Testimony of Naomi Karp

AARP Public Policy Institute

Judicial Council of California
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AARP appreciates the opportunity to testify on the important issue of the Probate Courts' role in conservatorship cases and specifically on temporary conservatorships. I am Naomi Karp, an attorney and Senior Policy Advisor at AARP's Public Policy Institute. Since my days as a legal services attorney representing older people and people with disabilities, I have focused on, and been acutely concerned about, the rights and interests of vulnerable incapacitated individuals from both a practice and a policy perspective. AARP's national office is working closely with our California state office to support active legislative and other advocacy efforts in this key arena.

AARP's written policies support strong legal protections against all forms of exploitation and abuse of incapacitated and vulnerable adults, as well as strong procedural and substantive safeguards to protect individual rights. In the conservatorship area, the key is to balance needed court intervention to address abuse and neglect, and due process protections to protect individual autonomy to the greatest degree possible. Thus, AARP's Policy Book urges states to safeguard individual rights through "a process for emergency proceedings that includes actual notice to the respondent, mandatory appointment of counsel, proof of respondent's emergency, appropriate limitations on emergency powers, and termination upon showing that the emergency no longer exists."

I will focus today's testimony on the excellent issues listed in the invitation to participate in this panel. But first I'd like to outline a paradigm for a well-constructed temporary conservatorship process based on due process

requirements and an examination of other states' statutes. The process should be two-tiered, depending on the urgency of the facts at hand. A **temporary** conservatorship should be instituted under urgent but not emergent circumstances, should include key due process elements such as advance notice and hearing, and should be of short duration. An **emergency** conservatorship should be ordered on an ex parte basis to avoid imminent and major harm – in a *very small fraction of cases* – with appropriate notice, and hearing to follow in short order. Wyoming's statute incorporates this system and terminology of distinguishing temporary and emergency guardianships. These processes may be viewed as analogous to equity actions for injunctive relief, in which a plaintiff may seek a temporary restraining order immediately, a preliminary injunction with a little more notice and hearing, and finally a permanent injunction.

Now to your questions.

Are current standards for establishment of temporary conservatorships appropriate? The California Probate Code currently fails to articulate a standard for appointment of a temporary conservator beyond the vague phrase "good cause for appointment." The Code should include the basic criteria for appointment, which should be:

- "Good cause" concretely defined, with the definition conveying the principles that the incapacitated person is at risk of serious, imminent or emergent harm, and that additional harm will result if the general conservatorship process and timeframe is followed. Other states, including New Jersey, Oregon, Oklahoma and Minnesota, have specific language, and we will provide you with citations in detailed written comments to follow.
- No one currently has authority to act on behalf of the proposed conservatee – or an existing fiduciary is unwilling, ineffective or abusive.
- The petition states a factual basis for the need for temporary conservatorship.
- The court finds facts that constitute the urgent or emergency need.

- The conservator is given only those powers necessary to respond to the emergency.

Should the courts be able to waive notice and, if so, under what circumstances? Almost all states appear to permit waiver of advance notice of the proceeding in some emergency circumstances. Texas is the only state I'm aware of with a statute requiring advance notice of the proceedings without exception. However, notice should not be waived except in the most extreme circumstances.

The California Probate Code currently requires 5 days notice to the proposed conservatee "unless the court for good cause otherwise orders." Again, "good cause" should be defined, and defined extremely narrowly. Possible justifications for waiving advance notice include the following:

- the proposed conservatee lives with a caregiver who is actively dissipating assets, and giving notice to the proposed conservatee serves as notice to the abuser who may take drastic action before the court can intervene
- a kidnapping
- a severe health problem requiring immediate treatment when the proposed conservatee can't or won't seek treatment
- other dire circumstances in which waiting even a couple of days may mean that serious irreparable harm will ensue.

One way to limit the number of emergency cases requiring waiver of notice before the court acts is to provide for a shorter notice period when an emergency is alleged. For example, Oregon and Minnesota require two days notice and Oklahoma requires 72 hours. Also, it is critically important that the temporary conservatee get notice *at some point*, shortly after the emergency appointment if not before, and an opportunity to contest the appointment. Wyoming and Minnesota, for example, require notice within 48 hours after an ex

parte order. This allows the temporary guardian to take immediate protective action and informs the conservatee as soon as it is safe to do so.

What role should court investigators play? This is a difficult question due to resource limitations. However, investigators play a key role in the conservatorship process when they inform the respondent of the impending case, and of the right to oppose the appointment, to attend the hearing, to be represented by legal counsel, and to have counsel appointed by the court if the respondent has no independent counsel. We recommend that this function be included in the temporary conservatorship process, either before the hearing or, in those unusual cases requiring an ex parte emergency appointment, within 48 hours after the appointment. Maine requires a similar procedure.

Alternatively, if counsel is appointed upon filing of the petition in every case, there may be diminished need for the investigator's immediate visit. Florida and Arizona, for example, mandate appointment of counsel in emergency guardianship proceedings, and we support this requirement.

Are the powers and duties granted to temporary conservators appropriate? Courts should limit the temporary conservator's powers to those essential for dealing with the urgent or emergent situation giving rise to the petition. Thus, the current code language is too broad. New Jersey, for example, limits the temporary guardian to providing "only for those services determined by the court to be necessary to deal with critical needs or risk of substantial harm to the alleged incapacitated person…" Other state statutes are similarly restrictive.

Probate courts should specify the temporary conservator's limited powers and duties in the letters of temporary conservatorship, as is required in many other states. A check-off form could facilitate this process.

We have other suggestions for creating an efficient temporary conservatorship process that safeguards rights, and we will forward them in writing. Also, we are in the midst of a 2-year study of guardianship monitoring in collaboration with the American Bar Association Commission on Law and Aging. Our report on a national survey about court monitoring practices will be released soon, and we will provide this Task Force with findings relevant to its work.

Thanks again for the opportunity to testify, and I will gladly answer questions today or in the future.

NAOMI KARP

Naomi Karp, J.D., is Senior Policy Advisor – Consumer Team at AARP's Public Policy Institute. For 10 years she was a legal services attorney representing low-income and elderly clients. Since 1988, she has worked at the intersection of law, aging and public policy. From 1988 – Feb., 2005, she was on the staff of the American Bar Association (ABA) Commission on Law and Aging. At the ABA, her areas of focus included guardianship, healthcare decision-making, elder abuse, dispute resolution, disability issues, and long-term care. Her activities included research, technical assistance to the public and private bar, legislative and administrative advocacy, training, and collaborative policy work with non-profits and government. She received support from foundations including the Robert Wood Johnson Foundation, Henry J. Kaiser Family Foundation, William and Flora Hewlett Foundation, the Commonwealth Fund, AARP Andrus Foundation as well as the Administration on Aging, Centers for Medicare and Medicaid Services and the State Justice Institute. Key research projects focused on: public guardianship; dementia and Medicare managed care; health care decision-making for "unbefriended" older persons; Medicaid estate recovery; resolving consumer disputes in managed care; and aging, disability and dispute resolution. She has written numerous reports, journal articles and other publications on these topics.

At AARP, Ms. Karp is responsible for research and developing policy positions regarding elder abuse, guardianship, probate and other legal rights issues. She has convened internal working groups on the Elder Justice Act and on guardianship and alternatives. With the ABA Commission on Law and Aging, she is conducting a study of adult guardianship monitoring. AARP's National Policy Council (NPC) has been charged by AARP's Board of Directors with investigating and reporting on the issue of "Decision-Making for Incapacitated Adults: Are Adequate Systems in Place?" Ms. Karp has taken the lead in educating the NPC on this topic, arranging site visits, and conducting other events exploring this charge.

Supplementary Testimony of AARP for the Probate Conservatorship Task Force, Judicial Council of California

By Naomi Karp, J.D.
AARP Public Policy Institute

AARP appreciates the opportunity to testify and to submit comments on the Probate Courts' role in conservatorship cases. As promised at the March 24, 2006 hearing in San Francisco, this document includes supplementary information primarily on two topics: (1) temporary conservatorship and (2) monitoring of conservatorships after appointment.

I. Temporary Conservatorship

In previously submitted written testimony and oral comments, AARP outlined a paradigm for a well-constructed temporary conservatorship process based on due process requirements and an examination of other states' statutes. This set of comments includes statutory language and citations to other states' laws that may provide good models for this Task Force in recommending changes to the Probate Code, court rules and court practices.

A. Standards for Establishment of Temporary Conservatorships

California needs a definition for "good cause for appointment" of a temporary conservator. Many states have articulated standards for temporary appointments,[1] including:

[1] Terminology varies from state to state, with many states using the term "guardian" rather than conservator. All of the referenced statutes refer to proceedings involving allegedly incapacitated adults, not minors.

- Texas. An application for appointment of a temporary guardian must state "the danger to the person or property alleged to be imminent." V.A.T.S. Probate Code, §875©(2).
- Wyoming. "If the court finds that compliance with the procedures specified in this chapter will likely result in substantial harm to the proposed ward's health, safety or welfare…the court…may appoint an emergency guardian." Wy. St. §3-2-106(d).
- Oregon. A temporary fiduciary may be appointed if "there is an immediate and serious danger to the life or health of the respondent" or to the "estate of the respondent" and "the welfare of the respondent requires immediate action." ORS §125.600.
- Indiana. If "an emergency exists" the court may appoint a temporary guardian. Ind. Code §29-3-3-4.
- Kentucky. The court may appoint a limited guardian or limited conservator if "it appears that there is danger of serious impairment to the health or safety of the respondent or damage or dissipation to his property if immediate action is not taken." KRS 387.740(1).
- Oklahoma. The court may appoint a special guardian when it appears there is "imminent danger that the health or safety of said person will be seriously impaired or that the financial resources of said person will be seriously damaged or dissipated unless immediate action is taken." 30 Okl. St. Ann. §3-115.

B. Waiver of Notice

California needs to articulate extremely narrow circumstances under which notice of the petition for temporary guardianship may be waived and appointment made prior to notice and/or hearing. Examples of other state provisions addressing this question include:

- Wyoming. "An emergency guardian may be appointed without notice to the proposed ward or the guardian ad litem only if the court finds by a

preponderance of the evidence from affidavit or testimony that the proposed ward will be substantially harmed before a hearing on the appointment can be held." Wy. St. §3-2-106(e).

- Minnesota. Essentially the same language as Wyoming. M.S.A. §524.5-311(b).
- Oregon. "The court may waive the requirement that notice be given before appointment if the court finds that the immediate and serious danger requires an immediate appointment." ORS §125.605(2).
- Indiana. "No such appointment shall be made except after notice and hearing unless it is alleged and found by the court that immediate and irreparable injury to the person or injury, loss or damage to the property….may result before the alleged incapacitated person…can be heard in response to the petition." Ind. Code 29-3-3-4(a)(4).
- Oklahoma. Appointment without notice is only permissible "upon a showing that an immediate or reasonably foreseeable serious physical harm to the subject...or serious impairment of the financial resources of said person will result from a delay, and upon presentation of a proposed emergency plan of care for the subject of the proceeding." 30 Ok. St. Ann. §3-115(D).

Some states reduce the number of cases in which there is a need for waiving notice by shortening the notice period. See, e.g. Oregon (two days notice, ORS §125.605(2)); Oklahoma (hearing within 72 hours, 30 Okl.St.Ann. §3-115(C)).

If the court appoints a temporary conservator without notice, notice must be given very soon after the appointment. See, for example, Wyoming (notice to proposed ward and guardian ad litem within 48 hours after appointment – Wy. St. §3-2-106(e)) and Minnesota (also 48 hours after appointment – M.S.A. §524.5-311(b)).

Courts also should hold hearings on the temporary conservatorship after an ex parte appointment. Minnesota requires a hearing on the appropriateness of the appointment within five days (M.S.A. §524.5-311(b); Wyoming requires such a hearing within 72 hours after the appointment (Wy. St. §3-2-106(e). At the very least, the court should hold an expeditious hearing if the temporary conservatee objects. Some states requiring expeditious hearings upon objection include:

- Oregon. "[T]he court shall hear the objections within two judicial days after the date on which the objections are filed." O.R.S. §125.600(5).
- Arizona. "If the court orders the appointment of a temporary guardian without notice, the ward may appear and move for its dissolution or modification on two days' notice to the petitioner and to the temporary guardian or on such shorter notice as the court prescribes. The court shall proceed to hear and determine that motion as expeditiously as possible."
- New Jersey. "If the court enters an order appointing a pendent elite temporary guardian without notice, the alleged incapacitated person may appear and move for its dissolution or modification on two days' notice to the plaintiff and to the temporary guardian or on such shorter notice as the court prescribes." AB 1922 enacted 2006.

C. Role of Investigators in Temporary Conservatorship

Investigators should definitely be involved in the temporary conservatorship process, visiting the alleged incapacitated person either before the hearing or, if the appointment is ex parte, within 48 hours after appointment. Maine mandates that a "visitor or guardian ad litem" be appointed after the court names a temporary guardian, who shall explain the meaning and consequences of the appointment – and advise of the right to contest the appointment, to seek limitation of the order, and to be represented by counsel. The visitor or GAL must make a report to the court within 10 days of the appointment. 18 M.R.S.A. §5-310-A(a-1).

AARP supports mandatory appointment of counsel in temporary conservatorship cases. Florida law states that the court "shall appoint counsel to represent the alleged incapacitated person during any such summary proceedings" (Fl. Stat. Ann. §744.3031(1). Arizona statute says, "Unless the proposed ward is represented by independent cousel, the court shall appoint an attorney to represent the proposed ward in the proceeding on receipt of the petition for temporary appointment" (A.R.S.§14-5310(C)).

D. Limited Powers and Duties

California law should clearly specify that a temporary conservator's power are limited to those essential to dealing with the urgent or emergent situation giving rise to the petition. Other states have more clearly made the nexus between the urgent need and the role of the temporary conservator. For example:

- Texas. Temporary guardians have "only those powers and duties that are necessary to protect the respondent against the imminent danger shown." V.A.T.S. Probate code §875(g).
- New Jersey. The pendent lite temporary guardian may provide "only for those services determined by the court to be necessary to deal with critical needs or risk of substantial harm to the alleged incapacitated person." NJ A1922 §12(c)(4).
- Indiana. The court may grant "only those powers that are necessary to prevent immediate and substantial injury or loss." Ind. Code §209-3-3-4.

Temporary conservatorships should be of short duration, and should not be permitted to drag on due to a backlog of petitions for permanent conservatorship or for any other reason. If an extension is sought, the court should hold a hearing to determine the necessity. Kansas has included this requirement in its statute (K.S.A. §59-3073(b)(3))

II. Monitoring of Conservatorships

Court monitoring of conservators is required to ensure the welfare of incapacitated persons, identify abuses, and sanction guardians who demonstrate malfeasance. The *LA Times* series is just the latest example of reports from around the country highlighting the potential for abuse and for system failures. In 2005 the AARP Public Policy Institute, in conjunction with the American Bar Association Commission on Law and Aging, conducted a survey to examine current court practices for guardian oversight. AARP released a comprehensive report on the survey results on July 6, 2006. The report has received significant media attention, including an article in the July 6 *LA Times*. AARP will make copies of the report available to the Judicial Council's Task force.

Here are some key findings and implications from the survey that may be useful to the Task Force. The comprehensive questionnaire focused on actual practices rather than statutory provisions. Close to 400 probate judges, court managers, guardians, elder law attorneys and legal representatives of people with disabilities from 43 states and the District of Columbia responded to the survey.

A. Findings

- <u>Reporting and Accounting Requirements.</u> About 74% of respondents said their court requires annual filing of personal status reports, and over 80% said they are required to file accountings annually. A third of respondents stated that their court consistently requires guardians to file plans for future care of the individual. Interestingly, these requirements are all more stringent than California's current reporting and planning requirements.
- <u>Court Assistance to Guardians.</u> The most commonly available resource for guardians is court-provided written instructions or manuals (43.2% of respondents). More than a third of respondents reported that training

sessions are sponsored by non-court entities for their jurisdiction, and over a fifth said that no guardian training resources are available. About 40% stated that no samples of appropriately prepared reports and accountings were available to them.

- Enforcing Reporting Requirements. Some 63.8% of respondents indicated that the court has an effective notification system in place to alert guardians of report due dates. The most commonly named court sanction for failure to file reports and accountings is sending the guardian a notice of delinquency (46.5%), followed by entering show cause orders (31.8% report routine use and 27.4% when appropriate); 15.5% said court staff informally contacts the guardian, and only 3.9% reported use of fines. When a guardian habitually files late, 48.6% reported that the court requires such a guardian to appear for a status hearing.
- Verification and Investigation. Over a third of respondents stated that no one is designated to verify the information in reports and accounts. No one visits the incapacitated individual in the jurisdictions of 40.3% of respondents. Only about 38% of respondents said that a possible problem in an accounting triggers an inquiry into an incapacitated person's well-being. Just over half of respondents said that the court responds to complaints about a guardian by appointing a guardian ad litem, special master or visitor to investigate.
- Sanctions. The most common sanction (67.2%) was removing the guardian and appointing a successor guardian.
- Funding. Over 43% of respondents stated that funding for monitoring is unavailable or clearly insufficient. Sources of funds named for monitoring included state legislative appropriations specifically for monitoring and filing fees, but almost a third of respondents said there is no specific funding for guardianship monitoring.
- Role of Attorneys. The role of the attorney for the incapacitated person in monitoring the person's well-being after a guardian is appointed varies greatly. According to a third of respondents, the court dismisses the attorney

after the appointment. Only 7.5% stated that the attorney stays actively involved throughout the case.

- Data Systems and Court Technology. Only 27.6% said the court has a computerized system to track the number of adult guardianship filings and dispositions, and only 8% stated that their court's computer system tracks and aggregates filing, dispositions and other elements as well. Over a third of respondents said their court uses technology to identify late filings.

B. Discussion and Conclusions

Some themes that emerged from the national survey are relevant to California, and include the following:

- Use of technology in monitoring is minimal; harnessing technology could effect a paradigm shift in monitoring practices.
- Guardian training has increased but remains a compelling need.
- Verification of guardian reports and accounts, as well as visits to individuals under guardianship, is frequently lacking – yet mechanisms serving as the "eyes and ears" of the court are critical.
- The role of volunteers in monitoring is minimal, yet offers potential.
- Court-community collaboration on monitoring is infrequent yet could enhance oversight.
- Funding remains minimal – and heightening the awareness of legislatures, county commissions and other funding sources on the urgent need for monitoring resources is an important step in securing the welfare of vulnerable individuals under guardianship.