** interview a conservatee's family and provide their report to family. Those protections are not yet funded or implemented. Many court investigators **never** interview any family members.
>
> Court investigators generally only interview the conservator, a person who may have scant knowledge of the conservatee's circumstances. The court never learns the conservatee's true needs or abilities. Courts rule without knowledge of supports available through the conservatee's family, circles of support, or other professionals.

(Emphasis in original.)

6. Seeks to enhance legal representation in conservatorship proceedings

   a. *Mandates legal representation, choice of attorney, and zealous representation*

In specified proceedings to appoint, terminate, or modify conservatorships, or determine the person's capacity, if the person who is the subject of the proceeding requests, but is unable to retain, counsel, the court must appoint counsel, regardless of whether the person lacks or appears to lack capacity. (§ 1471(a).) Likewise, even if the person does not request counsel, the court must, regardless of whether the person lacks or appears to lack capacity, appoint an attorney if the court determines it would be helpful to the resolution of the matter or necessary to protect the interest of the person. (§ 1471(b).)[25]

This bill, with respect to the role of counsel in those conservatorship proceedings, would:

- Make appointment of counsel mandatory.
- Provide that an attorney must be appointed for the person in an appeal or writ proceeding, in order to advocate for their rights, interests, and stated wishes before the court.
- Provide that a conservatee, proposed conservatee, or person alleged to lack legal capacity expresses any preference for a particular attorney to represent them, the court must allow representation by the preferred attorney, even if the attorney is not on the court's list of appointed attorneys.[26]
- Provide that the role of legal counsel of a conservatee or proposed conservatee is that of a zealous advocate.

Arguably, at the heart each of these changes with respect to the quantity and quality of legal representation for the conservatee is the issue of the proper role of the probate conservatorship attorney. As described below, conservatorship attorneys, especially those who are court-appointed, are often instructed by courts to serve a role that is more paternalistic than adversarial.

   b. *The duties of court-appointed counsel*

"'The duty of a lawyer both to his client and to the legal system, is to represent his client zealously within the bounds of the law.' [Citations.] More particularly, the role of . . . attorney requires that counsel 'serve as . . . counselor and advocate with courage, devotion and to the utmost of his or her learning and ability . . . .' [Citation.]" (*People v.*

[25] This contrasts with a neighboring provision that makes appointment of counsel mandatory in all limited conservatorship cases (§ 1471(c)), which are a more limited type of conservatorship typically used for people with developmental disabilities.

[26] As noted above, Britney Spears attempted to have her own attorney replace her court-appointed attorney amid her efforts to have her father removed from the conservatorship. The court overruled her and gave her a court-appointed attorney, deeming her to lack the capacity to choose her own attorney.

McKenzie (1983) 34 Cal.3d 616, 631; italics omitted.) Lawyers owe clients duties of competence, diligence, and loyalty, including the obligation to avoid conflicts of interest and maintain confidentiality. (*See* Bus. & Prof. Code § 6808.)[27]

While an attorney generally may only represent clients who have legal capacity, probate conservatorship attorneys, particularly those appointed by the court, are in a different position because many clients have diminished capacity.[28] Existing law is unclear with respect to the attorney's role in such cases. Sections 1470 and 1471 provide for the appointment of an attorney to protect the client's "interests."[29] This can be construed to mean that the attorney may substitute their own judgement for the client's.
In this regard, the CEB Practice Guide on probate conservatorships identifies three basic situations: a client who clearly lacks capacity, a client who clearly has capacity, and in-between cases in which the person has partial capacity.[30] In the first situation, if the client is "comatose, otherwise nonresponsive, or totally delusional," the Guide states that counsel must apply their "understanding of the client's best interests in taking positions or making recommendations to the court."[31] In the second situation, if the

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[27] In 2018, the State Bar adopted new Rules of Professional Conduct. Chapter 1 governs the lawyer-client relationship. *See* State Bar of California website, http://www.calbar.ca.gov/Attorneys/Conduct-Discipline/Rules/Rules-of-Professional-Conduct/Current-Rules/Chapter-1-Lawyer-Client-Relationship (Apr. 4, 2021).

[28] Existing law does not specifically address when a person subject to a conservatorship petition has capacity to retain counsel, but this issue overlaps with a person's capacity to make decisions. The Probate Code establishes a rebuttable presumption affecting the burden of proof that individuals have the capacity to make decisions and to be responsible for their acts or decisions. (§ 810(a).) A person who has a mental or physical disorder may still be capable of contracting, conveying, marrying, making medical decisions, executing wills or trusts, and performing other actions. (*Id.* at (b).) A person lacks capacity to make decisions unless the person has the ability to communicate verbally, or by any other means, the decision, and to understand and appreciate, to the extent relevant, all of the following:

- The rights, duties, and responsibilities created by, or affected by the decision.
- The probable consequences for the decision maker, and where appropriate, the persons affected by the decision.
- The significant risks, benefits, and reasonable alternatives involved in the decision. (§ 812.)

Going forward, the author may wish to explore whether the bill should address a conservatee's capacity to make decisions, including directing counsel.

[29] By contrast, Family Code section 3151(a), which governs the duties of minor's counsel, states: "The child's counsel appointed under this chapter is charged with the representation of the child's best interests."

[30] Samuel D. Ingham III, *California Conservatorship Practice* (Cont. Ed. Bar 2018) § 7.26 (CEB Practice Guide).

[31] *Id*. The Third District Court of Appeal reflected this understanding in *Conservatorship of Drabick* (1988) 200 Cal.App.3d 185, in which a court-appointed attorney for a permanently unconscious conservatee came to agree with the conservator that the conservatee would have refused life-sustaining treatment. While appellate counsel argued that the appointed attorney had a duty to advocate for life-sustaining treatment because "'[the] irreducible minimum condition of effective representation is the adoption of an adversary position toward the opposing party,'" the court rejected this argument, stating:

> When an incompetent conservatee is still able to communicate with his attorney it is unclear whether the attorney must advocate the client's stated preferences -- however unreasonable -- or

client suffers no significant impairment, "the relationship between attorney and client will function much as it would in any other representation not involving court appointment."[32]

As for the third situation—the in-between case—this "presents the greatest challenge," particularly if the client wishes to take a position that the attorney believes is antithetical to the client's own interests.[33] Moreover, there is variation among courts as to how to deal with such situations. Some courts routinely encourage or require attorneys to provide courts with reports regarding their clients that include the attorney's belief about the client's best interest.[34] According to the Guide, "[o]ne school of thought considers the attorney—even one appointed by the court—to be a zealous advocate for the client's wishes."[35] The other school of thought "gives the court-appointed attorney the professional discretion to conclude that the course of action selected by the partially impaired client is not appropriate," meaning that "the attorney is free to make recommendations contrary to the client's stated wishes."[36]

> independently determine and advocate the client's best interests. [Citation.] When the client is permanently unconscious, however, the attorney must be guided by his own understanding of the client's best interests. There is simply nothing else the attorney can do.

(*Id.* at 212; see also *Conservatorship of Wendland* [attorney appropriately exercised his "independent judgement" for a permanently unconscious client whose life support was withdrawn.])

[32] CEB Practice Guide, *supra*, note 30 at § 7.26.

[33] *Id.* § 7.27.

[34] Los Angeles Superior Court Rule 4.125 provides: "Court-Appointed Counsel Panel attorney's primary duty is to represent the interests of his or her client in accordance with applicable laws and ethical standards. The Court-Appointed Counsel Panel attorney's secondary duty is to assist the court in the resolution of the matter to be decided. The Court-Appointed Counsel Panel attorney must, if practical, ensure that the client is afforded an opportunity to address the court directly." San Francisco Superior Court Rule 14.78Q(5) provides: "Role of the Court-Appointed Attorney. Court-appointed attorneys are expected to inform the Court of the wishes, desires, concerns, and objections, of the (proposed) conservatee. If asked by the Court, the attorney may give his or her opinion as to the best interests of the (proposed) conservatee and whether a conservatorship is necessary. No written report is required or necessary unless requested by the Court."

[35] CEB Practice Guide, *supra*, note 30 at § 7.27.

[36] *Id.* These issues factor into the choice of counsel as well. The CEB Practice Guide states: "A client whose capacity to retain private counsel is uncertain presents the appointed attorney with a more complex problem, both ethically and procedurally. Court-appointed counsel should avoid making what amounts to a medical evaluation that may prejudice the client's ability to contest the proceeding." (*Id.* at § 7.30B.) The Guide suggests that "counsel should consider asking the court to appoint a qualified independent psychiatrist who has never been involved with the proposed conservatee" to prepare a written report on the question of whether the person has the capacity to direct private counsel. (*Id.*) "It is far better for both private counsel and the court-appointed attorney to rely on the conclusions of a neutral medical expert than to litigate the capacity to utilize private counsel." (*Id.*) Going forward, the author may wish to explore this possibility.

c. Arguments that court-appointed counsel should be zealous advocates

A 2009 report showed that the likelihood of a conservatorship being established for a proposed conservatee with a court-appointed attorney was 90 percent, as opposed to the 73 percent when the proposed conservatee did not have a court-appointed attorney.[37] The report suggests that court-appointed attorneys for proposed conservatees may be too collaborative with the court, court investigator, and proposed conservators. Although all parties agree that a probate conservatorship is an intervention process intended to benefit the proposed conservatee, the report suggested that court-appointed attorneys are not adversarial enough to protect the best interests of the proposed conservatee from completely losing the right to make their own decisions.[38]

A 2019 article entitled *A Lawyer is a Lawyer is a Lawyer* argues that "the practice of requiring or encouraging appointed attorneys to report to the court about what the attorney believes is in the best interests of the proposed conservatee should be ended, and California should instead follow state-wide, uniform procedures that encourage appointed attorneys to fulfill their duty to act solely and only as zealous advocates for their clients."[39] Furthermore, "[t]he California attorney is required to be a loyal, confidential, and zealous advocate regardless of the client's mental condition."[40] The authors argue that anything less could violate duties of confidentiality and loyalty and raise constitutional concerns of due process and equal-protection.[41] The authors also point out that the California Supreme Court rejected ABA Model Rule 1.14, which provides:

> When the lawyer reasonably believes that the client has diminished capacity, is at risk of substantial physical, financial or other harm unless action is taken and cannot adequately act in the client's own interest, the lawyer may take reasonably necessary protective action, including consulting with individuals or entities that have the ability to take action to protect the client, and, in appropriate cases, seeking the appointment of a guardian ad litem, conservator or guardian.[42]

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[37] Sarah Anders et al., *Conservatorship Reform in California: Three Cost-effective Recommendations*, Goldman Sch. Pub. Pol'y, U.C. Berkeley 1, 6 (May 2009), p. 11.
[38] *Id*. at 11-12.
[39] Rudolph & Hughes, *A Laywer is a Lawyer is a Lawyer* (2019) 25 Cal. Trust & Estates Q. 1, 28.
[40] *Id.* at 31.
[41] *Id.*
[42] *Id.* at 33-34. As the authors note, this arguably conflicts with Business and Professions Code Section 6068(e)(1), which requires a lawyer to "maintain inviolate the confidence, and at every peril to himself or herself to preserve the secrets, of his or her client." The only exception to this is that an attorney "may, but is not required to, reveal confidential information relating to the representation of a client to the extent that the attorney reasonably believes the disclosure is necessary to prevent a criminal act that the attorney reasonably believes is likely to result in death of, or substantial bodily harm to, an individual." (*Id.* at (e)(2).) AB 596 (Nguyen, 2021) would require attorneys appointed to represent conservatees or

The article contrasts the role of court-appointed attorney with guardians ad litem. The former, the authors argue, are officers of the court but have duties only to their clients.[43] The latter are direct agents of the court, responsible for investigating the situation and offering a determination of the person's interests.[44]

The article points to two cases as illustrations of the ethical pitfalls of lawyers serving the best interest of their clients in lieu of their stated desires. In *Conservatorship of Schaeffer* (2002) 98 Cal.App.4th 159, the Court of Appeal reversed a lower court's decision to withhold a report from a conservatee's attorney from the other parties on the basis that it violated the due process rights of the conservatee's *wife*, who was petitioning to replace a professional conservator and become her husband's conservator. (*Id.* at 161-162.) The report contained confidential information and conceded that a conservatorship was required. (*Id.*) It indicated that the conservatee had stated he wanted his wife to be his conservator, but the attorney believed that was only because she had pressured him. (*Id.*) The article points out that the court did not consider whether the conservatee's due process rights were violated.[45]

In *Conservatorship of Cornelius* (2011) 200 Cal.App.4th 1198, a temporary conservatorship was created for a person during a conservatorship petition that was ultimately dismissed. (*Id.* at 1205.) The proposed conservatee's attorney reported to the court that he believed a conservatorship of the estate was necessary despite the person's stated wishes. (*Id.*) The Court of Appeal held that the conservatorship estate was required to pay the temporary conservator, attorneys, and providers because the expenses had been incurred in good faith and in the best interests of the proposed conservatee. (*Id.*) The article points out the conservatee's attorney divulged facts that the petitioner seeking to impose the conservatorship should have presented, not the attorney.[46] "To add insult to injury, the appointed attorney's report in the end served as important evidence supporting the court's conclusion that the petition for conservatorship was filed in good faith—evidence that cost her client money."[47]

The role that court-appointed attorneys play in some counties raises serious questions as to whether conservatees and proposed conservatees are getting adequate legal representation. And the fact that some courts rely on attorneys to behave more like

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proposed conservatees to act as an advocate for the client. However, if the attorney determines that the client is unable to communicate, the bill would require the court to replace the attorney with a guardian ad litem. The bill is pending in the Assembly Judiciary Committee.

[43] *Id.* at 32.

[44] *Id*. In this regard, section 1003(a)(2) authorizes the court to appoint a guardian ad litem at any stage of a proceeding to represent the interest of, among others, an incapacitated person, if the court determines that representation of the interest otherwise would be inadequate. The article states that section's application to proposed conservatees may need to be clarified via legislation. (*Id.* at 35.) Going forward, the author may wish to explore this possibility.

[45] *Id.* at 30.

[46] *Id.*

[47] *Id.*

investigators underscores the need to finally implement the 2006 reforms—the other part of this bill. By invigorating the courts' oversight powers and ensuring that clients get the robust legal representation they deserve, the bill provides important protections to vulnerable individuals, celebrity or otherwise.

The author writes:

> A conservatorship is arguably the most consequential civil restriction levied against Californians. The court, acting in what it decides as the conservatees best interest, is effectively depriving an individual of fundamental rights—to manage property, to spend money, to handle their own medical affairs, even to make everyday decisions about what to eat or who to spend time with. Such consequential, life-altering restrictions should never be applied without the presence of attorneys who are constantly advocating for a conservatee's interests, and seeking the least restrictive alternatives to the abridgment of their civil rights. Furthermore, our courts and attorneys should never—for expediency or efficiency's sake—neglect to apply the fullest extent of best practices that California statute requires.

7. Support

The National Coalition for a Civil Right to Counsel argues that automatic appointment of counsel is a best practice that should be uniformly adopted. They write:

> This is the appropriate approach: to treat all types of guardianships and conservatorships the same, regardless of whether the protected person has a developmental disability or whether the conservatorship is temporary or permanent in nature. In all scenarios, the protected persons are equally vulnerable and often incapable of understanding the need for appointed counsel. In fact, counsel is automatically appointed in other similar types of California proceedings. See e.g. Cal. Health & Safety Code § 416.95 (requiring appointment of counsel where State petitions for guardianship or conservatorship of adult developmentally disabled person); Cal. Welf. & Inst. Code § 5465 (requiring appointment of public defender or other attorney in proceeding authorized in certain counties to establish conservatorship due to "serious mental illness or substance abuse disorders"); Cal. Welf. & Inst. Code § 5365 (requiring appointment of public defender or other attorney for conservatorships of "gravely disabled persons"). Moreover, more than half the states currently require the automatic appointment of counsel for all protected persons for all types of guardianship/conservatorship proceedings without requiring a request, demonstrating that this is the accepted best practice.

The Spectrum Institute applauds all aspects of the bill that would make conservatorship proceedings more adversarial, writing:

> SB 724 would require the court to allow a conservatee or proposed conservatee to be represented by the attorney of their choice. The bill implements the due process right of a civil litigant to be represented by a privately retained attorney. The bill is consistent with the legislative intent manifest in various sections of the probate code.
>
> […]
>
> Everyone with an attorney is entitled to have counsel be a zealous advocate defending their rights and promoting their stated wishes. Unfortunately, that often does not happen. In many cases, courts instruct appointed counsel to act as "the eyes and ears of the court" and to advocate for what counsel believes is in the client's best interests—even if this requires counsel to be disloyal to the client or violate their right to confidentiality. In places such as Los Angeles, local court rules such as Rule 4.125 give appointed counsel a dual role. Attorneys are told to represent the client but also to help the court resolve the case. SB724 would remove this ethical tension by clarifying that counsel has one duty: to be a zealous advocate.

8. Amendments

The author has agreed to amendments to clarify the scope of the bill and make other technical and conforming changes. First, because section 1470 applies to appointment of counsel in any probate proceeding, this section requires conforming changes in light of the bill's changes. These changes would be made as follows:

Amendment 1

Amend section 1470(a) as follows:

(a) The court may appoint private legal counsel for a ward, a proposed ward, a conservatee, ~~or~~ a proposed conservatee*, or a person alleged to lack legal capacity* in any proceeding under this division if the court determines the person is not otherwise represented by legal counsel. ~~and that the appointment would be helpful to the resolution of the matter or is necessary to protect the person's interests~~.

An additional clarification in section 1471(b) is as follows:

Amendment 2

Amend section 1471(b) as follows:

(b) If a conservatee or proposed conservatee has not retained *legal counsel and does not plan to retain* legal counsel, whether or not that person lacks or appears to lack legal capacity, the court shall, at or before the time of the hearing, appoint the public defender or private counsel to represent the interests of that person in any proceeding listed in subdivision (a).

Additionally, while it is generally understood that an attorney's role is that of a zealous advocate, the term "zealous" is not used in Business and Professions Code section 6068, which governs the ethical duties of attorneys. To avoid confusion and make it clear that counsel for a conservatee or proposed conservatee must act consistent with the general rules of ethics, the following changes will be made:

Amendment 3

Amend section 1471(e) and (f) as follows:

(e) The role of legal counsel of a ~~conservatee or proposed conservatee~~ *conservatee, proposed conservatee, or person alleged to lack legal capacity* is that of a zealous advocate, *consistent with the duties set forth in Section 6068 of the Business and Professions Code and the California Rules of Professional Conduct.*

(f) In an appeal or writ proceeding arising out of a proceeding described in this section, if a conservatee or proposed conservatee is not represented by legal counsel, the reviewing court shall appoint legal counsel to ~~advocate for the rights, interests, and stated wishes of~~ *represent* the conservatee or proposed conservatee before the court.

Finally, several provisions in the Probate Code pertain to gathering information as to whether the conservatee has or plans to retain counsel. (§§ 1826(a)(9), (10); 1851.1(b)(10), (11); 2253(b)(5), (6); 2250.6(c).) Those provisions require conforming changes in light of this bill's changes. The amendments will include these conforming changes.[48]

SUPPORT

California Public Defenders Association
Coalition for Elder & Disability Rights
National Coalition for a Civil Right to Counsel

[48] Additional amendments may include technical, nonsubstantive changes recommended by the Office of Legislative Counsel and the addition of co-authors.

Youth-x-Senior Buddies
Spectrum Institute

OPPOSITION

None known

RELATED LEGISLATION

Pending Legislation:

SB 602 (Laird, 2021) would require probate conservators to submit, at specified points, comprehensive care plans for the care of conservatees and the management of their estates. The bill will be heard in the same hearing as this bill.

AB 596 (Nguyen, 2021) would require attorneys appointed to represent conservatees or proposed conservatees to act as an advocate for the client. However, if the attorney determines that the client is unable to communicate, the bill would require the court to replace the attorney with a guardian ad litem. The bill is pending in the Assembly Judiciary Committee.
AB 1194 (Low, 2021) would make various changes to enhance the regulation of professional fiduciaries, including professional conservators. The bill is pending in the Assembly Business and Professions Committee.

Prior Legislation: *See* Comment 3.

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