Conservatorship Reform in California:
Three cost-effective recommendations

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Executive Summary

This report assesses the effectiveness of California's conservatorship system in protecting the rights and welfare of the elderly. The 2006 Omnibus Conservatorship and Guardianship Reform Act strengthened the system by creating additional oversight and requirements for conservators, attorneys and judicial officers. However, our analysis suggests the process through which conservatorships are granted can still be substantively improved.

Our research included a review of sixty conservatorship case files originated in 2007 in San Francisco County, and numerous interviews with relevant parties. Our findings highlighted three specific problems:

- California lacks an adequate information system for oversight of conservatorships.
- The current probate procedure does not sufficiently protect due process rights.
- California's process places insufficient emphasis on less-restrictive forms of conservatorship.

We offer three recommendations that individually address each of these problem areas. Given the current budget crisis and limits on court resources, we paid particular attention to cost-effectiveness. In addition, we sought to minimize costs to conservatees, to guarantee due legal process and to maximize the probability that conservatorships, when granted, are the least-restrictive means of caring for the conservatees. We also sought to minimize disincentives for responsible conservators to continue participating in the system.

Recommendations:

1. Establish a web-based filing system for all mandatory forms used in the conservatorship process, including petitions, orders and accountings.
2. Require court-appointed attorneys, prior to receiving compensation, to submit a written report detailing defense of the proposed conservatee.
3. Require petitioners and courts to specify, using a checklist on petitions and order forms, the powers requested and granted for conservatorships.

Introduction

Project goals

California Advocates for Nursing Home Reform (CANHR) is a non-profit advocacy organization interested in safeguarding the welfare and rights of the elderly. CANHR is concerned that flaws within the current conservatorship system may, in some cases, harm the vulnerable population it is designed to protect.

CANHR highlighted three goals for our project:

- An examination of the effect, if any, of conservatorship reform laws passed in 2006 by the California Legislature.
- An empirical data-gathering effort designed to investigate trends within the conservatorship system. To date, only broad descriptive statistics on conservatorships have been published by California's courts.
- If appropriate, policy recommendations for further improvements based on our findings.

In this report, we describe the 2006 reform efforts, our data collection methodology and recommendations to address three major problems highlighted by our data. Since CANHR is particularly interested in the process through which conservatorships are granted, we focus our analysis on this area. Our policy recommendations are derived in part from an extensive list of 85 recommendations published by the Judicial Council of California's Probate Conservatorship Task Force. By intention, the Task Force's recommendations did not prioritize cost. In contrast, we seek to add value by focusing on three recommendations we feel to be especially cost-effective.

Defining a conservatorship

A conservatorship is granted when the court finds that an adult lacks the capacity to take care of himself or herself, or his or her affairs.[1] For example, a conservatorship may be granted if an elderly person is subject to undue influence, if the person suffers from dementia, or if the person needs someone to make medical decisions for him or her. An adult deemed incapacitated by the court is called the conservatee. The person appointed by the court to manage the personal care or finances of the conservatee is called the conservator. There are three types of conservators: relatives or friends, professional fiduciaries, and the Public Guardian. Professional fiduciaries are private professional conservators. The Public Guardian is a county agency that serves as a public conservator, typically for people receiving public benefits.[2] As of June 2006, there were 45,181 active conservatorships in California.[3]

Conservatorships can be of the person, of the estate, or both. Generally, a conservatorship of the person grants the conservator the power to establish the conservatee's place of residence and to manage the conservatee's health care, meals, clothing, personal care, housekeeping, transportation and recreation. Conservators may also request additional powers such as exclusive

[1] Conservatorships are called guardianships in most other states. A guardianship in California, however, only applies to minorities.

[2] Handbook for Conservators, Rep, 2002, Judicial Council of California, 15 Mar. 2009 <http://www.courtinfo.ca.gov/selfhelp/seniors/handbook.htm>, p. 1.

[3] Court Effectiveness in Conservatorship Case Processing: A Report to the Legislature, Rep, Jan. 2008, Judicial Council of California, 15 Mar. 2009, p. 5.

medical authority or the authority to administer psychotropic drugs to a conservatee suffering from dementia. A conservatorship of the estate grants the conservator the power to manage the conservatee's finances, assets, investments and bills.

Conservatorships can either be temporary or permanent. A temporary conservator is appointed if the conservatee is in need of immediate help. The appointment usually lasts thirty to sixty days.[4] A petition for permanent conservatorship must accompany all petitions for temporary conservatorship. In the 2005-2006 fiscal year, 5,600 petitions for permanent conservatorships and 1,615 petitions for temporary conservatorships were filed in California.[5]

Conservators must file petitions with the court for both temporary and permanent conservatorships. Once a petition is filed, all relevant parties must be properly notified unless the conservatee faces "immediate and substantial harm during the notice period."[6] Relevant parties include the proposed conservatee and any living relatives. Court investigators, who are employees of the court, are required to meet with the proposed conservatees, to inform them of their rights, and to submit a written report including an opinion on whether a conservatorship is appropriate. In addition, the proposed conservator may file a capacity declaration with the petition. The declaration is completed by a licensed physician or psychologist, who evaluates the proposed conservatee's mental functions and capacity to give informed consent to any form of medical treatment.[7] A hearing is then held to determine whether the conservatorship should be granted. Temporary conservatorship hearings usually take place five days after the petition is filed, while permanent conservatorship hearings may be held several months later. The proposed conservatee has the right to an attorney, and may attend the hearing if able and willing. If contesting the conservatorship, the proposed conservatee may also request a jury trial.

Previous legislative action

In November 2005 the Los Angeles Times published a four-part series entitled "Guardians for Profit," which called attention to significant flaws within California's conservatorship system. The articles highlighted numerous cases of financial and elder abuse by professional fiduciaries. For example, one conservator used a conservatee's savings to pay his taxes and invest in a friend's restaurant, while another secretly sold a conservatee's house to herself at below-market rate.[8] Conservators also overcharged for services. One conservator charged $170 dollars for grocery delivery; another charged $1,700 dollars to attend a conservatee's burial.[9] The Los Angeles Times suggested these cases illustrated "how inaction and inattention by the courts have left many elderly Californians vulnerable to abuse by the very people entrusted with their care."[10] The resulting public outcry forced the California Legislature to take action by passing the Omnibus Conservatorship and Guardianship Reform Act of 2006.

[4] Handbook for Conservators, p. 2, 3, 16 and 51.
[5] Court Effectiveness in Conservatorship Case Processing, p. 5.
[6] Probate Conservatorship Task Force Recommendations to the Judicial Council, Rep, 9 Dec. 2008, Judicial Council of California, 1 Apr. 2009 <http://www.courtinfo.ca.gov/jc/tflists/probcons.htm>, p. 15.
[7] GC-335 Capacity Declaration-Conservatorship, Judicial Council of California.
[8] Jack Leonard, Robin Fields, and Evelyn Larrubia, "When a Family Matter Turns Into Business," Los Angeles Times 13 Nov. 2005.
[9] Leonard et al, 13 Nov. 2005.
[10] Jack Leonard, Robin Fields, and Evelyn Larrubia, "Justice Sleeps While Seniors Suffer," Los Angeles Times 14 Nov. 2005.

The laws made significant improvements to the system for establishing conservatorships, several of which are highlighted below:

- *Licensing for professional fiduciaries.* The Professional Fiduciaries Act created the Professional Fiduciaries Bureau within the Department of Consumer Affairs. The Bureau regulates the profession by requiring every practicing professional fiduciary to obtain a license from the Bureau and agree to a Professional Fiduciaries Code of Ethics.[11] Licensing requires passing an exam, 30 hours of initial education courses, and 15 annual hours of continuing education credit for renewal.[12]

- *Mandatory court investigator reports for temporary conservatorship hearings.* Unlike before the 2006 reforms, court investigators are now required to submit a written report to the court prior to the temporary conservatorship hearing (or within two days of the hearing if before is not feasible).[13] The court investigator is required to submit a second report for the permanent conservatorship hearing.

- *New educational requirements*. The 2006 Omnibus Act requires that the Judicial Council of California establish qualifications and educational requirements for court-employed attorneys, examiners and court investigators. In addition, court-appointed attorneys, probate judges and public guardian staff are required to take specific educational classes. Finally, the Act orders the Judicial Council to develop a short educational program to be made available to proposed conservators and guardians.[14]

The Judicial Council of California estimated $17.4 million dollars were needed to implement the legislation's reforms in fiscal year 2007-2008. This appropriation was eliminated from the final budget.[15] Consequently, court resources and staff are severely strained, as courts are expected to meet new requirements without any additional funding from the state.[16] The 2006 reforms strengthened the conservatorship system by creating additional oversight and requirements for actors involved in the system. However, as our analysis will demonstrate, the process through which conservatorships are granted can still be substantively improved. Given the current state budget crisis, we pay particular attention to cost-effectiveness in making our recommendations.

Quantitative analysis of data

Our dataset consists of sixty randomly selected conservatorship case files originated in San Francisco County in 2007. We chose 2007 to gain a clear picture of how the system is operating in the wake of the 2006 reforms. We selected 2007, not 2008, in order to allow time for the courts to issue rulings. Statistical software was used to select cases randomly from a pool of all eligible filings.

[11] Professional Fiduciaries Bureau, California Department of Consumer Affairs, 9 May 2009 <http://www.fiduciary.ca.gov/>.
[12] Professional Fiduciaries Bureau.
[13] AB 1363, Jones, Omnibus Conservatorship and Guardianship Reform Act, (2006) (enacted), p. 16.
[14] AB 1363, p. 1 and 4.
[15] Probate Conservatorship Task Force Recommendations to the Judicial Council, p. 2 to 3.
[16] Courts did receive $8.5 million in funding from the Judicial Council of California Trial Improvement Fund, however this was on a one-time basis in fiscal year 2008-2009.

We summarize our main findings below:

- *Petitions for temporary and permanent conservatorships were infrequently denied.* Among cases in which the proposed conservatee did not die prior to the hearing and no competing petition was filed, 84 percent of petitions for permanent conservatorship (37 of 44) were granted. Similarly, 88 percent of petitions for temporary conservatorship (42 of 48) were granted.

- *Petitions were usually accompanied by requests for temporary conservatorships.* Eighty percent (48 of 60) of petitions for permanent conservatorships were accompanied by petitions for temporary conservatorship. According to one attorney we interviewed, the high rate of filings for temporary conservatorship may be due to the long waiting time between filing a petition for permanent conservatorship and the hearing. Our data showed that, on average, petitioners wait 92 days for a permanent conservatorship hearing to take place. This delay is due at least in part to the workload of court investigators. According to a probate official, investigators in San Francisco County typically have 10 to 20 active investigations on their desks at any given time. Investigations require from six to more than 40 hours to complete.

- *Proposed conservatees rarely attended temporary or permanent conservatorship hearings*. Only 21 percent (9 of 42) of proposed conservatees attended their temporary conservatorship hearings. This figure rises only modestly for permanent conservatorship hearings, with 27 percent (11 of 41) of proposed conservatees attending. Many proposed conservatees do not attend because of medical inability. However, it is noteworthy that few proposed conservatees have the opportunity to personally express their wishes in court.

- *Proposed conservatees are more likely to have attorney representation at permanent conservatorship hearings than at temporary conservatorship hearings.* An attorney for the proposed conservatee was present at 46 percent (19 of 41) of permanent conservatorship hearings, a surprisingly low figure. Attorney representation during temporary conservatorship hearings, however, is even lower, at 31 percent (13 of 42). The 15-percentage point difference is likely due to the quick 5-day turnaround between filing a petition for temporary conservatorship and the hearing. Many proposed conservatees may have difficulty securing an attorney in that time.

- *Proposed conservatees were more likely to be permanently conserved when represented by an attorney*. Seventy-three percent (11 of 15) of petitions for permanent conservatorship were granted when the proposed conservatee did not have an attorney. Surprisingly, the percentage climbed to 90 percent (26 of 29) when the proposed conservatee had an attorney.[17]

- *Zero conservatorship cases went to jury trial.*

[17] One explanation for this statistic might be that those with an attorney may actually need a conservatorship more than those without. For example, someone in a coma may need the protection of a conservatorship; however, a court might be wary to grant it without the proposed conservatee having representation.

- *Of the proposed conservatees that had attorney representation at some point, 53 percent (21 of 40) were represented by court-appointed attorneys.*

- *Powers granted to conservators were rarely limited.* Among the 37 cases in which permanent conservatorship was granted, only 4 included limitations on the powers granted to the conservator. These limitations were minor.

Qualitative analysis

To complement our data analysis, we interviewed numerous interested parties within the conservatorship system. These interviews helped us gauge how feasible our recommendations would be to implement. Organizations interviewed included: California Advocates for Nursing Home Reform; Los Angeles Times; Office of Governmental Affairs, Administrative Office of the Courts; San Francisco Probate Department; Ramsey County (MN) Probate Department; the Minnesota Association for Guardianship and Conservatorship; a professional fiduciary; and an attorney who represents both conservators and conservatees. We also reviewed literature pertaining to conservatorship issues both in California and nationwide. Finally, to better understand probate proceedings, we attended conservatorship hearings in San Francisco.

Problems highlighted by analysis

Our analysis highlighted three specific problems with the current conservatorship system:

1. California lacks an adequate information system for oversight of conservatorships.
2. The current probate procedure does not sufficiently protect due process rights.
3. California's process places insufficient emphasis on less-restrictive forms of conservatorship.

We offer the following recommendations to make substantive improvements in each of these problem areas at reasonable cost:

1. Establish a web-based filing system for all mandatory forms used in the conservatorship process, including petitions, orders and accountings.
2. Require court-appointed attorneys, prior to receiving compensation, to submit a written report detailing the defense of the proposed conservatee.
3. Require petitioners and courts to specify, using a checklist on petition and order forms, the powers requested and granted for conservatorships.

Evaluative criteria used

We used the following set of criteria to decide on our final set of three recommendations to improve California's conservatorship system:

1. Maximize cost-effectiveness.
2. Minimize cost to conservatees.
3. Maximize probability that each conservatorship is the least-restrictive possible means of caring for the conservatee.
4. Maximize due legal process for proposed conservatees.
5. Minimize disincentives for responsible conservators.

Recommendation 1: Web-based Filing System

Establish a web-based filing system for all mandatory forms used in the conservatorship process, including petitions, orders and accountings.

California lacks an adequate information system for oversight of conservatorships

California does not currently aggregate extensive data on conservatorship cases. To collect data on the state's 45,000-plus active conservatorships, one would need to visit every county courthouse to review individual case files. Such data collection is impractical, onerous and time consuming. Furthermore, as we discovered through our own data-gathering effort, deciphering a case file is a highly subjective process. Forms are sometimes incorrectly completed, and occasionally missing from the file altogether. Such patchwork data is an obvious impediment to ongoing oversight and reform efforts.

As a solution, we propose a web-based filing system for all mandatory forms used in the conservatorship process: petitions for temporary and permanent conservatorships, the orders granting conservatorships, and the annual accounting forms. Web-based filing is a cost-effective means of gathering data and increasing oversight by both the courts and the public. Because checks can be built into the process to ensure consistent data entry, electronic forms will also save time for court staff. Finally, red-flag software can be used to detect possible instances of abuse.

Sparse national and state-level data

In a 2004 report, the United States Government Accountability Office (GAO) highlighted the lack of data on conservatorships around the country. Less than one-third of courts surveyed tracked the number of active conservatorships for incapacitated adults. GAO concluded that lack of data hindered oversight and reform efforts. According to the report, there was no way to tell if the incidents of abuse were "isolated examples of abuse in an otherwise well-functioning process or accurately portray the norm..." GAO also states that "sufficient data are not available to determine the incidence of abuse of incapacitated people by [conservators]. . . nor the extent to which [conservators]. . . are protecting incapacitated people from abuse." [18]

The lack of national aggregate data is mirrored at the state level in California. As mentioned, we found data collection to be a difficult and time-consuming process. We are not alone; despite its centrality to the court system, the Judicial Council of California itself has acknowledged difficulty in gathering information on conservatorships statewide. A 2007 report states "[b]ecause currently no statewide case management system is in place, and local systems capture data elements differently, basic information on conservatorship cases is not readily available for more than a handful of trial courts."[19] The Judicial Council further concludes: "Baseline and ongoing data collection will facilitate system wide oversight. It is essential to collect baseline

[18] *Guardianships: Collaboration Needed to Protect Incapacitated Elderly People.* Washington DC: United States Government Accountability Office, 2004.

[19] *Court Effectiveness in Conservatorship Case Processing: A Report to the Legislature.* San Francisco, CA: Judicial Council of California, 2007.

and ongoing data for this case type. Ongoing evaluation of the conservatorship system must begin with increasing the availability of descriptive baseline data."[20]

Web-based filing system increases transparency

Among states, California is not alone in failing to collect data on its active conservatorships. California has an opportunity to lead by being among the first in the nation to convert to an online filing system.

The Judicial Council identified as critical statistics for oversight the total number of conservatorships per jurisdiction, the annual number of petitions for conservatorships, and the percentage of petitions granted. An online filing system could easily aggregate such data, eliminating the need for expensive surveys and case-by-case file reviews. The system would also collect key metrics such as the percentage of conservatees represented by attorneys, the average delay between petition filings and hearing dates, and the overall percentage of cases handled by Public Guardians. Such data would permit the tracking of county-specific and statewide trends, facilitating policy responses to changing circumstances. For example, a steep increase in the percentage of cases handled by Public Guardians might indicate the departure of professional fiduciaries from the system. Such a departure might require additional funding for Public Guardians or heightened incentives for professional fiduciaries.

Both internally and externally, web-based filing will increase transparency in the conservatorship system. Internally, state officials will be able to query, locate and review data instantaneously. The Judicial Council or other state agencies would be able to study trends across the state or in specific counties. Externally, a database of non-confidential information can be made available to the public. Documents, attachments and court investigator reports currently classified as confidential would remain offline. Public skepticism about the conservatorship process may decrease if the system is made more transparent.

Many counties already scan forms as images which can be viewed on courthouse computers. Because statistics cannot be aggregated from these files, they offer little benefit in terms of data collection. The Judicial Council has instituted a Portable Document Format (PDF) file that can be filled out online and printed for petitions for conservatorship. While these forms are not entered into a database, they do lay the groundwork for online data collection, and should ease the transition process.

How an online system would work

We recommend that all mandatory forms be completed online and that courts eliminate paper forms. Mandatory documents include: petitions for conservatorships, orders granting conservatorships, and the accounting forms required to be completed annually by conservators. Petitioners without internet access should be permitted to use courthouse terminals. Once submitted online, forms will be immediately available to court staff. Because the content of the forms will not change, transitioning to an online system should not require significant additional training for court staff.

[20] *Court Effectiveness in Conservatorship Case Processing: A Report to the Legislature.* San Francisco, CA: Judicial Council of California, 2007.

A number of checks will be built into the web-based system. If a user fills in a form inconsistently or incorrectly, submission will be denied until the form is appropriately completed. Ensuring that all forms are correct and complete will result in fewer court hearings and fewer continuances due to improperly filled-out paperwork. It will also save court resources, since staff will no longer need to hand-check forms and scan them into the system for public viewing. If court staff wish to review a particular file, they will be able to print the information from the database in a format similar to the current, manually-completed forms. Data then becomes universally available in a consistent format.

Once data is collected, "red flag" software will be developed to check for potential cases of abuse. This software will be especially useful in auditing the financial accountings submitted by conservators. Automated checks of the financial information can help guard against abuse of a conservatee's finances. The web-based system can be designed to accept accountings created in popular financial software such as Microsoft Money or Intuit QuickBooks.

Case study: Ramsey County, Minnesota

Ramsey County, Minnesota, began requiring conservators to file all annual accounting forms online in September 2008. We spoke with the county's probate court manager about implementation of the web-based system. Ramsey County spent a year creating the system with the help of a private contractor, at a project cost of $40,000 dollars. Maintenance and upkeep cost $4,700 dollars annually. Ramsey County's system is a pilot project for the state. In the near future, the system will be expanded to cover the rest of Minnesota.

Implementation of the online accounting process was straightforward. Ramsey County chose to eliminate all paper accountings and to make their courthouse computers available for filings. This change created no extra work for either conservators or the court. If court staff wished to view a report, they could use the database to print a form identical to the accounting form that would otherwise have been completed manually. The official start date of the new requirement, September 2008, is effectively "staggered" for conservators; for example, those who had filed their previous accounting in August 2008 will not be required to file an online accounting until August 2009. This staggered start minimized the technical challenges associated with a web-based system. Three trainings were offered over the course of many months.

Because of built-in software for checking errors, the new system eliminated the need to correct small errors on forms, allowing staff to focus on more substantive work. Most conservators were surprised that online filings had not been made mandatory sooner. Few conservators expressed dissatisfaction with the new system.[21]

Implementation and costs

As in Minnesota, we recommend establishing a pilot project in one county in California. There should be a staggered start that allows most conservators time to adjust to the new filing requirements. This will minimize technical issues.

The cost of Ramsey County's system was $40,000 dollars. This system handles only accountings, just one component of our recommendation. We estimate that $150,000 dollars, slightly more than triple the cost, will be needed to develop a one-county online system for all

[21] Case study all from: Maus, Dean. Ramsey County Probate Court Referee. Phone interview. 16 Apr 2009.

conservatorship-related filings, including petitions, orders and accountings. Assuming a fixed annual maintenance cost of $4,700 dollars, managing the system for 10 years would cost an additional $47,000 dollars. Our total estimate is $197,000 for establishing and running a system for 10 years. Since auditing is performed as-needed or at-will, we do not include this cost in our estimate. For this reason, our figure may be considered a lower bound. However, since an online system is scalable, the cost of expansion to other counties should not be as large.

Recommendation 2: Detailed Defense Report

Require court-appointed attorneys, prior to receiving compensation, to submit a written report detailing the defense of the proposed conservatee.

Current probate procedure does not sufficiently protect due process rights

California's Probate Code specifies that the system should "Protect the rights of persons who are placed under conservatorship."[22] The Probate Code ensures this by setting up a series of controls such as mandatory notices, court supervision over conservators and periodic reviews of the conservatorship. The protection of a proposed conservatee's rights depends heavily on the court and on the performance of the proposed conservatee's attorney. However, our research suggests these attorneys may not be fulfilling their function.

To better guarantee due process rights for conservatees, we focus on the role of court-appointed attorneys and recommend that they submit a standardized report detailing some key aspects of their defense of the proposed conservatee. According to our data, they are essential actors in the proceedings: 53 percent of conservatee lawyers were court-appointed. This report should be a requirement for compensation and should be filed when attorneys submit their fees for court approval. We believe that this is a cost-effective alternative that would reduce due process violations, by setting up short-term incentives that do not exist today.

Attorney's role is essential

The probate court "may appoint private legal counsel" if it determines that the appointment would be helpful to the resolution of the case or if it is necessary for the protection of the proposed conservatee's interests.[23] Also, the court can appoint legal counsel upon request by the proposed conservatee even if his or her capacity is challenged.

The Rules of Professional Conduct published by the State Bar of California outline the legal counsel's role during the conservatorship process. An attorney should communicate with the conservatee, keeping him or her reasonably informed about the procedure and its meaning, transmit the proposed conservatee's desires to the court, and, most importantly, abstain from advancing any interest adverse to his or her client.[24] These duties entail the organization of the client's legal defense, which includes reading the file, presenting objections when appropriate

[22] Prob. § 1800 (a)
[23] Prob. §§ 1470 (a), 1471.
[24] Rules of Professional Conduct, State Bar of California

and presenting arguments to the court.[25] In general, the attorney must work to ensure that the court only grants a conservatorship when it is the least restrictive means of caring for the conservatee and when the burden of proof has been met.[26] In this respect, the California probate code establishes that "the standard of proof for the appointment of a conservator pursuant to this section shall be clear and convincing evidence."[27] If these standards are upheld by attorneys during the proceedings, they will be advancing their client's interest and ensuring due process of law.

Proceedings must ensure due process rights

Procedural protections are essential to conservatorships[28], as conservatorship is one of the most severe restrictions allowed on one's liberty or property.[29] Due process of law as a legal and jurisprudential concept has its origins in the Magna Carta. The framers of the United States Constitution considered it a fundamental right of the people and included it in the Bill of Rights.[30] Specifically, the U.S. Constitution establishes due process rights in its Fifth and Fourteenth Amendments. The California state constitution does so in Article 1, Section 7 (a): "No person shall be deprived of life, liberty, or property, without due process of law."

Since its inclusion in the Bill of Rights, the concept of due process of law has been developed by Supreme Court decisions to include two kinds of rights: procedural due process (protections embedded in a judicial process for taking away life, liberty or property) and substantive due process (reasons for taking away life, liberty or property).[31] Our recommendation is concerned with procedural due process, since we find there is a compelling societal interest in protecting proposed conservatees who might be at risk. The content of procedural due process has been traditionally understood to be three-fold, consisting of the right to a fair and public trial conducted in a competent manner, the right to be present at the trial, and the right to be heard in one's own defense.[32] When these rights are observed in a procedure, we can conclude that the proposed conservatee has had meaningful access to justice.[33]

In the probate procedure, when there is consideration of whether a person lacks the capacity to run his or her own affairs, the role of a legal advisor is essential to prevent errors due to

[25] The rule 3-110 of professional Conduct for California establish that is an infraction to the duties of an attorney to "Fail to act competently" and that competence shall mean to apply: 1) diligence, 2) learning and skill and 3) mental, emotional and physical ability.

[26] Probate Code 1800.3

[27] Prob. § 1801 (e)

[28] Starr, June; Friedman, Lawrence "Statutory Reform and the Incompetent Elderly; 17 PoLAR 65 (1994) Political and Legal Anthropology Review. The authors conclude that the California solution for possible abuses, is to *increase procedural safeguards*.

[29] Bernstein, Paul. "Eroding Roulet: how the courts ignore a landmark in California civil commitment hearings." University of San Francisco Law Review 33.1 (Fall 1998): 59-83. The article analyzes a 1979 landmark decision by the California Supreme Court called the "*Conservatorship of Roulet.*" The Court recognized that commitment to a mental institution involves as much loss of liberty as imprisonment.

[30] Rankove, Jack "Original Meanings: Politics and ideas in the making of the Constitution" Chapter X, *Rights.* 1996

[31] Chemerinsky, Erwin "Constitutional law, Principles and Policies" Third Ed. Aspen Pub. 2006, p.545.

[32] *Mullhane v. Central Hanover bank & Trust Co. 339 U.S. 306 (1950), Goldberg v. Kelly, 397 U.S. 254 (1970), Richards v. Jefferson County, 517 U.S. 793 (1996). All cited in* Chemerinsky, Erwin , op.cit. p. 580

[33] York, Tricia M. Conservatorship Proceedings and Due Process: Protecting the Elderly in Tennessee; U. Mem. L. Rev. 538 (2005-2006) This article analyzes Legislation in Tennessee and propose changes in order to protect due process*:*

ignorance or confusion. This decreases the likelihood of due process violations. Even if the overwhelming majority of granted conservatorships are justified on the grounds of health, destitution or practical needs, the legal system must especially protect the rights of that small share of cases in which there may be reason to adopt a less-restrictive alternative. To achieve this goal it is essential that proposed conservatees' attorneys advance, without compromise, the conservatees' interests. However, our data tells a different story regarding the role of conservatees' attorneys.

Court-appointed attorneys do not fulfill their role

Our data collection suggests that attorneys are not fulfilling their roles in probate proceedings. First, we found the likelihood that a permanent conservatorship was granted increased when the proposed conservatee had an attorney. Without an attorney the likelihood was 73 percent; with an attorney it was 90 percent. In theory, the attorney should be fighting for a less-restrictive alternative to conservatorship whenever possible. Therefore, having an attorney should decrease, not increase, the likelihood of a conservatorship being granted.

Second, we found that the number of cases that went to trial is zero. In probate procedure, trials are the exception rather than the rule. However, even accounting for this factor and others, such as the costs of trials and the negative consequences of postponing key decisions, the probability of a case going to trial cannot be zero. These statistics provide evidence that attorneys do not properly represent proposed conservatees.

Incentives for court-appointed attorneys

Long term Incentives

Attorneys do not have strong procedural incentives to oppose the granting of conservatorships, especially if the court investigator's report concludes that the conservatorship is warranted. Attorneys have only short-term financial incentives to extend the procedures and request a trial, which would lead to increased fees. On the other hand, they face few long-term incentives to push for a trial and to expend the resources of the courts, since courts may be more willing to appoint attorneys whom they see as collaborators, or "team players." Courts may be less likely to appoint an attorney who fights too much. This model is in line with our statistics, which show that proposed conservatees with attorneys are more likely to be conserved.

Non- adversarial procedure

There is another explanation, related to the nature of probate procedure, that addresses an ongoing controversy among practitioners about the role of the attorney.[34] Some of the practitioners we interviewed stated that a conservatorship is an intervention process that is intended to benefit the conservatee. The paternalistic nature of this process means that attorneys representing a proposed conservatee should be collaborative rather than adversarial. The collaborative effort involves all actors: judges, court investigators and attorneys for both the conservator and the proposed conservatee. In contrast, the adversarial process is characterized by opposing views that clash before the court, with the outcome determined by the weight of the

[34] Dore, Margaret K. "*Ten reasons people get railroaded into guardianship*." American Journal of Family Law 21.4 (Wntr 2008): 148(5). "There is a misconception that guardianship is always a good thing, proposed wards agree to it not understanding that their rights will be restricted Guardianship is a severe loss of liberty"

evidence provided. Our interviews and our statistics suggest that the model for conservatorship probate procedure in California is more collaborative than adversarial[35].

Even if the proper nature of the probate procedure is non-adversarial, attorneys should not simply collaborate with the court. First and foremost, attorneys are advocates with the duty to protect the proposed conservatee's interests and to follow his or her instructions. Again, even if the overwhelming majority of conservatorships are warranted, the legal system must protect due process rights in cases where a less-restrictive alternative is available. A well-functioning procedure, in which attorneys articulate a meaningful defense "is necessary to measure the degree of threatened deprivation and then balance it against the state's interest in an expeditious proceeding."[36] Our data suggest this issue is not properly addressed by the status quo.

Mandate a written report

We propose that court-appointed attorneys file a written report detailing the desires of the proposed conservatee and the legal arguments made on his or her behalf, before receiving compensation for services. Court-appointed attorneys are already required to submit a letter to the court reporting the number of hours billed to his or her client for compensation. This mandatory written report should be submitted alongside billing hours. Implementing this recommendation is quite feasible as, according to the California Probate Code, it can be accomplished without additional legislation by the authority of the Judicial Council.[37] This recommendation would provide economic incentives as well as behavioral incentives. By signing a form that describes their efforts in their clients' defense, we expect to encourage attorneys to adopt an active role opposing the conservatorship when their clients want to do so, and to collect and present evidence to advance their case before the court.

Standardized form and minimum content

In order to minimize the amount of time devoted to the report and to reduce costs for the proposed conservatees, the report should be a standard form.

The report must at least answer the following questions:

- Did the conservatee oppose the conservatorship?
- If the conservatee was opposed, what legal steps were taken?
- Was the conservatee informed of his or her right to a jury trial?
- If the conservatee opposed conservatorship and a jury trial was not requested, why?

Cost-effective

We calculate the cost of this recommendation using an estimate of attorney's fees at $250 dollars per hour. We estimate that the report can be completed in 45 to 60 minutes. Thus, we estimate

[35] This fits our findings in the sense that the addition of another collaborator to the system actually *increases* the rate of conservatorships granted.

[36] Jones, Vreeland O. Probate Code Conservatorships: A Legislative Grant of New Procedural Protections [comments] 8 Pac. L. J. 73 (1977)

[37] CPC 1001. (a) The Judicial Council may provide by rule for the practice and procedure under this code. Unless disapproved by the Judicial Council, a court may provide by local rule for the practice and under this code. Judicial Council and local court rules shall be consistent with the applicable statutes. (b) The Judicial Council may prescribe the form of the applications, notices, orders and other documents required by this code. Any form prescribed by the Judicial Council is deemed to comply with this code.

the cost of this recommendation to each proposed conservatee is between $188 and $250 dollars. We do not anticipate the mandatory written report will create any additional costs to the courts.

Potential pitfalls

There is always a possibility that attorneys will deviate from our cost estimates by taking more time to complete the form and charging more than estimated. Our recommendation addresses this concern by proposing a standardized form intended to minimize time invested by attorneys. Also, common practice would determine a "standard time" devoted to filling out the form, creating a disincentive to charge more than the required time.

Another potential concern is that our recommendation is not directed at all attorneys, only those appointed by the court. However, it makes sense to focus attention on court-appointed attorneys because, according to our data, court-appointed attorneys constitute 53 percent of the overall legal counsel for proposed conservatees. Also, attorneys directly contracted by a proposed conservatee face a different set of incentives, and therefore, have fewer reasons to deviate from representing the real interest of conservatees.

Finally, we considered whether the mandatory report could violate client-attorney privilege. We believe this is not the case, since the form would contain broad legal reasoning rather than confidential information.[38]

Recommendation 3: Checklist of Powers

Require petitioners and courts to specify, using a checklist on petition and order forms, the powers requested and granted for conservatorships.

Insufficient emphasis on less-restrictive forms of conservatorship

California's probate code permits courts to limit the powers of conservators. For conservatorships of the person, "the court, in its discretion, may limit the powers and duties that the conservator would otherwise have."[39] For conservatorships of estate, the court may "insert in the order of appointment conditions not otherwise obligatory providing for the care and custody of the property of the ward or conservatee."[40]

However, our research suggests such limitations are the exception rather than the rule. Of 40 petitions resulting in permanent conservatorships, we found one case in which the public guardian was asked to make special arrangements for the conservatee's rehabilitation, two cases in which monthly allowances were granted to the conservatee, and one case in which the conservator was directed to consult with the conservatee's relatives regarding medical care. In the remaining 36 cases (90 percent), the courts did not limit the conservator's powers. Lacking access to confidential filings, we cannot judge whether the condition of the conservatee

[38] According to the California Rules of Professional Conduct, "Client-lawyer confidentiality applies to information relating to the representation, whatever its source, and encompasses matters communicated in confidence by the client."
[39] Prob. § 2351 (b)
[40] Prob. § 2402

warranted the granting of full powers to the conservator in these cases. At minimum, our data suggests that courts limit powers infrequently and in minor ways.

The Probate Code states that a conservatorship should only be established when it is "the least restrictive alternative needed for the protection of the conservatee."[41] This standard enjoys broad consensus because of the severe restrictions conservatorship places on a conservatee's civil liberties. Conservatorships are intended as a last resort. By extension, we reason that even when conservatorships are deemed appropriate, they should be made as non-restrictive as possible. In other words, powers should be withheld from the conservator unless it can be proved they are needed to care for the conservatee. To encourage this practice, we recommend that a checklist of powers be added to California's conservatorships forms.

Moving to a "positive" model

Currently, some notable powers, such as the right to marry and to consent to medical treatment, are retained by the conservatee unless the court explicitly grants them to the conservator. In general, however, California operates under a "negative" model, under which conservator powers are plenary and must be specifically withheld by the court. To encourage increased tailoring of powers, we recommend that California shift to a "positive" model under which conservator powers must be specifically granted. This could be accomplished by redesigning the petition and order forms for both temporary and permanent conservatorships to include a checklist of powers. Petitioners would be required to specify and briefly justify in writing why each power is needed; courts would approve or deny each power based on the evidence provided.

Several other states, such as Florida, Rhode Island and Minnesota, emphasize the use of limited conservatorships with specified powers.[42] For example, in Minnesota, petitioners for conservatorship of the person (termed "guardianship") must justify in writing why a limited conservatorship is not appropriate. If applying for limited powers, the petitioner chooses from a list including powers to change the conservatee's residence, to care for the conservatee's possessions, and to give consent for medical or professional care. A space is also left for the petitioner to request powers not included on the checklist as well as "all other powers, duties and responsibilities conferred on the [conservator] under applicable law." The judicial officer then authorizes or denies each power through an identical checklist on the order establishing conservatorship. Powers are similarly delineated for conservators of the estate. Copies of Minnesota's forms are provided in Appendix A.

Further research, legal consultation and interviews with practitioners are needed to generate a final checklist of powers appropriate for California. We offer the following preliminary recommendations based on the powers broadly available to conservators under current California law. Each bullet point represents a proposed box on the checklist.

Powers and Duties Pertaining to Conservatorships of the Person:

- Choice of conservatee's residence
- Provision of non-medical services such as home maintenance, hygiene and meals
- Control over conservatee's personal effects and clothing

[41] Prob. § 1800.3 (b)

[42] Limited Guardianship of the Person (As of statutory revisions July 2008).
AARP Public Policy Institute. <https://www.abanet.org/aging/legislativeupdates/pdfs/chart_limited.pdf>

- Supervision authority, including management of visits and recreation
- Medical care, including the choice of health care providers
- Dementia treatment
- Withholding of allowance[43]
- Other powers the court deems necessary for care of the conservatee

Powers and Duties Pertaining to Conservatorships of the Estate:

- Control over the conservatee's financial and bank accounts
- Management of the conservatee's bills, debts and outstanding claims
- Investment decisions on behalf of the conservatee
- Approval of contracts, including insurance policies
- Authority to apply for government benefits on behalf of the conservatee and to collect non-wage income
- Authority to represent the conservatee in court matters not related to the conservatorship
- Power to sell assets which are not real estate
- Other powers listed under Probate Code Section 2590, including the power to sell real estate, to borrow money and to operate the conservatee's businesses.
- Other powers the court deems necessary for conservation of the estate.

The checklist of powers could be reconciled with existing limitations and protections under California's probate code. For example, California has additional rules governing medical decision-making and determination of residence for conservatees. It should be noted that Minnesota also provides for further limitations in its probate code, in addition to using a checklist. For example, even if granted to a conservator, the power to make medical decisions for the conservatee does not extend to experimental treatments or to drastic measures like electroshock therapy. A checklist thus offers two levels of protection: not only must each power be specifically granted, but each may be further limited through language contained in the probate code. Such limitations will help ensure that each conservatorship is the least restrictive alternative possible.

Emphasizing less-restrictive alternatives

Conservatorships should not be established when less-restrictive alternatives are available. However, as one elder abuse activist has written, "the problem is, there just aren't many alternatives, and those that do exist are either flawed or aren't being used."[44] Some alternatives, such as durable powers of attorney and medical wills, require foresight on the part of the conservatee. Others, such as Probate Code section 3200, which permits the court to appoint a medical decision-maker for an incapacitated person, are narrowly defined and may not suffice to care for conservatees with multiple ongoing needs.

By encouraging limitations on conservator powers, the proposed checklist creates a menu of less restrictive alternatives for petitioners and courts to consider. For example, a judge may decide a conservator needs the power to provide home upkeep services for a conservatee, but does not

[43] We recommend the forms reflect a prior presumption that a monthly allowance should be granted unless the conservatee explicitly refuses it or the court finds that an allowance is impractical.
[44] Nerenberg, Lisa. "Feel-Good Laws or Real Reform?" Prevent Elder Abuse. 12 Feb. 2007. <http://preventelderabuse.blogspot.com/search/label/Conservatorship>

require other supervision authority. In such cases, the granting of unnecessary powers infringes on a conservatee's civil liberties. This infringement is of special concern when the conservator fails to perform his or her duties responsibly.

Shifting to a positive model may have particular value in regard to temporary conservatorships. A temporary conservatorship is meant to protect the conservatee pending hearing on a permanent conservatorship. In the meantime, the temporary conservator may require only limited authority, such as the power to move the conservatee into or out of a hospital, or to safeguard assets from theft. In such cases, a checklist would rightly encourage courts to sharply limit conservator powers. Moreover, it would counteract a possible tendency for courts to simply extend the powers of the temporary conservator when establishing permanent conservatorship, rather than reconsidering whether such powers are still needed.

A checklist may also improve soundness and consistency of judgment. In a study by researchers at Rice University[45], participants were asked to read fictional crime cases and decide whether the evidence suggested guilt or innocence. The study found greater consistency of verdicts among participants when the evidence was evaluated in blocks rather than holistically, suggesting that granularity improved judgment. Checklists have also been shown to improve performance standards in other institutional settings, notably hospitals. In Michigan, a project that implemented simple sterilization checklists in intensive care units is credited by some with having saved 175 million dollars and fifteen hundred lives over the course of eighteen months.[46]

Beyond the practices of other states, support for the use of checklists and for positive models is reflected in expert testimony to the Probate Conservatorship Task Force[47] and in the Task Force's 85 recommendations for reforming the conservatorship system.[48] The Uniform Probate Code, a statute adopted by some states that attempts to standardize probate law throughout the country, also encourages the tailoring of conservator powers: "The Court must specify the powers granted to the guardian and the limits on the incapacitated person's rights. The Act's emphasis on less restrictive alternatives, a high evidentiary standard and the use of limited guardianship is consistent with the Act's philosophy that a guardian should be appointed only when necessary, only for as long as necessary, and with only those powers as are necessary."[49]

Potential pitfalls and costs

Having explained the reasons for our recommendation, we now address potential pitfalls. Where appropriate, we provide cost estimates.

1. The checklist may degrade care for some conservatees.
2. The checklist creates extra work for courts and judicial officers.

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[45] Schum, David A. and Martin, Anne W. "Formal and Empirical Research on Cascaded Inference in Jurisprudence." Law and Society Review 17.1 (1981): 105-152.
[46] Gawande, Atul. "The Checklist." The New Yorker 10 Dec. 2007: 86.
[47] Naomi Karp of the AARP Public Policy Institute has suggested using a checklist on orders establishing temporary conservatorships. Testimony of Naomi Karp, AARP Public Policy Institute. Judicial Council of California Probate Conservatorship Task Force. 24 Mar. 2006
< www.courtinfo.ca.gov/jc/tflists/documents/karp.pdf>
[48] Specifically, the Task Force suggests that court investigators provide recommendations specifying which powers should be granted to conservators under Probate Code sections 2351 and 2591.
[49] Uniform Probate Code (Last Amended or Revised in 2008). National Conference Of Commissioners On Uniform State Laws. Comment to Section 5-311.

3. The checklist creates extra burden for conservators.
4. The checklist may raise expenses for conservatees.

The checklist may degrade care for some conservatees

Several practitioners we interviewed objected to the idea of specifying conservator powers. They argued that the court may not know at the time of the hearing what powers are needed for the care of the conservatee, and that limitations restrict flexibility of care.

While acknowledging this concern, we note again the need to safeguard the civil liberties of conservatees against unnecessary restrictions. We assert that petitioners should be able to provide convincing arguments and a clear picture of what authority they need. The exercise of completing the checklist may even assist some conservators in planning for the best care for the conservatee. We further note that our recommendation in no way prevents courts from granting broad powers to conservators when merited. Courts will still be guided in their decisions by court investigators' reports, which must be filed within two days of establishing a temporary conservatorship and again prior to establishing a permanent conservatorship.

The checklist creates extra work for courts and judicial officers

The checklist should not add significant burden for courts and judicial officers. The Judicial Council of California estimates that 80 percent of petitions for conservatorship concern simple, uncontested cases with small estates. For such cases, especially when the conservatee is largely incapacitated, the checklist will not impede the broad conferral of powers. When the conservatee has limited capacity or contests the conservatorship, the checklist may rightly trigger additional consideration by the judicial officer. However, for these non-simple cases, conservators would be expected to apply only for those powers needed, reducing the burden for courts.

We estimate the annual added costs to courts to be $273,208 dollars. This estimate is based on figures used by the Judicial Council of California to calculate costs imposed by the 2006 Omnibus Conservatorship and Guardianship Reform Act. Our estimate includes:

- Hearings that may be required if conservators return to request additional powers
- Time required to fill out checklists
- Salaries of court staff

Two assumptions in particular may limit the accuracy of our estimate. First, for simplicity, we assign equal costs for hearings pertaining to temporary and permanent conservatorships. This assumption may inflate our estimate, since temporary conservatorships are sometimes heard by staff attorneys rather in full court. Second, it is not clear that additional judges would be needed as a result of our recommendation. Thus, in keeping with the practice of Judicial Council, we have not included judge time. As such, our figure may be considered a lower-bound estimate. A detailed version can be found in Appendix A.

The checklist creates extra burden for conservators

Public guardians, non-professional conservators and professional fiduciaries play an important social role in safeguarding vulnerable elders. For this reason, we seek to minimize disincentives for responsible conservators to continue participating in the conservatorship system.

Our recommendation asks conservators to choose from a checklist of powers and to briefly write why each power is required for care of the conservatee. We estimate an additional 30-60 minutes would be needed per petition. Proposed conservators are already required to list supporting facts as to why conservatorship is needed to care for the conservatee. It should not require significantly more effort to explain which powers are needed and why.

Conservators may also need to return to court if they request additional powers. Assuming the checklists for person and estate include approximately eight powers each, we estimate three additional hearings may be needed over the lifetime of the conservatee in non-simple cases. Given the gravity of conservatorship, we believe this to be a reasonable added burden. Since conservators may bill conservatees, we quantify the estimated cost in the following section regarding added costs to conservatees.

The checklist may raise expenses for conservatees

This recommendation may raise expenses for conservatees, since extra court assessments, attorney fees and conservator fees are subtracted from the conservatee's estate. For simple cases, we estimate this cost to be $275 dollars per conservatee's lifetime. For more complex cases, we estimate the cost to range between $888 and $2,625 per conservatee's lifetime. We believe these costs are justified to protect conservatees' civil liberties. We have calculated these costs using an attorney's fee of $250/per hour. If conservators fill out the checklist themselves, the costs may be lower. A detailed version of our estimate can be found in Appendix A.

Implementation

The Probate Conservatorship Task Force has recommended that California require courts to specify the powers granted to temporary conservators. The Probate and Mental Health Advisory Committee (PMHAC) is studying the issue to determine if legislation is required or if such a recommendation can be implemented through rule of court or form changes. However, Probate Code section 1001 states "The Judicial Council may prescribe the form of the applications, notices, orders, and other documents required by [the Probate] code," suggesting a checklist may be implemented without new legislation.[50] Regardless, further input should be solicited from attorneys, conservators and judicial officers to finalize the delineation of powers on the checklist and to ensure the revised forms are easy to use.

Conclusion

Summary

As mentioned in our introduction, we sought to achieve three goals through our research and analysis:

- An examination of the effect, if any, of conservatorship reform laws passed in 2006 by the California Legislature.
- An empirical data-gathering effort designed to investigate trends within the conservatorship system.
- Policy recommendations for further improvements based on our findings.

[50] Prob. § 1001 (b)

We began by summarizing the principal provisions of the 2006 Omnibus Conservatorship and Guardianship Reform Act. These include licensing requirements for professional fiduciaries, expanded duties for court investigators and new educational requirements for many actors within the system. To date, the Act has not been funded, resulting in incomplete implementation. For this reason, the full potential impact of these reforms is difficult to assess.

To measure some of this impact, we chose 2007 as the time frame for our case file review. We used statistical software to randomly select sixty cases from all conservatorship petitions filed in San Francisco County in that year. Among other findings, we concluded that petitions for conservatorships were rarely denied, that proposed conservatees were actually more likely to be conserved when represented by an attorney, and that powers granted to conservators were rarely limited.

Our data collection, coupled with qualitative research, led us to focus on three distinct problems:

1. California lacks an adequate information system for oversight of conservatorships.
2. The current probate procedure does not sufficiently protect due process rights.
3. California's process places insufficient emphasis on less-restrictive forms of conservatorship.

We propose one recommendation for each of the above problems. To create an adequate information system, we recommend a web-based filing process for all conservatorship-related documents. To protect due process rights, we recommend that a mandatory defense report be filed by court-appointed attorneys for proposed conservatees. Finally, to emphasize less-restrictive forms of conservatorship, we recommend a checklist of powers be added to petition and order forms.

Evaluative criteria

In advancing our recommendations, we bear in mind the following evaluative criteria:

1. Maximize cost-effectiveness.
2. Minimize cost to conservatees.
3. Maximize probability that each conservatorship is the least-restrictive possible means of caring for the conservatee.
4. Maximize due legal process for proposed conservatees.
5. Minimize disincentives for responsible conservators.

The following table summarizes how each recommendation fares in terms of our evaluative criteria:

	Web Filing System	Attorney Report	Checklist of Powers
1. Max. cost-effectiveness	Good	Good	Fair to Good
2. Min. cost to conservatees	Good	Good	Good
3. Max. prob. of least restrictive means	Neutral	Good	Good
4. Max. due process for conservatees	Neutral	Good	Neutral
5. Min. disincentives for conservators	Good	Neutral	Fair

Criteria: Web-based filing system

We estimate the creation of a web-based system for all necessary conservatorship filings in one county would cost $197,000 dollars for 10 years. However, once created, the system would be relatively inexpensive to expand to other counties. The current lack of data on conservatorships is a serious impediment to oversight efforts and attempts to improve policy. We feel the benefits of increased information make this recommendation highly cost-effective. We rate it “Good” under Criterion 1.

This recommendation adds no direct costs for conservatees. Therefore, we rate it “Good” under Criterion 2.

This recommendation does not directly affect the likelihood that conservatorships will be the least restrictive means of caring for conservatees. It also does not directly improve due legal process. Therefore, we rate it “Neutral” for Criteria 3 and 4.

This recommendation is unlikely to create disincentives for responsible conservators, and may even streamline the petitioning process. We rate it “Good” under Criterion 5.

Criteria: attorney defense report

By affecting the incentives of court-appointed attorneys, this recommendation would do much to safeguard due process rights of conservatees at little added cost to courts. We rate it “Good” under Criterion 1.

Conservatees will bear the brunt of added attorney costs. We estimate these costs to be minimal, however. If a standard form is used, we estimate each report would require between 45 and 60 minutes, resulting in attorney costs between $188 and $250 dollars per conservatee. Therefore, we rate this recommendation “Good” under Criterion 2.

This recommendation would increase incentives for attorneys to seek the least restrictive alternative means of caring for conservatees. The recommendation is also expressly designed to maximize due process. We rate it “Good” under Criteria 3 and 4.

This recommendation should not directly create disincentives for conservators. We rate it “Neutral” under Criterion 5.

Criteria: checklist of powers

We estimate adding a checklist of powers to conservatorship forms would cost California's courts $273,208 per year. Given the importance of ensuring that conservatorship is always the least restrictive means of caring for the conservatee, we believe this cost to be highly reasonable. However, because it is a lower-bound estimate, we rate this recommendation only "Fair to Good" under Criterion 1.

We believe this recommendation will be highly effective in emphasizing less restrictive forms of conservatorships when appropriate. The lifetime cost to conservatees, ranging from $275 to $2,625 dollars, is reasonable given the added protections to civil liberties. For these reasons we rate this recommendation "Good" under Criteria 2 and 3.

This recommendation does not affect due process for conservatees. We rate it "Neutral" under Criterion 4.

This recommendation creates minor disincentives for conservators, since some may need to return to court to request additional powers. However, we estimate the number of additional trips to be low, at three over the course of the conservatee's lifetime for complex cases. Furthermore, in many cases the costs of the conservator's time may be billed to the conservatee. For these reasons, we rate this recommendation "Fair" under Criterion 5.

Conclusion

The Omnibus Conservatorship and Guardianship Reform Act of 2006 contains many worthwhile policy objectives. Unfortunately, the state's failure to fund the Act has hobbled implementation. Many practitioners we interviewed expressed the opinion that the courts had been strained by the new mandates in the absence of additional funding.

Regardless of the Act's implementation status, we feel it does not go far enough in protecting the rights of conservatees. Because of the current financial crisis, we have recommended solutions that do much to safeguard these rights at relatively low cost. An additional benefit is that our recommendations are unlikely to require additional legislation.

Conservatorship issues are only likely to grow in importance as California's population ages. The number of Californians aged over 85 is expected to increase by 72 percent from 2010 to 2030. Over the same period, the number of Californians over 65 is expected to increase by 88 percent.[51] Unfortunately, longevity does not always spell self-sufficiency. We encourage efforts to increase public awareness about the importance of old-age planning, including the use of advance care directives and estate planning. Such foresight may avert the need for conservatorship in some cases. However, a percentage of the steadily growing elderly population is still likely to require conservatorship, whether administered through friends and family, professional fiduciaries, or the public guardian.

Vice-President Hubert Humphrey once said "the moral test of government is how that government treats those who are in the dawn of life, the children; those who are in the twilight of life, the elderly; those who are in the shadows of life; the sick, the needy and the handicapped."

[51] U.S. Administration on Aging <http://www.aoa.gov/AoARoot/Aging_Statistics/future_growth/future_growth.aspx>

Almost by definition, proposed conservatees are among the most vulnerable members of our society. Continued attention must be paid to their rights and well-being. We submit our analysis in the hope of improving the welfare of conservatees and proposed conservatees throughout the state of California.

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Appendix A

Cost estimate for checklist of powers recommendation

Assumptions:[52]

- 5,500 permanent conservatorship petitions are filed each year
- 2,200 temporary conservatorship petitions are filed each year
- 87 percent of permanent conservatorships are granted
- 80% of conservatorship cases are simple, with no contested proceedings or small estates. 15% are moderately complex, and 5% are complex, involving multiple proceedings, complicated accountings and the hearing of evidence.
- Statewide average hourly rate, including benefits, is $62.31 for court reporters, $45.34 for courtroom clerks, and $41.40 for secretaries
- Average hourly rate for attorneys is $250

Cost to courts:

Cost of completing checklist for temporary and permanent conservatorship:

	Annual Temporary and Permanent Petitions	Additional Court Time Needed	Total Cost of Court Staff	Total Cost
Simple	6,160	0.05 hrs	$149.05/hr	$45,907
Moderately Complex	1,155	0.15 hrs	$149.05/hr	$25,823
Complex	385	0.25 hrs	$149.05/hr	$14,346

Out of the 7,700 permanent and temporary conservatorship petitions filed annually, we estimate that 6,160 (80%) are simple cases, 1,155 (15%) are moderately complex cases, and 385 (5%) are complex cases. The time required to fill out the checklist will vary depending on the complexity of the conservatorship case. We estimate it will take 3 minutes (0.5 hours) to fill out the checklist in simple cases, 9 minutes (0.15 hours) in moderately complex cases, and 15 minutes (0.25 hours) in complex cases. The sum of court staff salaries for court reporters, courtroom clerks, and secretaries is $149.05 per hour. It is not clear that additional judges would be needed as a result of our recommendation. Thus, in keeping with the practice of the Judicial Council, we have not included judge time. The court staff cost is likely lower for temporary conservatorship hearings; however, for simplicity, our estimate assumes that equal court staff resources are used for both temporary and permanent conservatorship hearings. Under these assumptions, the cost to the court of filling out the initial checklist of powers during both temporary and permanent conservatorship hearings is $86,076.

[52] Assumptions listed are taken from Judicial Council of California cost estimates except: percentage of permanent conservatorships granted (from our data collection) and cost of attorney (from anecdotal evidence).

Cost of additional hearings:

	Annual Permanent Petitions Granted	Additional Court Hearings	Court Time Per Hearing	Total Cost of Court Staff	Total Cost
Simple	3,828	0	N/A	$149.05/hr	$0
Moderately Complex	718	1.5	0.5 hrs	$149.05/hr	$80,263
Complex	239	3	1 hr	$149.05/hr	$106,869

Of the 5,500 annual petitions for permanent conservatorship, we estimate that 87 percent, or 4,785, will be granted. For simplicity, we assume that the percent of petitions granted is constant across cases of different complexities. We estimate that zero additional hearings will be needed for simple cases, 1.5 will be needed for moderately complex cases, and 3 will be needed for complex cases. For those additional hearings, we estimate that the hearings will last 30 minutes (0.5 hours) for moderately complex cases and one hour for complex cases. The total cost to the court for additional hearings is $187,132.

Total cost to court:

	Cost of initial checklist	Cost of additional hearings	Total Cost to Courts
Simple	$45,907	$0	$45,907
Moderately Complex	$25,823	$80,263	$106,086
Complex	$14,346	$106,869	$121,215
Total	$86,076	$187,132	$273,208

Cost to conservatees:

Completion of checklist on petitions for temporary and permanent conservatorships:

	Annual Temporary and Permanent Petitions	Time Needed to Fill out Checklist	Additional Court Time Needed	Cost of Attorney	Total Cost
Simple	6,160	0.5 hrs	0.05 hrs	$250/hr	$847,000
Moderately Complex	1,155	0.5 hrs	0.15 hrs	$250/hr	$187,688
Complex	385	0.5 hrs	0.25 hrs	$250/hr	$72,188

Implementing the checklist recommendation will increase costs to conservatees, since they will pay for additional attorney time. The initial temporary and permanent conservatorship court hearings will last longer and the attorney will spend additional time filling out the petitions for temporary and permanent conservatorships. We estimate that attorneys will charge an additional 33 minutes (0.55 hours) for simple cases, 39 minutes (0.65 hours) for moderately complex cases, and 45 minutes (0.75 hours) for complex cases. Given a $250 per hour wage rate, we estimate that the initial checklist will cost conservatees $1,106,876.

Cost of additional hearings:

	Annual Permanent Petitions Granted	Additional Court Hearings	Court Time Per Hearing	Time Needed to Prepare for Hearing	Total Attorney Time	Cost of Attorney	Total Cost
Simple	3,828	0	N/A	N/A	N/A	$250/hr	$0
Moderately Complex	718	1.5	0.5 hrs	1 hr	2.25 hrs	$250/hr	$403,875
Complex	239	3	1 hr	2 hrs	9 hrs	$250/hr	$537,750

As in the cost estimate for the courts, we assume that simple cases will require no additional hearings, moderately complex cases will require two, and complex cases will require three. We assume that attorney preparation time required for these hearings will vary by complexity of the case. We estimate that moderately complex cases will require an hour of attorney preparation and complex cases will require two hours. Additional court hearings are estimated to cost an additional $941,625 across all conservatees.

Total cost to conservatee:

	Cost of initial checklist	Cost of additional hearings	Total Cost to Conservatees	Average Cost to Conservatee*
Simple	$847,000	$0	$847,000	$275
Moderately Complex	$187,688	$403,875	$591,563	$888
Complex	$72,188	$537,750	$609,938	$2,625
Total	$1,106,876	$941,625	$2,048,501	$484

*Averages are calculated assuming both a temporary and permanent conservatorship were granted.