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CALIFORNIA JUDGES ASSOCIATION
The Voice of the Judiciary

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March 22, 2006

Hon. Roger W. Boren
Chair, Probate Conservatorship Task Force
Judicial Council of California
455 Golden Gate Avenue
San Francisco, CA 94102

Re: March 24, 2006 Task Force Public Hearing
"Improving the Management & Oversight of Probate Conservatorship Cases in California Trial Courts"

Dear Justice Boren:

I am writing you on behalf of the California Judges Association (CJA) regarding how to improve the management and oversight of Probate Conservatorship cases in California trial courts. CJA welcomes this opportunity to address a subject of mutual concern and respectfully suggests you consider the following remarks.

Background

Judicial process to determine whether a person should be conserved and to supervise the exercise of granted power includes both a review of past acts, confirmations of sale, accounts and the like, and a prospective consideration of authority for certain future acts, removal of the conserved person from the state, sale of the personal residence, and dementia care, among others. Fundamental protections are provided to persons subject to the proceedings by notice, appointed counsel, trial and by an independent evaluation and investigation by the court.

Temporary Conservatorship

The obvious starting point for improvement is temporary conservatorship practice before the noticed hearing. Statute currently requires notice only to proposed conservatee which for good cause may be waived. The court is authorized to require further notice according to the circumstances of each case, but statute offers no guidance. Unlike the Rules of Court for general civil matters there are no rules for ex parte application in probate. Local practices have been cultivated which are widely disparate court to court. Guidelines and minimum standards for this dramatic intrusion into a protected person's life would help efficiency and assure better protection from abuse.

The Nature of Conservatorship Proceedings

Every party has a right to trial and a proposed conservatee has a right to jury trial. The discovery provisions found in the Code of Civil Procedure and Probate Code assure a truth finding process like that for actions at law. Unlike actions at law, however, conservatorship is an application to the court which requires the court find it sufficient for relief even absent objection. Similar to demurrer this evaluation examines sufficiency by the facts on its face together with propositions for which judicial notice is appropriate, e.g., Medi-Cal financial eligibility requirements. However, unlike demurrer each court must rely on its own expertise and common sense in determining whether further inquiry is required, e.g., are the grocery expenses consistent with the needs of an elderly person?

In addition, evaluation includes consideration of an independent investigation by court personnel, the probate investigator. This neutral fact discovery may be the most important tool employed by the court. Particularly for propositions which mingle fact and opinion, e.g., competence, adequate care, family access, etc, an investigation will be free of a party's self interest. Of course litigation can determine competing claims, but win or lose, that imposes a substantial cost on the subject's estate.

This supervision is not merely passive. Statutes require the court act on its own motion for the protection of the conserved party, notably for failing statutory deadlines, e.g., inventory and appraisals, and accounts.

Where further inquiry or action is required, statutes are not always clear. The provisions of the Code of Civil Procedure apply to probate to the extent that they are consistent with the Probate Code. Actions taken to further inquire may depend upon the expertise or imagination of a particular judge.

Resources may include:

Appointment of counsel,
Appointment of a temporary conservator,
Appointment of a guardian ad litem for a respondent to a petition to conserve,
Appointment of forensic experts, e.g., accountants, doctors and social workers, for reports to the court
Increasing the amount of bond required, or the blocking of funds
Suspension of letters, or of certain powers, and
Appointment of a referee, accountant, lawyer or other professional, pursuant to C.C.P. 638/639
Order an interim review, or accounting.

Improving Supervision

It follows that training of judges and court staff, clerks, examiners and investigators and retention of their expertise is necessary for execution of this statutory duty. Currently, however, judges have no probate court specific education and continuing education requirements. Our juvenile court rules are a paradigm for probate to emulate. Probate investigators have no court required, statewide standards and no court furnished, statewide training. Support staff training could include some accounting principles.

It is also apparent that tracking of milestone events, including ones without calendar dates, e.g., the filing of an Inventory and Appraisal, is necessary to complete the courts duty. New software is under development which can provide the necessary tracking. Funding this for

all courts would be of great assistance to supervision. It could be helpful to provide an express statute or rule permitting an inventory to be filed without an appraisal, for good cause.

Communication directly with the court, even to alert the court of grave danger to the conserved, is grounds for the court to withdraw rather than grounds to act. A Rule of Court for juvenile judges is a paradigm for probate and pending legislation to permit this contact is worthy of support.

As noted above there is some concern about whether certain resources are in fact applicable to probate. It would be useful to have express authority for appointment of forensic experts and for reference under CCP 638/639. Useful, also, would be statutes fleshing out of the process of person-only reviews. Currently, the court must review, but there is no requirement be done in open court which would permit interested persons to address the issues. Statute currently does not require conservators to cooperate in fact gathering for this review.

Counsel

Right to counsel in conservatorship has some fundamental issues in its application. There is no statutory guidance and little case law. This results in disparate application between courts in different counties and between judges in the same court.

A petition, or the investigation report, may present facts which show a lack of capacity to manage affairs or resist undue influence, yet counsel may appear as retained. Beyond the capacity issue, there question of who is actually controlling the subject's counsel. The nature of any inquiry must be circumspect, but the extent to which the court may inquire, and if necessary intervene is unclear. For example, may the court appoint a guardian ad litem when it has the effect of removing retained counsel?

Less troubling but more fiercely debated is the role of appointed counsel. Does the attorney represent the subject's wishes or best interest? In other proceedings counsel are to represent interests, the W&I Code establishes this for juveniles and case law requires this in competency proceedings arising from criminal prosecutions Settling this issue may not be easy but is necessary.

Unrepresented Litigants

There has been a shift in the nature of probate filings and a consequent increase in resource demands over the last twenty years which current data collection does not adequately reflect. The necessity of probate supervision of decedents' estates has declined with withdrawal of the supervision of testamentary trusts and small estates. Currently, this decline is accelerating because of the popularity of revocable trusts, so called "living wills", which avoid not only court, but also lawyers. The net effect is to create a higher concentration of complex and contested decedents' estates matters for those that are filed. An increase in demand on probate resources is found in conservatorships, too. While durable powers of attorney for medical care and "living wills" have reduced the necessity for conservatorship, those that are filed are much more likely to be the difficult cases.

The final element for this perfect storm buffeting probate is unrepresented litigants. The development of pro se conservatorship litigation by those who lack funds and those who seek to avoid lawyers has increased dramatically in the last few years. Counter clerks, examiners and judges all must spend a few extra minutes for each appearance, on each case fielding questions and explaining. There is a sense that HIPPA has played a part in driving the need for conservatorship where the estate is too small to fund representation.

In addition to the time spent explaining matters to parties who are pro se, a great deal of staff and judicial effort is required to enforce fiduciary obligations. Conservators are required to sign an acknowledgement of duties before letters may issue, but signing does not equal reading and understanding, something far less likely when the party is in propria persona. Failure to file inventory and appraisals, failures to respond to investigator requests for current conservatee circumstances, and failures to account are markedly higher for unrepresented litigants. These additional proceedings are most often done on courts own motion. A calendar appearance then is merely the tip of the iceberg for the demand on court resources.

Pro per clinics offer assistance not only to litigants but to the court. In addition many more receive direction from "paralegals" and "legal typing services." Replacing their role with court clinics seems a mighty budget challenge. Typing services provide a necessary service, but are not supposed to offer direction. It is naive to believe they don't give legal advice, particularly as there is no credible downside for doing it. Underground legal assistance is a breeding ground for elder abuse and fraud. Reduction of estates, ostensibly to achieve Medi-Cal eligibility and avoid repayment, are more likely found where quasi-lawyers practice. A license which could be lost would be incentive to train and maintain standards. More could be assisted with more effective use of funds by increasing development of plain English forms and computer assisted document preparation.

Who Will Bear the Cost of Reform?

Demands on court resources not only impact the state budget, they also impact the parties' pocket books, none more so than that of the protected person. Court costs, lawyers and other professionals' fees, with rare exception, are borne by the protected party's estate. Proposals which increase costs to the protected party must be measured against the benefit delivered.

Proposals which drive up costs also will have an unintended consequence to consider. Cost increases are an incentive to avoid conservatorship and place reliance on non-lawyer, non-court devices. These may be appropriate, even desirable, in given circumstances, but they are unsupervised. One of the most egregious cases of elder neglect and abuse seen in my court was perpetrated by a former legal secretary doing business as a fiduciary for hire as an attorney-in-fact.

There may be additional cost for a protected person for new and reformed remedies, a reduction in personal privacy. Who of us wants all our relatives to know all of our personal and financial information?

Conclusion

Conservatorships in general, and pro per filings in particular, are more intensive than other probate actions. The former have increased over the years while the latter, "easier" actions have decreased. Current data capture systems have failed to reflect the shift and the consequent demand on judicial resources. The first step to increased protection is increased budget resources and an incremental approach to legislative improvement.

Sincerely,

Hon. F. Clark Sueyres, San Joaquin Superior Court
Chair, CJA Probate & Mental Health Law Committee