

CALIFORNIA CONSERVATORSHIP DEFENSE

A GUIDE FOR ADVOCATES



CANHR

Long Term Care Justice and Advocacy

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Introduction

Before I began representing conservatees in San Diego in 2003, I thought a provident action would be to observe some conservatorship hearings and become familiar with the court and its procedures. I attended a few hearings and was immediately shocked by the poor quality of advocacy on behalf of the conservatees. First, the vast majority of the conservatees did not appear at their own hearings. Neither the judge nor the conservatees' attorneys acknowledged that the absence of the conservatee was a handicap to deciding whether a conservatorship was warranted. Second, conservatee attorneys openly told the judge, *on the record*, what their personal opinion was with respect to the issues at hand and often recommended that a conservatorship be granted without limitation. Not only were the attorneys failing to question the propriety of unnecessary conservator powers, they were actually failing to convey their clients' view at all. Six years of representing conservatees has done nothing but confirm my initial impressions that court-appointed attorneys for conservatees generally do not zealously advocate the positions of their clients.

The tepid advocacy I observed in conservatorship hearings was the product of many influences. Perhaps the most important influence was a local court rule *requiring* court-appointed attorneys for conservatees to give their personal opinion regarding the conservatorship. Another influence was the fact that most attorneys appointed to represent conservatees also represent conservators. These attorneys seemed more inclined to play a passive role in the conservatorship process when representing conservatees. Other influences were less difficult to perceive, but perhaps even more insidious. Representing conservatees, who have often had some recent expression of vulnerability, naturally draws out the protective instincts of their counselors. For that reason, attorneys are more likely to pursue paternalistic aims. Finally, the reimbursement system for attorneys who represent conservatees creates a Hobbesian choice where zealous opposition to the conservatorship will dramatically raise the costs of the proceeding, which are expected to be paid exclusively by the conservatee. Not only must conservatees pay to fight their own case, they must also pay the costs incurred by the other side.

The defense of conservatorships is also weakened by a paucity of coordinated information. The Continuing Education of the Bar's (CEB) two-volume manual on California conservatorship practice has well over 1,500 pages. Only one of those pages discusses the standard of proof required of conservatorship petitioners. Quite simply, the CEB manual is written for people who represent conservators and not conservatees. There is nearly no developed case law, law review articles, or other scholarly review dedicated to the issues of fighting conservatorships.

This manual is an effort to give conservatorship defense some legitimacy. It is designed to be a first step in what I hope to be an accelerated development of information about fighting for the independence and rights of conservatees. My hope is that this manual will have several revisions, as more and more attorneys undertake zealous conservatorship defense and new advocacy techniques and legal arguments are developed and implemented.

Tony Chicotel, CANHR Staff Attorney

The Ethical Conundrum – How to Represent a Conservatee¹

Before attorneys explore the legal standards and methods for fighting conservatorships, they must first resolve their approach to the ethical dilemma presented by representing persons with limited or no decision-making capacity. Simply stated, the representation of clients with cognitive impairments pits a lawyer's traditional role of zealously representing his client with his desire to secure an outcome most consistent with the client's objective "best interests."

DEFINING ZEALOUS ADVOCACY AND BEST INTERESTS

"**Zealous advocacy**" refers to the popular conception of a lawyer in the relentless pursuit of his client's wishes. Interestingly, zealous advocacy is not directly mandated by the Model Rules of Professional Conduct or the California Rules of Professional Conduct. Model Rule 1.3 does require lawyers act with reasonable diligence. The official comment to Rule 1.3 explains that:

"A lawyer should pursue a matter on behalf of a client despite opposition, obstruction or personal inconvenience to the lawyer, and take whatever lawful and ethical measures are required to vindicate a client's cause or endeavor. A lawyer must also act with commitment and dedication to the interests of the client and with zeal in advocacy upon the client's behalf."

Interestingly, the comment requires "zeal in advocacy." In contrast, California has no directive related to diligence or advocacy at all.

Arguments in favor of zealous advocacy include tradition, the structure of the justice system, and the fallibility of attorney judgments. Zealous advocacy has been the traditional role of attorneys for hundreds of years. They are hired by, and work at the discretion of, their clients. As a result, clients

1. For the sake of simplicity, the term "conservatee" is used in reference to both proposed conservatees awaiting adjudication of the conservatorship petition and actual conservatees who have been conserved.

have traditionally directed all critical case decisions, leaving only minor tactical issues to attorneys. In addition, the American system of justice is adversarial - truth is determined after each party has made its best arguments to a judge or jury. In such a system, an attorney's failure to make her client's best arguments deprives the judge or jury full information about the merits of the case and essentially renders the attorney the ultimate arbiter of the case. Vigorous attorney representation is vital to American conceptions of due process, particularly when essential personal liberties are at stake. When attorneys fail to advocate zealously for their client's wishes, they subvert the justice system by subjecting clients to their personal judgment about the ultimate issues, complete with biases and economic incentives, and without complete case information ferreted out through adversarial arguments.

"**Best interests**" refers to a more holistic role of attorneys, whereby they use their individual judgment to shape the course of their representation and the outcome of their client's case. Using a best interests approach, attorneys are expected to occasionally forego their client's express decisions or goals in lieu of what the attorney feels the client needs. Best interests is consistent with an attorney's desire to ultimately do what's best for the client. The approach is also arguably more efficient in certain cases as the client's and the court's resources are tailored to achievable outcomes. Efficiency is particularly salient in conservatorship cases because the conservatee pays for the expenses of both sides. Thus, unsuccessful legal arguments can be especially harmful.

GUIDANCE IN THE ZEALOUS ADVOCACY VS. BEST INTERESTS DEBATE IN CONSERVATORSHIP DEFENSE

The Probate Code

The Probate Code does not offer much guidance about the proper role of a conservatorship defense attorney. In situations where an attorney is appointed to represent a conservatee through the discretionary power of the court, the attorney's stated role is to be "helpful to the resolution of the matter" or "to protect the [conservatee's] interests." (§ 1470(a))²

2. Unless otherwise noted, all Code sections refer to the Probate Code.

Assisting the resolution of the case appears to give the attorney a role that is somewhat detached from zealous advocacy and instead focuses on a conciliatory role. The protection of a conservatee's interests, on the other hand, is consistent with the function of a determined advocate.

When the conservatee attorney's appointment is mandated by law, the attorney is to "represent the interest of [the conservatee]."³ (§ 1471) There is no mention of resolving the matter. Thus, mandatory appointments are perhaps more aligned with the role of a zealous advocate. However, neither Probate Code section explains how a conservatee's interests are determined. The conservatee's interests might be determined by the conservatee, the court, or the conservatee's attorney.

Aside from the brief mention of court-appointed attorneys in Sections 1470 and 1471, the remainder of the Probate Code is silent regarding the role of conservatee attorneys. However, a handful of other sections do partially frame the job that conservatee attorneys are meant to undertake. **Section 1003(a)** discusses the availability of guardians ad litem to "represent the interest" of a conservatee in a more generalized way than raw advocacy. Similarly, Section 1826 requires the appointment of a court investigator to review every conservatorship petition and make a recommendation to the court regarding the ultimate issues at hand. The obligatory role of court investigators and potential for guardians ad litem give the court ample input from relatively impartial participants focused on the "best" outcomes for conservatees. Asking the conservatees' attorneys to play a similar function is duplicitous and unnecessary; therefore, by statutory interpretation, attorneys *must* play a role different from that of the detached, objective maker of recommendations.

3. Instances when attorney appointments are required include when: a conservatee requests attorney representation (§ 1471(a)), dementia powers are requested by the conservator (§ 2356.5(f)(1)), a limited conservatorship is sought (§ 1471(c)), and court authorization for medical treatment is sought. (§ 2357(d))

Probate Code Sections 1823 and 1828 discuss the conservatee's right to oppose the conservatorship and right to counsel. By affirming both rights within the same sections, the right of counsel must be seen as one component of the overall ability of a conservatee to fight a conservatorship petition.

Finally, **Section 2356.5** requires the appointment of an attorney for the conservatee in any case in which dementia powers are sought. Clearly, the legislature perceived that attorneys play an integral role in cases in which very sensitive civil rights are involved. Requiring attorney representation as a matter of state law in cases in which extraordinary conservatorship powers are sought is an indication that the greater the powers sought, the more important the attorney's role. The one unique element that attorneys bring is advocacy. Recommendations to the court about the purported best interests of the conservatee are already available from guardians ad litem and court investigators. **Section 2356.5(b)** places the conservatee's right to an attorney in dementia power cases between a statement that the conservatee has the right to oppose the petition and to a jury trial if desired. Clearly, the legislature anticipated that attorneys in such matters would assist conservatees to fight the proposed conservatorship powers.

VERDICT: The Probate Code's guidance is MIXED.

Ethical Rules

The **California Rules of Professional Conduct** provide no direct guidance to attorneys who represent conservatees or any other persons who may suffer from mental disabilities and may not have the capacity to make socially acceptable decisions. The tension between zealous advocacy and pursuing the best interests for a client has been addressed, though, by a number of ethics opinions.

The statewide **California Standing Committee on Professional Responsibility (COPRAC)** issued an opinion (1989-112) that an attorney may not institute protective action (in this case, conservatorship proceedings) contrary to a client's wishes, even if

the attorney feels that such action is necessary to protect the client or is in the client's best interests. The Committee relied on California rules mandating attorneys to protect the confidentiality of their client's information and to avoid conflicts with clients. The absolute nature of the confidentiality and conflict avoidance rules preclude any attempt by attorneys to undermine the express wishes of their clients.

Most local bar associations that have considered the issue have agreed with the COPRAC decision. The **San Diego Bar Association** (Ethics Opinion 1978-1) and **Los Angeles Bar Association** (Ethics Opinion 1988-450) have both held that clients have the exclusive authority to direct the conduct of their own case. Confidentiality and zealous advocacy preclude the notion that an attorney should seek any outcome different from that which his client is seeking. Such an action would be adverse to the client. The **Orange County Bar Association** addressed the issue of attorneys for conservatees directly, concluding in Opinion 95-002 that conservatee attorneys may not reveal facts adverse to their clients when that client opposes the conservatorship.

The one local ethics opinion that has reached a different conclusion from those above was authored by the **San Francisco Bar Association** in Opinion 1999-2. Relying heavily on Model Rule 1.4 discussed below, the Association found that an attorney has the discretion to undertake unwanted protective action for a client to preserve the client's person or property. Such protective action could include the initiation of conservatorship if all other less intrusive options have been exhausted and the attorney does not represent the petitioner or proposed conservator. The opinion concluded that "the client's best interests are paramount, not the attorney's role."

The **American Bar Association's Model Rules** do speak directly to the representation of clients with "diminished capacity." Model Rule 1.14 states:

"When a client's capacity to make adequately considered decisions in connection with a representation is diminished, whether because

of minority, mental impairment or for some other reason, the lawyer shall, as far as reasonably possible, maintain a normal client-lawyer relationship with the client."

The Rule requires attorneys to advocate for their clients as they normally would, as far as reasonably possible. The Rule indicates that, even when confronted with a client with mental disabilities, the starting point of representation should be traditional zealous advocacy. Nonetheless, when a client with mental disabilities may suffer harm and cannot adequately protect himself, attorneys are authorized to forego zealous advocacy of their client's wishes, including the release of reasonably necessary confidential information:

"When the lawyer reasonably believes that the client has diminished capacity, is at risk of substantial physical, financial or other harm unless action is taken and cannot adequately act in the client's own interest, the lawyer may take reasonably necessary protective action, including consulting with individuals or entities that have the ability to take action to protect the client and, in appropriate cases, seeking the appointment of a guardian ad litem, conservator or guardian."

Protective action that is not authorized by or even counter to specific instructions of a client may be undertaken by the attorney. The protective action is not mandated. **California's Business & Professions Code Section 6068(e)** limits discretionary disclosures of client confidences to when the attorney reasonably believes that such a disclosure is necessary to prevent a criminal act that will result in death or substantial bodily harm.

Applicable ethical rules provide no direct guidance to attorneys who represent conservatees of questionable mental capacity. Most California authority is inconclusive and indirect, addressing only the notion of instituting protective action for clients. Neither the ethical rules nor opinions contemplate a situation like conservatorship where protective action has already been sought.

VERDICT: The Ethical Rules favor ZEALOUS ADVOCACY.

Local Court Rules

Some local courts have explicitly set forth the proper role of attorneys who have been appointed to represent proposed conservatees through their procedural rules. These courts predominantly ask court-appointed attorneys to assume a “best interests” standard of representation.

San Francisco’s local rule 14.90(R) states:

“Court appointed attorneys are expected to inform the Court of the wishes, desires, concerns, and objections, of the (proposed) conservatee. If asked by the Court, the attorney may give his or her opinion as to the best interests of the (proposed) conservatee and whether a conservatorship is necessary.”

The San Francisco rule gives two somewhat conflicting responsibilities to conservatee attorneys. First, they must relay their client’s wishes, indicating that the attorneys must play at least a cursory role of zealous advocate. The second responsibility, if sought by the court, is to provide an “opinion as to the best interests of the conservatee.” By distinguishing the two responsibilities, the San Francisco rule clearly envisions that attorneys’ opinions will be different from the wishes and desires of their clients. Thus, the rule gives the court’s tacit approval to attorneys who tell the court that they do not agree with the wishes of their clients. On the bright side for zealous advocates, the expression of the attorney’s opinions are discretionary – the attorney *may* give his or her opinion.

San Diego’s local court rule 4.18.12, meanwhile, states “counsel appointed by the court to represent conservatees must prepare and file a written report to the court . . . [s]aid report must *make a recommendation as to the issues at hand*.” Rule 4.18.12 clearly adopts the best interest standard for conservatee attorneys and makes no allowance for zealous advocacy. Not only is the “recommendation” mandatory for all attorneys, the rule does not even require an expression of the conservatee’s wishes.⁴

4. The use of the term “recommendation” indicates that the report will express the personal feelings and opinions of the conservatee’s attorney with little to no regard for what the conservatee’s feelings are regarding the matter. The author has seen many court-appointed attorney reports

Sacramento has perhaps the fullest exposition on the difficult interplay of zealous advocacy versus best interests representation. Sacramento’s local rule 15.103 separates conservatees into three categories. For conservatees who are noncommunicative, clearly delusional, or not opposed to conservatorship, the attorney must report “what would be in the client’s best interests.” For clients who are communicative, alert, and opposed to the conservatorship, the attorney “must use all reasonable and appropriate means to obtain the result being sought by the client” if the attorney believes sufficient grounds exist to support the client’s position. For conservatees who do not fall into either of the two categories above (client is opposed to the conservatorship, but appears to have impaired judgment), the attorney must undertake a balance similar to that required in San Francisco: reporting the client’s wishes while also recommending what would be in the client’s best interests. Unlike San Francisco’s rule, however, Sacramento’s best interests recommendation is mandatory.

While most local courts have rules about appointing attorneys for proposed conservatees, very few give any guidance to the attorneys about their role. Coupled with the lack of statewide rules, the few disparate local rules contribute to a wide variance in the quality of court-appointed attorney representation for conservatees throughout California. The few courts that have given such guidance have adopted a predominantly best interests approach with little regard for zealous advocacy unless the proposed conservatee is communicative and alert.

VERDICT: The Local Rules favor BEST INTERESTS.

Case Law

California is bereft of case law regarding the proper role of attorneys who represent conservatees during a conservatorship case. There are some cases, however, that clarify attorneys’ ethical obligations when their clients have possibly impaired mental capacity. **Sullivan v. Dunne, (1926) 198 Cal 183**, holds that attorney-client relationships cannot be

that have, in fact, completely overlooked the conservatee’s steadfast opposition and instead made recommendations that conservatorship be granted.

formed unless the client has capacity to contract. The court reasonably found that an attorney cannot rely on the instructions of an incompetent person, which supports the notion that conservatee attorneys may not be engaged in a traditional attorney-client relationship. However, the inability to contract had been a finding of the court, not an individual attorney, and the attorney at issue was allegedly hired by the client, not appointed by the court. The court's holding also failed to address the potentially significant due process issues at hand. By today's standards, attorney representation to oppose a conservatorship is undoubtedly a necessary constituent to basic due process.

In ***Drabick v. Superior Court* (1988) 200 Cal. App. 3rd 185**, the court held that, when a client is comatose and there is no evidence of his wishes, an attorney has no choice but to use his own judgment in determining the client's best interests. The court actually considered an attorney's role in representing persons with questionable capacity, but did not elucidate a conclusion. Rather, the court stated "when an incompetent conservatee is still able to communicate with his attorney, it is unclear whether the attorney must advocate the client's stated preferences – however unreasonable – or independently determine and advocate the client's best interests." (at 212)

Other relevant California cases to the attorney's role in representing clients with possible incapacity are ***Keyhea v. Rushen*, (1978) 178 Cal. App 3rd 526** and ***Flatt v. Superior Court*: (1994) 9 Cal. 4th 275**. In *Keyhea*, the court found that decision-making capacity, in the context of exercising or protecting individual rights, is solely a judicial determination. Attorneys are not suited to make a conclusive determination about anyone's capacity. In *Flatt*, the State Supreme Court held that an attorney's duty of confidentiality and to avoid conflicts of interest with clients is inviolate. A client's trust in counsel is one of the foundations of their relationship.

The most recent case that addresses the role of an attorney in representing a person with alleged incapacity actually comes from a conservatorship case. In ***In Re Conservatorship of David L*, (2008) 164 Cal. App. 4th 701**, an Appeals Court

considered whether a proposed LPS conservatee has a right to effective assistance of counsel similar to that found in criminal matters. The Court held the statutory right to counsel for conservatees includes an implicit duty of counsel to perform in an effective and professional manner. Conservatees have significant liberty interests at stake and due process requires strong and effective attorney advocacy. The *David L* case suggests that conservatee attorneys, by nature of their important role in protecting individual rights, must present a reasonably vigorous case in favor of those rights. Attorneys who advocate the best interests of their clients add little to due process; in fact, they may impair it.

VERDICT: Case law guidance is MIXED.

A Theory in Support of Zealous Advocacy

If all attorneys who represented conservatees agreed to zealously advocate for the express wishes of their clients, more conservatorship petitions would likely be opposed and subsequently more vigorously scrutinized.⁵ As a result, fewer conservatorships would likely be granted statewide. In such a scenario, mistakes made on the ultimate conservatorship decision would be false negatives, meaning conservatees that actually meet the legal criteria for conservatorship would not be conserved. False negatives require a breakdown of the conservatorship system at large, with the "mistaken" conservatorship determination being made by judges or juries.

If, on the other hand, all attorneys who represented conservatees decided to advocate for the best interests of the conservatee, as determined by those attorneys, more conservatorship petitions would likely be granted. In this scenario, any mistakes regarding the satisfaction of conservatorship criteria would be false positives, meaning the conservatee did not meet the legal criteria for conservatorship but was conserved anyway. False positives would

5. Robust conservatorship defenses might also discourage potential conservators from seeking conservatorships in the first place. Weakened conservatorship defense, as practiced in a best interests approach, would likely have an equally compelling opposite effect of encouraging more conservatorship petitions.

result, not from the breakdown of the conservatorship system, but merely because the conservatee did not have appropriate representation.

When an attorney makes the choice about the best interests of his client and subsequently advocates that position, he assumes the role of a judge. If an unmerited conservatorship is then granted, the conservatorship is the result of that attorney's failure to accurately assess the conservatee's capacity and contest the petition. The mistake is made by one attorney acting on his own beliefs. If, on the other hand, an attorney advocates for his client's express wishes, the judge is probably presented multiple interpretations of fact, after full discovery and hearing expert opinions and legal arguments. Any mistake in this scenario is made only after every party has had an opportunity to influence the case's outcome. Attorneys who assume the ability to discern a client's best interests circumvent the American system of due process, adversarial fact-finding, and presentation to a judge by imposing their own notion of justice, subject to very little scrutiny.

CONCLUSION TO THE ETHICAL DEBATE: ZEALOUS ADVOCACY OR BEST INTERESTS?

After reviewing all of the possible sources of authority and guidance, the proper role of attorneys representing conservatees remains confusing and unsettled. Multiple authorities support the notion that an attorney must serve the role of zealous advocate and fight conservatorships whenever directed to do so by clients, while other authorities indicate that the proper role of an attorney is to determine and pursue a client's best interests. The conflicting authorities are confusing; however, they do provide clear guidance in some conservatorship case situations.

Clients with clear capacity

For clients who clearly have capacity, the authorities largely direct their attorneys to zealously advocate on their behalf. While the Probate Code indicates that some conservatees' attorneys are supposed to "protect the interests" of conservatees and some local rules ask attorneys to "make recommendations as to the issues at hand," neither of these is consistent with the California Rules of Professional

Conduct or the Model Rules, which command an exclusive zealous advocacy standard for clients with unimpaired capacity. Obviously, persons with full capacity to make their own decisions should not be conserved. Thus, any efforts by an attorney to contribute to the conservation of such a person would not only be unethical and unprofessional, but unjust as well. For conservatees with capacity, attorneys should advocate zealously in all cases, even if the conservatee is making potentially unsound or unsafe decisions. If an attorney cannot provide zealous advocacy to a client with capacity, they should withdraw from representation.

Clients with no ability to communicate

Attorneys with clients who have no ability to communicate in any meaningful way have no alternative other than to approach their representation from a best interests perspective. Attorneys faced with such a situation should be sure to diligently look for evidence of their client's wishes prior to the event that created the inability to communicate. Barring the existence of such evidence, attorneys must examine the client's situation and advocate for the optimal outcome based on their own opinion of what is best.

Clients with questionable capacity

Legal authorities are unclear about an attorney's appropriate role when representing clients whose capacity is difficult to determine. However, even in this most ethically difficult scenario, attorneys who prefer a zealous advocate or best interests role have some common ground and obligations. At a minimum all conservatee attorneys should:

- 1) vigorously investigate the propriety of the proposed conservator;
- 2) ensure less restrictive alternatives to conservatorship are legitimately considered;
- 3) limit the conservator's proposed powers appropriately; and
- 4) state what the conservatee wants to the court.

For clients with questionable capacity who insist on fighting a conservatorship the attorney believes is provident or necessary, the proper course of representation may be to do what you feel is best until

there is better authority. Ample support exists for either side. However, if you do select a best interests approach, at a minimum you must disclose your preferences to your client and explain that he or she has the right to seek alternative counsel. These disclosures should be carefully documented to protect the attorney from any future malpractice actions that might result from advocating a position different from the client's. If you select a zealous advocacy approach, you need not blindly advocate for your client's stated wishes. Rather, you can use your powers of persuasion to convince the client to take prudent courses of action. If that fails and you cannot continue to advocate for your client, you can withdraw. A final possibility is to advocate for your client but insist that they attend all hearings so the judge will have the opportunity to observe the client firsthand.⁶

Fighting a Conservatorship

THE STANDARD OF PROOF

Fighting against a conservatorship is rarely mentioned in advocacy or legal academic materials. As mentioned in the Introduction, CEB's two-volume book about conservatorships contains more than 1,500 pages and only one page covers the issue of proving the case. For good reason, the ultimate approval of conservatorship petitions is generally assumed. CANHR recently conducted a statewide study on conservatorships and found that less than four percent of all conservatorship petitions are denied.

The criteria for being conserved in California is set forth in **Probate Code Section 1801(a)** which states that a conservatorship of the person may be established for any adult who is "*unable to provide properly* for his or her personal needs for physical health, food, clothing, or shelter." Obviously, the term "properly" is subject to varied interpretation and is often the key to the conservatorship determination. The Code provides little additional guidance, but the standard for conservatorship is clearly a functional

standard, focused on inability. Such inability must be demonstrated by clear and convincing evidence. (§ 1801(e)) The Code does not require the proposed conservatee have a mental or physical disability. Regardless of the reason, anyone who cannot meet their health, food, clothing, or shelter needs can be conserved. Homeless people, poor eaters, or people without health insurance could all conceivably fit the criteria.

For a conservatorship of the estate, the court must be convinced that the proposed conservatee:

"is substantially unable to manage his or her own financial resources or resist fraud of undue influence Substantial inability may not be proved solely by isolated incidents of negligence or improvidence." (§ 1801(b))

Unlike personal matters, conservation of the estate requires evidence of *substantial* inability to manage one's affairs. Additionally, there is an express prohibition of using one incident as conclusive evidence of such inability. The standard of proof for estate conservatorships is also clear and convincing evidence.

For both conservatorships of the person and estate, the quality of the proposed conservatee's decisions and behavior is the sole consideration of the courts. There is no statutory consideration of disability or the cognitive processes involved in the conservatee's decision-making. The California test for conservatorships is purely functional, opening the process to taking over the affairs of mere eccentrics: persons who have rationally considered their options but have nonetheless chosen a course of action that society deems not in their best interests.⁷

The Probate Code standards both discuss an inability to provide or manage personal needs and resources. Unlike LPS conservatorships, no mention is made of whether third party assistance may be considered in assessing a conservatee's

6. For further information about the proper role of attorneys for conservatees, see Gottlich, Vicki, "Zealous Advocacy for the Defendant in Adult Guardianship Cases," Clearinghouse Review (January 1996), pp.879-889.

7. The author believes that the California statute regarding conservatorships is unconstitutional because it does not require the conservatee to have a mental disability that prevents them from appreciating the risks of their choices and actions.

inabilities.⁸ The Probate Code mentions only a conservatee’s individual inabilities, but clearly third party assistance has to be part of a court’s assessment. Otherwise, any person with significant disabilities who has caregivers or who are living in a long term care facility would meet the criteria for conservatorship. Conservatorships are meant to protect persons who cannot manage their own person or estate. Individuals who receive third party assistance sufficient to meet their needs do not need additional protection and thus seem outside the scope of conservatorship as a state policy.

There are virtually no published cases that provide guidance about the Probate Code standard. Perhaps this is due to fact that conservatorships are rarely vigorously contested by the attorneys who represent conservatees. Nonetheless, the **Due Process in Competency Determination Act (§§ 810-813, “the Act”)** gives a rather detailed process for assessing a person’s mental capacity to make legal decisions. The factors listed in the Act may be helpful to conservatorship cases. The Act begins by stating that all persons are presumed to have capacity to make decisions, although that presumption is rebuttable. (§ 810) The Act states that a determination of incompetency requires a court to find that the person has a deficit in mental functioning and then lists multiple specific mental functions to consider. (§ 811) The Act then states that in order to be found competent, a person must have the ability to communicate decisions and to understand and appreciate:

“the rights, duties, and responsibilities created by, or affected by the decision; the probable consequences for the decision maker and, where appropriate, the persons affected by the decision; [and] the significant risks, benefits, and reasonable alternatives involved in the decision.” (§ 812)

The final section of the Act (§ 813) gives additional criteria for determining capacity to make medical decisions. The factors listed in the Act must be expressly considered in three conservatorship

8. Third party assistance must be explicitly considered in LPS conservatorships in Welfare and Institutions Code Section 5350(e)(1).

scenarios: court investigator reports (§ 1826(d)(2), when dementia powers are sought (§ 2356.5(b)), and when informed consent powers are sought. (§ 1881(b)(2))

According to Probate Code Section 811, a judicial finding of incompetency requires a deficit in at least one of the following mental functions:

- 1) alertness and attention;
- 2) information processing (including memory);
- 3) thought processes; and
- 4) ability to modulate mood and affect.

MEDICAL EVIDENCE OF INABILITY

Most petitions for conservatorship are accompanied by at least one doctor or psychologist’s capacity assessment. Such an assessment is only required by state law in limited situations but many jurisdictions’ local rules require them in many cases. The Judicial Council form GC 335 is used almost exclusively for completing the assessment.⁹ Since they are sought by potential conservators in an effort to enhance their chances of being awarded conservatorship, completed GC 335’s almost always conclude that the conservatee lacks capacity to manage his or her affairs. Such forms are very influential to conservatorship courts because they are authored by medical professionals and capacity is often considered to be predominantly a medical issue.

Despite the prevalence of unfavorable GC 335’s, they are a rich source for challenging proposed conservatorships. The forms suffer from several factors that may render them unreliable in any individual case:

- a. Bias: Medical professionals naturally want to please the people with whom they are most directly dealing. GC 335’s sought by

9. By its terms, the GC 335 is used by courts to determine whether the conservatee has: 1) the medical (in)ability to attend hearings, 2) the ability to give informed consent to medical treatment, and 3) dementia. Medical declarations are required by state law only in these three situations. (§§ 1825(b), 1890, and 2356.5(f)(3)) Local rules may require medical declarations in additional situations.

conservatees often reach far different conclusions than those sought by conservators. The disparity is often so striking that one wonders whether or not the medical professionals were assessing the same person.

b. Too quick and sloppy: Empirical evidence indicates that GC 335's are often completed in a hurry, haphazardly, and with little regard for careful assessment. CANHR's Study of California Conservatorships reveals that the vast majority of completed GC 335 forms have virtually no internal variance regarding the many functional capacities that are supposed to be considered. The lack of variance indicates that assessing doctors do not carefully consider each factor individually but rather use one overall impression to dominate their analysis.

c. Illegal revelation of confidential health information: Both Federal (HIPAA 42 USC § 1320d) and State law (CMIA Civil Code § 56) generally prohibit the disclosure of personal health information without the consent of the patient at issue. A completed GC 335 reveals such personal health information. If the disclosure of the health information was not authorized by an appropriate patient representative, the proposed conservator is left with choosing between two troublesome outcomes: 1) the disclosure was authorized by the patient-conservatee, indicating that the conservatee continues to have capacity to make health care decisions, negating the need for a conservatorship or 2) the disclosure was illegal, subjecting the GC 335 to exclusion from the court's record based on evidentiary objections or public policy that disfavors such disclosures.

d. Poor medicine: A thorough medical assessment of a conservatee's capacity should include, at a minimum:

- a physical examination;
- a determination of whether or not observed capacity impairments are actually symptoms of a treatable condition;
- consideration of treatment that may alleviate observed impairments and enhance decisional capacity (this would support the notion that conservatorship is unnecessary);

- a full assessment of the conservatee's functional abilities;
- an identification of the conservatee's current needs and supports;
- a review of lab reports to rule out possible reasons for observed impairments such as dehydration or infection;
- ruling out other possible reasons for impairments such as pain, stress, sleep deprivation, or depression.

e. Unreliability of Doctor Assessments in General: Even physicians experienced in assessing capacity demonstrate significant variation in their evaluation of individual patients that renders the physician's role in capacity judgments quite unreliable. (Marson, Daniel C. et. al., "Consistency of Physician Judgments of Capacity to Consent in Mild Alzheimer's Disease," *Journal of the American Geriatric Society*, Vol. 45 (April 1997), pp. 453-457) A study was conducted where five physicians with extensive clinical experience in assessing dementia and capacity were asked to render capacity determinations for 29 patients with mild Alzheimer's Disease. The physicians had only 56% agreement regarding the capacity of the patients to make their own medical decisions. The results were deemed by the study's authors as "alarming," substantiating "a long-standing clinical concern, namely, that physician competency assessment is a subjective, inconsistent, and arguably idiosyncratic process. (pp. 455, 456) A subsequent study by many of the same authors found that the use of a specific definition of capacity considerably improved (76%) physician agreement (Marson, Daniel C., et. al., "Consistency of Physicians' Legal Standard and Personal Judgments of Competency in Patients with Alzheimer's Disease," *Journal of the American Geriatric Society*, Vol. 48 (August 2000), pp. 911-918.)

Medical professional assessments almost uniformly go completely unchallenged in conservatorship cases despite their relative unreliability. Zealous advocates should strongly consider assisting clients to arrange a second doctor assessment with clear instructions to

complete a thorough examination. Such assistance may be your best opportunity to successfully challenge the proposed conservatorship.

CHALLENGING THE COURT INVESTIGATOR'S REPORT

Besides the assessment of medical professionals, conservatorship courts rely primarily on the reports of its investigators. The content of investigator reports is largely prescribed in Probate Code Section 1826 and should be reviewed in all cases to ensure that investigators are performing reliable investigations. Conservatee attorneys should pay particular attention to the investigator's specific consideration of the criteria for conservatorship and consideration of less restrictive alternatives.

RULING OUT LEAST RESTRICTIVE ALTERNATIVES

Under general constitutional law principles, no person should be conserved if any less restrictive alternatives are available to meet the needs of the proposed conservatee. Probate Code Section 1821(a)(3) requires that less restrictive alternatives be considered and ruled out within the Petition's Confidential Supplemental Information form. Courts and defense counsel often give less restrictive alternatives a cursory review only, maintaining that conservatorship is the only intervention available.

Many conservatorship petitioners state that less restrictive alternatives are not available because the conservatee allegedly has lost capacity to execute any documents to share decision making authority. Incapacity to execute legal documents, however, is not sufficient grounds for a conservatorship. A person may only be conserved when they are unable to meet their needs. If the conservatee is willing to voluntarily accept assistance that will enable them to meet their needs, defense counsel should argue steadfastly that no conservatorship is necessary and that less restrictive alternatives are in fact suitable.

GO TO TRIAL

Conservatees have a right to a jury trial to determine whether conservatorship is warranted. (§ 1827) In CANHR's recent study of conservatorships, we discovered that only one percent

of all conservatorship cases end in a trial of any sort. The use of trial is likely very underutilized in conservatorship defense. Even if a trial is not desired by the conservatee, its availability can be used to negotiate advantageous settlements.

Limiting the Conservatorship

Despite the best efforts of zealous advocates, most conservatorship petitions are destined to be granted. However, a significant number, perhaps even a majority of conservatorships, are characterized by an overreaching of power by the proposed conservator. Defense attorneys should carefully review each power sought and advocate to narrowly tailor the conservatorship to ensure that the conservatee retains as much independence as possible. Probate Code Section 1800 sets forth the express intent of the legislature regarding conservatorships, including protecting the rights of conservatees so that they maintain as much independence as possible.

Even if an attorney believes a conservatee's best interests require legal intervention, they should still push for least restrictive alternatives and possible conservatorship limits.

MEDICAL DECISION-MAKING

Ordinary conservatorships of the person do not prohibit conservatees from giving or withholding consent to proposed health care treatments. However, more than three-quarters of all petitions for conservatorship of the person include a request for medical decision-making authority pursuant to **Probate Code Section 2355**. The exclusive authority to make medical decisions is an extraordinary power; it allows the conservator to override the express refusals of medical treatment made by the conservatee. Using this power, a conservator could force a conservatee to receive psychotropic medications or live in a nursing home.

Requests for medical decision-making powers should be carefully scrutinized by defense attorneys. Attorneys can make a strong argument that the request is premature if the conservatee does not often object to health care treatments proposed by

doctors.¹⁰ Both conservatee safety and autonomy is enhanced when medical decision-making authority is initially vested in the conservatee. In such a case, if the conservatee does refuse a proposed treatment, the conservator must then make a new request to the court for decision making power. At that time, the conservatee (and their attorney) will be able to express their reasons for refusing the proposed treatment to a judge. Even if a conservatee lacks the ability to provide informed consent to medical decisions per **Probate Code Section 1881**, defense attorneys should fight to limit the conservator's authority to cases in which the conservatee is not actively refusing the proposed treatment.

DEMENTIA POWERS

Probate Code Section 2356.5 allows conservators to request particularly strong powers if the conservatee allegedly suffers from dementia. If the conservatee has a dementia-related illness, the conservator may be empowered to place the conservatee in a locked-door institution and to authorize the administration of medications "appropriate to the care of dementia." In other words, Section 2356.5 permits conservators to lock up and drug conservatees. The State has recognized that these powers are particularly violative of civil rights by requiring that attorneys be appointed to represent conservatees anytime dementia powers are sought.

Dementia powers are often sought by conservators anytime a conservatee has been diagnosed with dementia, regardless of whether the conservatee needs placement in a locked-door institution or takes medications specifically to treat dementia. Much like the issue of medical decision making authority,

10. The author believes that conservatees who do not regularly refuse proposed medical treatment are much better served by retaining the power to make health care decisions. If the power is given to the conservator and the conservatee has reasonable grounds for refusing, the court will never be asked to resolve the dilemma. If, however, health care decision making remains with the conservatee and the conservator wishes to override one of his decisions, the conservator will be forced to bring the matter to the court's attention. When courts grant exclusive decision making to the conservator, it renders the conservatee impotent to refuse treatments regardless of his reasons and essentially eliminates any judicial review.

dementia powers can be fought as premature unless the conservatee has a verified need for a locked-door placement or has previously refused dementia treating medications.

Medications "appropriate to the care of dementia" often fall into one of two categories: memory-prolonging drugs and psychotropic drugs. While their efficacy is debatable, memory-prolonging drugs, such as Aricept and Namenda, are much less likely to threaten the health and well-being of conservatees with dementia than psychotropic drugs. Psychotropic drugs actually do not "treat" dementia, but instead limit some of the observable symptoms. Many psychotropic drugs have FDA black box warnings explaining that their use may increase the risk of death in elderly users. Psychotropic drugs for dementia should be very carefully reviewed by conservatee advocates and vigorously opposed whenever the conservatee has expressed reservations about their use.

PLACEMENT OF THE CONSERVATEE

Probate Code Sections 2352 and 2352.5 require conservatees be placed in the least restrictive setting possible. Express state policy presumes that the conservatee's personal residence is the most suitable placement. Conservatees living outside of their personal residence must be given a plan for returning them to their homes or a detailed explanation of why home placement is no longer practical.

Attorneys representing conservatees should be vigilant about placement. Professional conservators, in particular, have a bias toward institutional placements for two reasons. One, institutional living requires very little conservator oversight as most living activities are coordinated by professional caregivers. Two, institutional placement is often less expensive than equivalent home care. Conservators can thus stretch the conservatorship estate farther, guaranteeing a source of conservator payment for a longer period of time. Many professional conservators' ideal client is one who lives in a nursing home paid for by Medi-Cal and has substantial funds held in a special needs trust, from which the conservator can be regularly paid. Institutional placements should be vigorously opposed if there are any less

restrictive settings where care can be safely given. Cost should be a secondary consideration.

NAMING THE CONSERVATOR

In many conservatorship cases, the conservatee may prefer someone other than the petitioner be appointed conservator if the court determines a conservator is necessary. The conservatee's preferences should prevail, assuming the person is willing and able to act as conservator. Probate Code Section 1810 allows conservatees with capacity to nominate a conservator. Any nominee is the presumptive choice unless evidence demonstrates that such an appointment is not in the best interests of the conservatee. If there is no nominee, the law presumes that spouses, adult children, parents, or siblings are the best people to act as conservators.

When confronted with competing proposed conservators, courts often appoint a third party, usually a professional conservator, in an effort to avoid future conflicts among squabbling family members. In **Conservatorship of Ramirez, (2001) 90 Cal. App.4th 390**, however, a Court of Appeals held that anytime a conservatee's preferred conservator is "competent, caring, and willing," they should be appointed. Defense attorneys should therefore zealously advocate for the appointment of the conservatee's preferred conservator regardless of whether there is conflict among the conservatee's family members.

POSITIVE LIMITS

Even after an attorney for a conservatee has fought to limit the powers a conservator may exercise, they can still seek other orders from the court that maximize a conservatee's independence. These orders can be labeled "Positive Limits" to the conservatorship. **Probate Code Section 1800** explains that the duty of the court is not only to determine whether a conservatorship is appropriate, but also its "extent." **Sections 2351(b) and 2402** permit a court to impose positive limitations on conservatorships of the person and estate, respectively. The promotion of positive limits is a corollary of using a conservatorship only when all less restrictive measures have been considered and ruled out. If conservatorship

is a last resort, the conservatorship itself should be as least intrusive upon the conservatee as possible. Potential positive limits include money allowances, visitation, and other highly personal matters.

ALLOWANCES

Personal allowances for conservatees are specifically endorsed by **Probate Code Section 2421**. Conservatorship defense lawyers should argue for a retained allowance for conservatees in all but the most extreme cases. Of all the infantilizing features of conservatorships, perhaps none is more demeaning than leaving a grown adult with no money in their pocket.

Probate Code Section 2421(a) states "upon petition of the guardian or conservator or the ward or conservatee, the court may authorize the guardian or conservator to pay to the ward or conservatee out of the estate a reasonable allowance for the personal use of the ward or conservatee. The allowance shall be in such amount as the court may determine to be for the best interests of the ward or conservatee."

VISITATION

Visitation with the conservatee often becomes an issue after a conservatorship has been granted, particularly when the conservatorship was motivated by family squabbling for control over the conservatee or by elder abuse. Conservators' inherent powers likely include the ability to control a conservatee's visitation. Controlling visitation is tantamount to controlling personal relationships, a power that is almost beyond comprehension. Conservatorship defense attorneys should anticipate potential visitation issues and seek an order allowing the conservatee some control over visitation.¹¹ Besides being an often underestimated personal right, visitation can be vital for monitoring a conservator's conduct.

11. The state Judicial Council believes that conservatees retain the right to control their own visitation. The Judicial Council's recitation of conservatee rights, Form GC-341, states that conservatees keep the right to "receive visits from family and friends."

MISCELLANEOUS

Other areas where conservatorships can be narrowly tailored include control over a conservatee's residential placement, clothing and other personal effects, and recreation activities.

Post-conservatorship Issues

Post-conservatorship issues can be every bit as important to the individual rights of conservatees as the issue of granting a conservatorship in the first place. Although this Guide is focused on fighting conservatorships, once a conservatorship is granted the fight often continues.

TERMINATION

Terminating a conservatorship is specifically addressed in **Probate Code Sections 1860-1865**. There are two possible bases for termination while the conservatee is still living: the conservatorship is “no longer necessary” or the grounds for establishing a conservatorship no longer exist. An interesting note to these bases is they explicitly allow for the termination of conservatorship when the conservatee still meets the grounds for conservatorship but such intervention is deemed unnecessary. This appears to allow for termination when third party assistance has been engaged and is stable such that court oversight is no longer needed.

A petition for termination can be brought by virtually anyone with an interest in the affairs of the conservatee. An interesting conundrum for attorneys is pursuing a termination of conservatorship for a person who has been adjudicated as incapable of contracting or engaging in professional relationships – i.e., retaining an attorney. Attorneys who take on a termination case risk going unpaid if the termination is not granted. Conservators who control a conservatee's estate are unlikely to want to pay the costs of an action to terminate their control. A strong public policy argument can be made, however, that any attorney for a conservatee who operates in good faith in seeking a termination of conservatorship should be paid regardless of the outcome. Otherwise, conservatees would be dealt a significant blow in their ability to challenge unmerited conservatorships.

HEALTH CARE DECISION-MAKING

One other noteworthy post-conservatorship issue is the exercise of health care decision making authority under **Probate Code Section 2355**. Many conservators erroneously exercise this power without ever consulting the conservatee in health care treatment matters. Section 2355 requires conservators to make decisions consistent with a conservatee's individual health care instructions, presumably instructions given prior to the loss of capacity that precipitated the conservatorship. However, when there are no advance instructions to consult, a conservator must make decisions in accordance with the conservatee's best interests. A determination of best interests should always begin with the conservatee's currently expressed wishes. A conservator who does not ask a conservatee what they believe about a proposed health care decision has neglected the most salient source of information in the decision. Conservators habitually ignore the stated preferences of their conservatees. Defense attorneys should be vigilant about changing those habits.

Appendix

The following conservatorship hearing transcript excerpts are taken from a San Francisco case heard in February 2009. The excerpts are intended to highlight the generally weak advocacy for conservatees. In the case, a temporary conservator had already been appointed. The initial testimony explained that the conservatee's house had been in disarray prior to the appointment of a temporary conservator but now was clean. In addition, an in-home caregiver had been hired to assist the conservatee with his activities of daily living. The Court then asked to hear from the conservatee, whose name has been changed in this excerpt.

COURT-APPOINTED ATTORNEY: Mr. Miller has instructed me, as his counsel, to voice his opposition to the conservatorship. He feels that he is now able to handle his personal and financial affairs, and so on. He recognizes that he can't do certain things that he did as a younger man, and he does have some difficulties with bathing and personal hygiene. But with informal care, given opportunities, he feels

that he can take care of himself. If a conservatorship is established, if that's the Court's pleasure, then he would prefer to have his daughter, who lives in Hawaii, serve as the conservator.

Finally. Following my questions, he would welcome an allowance. And I have spoken to counsel for the conservator on that, there would be general agreement if conservatorship is established. But I'm constrained, as court-appointed counsel, to again voice Mr. Miller's opposition to the conservatorship.

[Mr. Miller is then introduced to the Court.]

COURT-APPOINTED ATTORNEY: Your Honor, Mr. Miller asked me if he may address the Court, and I said that is his right.

THE COURT: Absolutely. I know in reading through the investigator's report I have become a little bit of a history buff in World War II history. And I notice that you were in the Battle of the Bulge, which is a remarkable event.

MR. MILLER: Yeah.

THE COURT: That was in the end of, were you there at the end of 1944 or beginning of 1945?

MR. MILLER: End of '44.

THE COURT: End of '44.

MR. MILLER: I was right in the thick of it.

THE COURT: And then you fought in some other major battles as well.

MR. MILLER: Across the Rhine River, and a lot of battles we've had.

THE COURT: I've read about it. I can only imagine how difficult it was. How old were you at the time?

MR. MILLER: Eighteen.

THE COURT: So you were just barely an adult when you were over there.

MR. MILLER: I was in the Battle of the Bulge at 18. And on xx is my birthday. I turned 19. We were living in a foxhole about 500 yards from The Front. We shot from there. But we were 3-, 4-, 500 yards from the German line. And every once in awhile, they would make an advance, and we'd have to cut them down. But it's been a long, long time ago now.

THE COURT: Well, it was a remarkable thing that you and the other veterans at that time against major odds from the German Army, which was trying to mount a crushing offensive against the Allies in that battle. So congratulations for all that you did there.

It appears from the report I read that things are in pretty good, pretty good place for you right now. You're home. You're getting some –

MR. MILLER: Let me let me explain to you.

THE COURT: Sure. You tell me.

MR. MILLER: They said that I refused Veterans services. I don't know any services Veterans offered me that I refused. They didn't offer any services outside of me coming out there and being examined by doctors and getting operations and stuff. They didn't offer to send somebody to the house to help me out.

And as far as the house smelling bad is concerned, I had a series of heart attacks and it knocked up the back wall of my heart and it makes it so I don't smell. I can't smell anything. And I taste very little in the way of food.

THE COURT: You've had –

MR. MILLER: So I shouldn't be faulted for that.

THE COURT: No. No one's faulting you for that at all. You've had a series of medical issues and medical conditions.

MR. MILLER: I've got cancer.

THE COURT: Right. And you've got cancer, and you have some other issues as well concerning your health. That's what I understand. Would you agree with that?

MR. MILLER: Yeah. But mainly it's the cancer.

THE COURT: Right, and that's always very serious, and the especially the cancer that I'm aware that you have.

The concern that I have, the Court has, is your inability, perhaps, to smell or recognize, have your senses recognize your conditions that you were living in before and how that may be affecting your health versus how they are now. What those conditions are like now. Would you agree that there's been some, to your observation, anyway, some improvement in the condition of your house?

MR. MILLER: Well, yes. But these people that do that kind of work, they've got very light fingers. I have a lady and a gentleman that take care of me now eight hours a day. And someone went in my pants' pocket and took three \$100 bills and change. I mean, it's up to maybe a hundred dollars worth of tens and twenties. And they were the only two people who were in the house, that I know of, that had the opportunity to go through my clothes. Now I love them dearly and they are both very good to me. But I don't invite anybody stealing off anybody. I was brought up that way and I believe in that. And anybody who says that that's wrong is just crazy, as far as I'm concerned. Nobody has the right to take anything of mine, and I don't have any right to take anything of anybody else's.

THE COURT: There's a request that in the event the Court grants the conservatorship, that your daughter be appointed as the conservator.

MR. MILLER: I really don't want a conservator. I'll accept my daughter if I have to.

THE COURT: No. I understand. Your attorney's indicating that your preference is not to have the conservatorship.

[A brief discussion of Mr. Miller's daughter and his expected great-grandson ensues.]

THE COURT: I just read in the paper today that the mayor and his wife are going to have a baby. Did you see that?

MR. MILLER: I thought the mayor was in control. He was going to have the baby and she would help him.

(Laughter in the courtroom)

[The Court begins to conclude.]

MR. MILLER: I don't need a conservator. I can handle everything. I admit that something went wrong –

THE COURT: Well, let's do this.

MR. MILLER: – because someone stole, one of the people who worked for me stole some of my checkbooks.

THE COURT: Let me indicate that this is not going to be necessarily forever because, you know, you have a right to come back in here and –

MR. MILLER: You know, I'm an American citizen and I did fight in the Second World War. And it seems like even though I'm 83 years old, I can take care of my own business, my own money. . . . I don't spend money when I don't have to.

THE COURT: Well, I understand. But as my father used to tell me, money was made round to go around. So, you know, it's okay that you spend money for a good purpose, and there's no better person to spend money on than yourself. So it's good that you have some to spend on yourself.

All right?

MR. MILLER: I've lots to spend on myself, but I don't need anything. I'm happy the way things are.

THE COURT: And that's good. Stay happy.

The court grants the conservatorship, with informed consent powers. A fifty dollar per week allowance is given. The court-appointed attorney is silent and he is not discharged. No mention is ever made of the legal standard for a conservatorship and the conservatee is never told that he has the right to submit additional evidence or request a jury trial.



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