Representing the Conservatee in a Contested Probate Conservatorship Proceeding

By Charles M. Riffle[1]
Aaron, Riechert, Carpol & Riffle
Redwood City, California

California Probate Conservatorship statutes are designed to "protect the rights of persons who are placed under conservatorship".[2] In most conservatorship proceedings, all participants will acknowledge that the proposed conservatee's incapacities require the protection of a conservatorship. However, there are cases where the proposed conservatee objects to the imposition of a conservatorship. A proposed conservatee who objects to the establishment of a conservatorship is entitled to have counsel, either of his or her own choosing or appointed by the court.[3] The Probate Code expressly provides for a trial of a contested conservatorship to be conducted according to the same procedures as civil actions.[4]

A contested conservatorship trial usually arises in one of two situations. First, a relative or friend believes that the proposed conservatee is unable to manage his or her own financial affairs or personal care, and files a petition for appointment of a probate conservator. The proposed conservatee believes that he or she still has the capacity to manage his or her care and property, and seeks the assistance of a lawyer to contest the proceeding. Second, the conservatee is under an existing conservatorship, but believes that he or she has improved to the point where he or she can resume responsibility for his or her financial affairs or personal care.[5]

This article will describe the role of the conservatee's lawyer when the establishment of a conservatorship is being contested, point out how applicable evidence rules for such proceedings differ from other civil actions, and make suggestions for successful handling of the case.[6]

A. The Statutory Basis of Probate Conservatorships

Probate Code section 1801 sets forth the grounds for establishment of a probate conservatorship for both the person and estate of the proposed conservatee. A conservatorship of the person may be established if the proposed conservatee "is unable properly to provide for his or her personal needs for physical health, food, clothing or shelter...."[7] A conservatorship of the estate may be established for a person "who is substantially unable to manage his or her own financial resources or resist fraud or undue influence."[8]

A proceeding to establish a conservatorship of the person or estate, or both, may be instituted by filing a Petition for Appointment of Probate Conservator [Judicial Council Form GC-310(90)] along with a Confidential Supplemental Information Form (Probate Conservatorship) [Judicial Council Form GC-312 (90)]. Although both forms require itemization of facts showing need for a conservatorship, it is often the Confidential Supplemental Information Sheet which provides a detailed description of the events which precipitated the filing of the petition. Although the Supplemental Information Form is deemed confidential, it will be available to the attorney for the conservatee from either the attorney for the petitioner or the court investigator's office. In some cases, especially where a temporary conservatorship has been established, there is a report prepared by a psychologist or psychiatrist regarding the conservatee's mental condition. Often, either concurrently with the attorney's engagement or shortly thereafter, the local court investigator's office will have interviewed the proposed conservatee and prepared a report.[9] There may be a police report, or even a report from the county health services department concerning the proposed conservatee's living conditions. Counsel should identify whether such reports exist, and obtain copies of them.

If the conservatee is already subject to a temporary probate conservatorship, he or she will have no power to sign a fee contract with an attorney.[10] An attorney who undertakes such an engagement will have to rely on a court order to obtain payment of fees if a conservatorship is ultimately put in place. Even if the conservatorship is defeated, the better practice is to seek court approval of payment from the temporary conservator before discharge. Since the court is entitled to take the size of the conservatorship estate into consideration when awarding fees, the attorney must adjust preparation to fit the conservatee's budget.

B. Meeting with Proposed Conservatee

After obtaining as much written material as possible describing the condition of the proposed conservatee, counsel should arrange a meeting with the proposed conservatee. During that meeting, counsel should observe the client carefully to identify the proposed conservatee's strengths and weaknesses as a potential witness. Counsel should be prepared to discuss in detail with the proposed conservatee the specific allegations in the Petition and Confidential Supplemental Information Sheet, and all other available reports, to determine the proposed conservatee's explanation of events. This interview will also give the attorney an opportunity to evaluate the proposed conservatee's capacity for self-evaluation. The greater the proposed conservatee's ability to recognize his or her own deficiencies and express willingness to obtain assistance in these areas, the higher the likelihood that the trier of fact will find that the proposed conservatee can manage independently.

C. Ethical Dilemma

What are the lawyer's duties if the lawyer believes that the client definitely needs a conservatorship, but the client is opposed to it? The easy answer is that the lawyer can use his or her persuasive abilities to attempt to convince the client to accept the conservatorship. The attorney can cite the cost of forcing a trial, with little chance of success. The attorney can explain that if a trial is held, win or lose, fees for both attorneys will ultimately be borne by the conservatee. Similarly, the cost of experts on both sides will be paid for with the conservatee's funds. Unfortunately, the client's very lack of capacity may make him or her more susceptible to (or unable to properly evaluate) the attorney's advice.

On the other hand, the lawyer can identify those areas in which the proposed conservatee desires freedom the most, and encourage the proposed conservatee to negotiate for fewer restrictions in those areas.[11] Sometimes, simply describing the conservatee's life under the conservatorship can relieve the client's anxieties and help the client to accept the conservatorship. One of the primary reasons why many people reject the idea of conservatorship is a

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fear that it will render them powerless. To the extent that the attorney can present alternatives that give the client power, the client is more likely to see the wisdom of the conservatorship.

If, despite the attorney's best efforts, the proposed conservatee is still opposed to the conservatorship, the attorney's duty appears clear. A lawyer must represent a client zealously within the bounds of the law.[12] "The authority to make decisions is entirely that of the client and ... such decisions are binding on the lawyer."[13] As long as the client is capable of understanding what is occurring, and assisting the attorney in the advancement of the case, the attorney must defer to the client's wishes, and litigate the matter aggressively to conclusion.[14]

D. Filing Objections

Probate Code section 1829(a) provides that the proposed conservatee may appear at the hearing for imposition of a conservatorship and oppose the petition. The Probate Code does not require the conservatee to file any pleadings to perfect his or her opposition. The Continuing Education of the Bar publication on California Conservatorships and Guardianships recommends that counsel for the conservatee file written objections.[15] That publication even contains a form for such objections.[16] Absent local rules to the contrary, there is little benefit to the conservatee in filing written objections. Probate Code section 1800 succinctly describes the standard which the court or jury will apply in determining the need for a conservatorship, and there do not appear to be any affirmative defenses or other claims which must be asserted to enable the conservatee to introduce evidence in their support. Filing formal objections denying the allegations of the petition may only alert the attorney for the conservator to your theory of the case and add additional costs to the defense.

The filing of objections can provide a service to the court by notifying it of the existence of the opposition, and allowing a prompt transfer of the case to the trial calendar. If counsel chooses to file formal objections, the objections should be limited to informing the court to the fact of opposition, and little more.

E. Choosing the Expert

Once it appears as if the conservatorship will go to a trial, the attorney must retain the services of a psychiatrist or psychologist to serve as an expert witness. The choice of an expert is particularly important if the client will be a poor witness. Often a skilled expert witness can put the client's recognizable deficiencies into context for the trier of fact.

The attorney should take responsibility for locating qualified experts to interview the proposed conservatee. The practitioner should approach the engagement of such an expert cautiously because the normal psychotherapist-patient privilege does not apply in a conservatorship proceeding.[17] If the attorney is concerned that the expert might render the opinion that a conservatorship is necessary, the attorney can protect that opinion from discovery by the attorney for the petitioner by initially retaining the expert as a consultant. The attorney work-product privilege will protect the identity and opinions of such a consultant from discovery by opposing counsel.[18]

When the attorney has identified a health care professional who can act as an expert witness, the attorney should consider filing a petition for court authority to retain the expert, if time permits.[19] The petition should include the expert's hourly rate and an estimate of the total cost through trial. The filing of such a petition will, of course, identify the expert and virtually guarantee that the attorney for the petitioner will depose him or her. The attorney must balance this disadvantage against the assurance that the court's preapproval will assure the expert's later payment. If the attorney loses the contested conservatorship at trial, the attorney will have to obtain a court order directing the conservator to pay the expert's fees, as well as his or her own fees, possibly over the objections of the conservator. By obtaining prior court approval for engagement of the expert, the attorney can eliminate the chances that the court will disapprove or reduce the fee ultimately requested.

F. Trial by Jury?

The proposed conservatee has a right to have his or her case heard by a jury.[20] If counsel is considering a jury trial, a demand for trial by jury should be filed as soon as possible. At the very latest, the attorney should request a trial by jury at the time the case is set for trial.[21]

In deciding whether or not to opt for a jury trial, the attorney may wish to look long and hard at the contents of the court investigator's report. If the report contains unfavorable evidence which may be inadmissible at the trial (See Section H(2), *infra*), the attorney may wish to request a jury trial. If the attorney successfully objects to the introduction of the evidence at a jury trial, the jury will never see the unfavorable evidence. In contrast, the judge at a court trial will see the evidence when he or she must rule on the objection.

Cost may also be a factor in the final decision whether to demand a jury trial. Aside from the fact that jury fees must be posted,[22] substantial attorney's time may have to be spent on choosing the jury, formulating the jury instructions and conducting the trial. Since the conservatee's estate will ultimately bear the cost of both attorneys in the case, the additional cost associated with the jury trial may be prohibitive.

If the attorney requests a jury trial, the attorney must post the jury fees twenty-five days before the trial.[23] If a temporary conservatorship is in place and the temporary conservator will not agree to post the fees and/or pay them daily as the trial progresses, the attorney should seek a court order directing payment of the fees.

G. Preparing the Proposed Conservatee For Trial

In practice, the proposed conservatee will usually testify at the trial whether the attorney likes it or not. Even if one is opposed to the client testifying, the attorney for the petitioner can always call the client to the stand under Evidence Code section 776. Since a conservatorship is a "protective proceeding", and not a criminal one, there is no right against self incrimination.

The attorney's role in preparing the proposed conservatee for testifying at the trial is a delicate one. Often, the conservatee's personal hygiene is poor, and clothes are dated or worn. The attorney should be prepared to encourage, or coax, the conservatee to do the necessary shopping, obtain a hair cut, or use the makeup necessary to present a good appearance in court. If the client's appearance is consistent with life in the day-to-day world, the trier of fact is more likely to determine that a conservatorship is not necessary.

The lawyer's other critical job in preparing the client for trial is

to discuss the theme or theory of the case. If the client understands the nature of the attorney's defense, and the method of handling or explaining earlier erratic behavior, the client can better field the tough cross examination questions ahead. Role playing with the proposed conservatee can be an effective method of preparation. It allows the attorney to critique the client's answers, while relieving the client's anxiety about what is coming. The latter approach can also be a means to encourage any self-reflective behavior which appears. Does the client recognize his or her deficiencies? If so, how does the client plan to deal with them if the conservatorship is defeated. What does the client own? If the client prevails at the trial, are there any investment plans in place? Can the client recognize the need to resist the advances of strangers who may seek to take advantage of him or her? Does the client have a plan of how to resist such advances?

Regardless of the strengths of the respective expert witnesses, cases of this type are often won or lost on the proposed conservatee's abilities on the witness stand. Careful preparation for that testimony is probably the trial attorney's most important pre-trial job.

H. The Trial

1. *The Burden of Proof.*

One of the few advantages that the conservatee's attorney has at trial is the burden or proof. Unlike most civil actions, the trier of fact may impose a conservatorship only upon the presentation of clear and convincing proof that one is necessary.[24] "Clear and convincing" evidence is "evidence of such convincing force that it demonstrates a high probability of the truth of the fact(s) for which it is offered as proof."[25] The Supreme Court has been even more forceful in describing this standard as requiring evidence that is "clear, explicit, and unequivocal," "so clear as to leave no substantial doubt" and "sufficiently strong to command the unhesitating assent of every reasonable mind."[26] These are powerful definitions which can be used effectively to argue that petitioner has not carried his or her burden of proof.

2. *The Admissibility of the Court Investigator's Report.*

If the case has gone as far as a trial, there is a high likelihood that the local court investigator's office has recommended the establishment of a conservatorship. The petitioner will most likely offer a copy of the investigator's report into evidence. Will this tactic succeed?[27] Evidence Code section 1280 provides that a writing prepared by a public employee as a record of an act, condition or event is admissible when offered to prove the act, condition or event, if the report was made at or about the time of the act, condition or event, and was prepared in such a way to indicate its trustworthiness. Court investigator's reports traditionally contain the proposed conservatee's answers to specified questions and the investigator's observations about the conservatee gleaned during the course of an interview. The portions of the report which set forth the proposed conservatee's answers and the court investigator's observations regarding the person's conduct appear to be admissible under Evidence Code section 1280.

Often the report will contain the results of interviews with the client's friends and relatives in which those friends and relatives describe statements made or actions taken by the client. Absent an applicable exception to the hearsay rule, such statements are double hearsay, which should be excluded.[28] The proper method to handle a report containing both admissible observations and inadmissible hearsay is for the court to strike the hearsay portions. However, the law appears to be settled that the failure of the attorney to object to the admission of a portion of the report containing the double hearsay constitutes a waiver of the attorney's right to exclude it.[29]

Similarly, the court investigator's opinions, conclusions and recommendations as set forth in the report should not be admitted. The general rule is that if the statements in the report would not have been permitted if the court investigator testified on the stand, then that portion of the report should be excluded.[30] "[R]ecords of investigations ... conducted pursuant to requirement of law by public officers concerning causes and effects, and involving the exercise of judgment and discretion, expressions of opinion, and the making of conclusions are not admissible in evidence as public records."[31]

If the investigator is present to testify, counsel may wish to object to the introduction of his or her report into evidence on the ground that the report is cumulative.[32] If the judge has already ruled that portions of the report must be excised as inadmissible, counsel may be able to argue successfully that the introduction of a "chopped-up" report can only confuse the issues, especially when the investigator has testified as to the observations he or she made in the report.

3. *Functional Disability As Grounds For Establishment of Conservatorship.*

One of the two methods the petitioner can prevail in a contested conservatorship proceeding is by proving that the conservatee is substantially unable to manage his or her own financial affairs.[33] This is a functional test that requires evidence of the conservatee's management failings to succeed.[34] Accordingly, petitioner may present oral or documentary evidence of lack of attention to business matters (lapsed mortgage, utility or other payments, poor record keeping, unfiled tax returns, and the like). The trial may hinge on what is substantial inability, and what is simply lack of attention or interest. In fact, the last sentence of Probate Code section 1801(b) specifically states that "substantial inability may not be proved solely by isolated incidents of negligence or improvidence." No courts or commentators have examined the meaning of this sentence. Did the legislature, by insertion of this language in the 1977 code revision, require medical testimony to establish a conservatorship of the estate? Or did the legislature intend simply to instruct the trial court that there must be "many" incidents of negligence, as opposed to "few", before a conservatorship should be imposed. One interpretation is that by use of the word "isolated", the legislature was instructing the trial court to look for a pattern of mismanagement and neglect before creating a conservatorship. Such a pattern could be a symptom that the proposed conservatee is suffering from an organic or psychological impairment, rather than simply reacting to stress. From the defense point of view, the last sentence of Probate Code section 1801(b) can be used, along with the burden of proof, to convince the trier of fact that the petitioner has not succeeded in proving his or her case.

4. *Inability to Resist Fraud As a Basis for Imposition of a Conservatorship.*

The other ground for creation of a conservatorship is the proposed conservatee's substantial inability to resist fraud or undue influence. Once again, "isolated incidents" of inability will not be enough. The fact is, charlatans and crooks flummox smart, capable people every day. No one argues that California should conserve all persons who lose money to telephone solicitation

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scams. On the other hand, we have all seen designing people, sometimes relatives, who prey on the weakness of the old and infirm. The trial, like many, may explore the location of the line between occasional loss of property to others through generosity, neglect or bad judgment and substantial inability to resist the overtures of the scheming. From a practical point of view, the trier of fact may be interested not so much in what has happened in the past as in the likelihood that the proposed conservatee will be able to resist future blandishments.

I. Post Trial Actions

Win or lose, there is still work to be done when the trial is concluded. If the conservatorship has been successfully defeated, counsel should assure that the court order reflecting the victory provides for cessation of any temporary conservatorship powers, and provides for prompt return to the proposed conservatee of all assets in the temporary conservatorship. If a temporary conservatorship was in place, the temporary conservator will have to file an accounting, and the order terminating the temporary conservatorship should set a date, say sixty days hence, by which the temporary conservator should file his or her accounting.

If the conservatorship is established, counsel should take the necessary steps to provide that the court order a bond large enough to protect all the conservatee's personal property, plus one year of anticipated income for the estate, including public benefits.[35] Depending on the testimony produced at trial, the attorney may be able to convince the court to include in its order appointing the probate conservator areas of independence for your client, thereby helping the client to better accept the court's determination.[36]

Once the dust settles, the attorney must prepare a petition for a court order requiring the conservator to pay the cost of experts who testified at the trial, as well as the attorney's own fees and costs advanced. If the attorney received the case on court appointment, the petition for fees should be coupled with a request for the attorney to be released as counsel of record for the conservatee. Probate Code section 1470 authorizes the court to order payment of attorney's fees "upon the conclusion of the matter." If the conservatee wishes to continue to be represented by counsel during the pendency of the conservatorship, such a desire should be brought to the attention of the court.

Conclusion

A contested conservatorship proceeding presents the attorney with a unique opportunity to use both civil litigation and people skills. Because a conservatorship in California is a "protective" proceeding, but interferes dramatically with a person's privacy and independence, the attorney must walk a delicate line between aggressively advocating for the client and being sensitive to the client's possible need for assistance in daily living. Often the attorney may become conflicted in a way criminal defense attorneys never are. The attorney's winning the trial may place the client at an ongoing risk; the attorney's losing the trial may in fact result in beneficial protection of the client's assets and personal safety. Unlike physicians, attorneys do not have "do no harm" as part of their code of ethics. In this context, an attorney's successful discharge of his or her duty may actually permit harm to befall his or her client. The need for each attorney to creatively resolve this inherent conflict is part of the unique challenge of representing clients in contested conservatorship proceedings.

Endnotes

1. The author wishes to express his appreciation to James R. Kaspar, Chief Probate Investigator for San Mateo County, and James L. Deeringer of Downey, Brand, Seymour & Rohwer in Sacramento, California for their invaluable assistance in the preparation of this article.
2. Cal. Prob. Code §1800.
3. Cal. Prob. Code §§1470, 1471.
4. Cal. Prob. Code §1827.
5. The scope of this article is limited to an analysis of the issues arising only on the first occasion, i.e. a contested trial to determine if a conservatorship should be instituted.
6. This article does not encompass contested trials in conservatorships established under the Lanterman-Petris Short Act (Cal. Welf. & Inst. Code §5000), which involve a different standard (the proposed conservatee must be "gravely disabled") and a different burden of proof ("beyond a reasonable doubt").
7. Cal. Prob. Code §1801(a)
8. Cal. Prob. Code §1801(b)
9. Cal. Prob. Code §§1851, 1826
10. Cal. Prob. Code §1872(a)
11. Cal. Prob. Code §1873.
12. Canon 7 A.B.A. Model Code of professional Responsibility; DR 7-101(a), *People v. McKenzie*, 34 Cal.3d 616, 631 (1983).
13. A.B.A. Model Code of Professional Responsibilities; EC 7-7; see A.B.A. disciplinary rule 7-101(A) (1)
14. See San Diego Bar Association Ethics Opinion 1978-1.
15. C.E.B., *California Conservatorships and Guardianships* §6.51
16. C.E.B., *California Conservatorships and Guardianships* §6.52
17. Cal. Evid. Code §1016
18. Cal. Code of Civ. Proc. §2018(b); *Long Beach v. Superior Court*, 64 Cal.App.3d 65 (1976)
19. Cal. Prob. Code §2403
20. Cal. Prob. Code §1827
21. Cal. Code of Civ. Proc. §631(4)
22. Cal. Code of Civ. Proc. §631
23. Cal. Code of Civ. Proc. §631(a)(5)
24. *Conservatorship of Sanderson*, 106 Cal.App.3d 611 (1980)
25. BAJI No. 2.62
26. In Re Angelia P., 28 Cal.3d. 908, 919 (1981); *People v. Martin*, 2 Cal.3d 822, fn.14 (1970); *People v. Caruso*, 68 Cal.2d 183, 190 (1968)
27. For a thorough discussion of the admissibility of a court investigator's report in a L.P.S. conservatorship, see *Conservatorship of Manton*, 39 Cal.3d 645 (1985)
28. Cal. Evid. Code §1800; *Clemente v. State of California*, 40 Cal.3d. 202, 223 (1993).
29. *In re Jacqueline H.*, 94 Cal.App.3d. 808, 813 (1979)
30. Witkin, *California Evidence*, 3d Edition, §783
31. *Pruett v. Burr*, 118 Cal.App.2d 188, 200 (1953)
32. Cal. Evid. Code §352
33. Cal. Prob. Code §1801(b)
34. Freeland O. Jones, "Probate Code Conservatorships: A Legislative Grant of New Procedural Protection." 8 *Pacific Law Journal* 731, 777 (1977). In contrast, the predecessor to Probate Code section 1801 listed a series of disease syndromes, i.e. advanced age, injury, mental weakness, intemperance, addiction to drugs and other disabilities as grounds for creating a conservatorship. Cal. Prob. Code §1751, repealed June 30. 1976.
35. Cal. Prob. Code §2320(c)
36. Cal. Prob. Code §1873 ■