

SENATE COMMITTEE ON JUDICIARY

OVERSIGHT HEARING

*The Role of the Courts in Protecting California's Increasing Aging and  
Dependent Adult Population*

March 24, 2015, 1:30 p.m.  
State Capitol, Room 112

BACKGROUND PAPER

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**I. INTRODUCTION**

According to the United States Census Bureau, more than 38 million people reside in California, making it the nation's most populous state. One of every eight United States residents lives in California, and by 2050, California's population is projected to reach 50 million people. (Pub. Policy Inst. of Cal. <[http://www.ppic.org/main/publication\\_show.asp?i=259](http://www.ppic.org/main/publication_show.asp?i=259)> [as of Mar. 16, 2015].)

In California, at least four times more elderly and disabled residents receive in-home care than live in nursing facilities, and this rate is expected to rise as baby boomers age. Although this arrangement offers individuals a greater sense of comfort and autonomy than life in an institution, in-home caregivers are largely untrained and unsupervised, leaving these vulnerable individuals at risk of possible abuse, neglect, and poor treatment.

As California's population ages, more elders will be the subject of court cases in which the elders' medical and psychological issues will be a factor with the increased likelihood of living with chronic disease, Alzheimer's and other health problems associated with old age, such as age-related dementia. Some of these court cases will also involve elements of physical, mental, and financial abuse.

Similarly, dependent adults rely on the judicial system to oversee their care, as necessary. Dependent adults are people between the ages of 18 and 64 years and have physical or mental limitations that restrict their ability to carry out normal activities or to protect their rights, including, but not limited to, people who have physical or developmental disabilities, or whose physical or mental abilities have diminished because of age. These individuals may rely on others for a variety of basic needs such as physical health, food, clothing, and financial assistance. Dependent adults may have

a conservator appointed to assist them with all or a limited amount of these needs as the individual requires.

In 2003, Disability Rights California (DRC) prepared a report on the difficulties faced by dependent adults who are abused by their caretakers and the failings of the abuse reporting laws. The report found that people with developmental disabilities are:

- victimized at a much higher rate (4-10 times more frequently) than other citizens;
- frequently severely abused and for longer periods of time;
- most frequently victimized in their residences by people they know and who may be responsible for their services and support; and
- are inadequately educated and supported to recognize, resist, and seek alternatives to abusive situations. (Disability Rights California, *Abuse and Neglect of Adults with Developmental Disabilities: A Public Health Priority for the State of California* (Aug. 2003) Pub. 7019.01, p. vi.)

Additionally, that report found that the system of protections was inadequate for victims with developmental disabilities because it: (1) results in underreporting of abuse, neglect, and victimization; (2) fails to collect reliable, valid data concerning the scope of the problem; (3) is complex and confusing to victims and mandated reporters; and (4) is generally unsuccessful in prosecuting perpetrators, and many individuals within the abuse response and criminal justice systems lack training and expertise working with people with developmental disabilities. (*Id.* pp. vi-vii.) DRC notes that not much has changed since the publication of that report.

As the baby boomers approach an age when they may be incapable of taking care of themselves, the number of conservatorship cases will increase. Conservators have complete authority over the personal and financial affairs of conservatees, so it is essential that adequate protections be in place to prevent physical and financial abuse.

## **II. PRIOR CONSERVATORSHIP REFORMS**

In November 2005, a series of articles published in the Los Angeles Times highlighted numerous flaws in the conservatorship system in the State. The Senate and Assembly Judiciary Committees held public informational hearings following publication of those articles, to further focus on systemic problems and thus, fashion proposals for effective reforms. The complaints lodged by conservatees and their families, who felt victimized by unscrupulous conservators, and by advocates for the elderly and dependent adults centered on a couple of points, one of which is the inadequacy of court oversight on conservators and conservatorship activities.

The courts, on the other hand, raised issues about the lack of resources for court investigators, who are the actual field inspectors for probate conservatees. That lack of resources resulted in delays for even the required reports. Although it was generally

agreed upon by legal practitioners, advocates, county counsels, and the courts that the conservatorship system is in and of itself not deficient in terms of policy, process, procedures and safeguards, all agreed that certain problems may be ameliorated expeditiously only if more oversight is exercised by the courts through court investigators. Indeed, many of the complaints lodged by the conservatees and their families could potentially be avoided or detected early on by court investigators reporting on their cases more frequently and more completely. Thus, it became obvious, from those hearings, that lack of resources (i.e., court investigators and probate examiners) was a real problem that must be tackled.

Following the informational hearings, several bills were introduced in both the Senate and the Assembly, referred to collectively as the Omnibus Conservatorship and Guardianship Reform Act of 2006 (2006 Omnibus Act), to ameliorate the most troublesome aspects of the conservatorship system. AB 1363 (Jones, Chapter 493, Statutes of 2006) contained numerous substantive provisions that reform critical aspects of the courts' oversight of conservatorships. SB 1116 (Scott, Chapter 490, Statutes of 2006) imposed some requirements in connection with the sale of a conservatee's personal residence. SB 1550 (Figueroa, Chapter 491, Statutes of 2006) established the Professional Fiduciaries Act (PFA) for the licensing and oversight of professional fiduciaries (discussed in more detail below). SB 1716 (Bowen, Chapter 492, Statutes of 2006) expanded the scope of evaluations conducted by court investigators and established a protocol for ex parte communication with the court about a conservatorship.

### **III. PROFESSIONAL FIDUCIARY ACT**

A professional fiduciary is a person who may be appointed by a court to provide conservatorship services for an elder or dependent adult. In 2006, as part of the 2006 Omnibus Act, the Legislature enacted SB 1550 (Figueroa, Chapter 491, Statutes of 2006), which became operative on January 1, 2008, and established the PFA for the purpose of licensing and regulating individuals who act as conservators, guardians, trustees, personal representatives, and agents under a durable power of attorney for health care or for finances, for two or more persons unrelated to the professional fiduciary or to each other, as specified. SB 1550 also established the Professional Fiduciary Bureau (Bureau) in the Department of Consumer Affairs to oversee licensing and enactment of the PFA. Public agency fiduciaries (public guardians and public conservators) and those employed by banks and trust companies are exempt from this regulatory scheme. SB 1550 also prohibited a court from appointing a person as a private professional conservator, guardian, or trustee, or permitting a person to continue to serve as such, unless he or she is licensed as a professional fiduciary and has filed evidence of the license with the clerk of the court in each county where a petition for appointment has been filed.

The Bureau is self-funded from licensing fees. Prior to the passage of SB 1550, professional fiduciaries had to register with a statewide registry, were fingerprinted and background checked by the Department of Justice, and were not subject to minimum education requirements. At that time, there were approximately 1,500 registered professional fiduciaries. When SB 1550 went through the legislative process, it was estimated that 800 of those 1,500 professional fiduciaries would apply for licensing with the Bureau. However, that number was not realized within the first year of enactment, and within a few years, the Bureau chief had resigned and the Bureau staff was reduced from four people to one half-time person.

The Bureau's duty to enforce and administer the PFA originally was to be repealed on January 1, 2012, and has been extended three times. (*See* SB 294 (Negrete McCloud, Ch. 695, Stats. 2010; SB 543 (Steinberg, Ch. 448, Stats. 2011); AB 2741 (Bonilla, Ch. 344, Stats. 2014).) With each extension of the sunset, the Senate Committee on Business, Professions and Economic Development has held an oversight hearing on the Bureau and provided recommendations thereon. That Committee noted that in the first three years of its existence, the Bureau had two loans to repay, which potentially affected its workforce. However, the number of licensed professional fiduciaries has steadily grown, from 86 in 2008, to 822 as of January 31, 2015. The Bureau notes that 654 of those currently licensed are active. At this time, the Bureau's main staffing concern is the inadequate number of personnel to support its enforcement activities. The Bureau is currently budgeted for 2.7 positions, which includes one program analyst, one enforcement analyst, and a part time position for the Bureau Chief, which will be a full time position beginning on July 1, 2015. Additionally, the Bureau has a part-time enforcement analyst and a licensing analyst borrowed from the Bureau's call center.

Recent accomplishments noted by the Bureau that provide enhanced consumer education, elder and dependent adult abuse protection, and enforcement of the PFA include:

- implementing a Cite-and-Fine program;
- partnering with the Department of Consumer Affairs' Division of Investigations to investigate complaints of misconduct and pursue unlicensed activity;
- creating and implementing an expert consultant process enabling the Bureau to conduct enforcement investigations more quickly and effectively;
- improving education to consumers and licensees through updates to the Bureau's Web site, e-newsletter, brochures, and other promotional materials;
- posting formal disciplinary accusations and cite and fines against licensed professionals on the Bureau's Web site;
- creating a social media presence for gathering and disseminating consumer information via YouTube and Twitter; and
- participating in the creation of the Senior Gateway Web portal, which is the Department of Consumer Affairs' one-stop Web site that connects seniors, their

families, and caregivers with the information, services, and resources needed to find answers and solve problems.

In the past five years, the Bureau has received between 80 and 100 complaints per fiscal year. Of those complaints, the Office of the Attorney General, which is responsible for prosecuting criminal complaints against professional fiduciaries, has consistently investigated three complaints per year. Other complaints have resulted in approximately one revocation, few voluntary license surrenders, and between one and four license probations. The Bureau's Cite and Fine authority became effective on July 1, 2012, which has resulted in a total of 18 cites or fines. The comprehensive fiscal year complaints and enforcement actions statistics are provided below.

<b>FISCAL YEAR</b>	<b>2007/08</b>	<b>2008/09</b>	<b>2009/10</b>	<b>2010/11</b>	<b>2011/12</b>	<b>2012/13</b>	<b>2013/14</b>	<b>2014/15*</b>
<b>Total Number of Licensees</b>	86	346	447	536	630	708	780	825
<b>Complaints Filed</b>	3	66	47	82	104	98	103	103
<b>Investigations Initiated by Attorney General</b>	0	0	3	2	3	3	3	1
<b>License Revocations</b>	0	0	0	1	1	0	0	1
<b>Voluntary License Surrender</b>	0	0	0	0	0	1	0	0
<b>License Suspensions</b>	0	0	0	0	0	0	0	0
<b>Probationary Licenses</b>	0	0	0	2	0	4	1	1
<b>Probations with License Suspension</b>	0	0	0	0	0	0	0	0
<b>Cites and Fines</b>	N/A	N/A	N/A	N/A	0	11	5	2
<b>Petitions to Revoke Probation</b>	0	0	0	0	0	0	1	0

Source: Professional Fiduciaries Bureau

\*7/1/2014-2/28/2015

Additionally, the Bureau reports that it has conducted only one audit of professional fiduciary licensees. Last year, the Bureau conducted a continuing education audit of five percent of its licensees (approximately 33-35 licensees), and only two licensees were

unable to substantiate completion of the annual requirement of 15 hours of continuing education.

#### **IV. ELDER ABUSE AND DEPENDENT ADULT PROTECTIONS**

In 1982, the Legislature enacted AB 1805 (Felando, Ch. 1184, Stats. 1982), the Older Californians Act, which provided voluntary and mandatory abuse reporting provisions regarding the actual or suspected physical or other abuse for elders. In 1985, the Legislature repealed those provisions and combined elder and dependent adult abuse reporting provisions. (*See* AB 3988 (Papan, Ch. 1164, Stats. 1985).) In 1991, these protections were titled the Elder Abuse and Dependent Adult Civil Protection Act (EADACPA). (*See* SB 679 (Mello, Ch. 774, Stats. 1991).) In 1994, the Legislature recodified and recast elder and dependent adult abuse reporting requirements. (*See* SB 681 (Mello, Ch. 594, Stats. 1994).)

In 2005, the Department of Justice estimated that 1 in 20 elders is a victim of neglect, or physical, psychological, or financial abuse, but for every reported case of elder abuse, it is estimated that five cases are never reported. (Cal. Atty. Gen. Crime and Violence Prevention Center, Elder Abuse Facts (2006).) That same year, the Legislature enacted SB 1018 (Simitian, Chapter 140, Statutes of 2005), which established the Financial Elder Abuse Reporting Act of 2005 so that individuals in a position of witnessing elder or dependent adult financial abuse would make timely reports to law enforcement, adult protective services, or local ombudsmen in order to protect elderly and dependent adults from physical abuse and financial predators. Although not a new law (enacted in the mid-1980s), Penal Code Section 368, California's criminal elder abuse statute, is noteworthy because it recognizes that elders deserve special protection and consideration due to their vulnerability, and it carries penalty enhancements for crimes against elders.

Under EADACPA, a mandated reporter of suspected or actual physical abuse is any person who has assumed responsibility for care or custody of an elder or dependent adult, whether or not that person receives compensation, including, among others, administrators, supervisors, and any licensed staff of a public or private facility that provides care or services for elder or dependent adults. Further, all officials and employees of specified financial institutions are considered mandated reporters of elder or dependent adult financial abuse. EADACPA immunizes these mandated reporters from civil or criminal liability for making these reports but provides civil penalties for failing to report suspected physical or financial abuse and the failure to report resulted in death or great bodily injury.

Adult protective services agencies, law enforcement, and local Ombudsman's offices receive complaints of elder and dependent adult abuse and are responsible for cross-

reporting allegations of abuse to the appropriate law enforcement agencies, public agencies, and licensing entities having jurisdiction over these cases.

#### **A. Law Enforcement Agencies.**

Local law enforcement agencies are often called in to investigate reports of elder and dependent adult abuse. These investigations are coordinated with local adult protective agencies and may range from performing a status check on the individual to interviewing victims, suspects, and witnesses to elder or dependent adult abuse. During investigations, law enforcement may collect evidence of physical, sexual, or financial abuse. If necessary, law enforcement officers may take individuals into custody for a 72-hour evaluation if the individual poses a threat to themselves or others. If a law enforcement officer has reasonable cause to suspect a felony was perpetrated, the officer may arrest the suspect. A lawful arrest may be founded upon the officer's observations, including physical injury, property damage, signs of serious visible disruption, and/or statements by the victim or other witnesses.

In 2003, Disability Rights California (DRC) noted in a report that law enforcement officers only receive limited training in elder and dependent adult abuse that focuses primarily on individuals with psychiatric disabilities. (Disability Rights California, *Abuse and Neglect of Adults with Developmental Disabilities: A Public Health Priority for the State of California* (Aug. 2003) Pub. 7019.01, p. 37.) The report said that this results in investigations of variable quality with inconsistent outcomes, leading to inadequate protection of victims with developmental disabilities and low rates of prosecution of alleged perpetrators. (*Id.* p. 37.) DRC notes that "encounters with the criminal justice system can be baffling and intimidating to people with cognitive impairments. Investigators and prosecutors may see victims with developmental disabilities as poor historians [and] the veracity of victims is often questioned. This leads to inadequate investigation, including failure to consider the testimony of victims sufficiently." (*Id.*) Further, DRC asserts that investigators tend to rely upon information provided by facility staff and neglect to gather or sufficiently value necessary information from the victim or other witnesses with disabilities.

#### **B. Adult Protective Services.**

Each county has an adult protective services (APS) agency to help elder and dependent adults when they are unable to meet their own needs, or are victims of abuse, neglect, or exploitation. APS is a 24-hour service program designed to investigate all reported at-risk situations without regard to income involving individuals 65 years of age or older and dependent adults. Types of referrals received by APS include physical, sexual, or financial abuse, isolation, neglect, or self-neglect of elders or dependent adults who live in private residences, hotels, hospitals, or health clinics (when the abuser is not a staff member). Referrals are received through the Elder Abuse Hotline or from other entities.

Once an abuse report is filed, APS social workers make face-to-face contact with the alleged abused, neglected, or exploited person to investigate and assess the situation. An appropriate case plan is developed, working with outside agencies, such as the local Senior Center and the Alzheimer's Association, or the Department of Consumer Affairs, coordinating with Department of Mental Health, Public Guardian, law enforcement, or the District Attorney.

APS is also required under EADACPA to provide mandated reporter training, but counties are struggling to meet this mandate in light of increasing local workloads. APS relies on timely reports by mandated reporters to protect victims from further harm, and training of mandated reporters is critical. A recent report by the Senate Select Committee on Aging and Long Term Care reported that, in 2011, the fiscal and programmatic control of APS was realigned from the State to the county level, which has brought about increased inconsistencies among counties in training, investigation, and response. (Sen. Select Com. on Aging and Long Term Care, *A Shattered System: Reforming Long-Term Care in California; Envisioning and Implementing an IDEAL Long-Term Care System in California* (Jan. 5, 2015) <<http://sd25.senate.ca.gov/sites/sd25.senate.ca.gov/files/AgingLong%20TermCareReport.pdf>> [as of Mar. 10, 2015] p. 29.) This report recommended that the State increase training requirements and support for APS social workers, long-term care ombudsmen, and law enforcement entities that are responsible for investigating and responding to abuse, including how and when to report. (*Id.*)

The Department of Social Services (DSS) has regulatory and oversight responsibility for the APS program and is responsible for funding and supporting the statewide training of APS programs. However, only \$154,000 is allocated from the General Fund to DSS to support statewide training, and the amount has not increased for nine years, despite the fact that APS cases statewide have risen by 35 percent between 2001 and 2013. As of March 2014, APS reports responding to 125,000 abuse reports per year, serves nearly 25,000 cases, and employs 550 social workers statewide, which equates to less than \$350 per worker, per year, from the allotted General Fund budget. (County Welf. Directors Assn. of Cal., *Budget Fact Sheet, Adult Protective Services – Training Funds* (Mar. 4, 2014).)

Last year, APS and elder abuse stakeholders requested funding for a full-time DSS position to work with federal, state, and county agencies and other stakeholders to promote coordination, quality assurance, and best practices in APS. For this reason, the 2014-15 budget enacted last year provided for \$150,000 in General Funds to create one permanent, full-time position within the DSS to serve as a dedicated APS liaison to the federal government, provide leadership on statewide APS policy issues, and provide support to county APS programs. (Asm. Budget Com. Floor Report 2014-15 Budget (June 14, 2014) <<http://abgt.assembly.ca.gov/sites/abgt>.

assembly.ca.gov/files/Floor%20Report-June%2014%2C%202014%204%20PM%20Draft.pdf> [as of Mar. 10, 2015] p. 14.) However, the current funding level is insufficient to meet the needs of all 58 counties for training new social work staff, advanced training for seasoned workers, specialized training for APS supervisors, and new curricula to address emerging trends and legislative mandates. (County Welf. Directors Assn. of Cal., *Budget Fact Sheet, Adult Protective Services – Training Funds* (Mar. 4, 2014).)

### **C. Long-Term Care Ombudsman.**

The Long-Term Care Ombudsman program was authorized by the federal Older Americans Act and the companion Older Californians Act. As of March 2014, the Office of the State Long-Term Care Ombudsman has oversight responsibility for 35 local ombudsman programs throughout the State, with approximately 165 paid staff and 856 certified volunteers.

Ombudsmen receive, investigate, and attempt to resolve complaints in long-term care (LTC) and residential care facilities for the elderly (RCFE). These facilities include 1,271 skilled nursing and intermediate care facilities, and 7,571 residential care facilities for the elderly with a combined 296,002 LTC beds in California. (Long-Term Care Ombudsman Program Narrative (Mar. 2014).) Ombudsmen are responsible for assisting LTC residents, their friends, families, and the public in the following areas: (1) resolution of LTC quality-of-life and quality-of-care issues; (2) investigation of abuse occurring in LTC and community care facilities; (3) education about laws and regulations related to LTC; and (4) witnessing advance health care directives and certain property transfers for residents of skilled nursing facilities.

When investigating physical or financial abuse, the federal Older Americans Act requires the Long-Term Care Ombudsman to obtain the consent of the victim before revealing his or her identity to law enforcement or other investigative agencies. That requirement forced many local ombudsmen coordinators to drop serious abuse cases because they were unable to get consent from the abuse victims. The federal law was also at odds with EADACPA, which requires ombudsmen to refer all cases to law enforcement and licensing agencies. To address this problem, the Code of Federal Regulations was recently revised to authorize ombudsmen to take appropriate steps to investigate and work to resolve the abuse complaint in order to protect the health, safety, welfare and rights of the victim when the victim is unable to communicate his or her informed consent. (*See State Long-Term Care Ombudsman Programs; Final Rule, 45 C.F.R. pt. 1327 (Feb. 2015).*) Accordingly, ombudsmen are now able to identify the victim by name when cross-reporting to APS and law enforcement in order to prevent any additional harm to the victim.

The Ombudsman program relies on a combination of state and federal funds. In 2008, Governor Schwarzenegger vetoed \$3.8 million of the program’s budget (reducing the Ombudsman program budget by almost 50 percent). One year later, the Ombudsman budget was increased for one year but was still 27 percent below the 2007-2008 budget. (Sen. Ofc. of Oversight and Outcomes, *California’s Elder Abuse Investigators: Ombudsmen Shackled by Conflicting Laws and Duties* (Nov. 3, 2009) p. 6.) This report notes that after the budget cuts, ombudsmen started receiving fewer complaints purportedly because mandated reporters knew that ombudsmen were unable to visit facilities as frequently. (*Id.* p. 13.) The chart below shows the total complaints and reports received by the Long-Term Care Ombudsman program of suspected physical, sexual, and financial elder and dependent adult abuse in LTC facilities.

<b>TOTAL COMPLAINTS AND REPORTS OF SUSPECTED PHYSICAL, SEXUAL, AND FINANCIAL ELDER AND DEPENDENT ADULT ABUSE IN CALIFORNIA’S LONG-TERM CARE FACILITIES</b>						
<b>FISCAL YEAR</b>	<b>2008-09</b>	<b>2009-10</b>	<b>2010-11</b>	<b>2011-12</b>	<b>2012-13</b>	<b>2013-14</b>
<b>Total # of Complaints</b>	43,528	40,287	40,146	37,542	39,661	39,636
<b>Physical Abuse</b>	1,855	1,877	1,552	1,492	1,684	1,643
<b>Sexual Abuse</b>	566	560	532	530	544	564
<b>Resident-to-Resident Physical or Sexual Abuse</b>	1,487	1,870	1,660	1,592	1,832	2,420
<b>Financial Exploitation</b>	489	527	518	538	556	615
<b>Abuse/Neglect/Abandonment by Others</b>	354	422	348	424	419	309
<b>Financial Exploitation by Others</b>	831	863	920	859	910	865

Source: Annual Ombudsman Reports to the U.S. Administration on Aging

The total numbers of complaints received by ombudsmen are down from 43,528 in the 2008-09 fiscal year, to 39,636 in the 2013-14 fiscal year. However, resident-to-resident physical or sexual abuse and financial exploitation reports submitted to ombudsmen are on the rise. Additionally, abuse and neglect investigations have become a major focus of the Long-Term Care Ombudsman program, at the expense of the other functions envisioned by the federal Older Americans Act, such as making regular, unannounced visits to check on LTC and RCFE residents to root out potential problems before the residents are victimized. (Sen. Ofc. of Oversight and Outcomes, *California’s Elder Abuse Investigators: Ombudsmen Shackled by Conflicting Laws and Duties* (Nov. 3, 2009) p. 2.)

#### **D. Judicial Oversight of EADACPA Cases.**

Under EADACPA, an elder or dependent adult who has suffered physical abuse or neglect can file a civil action against his or her abuser. (Welf. & Inst. Code Sec. 15657.) A civil action can also be filed for elder or dependent adult financial abuse

(Welf. & Inst. Code Sec. 15657.5) or abduction (Welf. & Inst. Code Sec. 15657.05), and a protective order can be issued to protect the elder or dependent adult. (Welf. & Inst. Code Sec. 15657.03.)

Courts are reimbursed for processing elder and dependent adult abuse cases on a per filing basis, and a review of the reimbursement amounts is informative of each superior court's oversight of EADACPA cases. The top four county courts with the largest reimbursements for elder and dependent adult abuse filings are San Diego, Orange, Los Angeles, and Alameda as follows:

<b>Top Four Elder/Dependent Adult Trial Court Reimbursements</b>						
<b>FISCAL YEAR</b>	<b>2008-09</b>	<b>2009-10</b>	<b>2010-11</b>	<b>2011-12</b>	<b>2012-13</b>	<b>2013-14</b>
<b>San Diego County Superior Court</b>	\$72,150	\$63,044	\$59,104	\$46,306	\$46,935	\$51,870
<b>Orange County Superior Court</b>	\$49,210	\$50,724	\$39,973	\$42,568	\$46,295	\$47,492
<b>Los Angeles County Superior Court</b>	\$41,995	\$47,101	\$46,253	\$42,809	\$42,339	\$47,594
<b>Alameda County Superior Court</b>	\$33,300	\$35,686	\$33,386	\$29,424	\$29,881	\$28,392
<b>Total Reimbursement for All Courts</b>	\$338,920	\$368,340	\$56,340	\$332,465	\$332,340	\$332,340

Source: Judicial Council of California, Administrative Office of the Courts, Annual Trial Court Allocations and Reimbursements Reports

Since 2008, San Diego County Superior Court has consistently been the most reimbursed court for elder and dependent adult abuse filings, yet San Diego County, with 12.3 percent of its population aged 65 or older, does not have the highest percentage of adults aged 65 and older. As of 2013, San Francisco County had one of the highest elder populations at 14.2 percent. (See United States Census Bureau, State and County QuickFacts <<http://quickfacts.census.gov/qfd/states/06/06075.html>> [as of Mar. 11, 2015].) Yet, San Francisco County Court had significantly lower elder and dependent adult abuse filings reimbursement amounts as follows:

<b>Elder/Dependent Abuse filings reimbursements - San Francisco Superior Court</b>	
<b>Fiscal Year</b>	<b>Amount of Reimbursement</b>
2008-09	\$4,255
2009-10	\$8,509
2010-11	\$6,555
2011-12	\$6,391
2012-13	\$9,107
2013-14	\$3,314

Source: Judicial Council of California, Administrative Office of the Courts,  
Annual Trial Court Allocations and Reimbursements Reports

To provide efficient judicial review of elder and dependent adult protective orders, many county superior courts have separated elder and dependent adult abuse protective order requests from other protective order filings and established elder and dependent adult abuse hearing calendars, including Alameda (every Friday), San Francisco (every Wednesday at 1:30 p.m.), and Sonoma (every day between 8:30 a.m. and 10:00 a.m.).

## **V. PROBATE CONSERVATORSHIP TASK FORCE**

In February 2006, Chief Justice Ron George appointed a Probate Conservatorship Task Force to evaluate the court's role in the conservatorship system and to make recommendations for reform, if necessary. Composed of representatives from the courts, advocacy organizations, the Attorney General, legislative staff, practitioners in the conservatorship area, conservators, and other judicial officers, the Task Force held several public hearings and released its final report in October 2007. The report detailed 85 recommendations and included items that needed further study and review, additional funding, changes in legislation or rules of court, and preparation of training materials and guidelines for the courts.

On December 9, 2008, the Task Force reported the status of the implementation of its recommendations and noted that there had been many challenges in implementation of the statutes and recommendations. (*See* Judicial Council of Cal., Admin. Off. of Cts., Rep., Probate Conservatorship Task Force Recommendations to the Judicial Council: Status of Implementation (Dec. 9, 2008) <<http://www.courts.ca.gov/documents/120908item10.pdf>> [as of Mar. 13, 2015] pp. 1-2.) The recommended legislative changes were enacted by AB 1727 (Committee on Judiciary, Chapter 553, Statutes of 2007), which made several technical and clarifying changes to the 2006 Omnibus Act. SB 1047

(Committee on Business, Professions and Economic Development, Chapter 354, Statutes of 2007) amended the Professional Fiduciaries Act to extend the deadline from July 1, 2008, to January 1, 2009, for private professional fiduciaries to become licensed. AB 1340 (Jones, Chapter 293, Statutes of 2008) enacted additional clarifying provisions to the Omnibus Act and implemented several more Task Force recommendations. (*Id.* p. 2.)

The Task Force noted that the 2006 Omnibus Act provided for increased judicial oversight of conservatees, which the Task Force expected to result in increased workload for court staff. (*Id.* p. 2.) Although the 2007-2008 State Budget contained an appropriation of \$17.4 million to fund the additional court staff and resources required under the 2006 Omnibus Act, the funding was removed from the final budget leaving courts to meet the 2006 Omnibus Act mandates with existing resources. (*Id.* p. 3.)

The Task Force also reported that, of the 85 proposed recommendations contained in its 2007 Final Report, 22 recommendations had been implemented through the passage of legislation, adoption of new rules of court, and changes to Judicial Council forms. (*Id.*) An additional nine recommendations were partially implemented or were pending adoption of new rules of court or mandatory Judicial Council forms, and six recommendations had been implemented through training programs, conferences, broadcasts, Web sites, and guidebooks. (*Id.*) This leaves 28 recommendations in various states of review and analysis, and the Task Force noted that the most significant impediment to implementation of these remaining recommendations was lack of sufficient funding. (*Id.* p. 4.)

## **VI. CALIFORNIA'S CURRENT CONSERVATORSHIP SYSTEM**

In California, a conservatorship is a court action where a judge appoints a person (conservator) to care for another adult (conservatee). There are two basic types of conservatorships: probate conservatorships, which are the focus of this hearing, and Lanterman-Petris-Short (LPS) conservatorships, which are not the subject of this discussion. There are two types of probate conservatorships – general conservatorships for adults who cannot take care of themselves or their finances, and limited conservatorships for adults with developmental disabilities who cannot fully care for themselves or their finances but do not need the higher level of care or help that conservatees in general conservatorships require. The conservator who is appointed may be a family member, friend, professional fiduciary, or public guardian.

During the conservatorship process, the needs of the proposed conservatee are evaluated by the judge, a court investigator, and possibly a public guardian. After the conservatorship has been established, the court investigator and judge continue to monitor the conservatee and the actions of the conservator, who may be a public guardian or professional fiduciary, if not a relative or friend. Because the conservatee is

at the mercy of the conservator appointed to manage the conservatee's personal or financial matters, judicial oversight is necessary to make certain the conservatee is not being abused or defrauded.

#### **A. Court investigators.**

Court investigators are referred by the court to conduct investigations of and report to the court about the appropriateness of a conservatorship. During these investigations, the court investigators interview the proposed conservatee and notify him or her that a conservatorship petition has been filed on his or her behalf. The 2006 Omnibus Act improved judicial oversight of conservatorship cases by requiring court investigators to obtain more information during the conservatorship petition process, including requiring interviews of the proposed conservator, the petitioner, and the proposed conservatee's spouse and relatives. The 2006 Omnibus Act also required court investigators, after a conservatorship had been granted, to perform a 6-month interview with the conservatee, and file a report with the court regarding the appropriateness of the conservatorship and whether the conservator was acting in the best interests of the conservatee regarding the conservatee's placement, quality of care, including physical and mental treatment, and finances. An annual interview and report was required thereafter.

However, SB 78 (Committee on Budget and Fiscal Review, Chapter 10, Statutes of 2011) suspended all superior court duties imposed by the 2006 Omnibus Act until the Legislature makes an appropriation for this purpose. Accordingly, the additional court investigator duties are not currently required to be performed.

The California Association of Superior Court Investigators recently surveyed its members to find out what practices and procedures had been developed to increase conservatorship oversight. Seventeen courts responded to the survey, representing two small courts, four small to medium courts, five large to medium courts, and six large courts. Below is a summary of the best practices used by the courts.

- Temporary Conservatorships: Virtually every court now reviews requests for temporary conservatorships. Some courts review the petition, conduct background checks, and identify red flags. Other courts do a full investigation, although some courts only provide an oral report to the judge. In prioritizing workload, some courts waive investigations when a public guardian is the petitioner or only do an investigation if requested by the judge following a hearing.
- Follow-Up Investigations of Conservatees: Only three courts surveyed conduct six-month or annual investigations. One court does so with the assistance of student interns from a social work master's degree program. Several courts conduct more frequent investigations on a case-by-case basis, a practice they used before the 2006 Omnibus Act reforms.

- Workload: Every court surveyed is experiencing difficulty managing their existing workload with their current staffing levels. When faced with hard choices about limited resources, many courts have adjusted how investigations are conducted and how reports are completed.
- Inventory and Appraisals: Most of the courts surveyed have implemented a system to track conservator compliance with filing the Inventory and Appraisal and accountings. Most courts set a compliance hearing, but some use an internal tickler system. Most of the courts surveyed coordinate their review of the conservatorship with the hearing to review and approve an accounting. Several courts are in the process of developing a database or case management system to better coordinate their work.
- Interviews of Proposed Conservatee Family and Friends: About half of the courts surveyed make collateral contacts to relatives, friends, and neighbors. Many of the courts make collateral contacts on a case-by-case basis, a practice used before the 2006 Omnibus Act reforms.
- Professional Fiduciary Licensing Checks: With few exceptions, most court investigators contact or check the Professional Fiduciaries Bureau Web site when conducting an investigation involving a licensed fiduciary. The court investigator ensures the professional fiduciary's license is current and no adverse actions have been reported. A few courts have made complaints to the Bureau about professional fiduciaries.
- Appropriateness of Conservatorship: Every court investigator surveyed assesses whether a conservatorship is the least restrictive means of helping the proposed conservatee. The court investigators analysis is usually included in the report, particularly if it is not the least restrictive alternative. Most courts surveyed felt the conservatorships granted were necessary and appropriate.
- Case Backlog: Most of the courts surveyed have a backlog of cases due for mandated reviews. The backlogs ranged from being several years to a few months past due.
- Staffing needs: The lack of adequate staffing and competing priorities were the most frequent challenges cited by the surveyed courts. In addition to conservatorship investigations, court investigators also conduct guardianship investigations for children and some provide mediation to families for custody and visitation. Most court investigators prioritize cases on calendar for a hearing. A large number of cases only involve a conservatorship of the person (rather than of the estate or both the person and the estate), so most cases are not on calendar. Several court investigators surveyed reported having a close working relationship with Adult Protective Services, the Long-Term Care Ombudsman, and the local regional centers. If these agencies receive a complaint involving a conservatee, they contact the court investigator, which triggers a review of the conservatorship. (Cal. Assn. of Superior Ct. Investigators, Board of Directors, Letter to Sen. Judiciary Committee (Mar. 12, 2015).)

## **B. Public Conservators.**

If a person resides in California and requires a conservator but there is no one else who is qualified and willing to act and whose appointment as conservator would be in the best interest of the person, then a public guardian in the county where the person resides can apply to be appointed as the conservator.

The duties of a conservator of the person include, but are not limited to, arranging for the care and protection of the conservatee, arranging for and locating appropriate living arrangements for the conservatee, making medical and mental health decisions, arranging for the basic needs of food, clothing, transportation, recreation, and ensuring the overall well-being of the conservatee. A conservator of the estate must manage the conservatee's finances, locate and take control of all known assets, sell personal and real property, collect the conservatee's income and apply for all eligible public assistance, medical insurance, and other entitlements. The conservator of the estate must also develop a budget to ensure the conservatee lives within his or her means, pay the conservatee's bills, invest the conservatee's money, and protect the conservatee's assets. The conservator is also required to account to the court for all actions taken on behalf of the conservatee.

The 2006 Omnibus Act required the public guardian to apply as a conservator of an individual if there was an imminent threat to the individual's health or safety or the person's estate, and required the public guardian to begin an investigation within two days of receiving a referral for conservatorship. However, as with court investigators, these duties are on hold pending an appropriation for cost.

Although there are no current statewide statistics on the number of conservatorships managed by public guardians, the County of Santa Barbara reports that there are only four public guardians to handle 190 conservatorships. Since a conservatorship is established where the conservatee resides but the conservatee may be relocated to another county with services necessary for the care of the conservatee, Santa Barbara County public guardians report that 80 percent of their conservatees are out of county and reside all the way north from Napa to Costa Mesa in the south. The County of Santa Barbara is small in comparison to the County of Los Angeles, which is estimated to manage over 4,000 conservatees. Further, since court investigators have seen a dramatic reduction in staffing, public guardians are being ordered to perform investigations that would otherwise be performed by the court investigators.

There is no uniform structure to California counties' Offices of the Public Guardian, Public Conservator, and Public Administrator. They, as one division or separately, fall under different departments, such as Health and Human services, Mental Health, Treasurer/Tax collector, Sheriff and District Attorney or are stand-alone

offices. Every county has different caseloads depending on staffing, availability of support staff, county department size, and program structure.

With respect to state reimbursement for county public guardians, the Property Tax Relief Act of 1972 (SB 90, Dills, Chapter 1406, Statutes of 1972) established a reimbursement system for local agencies and school districts to recover the costs of new programs or increased levels of service mandated by state government. The Commission on State Mandates reviews claims made by local agencies and school districts to determine whether the submitted costs are reimbursable. Notably, last year, the County of Los Angeles submitted a SB 90 test claim to determine whether the 2006 Omnibus Act requirements were reimbursable, but the test claim was denied by the Commission because Government Code Section 24730 authorizes, but does not require, a local public guardian office in each county.

Most California counties fund their local public guardian/conservator programs through their General Fund, without the support of state or federal funding. These programs are intended to provide care and protection to the most vulnerable adults who fall below the federal poverty limit, have no community support, are estranged from or have no family, or have been victims of abuse.

### **C. Professional Fiduciaries.**

As of February 28, 2015, there are 825 licensed professional fiduciaries in California. Like public guardians, professional fiduciaries are court-appointed to act as conservators to manage a conservatee's person, estate, or both. A person appointed as a conservator will be considered a professional fiduciary if they act as conservator for two or more individuals at the same time who are not related to the professional fiduciary or to each other. While a public guardian may be appointed as a conservator of an individual with limited means and no family or friends to assume the role of conservator, a professional fiduciary is typically appointed when there is no one else willing or able to serve as the conservator and the proposed conservatee's estate is sufficient to pay for the conservatorship services provided by the professional fiduciary.

Professional fiduciaries provide critical services to seniors, disabled persons, and children. They manage matters for clients, including, but not limited to, daily care, housing, and medical needs, and also offer financial management services ranging from basic bill paying to estate and investment management. A professional fiduciary may be asked by a family member, friend, or the court to act as a conservator.

Since a professional fiduciary may have no established relationship with a proposed conservatee or his or her family, and after being appointed by the court there may be

no one other than the professional fiduciary to monitor the conservatee’s care on a daily basis, the licensing and oversight of professional fiduciaries by the Professional Fiduciary Bureau (Bureau) is critical. Professional fiduciaries are required to provide an annual statement to the Bureau disclosing, among other things, whether or not the professional fiduciary has been removed as a conservator, guardian, trustee, or personal representative for cause, has been found by a court to have breached a fiduciary duty, and any ownership or beneficial interest in any businesses or other entities that have received payments from a client (such as a conservatee) of the professional fiduciary. Courts review professional fiduciary licensing information through either the Bureau’s Web site or by contacting the Bureau prior to appointment of the professional fiduciary as a conservator to make sure the professional fiduciary is currently licensed with no disciplinary actions.

**D. Judicial Oversight of Conservatorship Cases.**

In 2005, the Judicial Council of California estimated that 5,500 new probate conservatorship cases were filed each year and reported an active caseload of approximately 33,000 cases. At that time, some 500 conservators oversaw more than \$1.5 billion in assets. Although these statistics were available in 2005 when the conservatorship reforms were analyzed, there are no current statewide statistics, by county, available because there is no statewide database. However, the San Diego County Superior Court provided the following statistics on conservatorship cases filed in that court between 2011 and 2015 and the current number of active cases:

<b>Conservatorship Filings – San Diego Superior Court</b>		
<b>Conservatorship Case Category</b>	<b>Filed 1/1/2011 – 1/1/2015</b>	<b>Total Active Cases</b>
Person	178	557
Person and Estate	444	861
Estate	81	214
Limited Person	733	2135
Limited Person and Estate	25	133
Total	1461	3900

Source: San Diego County Superior Court

Santa Barbara County Superior Court reports that the probate conservatorship process has not been streamlined and, due to funding issues, most counties experience conservatorship hearing delays of two to three months from the date of filing. With delays in hearing dates comes the concern for the proposed

conservatee's due process protections. California authorizes the establishment of a temporary conservatorship over the proposed conservatee pending an evidentiary showing that the proposed conservatee needs a permanent conservatorship. While a temporary conservatorship will protect an elder or dependent adult at immediate risk of physical or financial abuse, a proposed conservatee must be afforded due process protections since a conservatorship is one of the most severe restrictions allowed on one's liberty or property.

California courts will only grant a conservatorship when it is the least restrictive means of caring for the proposed conservatee and when the burden of proof (clear and convincing) has been met. The court may appoint an attorney to represent the proposed conservatee during the conservatorship petition process to ensure that the proposed conservatee's interests are protected. In theory, the court-appointed counsel should be arguing on the proposed conservatee's behalf for a less-restrictive alternative to conservatorship whenever possible.

However, a 2009 report showed that the likelihood of a conservatorship being established for a proposed conservatee with a court-appointed attorney was 90 percent, as opposed to the 73 percent when the proposed conservatee did not have a court-appointed attorney. (Anders, Milbury, Lamartine, Shen, *Conservatorship Reform in California: Three cost-effective recommendations*, Goldman School of Public Policy, Univ. of Cal. at Berkeley (May 2009) p. 11.) That report suggests that court-appointed attorneys for proposed conservatees may be too collaborative with the court, court investigator, and proposed conservators. Although all parties agree that a probate conservatorship is an intervention process intended to benefit the proposed conservatee, the report suggested that court-appointed attorneys are not adversarial enough to protect the best interests of the proposed conservatee from completely losing his or her right to make his or her own decisions. (*Id.* pp. 11-12.) That report recommended that, in order to determine the effectiveness of the court-appointed attorney, the attorney should be required to file a written report detailing the desires of the proposed conservatee and the legal arguments made on his or her behalf before the court-appointed attorney can receive compensation for services rendered to the proposed conservatee. (*Id.* p. 12.)

Another recommendation of that report sought to address whether the powers of conservators are limited enough to serve the needs of the conservatee. The report suggested including a checklist of powers on conservatorship forms so that each power given to the conservator is specifically granted by the court, and conservators do not overly assert general powers over the conservatee and make certain that the conservatorship is the least restrictive means of helping the conservatee. (*Id.* p. 14.) The report states that the contemplation of the list of powers would be particularly valuable for temporary conservatorships. 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. (*Id.* p. 16.) In these cases, the checklist would highlight to the court the assistance that the proposed conservatee actually needs, rather than authorizing broad powers be given to the temporary conservator.

Although courts already have the ability to specify the conservator's powers, the consideration of enumerated powers on conservatorship forms may necessitate a discussion of providing limited conservatorships for elders. Currently, a limited conservatorship is only available for dependent adults. The Judicial Council is currently considering this issue.

Additionally, conservatorships are becoming common across the United States because the proportion of elderly adults in the population is increasing. People often move from one state to another, own property or conduct transactions in more than one state, and spend time in multiple locations. Due to these developments, conservatorship jurisdictional disputes between states are increasing and raise issues relating to the transfer of a conservatorship from one state to another and requests for recognition in one state of a conservatorship established in another state. To address these issues, SB 940 (Jackson, Chapter 553, Statutes of 2014), established the California Conservatorship Jurisdiction Act, which is effective on January 1, 2016, and provides jurisdictional and procedural guidance on conservatorship proceedings between California and other states.

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