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1. [NOTES: BEYOND #FREEBRITNEY: AN ANALYSIS OF THE IMPACT OF AB 1194 ON PROFESSIONAL FIDUCIARIES, THE ROLE OF COURT-APPOINTED COUNSEL, AND COURT OVERSIGHT REQUIREMENTS, 63 Santa Clara L. Rev. 391](#)

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# **NOTES: BEYOND #FREEBRITNEY: AN ANALYSIS OF THE IMPACT OF AB 1194 ON PROFESSIONAL FIDUCIARIES, THE ROLE OF COURT-APPOINTED COUNSEL, AND COURT OVERSIGHT REQUIREMENTS**

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## **Reporter**

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## **Highlight**

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This article analyzes the impact of California Assembly Bill No. 1194 (AB 1194) on professional fiduciaries and court-appointed counsel and posits funding issues as a barrier to achieving the goals set out by AB 1194 and prior conservatorship law reforms. This article proposes numerous changes to AB 1194, including incentivizing rather than solely penalizing professional fiduciaries, adopting a midway standard between zealous advocacy and the best interests standard for court-appointed counsel, and development of a coherent funding plan.

AB 1194 was adopted largely in response to media movements such as #FreeBritney, the movement which called for an end to the conservatorship of Britney Spears. #FreeBritney, however, resulted in no studies to quantify abuse in the context of conservatorships, and the legislative history of the resulting bill cites small-sample, niche, or fictional accounts of abuse in support. Articles analyzing AB 1194 specifically are similarly few and far between.

In practice, AB 1194 poses significant problems that undermine its goal of protecting the elderly and incapacitated. As currently written, AB 1194 risks triggering a mass exodus of professional fiduciaries from conservatorship work. Scarcity of professional fiduciaries will disadvantage conservatees because professional fiduciaries offer neutrality and experience in handling complex conservatorships. AB 1194 additionally requires zealous advocacy of court-appointed counsel, codifying one side of a longstanding debate between the zealous advocacy and the best interests of the conservatee standard for court-appointed counsel. However, zealous advocacy is impractical in certain situations, and in others, places the conservatee in danger. Further, the Legislature has not made clear how much funding is necessary to accomplish the mandates of AB 1194, nor is it clear where the funding will come from. Without a coherent fiscal plan, AB 1194 will not achieve its goal of protecting the elderly.

With the population of elderly individuals in California estimated to expand rapidly in the coming years, it is necessary that California adopt data-driven conservatorship legislation that creates, supports, and funds a protective conservatorship system.

## **Text**

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\* J.D. Santa Clara University School of Law Senior Notes Editor, Santa Clara Law Review Volume 63. I would like to thank Charles M. Riffle for cultivating my interest in this area of the law and Juliette D. Nguyen for her guidance in selecting this topic. Many thanks to my wonderful mentors along the way.

## **[\*393] I. Introduction**

In early 2021, the New York Times released *Framing Britney Spears*, a documentary recounting the conservatorship of Britney Spears.<sup>1</sup> The public was outraged. Fans and non-fans alike advocated for the termination of Britney's conservatorship, and more broadly, called for sweeping reform to California's conservatorship law.<sup>2</sup> A movement known as #FreeBritney gained significant momentum in the media<sup>3</sup> and social media.<sup>4</sup> Only months after the *Framing Britney Spears* documentary, Britney Spears's conservatorship was terminated, and California adopted Assembly Bill No. 1194 (AB 1194) reforming California conservatorship law.<sup>5</sup> The [\*394] problem is, many know #FreeBritney, but few know conservatorships.

First, this note will examine the impact of AB 1194 on professional fiduciaries, focusing on the Legislature's factual considerations in passing AB 1194 and considering whether AB 1194 imposes too heavy a burden on professional fiduciaries. This discussion will demonstrate the need for annual data reporting on conservatorships and will demonstrate that incentivizing professional fiduciaries, rather than solely penalizing them, will benefit conservatees while preventing a mass exodus of professional fiduciaries from conservatorship work.

Second, this note will discuss the expressly defined role of court-appointed counsel as a zealous advocate for their clients. An analysis of the costs and benefits of zealous advocacy and best interests approaches to the role of counsel will demonstrate that a flexible, midway point between the two standards will best serve conservatees, proposed conservatees, and those alleged to lack capacity. This note will additionally address the role of conservatees and proposed conservatees in selecting counsel and will propose that either court-appointed counsel or counsel with similar expertise should be required.

Lastly, this note will touch upon whether AB 1194 is a response to prior law or, rather, prior funding issues. The latter being most likely, the Legislature must determine the costs of compliance with clarity. If the State of California cannot absorb the costs within the budget, the note proposes specific means for raising funds.

## **II. Background**

This section provides an overview of California conservatorship law. First, this section will introduce what a conservatorship is and the process for obtaining one in California. Next, this section will address the role of professional fiduciaries in conservatorships, as well as the role of court-appointed counsel. Lastly, this section will survey the recent history of California conservatorship law, with [\*395] particular emphasis on the Omnibus Conservatorship and Guardianship Reform Act of 2006 and AB 1194.

### **A. What is a Conservatorship and What is the Process for Obtaining One?**

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<sup>1</sup> Framing Britney Spears (New York Times 2021).

<sup>2</sup> See Bianca Betancourt, *Why Longtime Britney Spears Fans Are Demanding to #FreeBritney*, Harper's Bazaar (Nov. 12, 2021), <https://www.harpersbazaar.com/celebrity/latest/a34113034/why-longtime-britney-spears-fans-are-demanding-to-freebritney/>.

<sup>3</sup> See Betancourt, *supra* note 2 (discussing Britney Spears' conservatorship and the #FreeBritney movement) Kristin Robinson, *#FreeBritney Protestors Make Their Presence Known at Spears' Latest Conservatorship Hearing*, Variety (July 23, 2020, 5:17 PM), <https://variety.com/2020/music/news/freebritney-spears-conservatorship-hearing-protest-1234714274/> (covering a #FreeBritney protest outside of Spears' July 22, 2020, conservatorship hearing).

<sup>4</sup> See Free Britney L.A. (@freebritneyla), Instagram, <http://instagram.com/freebritneyla> (last visited Jan. 30, 2023) (account with over 85,000 followers) #FreeBritney, Twitter, <https://twitter.com/hashtag/freebritney> (last visited Jan. 23, 2023).

<sup>5</sup> Anastasia Tsioulcas, *Britney Spears' Conservatorship Has Finally Ended*, NPR (Nov. 12, 2021, 5:16 PM), <https://www.npr.org/2021/11/12/1054860726/britney-spears-conservatorship-ended> Assemb. B. 1194, 2021 Assemb., Reg. Sess. (Cal. 2021) (signed into law by Governor Gavin Newsom on September 30, 2021).

At a high level, a conservatorship is a mechanism to protect a person who cannot care for his or her own person or property.<sup>6</sup> In California, the elderly make up the majority of conservatees.<sup>7</sup> A conservatorship may be sought, for example, when an elderly person can no longer live alone.<sup>8</sup> In such a case, a conservatorship may be necessary to transfer a loved one into an assisted living facility.<sup>9</sup>

**[\*396]** Probate conservatorships<sup>10</sup> include conservatorships of the person and conservatorships of the estate.<sup>11</sup> In a conservatorship of the person, the conservator manages the conservatee's medical care, housing, food, and other daily decisions.<sup>12</sup> In a conservatorship of the estate, the conservator manages the conservatee's finances where the conservatee cannot protect his or her finances from undue influence.<sup>13</sup>

The process for obtaining a conservatorship begins with a petition filed by the proposed conservatee, the proposed conservatee's spouse, a relative of the proposed conservatee, or an interested state or local agency.<sup>14</sup> The petition must specify the type of conservatorship sought (of the person and/ or of the estate) and must include supplemental information demonstrating the need for a conservatorship.<sup>15</sup> The petitioner must also give proper notice.<sup>16</sup>

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<sup>6</sup> Leonard Thomas Adamiak et al., Cal. Continuing Educ. of the Bar, California Conservatorship Practice §1.2A (2021).

<sup>7</sup> Lawrence Friedman & Mark Savage, *Taking Care: The Law of Conservatorship in California*, 61 S. Cal. L. Rev. 273, 274 (1988). However, conservatorship data is sparse both in California and nationwide. See **Cal. Prob. Code §1458(a)(1)(A)-(F)** (Deering 2022) (requiring courts to provide data on the number of conservatorship petitions filed and granted and the number of conservatorships under court supervision) see also Letter from Elizabeth Warren, Senator, U.S. & Robert P. Casey, Jr., Senator, U.S., to Hon. Xavier Becerra, Secretary, U.S. Dep't of Health and Human Serv. & Hon. Merrick Garland, Att'y Gen., U.S. Dep't of Just. (July 1, 2021), <https://www.warren.senate.gov/imo/media/doc/2021.07.01%20Letter%20to%20DOJ%20and%20HHS%20re%20Conservatorship.pdf> (calling for increased conservatorship data nationwide).

<sup>8</sup> Friedman & Savage, *supra* note 7, at 286.

<sup>9</sup> *Id.*

<sup>10</sup> California law provides for three types of probate conservatorships (general, temporary, and limited) as well as mental health conservatorships. Sections 1400 to 3925 of the California Probate Code govern probate conservatorships. General probate conservatorships are primarily established over elderly individuals who can no longer manage their care and/ or finances. Kaylee K. Sauvey, *Updating Conservatorship Administration in Light of Britney's Case*, 64 Orange Cnty. Law. 32, 33 (2022). Termination is not usually necessary because general conservatees are not anticipated to regain capacity. *Id.* Temporary probate conservatorships last for a limited period and can be established rather quickly. *Id.* Temporary probate conservatorships generally give a temporary conservator power to act on the conservatee's behalf while the general conservatorship petition is pending. *Id.* Limited probate conservatorships are for developmentally disabled adults. *Id.* Mental health conservatorships, on the other hand, are governed by the Lanterman-Petris-Short Act found in sections 5000 to 5556 of the California Welfare & Institutions Code. *Id.* LPS conservatorships involve individuals with mental health disorders, developmental disabilities, and chronic alcoholism, and LPS conservatorships aim to provide these individuals with treatment and to ensure that their legal rights are protected. See generally **Cal. Welf. & Inst. Code §5001(a)-(i)** (Deering 2022) (describing legislative intent behind the Lanterman-Petris-Short Act). This note focuses exclusively on general probate conservatorships.

<sup>11</sup> **Cal. Prob. Code §1800.3(a)(1)** (Deering 2022).

<sup>12</sup> Adamiak et al., *supra* note 6.

<sup>13</sup> *Id.*

<sup>14</sup> **Cal. Prob. Code §1820(a)(1)-(5)** (Deering 2022).

<sup>15</sup> *Id.* §1821(a)(1) (Deering 2022).

<sup>16</sup> See generally **Cal. Prob. Code §1822** (Deering 2022) (describing requirements for notice of hearing). The petitioner must give notice and a copy of the petition to the proposed conservatee's spouse and relatives within the second degree at least 15 days

**[\*397]** The supplemental information should address (1) the proposed conservatee's inability to provide for her own physical health, food, clothing, and shelter (2) the proposed conservatee's ability to live in her own residence while conserved (3) alternatives available<sup>17</sup> and why the alternatives are not possible (4) health or social services received by the proposed conservatee and (5) the proposed conservatee's inability to manage her finances or inability to resist fraud or undue influence.<sup>18</sup> If the petitioner or proposed conservator is a professional fiduciary, the petition must include information about the professional fiduciary's hourly fee and expenses.<sup>19</sup> If anyone other than the proposed conservatee petitions, the petition must describe (1) the efforts to find the proposed conservatee's relatives or, alternatively, why contacting them was not possible and (2) the proposed conservatee's preferences for a conservator or, alternatively, why those preferences were not possible.<sup>20</sup>

After the petition is filed, a court investigator interviews the proposed conservatee, petitioner(s), proposed conservator(s), the proposed conservatee's spouse or relatives **[\*398]** within the first<sup>21</sup> degree,<sup>22</sup> and in some cases, close friends.<sup>23</sup> The court investigator must also inform the proposed conservatee of the petition, its effect, the conservatee's right to oppose the petition, and the conservatee's right to retain legal counsel.<sup>24</sup> The court investigator must also weigh the supplemental information provided with the petition.<sup>25</sup> New under AB 1194, court investigators must also "review relevant medical reports regarding the proposed conservatee from the proposed conservatee's primary care physician and other relevant mental and physical health care providers."<sup>26</sup> The court investigator reports her findings to the court.<sup>27</sup>

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prior to the hearing. *Id.* §1822(a)-(b)(2). After the petition is filed, the clerk issues and serves a citation to the proposed conservatee indicating the time and place of the hearing. [Cal. Prob. Code §1823\(a\)](#) (Deering 2022). The clerk-issued citation explains the legal standard the court uses to determine whether to grant the conservatorship petition as well as the "nature, purpose, and effect of the proceeding ...." *Id.* §1823(b)(4) [Cal. Prob. Code §1827](#). The proposed conservatee has the right to oppose the conservatorship, obtain legal counsel, and to elect for a jury trial. *Id.* §1823(b)(5)-(7).

<sup>17</sup> Possible alternatives to a conservatorship of the estate include appointing an agent under power of attorney and/ or trustee of the proposed conservatee's trust. Appointment of an agent under an advance healthcare directive is a possible alternative to a conservatorship of the person. See Cal. Prob. Code. §1821(C)(i)-(iv).

<sup>18</sup> [Cal. Prob. Code §1821\(a\)\(1\)\(A\)-\(E\)](#) (Deering 2022).

<sup>19</sup> *Id.* §1821(c)(1). If the petition for a temporary conservatorship is not filed together with the petition for a permanent conservatorship, the petition must include the professional fiduciary's licensing information plus "[a] statement explaining who engaged the petitioner or proposed conservator or how the petitioner or proposed conservator was engaged to file the petition for the appointment of a conservator or to agree to accept the appointment as conservator and what prior relationship the petitioner or proposed conservator had with the proposed conservatee or proposed conservatee's family or friends." *Id.* §1821(c)(2)(B).

<sup>20</sup> *Id.* §1821(d)(1)-(2).

<sup>21</sup> If the proposed conservatee does not have a spouse, registered domestic partner, or relatives within the first degree, the court investigator will interview the proposed conservatee's relatives within the second degree. *Id.* §1826(a)(1)(C).

<sup>22</sup> Each generation constitutes a degree of relatedness. *Id.* §13(a). For example, a grandparent and a grandchild are related in the second degree, and aunts/uncles and nieces/nephews are related in the third degree. *Id.* §13(b)-(c).

<sup>23</sup> *Id.* §1826(a)(1)(A)-(D).

<sup>24</sup> *Id.* §1826(a)(2).

<sup>25</sup> [Cal. Prob. Code §1826\(a\)\(4\)\(A\)-\(B\)](#) (Deering 2022).

<sup>26</sup> *Id.* §1826(a)(9).

<sup>27</sup> *Id.* §1826(a)(10)(A)-(B).

The next step is the hearing, where the court determines whether to grant the conservatorship.<sup>28</sup> The proposed conservatee<sup>29</sup> may also demand a jury trial.<sup>30</sup> The court may only grant a conservatorship if it finds that the conservatorship is the "least restrictive alternative needed for the protection of the conservatee."<sup>31</sup> The standard of proof for establishing a conservatorship is clear and convincing.<sup>32</sup>

If the court grants the conservatorship, it provides the conservator with a written description of her duties and [\*399] limitations.<sup>33</sup> In addition, the conservatorship is subject to review six months after establishment of the conservatorship, one year after establishment of the conservatorship, and annually thereafter.<sup>34</sup> Review requires the court investigator to visit the conservatee, investigate,<sup>35</sup> and report to the court.<sup>36</sup> The conservator must also present an accounting of the estate's assets to the court one year after appointment and biennially thereafter.<sup>37</sup> A conservatorship may be terminated upon death or court order.<sup>38</sup>

## B. Role of Professional Fiduciaries in Conservatorships

In the conservatorship context, a professional fiduciary is a "person who acts as a .... conservator of the person, the estate, or the person and estate, for two or more individuals at the same time who are not related to the professional fiduciary or to each other."<sup>39</sup> Outside the conservatorship context but within the realm of probate

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<sup>28</sup> *Id.* §1827.

<sup>29</sup> Litigation expenses are largely the burden of the conservatee. For example, in contested matters where a party petitions for the appointment of a conservator and another party petitions for the appointment of a different conservator, the petitioning party who was unsuccessful may petition the court for reimbursement of costs provided that the court determines the petition was filed in the conservatee's best interests. *Id.* §2640.1(a). Such costs are paid from the conservatee's estate. *Id.* §2640.1(c)(2).

<sup>30</sup> [Cal. Prob. Code §1827](#) (Deering 2022). However, section 1827 only entitles a proposed conservatee to a jury trial on the issue of establishment of a conservatorship. [Cal. Prob. Code §1827](#) Law Revision Commission's cmt. to 1990 amendment. There is no right to a jury trial on the issues of who will be the conservator or the conservatee's legal capacity. *Id.*

<sup>31</sup> Prob. §1800.3(b).

<sup>32</sup> [Cal. Prob. Code §1801\(e\)](#) (Deering 2022).

<sup>33</sup> *Id.* §1835(a). The description of duties must include the following categories: (1) the conservator's responsibilities and limitations (2) the conservatee's rights (3) how the conservator should determine the conservatee's needs (4) how the conservator should meet the conservatee's needs (5) how to ensure that the conservatee is provided with the least restrictive environment (6) the court proceedings relevant to conservatorships and (7) information regarding the requirements for inventory and appraisals. *Id.* §1835(b)(1)-(7).

<sup>34</sup> *Id.* §1850(a)(1)-(2). Conservatorships are also subject to review at any time upon motion or if the court decides to review the conservatorship *sua sponte*. *Id.* §1850(b). Note that under former law, if the court found that the conservator was acting in the best interest of the conservatee, the court could set review for every two years. [Cal. Prob. Code §1850\(a\)\(2\)](#) (2011) (amended 2021).

<sup>35</sup> The court investigator must determine (1) whether the conservatee wishes to terminate the conservatorship (2) whether the conservatee wishes to remove the conservator and appoint another (3) whether the conservatee still meets the criteria for a conservatorship and (4) whether the conservatorship is still the least restrictive alternative. [Cal. Prob. Code §1851\(a\)\(1\)\(A\)-\(C\)\(ii\)](#) (Deering 2022).

<sup>36</sup> *Id.* §1850(a)(1)-(2).

<sup>37</sup> *Id.* §2620(a). The technical accounting requirements are extensive. See *id.* §§1061-64. Each accounting is subject to judicial review, and the court may suspend or remove the conservator if the accounting contains material errors. *Id.* §2620(d).

<sup>38</sup> *Id.* §1860(a).

practice, professional fiduciaries may also serve as personal representatives of a decedent's [\*400] estate, trustee, or agent under durable power of attorney for healthcare or finances.<sup>40</sup>

In some cases, family members serve as conservators, but family members are not always the best choice. For instance, a conservatee may have no family members or friends willing or able to serve as conservator, or the conservatee's relatives may disagree about who should be appointed conservator.<sup>41</sup> In such cases, a professional fiduciary may be best.<sup>42</sup>

In fact, there are numerous benefits to using a professional fiduciary as a conservator.<sup>43</sup> For one, they are experienced in handling complex conservatorships.<sup>44</sup> They are additionally a neutral party, which is advantageous in contentious family situations.<sup>45</sup> While professional fiduciaries do charge a fee, they tend to depend less on attorney assistance with nonlegal issues, which can reduce attorney's fees.<sup>46</sup> Further, professional fiduciaries frequently charge based on the type of service provided.<sup>47</sup> Thus, the estate only pays for what it needs.<sup>48</sup>

Appointment of a professional fiduciary must be in the best interest of the conservatee.<sup>49</sup> In addition, professional [\*401] fiduciaries must comply with licensing requirements as outlined in the California Professional Fiduciaries Act.<sup>50</sup>

Professional fiduciaries accordingly play an important - and regulated - role in the conservatorship system.

### C. Role of Court-Appointed Attorneys

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<sup>39</sup> [Cal. Bus. & Prof. Code §6501\(f\)\(1\)\(A\)](#) (Deering 2022).

<sup>40</sup> *Id.* §6501(f)(1)(B)-(2). Similar to professional conservatees, professional personal representatives are defined as persons who serve as personal representatives for two or more individuals at the same time who are not related to the professional fiduciary or to each other. *Id.* §6501(f)(1)(B). Professional trustees and agents under durable power of attorney for healthcare or finances, on the other hand, are defined as persons who provide services for three or more individuals at the same time and to whom they are not related. *Id.* §6501(f)(2).

<sup>41</sup> Adamiak et al., *supra* note 6, at §1.42G.

<sup>42</sup> *Id.*

<sup>43</sup> *Id.* §20.25F.

<sup>44</sup> *Id.*

<sup>45</sup> *Id.*

<sup>46</sup> *Id.*

<sup>47</sup> Adamiak et al., *supra* note 6, at §20.25F (categories of services provided may include personal and routine medical supervision critical and end-of-life decision making investment analysis and buy-sell authority tax issues litigation sales and purchases of real property and obtaining loans).

<sup>48</sup> *See id.*

<sup>49</sup> [Conservatorship of Ramirez, 90 Cal. App. 4th 390, 403 \(2001\)](#) (reversing lower court's appointment of professional fiduciary as conservator because there was a "competent, caring family member willing to serve," and thus there lacked evidence indicating professional fiduciary as conservator rather than relative as conservator was in conservatee's best interest).

<sup>50</sup> *See generally* [Cal. Bus. & Prof. Code §§6500-6592](#) (Deering 2022) (describing the requirements to obtain and maintain a professional fiduciary license in California).



Given the vulnerability<sup>51</sup> of conservatees and proposed conservatees and the significant effects of a conservatorship on a conservatee's rights, attorneys play a particularly crucial role in conservatorship proceedings. Generally, if the court finds that a conservatee or proposed conservatee is not represented by legal counsel and such appointment is either helpful or necessary to protect the conservatee or proposed conservatee's interests, the court may appoint private legal counsel to represent the person.<sup>52</sup> Court appointment of counsel is mandatory in certain proceedings if a conservatee was unable to obtain counsel and desires counsel.<sup>53</sup> Court-appointed counsel are entitled to fees, but all fees and expenses must be approved by the court upon conclusion of the matter.<sup>54</sup>

Similar to professional fiduciaries, court-appointed counsel are indispensable components of the greater conservatorship system.

#### **D. History of California Conservatorship Law**

California conservatorship law has been subject to two major reforms in the past sixteen years, the Omnibus Conservatorship and Guardianship Reform Act of 2006 ("Omnibus Act") and most recently, AB 1194. The Omnibus [\*402] Act and prior reforms were an attempt to respond to "criticism of the system's insensitivity to the special needs of vulnerable and elderly men and women who suffer from varying degrees of functional impairment" and added protections for conservatees and proposed conservatees.<sup>55</sup> The goal of AB 1194 is similar.<sup>56</sup>

##### **1. The Omnibus Conservatorship and Guardianship Reform Act of 2006**

At a high level, the Omnibus Act (1) established the Professional Fiduciaries Act (2) sought to protect conservatees' rights to stay in their residences (3) permitted *ex parte* communications with the court regarding issues involving conservatees and fiduciaries' conduct and (4) made changes to the role of court staff, augmented accounting requirements, and introduced new court oversight practices.<sup>57</sup>

The Omnibus Act was spurred largely by a series of *Los Angeles Times* articles describing a flawed conservatorship system.<sup>58</sup> However, the media account was "journalistic, sensationalistic, and flawed in that it failed to measure the specific outrages that it reported against the thousands of cases that are well handled throughout the state's court system."<sup>59</sup> Additionally, the articles implied a "backhanded approval of existing statutes:

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<sup>51</sup> This vulnerability stems from the fact that conservatees (and allegedly proposed conservatees) possess mental "deficits .... [that] render the proposed conservatee unable to make and communicate decisions or to understand and appreciate the consequences of those decisions." Adamiak et al., *supra* note 6, at §1.10a.

<sup>52</sup> [Cal. Prob. Code §1470\(a\)](#) (Deering 2022).

<sup>53</sup> *Id.* §1471(a). Proceedings requiring court appointment of counsel include (1) proceedings to establish a conservatorship (2) proceedings to terminate a conservatorship (3) proceedings to remove a conservator (4) proceedings for a court order impacting the conservatee's capacity and (5) proceeding to remove a temporary conservatee from their residence. *Id.* §1471(a)(1)-(5). Counsel is also required to petition for power to administer medication. *Id.* §2356.5(c).

<sup>54</sup> *Id.* §1470(b).

<sup>55</sup> Edward J. Corey, Margaret G. Lodise & Peter S. Stern, *Crisis in Conservatorships*, Weintraub Tobin (Jan. 2, 2007), <https://www.weintraub.com/blogs/crisis-in-conservatorships>.

<sup>56</sup> Assemb. Comm. on Judiciary, Assemb., Reg. Sess., at 8 (2021) (indicating that the goal of AB 1194 is to protect the elderly and vulnerable).

<sup>57</sup> Corey, Lodise & Stern, *supra* note 55.

<sup>58</sup> *Id.* (describing the bills included in the Omnibus Act as a response to the *Los Angeles Times* articles).

<sup>59</sup> *Id.*



most of the abuses<sup>60</sup> described in [\*403] the articles took place because the laws that presently exist were not enforced."<sup>61</sup>

The Legislature responded to these media accounts with substantive changes. The Professional Fiduciaries Act component of the Omnibus Act provided a broad definition of a fiduciary<sup>62</sup> and imposed various licensing requirements.<sup>63</sup> While the Legislature enacted these measures with the intent of "protect[ing] the public health, safety and welfare of .... California's seniors,"<sup>64</sup> the Act has been criticized as overly broad.<sup>65</sup> The Omnibus Act additionally mandated a statistical study of court effectiveness in conservatorship cases in three counties to be used for statewide recommendations<sup>66</sup> and established a presumption that the conservatee's residence is the least restrictive alternative.<sup>67</sup>

Furthermore, the Omnibus Act imposed new responsibilities on court investigators. Court investigators were required, by statute, to interview the petitioner, proposed conservator, proposed conservatee, relatives within the first degree, relatives within the second degree to the greatest extent possible, and close friends.<sup>68</sup> Additionally, court investigators were to investigate a conservatorship six months after establishment, one year after establishment, and [\*404] annually thereafter (or every two years, if the court deemed fit).<sup>69</sup>

The Omnibus Act, however, was never adequately funded.<sup>70</sup> In the wake of the 2008 budget cuts, the Legislature relieved the Judicial Counsel of many of the requirements imposed by the Omnibus Act.<sup>71</sup> There was thus concern

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<sup>60</sup> The articles described instances in which professional conservators orchestrated schemes to financially benefit from the conservatee's assets and criticized lack of court oversight over such cases. Jack Leonard, Robin Fields & Evelyn Larrubia, *Justice Sleeps While Seniors Suffer*, L.A. Times (Nov. 14, 2005, 12:00 AM), <https://www.latimes.com/news/la-me-serve14nov14-story.html>. One example of the abuses described in the articles is that of 93-year-old Emmeline Frey. *Id.* Frey was under a conservatorship when her professional conservator invested more than \$500,000 of Frey's money with the professional conservator's son. *Id.* Due to the son's inexperience investing money, the investments fared poorly resulting in losses to clients like Frey. *Id.*

<sup>61</sup> Corey, Lodise & Stern, *supra* note 55.

<sup>62</sup> *Id.* (expanding "the definition of "Professional Fiduciary" beyond Conservators and Guardians to include Trustees, Agents under Durable Powers of Attorney for Health Care and Agents under a Durable Power of Attorney for Finances.").

<sup>63</sup> *Id.* For example, the Professional Fiduciaries Act required that professional fiduciaries be at least twenty-one years old, be a citizen or legally admitted to the United States, have not committed certain acts in the past, submit fingerprints, complete certain education requirements, pass an exam, and adhere to an ethics code, consent to a credit check, file an application, and pay the application fee. [Cal. Bus. & Prof. Code §6533\(a\)-\(j\)](#) (2006) (Deering 2022).

<sup>64</sup> Corey, Lodise & Stern, *supra* note 55.

<sup>65</sup> *Id.* (describing the new law as providing insufficient measures to deter an "unscrupulous, unskilled or unqualified" licensed, professional fiduciary yet providing a definition for fiduciary that is so broad that a non-professional fiduciary could become subject to the requirements and face severe consequences).

<sup>66</sup> *Id.* **Cal. Prob. Code §1458** (2006) (repealed 2009).

<sup>67</sup> Corey, Lodise & Stern, *supra* note 55.

<sup>68</sup> *Id.* [Cal. Prob. Code §1826\(a\)\(1\)-\(3\)](#) (2006) (amended 2021).

<sup>69</sup> Corey, Lodise & Stern, *supra* note 55 [Cal. Prob. Code §1850\(a\)\(1\)-\(2\)](#) (2006) (amended 2021).

<sup>70</sup> Assemb. Comm. on Bus. and Prof., Assemb., Reg. Sess., at 5 (2021).

<sup>71</sup> *Id.*

that the law - optional rather than mandatory in many respects due to the lack of funding - was not adequately protecting the elderly and vulnerable.<sup>72</sup> Enter AB 1194.

## 2. AB 1194

The origin of AB 1194 is somewhat similar to that of the Omnibus Act, and in many ways, AB 1194 is a continuation of the Omnibus Act.<sup>73</sup> As indicated in the Assembly Committee on Judiciary's analysis of AB 1194, AB 1194 responds largely to media accounts of problems with California conservatorship law.<sup>74</sup> The Committee on Judiciary specifically notes (1) the above-discussed Los Angeles Times articles, which also spurred the Omnibus Act (2) a 2012 Mercury News series finding that a small group of Santa Clara County's court-appointed counsel were charging excessive fees (3) a 2018 Orange County Register article describing lack of court oversight and accountability (4) the documentary *Framing Britney Spears* (5) and the fictional movie *I Care a Lot* depicting a professional fiduciary who targets elderly individuals, removes them from their homes, and sells their assets for personal gain.<sup>75</sup>

AB 1194 increases scrutiny over professional fiduciaries, allows conservatees to select an attorney other than court-appointed counsel, requires that attorney to zealously advocate for their client, and requires greater court oversight over conservatorships.

**[\*405]** Professional fiduciaries are now required to post their fees on the internet,<sup>76</sup> and the new law provides more detailed guidance as to when a professional fiduciary should be sanctioned.<sup>77</sup> Specifically, the new law requires the Professional Fiduciaries Bureau to impose sanctions if it finds that a professional fiduciary (1) breached a fiduciary duty to the client and caused harm, (2) abused an elder,<sup>78</sup> or (3) violated any of the laws that bind professional fiduciaries.<sup>79</sup> It also mandates revocation of a professional fiduciary's license<sup>80</sup> if the professional fiduciary "[k]nowingly, intentionally, or willfully" abused an elder under Welfare and Institutions Code section 15610.07 or caused "serious physical or financial harm or mental suffering to a client through gross negligence or gross incompetence."<sup>81</sup>

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<sup>72</sup> Assemb. Comm. on Judiciary, *supra* note 56, at 8.

<sup>73</sup> Peter S. Stern, *AB 1194: Another Conservatorship Reform Act - Was It Really Necessary?*, 43.3 Est. Plan. & Cal. Prob. Rep. 44, 44 (2021).

<sup>74</sup> Assemb. Comm. on Judiciary, *supra* note 56, at 6-7.

<sup>75</sup> *Id.*

<sup>76</sup> [Cal. Bus. & Prof. Code §6563\(a\)](#) (Deering 2022).

<sup>77</sup> See *generally id.* §6580 (providing Professional Fiduciaries Bureau authority to investigate alleged violations by a professional fiduciary and impose various types of sanctions).

<sup>78</sup> Abuse is defined as (1) "[p]hysical abuse, neglect, abandonment, isolation, abduction, or other treatment with resulting physical harm or pain or mental suffering" (2) "[t]he deprivation by a care custodian of goods or services that are necessary to avoid physical harm or mental suffering" and/or (3) financial abuse. [Cal. Welf. & Inst. Code §15610.07\(a\)\(1\)-\(3\)](#) (Deering 2022).

<sup>79</sup> Bus. & Prof. §6580(a)(2)(A)-(C).

<sup>80</sup> In addition to revocation of a professional fiduciary's license, abuse of elders can result in criminal liability. See *generally* [Cal. Penal Code §368](#) (Deering 2022).

<sup>81</sup> Bus. & Prof. §6580(d)(1)-(2). Furthermore, any penalties that the court imposes on a professional fiduciary must now be reported to the Professional Fiduciaries Bureau. [Cal. Prob. Code §1051\(d\)](#) (Deering 2022).

AB 1194 also introduces a new civil damages provision for conservators. If a court finds that a professional fiduciary has abused a conservatee the conservator is civilly liable for up to \$10,000 per act of abuse.<sup>82</sup> Non-professional conservators are liable for up to \$1,000 per act of abuse.<sup>83</sup>

Additionally, AB 1194 makes significant changes to the law regarding conservatees' selection of counsel.<sup>84</sup> Under section 1471 as amended, a conservatee may select an attorney to represent her, even if that attorney is outside the court's list [\*406] of court-appointed counsel.<sup>85</sup> Section 1471 also clarifies the role of counsel for a conservatee or proposed conservatee as that of "a zealous, independent advocate representing the wishes of their client."<sup>86</sup>

Perhaps due to the lack of existing case law or explicit prior legislation on the topic, AB 1194 was predated by debate regarding the role of counsel in conservatorship proceedings.<sup>87</sup> The main question was whether counsel should act in the best interest of a conservatee or proposed conservatee or whether counsel should instead zealously advocate for their client's interests, despite cognitive issues.<sup>88</sup> Under the best interests conception, counsel advocates for that which, in counsel's judgment, best protects the client's interest.<sup>89</sup> Conversely, the zealous advocacy approach, now mandated under section 1471, requires counsel to "represent[] the wishes of their client."<sup>90</sup>

Furthermore, AB 1194 introduces additional responsibilities for court personnel. Most notably, upon petition for conservatorship, AB 1194 requires court investigators to obtain and review a proposed conservatee's medical reports.<sup>91</sup> Additionally, the court must review conservatorships annually, with AB 1194 striking the formerly permissible two-year review schedule if the court determined the conservator was acting in the conservatee's best interest.<sup>92</sup>

When court review is required, AB 1194 explicitly defines additional areas the court investigator must examine. For example, the court investigator must determine whether the conservatee wishes to remove the conservator, whether the conservatee still meets the criteria for a conservatorship, and [\*407] whether the conservatorship is still the least restrictive alternative.<sup>93</sup> If the court investigator determines that the conservatee still meets the

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<sup>82</sup> *Cal. Prob. Code §2112(a)(1)* (Deering 2022).

<sup>83</sup> *Id.* §2112(a)(2).

<sup>84</sup> See generally *id.* §1471 (providing that a conservatee may select an attorney to represent her, even if the attorney is not on the court's list of court-appointed counsel and codifying the zealous advocacy standard).

<sup>85</sup> *Id.* §1471(c).

<sup>86</sup> *Id.* §1471(e). Section 1471(e) also requires that counsel act in a manner consistent with the California Rules of Professional Conduct and section 6068 of the California Business and Professions Code.

<sup>87</sup> See Tony Chicotel, Cal. Advoc. for Nursing Home Reform, California Conservatorship Defense: A Guide for Advocates 7 (2010), <http://www.canhr.org/publications/PDFs/conservatorship%26amp%20defense%26amp%20guide.pdf> ("Simply stated, the representation of clients with cognitive impairments pits a lawyer's traditional role of zealously representing his client with his desire to secure an outcome most consistent with the client's objective `best interests.'").

<sup>88</sup> *Id.*

<sup>89</sup> *Id.*

<sup>90</sup> [Cal. Prob. Code §1471\(e\)](#) (Deering 2022).

<sup>91</sup> *Id.* §1826(a)(4)(A) *Id.* §1826 (a)(11).

<sup>92</sup> [Cal. Prob. Code §1850\(a\)\(2\)](#) (2011) (amended 2021) [Cal. Prob. Code §1850\(a\)\(2\)](#) (Deering 2022).

requirements for a conservatorship, the court investigator must determine if the order appointing the conservator should be modified, with respect to the conservator's duties, to ensure the conservatorship is the least restrictive alternative.<sup>94</sup>

Thus, AB 1194, largely a continuation of the Omnibus Act, accomplishes three main objectives - increased scrutiny of professional fiduciaries, codification of the zealous advocate standard for counsel, and increased court oversight of conservatorships. As with many new laws, these changes are not without flaw. The subsequent sections will examine the practical effects of these three principal areas of AB 1194 and suggest further amendments.

### III. Identification of Problem

AB 1194 presents three main problems. First, it provides for increased scrutiny and penalization of professional fiduciaries, despite little widespread data indicating the frequency of abuse, types of abuse, and primary perpetrators of abuse.<sup>95</sup> The increased risk of the profession raises concerns about a mass exodus of professional fiduciaries from conservatorship work.<sup>96</sup> Second, it requires court-appointed counsel to zealously advocate for their client in situations where doing so may be detrimental to the client. Third, it requires increased court oversight of conservatorships without providing a clear source of funding.

Conservatorships impact society's most vulnerable, and as a legal community, we must ensure that these individuals are afforded adequate protection. Additionally, as the Baby Boomer generation ages, conservatorships will only become more common and more prevalent.<sup>97</sup> Thus, now more than [\*408] ever, the legal community must address the problems posed by AB 1194.

### IV. Analysis

This section will address each of the three primary problems presented by AB 1194. It will first analyze the increased scrutiny of professional fiduciaries, examining the Legislature's factual findings and weighing the costs and benefits of the new penalties imposed by AB 1194 on professional fiduciaries. Second, this section will discuss counsel's role as a zealous advocate and conservatees' power to select an attorney. The analysis will pay close attention to whether this system allows for enough flexibility and whether it provides enough protection for clients with diminished capacity. Third, this section will touch upon the increased requirements for courts and court staff and will suggest means to ensure appropriate funding.

#### A. Increased Scrutiny of Professional Fiduciaries

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<sup>93</sup> [Cal. Prob. Code §1851\(a\)\(1\)\(B\)](#) [Cal. Prob. Code §1851\(a\)\(1\)\(C\)\(i\)-\(ii\)](#).

<sup>94</sup> *Id.* §1851(a)(2).

<sup>95</sup> Stern, *supra* note 73.

<sup>96</sup> *Id.* at 50 ("By elevating sanctions to a punitive level, AB 1194 will probably drive good professionals away from accepting conservatorship appointments.").

<sup>97</sup> See America Counts Staff, *2020 Census Will Help Policymakers Prepare for the Incoming Wave of Aging Boomers*, U.S. Census Bureau (Dec. 10, 2019) <https://www.census.gov/library/stories/2019/12/by-2030-all-baby-boomers-will-be-age-65-or-older.html> (all members of the Baby Boomer generation, estimated at about 73 million people, will be over the age of 65 by 2030) Daniel L. Murman, *The Impact of Age on Cognition*, 36.3 *Seminars Hearing* 111, 115 (2015) ("Cognitive abilities can be divided into several specific cognitive domains including attention, memory, executive cognitive function, language, and visuospatial abilities. Each of these domains has measurable declines with age.") Conservatorships will become more prevalent as the Baby Boomer generation ages because conservatorships are used to care for individuals that can no longer care for themselves, including individuals suffering from cognitive impairment. See Adamiak et al., *supra* note 6.

The component of AB 1194 applicable to professional fiduciaries sends a clear message - professional fiduciaries need to be further regulated. However, this message is unsupported by meaningful factual findings,<sup>98</sup> and even if it were supported, punitive measures only go so far to protect the elderly and vulnerable. First, this section will examine the Legislature's "factual" findings on abuse by professional fiduciaries and discuss the need for further reporting. Second, this section will examine the punitive nature of the new legislation. Third, this section will suggest a more effective incentive program for professional fiduciaries.

### **[\*409] 1. Legislature's "Factual" Support for AB 1194**

Perhaps the most crucial first step in analyzing the increased scrutiny of professional fiduciaries is to identify the shortcomings of the prior law - and how the Legislature determined that such shortcomings existed. The provisions of AB 1194 applicable to professional fiduciaries are largely geared toward mitigating abuse of conservatees.<sup>99</sup> This is certainly a worthy objective. However, the manner in which the Legislature went about informing itself of the problem makes it difficult, if not impossible, to generate a tailored solution.

The legislative analysis shows that the Legislature relied on media accounts in concluding that (1) abuse by professional fiduciaries was rampant within California's conservatorship system and (2) therefore new legislation was needed to address this abuse.<sup>100</sup> While media accounts are not always unreliable, the specific media accounts that the Legislature cites in its analyses are questionable.<sup>101</sup> For example, the #FreeBritney movement and documentary recount a conservatorship that is quite unique and unlike the majority of conservatorships in California - Britney Spears was young, wealthy, and famous.<sup>102</sup> She was not elderly, nor was the size of her estate "average."<sup>103</sup> To base an overthrow of existing conservatorship law on such a rare and unique circumstance seems, as an [\*410] initial matter, askew.<sup>104</sup> As another example, the film *I Care a Lot* is fictional.<sup>105</sup> Reform of existing conservatorship law based on a fiction is similarly imprudent.

Moreover, the Los Angeles Times articles present a similarly limited snapshot.<sup>106</sup> Many of the abuses described in the articles were the product of failed enforcement of existing law.<sup>107</sup> The implication of this reality is that the

<sup>98</sup> *Id.* at 44.

<sup>99</sup> See Assemb. Comm. on Bus. and Prof., *supra* note 70, at 4 (purpose of AB 1194 is "to protect those that are not able or forbidden to protect themselves" and to remedy lack of oversight over conservatorships generally and specifically over conservators).

<sup>100</sup> See Assemb. Comm. on Judiciary, *supra* note 56, at 6-7 (indicating that media accounts, namely the Los Angeles Times articles, 2012 Mercury News series, 2018 Orange County Register article, New York Times Britney Spears documentary Framing Britney Spears (New York Times 2021), and movie *I Care a Lot* (Netflix 2020), have revealed significant problems in California conservatorships, including abuse by professional fiduciaries).

<sup>101</sup> See Stern, *supra* note 73.

<sup>102</sup> *Id.* at 50 see Lawrence Friedman & Mark Savage, *supra* note 7, at 279 (discussing San Mateo County data between 1980 and 1985 indicating that "conservatorship is predominantly an arrangement for people over 60 ....") see also Madeline Berg, *As the #FreeBritney Movement Grows, A Look at Britney Spears' Net Worth*, Forbes (Feb. 10, 2021, 8:49 AM), <https://www.forbes.com/sites/maddieberg/2021/02/10/as-the-freebritney-movement-grows-a-look-at-britney-spears-net-worth/?sh=2a41c45810ad> (estimating Britney Spears' estate at \$60 million).

<sup>103</sup> Stern, *supra* note 73, at 50 see Friedman & Savage, *supra* note 7, at 279 see also Berg, *supra* note 102.

<sup>104</sup> Stern, *supra* note 73, at 50 ("The problem with changes of this scale is that they are disproportionate to the problem we have had Britney Spears in the news all year, but how many other cases are there like hers?").

<sup>105</sup> Assemb. Comm. on Judiciary, *supra* note 56, at 7 (noting that *I Care a Lot* (Netflix 2020) is "clearly a work of fiction.").

<sup>106</sup> See Stern, *supra* note 73 Corey, Lodise & Stern, *supra* note 55.

existing law is not the problem - rather, lack of enforcement and resources is largely to blame.<sup>108</sup> Reliance on the Los Angeles Times articles in the passing of AB 1194 is clearly troublesome, just as it was in the passing of the Omnibus Act.<sup>109</sup>

The Mercury News and Orange County Register articles are also limited. The Mercury News article covers an investigation which found that in Santa Clara County a "*small group of the county's court-appointed personal and estate managers [were] handing out costly and questionable bills ....*"<sup>110</sup> While the conduct described is clearly problematic, the scope of the article is too narrow to definitively conclude that such conduct is widespread.

While the Legislature did consider the 2008 report *Court Effectiveness in Conservatorship Case Processing: A Report to the Legislature* covering 2005-2006 fiscal year,<sup>111</sup> it is unclear [\*411] that such a dated and narrow report would justify amending the existing legislation. In fact, the Legislature appears to have acknowledged the shortcomings of the 2008 report, both explicitly in the legislative analysis<sup>112</sup> and implicitly in calling for a further study to be conducted.<sup>113</sup>

In sum, AB 1194 was not founded in any "hard research to show that the system was failing."<sup>114</sup> This is particularly problematic in light of data collected by the Professional Fiduciaries Bureau inferring that the former system was *working*.<sup>115</sup> For example, between 2011 and 2021, the Bureau only received an average of 100 to 145 complaints per year, and of those complaints between 75% and 100% were referred for investigation.<sup>116</sup> Since anyone can file a complaint with the Bureau, it is unlikely that this number reflects significant underreporting on those grounds.<sup>117</sup>

In addition, between 2011 and 2021, none of the 135 Professional Fiduciaries Bureau actions against fiduciaries involved "conservator malfeasance, neglect of conservatees, or other serious acts of abuse in conservatorships."<sup>118</sup>

<sup>107</sup> Corey, Lodise & Stern, *supra* note 55 (in the context of the Omnibus Act, describing relevant themes from the 2005 *Los Angeles Times* articles).

<sup>108</sup> *Id.*

<sup>109</sup> See Stern, *supra* note 73 (describing the *Los Angeles Times* article as an example of legislation "by anecdote.").

<sup>110</sup> *Santa Clara County's Court-Appointed Personal and Estate Managers Are Handing Out Costly and Questionable Bills*, Mercury News (Aug. 13, 2016, 3:52 AM), <https://www.mercurynews.com/2012/06/30/santa-clara-countys-court-appointed-personal-and-estate-managers-are-handing-out-costly-and-questionable-bills/> (emphasis added).

<sup>111</sup> Assemb. Comm. on Judiciary, *supra* note 56, at 9-10. At a high level, the report approximated the number of conservatorship petitions filed for the 2005-2006 fiscal year, the number of current conservatorships in California as of 2006, number of missing reviews, yearly court work hours per conservatorship, and staffing needs prior to the Omnibus Act. Jud. Council of Cal., *Court Effectiveness in Conservatorship Case Proceeding*, Reg. Sess., at 1-2 (2008).

<sup>112</sup> Assemb. Comm. on Judiciary, *supra* note 56, at 9-10 (indicating that the 2008 report "provided limited data for the 2005-06 fiscal year.").

<sup>113</sup> See generally **Cal. Prob. Code §1458** (Deering 2022) (requiring the Judicial Council to conduct a study measuring court effectiveness in conservatorship cases and mandating what said study should include).

<sup>114</sup> Stern, *supra* note 73.

<sup>115</sup> *Id.* at 45.

<sup>116</sup> *Id.*

<sup>117</sup> *Id.*

<sup>118</sup> *Id.*



Although some of the cases involved fraud and misappropriation of funds, most of the actions involved failure to renew one's fiduciary license.<sup>119</sup>

Due to the lack of a comprehensive study predating AB 1194, it is unclear how common abuse is in the context of conservatorships.<sup>120</sup> Furthermore, it is unclear how much of the abuse can be attributed to existing law, as opposed to failure to enforce existing law.<sup>121</sup> Even if the Legislature were [\*412] to assume abuse were occurring, data is needed to determine how to best tailor the law to addressing the abuse.<sup>122</sup>

The Legislature took a step in the right direction in adding section 1458 to the Probate Code. Section 1458 requires the Judicial Council to report to the Legislature measures of court effectiveness in conservatorship cases.<sup>123</sup> Broadly, it requires 2018-2019 caseload statistics, an analysis of compliance with required timeframes, and a description of county-to-county differences that might impact how conservatorship cases are processed.<sup>124</sup>

The following caseload statistics must be included: (1) the number of conservatorship petitions filed, granted, denied (2) at the end of the year, the number of conservatorships under court supervision that were investigated (3) at the end of the year, the number of conservatorships under court supervision in which a hearing was held (4) the number petitions challenging a conservator's conduct that were filed, granted, and denied (5) the number of conservatorships under court supervision with accountings due or accountings received after they were due and (6) the number of conservatorships under court supervision where bond was not required.<sup>125</sup> In all categories, cases are to be distinguished by whether a professional fiduciary was appointed.<sup>126</sup>

The section 1458-mandated study captures a specific moment in time, the 2018-2019 fiscal year.<sup>127</sup> While this is certainly better than nothing, the study will ultimately do little to map trends. The data will also provide no insight into the prevalence of abuse during and post-Covid,<sup>128</sup> and more [\*413] generally, as times change. Section 1458 should thus be amended to require annual reporting. This will allow the Legislature to enact data-driven laws that both protect conservatees and allocate state resources to where they are demonstrably needed.

## 2. The Punitive Nature of AB 1194 May Trigger an Exodus of Professional Fiduciaries

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<sup>119</sup> *Id.*

<sup>120</sup> Stern, *supra* note 73.

<sup>121</sup> See Corey, Lodise & Stern, *supra* note 55 (referring to the *Los Angeles Times* articles).

<sup>122</sup> This is supported by the addition of section 1458 of the Probate Code, which requires the Judicial Council to report to the Legislature measures of court effectiveness in conservatorship cases. **Cal. Prob. Code §1458(a)** (Deering 2022).

<sup>123</sup> **Cal. Prob. Code §1458(a)**.

<sup>124</sup> *Id.* §1458(a)(1)-(3).

<sup>125</sup> *Id.* §1458(a)(1)(A)-(F).

<sup>126</sup> *Id.*

<sup>127</sup> *Id.* §1458(a)(1) (requiring caseload statistics from the 2018-2019 fiscal year).

<sup>128</sup> The Covid-19 pandemic has been particularly impactful on the elderly and has likely resulted in changes in the frequency, types, and reporting of abuse. See Kenneth Heisz, *Beware of the Con in Conservatorships: A Perfect Storm for Financial Elder Abuse in California*, 17 Nat. Acad. Elder L. Att'ys J. 33, 34, 48 (2021) (arguing that Covid-19 stay-at-home orders have exacerbated elder abuse and allowed for isolation of elders).



It is equally crucial to consider whether the new legislation is unduly burdensome on professional fiduciaries. Fiduciary law requires a balance of two interests.<sup>129</sup> On the one hand, the fiduciary "must be entrusted with the power in order to perform his function."<sup>130</sup> On the other, "his possession of the power creates a risk that he will misuse it and injure the entrustor."<sup>131</sup>

Laws regulating fiduciaries are essential "[b]ecause the entrustor cannot satisfactorily protect himself while maintaining the benefits of the fiduciary relation ...."<sup>132</sup> That said, fiduciaries cannot be so constrained that they are unable to do their jobs.<sup>133</sup> The balance lies in a law that incentivizes fiduciaries and entrustors to enter into fiduciary-entrustor relations.<sup>134</sup>

If the scale is tipped toward too much regulation of fiduciaries, namely if the "burden of regulation outweighs [fiduciaries'] potential benefit from the relation," the concern is that fiduciaries will avoid entering into fiduciary-entrustor relationships by, for example, finding other work.<sup>135</sup> To avoid this fate, the law should provide for "the minimal protection on which a reasonable entrustor would insist and the maximum burden that a reasonable fiduciary might agree to bear."<sup>136</sup>

Newly added section 6563 to the Business and Professions Code, mandating increased requirements for fiduciaries' fee [\*414] disclosure, meets this standard.<sup>137</sup> A reasonable conservatee is likely to insist, minimally, upon fee transparency. Further, the overall burden of compliance on the fiduciary is small - simply updating the website, or alternatively, providing up-front information about fees. Accordingly, the provision should remain.

However, it is not as clear that amended section 6580 of the Business and Professions Code meets the requisite standard. Section 6580(a)(2) requires the Professional Fiduciaries Bureau impose sanctions if it finds that a professional fiduciary (1) breached a fiduciary duty and caused financial, physical, or mental harm to a client (2) abused an elder under Welfare and Institutions Code section 15610.07 or (3) violated a statute or regulation which binds fiduciaries.<sup>138</sup> Furthermore, section 6580(d) requires license revocation if the Professional Fiduciaries Bureau finds that a professional fiduciary (1) knowingly, intentionally, or willfully breached a fiduciary duty that constitutes section 15610.07 abuse or (2) through gross negligence or gross incompetence caused serious physical, financial, or mental suffering to a client.<sup>139</sup> Further, if the court finds that a professional fiduciary has committed abuse, the professional fiduciary is subject to a \$10,000 civil penalty per act of abuse.<sup>140</sup>

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<sup>129</sup> Tamar Frankel, *Fiduciary Law*, [71 Cal. L. Rev. 795, 809 \(1983\)](#).

<sup>130</sup> *Id.*

<sup>131</sup> *Id.*

<sup>132</sup> *Id.* at 816.

<sup>133</sup> *Id.* at 826.

<sup>134</sup> *Id.* at 833.

<sup>135</sup> Frankel, *supra* note 129, at 833 Stern, *supra* note 73, at 49 ("Some private professional fiduciaries will probably choose to limit their practices to trust administration or to appointments as agents under powers of attorney.").

<sup>136</sup> Frankel, *supra* note 129, at 833.

<sup>137</sup> See generally [Cal. Bus. & Prof. Code §6563\(a\)-\(b\)\(3\)](#) (Deering 2022) (requiring that fees be posted online, or, if the fiduciary does not have a website, provide prospective clients with information about the fiduciary's fees).

<sup>138</sup> *Id.* §6580(a)(2)(A)-(C).

<sup>139</sup> *Id.* §6580(d)(1)-(2).

<sup>140</sup> **Cal. Prob. Code §2112(a)(1)** (Deering 2022).

On the one hand, these new regulations, taken together, might go beyond "the maximum burden that a reasonable fiduciary might agree to bear."<sup>141</sup> Even the most prudent, well-meaning professional fiduciary might fear the risk of making a career-ending mistake. Consequently, the regulations might encourage professional fiduciaries to seek out other work.<sup>142</sup>

**[\*415]** On the other hand, abuse under section 15610.07 of the Welfare and Institutions Code is a relatively high threshold.<sup>143</sup> Abuse of an elder or dependent adult is defined as (1) "[p]hysical abuse, neglect, abandonment, isolation, abduction, or other treatment with resulting physical harm or pain or mental suffering" (2) "deprivation by a care custodian of goods or services that are necessary to avoid physical harm or mental suffering" or (3) financial abuse.<sup>144</sup>

Statutes<sup>145</sup> and case law confirm this high standard. In *Bookout v. Nielsen*, the court found section 15610.07 abuse, but only in the context of particularly egregious conduct.<sup>146</sup> In that case, an elderly woman's (non-paying) tenant abused her by shaking his fists at her, threatening to provoke her to the point of a stroke, attempting to record the woman's conversations without consent, locking her out of her home, placing personal property in locked cabinets and storage facilities to prevent access, and using bright lights and cameras to prevent the woman from leaving her bedroom.<sup>147</sup>

Accordingly, the standard of section 15610.07 likely poses little risk to well-meaning professional fiduciaries. While the actual risk appears to be low, the new legislation taken as a **[\*416]** whole may create a perceived risk<sup>148</sup> that surpasses "the maximum burden that a reasonable fiduciary might agree to bear."<sup>149</sup>

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<sup>141</sup> See Frankel, *supra* note 129, at 833 (regulation of fiduciaries should be limited to "the minimal protection on which a reasonable entrustor would insist and the maximum burden that a reasonable fiduciary would agree to bear").

<sup>142</sup> Stern, *supra* note 73, at 49 ("Some private professional fiduciaries will probably choose to limit their practices to trust administration or to appointments as agents under powers of attorney.") see Frankel, *supra* note 129, at 833 ("[Fiduciaries] will refrain from serving if the burden of regulation outweighs their potential benefit from the relation.").

<sup>143</sup> See generally [Cal. Welf. & Inst. Code §15610.07](#) (Deering 2022) (defining "[a]buse of an elder or dependent adult").

<sup>144</sup> *Id.* §15610.07(a)(1)-(3).

<sup>145</sup> Isolation includes intentionally preventing an elder/ dependent adult from receiving mail or phone calls telling a visitor that the elder/ dependent adult is not home or does not wish to see the visitor contrary to the elder/ dependent adult's wishes false imprisonment and/ or physically restraining the elder/ dependent adult for the purpose of preventing him/ her from seeing visitors. *Id.* §15610.43(a)(1)-(4). Further, examples of neglect constituting abuse include failing to provide food, clothing, or shelter failing to provide medical care and failure to protect from health and safety hazards. *Id.* §15610.57(b)(1)-(3). Financial abuse involves (1) "[t]ak[ing], secret[ing], appropriate[ing], obtain[ing], or retain[ing]" property of an elder/ dependent adult "for wrongful use or with intent to defraud, or both" (2) assisting in such conduct or (3) "[t]ak[ing], secret[ing], appropriate[ing], obtain[ing], or retain[ing]" property of an elder/ dependent adult or assisting in such conduct via undue influence. *Id.* §15610.30(a)(1)-(3).

<sup>146</sup> See [Bookout v. Nielsen, 155 Cal. App. 4th 1131, 1141 \(2007\)](#).

<sup>147</sup> *Id.* *Bookout* involved an appeal of a protective order issued against the occupant of the elderly woman's home. [Id. at 1134-35](#). While *Bookout* does not address abuse specifically in the context of a conservator-conservatee relationship, it is nonetheless useful in generally understanding the type of conduct that constitutes section 15610.07 abuse.

<sup>148</sup> Perceived risk is nonetheless an important consideration because, like actual risk, it can bring about professional shifts. Furthermore, even if a professional fiduciary does not perform any act of abuse, "there may be situations when a conservatee or a friend or family member of a conservatee *alleges* such abuse." Stern, *supra* note 73, at 49 (emphasis added).

<sup>149</sup> See Frankel, *supra* note 129, at 833.

Furthermore, the new legislation, which outlines penalties for abuse that has not been proven to be widespread, is contrary to the moral theme that generally underlines fiduciary law.<sup>150</sup> The moral theme refers to the idea that "the law places [a fiduciary] in the role of a moral person and pressures him to behave in a selfless fashion, to think and act for others."<sup>151</sup> The moral theme is utilized because "the *prevention* of fiduciary abuse of power can pose serious problems."<sup>152</sup> Morality, when incorporated into legislation, may be more effective because "a sense of moral obligation will help bring about the desired behavior."<sup>153</sup> Thus, the punitive nature of the new legislation renders it less effective than a morality-based approach.

### 3. An Incentivization Approach to Regulating Professional Fiduciaries

Thus, the new legislation pertaining to fiduciaries should be supplemented with provisions that incentivize good behavior rather than to penalize bad behavior. In addition, any bad behavior that is addressed, through an incentive program or otherwise, must be supported by detailed, annual studies outlining how common abuse actually is and how abuse generally manifests. These measures will allow the Legislature to accomplish its goal of preventing abuse without deterring well-meaning professional fiduciaries from conservatorship work.

The Legislature may incentivize well-meaning professional fiduciaries in a number of ways. For instance, the Legislature may dictate a more lenient standard of judicial **[\*417]** scrutiny over the fees of professional fiduciaries upon a demonstration by the professional fiduciary that she has no record of abuse or questionable conduct. This offers the additional benefit of minimizing the costs to the conservatee's estate because less required judicial oversight translates to fewer court costs and attorney fees. The Legislature may also consider various means to incentivize joining the fiduciary profession, such as reduced licensing fees for individuals demonstrating a history of ethical conduct toward vulnerable groups.<sup>154</sup>

Professional fiduciaries are crucial to the conservatorship system. Through incentives and consistent factual support for the problems the legislature seeks to remedy, the Legislature will (1) formally recognize this importance, thus mitigating the risk of a mass exodus from the profession, and (2) more effectively achieve its goal of protecting the elderly and vulnerable.

### B. Counsel as Zealous Advocate and Conservatee's Power to Select Attorney

New to section 1471 are the requirement that counsel zealously advocate for their client's interests and the permission for conservatees to select an attorney not on the court's list of court-appointed counsel.<sup>155</sup> Both provisions independently present numerous concerns, and in aggregate, they present a perilous situation for conservatees, proposed conservatees, and individuals alleged to lack capacity. Section 1471 should accordingly be amended to require zealous advocacy in certain, narrow circumstances and best interests advocacy in others. In addition, the provision of section 1471 permitting selection of an attorney not on the court's list of court-appointed counsel should be modified to allow conservatees and proposed conservatee to select an attorney from the court's list of court appointed counsel or an attorney with comparable experience in conservatorship matters.

#### **[\*418] 1. Counsel as Zealous Advocate**

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<sup>150</sup> *Id.* at 829-30.

<sup>151</sup> *Id.* at 830.

<sup>152</sup> *Id.* at 831 (emphasis added).

<sup>153</sup> *Id.*

<sup>154</sup> Such a history could be established via a variety of means, including a background in caregiving with strong references, volunteer work with the elderly, or prior work with a regional center.

<sup>155</sup> [Cal. Prob. Code §1471\(c\)](#) (Deering 2022).

Amended Probate Code section 1471 takes an explicit stance within a preceding debate regarding the role of counsel in conservatorship cases - counsel must zealously advocate for their clients' interests.<sup>156</sup> While there are some benefits to a zealous advocacy approach, this section will suggest that the role of counsel should instead be somewhere between the zealous advocacy and best interest approach.

The zealous advocacy conception has some strengths. Particularly when a person's liberty is at stake, zealous advocacy ensures that counsel does not "subject[] clients to their personal judgment about the ultimate issues" which may be "complete with biases and economic incentives, and without complete case information ferreted out through adversarial arguments."<sup>157</sup>

In some respects, however, the best interests approach trumps the zealous advocacy approach. When counsel acts in the client's best interest, the result is generally more efficient because "the court's resources are tailored to achievable outcomes."<sup>158</sup> In conservatorship proceedings, the litigation expenses for both sides are paid by the conservatee, so efficiency translates to savings.<sup>159</sup> Further, counsel's determination of the client's best interest is not completely arbitrary - it is informed by (1) "the client's rights, remedies, and economic interests" and (2) "the extent to which the attorney knows what the client would decide if the client were capable of deciding."<sup>160</sup>

Additionally, the best interests approach aligns better with the available ethical guidance regarding representation of a client with diminished capacity. According to the formal guidance of the State Bar of California Standing Committee on Professional Responsibility and Conduct, "[w]hen the lawyer reasonably believes that the client lacks the capacity to make a decision, the lawyer may be required to refuse to assist in [\*419] effectuating the client's expressed wishes."<sup>161</sup> Thus, certain circumstances ethically demand either a best interests-like approach or ceasing to represent a client with wishes the attorney cannot ethically effectuate. Because section 1471 rejects the best interests approach,<sup>162</sup> it encourages - nay, mandates - ceasing to represent a conservatee with ethically challenging wishes. This ultimately leaves certain conservatees without representation.

The zealous advocacy standard is impractical and, in some circumstances, impossible. At the same token, the best interests approach alone is imperfect because it requires the attorney to determine the best interests of the

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<sup>156</sup> *Id.* §1471(d).

<sup>157</sup> Chicotel, *supra* note 87, at 7.

<sup>158</sup> *Id.*

<sup>159</sup> *Id.*

<sup>160</sup> Gregory S. French et al., *Aspirational Standards for the Practice of Elder Law with Commentaries*, 2.1 Nat'l Acad. Elder L. Att'ys J. 6, 24 (2005).

<sup>161</sup> State Bar of Cal. Standing Comm. on Pro. Resp. & Conduct, Formal Op. 13-0002 1 (2021).

<sup>162</sup> [Cal. Prob. Code §1471\(d\)-\(e\)](#) (Deering 2022). Implicitly, amended section 1471 rejects other best-interests-like approaches as well, including negotiating with a client to ultimately change the client's harmful, impossible, or impractical wishes. See *id.* While zealous advocacy is not defined in the California Rules of Professional Conduct, the comments to Rule 1.3 of the Model Rules of Professional Conduct indicate the zealous advocacy is only limited in that a "lawyer is not bound .... to press for every advantage that might be realized for a client" and "does not require the use of offensive tactics." Model rules of Pro. Conduct r. 1.3 cmt. 1 (Am. Bar Ass'n 2020). The Model Rules' definition of zealous advocacy would thus conceivably forbid, for example, working to convince a client staunchly opposed to a conservatorship that a conservatorship is really in her best interest. See *id.* While an attorney need not "press for every advantage," the implication is that the attorney must press for most advantages to achieve the client's desired objective. See *id.* Support for this is also found in the requirement that lawyers abide by their client's decisions concerning the objectives of representation. Rules of Pro. Conduct r. 1.2(a) (State Bar of Cal. 2018).

conservatee, which may be difficult or impossible to ascertain.<sup>163</sup> Thus, the standard should lie between the two extremes and should allow for more flexibility given the wide range of capacities.<sup>164</sup>

The following language would align with these goals: "The role of legal counsel is to advocate for the client's wishes to the extent possible. If advocacy for the client's wishes is impossible or significantly detrimental to the client's physical, emotional, or financial wellbeing, the role of legal counsel is to **[\*420]** advise<sup>165</sup> the conservatee, proposed conservatee, or person alleged to lack legal capacity as to the impossibility and/or ramifications of their wishes. If the client insists on impossible or significantly detrimental objectives, the role of legal counsel is to represent the best interests of the conservatee, proposed conservatee, or person alleged to lack legal capacity."

The language retains the zealous advocacy standard to an extent, while allowing counsel to work with a client to establish more practical goals. It additionally provides a solution if such counseling does not succeed, namely the best interests standard. This ensures that client's wishes are considered, while providing an alternative, other than ceasing representation, in situations where the client's wishes are harmful or impossible.

Dr. Heather Swadley has proposed an amendment to the Model Rules of Professional Conduct which involves a supported decision-making agreement,<sup>166</sup> and where the client's wishes cannot be ascertained, requires preservation of the client's "long-term interest in autonomy" rather than codification of the best interests standard.<sup>167</sup> This note does not incorporate the supported decision-making contract in its proposed language because it does little where the conservatee lacks capacity to contract. In California, contracts are subject **[\*421]** to rescission where a party was of unsound mind.<sup>168</sup> Unsound mind is presumed if the party is "substantially unable to manage his or her own financial resources or resist fraud or undue influence."<sup>169</sup> Thus, for individuals lacking capacity to contract, a supported decision-making agreement could well be subject to rescission and of little legal effect.

Accordingly, the role of counsel should instead be somewhere between the zealous advocacy and best interest approach. The above language accomplishes this goal in a manner that is both practical and protective.

## 2. Conservatee's Power to Select Attorney

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<sup>163</sup> See generally Chicotel, *supra* note 87, at 7 (generally describing the best interests approach).

<sup>164</sup> [Cal. Prob. Code §812](#) (capacity to make decisions) *Id.* §1900 (capacity to marry) *Id.* §1910 (capacity to vote) *Id.* §§1870, 1872 (capacity to enter into a transaction that binds the estate).

<sup>165</sup> In practice, such advice may take the form of, but is not limited to, "plain language explanations, time to discuss choices, helping the disabled person create pro-con lists, role-playing activities to understand choices, bringing supporters to important appointments to help the person remember, record, and discuss their options, and other necessary steps." Heather Swadley, *How #FreeBritney Exposes the Need to Disable the Model Rules of Professional Conduct*, **43 Mitchell Hamline L.J. Pub. Pol'y & Prac. 1, 23 (2022)**. This note does not propose inclusion of such language in the legislative text so as to allow for maximum flexibility on the part of the court-appointed counsel. Given the required level of experience to serve as court-appointed counsel, court-appointed counsel seems best suited to select a tailored method of advising his or her client - to which, based on court-appointed counsel's familiarity with the client, court-appointed counsel believes the client will best respond. For the Legislature to dictate how that advice should be given in a specific factual scenario appears to enter treacherous waters, for court-appointed counsel ought to know best how his or her particular client will best receive information. At the very least, inclusion of such language would be superfluous and given the experience of court-appointed counsel, should go without saying.

<sup>166</sup> Dr. Swadley proposes "that the Model Rules and corresponding commentary should be changed to encourage the creation of formalized supported decision-making agreements," namely contracts. *Id.* at 24.

<sup>167</sup> *Id.* at 27-28.

<sup>168</sup> [Cal. Civ. Code §39\(a\)](#) (Deering 2022).

<sup>169</sup> *Id.* §39(b).

Complicating the zealous advocacy versus best interests debate further, amended section 1471(d) permits a conservatee or proposed conservatee to select counsel other than court-appointed counsel.<sup>170</sup> The zealous advocacy duty applies to conservatee-selected counsel as well.<sup>171</sup> As discussed, the zealous advocacy standard alone is imperfect. A perilous combination thus results when zealous advocacy is coupled with the equally flawed practice of bringing lawyers inexperienced in conservatorship law into a conservatorship case.

The discrepancy between the requirements for court-appointed counsel and the requirements for attorneys broadly demonstrate the challenges of this combination. Admission to the State Bar of California requires an applicant to (1) demonstrate good moral character<sup>172</sup> (2) complete at least two years of college (at least one-half of a bachelor's degree) prior to law school<sup>173</sup> (3) register as a law student with the State Bar<sup>174</sup> (4) obtain a juris doctor degree from an institution accredited by the American Bar Association or study under the supervision of a licensed attorney or judge<sup>175</sup> (5) pass an [\*422] examination in professional responsibility<sup>176</sup> and (6) pass the general bar examination.<sup>177</sup>

With respect to students that opt to obtain a juris doctor from an ABA-accredited law school, the ABA only requires one professional responsibility course of at least two units,<sup>178</sup> one legal writing experience in the first year and another after the first year, and six credit hours of experiential courses.<sup>179</sup>

Counsel appointed by the court under [California Probate Code section 1470](#) or [1471](#) are subject to numerous additional requirements. As a threshold matter, court-appointed counsel must have been admitted to the California State Bar and must be in good standing.<sup>180</sup> They must have been free from professional discipline for twelve months and are required to demonstrate adequate professional liability coverage.<sup>181</sup>

Court-appointed counsel is also subject to additional educational and experiential requirements. To qualify to serve as court-appointed counsel, an attorney must have represented a petitioner, objector, conservatee, proposed conservatee, or person alleged to lack capacity in at least three separate proceedings.<sup>182</sup> One of such proceedings

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<sup>170</sup> [Cal. Prob. Code §1471\(d\)](#).

<sup>171</sup> *Id.* §1471(d)-(e).

<sup>172</sup> [Cal. Bus. & Prof. Code §6060\(b\)\(1\)](#) (Deering 2022).

<sup>173</sup> *Id.* §6060(c)(1)-(2).

<sup>174</sup> *Id.* §6060(d).

<sup>175</sup> *Id.* §6060(e)(1)-(2) (if an applicant does not obtain a JD from an accredited institution, he or she must have studied law "diligently and in good faith for at least four years" in one or a combination of enumerated manners. Enumerated manners include, among others, studying law under the supervision of a California State Bar licensee who has practiced law continuously for at least 5 years or studying in the chambers and under the supervision of a judge).

<sup>176</sup> *Id.* §6060(f).

<sup>177</sup> *Id.* §6060(g).

<sup>178</sup> The course must "include[] substantial instruction in rules of professional conduct, and the values and responsibilities of the legal profession and its members." Am. Bar Ass'n, 2022-2023 Standards and Rules of Procedure for Approval of Law Schools 18 (2022).

<sup>179</sup> *Id.*

<sup>180</sup> Cal. Rules of Court, rule 7.1101(c)(1) (2020).

<sup>181</sup> Cal. Rules of Court, rule 7.1101(c)(2)-(3) (2020).

<sup>182</sup> Cal. Rules of Court, rule 7.1103(a) (2020).



must be a contested matter.<sup>183</sup> If an attorney lacks the above experience, she may qualify if (1) she works for an attorney, firm, or organization approved by the court to represent conservatees, proposed conservatees, and persons alleged to lack capacity, and (2) she is closely supervised by an attorney that meets the above experience requirements.<sup>184</sup> Alternatively, an attorney lacking the requisite experience may serve if (1) she completes Minimum Continuing Legal Education (MCLE) on topics of capacity, representing clients with disabilities, and [\*423] professional responsibility and (2) is closely supervised by a qualifying attorney.<sup>185</sup>

Annually, all court-appointed counsel must complete a minimum of three hours of professional education approved by the State Bar for MCLE credit in relevant subject areas.<sup>186</sup> These subject areas include (1) conservatorship law and proceedings, determining capacity, and the legal rights of conservatees, proposed conservatees, and people alleged to lack capacity (2) professional conduct and (3) considerations in representing the elderly and disabled, such as communicating with the elderly and disabled, the vulnerability of the elderly and disabled, the effects of aging and neurocognitive disorders on one's ability to perform daily tasks, and less-restrictive alternatives to conservatorship.<sup>187</sup>

Given the numerous additional requirements necessary to become court-appointed counsel in conservatorship proceedings, court-appointed counsel is certain to possess experience in the area of conservatorship law. While non-court-appointed counsel may possess similar expertise, not all non-court-appointed counsel are conservatorship or probate specialists. Giving a conservatee or proposed conservatee complete freedom to select their counsel (outside of vetted court appointed counsel) makes conservatees and proposed conservatees vulnerable to unqualified legal practitioners and increased expenses. In response, section 1471(d) should be modified to allow conservatees and proposed conservatees to select an attorney from the court's list of court-appointed counsel or an attorney with comparable experience in conservatorship law.

### C. Funding Increased Court Review of Conservatorships

Although passed with the intent of protecting the vulnerable,<sup>188</sup> it is unclear whether the state budget can accommodate the increased court oversight requirements of AB 1194. Accordingly, as an initial matter, the costs of accommodation must be fully fleshed out. If such an inquiry determines that the budget can accommodate the costs of [\*424] compliance, the necessary resources should be allocated. If the budget cannot, California should consider means to raise the adequate funds.

The predecessor to AB 1194, the Omnibus Act, was never appropriately funded due to budget cuts during the 2008 financial crisis.<sup>189</sup> In response to these budget cuts, in 2011 the Legislature granted the Judicial Council relief from many of the mandates included in the Omnibus Act.<sup>190</sup> The legislative analysis of AB 1194 characterizes AB 1194 as a means of protecting the vulnerable where the unfunded Omnibus Act provisions could not.<sup>191</sup>

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<sup>183</sup> Cal. Rules of Court, rule 7.1103(a) (2020).

<sup>184</sup> Cal. Rules of Court, rule 7.1103(b)(1) (2020).

<sup>185</sup> Cal. Rules of Court, rule 7.1103(b)(2) (2020).

<sup>186</sup> Cal. Rules of Court, rule 7.1103(c) (2020).

<sup>187</sup> Cal. Rules of Court, rule 7.1103(d)(1)-(3)(D) (2020).

<sup>188</sup> Assemb. Comm. on Judiciary, *supra* note 56, at 1-2.

<sup>189</sup> Assemb. Comm. on Bus. and Prof., *supra* note 70.

<sup>190</sup> *Id.*

<sup>191</sup> *Id.* Stern, *supra* note 73 ("One of the themes that runs through the legislative analyses that accompanied the amendments to AB 1194 was that the reforms implemented by the 2006 Act had not been properly funded and were not being properly enforced in the courts.").



With AB 1194, the Legislature intended to reinstate (some of) the Omnibus Act mandates *and* introduce additional, new requirements on the court.<sup>192</sup> For example, by now requiring court investigators to obtain and examine medical documents, courts will be required to hire more court investigators to accommodate the increased workload.<sup>193</sup> Additionally, where courts could formerly review some conservatorships every two years, courts must now review all conservatorships every year.<sup>194</sup> These requirements translate to additional costs beyond the costs associated with the Omnibus Act.

It is unclear, however, that the state is capable of funding AB 1194 to its intended glory. In 2007, the cost of compliance with the Omnibus Act was estimated at \$17.4 million plus increased court backlogs.<sup>195</sup> The cost of AB 1194 is estimated at \$339,000 annually to the Professional Fiduciaries Bureau [**\*425**] plus "[u]nknown costs, likely in the low tens of millions of dollars annually" to comply with just the Omnibus Act court oversight provisions that had not been funded previously.<sup>196</sup> The Assembly Committee on Appropriations notes that the cost of compliance with the previously unfunded Omnibus Act provisions would likely exceed the 2007 estimate.<sup>197</sup> Given this estimate and the fact that AB 1194 requires more than the Omnibus Act, the cost of compliance with AB 1194 will surely exceed \$17 million annually.<sup>198</sup>

In further support of the uncertainty of AB 1194's funding, AB 1194 includes numerous funding exceptions, similar to the Omnibus Act.<sup>199</sup> While the exceptions are not mandatory,<sup>200</sup> they do provide a curious loophole that calls into question whether the problem was the prior law or whether the problem was instead largely a funding issue.<sup>201</sup>

Thus, before further recommendations regarding the role of court staff can be made, a study is necessary to determine the cost of compliance with AB 1194. If the budget can accommodate the cost of compliance, it should be done. If the budget cannot accommodate the cost of compliance, California should consider solutions to raise the necessary funds. One option would be a ballot measure to increase taxes, coupled with a public awareness campaign stressing the need to fund the conservatorship system, especially as the Baby Boomer generation ages. Another option would be to make use of county or state-level bonds to be paid back via a gradual increase in sales tax.

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<sup>192</sup> See Assemb. Comm. on Bus. and Prof., *supra* note 70 see, e.g., [Cal. Prob. Code §1826\(a\)\(9\)](#) (Deering 2022) (requiring court investigators to "[g]ather and review relevant medical reports regarding the proposed conservatee ....").

<sup>193</sup> See Prob. §1826(a)(9). This increase in workload is demonstrated by the anticipated complexity of implementing this new requirement. According to one practitioner's experience, routine medical forms such as capacity declarations are already difficult to obtain from physicians. Stern, *supra* note 73, at 47. It is likely to be similarly difficult for court investigators to obtain medical reports, with HIPAA being one major concern. *Id.*

<sup>194</sup> [Cal. Prob. Code §1850\(a\)\(2\)](#) (2011) (amended 2021) [Cal. Prob. Code §1850\(a\)\(2\)](#) (Deering 2022).

<sup>195</sup> Assemb. Comm. on appropriations., Assemb., Reg. Sess., at 2 (2021).

<sup>196</sup> *Id.*

<sup>197</sup> *Id.*

<sup>198</sup> See *id.*

<sup>199</sup> E.g., [Cal. Prob. Code §§1051\(e\), 1826\(h\)\(2\), 1850\(e\)\(2\), 1850.5\(e\)\(1\)-\(2\)](#), 1851(f)(1)-(2), 1851.1(g)(1)-(2), 1851.6(b), 1860(e), 2112(d), 2250(k), 2250.6(e), 2253(j)(1)-(2), 2620(f), 2653(d) (Deering 2022).

<sup>200</sup> In the sense that courts have the option to comply or not comply prior to the appropriation of funding. E.g., Prob. §1826(h)(2) ("A superior court shall not be required to perform any duties imposed pursuant to the amendments to this section enacted by the measure that added this paragraph until the Legislature makes an appropriation identified for this purpose.").

<sup>201</sup> Stern, *supra* note 73, at 50 ("A lot of what AB 1194 is striving to fix could be fixed by substantial increases in the funding available to the courts.").

**[\*426] V. Proposal**

AB 1194 has the potential to trigger a mass exodus of professional fiduciaries and the potential to strip conservatees of experienced legal representation. Further, AB 1194 leaves critical funding questions unaddressed. Clearly, a legislative change is needed to confront these practical challenges.

**A. Amending Probate Code Section 1458 to Incentivize Professional Fiduciaries and Require Annual Data Collection**

First, section 1458 of the Probate Code should be amended to require annual reporting of conservatorship statistics. Further, the Probate Code should incentivize, rather than solely penalize, professional fiduciaries. While it is not necessary to restructure the Probate Code entirely, the addition of incentives would reduce the perceived risk of this line of work, preventing exodus from and encouraging arrival to the profession. Incentives such as more lenient scrutiny of fees for professional fiduciaries with no record of abuse and reduced licensing fees for individuals with a demonstrated history of ethical conduct toward vulnerable groups epitomize these goals. Connected with this proposal is the necessity to annually collect data on conservatorships, which can be accomplished by expanding section 1458. This would allow the Legislature to better analyze the frequency of abuse, the nature of abuse, and trends in abuse and to ultimately better tailor the law to fighting abuse.

**B. Amending Probate Code Section 1471 to Codify the Role of Court-Appointed Counsel as Midway Between Zealous Advocacy and Best Interests**

Second, the Probate Code should amend the role of counsel to reflect a midpoint between the zealous advocacy and best interests standard. Specifically, section 1471(d)-(e) should be amended with respect to the requirement for zealous advocacy to read: "The role of legal counsel is to advocate for the client's wishes to the extent possible. If advocacy for the client's wishes is impossible or significantly detrimental to the client's physical, emotional, or financial wellbeing, the role of legal counsel is to advise the conservatee, proposed conservatee, or person alleged to lack legal capacity as to the impossibility [\*427] and/or ramifications of their wishes. If the client insists on impossible or significantly detrimental objectives, the role of legal counsel is to represent the best interests of the conservatee, proposed conservatee, or person alleged to lack legal capacity."

This language continues to prioritize conservatees' and proposed conservatees' wishes but allows for flexibility if the wishes are detrimental or impossible. The flexibility, however, includes an intermediary step between the zealous advocacy standard and best interests standard, namely advising the client of the impossibility or ramifications of their wishes. This puts the conservatee's or proposed conservatee's wishes first while avoiding problems associated with the best interests standard.<sup>202</sup> Only if such counseling breaks down is the best interests approach permitted. This is necessary to provide counsel with an alternative to ceasing representation altogether.<sup>203</sup>

Section 1471(d) should also be amended to allow conservatees and proposed conservatees to select an attorney from the court's list of court-appointed counsel or an attorney with comparable experience in conservatorship law. On the one hand, conservatees and proposed conservatees should be able to select their own counsel. On the other hand, it is important to consider that conservatees and proposed conservatees lack or are alleged to lack a degree of capacity that might complicate selection of counsel. It may be difficult, for example, for such an individual to appreciate the difference between a conservatorship lawyer and a civil litigator. In that same vein, experienced conservatorship attorneys outside the court's list of court appointed counsel do exist, so it would be unduly limiting to narrow the selection pool strictly to court-appointed counsel.

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<sup>202</sup> Namely, the difficulty or impossibility of ascertaining that which is truly in the conservatee's best interest. Chicotel, *supra* note 87, at 7.

<sup>203</sup> As would appear to be ethically demanded under the current ethical guidance. See State Bar of Cal. Standing Comm. on Pro. Resp. & Conduct, *supra* note 161 ("When the lawyer reasonably believes that the client lacks the capacity to make a decision, the lawyer may be required to refuse to assist in effectuating the client's expressed wishes.").

Allowing conservatees and proposed conservatees to select counsel from court-appointed counsel or attorneys with comparable experience in conservatorship law solves this [\*428] dilemma. It provides conservatees with more of a choice, while ensuring some protection against inexperienced counsel and increased costs. While this standard would be an improvement, further amendments will be necessary as the California State Bar issues further guidance and training on representing clients with diminished capacity.

### **C. Allocating Funds to Probate Courts Through Ballot Measure or Bonds**

Third, AB 1194 requires a determination of cost and funding to meet that cost.<sup>204</sup> If the cost can be accommodated in the current budget, the allocation should be made. In the event that the cost cannot be accommodated in the current budget, this note proposes two options: (1) a ballot measure to increase taxes coupled with a public awareness campaign and/ or (2) use of county or state level bonds to be paid back via a gradual increase in sales tax.

A ballot measure to increase taxes coupled with a public awareness campaign is attractive for several reasons. While a ballot measure to increase taxes may not be immediately appealing to all voters, it can be strengthened with public outreach demonstrating the expected need for conservatorships as the Baby Boomer generation ages. The population over age sixty in California is expected to increase 166% in the period from 2010 to 2060.<sup>205</sup> The population over age eighty-five in California is expected to increase 489% in that same time period.<sup>206</sup> If California voters, over 20% of which are age sixty-six or older,<sup>207</sup> are made aware of these statistics, a ballot measure could be quite successful.

Alternatively, or in conjunction, California may consider county or state-level bonds to be paid back via a gradual increase in sales tax. County-level bonds are appealing in that they would target counties with greater needs without burdening those counties with sufficient funding. State-level bonds, however, would likely be able to raise greater sums [\*429] given the greater scope. At both levels, bonds incentivize the raising of funds by providing the opportunity for investors to predictably earn interest.<sup>208</sup> If this incentive is channeled to fund the conservatorship system, it could be quite powerful.

## **VI. Conclusion**

Public outcry certainly has its place within the legislative system. It is often a useful and necessary vehicle for effectuating legislative change. In the case of AB 1194, however, the public outcry focused on a niche series of media and fictional accounts.<sup>209</sup> The result was a series of legislation that responded to the public outcry but did not respond to the needs of the conservatorship system.<sup>210</sup>

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<sup>204</sup> Assemb. B. 1194, 2021 Assemb., Reg. Sess. (Cal. 2021).

<sup>205</sup> *Facts About California's Elderly*, Cal. Dep't of Aging, <https://aging.ca.gov/Data/Reports/Facts/About/California's/Elderly/> (last visited Jan. 31, 2023).

<sup>206</sup> *Id.*

<sup>207</sup> Cal. Sec'y of State, Report of Registration 24 (2021).

<sup>208</sup> *Bonds*, U.S. Sec. and Exch. Comm'n, <https://www.investor.gov/introduction-investing/investing-basics/investment-products/bonds-or-fixed-income-products/bonds> (last visited Jan. 31, 2023).

<sup>209</sup> Namely, the *Los Angeles Times* articles, the 2012 *Mercury News* series, the 2018 *Orange County Register* article, Framing Britney Spears (New York Times 2021), and *I Care a Lot* (Netflix 2020). Assemb. Comm. on Judiciary, *supra* note 56, at 6-7.

<sup>210</sup> Stern, *supra* note 73, at 50.

It is both the role and the duty of the legal system to protect the interests of the elderly and vulnerable. This is a crucial duty in general and particularly so as the Baby Boomer generation ages.<sup>211</sup> This note proposes some steps in furtherance of that duty. It is, however, the responsibility of the legal system to *continue* studying and continue proposing changes to conservatorship law. While such continued study must balance numerous considerations, as the above indicates, it is important to weigh the impact of legislation on each component of the conservatorship system. Central to these efforts is, of course, protecting the vulnerable, but they cannot be adequately protected if the interests, motivations, and responsibilities of those that staff the system are ignored. With this in mind, creative minds in conjunction can and will make a more understanding, efficient, and ethical, conservatorship system.

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<sup>211</sup> See *Facts About California's Elderly*, *supra* note 205 (predicting a 166% increase in individuals over 60 in California and a 489% increase in individuals over 85 between 2010 and 2060).