

CRISIS IN CONSERVATORSHIPS

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I. INTRODUCTION

California's conservatorship legislation will undergo substantial change on January 1, 2007, following the signature by Governor Schwarzenegger of a package of four legislative bills on September 27, 2006.¹

The "Omnibus Conservatorship and Guardianship Reform Act of 2006" will make it much more expensive, for those who want to be conservators, for conservatees, and for the court system, to establish and maintain conservatorships, although the new laws do nothing to bring about social changes that would help avoid conservatorships, create resources for the families of impaired persons, or provide funding to make the existing system, to say nothing of the new system, work better to protect vulnerable seniors. The new laws do provide many enhanced protections for conservatees; create a regulatory system for professional conservators and guardians; and mandate creation of standards for background and education for the court staff personal, court investigators, attorneys who are appointed to represent conservatees, and the judges themselves who are in charge of the conservatorship system in California's 58 superior courts.

A. The Evolution of Conservatorship Practice

California's conservatorship laws have changed substantially over the past fifteen years. Much of the change has been in response 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. The law has added protections for conservatees or proposed conservatees, making it more difficult to obtain adjudications that they need conservatorships unless the proponents of conservatorship can show that they have impairments that prevent them from handling their finances or their medical decisions. Adoption of the Due Process in Competence Determinations Act in 1995 ("DPCDA")² made it mandatory to demonstrate specific impairments, by medical or psychological evidence, that prevent a proposed conservatee being able to manage financial affairs, resist undue influence, or give informed consent for medical treatment, before a court could make findings of incapacity in those areas. The dementia statutes adopted in 1996³ required presenting specific evidence of incapacity and relation of the incapacity to the need for secure placement or administration of dementia medications before a court would authorize a conservator to exercise those powers. These legislative efforts sprang from a perception that it had become too easy for a petitioner to rely upon a one-sentence medical finding that, because a conservatee was senile, he or she should be conserved and placed in a locked setting. Much of this legislation brought additional protections, such as mandatory appointment of an attorney for a proposed conservatee, mandatory professional declarations to support Conservatorship petitions, and enhanced duties of the court investigators to determine whether certain requested powers were warranted.⁴

Parallel to these protective efforts, the legislature introduced a number of measures to control private professional conservators. In 1991, it became mandatory for a private professional conservator to register in each county where he or she wanted to be appointed as a conservator or guardian.⁵ In 2000 the statewide registry, maintained by the Department of Justice, was established.⁶ In 2004, AB 1155⁷ mandated creation of background and education requirements for private professional conservators and guardians and established guidelines for continuing education and led to adoption of two extensive rules of court developed by the Judicial Council, which became effective on January 1, 2006.⁸

Further, starting in 2000, in response to the Riverside County scandals, in which a private professional conservator avoided proper court oversight and defrauded conservatees and their estates, the Legislature tightened up accounting procedures, setting new requirements for providing account statements to the court in support of accountings and establishing tighter deadlines for providing accountings to the Court. In 2001, the accounting sections of the conservatorship law were rewritten to require a conservator or guardian of the estate to provide original account statements at the end of each account period and at the start of the conservatorship or guardianship⁹ and to establish deadlines for having accountings on file, with a range of alternative remedies where the conservator or guardian failed to have the accounting timely filed.¹⁰ That same year, the Legislature added provisions requiring institutions in which conservatorship or guardianship assets were held to file statements with the Court in affidavit form certifying to the existence and contents of accounts owned by or on behalf of a conservatee or ward.¹¹

B. The Los Angeles Times Critique of the System

The conservatorship law has thus been evolving and responding to perceived societal change—increased sensitivity to the needs of vulnerable seniors; reluctance to allow isolated problems and difficulties to cause seniors to lose their independence; awareness of the need to regulate and professionalize the professional fiduciary industry—on a continual basis since the major overhaul of the Probate Code in 1990.¹² In November 2005, the Los Angeles Times published four articles purportedly on private professional conservators¹³, which brought heart-wrenching descriptions of neglect, abuse, incompetency, and lack of oversight by the judicial system onto the newspaper's front page. The study 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. It did point out how in some cases the court system had failed, and it provided many examples in which individuals had been abused and their property had been lost.

Several themes emerged from the four articles:

--First, some of the most populous counties in the state do not have social agencies and court systems that are adequate to the task of coping with the problems of the impaired and vulnerable populations in those counties. The most important remedy called for in the articles is for substantial increase in court funding, staffing, and training.

-- Second, implicit in the articles is a backhanded approval of existing statutes: most of the abuses described in the articles took place because the laws that presently exist were not enforced. The courts in some counties are overwhelmed by their caseloads; they cannot do the job called for by existing law. One sorry anecdote after another presented vulnerable people being abused, stolen from, removed from their houses, deprived of their friends, their assets, and their dignity, because the court system failed to do what the laws say it should do. The articles quoted judges as saying they simply had too many cases and did not know what was going on in their courts. But many counties have vigorous and competent court investigators who actually do visit their conservatees, respond to complaints about abuse, and immediately seek court action when an abuse by a conservator or an attorney comes to their attention. Many probate examiner staffs throughout the state are up to the task of reviewing the accountings presented to them, and while they won't be able to catch every error that comes to their attention, they and the court investigators will call to the court's attention the obvious problems and would certainly report perceived abuses called to their attention by conservatees, for whom the court would then appoint an attorney. All conservators must furnish bond for the assets under their control, or must present courts with receipts from institutions that will hold the assets in blocked status.¹⁴ Where a conservator has made a bad investment, whether in a permitted asset such as common stocks listed on the market, or in an asset such as mutual funds that are not now permitted without prior court consent, if the court finds that the conservator was negligent, the conservator will face a petition for surcharge and the conservator's bonding company will have to make the conservatee's estate whole. There are already in the law provisions to protect a conservatee's assets from being improperly sold; and the conservatee's home has special protections that permit the court to have a court investigator interview the conservatee before the court will allow the sale to go through.¹⁵ It is not the present conservatorship law that is at fault; it is the failure of the courts to follow the law, again largely a problem of lack of resources, that permits many of the abuses reported by the articles.

--Third, the articles recount a breakdown in oversight and an absence of available communications channels for conservatees and their family to get through to the court with their complaints. Many of the stories depict helpless and vulnerable individuals who somehow cannot find a lawyer, or call the court, or get an advocate who can get through on their behalf to the court. In some instances the courts simply did not respond to reported abuses. Again, this problem underscores the need for massive changes in the way the conservatorship system is funded, but also for changes in the law that permits communication to the courts.

--Fourth, the articles target the temporary conservatorship system. The present conservatorship law permits imposition of temporary conservatorships under urgency circumstances without a hearing,¹⁶ and according to the authors many individuals find themselves under conservatorship without due notice, and often discover they are conserved only when they are denied access to their accounts.

--Fifth, the articles recount several episodes where private professional conservators improperly managed conservatorship matters and in some instances abused their

appointments to profit from their posts and point out that private professional conservators are not effectively regulated under the present legislation. _

The response to the series was prompt. The Judicial Council formed a Task Force on conservatorships, which held hearings in March 2006 in southern and northern California to solicit input from attorneys, staff persons, court investigators, private professional fiduciaries, public guardians and administrators, advocacy group members, and the family members of conservatees and will make recommendations for additional changes to the conservatorship law. Assemblyman Dave Jones (D., Sacramento) held hearings before the Assembly Judiciary Committee and introduced amendments on January 4, 2006, to a bill he had introduced in the first session of the 2005-6 Legislature.¹⁷ The amendments turned AB 1363 into an omnibus bill that included a substantial licensing section and an overhaul of many of the provisions in the Probate Code that related to areas of the law affected by the criticisms generated by the Los Angeles Times series. Senator Jack Scott (D., Pasadena) introduced SB 1116 on the same date as a placeholder, to be amended during the session to protect the ability of conservatees to stay in their personal residences. Senator Liz Figueroa (D., Fremont), also held hearings and subsequently introduced SB 1550, to provide for licensing and regulation of private professional fiduciaries on February 23, 2006. Senator Debra Bowen (D., Redondo Beach) who had earlier sponsored measures to tighten up accounting practices¹⁸ and regulation of professional fiduciaries¹⁹ introduced SB 1716 on February 24, 2006, which addressed the problem of ex parte communications with the court and proposed a number of changes in the functions of court investigators.

These four bills worked their way through the Legislature and underwent many amendments before their final passage. The components of the Omnibus Conservatorship and Guardianship Reform Act of 2006, as chaptered, are: Sen. Bill No. 1116 (Scott), (Stats. 2006, ch. 490) which focuses narrowly on protecting the rights of conservatees to stay in their homes and establishes presumptions in the law to define what the least restrictive residence of a conservatee should be; Sen. Bill No. 1550 (Figueroa), (Stats. 2006, ch. 491) adding the Professional Fiduciaries Act to the Business and Professions Cod; Sen. Bill No. 1716 (Bowen), (Stats. 2006, ch. 492) which makes a modest but critical addition to the Probate Code with a new section that explicitly permits ex parte communications to the court regarding actions by fiduciaries or matters involving conservatees; and Assem. Bill No. 1363 (Jones), (Stats. 2006, ch. 493) the last of the bills to be signed, which makes changes throughout the conservatorship law, revising the roles of court investigators, tightening up temporary conservatorship procedures, introducing more rigorous accounting requirements, imposing new court oversight practices, and mandating educational requirements for all court personnel that deal with conservatorships.

Each bill carried the proviso that it would not become operative unless the other three bills were enacted and became effective on January 1, 2007, presenting Governor Schwarzenegger with the predicament of vetoing the entire package, should he fail to sign any one of the bills.

The Trusts and Estates Section had a hand in each of the bills, either through discussions with sponsors and the legislative committees that worked on the legislation or in some cases through direct drafting in conjunction with authors of the bills. The Judicial Council's Advisory Committee on Probate and Mental Health also made major drafting contributions to Sen. Bill No. 1116. The major contributor to the Professional Fiduciaries Act was the Professional Fiduciary Association of California ("PFAC"). Sen Bill No. 1550 is arguably the most revolutionary part of the conservatorship bill package.

II. THE PROFESSIONAL FIDUCIARIES ACT: Registration of Private Professional Fiduciaries

A. Introduction

The most controversial of the bills signed by Governor Schwarzenegger is Sen Bill No. 1550, which creates the "Professional Fiduciaries Act." The "Professional Fiduciaries Act" was conceived on the belief that Professional Fiduciaries are nothing more than fiduciaries for profit, and are "part of a young, growing and largely unregulated trade in California."²⁰ Professional Fiduciaries are also perceived as a "new breed of entrepreneur" who turned a "family matter into a business" and ultimately failed to safeguard the very infirm that the system was designed to protect.²¹ While there are documented cases of financial abuse, as revealed by the Los Angeles Times articles, this conclusion is grossly overstated. Nonetheless, in response to the outcry from the series of articles, Sen. Bill 1550 was born.

The Act, which becomes effective on July 1, 2008, expands 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.²² Extending the definition of "Professional Fiduciary" as far as this Act does will likely sweep in potentially hundreds of individuals who clearly are not professional fiduciaries by either intent or any reasonable standard.

Additionally, the Act repeals Chapter 13 (commencing with Section 2850) of the Probate Code relating to Statewide Registry for private professional fiduciaries.²³ Section 2850, et seq. of the Probate Code was a regulatory process established to ensure that private professional conservators, guardians, and trustees met initial qualifications for education and experience, take continuing education courses and register through the individual counties as well as the Department of Justice consequent to the passage of Assem. Bill No. 1155 (Liu) of 2004.²⁴ This process which was only in existence since 2006, and not fully effective until 2007, was already an effective oversight system for professional fiduciaries. This Act unnecessarily creates a complicated statutory scheme where none was needed. This is further reflected by comments made by Governor Schwarzenegger at the time he signed the four bill package.

Out of the four conservatorship bills signed by Governor Schwarzenegger, Sen. Bill No. 1550 is the only one that included a “signing message”. It appears that but for the fact that each of these four conservatorship bills were to be signed as a single package, Governor Schwarzenegger would have vetoed the bill. In his signing message, Governor Schwarzenegger stated that “clean-up legislation will be necessary in the next legislation session” because the bill “establishes an unnecessary and complicated mechanism of transferring” responsibilities and jurisdiction over the regulation of professional fiduciaries “which is not justified and will leave consumers and the general public more confused by this regulatory scheme.”²⁵

Clearly, what the legislature has created with Sen. Bill No. 1550 in the wake of the Los Angeles Times articles, is a convoluted and overbroad statutory scheme where none was needed.

B. The Act’s Statutory Scheme

1. The Legislature’s Stated Reasons Why The Professional Fiduciaries Act Was Necessary

Like the other conservatorship bills, Sen. Bill No. 1550 was devised to protect California’s most vulnerable population from the financial abuse of unscrupulous professional fiduciaries that seek to do intentional harm.

In reaction to the Los Angeles Times articles, the Legislature stated that “professional fiduciaries are not adequately regulated at present. The lack of regulation can result in the neglect or the physical, emotional or financial abuse of the vulnerable clients that professional fiduciaries are supposed to serve. Unless there is a strengthened accountability, abuses of people who are unable to take care of themselves or their property by Professional Fiduciaries will increase.”²⁶ As a result of this concern for strengthened accountability, the Legislature created Sen. Bill No. 1550 to license and regulate Professional Fiduciaries because it believed it was necessary to protect the public health, safety and welfare of the most vulnerable population, California’s seniors.

2. Who Qualifies As A Professional Private Fiduciary Under Sen. Bill No. 1550?

The Bill defines “Professional Fiduciary” as:

- a. “A Person who acts as a conservator or guardian for two or more persons at the same time who are not related to the Professional Fiduciary or to each other by blood, adoption, marriage, or registered Domestic partnership”²⁷; or
- b. “A person who acts a Trustee, Agent under a Durable Power of Attorney for Health Care, or Agent under a Durable Power of Attorney for

Finances, for more than three people or more than three families, or a combination of people and families that totals more than three at the same time who are not related to the Professional Fiduciary by blood, adoption, marriage, or registered domestic partnership.”²⁸

A “Professional Fiduciary” does not include:

- a. a personal representative of an estate.²⁹
- b. “a trust company as defined in Section 83 of the Probate Code.”³⁰
- c. “an FDIC-insured institution or holding companies, subsidiaries or affiliates.”³¹
- d. “a person employed by a trust company” as defined by Section 83 of the Probate Code or an FDIC-insured institution who is acting in the course and scope of that employment.³²
- e. “Any public officer or public agency, including the public guardian, public conservator or agency in the State of California or of a county of California, when that public officer or agency is acting in the course and scope of official duties, or any regional center for persons with developmental disabilities as defined in Section 4620 of the Welfare and Institutions Code.”³³
- f. “any person whose sole activity as a professional fiduciary is as a broker-dealer, broker-dealer-agent, investment advisor representative regulated under Corporate Security Law of 1968.”³⁴

3. *Licensing Requirements*

Sen. Bill No. 1550 sets forth specific licensing requirements commencing on July 1, 2008, and any person who comes within the definition of “Professional Fiduciary” will be prohibited from holding himself or herself out to the public as such unless that person is licensed as a professional fiduciary as set forth under Business and Professions Code Section 6530, et seq.³⁵ A Professional Fiduciary will not be required to get a license if that person is a licensed California attorney or acting within the scope of practice of the certified public accountant or a person enrolled as an agent to practice before the Internal Revenue Service.³⁶

In order to qualify for a license as a Professional Fiduciary, a person must meet certain licensing requirements under Bus. & Prof. Code § 6530. Among those requirements is that the person must have at least one of the following:

- a. “A baccalaureate degree of arts or sciences from a college or university accredited by a nationally recognized accrediting body of colleges and universities or a higher level of education.”³⁷
- b. “An associate of arts or science degree from a college or university accredited by a nationally recognized accrediting body of colleges and universities, and at least five years of experience of substantive fiduciary responsibilities working for a professional fiduciary, public agency, or financial institution acting as a conservator, guardian, trustee, personal representative, or agent under a power of attorney.”³⁸
- c. “Experience of not less than three years, prior to July 1, 2008, with substantive fiduciary responsibilities working for a public agency or a financial institution acting as a conservator, guardian, trustee, personal representative, or agent under a durable power of attorney.”³⁹

A significant problem with this legislation is that there are many people who are selected to serve as trustees, or as agents under a power of attorney who might fit the statutory definition of a “professional fiduciary,” not knowing that they are subject to such a statutory scheme, or who may meet the statutory definition of “Professional Fiduciary” but may not be qualified under the strict licensing requirements of this Act. If either of these scenarios exist, there could be significant consequences to that individual. These consequences will be discussed in more detail below.

C. Problems with the Statutory Scheme

One of the key issues with Sen. Bill No. 1550 is the inclusion of trustees and agents under powers of attorney for health care and powers of attorney for finances in the definition of “Professional Fiduciary.” In many instances, conservators and guardians are selected by the court and a credentialing and licensing requirement can assist the court in the selection of the appropriate person to serve. Trustees and agents under durable powers of attorney, however, are ordinarily selected by the trustor or the principal. The trustor and principal should have the freedom to pick who they want to serve and that selection should not be based on who the legislature deems may be the “most qualified” to serve.

Additionally, not only does a trustor, and/or principal select his or her trustee and/or agent at the time he or she has full capacity, but in making that decision, individuals do so taking into consideration factors based on relationships and unique skill sets, broader than specific education and testing in a narrow field. Typically, testators and principals select family, friends and professionals who are their preferred choices to carry out the required duties, based upon the personal knowledge of and experience with the individuals they select.

These factors may take into account such things as personal, religious, work ethic, child rearing and charitable philosophies. Individuals selected may include active or non-active educators, physicians, lawyers and accountants, investment advisors and the like, but none of these skills sets necessarily essential to the job at hand. Advisors can always be hired. The most important characteristics are good judgment and common sense. The testator and/or principal is in the best position to make those choices, and his or her choice should be honored, absent a showing of undue influence or incapacity.

More and more frequently, estate plans are devised with multiple trustees or other agents with each agent being selected on the basis of his or her unique knowledge, philosophy and/or skill set. There has been no demonstrated need to regulate and restrict the pool of individuals who our clients must select from for these purposes and limiting the pool may severely restrict the available choices. To the client's detriment, this would often result in the selection of a lesser qualified person for the unique job at hand, taking in due consideration those factors the principal deems most important and goals he or she wishes to accomplish. As institutions continue to restrict the size of estates and trusts they are willing to administer, we should not simultaneously restrict the pool of available talent who may be willing to accept a principal's charge.

Due to the new statute's over breadth, a cautious practitioner should inquire as to the background of persons to be designated as trustees or under powers of attorney to ascertain any potential risk and should carefully advise clients of the potential consequences should a designated fiduciary be unable to act due to the strictures of the law.

D. Possible Sanctions For Non-Compliance

Under the Act, there are many grounds upon which a license can be suspended or revoked.⁴⁰ In these cases there are clearly sufficient protective measures to ensure that unscrupulous, unskilled or unqualified individuals are not serving as "Professional Fiduciaries." The problem with Sen. Bill No. 1550 does not lie with those individuals who hold themselves out as a licensed professional fiduciary who are in fact unscrupulous and/or unskilled. The problem lies with those who are serving at the request of a trusted friend who has no idea that he or she may now rise to the level of a "Professional Fiduciary" under the new statutory scheme. For these individuals, the unknown dangers are vast and potentially severe.

For example, an agent under a durable power of attorney may be named in several instruments (more than three) without knowing it, or may be acting under one, and suddenly be named in three more, without ever setting out to be a "professional." Would the designation in this example immediately become invalid? What about agents under powers of attorney that are not in court (as most of them would not be)? If an agent under a power of attorney is acting for more than three principals and is not in court, does he or she automatically get removed if something causes him to be in court? Is he or she subject to sanctions, or other civil or criminal penalties or fines for acting as an unlicensed agent? Are

the actions taken by the agent invalid because the agent was not licensed? These are just a few of the examples of the potential issues which exist.

Moreover, if the “Professional Fiduciary” does not have the sufficient accreditation, degree or experience, and if he has failed to become licensed as required under the Act, there are a myriad of consequences waiting the unwitting professional fiduciary. For example, if a fiduciary did not comport with the licensing requirement, the professional fiduciaries bureau in the Department of Consumer Affairs can sue that individual for violation of statute, and sanctions can include, among other things, possible criminal prosecution for violating the statute or regulation of the Professional Fiduciaries Act. The consequences could also result in a civil penalty or may in fact even lead to the fiduciary’s removal or court sanction for violation of the Act.

III. OVERSIGHT OF THE CONSERVATORSHIP SYSTEM

Prob. Code Sections Affected: 1456-1456 (all new)

Effective Dates: January 1, 2007 for Section 1457, January 1, 2008 for Sections 1456 and 1458

In addition to the comprehensive licensing scheme adopted under Sen. Bill 1550, numerous statutes affecting conservatorships and guardianships were added or amended by Assem. Bill No. 1363, Sen. Bill 1116 and Sen. Bill 1716. While Sen. Bill No. 1550 limited its scope to the licensing and definition of professional fiduciaries, the other parts of the Omnibus Guardianship and Conservatorship Act targeted different parts of the conservatorship law and can best be understood by looking at the particular areas of law they sought to change.

A. Educational Requirements for Court Officials

New Prob. Code Section 1456⁴¹ requires the Judicial Council, in conjunction with “interested parties,” including but not limited to the California Judges Association, the California Association of Superior Court Investigators, the California Public Defenders Association, the County Counsels' Association of California, the State Bar of California, the National Guardianship Association, and the Association of Professional Geriatric Care Managers, to promulgate a rule of court by January 1, 2008, that will establish qualifications and continuing education requirements, including course contents, for court staff attorneys, court investigators, probate examiners, attorneys appointed under Sections 1470 and 1471, and probate judges who hear Conservatorship matters. While this new section mandates that all court staff attorneys, court investigators, court appointed counsel, examiners, and judges themselves should have background and educational requirements, in fact all attorneys already have to complete MCLE requirements; judges must comply with Judicial Council educational mandates; and court investigators are probably the best trained corps of all, since they are drawn from the ranks, in most counties, of social workers who have substantial experience in dealing with problems of the elderly.

B. Education of Lay Persons

Section 1457⁴² requires the Judicial Council to develop a user-friendly educational program of no more than three hours in length for nonprofessional guardians and conservators, either before or after appointment, in video or internet format. As originally introduced, this section of the proposed legislation went substantially further, requiring the courts to assist lay persons in preparing conservatorship papers, and conceivably could have led to a situation where lay conservators would come before the court to seek approval of what the court itself had helped them prepare. This proposal was amended out of the bill. The section now provides at the statewide level what most major counties already provide: a video course on how to be a conservator. Few counties offer a three-hour training, however, and it will certainly be helpful to provide a more substantial background for nonprofessional guardians and conservators.

C. Evaluation of the System

Section 1458⁴³ mandates the Judicial Council to (1) measure court effectiveness in conservatorship cases by studying conservatorship practice in three selected counties through compiling statistics, analyzing compliance with statutory time frames, and (2) provide recommendations for statewide performance measures, best practices that serve to protect the rights of conservatees, and staffing needs. The Judicial Council is to report its findings to the legislature by January 1, 2008, and presumably there will be further legislative changes as a result of the Judicial Council's findings. As previously mentioned, the Chief Justice appointed a Probate and Conservatorship Task Force of the Judicial Council ("PCTF") shortly after publication of the Los Angeles Times articles. The PCTF report to the Judicial Council is scheduled for spring 2007 and likely will be instrumental in formulating the study and recommendations called for by Prob. Code Section 1458.

Of course, Prob. Code Section 1458 underscores a considerable flaw in the entire process surrounding these bills. Although the legislature has commissioned a major statistical study that would provide more substantial findings from which, in theory, proper legislation can be drawn, the rest of Assem. Bill No. 1363, and the accompanying bills, will be implemented now, notwithstanding what the study might show. It might have been more reasonable for the Legislature to focus more narrowly on a few specific problems with conservatorship practice and concurrently look for ways to increase funding for the courts.

IV. PROTECTION OF THE CONSERVATEE'S PERSONAL RESIDENCE

Prob. Code Sections Affected: 2253, 2352, 2352.5(new), 2540, 2543, 2590, 2591, 2591.5(new)

Effective dates: Prob. Code Section 2253, July 1, 2007, all other sections, January 1, 2007

One of the most sensitive areas raised in the Los Angeles Times articles and in testimony was protection of the conservatee's personal residence. Present Prob. Code Section 2352 establishes the standard that a conservatee's residence should be the least restrictive appropriate setting that is both available and necessary to meet the needs of the conservatee, on one hand, and is in the best interests of the conservatee, on the other. As there had been no change to this statute since prior to the recodification of the conservatorship law in 1990, it set what many practitioners and the courts thought was a clear standard. It was troubling, though, to read the accounts, both in the Los Angeles Times articles and in the testimony given before the legislature and the Judicial Council Task Force that so many conservatees had been moved out of their homes, or had their homes sold, under circumstances that did not seem to meet the requirements of the Code. Senator Jack Scott, working with substantial input from the Judicial Council's Probate and Mental Health Advisory Committee and, during the amendment phase of the legislation, with the Trusts and Estates Executive Committee, prepared legislation that establishes a presumption that the personal residence of a proposed conservatee is the least restrictive residence for him or her, provides notice requirements prior to removing a conservatee from his or her personal residence, and establishes more stringent requirements for the sale of a conservatee's residence.⁴⁴ Additional changes affecting a conservatee's residence impose new guidelines on moving a temporary conservatee from his or her residence and provide for a change of venue when a conservatee is moved to a county where a family member resides.

A. General

Prob. Code Section 2352⁴⁵ has been cleaned up to separate guardianship from conservatorship provisions. The notice provisions, presently in subdivision (c), have been amended to require notice to be sent to all persons entitled to notice of the filing of a petition to establish a conservatorship or guardianship. This change responds to complaints about moving conservatees without providing notice of the change of address to their family members. New subdivision (e), introduced at the request of the Trusts and Estates Section Executive Committee, now requires fifteen-day notice by mail to all persons entitled to notice at the inception of filing the guardianship or conservatorship, absent an emergency, *before* the residence of a ward or conservatee can be changed.

B. Presumption that Personal Residence is Least Restrictive

New Prob. Code Section 2352.5 (a)⁴⁶ states that “[i]t shall be presumed that the personal residence of the conservatee at the time of commencement of the proceeding is the least restrictive appropriate residence for the conservatee. In any hearing to determine if removal of the conservatee from his or her personal residence is appropriate, that presumption may be overcome by a preponderance of the evidence.”

This language underwent considerable revision. At one point, legislative staffers were pressing for a clear and convincing evidence standard, and the

wording of the statute made it appear that a hearing would be necessary prior to permitting any move of a conservatee from his or her personal residence. The statute now permits a move from the personal residence without a hearing, but if anyone objects, the matter would be subject to a hearing, and the conservator would have to show by a preponderance of evidence that the personal residence is not the least restrictive appropriate residence. When coupled with the new notice provisions of Prob. Code Section 2352, this section is likely to lead to more hearings in connection with moving a conservatee, but the section clearly provides an enhanced protection for conservatees.

The rest of the new section establishes the process to be followed by a conservator in making an evaluation of the level of care existing at the time the conservatorship is started. The conservator must consider what would be necessary to keep the conservatee in the personal residence, what will be done to return a conservatee to the personal residence if he or she is not living there, or what the problems are that would prevent the return of the conservatee to his or her personal residence.⁴⁷ The conservator is required to file a declaration under penalty of perjury regarding the placement issue within 60 days of appointment.⁴⁸ Additionally, “the conservator shall evaluate the conservatee's placement and level of care if there is a material change in circumstances affecting the conservatee's needs for placement and care.”⁴⁹ Subdivision (e) does exempt from the other provisions of the section developmentally disabled conservatees who are conserved by the Department of Developmental Services or regional centers.

C. Measures Affecting Sale of a Conservatee’s Present or Former Personal Residence

1. The Sale Process

Prob. Code Section 2540⁵⁰ has been tightened up by requiring the conservator to inform the court why other alternatives to the sale of a conservatee’s home, “including, but not limited to, in-home care services, are not available.” However, the amended statute does not establish a mandatory court investigation at the time a Prob. Code Section 2540 petition is filed. Further, the statute exempts sales from the Prob. Code Section 2540 protections when a conservator has been granted powers under Prob. Code Sections 2590 and 2591.

Prob. Code Section 2543⁵¹, which describes the manner of sale of conservatorship property, has been expanded to refer specifically to “the provisions of this code concerning sales by a personal representative as described in Articles 6 (commencing with Section 10300), 7 (commencing with Section 10350), 8 (commencing with Section 10360), and 9 (commencing with Section 10380) of Chapter 18 of Part 5 of Division 7.” The drafters believed that conservatorship practitioners had a bad track record for

following the correct sale procedures, independent of the abuses reported in the Los Angeles Times series. To address the issue of bargain sales and other questionable sales transactions, the statute now includes the requirements for reappraisal for sale and sale at a minimum price as an integral part of the conservatorship statute instead of relying upon the more general previous reference to “the provisions of this code concerning sales by personal representative.”

These amendments to Prob. Code Section 2543 do not change the substance of the law, merely restating the prior law in an effort to cause the prior (sufficient) law to be followed. New Prob. Code Section 2543(c), however, does venture into new territory, reflecting the opinions of the legislative analysts who worked on this bill that the real estate market was so volatile that a one year reappraisal statute was no longer a reasonable provision. The statute now requires a new appraisal for a conservatee’s personal residence if the existing one was carried out more than six months prior to the confirmation hearing. The court can waive the requirement if it is in the best interests of the conservatee to rely upon an earlier appraisal, so long as that appraisal was conducted not more than twelve months prior to the confirmation hearing.⁵²

2. *Conservator Powers Regarding Sales*

Prob. Code Sections 2590 and 2591, which deal with independent exercise of powers by a conservator of the estate, were amended to prevent end runs around the new restrictions in Prob. Code Sections 2540 and 2541 regarding sales of personal residences of conservatees. The change to Prob. Code Section 2590⁵³ was modest and subtle: the limiting phrase “and if consistent with Section 2591,” now modifies the clause in Prob. Code Section 2590 that defines the power of a conservator to act independently. Since the power would be in any case based on what was granted under Prob. Code Section 2591, this change is somewhat circular.

Changes to Prob. Code Section 2591⁵⁴ and the addition of new Prob. Code Section 2591.5⁵⁵ make the restrictions on sale of a personal residence much clearer. Prob. Code Section 2591, subdivision (d), distinguishes between sale of generic real property and sale of a conservatee’s personal residence, and subdivision (d)(2) locks the conservator both into the requirements of new Prob. Code Section 2591.5 and Prob. Code Sections 2352.5 and 2541 for sale of a conservatee’s personal residence.

Prob. Code Section 2591.5 requires conservators to “demonstrate to the court that the terms of sale, including the price for which the property is to be sold and the commissions to be paid from the estate, are in all respects in the best interests of the conservatee.” The disclosures required by this

requirement would presumably avoid some of the worst aspects of the bargain sales carried out to benefit conservators and their friends. The reappraisal and sale at minimum offer price provisions of Prob. Code Section 10309 must be applied, and a new six-month reappraisal requirement prior to date of the sale contract applies. The new statute does have a good cause exception for applying all the requirements of Prob. Code Section 2591.5 except the reappraisal. Further, the conservator is obliged to serve a copy of the final escrow statement within fifteen days of close of escrow on all persons entitled to notice of the petition for appointment for a conservator as well as on all persons who have requested special notice.

Some jurists have noted informally that the failure to extend the good cause exception to the reappraisal requirement may cause substantial losses to conservatorship estates where it is necessary to carry out disaster sales in order to recoup something for the estate where the alternative is to lose the entire property in foreclosure. This caveat aside, the new provisions—if applied by the courts—should provide substantial protections to conservatees and allow family members to stay informed about sales of conservatees’ residences. There remains one substantial loophole: the statutory changes did not modify the notice provisions of Prob. Code Section 2592. Notice of petitions under Prob. Code Sections 2590-91 is not required to be given to all persons who must be noticed at the inception of a conservatorship, and although the requirement to send a final escrow statement to all such persons is helpful, it does come after the fact of the sale.

D. Moving a Conservatee from the Personal Residence Under a Temporary Conservatorship

It is often critical, to protect a vulnerable senior, to get a temporary conservator appointed expeditiously and to move the senior from a place of neglect to a safe environment, even if the move involves taking a person from his or her personal residence. The dynamic tension between the current of the new law toward keeping a conservatee at home and the need for immediate relief of a problem of abuse, neglect, or self neglect comes to the surface most clearly in the temporary conservatorship area, which will be described in detail below.

Prob. Code Section 2253 is modified by amending subsection (b) to make a court investigation prior to moving a conservatee the default. Under the amended statute, the court investigator must interview the conservatee, make the determinations listed in the Code, and report to the court two days before the hearing requesting permission to move the conservatee, unless the court for good cause orders otherwise. The statute previously called for the court investigation only “if the court so directs.”⁵⁶ It would now be necessary for a petitioner who wants to relocate a temporary conservatee to argue to the court why the court investigator should not carry out an investigation. There may be situations of urgency where the court would find such good cause, but it is likely now that in most of these cases the court

investigator will have to see the conservatee before the move. The amended section requires the court investigator to visit the conservatee or proposed conservatee prior to the hearing and to report to the court at least two days before the hearing. It is not clear whether, if such a petition is filed *after* the court investigator has already made a visit for the temporary conservatorship, a second visit would be required, although this also should constitute “good cause.”

The changes to Prob. Code Section 2253 are not effective until July 1, 2007.

E. Change of residence and change of venue
Prob. Code Sections Affected: 2215
Effective Date: January 1, 2007

Present Prob. Code Sections 2210 through 2216 describe the process for transferring a conservatorship or guardianship proceeding to another county within the state. The existing statute requires the court to find that a change of venue is in the best interests of the conservatee before it can make the change. Assem. Bill No. 1363, amends the statute by adding new Section 2215(b)(2) to set a standard for determining the best interests of the conservatee.⁵⁷ This section would require that, upon a request to transfer the proceedings from the county in which the proceedings were initially brought to a county where the conservatee now resides and where a second degree relative also resides, such transfer be granted if it is in the best interests of the conservatee. The statute goes on to provide that, where a previous order approving a change of residence has been entered, that the requested change shall be presumed to be in the best interests of the conservatee absent a showing of *clear and convincing evidence* that the transfer will *harm* the conservatee.⁵⁸ There were many complaints brought to the attention of the legislature by family members of conservatees who struggled to have cases moved to their counties when they arranged for the move of a conservatee to their proximity. The new statute now creates a presumption that it is in the best interests of the conservatee to have venue changed if the conservatee has been moved to the county in which a person listed in Prob. Code Section 1821 lives.

It is not at all clear what would constitute harm to a conservatee under the new standard. Would the fact that the conservator lives in a different county and now has to spend additional travel time visiting the conservatee, or adjust to different court proceedings (perhaps even find different counsel!) thus incurring additional fees and expenses for the conservatorship constitute the necessary showing of harm? Unfortunately, there also seems to be no limit on when or where such a proceeding could be brought. The conservatee could have been living in the new county for a lengthy period of time and the relative or other petitioner could decide that the relative disagreed with the rulings being made in the conservatorship and could bring such a petition. Mere evidence that, on balance, the maintenance of the proceeding in the county it was originated was in the best interests of the conservatee would presumably not meet the standard for a showing of *harm* to the conservatee.

Whether this new provision results in significant increases in requests for transfers of proceedings remains to be seen.

V. ENHANCING THE SCOPE OF INVESTIGATIONS AND THE DUTIES OF COURT INVESTIGATORS

Prob. Code Sections Affected: 1826, 1850, 1850.5 (new), 1851, 2250.6 (new), 2253
Effective Dates: July 1, 2007 for all affected sections

Most experienced conservatorship practitioners in counties with vigorous and adequately staffed court investigations units find that the role performed by the court investigator in the conservatorship process is adequate, providing suitable protections, bringing to the court's attention objections of the conservatee, and assuring that where necessary the conservatee will be adequately represented. The horrific anecdotes recounted in the Los Angeles Times series highlighted the catastrophes that occurred when there were no periodic court investigations, and conservatees were ignored for years. The existing law is quite clear and, to many minds, completely satisfactory to provide oversight for conservatorships. The new legislation, and in particular Assem. Bill No. 1363, looks at the court investigation as a panacea that can correct and detect all problems, but only if the role of the court investigator is expanded. In fact, if the court investigators throughout the state were able to perform the duties already assigned to them by the law, the oversight failures so vividly described in the Los Angeles Times series likely would not have taken place.

A. Prior to appointment of a conservator

Prob. Code Section 1826, as amended by Assem. Bill No. 1363, Section 8, sets out the scope of duties for the court investigator. Because the section is so long, the major changes are given below in underscored text:

“(a) The court investigator also shall do all of the following:

(1) Interview the petitioner and the proposed conservator, if different from the petitioner.

(2) Interview the proposed conservatee's spouse or registered domestic partner and relatives within the first degree.

(3) To the greatest extent possible, interview the proposed conservatee's relatives within the second degree, as set forth in subdivision (b) of Section 1821, neighbors, and, if known, close friends, before the hearing.

“(1) Mail, at least five days before the hearing, a copy of the report referred to in subdivision (k) to all of the following: . . .

“(3) The proposed conservatee.

(4) The spouse, registered domestic partner, and relatives within the first degree of the proposed conservatee who are required to be named in the petition for appointment of the

conservator, unless the court determines that the mailing will result in harm to the conservatee.

“(q) Any investigation by the court investigator related to a temporary conservatorship also may be a part of the investigation for the general petition for conservatorship, but the court investigator shall make a second visit to the proposed conservatee and the report required by this section shall include the effect of the temporary conservatorship on the proposed conservatee. “

The changes in this section provide for more thorough questioning of the individuals involved in a proposed conservatee’s life including his or her relatives, neighbors, and close friends. Although there was no such mandate for wide ranging interviews and contacts in the prior statute, many court investigation units routinely carried out interviews with as many family members and persons close to the conservatee as the court investigator could locate. This change will raise the burden extensively on the court investigators, but should provide helpful data to the court about the need for a conservatorship and the existence of alternatives. Mailing the report to the conservatee, spouse, domestic partner, and first degree relatives has the positive effect of informing persons close to the conservatee of the court investigator’s findings, so the family members can, if they choose, object in a timely fashion. The negative effect of such wider disclosure is to reveal the frailties of the individual to his or her family and perhaps violate his or her privacy. New Prob.Code Section 1826(q) requires that there be a second investigation prior to the permanent hearing even though there was an investigation under new Prob. Code Section 2250.6, discussed below.

B. At the Review of the Conservatorship

Many courts consider that a conservatorship is always “open,” subject to review upon receipt of a complaint or inquiry, and if necessary the court investigator will initiate an informal investigation without any statutory authority. The gist of the amendments to Prob. Code Sections 1850 and 851 is to extend this common practice into the statute. Assem. Bill No. 1363 has two alternate versions of these sections, because when the bills were moving through the legislature, Sen. Bill No. 1716 also amended these sections. Since Assem. Bill No. 1363 was chaptered after Sen. Bill No. 1716, the versions of these Sections in Section 11.5 and 12.5 are the operative parts of the law now.⁵⁹

1. Delay in Effective Dates

All amendments involving enhanced duties of the court investigators are effective July 1, 2007.⁶⁰ This delay will give the court investigation units the opportunity to hire and train new investigators and new staff. Their functional workloads are nearly doubled by the amendments in these sections.

2. Six month Investigation Reviews

The most controversial provision in amended Prob. Code Section 1850 is its requirement for an investigation six months after the initial appointment of the conservator, in accordance with the provisions of subdivision (a) of Prob. Code Section 1851. The investigator is to

“report to the court regarding the appropriateness of the conservatorship and whether the conservator is acting in the best interests of the conservatee regarding the conservatee's placement, quality of care, including physical and mental treatment, and finances. The court may, in response to the investigator's report, take appropriate action including, but not limited to:

(A) Ordering a review of the conservatorship pursuant to subdivision (b).

(B) Ordering the conservator to submit an accounting pursuant to subdivision (a) of Section 2620.”

3. Annual Court Investigation Reviews

New subdivision (a) (2) sets the default review date “one year after the appointment of the conservator and annually thereafter,” but the court is given the discretion, after the first one-year review, to set the next review at two years “if the court determines that the conservator is acting in the best interest interests of the conservatee.”

Even if the court sets the following review at two years, “the court shall require the investigator to conduct an investigation pursuant to subdivision (a) of Section 1851 one year before the next review and file a status report in the conservatee's court file regarding whether the conservatorship still appears to be warranted and whether the conservator is acting in the best interests of the conservatee. If the investigator determines pursuant to this investigation that the conservatorship still appears to be warranted and that the conservator is acting in the best interests of the conservatee regarding the conservatee's placement, quality of care, including physical and mental treatment, and finances, no hearing or court action in response to the investigator's report is required.”

4. Court Reviews at Any Time

Prob. Code Section 1850(b) permits the court, on its own motion or upon request by any interested person, to

“take appropriate action including, but not limited to, ordering a review of the conservatorship, including at a noticed hearing, and ordering the conservator to present an accounting of the assets of the estate pursuant to Section 2620.

“(c) Notice of a hearing pursuant to subdivision (b) shall be provided to all persons listed in subdivision (b) of Section 1822.”

In a case that began with a temporary conservatorship, there will be a court investigation:

- (1) at the time of the temporary conservatorship;
- (2) at the time there is a change of residence of the temporary conservatee (good cause exception);
- (2) prior to the appointment of a permanent conservator;
- (3) six months after the appointment of a permanent conservator;
- (4) one year after the appointment of a permanent conservator;
- (5) one year thereafter, for the life of the conservatorship, either as a full review or an investigation and status report followed by a full review a year later;
- (6) and whenever the court believes it is appropriate to order an investigation.

Not only does this impose additional duties on the court, for which no funding has been earmarked, it will also increase the cost to the conservatee for the repeated investigations.

C. Reviews of Limited Conservatorships

New Prob. Code Section 1850.5 was added to differentiate limited conservatorships from general ones. While retaining the explicit power of the court to call for a review at any time, the new section keeps the prior statutory scheme of a review for limited conservatorships at the end of one year and biennially thereafter.

D. Duties of Court Investigator at Time of Review

Modifications to Prob. Code Section 1851⁶¹ enhance somewhat the description of what a court investigator is to do at the time of a review ordered pursuant to Prob. Code Section 1850. The investigator's visit to the conservatee is now to be without prior notice to the conservator, except as ordered by the court for necessity or to prevent harm to the conservatee. In determining whether the conservator is acting in the best interests of the conservatee, the evaluation is to include "an examination of the conservatee's placement, the quality of care, including physical and mental treatment, and the conservatee's finances."

As in the pre-appointment review, the court investigator, "[t]o the greatest extent possible, . . . shall interview individuals set forth in subdivision (a) of Section 1826, in order to determine if the conservator is acting in the best interests of the conservatee." And the court investigator's report is to be mailed to the conservatee's spouse or registered domestic partner, the conservatee's relatives in the first degree, and if there are no such relatives, to the next closest relative, unless the court determines that the mailing will result in harm to the conservatee.

Most court investigators review placement, treatment of the conservatee, quality of care, and the conservatee's finances as a routine part of a court investigation already. By including these specific requirements the Legislature is making it clear that these subjects of the investigation are mandatory. The enhanced interviewing requirements will of course take much longer, although some courts already provide for such interviewing practices in their routine court investigations and such standards appear to be best practices.

E. Court Investigator Duties in Temporary Conservatorships

The Probate Code treats temporary conservatorships and guardianships at Prob. Code Sections 2250 through 2258. The first of the Los Angeles Times articles described many people who found themselves conserved, after the fact, without adequate notice and without an opportunity to oppose appointment of a temporary conservator. In many counties, the wait for a hearing date for a general conservatorship is ten to twelve weeks and if it were not possible to use an expedited process, people would go without proper medical care or general support, and vulnerable seniors would lose assets to abusers. The reason why it takes so long to get into court for permanent appointments, in most counties, is that it is necessary to allow time for a thorough court investigation as described in Prob. Code Section 1826.

The legislative response to the perceived abuse, of course, was to order a court investigation as part of a temporary conservatorship. Prob. Code Section 2250.6⁶² essentially imports the requirements of Prob. Code Section 1826 into the temporary conservatorship statute, requiring a court investigation before a hearing for appointment of a temporary conservator, or, where it is not feasible to carry out the investigation prior to the hearing, as in the case of an ex parte appointment, to carry out the court investigation within two court days of the hearing. The duties of the court investigator in either case include interviewing the conservatee, the petitioner, the conservator, if different from the petitioner, and interviewing the spouse, domestic partner, relatives within two degrees, neighbors, and close friends. The advisement of the (proposed) temporary conservatee described in Prob. Code Section 2250.6(a)(2) and (b)(2) is taken nearly verbatim from Prob. Code Section 1826(b), including explanations of the citation, which may not yet have been served upon a proposed temporary conservatee, and the right to a jury trial, which does not exist in the case of a temporary conservatorship.

The court investigator is further mandated to make determinations regarding the proposed conservatee's ability and willingness to attend the hearing, desire to contest the establishment of a conservatorship, and objection to the appointment of the nominated conservator or preference for another conservator. The investigator then reports his or her findings to the court.

Where the investigation takes place after the appointment of a temporary conservator, the court investigator must inform the court within three court days of the interview if the temporary conservatee objects to the appointment of the temporary conservator or requests an attorney. And if the court investigator believes that the temporary conservatorship is inappropriate, the court investigator shall "immediately," which is defined as no more than two court days following the investigation, inform the court in writing.

The proposed changes involving the court investigator will have substantial positive effect upon the openness of the system. It remains to be seen whether the imposition of the new requirements will have the effect of reducing the number of filings for temporary conservatorship, which might be an entirely appropriate outcome, in light of the protest that

temporary conservatorships are unnecessarily filed and inappropriately created by the courts, or of simply causing more costly hearings and perhaps even delays that permit situations of abuse and neglect to go on unimpeded because of the lack of an effective and rapid judicial remedy.

F. Court Investigator Duties When There is a Change of Residence of the Temporary Conservatee

See discussion above of Prob. Code Section 2253.

VI. INCREASED SENSITIVITY TO CONSERVATEE RIGHTS AND WISHES

Prob. Code Sections Affected: 1830, 2113 (new), 2623, 2640, 2641

Effective Dates: January 1, 2007, except that notice under Prob. Code Section 1830, may not be effective before January 1, 2008

A. Notice of Conservatee's Rights

New Prob. Code Section 1830(c) provides:

“An information notice of the rights of conservatees shall be attached to the order. The conservator shall mail the order and the attached information notice to the conservatee and the conservatee's relatives, as set forth in subdivision (b) of Section 1821. By January 1, 2008, the Judicial Council shall develop the notice required by this subdivision.”

As the Judicial Council is directed to develop the notice requirements referred to in the section, it appears that the section does not take effect until January 1, 2008 although the section itself does not indicate a delayed effective date from the general date of January 1, 2007 for the legislation. If this section is deemed operative on January 1, 2007, it would fall to counsel to include in orders a listing of a conservatee's rights, presumably drawn from Prob. Code Section 1823.

B. Explicit Protection for the Wishes of the Conservatee

New Prob. Code Section 2113 provides: “A conservator shall accommodate the desires of the conservatee, except to the extent that doing so would violate the conservator's fiduciary duties to the conservatee or impose an unreasonable expense on the conservatorship estate.”

This new code section specifically sets forth a concept that was only implicit in the code prior to the enactment of the new bills— the need for the conservator to consult with and respect the desires of the conservatee. It has always been the case in conservatorships that, where the wishes of the conservatee were known or could be determined they would be respected if they were in line with the best interests of the

conservatee.⁶³ However, in the testimony before the legislature and in the articles leading to the legislation, many conservatees and interested members of the public complained of conservatees essentially being ignored regarding their wishes to stay at home, to visit with certain friends or relatives or to choose how to spend their money. This statute is an attempt to force conservators to consult with the conservatees. It is likely, however, that the result of this statute will be an increase in petitions for instructions where conservators, faced with a conservatee objecting to the conservator's decision, will seek instruction from the court.

C. New Restrictions on Charging Estates for Opposing Actions By or on Behalf of Conservatees, or Defending Conservator's Actions

This section should particularly be read in conjunction with amended Prob. C. Section 2623(b) which provides that a conservator cannot be compensated for fees and costs "incurred in unsuccessfully opposing a petition , or other request or action, made by or on behalf of a ward or conservatee unless the court determines that the opposition was made in good faith, based on the best interests of the ward or conservatee." Counsel representing a conservator is likely to advise that where there is controversy, the conservator is best protected by seeking court instruction. After all, it would be hard to argue that the conservator's action in seeking the instruction was not in good faith and, if instructed by the court, the conservator would then have protection for the fees and costs incurred in the particular action.

This same language is now incorporate in Prob. Code Sections 2623, 2640 and 2641 regarding the award of fees and compensation to the conservator. Several of the Los Angeles Times accounts involved struggles between conservatees and fiduciaries that ended up with the conservatee paying for all the attorney fees. This is an unpleasantness that is built into the system. The system has to allow for payments to guardians and conservators, and their counsel, from the estate, otherwise, few persons would be willing to undertake the task of serving as fiduciaries or as counsel for fiduciaries. It is up to the court to strike the balance as to when a fiduciary is defending him- or herself reasonably and when the charges are unrelated to the fiduciary's duties toward the ward or conservatee. The Probate Code presently allows reasonable fees for counsel and just and reasonable fees for the guardian or conservator.⁶⁴ When the conservator opposes an action by the conservatee, for removal or for objecting to an account, for example, the Court must determine whether it was reasonable for the conservator to do so. The Lefkowitz case⁶⁵, which arose from the Riverside county scandals of the early 1990s, best sets the standard for when it is proper for the court to award fees to a fiduciary or the fiduciary's attorney in an action brought against the fiduciary by the conservatee or someone acting on the conservatee's behalf. The Court put it simply: if the conservator believed the opposition to the conservatee's petition was in the best interests of the conservatee, and if the conservator's belief was objectively reasonable, it would be proper to compensate the fiduciary and counsel for their fees.⁶⁶ The present statutory scheme and existing case law permit the courts to determine what is reasonable, or just and

reasonable, where a conservator seeks compensation for defending against a petition brought by the conservatee. The Legislature did not agree and has essentially codified *Lefkowitz* by applying an objective standard.

VII. TEMPORARY CONSERVATORSHIPS

Prob. Code Sections Affected: 2250, 2250.2(new), 2250.4(new), 2250.6(new)

Effective Dates: July 1, 2007

A perceived failure of the current conservatorship system as detailed in the articles and the public hearings preceding this legislation was the imposition of temporary conservatorships with virtually no notice to conservatees and the continuation of those conservatorships with little or no opportunity for the conservatee subsequently to be heard.

A. New Notice Requirements

Amended Prob. Code Section 2250 attempts to regulate this by imposing strict new notice requirements on temporary conservatorships, providing for additional hearings where a permanent hearing is not conducted within 30 days of the appointment of a temporary conservatorship and allowing for what amounts to an ex parte petition for termination of a temporary conservatorship.

New Prob. Code Section 2250.2 extends these same provisions to LPS conservatorships.

B. Attendance at the Hearing

Probate Code Section 2250.4 is added to mandate appearance of the conservatee at the hearing on the temporary conservatorship with very limited exceptions for medical inability or where the conservatee is out of state. If the proposed conservatee has been visited by the court investigator and expresses an unwillingness to attend the hearing, and no opposition to the conservatorship or the proposed conservator, the conservatee need not appear.⁶⁷ If the conservatee is unwilling or unable to attend the hearing but does not meet any of the above criteria, the court may only conduct the hearing if it finds that a failure to conduct the hearing will result in substantial harm to the conservatee.⁶⁸

C. A Mandatory Role for Court Investigators

Additionally, the new court investigator requirements imposed with regard to permanent conservatorships are extended to temporary conservatorships through requirements that the court investigator visit the proposed conservatee prior to the imposition of a conservatorship or, where such a visit is not possible prior to the hearing, within two court days thereafter (See discussion at Section V, E, supra).

VIII. NEW REQUIREMENTS FOR BOND

Prob. Code Sections Affected: 2320, 2321

Effective Date: January 1, 2007, except for 2320(c)(4) effective January 1, 2008

A. Covering the Cost of A Surcharge Action

New Probate Code Section 2320(c)(4) provides for an additional component of bond, stating that “[o]n or after January 1, 2008, [bond must include] a reasonable amount for the cost of recovery to collect on the bond, including attorney’s fees and costs. The Judicial Council shall, on or before January 1, 2008, adopt a rule of court to implement this paragraph.”⁶⁹ The Legislature expressed significant concern about the fact that, where litigation against fiduciaries occurred, the conservatee’s estate frequently bore the burden of the cost, even where a bond existed. The legislation originally provided simply for a reasonable amount for the cost of recovery to collect on the bond, including attorney’s fees and costs. The Trusts and Estates Section opposed this change because there did not seem to be a reasonable way to calculate the “reasonable amount.” The Legislature responded by modifying the proposed change, adding the last sentence, which mandates the Judicial Council to come up with an objective statewide standard for increasing bond to cover the possible cost of a surcharge action. As of the printing of this article, the authors do not know what form such a rule will take. Presumably, the estimation would have to involved some sort of formula as it would be virtually impossible to determine at the outset of the conservatorship what costs and fees would be necessary to enforce the bond assuming that the conservator commits malfeasance and is surcharged. Bond is, of course, payable from the conservatee’s estate, so the extra annual charge caused by this amendment would be borne by the conservatee, not the fiduciary.

B. Tightening the Requirements for Bond Waivers

As the section currently stands, there is no provision for the waiver of this component of the bond and Prob. Code Section 2321, also amended, bars the court from waiving bond at all “without a good cause determination by the court which shall include a determination by the court that the conservatee will not suffer harm as a result of the waiver or reduction of the bond.”⁷⁰

IX. FIDUCIARY MANAGEMENT AND FEES

Prob. Code Sections Affected: 2401, 2410(new), 2623, 2640, 2641

Effective Date: January 1, 2007, except that uniform standards will be developed by January 1, 2008

A. New Management Standards

Probate Code Sections 2401 and 2410 together impose new regulations on fiduciary investments. Section 2401 now limit trust company investments in securities in which the trust company has any interest. The more significant change to the law is the addition of new Prob. Code Section 2410 to require that “[o]n or before January 1, 2008, the Judicial Council, in consultation with the California Judges Association, the California Association of Superior Court Investigators, the California State Association of Public Administrators, Public Guardians, and Public Conservators, the State Bar of California, the National Guardianship Association, and the Association of Professional Geriatric Care Managers, shall adopt a rule of court that shall require uniform standards of conduct for actions that conservators and guardians may take under this chapter on behalf of conservatees and wards to ensure that the estate of conservatees or wards are maintained and conserved as appropriate and to prevent risk of loss or harm to the conservatees or wards. This rule shall include at a minimum standards for determining the fees that may be charged to conservatees or wards and standards for asset management.”

While it is clear that the investment standards appropriate to trusts are not applicable in all circumstances to conservatorships, it seems equally clear that the Judicial Council will adopt rules which clarify the current standards regarding investments by conservators. For some time now, there have been concerns that the current Probate Code does not allow the conservator to make investments which seem quite ordinary. On the other hand, it would not necessarily be appropriate to impose upon a conservator, charged with maintaining the assets and providing for the conservatee, the standards imposed on a trustee. The proposed new rule also requires standards regarding fees charged by conservators. In the past, the determination of fees has largely been a matter of local court practice. It is not clear whether the rule to be developed will set a mechanism for determining the fee or whether it will merely impose rules as to the information to be provided to assist the court in establishing the fee.

As required by the statute, the Trusts & Estates Section will participate in developing the required rule.

B. Restrictions on Conservator Fees

1. Restrictions For Unsuccessfully Opposing the Conservatee

As mentioned above, a conservator’s fees may now be limited where the conservator unsuccessfully opposes the petition or other request for action by or on behalf of the conservatee without good faith and for the best interests of the conservatee.⁷¹

2. *Restrictions Where Petitioner is Unsuccessful But a Conservator is Appointed*

The provisions for recovery of fees by a petitioner and the attorney for a petitioner who do not succeed in having the petitioner appointed, even where a conservator is appointed, are revised to required that the court make a determination not only that such fees were reasonable but also that they incurred for the best interests of the conservatee.⁷² The specific concern expressed by the legislature in this regard was the tremendous potential cost to the conservatee of an extended battle over who should be appointed conservator. Presumably, under the revised code section, the actual cost of the petition initiating the conservatorship and the fees for such petition will be recoverable, but the fees and costs of litigation over who is appointed will not be reimbursable.

3. *Restrictions on Fees in the Case of Removal*

Where a petition for removal is filed and granted, Prob. C. Section 2653 now provides that the costs of the removal petition may be charged to the conservator as follows:

“(1) The court shall award the petitioner the costs of the petition and other expenses and costs of litigation, including attorney's fees, incurred under this article, unless the court determines that the guardian or conservator has acted in good faith, based on the best interests of the ward or conservatee.

(2) The guardian or conservator may not deduct from, or charge to, the estate his or her costs of litigation, and is personally liable for those costs and expenses.”

These provisions bring conservatorship litigation in line with the provision of the Probate Code regarding what trustees may or may not appropriately charge to trust estates. It remains to be seen whether this statute will substantially alter the payment of fees as the conservator would, in any event, have had to petition the court for the fees during the period of the litigation and the court would, presumably, have considered the fact that the conservator was removed for cause in determining whether fees were appropriate.

X. INVENTORIES AND ACCOUNTINGS

Prob. Code Sections Affected: 2610, 2620, 2620.2

Effective Dates: January 1, 2007 for 2610 and 2620.2, except the notice required in 2610 will not be prepared by Judicial Council before January 1, 2008; July 1, 2007 for 2620

A. Disclosure of the Inventory to the Conservatee and Family Members

To insure that the assets of a conservatee are being accurately inventoried, the Prob. Code Section 2610 now requires that the inventory required to be filed within 90 days of the appointment of a conservator, be served not only on the conservatee, but also on the conservatee's spouse or domestic partner and relatives within the first degree, unless no such relatives exist, in which case the notice shall be served on the next closest relative. Only where such notice would harm the conservatee can it be waived.⁷³ While the new provisions add to the protections for a conservatee by allowing those close to the conservatee to evaluate whether the conservator is doing his or her job appropriately, they also reduce the level of privacy available to a conservatee by circulating information concerning the conservatee's assets to a wider range of individuals.

The inventory is required to be accompanied by a notice as to how to object to the inventory. A form to effectuate the notice required is to be developed by the Judicial Council by January 1, 2008. As with the other forms to be developed by the Judicial Council, it is not clear that the required notice will not need to be given in the interim as the statute becomes effective on January 1, 2007.

B. New Forms for Accountings and New Documentary Requirements

The new legislation also requires the Judicial Council to develop forms for standard and simple accountings by January 1, 2008 and requires that, after that time, all accountings be submitted on the Judicial Council form.⁷⁴

Even prior to the new forms becoming effective, however, conservators and guardians will have to comply with rules regarding the supporting documents to be submitted.⁷⁵ If the conservator is a professional fiduciary, account statements for all periods will be required for all accountings.⁷⁶ New Prob. Code Sections 2620(c)(4) and (5) also require all conservators to submit the original closing escrow statements for sales of real property and bill statements (presumably invoices) from care facilities.

Prob. Code Section 2620 (e) now provides as well that “[t]he guardian or conservator shall make available for inspection and copying, upon reasonable notice, to any person designated by the court to verify the accuracy of the accounting, all books and records, including receipts for any expenditures, of the guardianship or conservatorship.” Such inspection is separate and apart from any discovery which might be sought by an objecting beneficiary and is available to the court even in a case where no one has filed an objection.

Although it seems clear that the Court has always had the power to review an account in any manner it saw fit, new Section 2620(d) makes each accounting subject to “random or discretionary, full or partial review by the court,” which means the

court can take whatever steps it wants to require additional documentation from a guardian or conservator.

As detailed above, the court investigators and probate examiners will be trained to review accountings in greater detail and these additional tools will presumably work to allow closer scrutiny of conservatorship accountings. The new provisions of Probate Code Section 2620 are effective on July 1, 2007.

C. Enhanced Sanctions for Late Accountings

Finally, Prob. Code Section 2620.2 is amended to provide stricter time lines and penalties for failure to provide an accounting as required under Prob. Code Section 2620.⁷⁷ Where the conservator fails to file such an accounting, the court may order it filed and set for hearing within 30 days of the date of the court's order. The conservator may, on a showing of cause, extend that deadline for 30 days.⁷⁸ However, if the accounting is then not filed, the court may remove the conservator, suspend the conservator and appoint a temporary conservator to compile the accounting with the expenses of the temporary conservator surcharged to the conservator's bond, or appoint an attorney pursuant to Probate Code Section 1470 to represent the conservatee with the costs of that appointment again charged to the conservator's bond.⁷⁹

The Legislature does not seem to have considered the effectiveness of the present statutory plan. The problem, as court attorneys and practitioners know, is not the fiduciaries who are a month or two late in assembling their accountings, it is the fiduciaries who cannot produce accountings at all or who have embezzled assets.

The amendments to Section 2620.2, which do take effect on January 1, 2007, cut the time provided to produce the accounting from 60 to 30 days after issuance of notice to the fiduciary and counsel for the fiduciary. The court is permitted to extend this time, "upon cause shown," by an additional 30 days, which for nonlicensed fiduciaries can be extended by 30 additional days.⁸⁰

What the courts, counsel, and fiduciaries are left to work with is an overly rigid scheme that will not offer any more substantial protection to estates but may penalize both professionals and family members alike for having difficulty coping with the complexity of fiduciary accountings. Consider, for instance, the case where a fiduciary is stricken with a health condition that makes it impossible to comply with the newly reduced time deadlines. The court is required to impose a sanction, such as appointment of a temporary conservator, to complete the accounting. The new statute takes away from the court its ability to consider the mitigating circumstances of the distressed fiduciary and instead imposes on him or her all the fees awarded to the replacement fiduciary and counsel.⁸¹

XI. EX PARTE COMMUNICATIONS WITH THE COURT

Prob. Code Sections Affected: 1051

Effective Dates: January 1, 2008

One of the recurring themes of the Los Angeles Times series is the difficulty conservatees and their family members have in being heard by the court. Senator Bowen's bill, SB 1716, addresses that matter directly by permitting ex parte communications regarding conservators and conservatees. New Probate Code Section 1051(b) permits the court to refer to the court investigator or take other appropriate action in response to an ex parte communication regarding either a fiduciary, about the fiduciary's performance of his or her duties and responsibilities, or a person who is subject to a Conservatorship or guardianship. The court is required to disclose the ex parte communication to all parties and counsel, and may for good cause dispense with such disclosure if necessary to protect a ward or conservatee from harm.

Many courts routinely referred complaints to the court investigator, but some simply returned the communications to the sender, with a notation that ex parte communications would be ignored by the court. This statute emphasizes the legislature's desire to provide a means for conservatees, their family, and friends to contact the court with complaints about the condition of a conservatee or how conservators are conducting their business.

The Judicial Council is directed to develop a rule to implement this section prior to January 1, 2008.

XII. NEW MANDATES AND EDUCATIONAL REQUIREMENTS FOR THE PUBLIC GUARDIAN

Prob. Code Sections affected: 2920, 2923 (new)

Effective Dates: January 1, 2007 (Section 2920); January 1, 2008 (Section 2923)

The fourth Los Angeles Times article,⁸² was a scathing assault on the Los Angeles County Office of Public Guardian. The Legislative response was to amend Prob. Code Section 2920, which heretofore established the mechanism for permissive filing by the Office of Public Guardian either when it appeared necessary to file to protect an individual or when the court ordered such a filing. Assem. Bill No. 1363, Section 32, amends that section to make a filing for Conservatorship by the public guardian mandatory "if there is an imminent threat to the person's health or safety or the person's estate"⁸³. Further, should the guardian not file on its own, the court is now mandated to order the public guardian to file for appointment where there is no one else qualified and willing to act, if an appointment of guardian or conservator appears to be in the best interests of that person,⁸⁴ and the public guardian is mandated to begin an investigation within two business days of receiving a referral under new subdivision(c) of Prob. Code Section 2920.

New Prob. Code § 2923⁸⁵ requires the public guardian, and presumably the deputies working in the office of the public guardian, to comply with continuing education requirements established by the California State Association of Public Administrators, Public Guardians, and Public Conservators.

XIII. MISCELLANEOUS ISSUES

Prob. Code Sections Affected: 1822, 2701

Effective Dates: January 1, 2007

A. Unnecessary Statutory Language

The new version of Prob. Code Section 1822, now contains paragraph (f) which refers to development of a form for notice by the Judicial Council. As initially drafted, AB 1363 required the court to provide free assistance to parties and relatives involved in the conservatorship process. Although this mandate was removed from the statute during the course of its passage, paragraph (f) which requires the Judicial Council to draft a form to effectuate the notice appears to have inadvertently been left in the legislation. As detailed in this article, it is more than likely that clean up legislation will be proposed and this section would presumably be deleted in any such legislation.

B. Revisions to Requests for Special Notice

Probate Code Section 2701 has also been modified to make it clear when requests for special notice may be made and withdrawn, or, if withdrawn, reinstated. This changes the current law providing that requests for special notice expire at the end of three years.

XIV. CONCLUSION

Seniors are a vulnerable and disadvantaged class of citizens that are in need of protection. For the past decade, California has led the nation in its efforts to protect the elderly and disabled. The conservatorship system is far from perfect, and in those counties that have not been able to enforce the existing law, there have clearly been serious problems. However, the conservatorship system is not “despicable” or “corrupt.” Unfortunately, notwithstanding the California Legislature’s best intended efforts to protect the state’s senior citizens, the Omnibus Conservatorship and Guardianship Reform Act of 2006 is an overbroad and in many instances unnecessary statutory scheme. The passage of time will be the ultimate judge as to whether the intended consequences of the four bills will achieve their intended result.

Endnotes

¹ Although the effective date of all bills is January 1, 2007, many of the provisions, most notably those affecting licensing of professional fiduciaries and those expanding the duties of court investigators, do not take effect until July 1, 2007, January 1, 2008, or July 1, 2008.

² Stats. 1995, ch. 842, Prob. Code §§ 810-814

³ Stats. 1996, ch. 910, effective 1/1/98

⁴ Prob.Code § 2356.5

⁵ Stats. 1990, ch. 79, § 14, effective 7/1/91, Prob Code §§ 2340-43

⁶ Stats. 1999, ch. 409, Prob Code §§ 2850-54.

⁷ Assem. Bill No. 1155 (Liu), (2003-2004 Reg. Sess.), Stats. 2004, ch. 625

⁸ California Rules of Court, Rules 7.1010 and 7.1060)

⁹ Stats. 2000, ch. 565(amending California Prob. Code § 2620)

¹⁰ Stats. 2001, ch. 359 (amending and completely rewriting California Prob. Code § 2620.2)

¹¹ Stats. 2001, ch. 563,(adding Prob. Code §§ 2890-2893)

¹² Stats. 1990, ch. 79, §14

¹³ *Guardians for Profit*, Los Angeles Times, (November 13-11, 2005)

¹⁴ Prob. Code § 2320

¹⁵ Prob. Code §§ 2540-41; 2543; 2590-91, 10300 et seq.

¹⁶ Prob. Code §§ 2250 et seq.

¹⁷ Assem. Bill No. 1363 (Stats. 2006, ch. 493)

¹⁸ Stats. 2001, ch. 359, §4

¹⁹ Stats. 2004, ch. 548, §3

²⁰ *When a Family Matter Turns Into A Business*, Los Angeles Times, November 13, 2005.

²¹ *Id.*

²² Sen. Bill No. 1550, Stats. 2006, ch. 491, Bus. & Prof. Code §6500 (b)(f).

²³ Probate Code §§2850 through 2855

²⁴ Assem. Bill No. 1155 amended Prob. Code §2342.5 [Alternative annual statements for authorized conservators of certain tax-exempt entities; filing a petition for appointment] and §2850 [Maintenance; use and disclosure; conservator, guardian, and trustee requirements] and added Prob. Code §2344 [Education and experience requirements; statewide register pre-conditions; exemption].

²⁵ Governor Arnold Schwarzenegger signing message to Members of the California State Senate on Sen. Bill No. 1550, (September, 2006)

²⁶ Sen. Bill No. 1550, Stats. 2006, ch. 491, § 2, Subsection (d).

²⁷ Bus. & Prof. Code §6500(f)

²⁸ *Id.*

²⁹ Personal Representative was included in the early versions of the Bill, but was removed by Amendment dated August 24, 2006.

³⁰ Sen. Bill No. 1550, (Stats. 2006, ch. 491, Chapter 6, Article 1, (f)(1)

³¹ *Id.* at (f)(2)

³² *Id.* at (f)(3)

³³ *Id.* at (f)(4)

³⁴ *Id.* at (f)(5)

³⁵ *Id.* at Article 3, §6530(a)

³⁶ *Id.* at 6530(b)(c)

³⁷ *Id.* at 6533(g)(1)

³⁸ *Id.* at 6533(g)(2)

³⁹ *Id.* at 6533 (g)(3)

⁴⁰ *Id.* at Article 5, §6580 et. seq.

41Assem. Bill No. 1363, Stats. 2006, ch. 493, §3
42*Id.* at §4
43*Id.* at §5
44Sen. Bill No. 1116, Stats. 2006, ch. 490
45*Id.* at §1
46*Id.* at §2
47Prob. Code § 2352.5(b)
48Prob. Code § 2352.5(c)
49Prob. Code § 2352.5(d)
50Sen. Bill No. 1116, Stats. 2006, ch. 490, § 3
51*Id.* at §4
52 There was discussion at the legislative level as to whether using the hearing date as the benchmark was appropriate given the potential delays between a sale and an actual hearing, but it was determined that the hearing date provided a fixed and easily determinable reference.
53Assem. Bill No. 1363, Stats. 2006, ch. 493, §5
54*Id.* at §6
55*Id.* at §7
56 former Prob. Code § 2253(b)
57Assem. Bill No. 1363, Stats. 2006, ch. 493, §14,
58The Trusts and Estates Section opposed the creation of a clear and convincing evidence standard to rebut the presumption, arguing that the new section might result in relocating conservatees to remote counties where possible abusers would not be subject to the same scrutiny they were under in the county of origin.
59See Assem. Bill No. 1363, Stats. 2006, ch. 493, §§ 34-35
60*Id.* at §34
61*Id.* at § 12.5,
62*Id.* at § 17
63See, e.g. Prob. Code §§ 2355 and 2850
64Prob. Code §§ 2623, 2640, 2640.1 (where the statute applies “just and reasonable” both to the fiduciary and to the attorney), Prob. Code §2640.1(c), 2641, and 2642).
65*Conservatorship of Lefkowitz* (1996) 50 Cal. App. 4th 1310, 58 Cal. Rptr. 2d 299
66*Lefkowitz, supra* at 50 Cal. App. 4th 1315, 58 Cal. Rptr. 2d 301.
67Prob. Code §2250.4(c).
68Prob. Code §2250.4(d).
69Assem. Bill No. 1363, Stats. 2006, ch. 493, § 19
70Prob. Code §2321(a)
71See, Prob. C. §2623, 2640 and 2641
72Prob. Code §2640.1(a)
73Prob. Code §2610(a)
74Prob. Code §2620(a)
75Prob. Code §2620(c)(2)
76Prob. Code §2620(c)(3).
77Prob. Code §2620.2(c)
78Prob. Code §2620.2(a)
79Prob. Code §2620.2(c)
80Prob. Code §§ 2620.2(a), 2620.2(e)
81Prob. Code § 2620.2(c)(3)
82*For Most Vulnerable, A Promise Abandoned*, Los Angeles Times, November 16, 2005
83Prob. Code §2920(a)(1)
84Prob. Code §2920(b)
85Assem. Bill No. 1363, Stats. 2006, ch. 493, §33