QUASI-JUDICIAL IMMUNITY IN CONSERVATORSHIPS: A GUIDE FOR CONSERVATORS AND THEIR COUNSEL

By Michelle L. Barnett, Esq., Charles Riffle, Esq.,* and Sarah Brooks, Esq.**

In 2014, the Fourth District Court of Appeal in *McClintock v. West*[1] held that a guardian ad litem in a family law case was entitled to quasi-judicial immunity in a subsequent tort action initiated against her by her former ward. In 2015, in the unpublished decision *Burk-Soorani v. Simon*,[2] the Second District Court of Appeal extended quasi-judicial immunity to a professional conservator who was sued in a tort action for elder abuse and wrongful death after she made healthcare decisions for a conservatee. The reasoning of the Fourth and Second District Courts of Appeal suggests that California courts may soon extend the protection of quasi-judicial immunity to conservators. But should they?

This article will examine the history of the quasi-judicial immunity doctrine, the application of the doctrine in California and elsewhere, and whether quasi-judicial immunity is warranted in the context of California conservatorships. As this article will demonstrate, the state's comprehensive statutory framework governing conservatorships renders quasi-judicial immunity unnecessary for the conservator of the estate. And whether a conservator of the person is cloaked with the protection of quasi-judicial immunity should hinge upon whether the conservator acted within the scope of his or her authority in a matter "intimately related to the judicial process."[3]

I. THE DOCTRINE OF QUASI-JUDICIAL IMMUNITY

A. Historical Foundation for Quasi-Judicial Immunity

In England, during feudal times, the King, through courts of equity, took responsibility for the care and protection of the estates of incapacitated lords.[4] After the American Revolution, this regal responsibility of *parens patriae,* or parent of the country, devolved to the individual state legislatures as representatives of the people.[5] Courts of equity, established in various state constitutions or by legislative action, became responsible for the care of the incapacitated person's property, and also for the incapacitated person's individual welfare.[6]

There have never been enough judges to personally handle all such *parens patriae* cases. To ease the judicial burden, the various state legislatures created statutory mechanisms permitting judges to preside over their *parens patriae* responsibilities through the use of surrogates. Such surrogates are ultimately held accountable to the probate judge and operate under his or her auspices. In California, the *parens patriae* surrogates include court investigators, public guardians, probate research attorneys, court clerks, bailiffs, guardians ad litem, guardians, and conservators.[7] Without the dedicated services of these surrogates, the California court system could not fulfill its *parens patriae* responsibility to safeguard the assets and otherwise protect the young, sick, and incapacitated citizens of this State.

B. The Evolution of Quasi-Judicial Immunity in California Courts

It is unquestioned in California that judges have absolute immunity from suit for the exercise of their judicial powers.[8] Similarly, California courts, relying on precedent from federal courts, have consistently extended the protection of quasi-judicial immunity to judicial surrogates who assist courts in carrying out their judicial functions.[9] After all, these surrogates are simply acting as an arm of the court. As discussed below, the list of judicial surrogates protected by the doctrine of quasi-judicial immunity has grown in the recent years. It now includes guardians ad litem, and in at least one case, a conservator.[10]

1. Howard v. Drapkin

Howard v. Drapkin is the leading case examining the doctrine of quasi-judicial immunity under California law. The case arose out of a family law action for child custody and visitation. Due to allegations of physical, emotional, and sexual abuse, the parties stipulated to the appointment of psychologist, Robin Drapkin, to perform a family evaluation and render non-binding findings and recommendations to the parties. Pursuant to the stipulation, Drapkin was authorized to provide written reports to the parties, but not to the court. Drapkin also was authorized to testify in the custody hearings if requested by the parties.[11] The family law judge signed the stipulated order, but had not required the stipulation, did not participate in drafting it, and did not supervise Drapkin's work.[12] After Drapkin conducted her evaluation, the minor's mother, Vickie Howard, alleged that Drapkin acted improperly in carrying out her evaluation and filed a civil action against Drapkin for professional negligence, intentional infliction of emotional distress, negligent infliction of emotional distress, and fraud.[13] Drapkin demurred on grounds that she was

protected by the doctrine of quasi-judicial immunity and the litigation privilege.[14] The trial court sustained Drapkin's demurrer, and the Second District Court of Appeal affirmed.[15]

The Second District held that absolute quasi-judicial immunity is properly extended to neutral third parties for their conduct in performing dispute resolution services which are connected to the judicial process and involve either: (1) the making of binding decisions; (2) the making of findings to the court; or (3) the arbitration, mediation, conciliation, evaluation, or other similar resolution of pending disputes.[16] Thus, the Second District affirmed the trial court's dismissal of the action because Drapkin, a court-appointed psychologist, was a neutral third party who was performing dispute resolution services connected to the judicial process.[17]

In reaching its decision, the Second District recognized that the overburdened judicial system must attract independent and impartial services and expertise to function.[18] Therefore, it is necessary "that these 'nonjudicial persons who fulfill quasi-judicial functions intimately related to the judicial process' [citation] should be given absolute quasi-judicial immunity for damage claims arising from their performance of duties in connection with the judicial process."[19] Without such immunity, "persons will be reluctant to accept court appointments or provide work product for the courts' use. Additionally, the threat of civil liability may affect the manner in which they perform their jobs. [Citation.]"[20]

2. McClintock v. West

In 2014, the Fourth District Court of Appeal, in *McClintock v. West*, extended quasi-judicial immunity to a guardian ad litem in a family law dispute.[21] The case involved divorce proceedings in which the court appointed Michele West as guardian ad litem to act on behalf of Douglas McClintock, who had checked himself into a hospital for depression on the eve of his divorce trial.[22] While serving as guardian ad litem, West made decisions on McClintock's behalf regarding the division of assets and child custody.[23] After the divorce case concluded, McClintock sued West for negligence, fraud, breach of fiduciary duty, breach of contract, and intentional infliction of emotional distress.[24] The trial court sustained West's demurrer without leave to amend, and the Fourth District Court of Appeal affirmed.[25]

The Court of Appeal held that the litigation privilege barred McClintock's breach of contract and fraud claims and ruled that West, as McClintock's guardian ad litem, had quasi-judicial immunity from McClintock's remaining tort claims.[26] In its consideration of the case, the Fourth District did a comprehensive review of the California cases that had extended quasi-judicial immunity to various judicial surrogates, including court commissioners, prosecutors, grand jurors, arbitrators, the State Bar and committee of Bar Examiners, and a court-appointed psychologist.[27] The Fourth District concluded that the correct test to be applied to determine whether quasi-judicial immunity should be extended to a guardian ad litem was whether the guardian ad litem fulfilled "a function that [was] 'intimately related to the judicial process . . . .'"[28] In deciding that West fulfilled such a function as guardian ad litem, the court pointed out that West acted under the supervision of the trial court and in the best interests of her ward.[29] As the court reasoned, acting in the best interests of the ward was "a function intimately related [to the judicial process], and indeed, one which the trial court found in this case was indispensable to bringing the case to conclusion."[30]

The Fourth District observed that "while a guardian ad litem's role is as a representative of the ward, he or she does not act as an advocate, and does not simply represent the ward's wishes. 'The court is, in effect, the guardian . . . and the guardian *ad litem* is but an officer and representative of the court. [Citation.]'"[31] The Fourth District further noted that "the guardian ad litem's authority is that of 'an agent with limited powers[,]' [citation]"[32] and "when a guardian ad litem believes that settling a case is in the ward's best interests, that decision requires court approval."[33] The court must then determine whether the ward's interests are adequately protected. "The guardian ad litem, therefore, when representing an adult deemed incapable of representing himself or herself, is in a similar role to a conservator, who derives his or her authority from the power of the state to protect incompetent persons."[34]

The Fourth District found that the policy considerations raised in *Howard v. Drapkin* weighed heavily in favor of immunity for West, asking "if West had known she'd be subject to liability, would she have agreed to appointment?"[35] The Fourth District further opined, "[w]hy would any qualified person ever accept appointment as guardian ad litem when his or her decisions could be subject to such post hoc second-guessing?"[36] Moreover, the Fourth District found that there were sufficient safeguards in place to ensure accountability of guardians ad litem. First, "immunity is limited to acts within the scope of the guardian's authority."[37] Second, "in addition to a guardian ad litem, wards generally have legal counsel."[38] Third, "guardians ad litem are appointed by and subject to the supervision of the trial court."[39] Finally, "the trial court's decisions are ultimately subject to review by an appropriate writ or appeal."[40] Therefore, the Fourth District concluded West was entitled to quasi-judicial immunity when acting within the scope of her authority as guardian ad litem.[41]

3. Burk-Soorani v. Simon

Until recently, no appellate court in California had faced the question of whether a conservator is entitled to quasi-judicial immunity for damages arising from the exercise of his or her duties as conservator. However, the Second District Court of Appeal, in its unpublished opinion of *Burk-Soorani v. Simon,* recently held that a court-appointed conservator with medical decision-making authority was protected by quasi-judicial immunity when acting within the scope of her appointment.[42]

Burk-Soorani involved a civil action for elder abuse and wrongful death initiated by a conservatee's daughters against a court-appointed conservator. Over the objections of those daughters, the probate court appointed Frumeh Labow, a professional fiduciary, as temporary conservator of the person and estate of Beatrice Burk after Burk was hospitalized.[43] Labow informed the court prior to her appointment that she intended to transfer Burk to a skilled nursing facility following her discharge from the hospital.[44] In the order appointing Labow temporary conservator, the court authorized Labow to make health care decisions and determine placement for Burk.[45] Labow moved Burk to a convalescent facility, once she was appointed as conservator, as she had informed the court she would do. Burk died of "overwhelming sepsis" approximately one week later.[46]

Following Burk's death, her daughters filed an action against Labow for elder abuse and wrongful death. The daughters alleged that Labow failed to select a competent medical and nursing staff and had "negligently and carelessly [fed] and supervis[ed] [Burk] such that she choked to death."[47] Labow filed a motion for summary judgment on the ground that she was protected by quasi-judicial immunity.[48] Labow supported her motion with a declaration explaining that she had not advocated for an appointment to act as Burk's conservator, and that she agreed to feed Burk pureed food with Burk's doctor's consent.[49] The trial court held that Labow, as court appointed conservator with medical decision-making authority, was protected by quasi-judicial immunity because she acted within her reasonable discretion and her activities were part of a quasi-judicial function.[50] The Second District agreed, acknowledging that "[t]o deny Labow immunity in a situation like this would discourage any qualified professional conservator from accepting court appointments in cases where family members disagree about medical decision-making, thus denying the incapacitated person any protection from the state."[51]

The Second District relied on the reasoning in *Howard v. Drapkin* and *McClintock v. West* to support its extension of quasi-judicial immunity to Labow. The Second District stated that "[t]he gravamen of a conservatorship proceeding is a concern that the proposed conservatee is no longer capable of making decisions that are in her best interests."[52] The probate court found that there was a pressing need for a neutral third party to make decisions regarding the conservatee's care in appointing Labow and granting medical decision-making authority.[53] The probate court concluded that "[h]ad there been no petition and no court involvement, Labow would have had no role in [Burk's] care. Her decisions were directly the result of her court appointment, and all the reasons discussed in *McClintock* weigh in favor of finding immunity here."[54]

Because the daughters presented no admissible evidence that Labow exceeded her authority as conservator, the Second District found that Labow was entitled to quasi-judicial immunity. The Second District noted, "the conservatorship proceeding and related statutes provide adequate supervision and protections against a conservator who might take action that is outside the bounds of her authority."[55] Thus, the Second District concluded, "[s]o long as the letter of appointment delineates the conservator's powers and duties, and those include medical decision-making, then the conservator is entitled to quasi-judicial immunity."[56] The court reasoned, "[t]o conclude otherwise would render meaningless the sections of the Probate Code that permit the court to appoint a conservator to make medical decisions or exercise statutory powers to care for a person with dementia."[57]

The opinion is unreported and, therefore, it is not binding on California courts.[58] However, the opinion indicates that California courts may start extending quasi-judicial immunity to conservators based on the reasoning in *Howard v. Drapkin* and *McClintock v. West.*

C. The Status of Quasi-Judicial Immunity for the Conservator in Other Jurisdictions

1. Federal Courts

Courts in other jurisdictions have split over whether quasi-judicial immunity should be extended to conservators. Federal courts appear more willing to determine that conservators are agents of the probate court in making medical decisions and managing the finances of incapacitated wards.[59] In such cases, federal courts have extended quasi-judicial immunity to conservators acting within the scope of their duties.[60] As the Ninth Circuit has said "[the conservator] was acting pursuant to his court-appointed authority in the performance of his statutory duties. He was acting in a quasi-judicial capacity and was immune from suit."[61] In at least one case, a federal court extended quasi-judicial immunity even where a conservator

acted beyond the scope of his statutory powers, but pursuant to explicit instructions from a judicial officer.[62] In that case, the conservator was appointed for the sole purpose of consenting to surgery and blood transfusions on behalf of an unconscious conservatee, whose family refused to consent on religious grounds.[63] The court extended immunity because the court's order appointing the conservator "was made with specific directions as to his course of conduct as conservator, giving him no discretion. His liability should be no greater than the judge who appointed him."[64]

2. State Courts

State courts have not been as uniform as federal courts in their analysis of quasi-judicial immunity. For example, Connecticut courts have extended quasi-judicial immunity to conservators, but only for those acts that the probate court approves or authorizes.[65] Courts in Texas and Alaska have refused to extend the protection of quasi-judicial immunity to conservators.[66] And despite extending quasi-judicial immunity to a guardian ad litem in a divorce proceeding, the Supreme Court of Nebraska refused to extend quasi-judicial immunity to a guardian of an incapacitated person in a wrongful death suit.[67] In that case, a ward was assaulted and killed by her roommate in a residential care facility. The court stated that "[u]nlike the functions of a guardian ad litem, . . . the role of a guardian in selecting a residence for an incapacitated ward is not closely related or ancillary to a court's adjudication of a particular matter."[68]

In *Gross v. Rell*, the Supreme Court of Connecticut held that "absolute quasi-judicial immunity extends to a conservator appointed by the Probate Court only when the conservator is executing an order of the Probate Court or the conservator's actions are ratified by the Probate Court."[69] Such a rule is necessary, the court determined, because "imposing liability on a conservator for acts authorized or approved by the Probate Court would chill that court's ability to make and carry out fearless and principled decisions regarding the conservatee's care and the management of his or her estate."[70] But, when a conservator's actions are not authorized or ratified by the probate court, the court reasoned that the conservator is not acting as an agent of the probate court, but as a fiduciary of the conservatee.[71] In such an instance, both conservators of the estate and of the person are not provided quasi-judicial immunity and may be held personally liable.[72] Not extending immunity in those circumstances "does not undermine the independence and integrity of the Probate Court's decisions regarding the conservatee."[73] In reaching its determination that a conservator is not entitled to quasi-judicial immunity in all cases, the court examined the legislative intent behind the requirement that conservators be bonded, opining "[t]here would be little point to requiring a probate bond or providing procedures for bringing an action against conservators if they were entitled to absolute quasi-judicial immunity for *all* of their conduct on behalf of conservatees."[74]

In Alaska and Texas, on the other hand, the courts have determined that conservators are *not* entitled to quasi-judicial immunity for any actions taken in their capacity as conservator.[75] In *Trapp v. State*, the Supreme Court of Alaska refused to extend quasi-judicial immunity to conservators because, in the court's view, immunity conflicted with the state's conservatorship statutes which: (1) explicitly make conservators liable for torts committed in the course of administration where they are personally at fault; and (2) permit claims by the estate against the conservator individually in either the conservatorship proceeding or another appropriate action.[76] The Supreme Court of Alaska also reasoned that "fiduciaries are generally liable to those whom they are charged with protecting when they breach their fiduciary duties."[77]

Similarly, in *Edwards v. Pena*, the Texas Court of Appeals for the Thirteenth District refused to extend immunity to conservators because state law subjected them to liability. As the court noted, the Texas Probate Code specifically states that a conservator of the estate may be held liable for failing to exercise due diligence in collecting all claims and debts due to the conservatee and recovering possession of the conservatee's property.[78] Texas law also recognizes that conservators owe a fiduciary duty to the conservatee and may be held liable if they breach that duty.[79] Finally, the court reasoned that "[p]ossessing and managing property are not activities generally undertaken by courts."[80] Neither Texas nor Alaska courts, however, have had the occasion to address whether the conservator who is acting pursuant the express orders of the probate court should be protected from liability for their actions under the doctrine of quasi-judicial immunity.

II. SHOULD CALIFORNIA COURTS EXTEND QUASI-JUDICIAL IMMUNITY TO CONSERVATORS?

A. The Current Statutory Framework Governing California Conservators

In California, a conservator, like a guardian ad litem, is subject to the regulation and control of the superior court in the performance of his or her duties.[81] While there is no statutory scheme governing the powers and duties of the guardian ad litem, California has a comprehensive statutory framework

regulating the actions of its conservators of the person[82] and of the estate.[83] And woven throughout this comprehensive framework are (1) statutes making the conservator personally liable for torts and other malfeasance in certain circumstances;[84] and (2) statutes permitting recovery against conservators in both probate and non-probate actions.[85]

There are extensive statutory provisions governing the powers and duties of a conservator of the estate. For example, a conservator of the estate must post a bond[86] and file an accounting of his or her actions with the court one year after appointment and at least every other year thereafter.[87] The conservator is required to provide notice of the hearing on the conservator's accounting to the conservatee and to any other person who has requested special notice of the conservatorship proceeding.[88] The assigned court investigator reviews the conservator's accountings,[89] and if the court spots irregularities in the conservator's account, it may appoint independent counsel to represent the conservatee.[90] California's conservatorship statutes expressly contemplate liability for a conservator of the estate who breaches his or her fiduciary duty to the conservatee, and Probate Code sections 2401.3 and 2401.5 set the measure of damages to be assessed against such a conservator of the estate.[91] The court can enter a judgment against the conservator to surcharge him or her for any losses the conservatorship suffered at the hands of the conservator.[92] The provisions of the code related to the court's ability to surcharge the conservator for breach of fiduciary duty "do not prevent resort to any other remedy available against the . . . conservator under the statutory or common law."[93] In these ways, the probate court oversees the actions of the conservator of the estate to ensure the conservatee's estate is managed appropriately and with due care.

However, the code also protects conservators of the estate who act reasonably or pursuant to court authorization. For example, if the court determines that the conservator acted reasonably and in good faith under the circumstances as known to the conservator, the court may excuse the conservator, in whole or in part, from surcharge liability.[94] Additionally, Probate Code section 2103 "releases the . . . conservator and the sureties from all claims of the . . . conservatee and of any person affected thereby based upon any act or omission directly authorized, approved, or confirmed in the judgment or order."[95]

There is less guidance for a conservator of the person, who must often make difficult life-altering decisions for the conservatee based on the conservator's determination of the conservatee's "best interests." A conservator of the person generally has the power to consent to medical treatment for the conservatee[96] and may determine where a conservatee should live—including the placement of a conservatee in a secured facility.[97] However, while a conservator with the appropriate powers can and should make routine medical decisions for a conservatee without court control or intervention,[98] more serious and life-altering decisions generally require court consultation.[99] For example, a conservator must seek authority from the court before a conservator can place a conservatee in a locked facility or administer psychotropic drugs to the conservatee for the treatment of dementia.[100]

Under California's conservatorship statutes, any interested person, including a family member, can bring a petition in the probate court at any time to question any act of a conservator of the person.[101] Accordingly, if the conservator acted outside his or her powers or neglected his or her fiduciary duties, the conservator may be personally liable to the conservatee or others.[102] In these ways, the probate court oversees the actions of the conservator of the person to ensure the personal needs of the conservatee are met.

Embedded within the statutory framework are consistent admonitions that the conservator must always act in the best interests of the conservatee. For example, a conservator of the person must follow a conservatee's instructions regarding health care decisions but, failing such instructions, must make such decisions in accordance with the conservator's determination of the conservatee's best interests.[103] A conservator of the estate also must exercise his or her duties in a manner consistent with a conservator's fiduciary duty to the conservatee, and solely in the interests of the conservatee.[104] As the *Handbook for Conservators* published by the Judicial Council of California states, "[t]he court and the conservatee are trusting [the conservator] to follow the law and to act in the conservatee's best interest."[105] If a conservator fails to exercise his or her duties appropriately, the court is able to not only surcharge the conservator, but it can limit the powers previously granted to a conservator, or remove the conservator altogether if it determines doing so would be in the conservatee's best interests.[106]

In California, an action for breach of fiduciary duty against a conservator normally is brought within the probate conservatorship proceeding. For the conservator of the estate, the action typically comes as part of an objection to an accounting,[107] a petition to surcharge the conservator,[108] or a petition under Probate Code section 850 to recover assets wrongfully taken from the conservatee. For the conservator of the person, the action could come as removal or surcharge petition.[109] In either case, the statutory framework of California law clearly gives the conservator no immunity of any type

where the conservator has acted outside the scope of his or her fiduciary duties and powers.[110]

The question is, however, whether California conservators should have, or even need, quasi-judicial immunity when acting within the scope of their authority as conservators.

B. Whether California Courts Extend Quasi-Judicial Immunity to Conservators Should Depend on the Nature of the Acts in Question

As in Texas and Alaska, two states whose courts have spoken on this issue, California courts should not, and do not need to, extend quasi-judicial immunity to protect conservators of the estate. The policy factors supporting quasi-judicial immunity for the guardian ad litem—espoused first in *Howard v Drapkin*, and later in *McClintock v. West*—apply with equal force to conservators as they do to guardians ad litem. Like guardians ad litem, the conservator "fulfills a function that is 'intimately related to the judicial process.'" Further, the conservator's role, like the guardian ad litem's role, "is that of a court-appointed officer, who, under the appointment of and under the supervision of the trial court, must act in [the] [conservatee's] best interests."[111]

However, the conservatorship statutes contain an important safeguard to protect the conservator. Where the probate court has approved or ratified a conservator's act, that order has a res judicata effect and "releases the . . . conservator and the sureties from all claims of the . . . conservatee and of any persons affected thereby based upon any act or omission directly authorized, approved, or confirmed in the judgment or order."[112] Even where the conservator's actions have not been approved or ratified by the probate court, the conservator may not be held liable if he or she acted "reasonably and in good faith" under the circumstances known to the conservator.[113] There are no similar statutory provisions protecting a guardian ad litem who has been accused of breaching his or her duties to the ward. Thus while quasi-judicial immunity may be necessary for the guardian ad litem, it is not necessary, or even warranted, for all conservatorships.

The need for judicial immunity may depend on the type of conservatorship under review. In contrast to guardians ad litem, the defalcating conservator of the person faces civil tort liability. The California conservatorship statutes expressly state that actions against a conservator of the estate who breaches his or her fiduciary duty are not limited to the surcharge provisions set forth in the Probate Code.[114]

The answer, however, is not quite as clear for the conservator of the person. This is especially true for the conservator making routine health care decisions for a conservatee. While a court order approving or ratifying a conservator of the person's acts has the same res judicata effect as it does for the conservator of the estate,[115] the conservator making routine or emergency health care decisions for a conservatee may not have time to seek authority from the court before making such important decisions. Nor do courts want the conservator of the person to seek their approval for each and every medical decision. Citing *Conservatorship of Drabick*,[116] the Law Revision Commission Comments to Probate Code section 2355 make it clear that court control or intervention in a conservator's routine medical decisions "is neither required by statute, nor desired by the courts."[117] Nonetheless, conservators of the person are free to seek ratification of their acts after the fact, and if they do, they are protected from future liability by statute without resorting to the doctrine of quasi-judicial immunity.[118]

But what happens where the conservator of the person makes a routine medical decision and the conservatee dies before the conservator of the person could seek court-ratification of his or her acts? Unlike the conservatorship of the estate, which continues for limited purposes after the conservatee's death,[119] the conservatorship of the person dies along with the conservatee.[120] There is no authority under the Probate Code for the conservator of the person to seek court ratification of health care or other decisions he or she made prior to the conservatee's death. Perhaps this is where application of the doctrine of quasi-judicial immunity is necessary for the protection of the conservator of the person.[121] The authors believe that California courts should follow the Second District's analysis in *Burk-Soorani* and extend quasi-judicial immunity where the conservator acts as a neutral third party to make decisions regarding the conservatee's care and acts within the bounds of his or her authority as conservator.[122] Without a court order approving the conservator's actions, the conservator of the person otherwise has no statutory protection from suit.

III. BEST PRACTICES FOR COUNSEL REPRESENTING THE CONSERVATOR

Until we hear from the Supreme Court definitively on the issue of whether a conservator acting within the scope of his or her authority enjoys the protection of quasi-judicial immunity, the best approach for the conservator and his or her counsel is to ensure that the conservator discloses all significant actions taken, or proposed to be taken, on behalf of the conservatee to the probate court. For the conservator of the estate, this means that petitions for approval of accountings should be crafted in such a fashion so as to disclose to the probate court each and every critical decision the conservator made during

the accounting period. When possible, conservators of the person should seek prior court approval for all major health care decisions, especially end-of-life and other life-altering decisions that they are required to make.[123] If prior court approval is not possible, the conservator of the person should, when feasible, seek court ratification of his or her actions after the fact under Probate Code section 2103. In the hopefully rare situation where the conservatee dies before the conservator of the person is able to obtain ratification of his or her acts, quasi-judicial immunity should protect the conservator of the person from liability for routine decision making related to the health and well-being of the conservatee.

Aaron, Riechert, Carpol & Riffle, APC
Redwood City, California

1 *McClintock v. West* (2013) 219 Cal.App.4th 540.

2 *Burk-Soorani v. Simon* (Mar. 13, 2015, B251686 [nonpub. opn.]).

3 *McClintock v. West*, *supra*, 219 Cal.App.4th at p. 551; citing *Howard v. Drapkin* (1990) 222 Cal.App.3d 843, 857.

4 See, generally, Role of the Attorney for the Alleged Incapacitated Person, 31 Stetson L.Rev. 687, 690-691 (2002).

5 *Id.* at pp. 691-692.

6 *Id.* at 691.

7 See *Howard v. Drapkin* , *supra*, 222 Cal.App.3d at p. 857; *Conservatorship of Wendland* (2001) 26 Cal.4th 519, 545.

8 *Oppenheimer v. Ashburn* (1959) 173 Cal.App.2d 624, 630.

9 *Howard v. Drapkin*, *supra*, 222 Cal.App.3d at pp. 850-860 (discussing the history of quasi-judicial immunity in California).

10 See, generally, *McClintock v. West*, *supra*, 219 Cal.App.4th 540; *Burk-Soorani v. Simon* (Mar. 13, 2015, B251686 [nonpub. opn.])

11 *Howard v. Drapkin*, *supra*, 222 Cal.App.3d at p. 849.

12 *Ibid.*

13 *Id.* at p. 848.

14 *Id.* at p. 850.

15 *Id.* at p. 847.

16 *Howard v. Drapkin*, *supra*, 222 Cal.App.3d at p. 860.

17 *Id.* at p. 864.

18 *Howard v. Drapkin*, *supra*, 222 Cal.App.3d at p. 857.

19 *Ibid.*

20 *McClintock v. West* (2013) 219 Cal.App.4th 540, 551

21 *McClintock v. West*, *supra*, 219 Cal.App.4th at p. 543.

22 *Ibid.*

23 *Id.* at pp. 544-545.

24 *Id.* at p. 547.

25 *Id.* at p. 543.

26 *McClintock v. West*, *supra*, 219 Cal.App.4th at pp. 553-554.

27 *Id.* at pp. 550-553. See note 10, *ante*.

28 *Id.* at p. 551, citing *Howard v. Drapkin*, *supra*, 222 Cal.App.3d at p. 857.

29 *Id.* at pp. 551-552.

30 *Id.* at p. 551.

31 *McClintock v. West*, *supra*, 219 Cal.App.4th at p. 549, emphasis in original, citing *Serway v. Galentine* (1946) 75 Cal.App.2d 86, 89.

32 *McClintock v. West*, *supra*, 219 Cal.App.4th at p. 549; *Berry v. Chaplin* (1946) 74 Cal.App.2d 652, 657.

33 *McClintock v. West*, *supra*, 219 Cal.App.4th at p. 549, citing Code of Civ. Proc. section 372.

34 *McClintock v. West*, *supra*, 219 Cal.App.4th at p. 549; *Young v. CBS Broadcasting, Inc.* (2012) 212 Cal.App.4th 551, 562.

35 *McClintock v. West*, *supra*, 219 Cal.App.4th at pp. 551-552.

36 *Id.* at p. 552.

37 *Ibid.*

38 *Ibid.*

39 *Ibid.*

40 *Ibid.*

41 *Id.* at p. 553.

42 *Burk-Soorani v. Simon* (Mar. 13, 2015, B251686 [nonpub. opn.]).

43 *Id.* at p. 6.

44 *Ibid.*

45 *Ibid.*

46 *Id.* at p. 5.

47 *Id.* at p. 16.

48 *Ibid.*

49 *Ibid.*

50 *Id.* at p. 17.

51 *Id.* at p. 21.

52 *Id.* at p. 20.

53 *Id.* at p. 21.

54 *Ibid.*

55 *Id.* at p. 22.

56 *Ibid.*

57 *Ibid.*

58 Cal. Rules of Ct., Rule 8.1115, subd. (a).

59 *Holmes v. Silver Cross Hosp.* (N.D.Ill.1972) 340 F.Supp. 125, 130-131; *Cok v Consentino* (1st Cir. 1989) 876 F.2d 1; *Zimmerman v. Nolker*

(W.D.Mo. Dec. 31, 2008, 08-4216-CV-C-NKL) 2008 U.S. Dist. Lexis 105165, at pp. 15-17; *Mosher v. Saalfeld* (9th Cir. 1978) 589 F.2d 438, 441-442.

60 *Holmes v. Silver Cross Hosp.*, *supra*, 340 F.Supp. at pp. 130-131; *Cok v. Consentino*, *supra*, 876 F.2d at pp. 1-3; *Zimmerman v. Nolker*, *supra*, 2008 U.S. Dist. Lexis 105165, at pp. 15-17; *Mosher v. Saalfeld*, *supra*, 589 F.2d at pp. 441-442.

61 *Mosher v. Saalfield*, *supra*, 589 F.2d at p. 442.

62 *Holmes v. Silver Cross Hosp.*, *supra*, 340 F.Supp. at pp. 130-132.

63 *Id.* at p. 131.

64 *Ibid.*

65 *Gross v. Rell* (2012) 304 Conn. 234, 250-252; *Zanoni v. Hudon* (1998) 48 Conn.App. 32, 37-38.

66 *Trapp v. State* (Alaska 2002) 53 P.3d 1128, 1130-31 [specific statutory authority for tort action]; *Edwards v. Pena* (Tex.Ct.App. 2001) 38 S.W.3d 191,196.

67 *Frey v. Blanket Corp.* (1998) 255 Neb. 100, 106-107.

68 *Id.* at p. 107.

69 *Gross v. Rell*, *supra*, 304 Conn. at p. 238.

70 *Id.* at p. 252.

71 *Id.* at pp. 253-254.

72 *Ibid.*

73 *Id.* at p. 254.

74 *Id.* at p. 256 (emphasis in original).

75 *Trapp v. State*, *supra*, 53 P.3d at pp. 1130-31; *Edwards v. Pena*, *supra*, 38 S.W.3d at p. 196.

76 *Trapp v. State*, *supra*, 53 P.3d at p. 1131.

77 *Ibid.*

78 *Edwards v. Pena*, *supra*, 38 S.W.3d at p. 196.

79 *Ibid.*

80 *Ibid.*

81 Prob. Code, section 2102.

82 Prob. Code, sections 2350 et seq.

83 Prob. Code, sections 2400 et seq.

84 Prob. Code, sections 2101, 2401.3, 2401.5; Welf. & Inst. Code, section 15610.70; Code Civ. Proc., section 996.470, subd. (a).

85 Prob. Code, sections 2101, 2401.3, 2401.5, 2401.7.

86 Prob. Code, section 2320, subd. (a).

87 Prob. Code, section 2620, subd. (a).

88 Prob. Code, section 2621.

89 Prob. Code, sections 1851, subd. (a), 1851.2.

90 Prob. Code, sections 1470, subd. (a), 1852.

91 Prob. Code, sections 2401.3, 2401.5.

92 Prob. Code, sections 2401.3-2401.6.

93 Prob. Code, section 2401.7.

94 Prob. Code, section 2401.3.

95 Prob. Code, section 2103.

96 Prob. Code, section 2354.

97 Prob. Code, section 2356.5, subd. (b).

98 Prob. Code, section 2355.

99 Prob. Code, section 2356.5; see also *Conservatorship of Wendland* (2001) 26 Cal.4th 519, 523 (a conservator may not withhold artificial nutrition and hydration from conscious conservatee, who is not terminally ill or in persistent vegetative state, absent clear and convincing evidence the conservator's decision is in accordance with the conservatee's own wishes or best interests).

100 Prob. Code, section 2356.5.

101 Prob. Code, section 2359, subd. (a).

102 See, e.g., Prob. Code, sections 2358 and 2359, subd. (c).

103 Prob. Code, section 2355, subd. (a).

104 *Conservatorship of Lefkowitz* (1996) 50 Cal.App.4th 1310, 1313-14.

105 Judicial Council of Cal., Handbook for Conservators (2002 Rev. Ed.), at p. 2.

106 Prob. Code, sections 2593, subd. (a), 2650, subd. (j).

107 Prob. Code, section 2622.

108 Prob. Code, section 2401.6.

109 Prob. Code, sections 2359, subd. (c)(3), 2650.

110 See, e.g., Prob. Code sections 2359, 2401.3.

111 *Howard v. Drapkin*, *supra*, 222 Cal.App.3d at p. 857.

112 Prob. Code, section 2103, subd. (a).

113 Prob. Code, section 2401.3.

114 Prob. Code, section 2401.7.

115 Prob. Code, section 2103.

116 *Conservatorship of Drabick* (1988) 200 Cal.App.3d 185.

117 Cal. Law Revision Com. com., Reuters Ann. Prob. Code (1999 supp.) section 2355, p. 293, citing *Conservatorship of Morrison* (1988) 206 Cal.App.3d 304, 312; *Conservatorship of Drabick*, *supra*, 200 Cal. App.3d at pp. 198-200.

118 Prob. Code, section 2103.

119 Prob. Code, section 2630.

120 Prob. Code, section 1860, subd. (a).

121 See *Burk-Soorani v. Simon, supra.*

122 *Ibid.*

123 Prob. Code, section 2355; *Conservatorship of Wendland*, *supra*, 26 Cal.4th at p. 543.