

CONSERVATORSHIPS: A CASE FOR ZEALOUS ADVOCACY



2022 Santa Clara County
Civil Grand Jury

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GLOSSARY AND ABBREVIATIONS

Bench Trial	A trial before a judge without a jury.
Britney Spears Legislation	Considered by many to be the world's most famous conservatee, Britney Spears highlighted the deep flaws in California's probate conservatorship system and shed a light on the importance of addressing the misuse of probate conservatorships. The Spears case resulted in Assembly Bill (AB) 1663, The Probate Conservatorship Reform and Supported Decision-Making Act, which goes into effect January 1, 2023.
Conservator of the Person	A person appointed to make decisions about personal matters of the conservatee such as housing, nutrition, medical needs, and social interactions.
Conservator of the Estate	A person appointed to handle the financial affairs of the conservatee.
Conservatorship vs. Guardianship	In California, a conservatorship is an arrangement whereby one adult is appointed to manage the affairs of another adult who cannot care for themselves and/or their finances. A guardianship refers to an adult overseeing the care and support of a minor.

Judicial Council of California

The policymaking body of the California courts, the largest court system in the nation. Under the leadership of the Chief Justice and in accordance with the California Constitution, the council is responsible for ensuring the consistent, independent, impartial, and accessible administration of justice.

Lanterman-Petris-Short (LPS) Conservatorship

The Lanterman-Petris-Short (LPS) Act provides guidelines for handling involuntary civil commitment of individuals to mental health institutions in the State of California. The act set the precedent for modern mental health commitment procedures in the United States. An LPS conservatorship is authorized under this act and these conservatorships expire after a year unless a new petition is filed before the court.

Limited Conservatorship

A type of probate conservatorship in which a judge gives an individual, called a limited conservator, certain powers to care for another adult, called a limited conservatee, who has a developmental disability.

Post-Adjudication

For purposes of this report, the Public Defender Office refers to post-adjudication proceedings in conservatorship cases as events that occur after the appointment of a conservator.

Probate Conservatorship

A court proceeding in which a judge appoints an individual (a conservator) to care for another adult who cannot manage their personal care or finances (a conservatee) due to cognitive impairment. The probate court can appoint a conservator of the person, estate, or both, depending on the needs of the conservatee.

Standing Order

A forward-looking order that applies to all cases pending before a court until rescinded or changed.

SUMMARY

Conservatorships have come into the news recently due to multiple documentaries about the conservatorship of Britney Spears and the acclaimed film “I Care a Lot,” which is about a person who defrauds individuals she is entrusted to care for under a conservatorship.

A conservatorship is a legal mechanism in which a court appoints a conservator or “protector” to manage the finances and/or personal affairs of an individual, known as the conservatee, who is cognitively impaired or has mental or physical limitations. Conservatees constitute a very vulnerable part of the Santa Clara County (County) community. They are individuals who are unable to care for themselves and need help due to age-related conditions like dementia or Alzheimer’s, a brain injury or disease, or an intellectual disability. Once a conservator is appointed, the conservatee loses control of the way in which they live their lives and/or control of their assets. Conservatorships are sometimes called a “civil death” because they may entail the loss of almost all civil rights.

The 2022 Santa Clara County Civil Grand Jury (Civil Grand Jury) received a public complaint from the Spectrum Institute, a nonprofit organization that focuses on research and education involving adults with mental or developmental disabilities. The Civil Grand Jury was informed that this public complaint was sent to civil grand juries in all 58 counties in California and requested an investigation of indigent conservatorship legal defense services. The complaint was sparked by the Spectrum Institute’s 2021 report, *Public Funding of Legal Services in Conservatorship Proceedings*. The study examined several counties, but not Santa Clara County, and found that there were excessive caseloads in some offices, caused by underfunding and understaffing. Further, the report pointed to a lack of performance standards, accountability, and quality assurance monitoring in many counties to guide attorneys as they provide legal defense services to clients in these proceedings.

In 2021, the California Legislature passed probate conservatorship reforms. The reforms clarified that the role of the conservatee’s or proposed conservatee’s counsel is that of a “zealous advocate” to represent the wishes of their client. At any given time, the County has several thousand individuals who are subject to conservatorship. Conservatees may have assets by which they are able to hire their own attorney to represent them in court to help assure that decisions regarding their freedom or assets are determined fairly. Many individuals, however, lack these resources and rely on the Santa Clara County Office of the Public Defender (PDO) for representation.

The Civil Grand Jury investigated the legal services that the PDO provides to conservatees in probate conservatorships. In the past three years, the PDO has been appointed to represent proposed conservatees in approximately 300 new petitions per year. In addition, the PDO is the attorney of record for approximately 3000 probate conservatees, the majority of whom are not

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actively monitored post-adjudication. Some of those cases may date back a decade, and it is possible that the client is deceased. The PDO has only one attorney dedicated to handle probate conservatorships. That attorney was mentored by his predecessor and learned on the job. Through its investigation, the Civil Grand Jury learned there are no case management standards, established performance standards, or established training or monitoring programs.

The Civil Grand Jury learned that the State of Nevada is leading the way in probate conservatorship reform. Because of the issues and challenges related to conservatee representation, the Civil Grand Jury reviewed the Nevada model, which was implemented in Clark County, to look at how they achieved success. The Nevada model embraces zealous advocacy of the client's position, active and continuous case management, comprehensive training, established performance standards, and tracking. In that model, each attorney has a cap of 180 clients and each conservatee is visited every six months after adjudication. In 2021, 43 percent of Clark County's total conservatorship cases were terminated, which shows that the attorneys are actively monitoring their cases for death, resolution, and opportunities for termination of the conservatorship.

Whereas the movies mentioned above focused on conservatorships of individuals who are seemingly taken advantage of because of their financial assets, this report focuses on the legal defense of people in the County who are not necessarily wealthy and would normally depend on the assistance of a public defender. As the Baby Boomer Generation ages, more and more people will be entering conservatorships. Additionally, most conservatorships, once established, only terminate if the conservatee can demonstrate an ability to manage their own affairs or, more likely when they die. It is therefore vital that the PDO be prepared by having the processes, procedures, and resources in place to fulfill their important role of zealous advocate in this process.

BACKGROUND

What is a Probate Conservatorship?

When someone is no longer able to handle their own financial and/or personal affairs, the court can appoint an individual (the conservator) to act on behalf of the incapacitated person (the conservatee). The judicial proceeding for this appointment is called a probate conservatorship.

Another type of conservatorship is called an LPS conservatorship, which is a conservatorship established under the Lanterman-Petris-Short Act and is governed by the California Welfare and Institutions Code. LPS Conservatorships automatically expire yearly unless a new petition is filed with the court.

For this report, the Civil Grand Jury focused primarily on probate conservatorships, because probate conservatorships can last a lifetime and there is no yearly review requirement with the court. These conservatees often have no voice, and they are extremely vulnerable to manipulation, neglect, and abuse. (For a side-by-side comparison of probate and LPS conservatorships see [Appendix A.](#))

Conservator of the Person and Conservator of the Estate

The California Probate Code provides for two types of probate conservators (see California Probate Code section 1801). The first is a Conservator of the Person, which may be appointed for a person who is unable to provide properly for their personal needs such as health, food, clothing, or shelter. In this instance, the Conservator of the Person can make what are typically very personal decisions like where the conservatee lives, what they eat, their medical care, and who they are allowed to see. The Conservator of the Person may not involuntarily commit the conservatee to a mental institution in a probate conservatorship.

The second type of probate conservator is a Conservator of the Estate, which may be appointed for a person who is substantially unable to manage their own financial resources or resist fraud or undue influence. In this instance, a Conservator of the Estate makes financial decisions for the conservatee like paying bills, handling investments, dispersing property, and collecting income.

A conservatorship may be granted over both the person and the estate but must be petitioned for separately.

General and Limited Probate Conservatorships

Probate conservatorships can be identified as either general or limited conservatorships.

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A general conservatorship (California Probate Code §1800, et seq.) has comprehensive powers and is most often used in the case of an elderly person whose mental or physical capacity has been severely compromised due to aging or dementia, or in the case of a younger adult who has been seriously impaired due to catastrophic illness or accident, rendering them incapable of caring for themselves or making them subject to undue influence. In a general conservatorship, the conservator may be the Conservator of the Person and/or Estate.

The powers of a limited conservator are different from the powers of a general conservator. Limited conservatorships are “for a developmentally disabled adult” such as individuals with intellectual disability, cerebral palsy, epilepsy, or autism whose disability (1) began before their 18th birthday; (2) continues, or can be expected to continue, indefinitely; and (3) is impactful enough to constitute a substantial handicap to the individual (California Probate Code § 1420). Because developmentally disabled people’s abilities can vary greatly, the court can limit the conservators’ powers by only giving them power over things the conservatee cannot manage without assistance. There are seven powers that a court can give to a limited conservator, pursuant to California Probate Code section 2351.5:

1. Fix the conservatee’s residence or dwelling
2. Access the conservatee’s confidential records or paper
3. Consent or withhold consent to marriage on behalf of the conservatee
4. Enter into contracts on behalf of the conservatee
5. Give or withhold medical consent on behalf of the conservatee
6. Select the conservatee’s social and sexual contacts and relationships
7. Make decisions to educate the conservatee

The limited conservator must petition for each specific power, and the appropriateness of each power requested must be assessed by the court and is dependent on whether the proposed conservator is seeking a conservatorship over the proposed limited conservatee’s person, estate, or both. seven powers that a court can give to a limited conservator: and therefore, have specific goals and objectives for the limited conservatee. A limited conservator’s duty includes helping the limited conservatee develop maximum self-reliance and independence by providing services resulting in more independent, productive, and normal lives (California Probate Code § 1801(d)).

Before a petition for limited conservatorship is heard, the proposed limited conservatee must be assessed by a regional center. The function of regional centers is to provide diagnosis, program planning, counseling, case management, referrals, and residential placement to developmentally disabled persons (California Welfare & Institutions Code §§ 4642, 4643, 4646, 4648).

The Roles in a Probate Conservatorship

There are various agencies involved in probate conservatorship, all of which have different roles and limitations worth pointing out.

Court: Conservatorship cases are assigned to a specialized department of the superior court called the probate court. The court has the legal authority to make decisions about the conservatorship including resolving disputes that may arise between the conservator and other interested persons, including the conservatee. The court's role is that of impartial decisionmaker with a primary responsibility of protecting the conservatee.

Court Investigator: Court investigators are employed by the superior court to conduct investigations of conservatorship matters, by advising prospective and established conservatees of their rights, gathering, assessing, and evaluating information regarding living arrangements, care plans, and other factors which impact the personal health and safety of incapacitated adults; and prepares written investigative reports with recommendations to the court. The Civil Grand Jury learned that currently court investigators are only overseeing estate conservatorships in the County. They review the status of these conservatorships one year after adjudication and every two years thereafter. At the specified intervals, the investigator receives an accounting from the conservator, then reports to the court in a compliance hearing.

Conservatees without estates, however, do not have compliance hearings with the court. In the past, court investigators had enough funding and resources to visit "non-hearing" conservatees on a regularly scheduled basis, but the Civil Grand Jury has learned that this stopped approximately ten years ago.

Conservator: Once the court has established a probate conservatorship, a conservator is appointed. Subject to certain limitations, the conservatee is entitled to nominate a conservator, which is given preference; however, the ultimate decision rests with the court, which is guided by the best interests of the proposed conservatee. The conservator can be spouse, parent, child, sibling, or an appropriate third party. If there is no person or entity willing or appropriate to act, the court may appoint the Santa Clara County Public Administrator / Guardian / Conservator (PAGC). Importantly, the role of the conservator is to act in the "best interests" of the conservatee, which is not necessarily always to do what the conservatee wants. The Judicial Council of California has published a handbook that details the role and responsibilities of the conservator. Sometimes, the conservator also has a lawyer to represent the interests of the conservator.

The Unique Role of the Conservatee’s Legal Advisor

When a probate conservatorship is initiated, the court will step in and appoint a public defender to protect the rights of the proposed conservatee and ensure due process (California Probate Code § 1471(a)). The appointment occurs when any of the following happens:

- (1) A proceeding to establish or transfer a conservatorship or to appoint a proposed conservator
- (2) A proceeding to terminate a conservatorship
- (3) A proceeding to remove a conservator
- (4) A proceeding for a court order affecting the legal capacity of the conservatee
- (5) A proceeding to obtain an order authorizing removal of a temporary conservatee from the temporary conservatee’s place of residence

The public defender is legally obligated to provide effective advocacy services, consistent with the Americans with Disabilities Act (ADA), which enables the proposed conservatee to participate in their case.

As discussed, the conservatee is a vulnerable adult. Conservatees are generally seniors who are in cognitive decline; adults of all ages with developmental disabilities; and adults of all ages who have cognitive disabilities caused by injuries or medical conditions. The vast majority of people with cognitive disabilities lack the ability to seek representation or the means to hire a private attorney of their choosing. Because of these conditions, the conservatee can also be easily influenced by the proposed conservator, which includes discouraging the conservatee from seeking counsel. Due to their cognitive state, the conservatee may struggle to meaningfully participate in the conservatorship proceedings and may have difficulty communicating their desires. It is important to note that mentally incapacitated clients who can give no direction still have statutory rights, civil rights, and constitutional rights that require protecting.

Recent Legislative Changes to Probate Conservatorships in California

In California, attorneys are called upon to be “zealous” advocates for their clients. The Supreme Court of California has affirmed this on several occasions, stating that once a lawyer agrees to represent a client, they must do so “zealously, within the bounds of the law.” This principle is long established, but recent events in probate conservatorship cases caused the legislature to remove any ambiguities about the right to counsel and role of counsel in probate conservatorship proceedings.

In 2021, a new bill, AB 1194, amended California Probate Code section 1471 to make clear the role of counsel appointed by the court to represent conservatees, proposed conservatees, and persons alleged to lack legal capacity. Statutory language stating counsel was to represent the

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“interests” of the person was removed. Additionally, the statute now states that the role of counsel is that of “a zealous, independent advocate representing the wishes of their client...” The amendments to the law were pushed by advocates who noted that many conservatee attorneys acted more in the role of an advocate and a voice for what the counsel thought was in the best interests of the conservatee or proposed conservatee whether or not those interests diverged from the expressed wishes of their client. As a result, some conservatees or proposed conservatees were left without meaningful representation. With these clarified requirements for court-appointed counsel, conservatees and proposed conservatees now have the protection of an advocate to fight against potential deprivation of their rights.

The amendments also expanded the instances when counsel will be appointed. Previously, Section 1471 of the California Probate Code applied if a person lacked legal capacity or was unable to retain counsel *and* requested counsel. Now, Section 1471 states that if the conservatee or proposed conservatee has not retained legal counsel and does not plan to retain legal counsel, whether or not the person lacks or appears to lack legal capacity, the court shall appoint the public defender or private counsel to represent the person in one of the proceedings specified in California Probate Code Section 1471(a).

The legislative changes also state that the conservatee or proposed conservatee has the right to select counsel of their choice and has a right to counsel on appeal from certain orders (including those to appoint a conservator, terminate a conservatorship, or remove a conservator).

Contingent upon an appropriation, the bill further expanded the duties of the courts and court investigators in investigating and reviewing conservatorships. Many of the changes involve the subject of terminating conservatorships or situations where the conservatee wishes to do so. Additionally, the State Legislature expanded the statutes governing the hearing process for the termination of conservatorships. Unfortunately, many parts of the bill were not funded, so they have not gone into effect and therefore are ignored.

In 2021, the California Legislature added Probate Code section 1458, which requires the Judicial Council of California to begin studying the “court effectiveness in conservatorship cases, including the effectiveness of protecting the legal rights and best interests of a conservatee.” This requires the Judicial Council to collect data from select counties regarding caseload statistics so statewide performance measures can be developed. This is promising.

Even more reform is happening. Just this September, the governor signed AB 1663, which provides a system to enable disabled and older people needing support to care for themselves and to pursue supported decision-making as a less restrictive alternative to probate conservatorship. AB 1663 establishes supported decision-making in statute. The bill also requires that alternatives to conservatorship are included for consideration in petitions for conservatorship and requires

courts to provide conservatees with information regarding the rights that they retain. The bill also makes it easier to end a conservatorship. Under AB 1663, courts are allowed to terminate a conservatorship without a hearing if both the conservatee and conservator agree to termination. Through this reform, the State Legislature is providing more rights for the conservatee that must be protected.

METHODOLOGY

The Civil Grand Jury conducted numerous interviews with the PDO and experts in the field of conservatorships. The PDO provided detailed statistical data, in some cases going back twelve years. The Civil Grand Jury based its analysis on these interviews, extensive document reviews, and numerous publicly available interviews about conservatorships. Follow-up questions were submitted via email. See the References section for additional source material used during this investigation.

INVESTIGATION

The Nevada Model for Guardianships/Conservatorships

As part of its investigation of probate conservatorships, the Civil Grand Jury learned that the State of Nevada is a leader in reforming its approach to probate conservatorships. The Civil Grand Jury elected to study the Nevada model to learn how they achieved their success. The use of conservatorships¹ in Nevada has also received a great deal of publicity over the last several years with the discovery of several cases that led to the arrest and conviction of private guardians who were responsible for elder abuse and exploitation.

To address abuses in guardianships, in 2015 the Supreme Court of Nevada created the “Commission to Study the Creation and Administration of Guardianships in Nevada’s Courts.” In its final report, the commission made numerous recommendations, including a proposed Guardianship Bill of Rights. This led to the passage of Nevada Senate Bill (SB) 360 in 2017. The goal of SB 360 was to address needed reform in conservatorships. The bill provides anyone under conservatorship or facing a potential conservatorship with 19 protected rights. These rights include the right to counsel, the right to receive notice of all conservatorship proceedings, the right to remain as independent as possible, the right to visitors, the right to be treated with respect and dignity, and the right to be in the least restrictive environment possible. (See [Appendix B](#) for the complete Bill of Rights.) Many of these same rights already exist under California law. A critical feature of the bill, however, was to mandate the appointment of an attorney for the proposed conservatee *before* a conservatorship can be established.

The Legal Aid Center of Southern Nevada (Legal Aid Center), a private non-profit organization, began exploring ways to provide independent counsel to persons under a guardianship. In 2016, the Legal Aid Center created a Guardianship Advocacy Program (GAP). After the Nevada

¹ Nevada uses the term guardianship whereas California uses the term conservatorship; in this report the terms will be used interchangeably.

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legislature passed SB 360 in 2017, the courts began referring every conservatorship matter to the GAP for representation regardless of an individual's financial status. Under Nevada Statewide Rules for Guardianships, the appointed attorney continues "as the attorney for the protected person or proposed protected person unless and until relieved as counsel by order of the guardianship court."

Today there are 18 attorneys working for the GAP dedicated to protecting over 2,800 adults in Clark County. The GAP has produced a 264-page training manual for attorneys entitled, "Representing the Elderly and Adults with Disabilities who are Facing or Under Guardianship." The training materials detail the role and duties of counsel for the conservatee or proposed conservatee, along with expectations for case handling. In addition to the established training, a benefit of having 18 attorneys doing similar work allows for cross training, collaboration, and professional development.

The GAP attorneys are clear that their role is that of zealous advocacy under a client-directed model. The client directs the attorney, who then advocates for the client's desires both during the initial stages of the conservatorship proceedings and post-adjudication with established routine follow-up. If there is any dispute between conservatee and conservator, the final determination is left to the judge. The vital aspect of this program is that the protected person has a voice and is receiving dedicated representation.

Under the Nevada model, the legal representation begins immediately after a petition to conserve the person is received. Regardless of financial status, the proposed conservatee is provided an attorney appointed by the court. A one-on-one interview with the client occurs immediately. During that preliminary meeting, the attorney interviews the client to determine their level of understanding and fills out a ten-page comprehensive needs assessment, which includes physical, cognitive, and medical background. This level of detail is fundamental because some medical conditions can present as cognitive impairment; and with medication, the need for a conservator may be eliminated. The comprehensive assessment enables the attorney to be fully informed so they can request medical evaluations if necessary. Family members may also be interviewed; however, the interviewees are selectively chosen. If the family member is estranged from the client, they will not be interviewed.

There is a standing order for the immediate release of records. This is a clerical function, designed to save attorney time. The pre-existing order authorizes attorneys to gather needed information such as:

- Hospitals records
- Doctors' office records
- Bank records
- Family records
- Guardian records

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- Regional Center Records

The list continues to change as needed. All records are free for the attorney and the order is accepted by all institutions involved with the conservatee. At the first hearing, if there is any missing documentation, the conservatorship is denied.

If a conservatorship is established, the GAP attorney or advocate does follow-up visits with a prescribed case-handling checklist every six months. It is important to note that someone from the program lays eyes on the conservatee regularly and submits a status report for the GAP's internal file.

To allow attorneys to have sufficient time to meet the case-handling expectations and do so in a competent manner, currently the GAP has set a maximum caseload of 180 new and old cases. As a further quality measure, attorney performance is monitored by the supervisor. The supervisor randomly selects cases for review, 15 per attorney annually, new and old, for quality assurance. Any new attorney submits all written pleadings to the supervisor for the first year. The supervisor can ensure the quality of the report and that it is consistent with standardized office policies. Additionally, the GAP staff has weekly meetings to discuss policies and cases, therefore ensuring uniformity in service and goals.

Further, the Nevada model tracks their outcomes, as highlighted in the chart below made available by the State of Nevada:

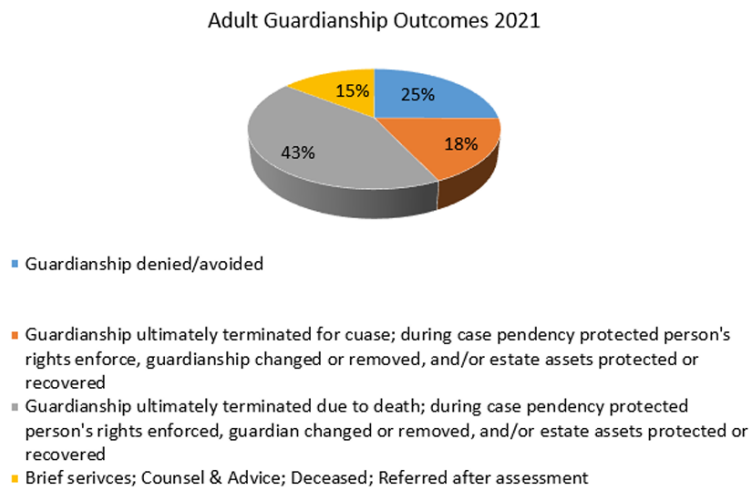


Figure 1. Nevada Adult Advocacy Program, 2021 Outcomes

A Review of the Office of the Public Defender’s Handling of Probate Conservatorships

Appointment of the Public Defender’s Office

As the Spectrum Institute report points out, the 58 counties in California have different models for appointing counsel for the conservatee. Some counties contract out those services. The PDO serves this function in the County.

Conservatorship Data

According to the 2021 Spectrum Institute report, approximately 70,000 adults in California are living under an order of probate conservatorship and about 5,000 new petitions for probate conservatorship are filed annually in the state. As the report notes, these numbers are estimates.

It is unknown how many probate conservatorships exist in our County. Not all probate conservatorships are assigned to the PDO, but the Civil Grand Jury sought to learn the volume of probate conservatorships handled by that office. Although the PDO was very cooperative and responsive to the Civil Grand Jury’s requests for statistical information, it took weeks for the data to be compiled because of the limited tracking of outcomes, as well as other limitations in the case management software used by the PDO.

The Civil Grand Jury learned that over the past three years, the PDO was assigned by the court as attorney of record for hundreds of new petitions. See Figure 2.

Year	Probate Petitions
2019	383
2020	245
2021	272

Figure 2. Number of New Conservatorship Cases per Year, Santa Clara County

Further, according to the PDO, it remains attorney of record for more than 3000 probate conservatorships that were established in the last 12 years. See Figure 3.

Year	Probate Conservatees
2019	2504
2020	2733
2021	2982
2022 YTD	3092

Figure 3. Number of Post Adjudication Total Conservatorship Cases by Year

At the Civil Grand Jury's request, the PDO counted all probate conservatorships from 2010 through June 1, 2022, where the PDO was the attorney of record. There are conservatorship cases that the PDO handled pre-2010 where the conservatee is still alive and where the PDO is still the attorney of record. Cases that are older than 12 years are not reflected in the table above. The figures above cannot be accurate because the PDO does not actively monitor the status of probate conservatorships. There is currently no set procedure by the PDO to follow up on these cases and ascertain if the current conservatorships are still appropriate and if the conservatee is alive. These cases only receive scrutiny when the conservatee or conservator requests action. The assigned attorney cannot adequately follow up on so many cases, and current procedures do not provide for proactive case management.

The Nevada model expressly states that the attorney is appointed to the case until relieved by the court. In California, Probate Code section 1471(a) and (b) provides for representation by the PDO in specified proceedings (e.g., proceedings to establish, transfer, terminate, and remove a conservator) and makes appointment of counsel mandatory in general probate conservatorships for these proceedings. For limited probate conservatorships, counsel is appointed "in any proceeding to establish a limited conservatorship." (California Probate Code section 1471(c)). This has been construed in the County to require that this representation be on a standing, or ongoing, basis. Currently, some of the 3000 probate conservatees are on a limited conservatorship and have continual legal representation.

It is beyond the scope and expertise of the Civil Grand Jury to state what the PDO's ongoing legal and ethical responsibilities are to the approximately 3000 post-adjudication conservatees. The PDO indicated that they are attorney of record, and they should resolve what that means for all of these cases. For reasons more fully developed below, the Civil Grand Jury advocates for voluntarily embracing a more proactive case management and case monitoring approach – consistent with legal and ethical requirements – for all cases where the PDO remains attorney of record.

Contesting the Initial Conservatorship Petition

The law sets forth various requirements for establishing a conservatorship (See California Probate Code § 1820 et. seq.). The establishment of a conservatorship is one of the specified proceedings that representation for a proposed conservatee is mandatory. In fact, the bulk of the PDO's work in probate conservatorships involves handling newly filed probate conservatorship petitions. In terms of contesting conservatorship appointments, the GAP reported that in 2021 conservatorship was denied or avoided in 18 percent of the cases in Clark County, Nevada. In Santa Clara County, conservator petitions can be contested by bench trials or jury trials. The PDO cited that there were no bench or jury trials in 2020 or 2021 related to conservatorships. This is not to say that the PDO

is not doing advocacy work as there were six hearings for limited conservatorship matters (two in 2020 and four in 2021). Zero cases were appealed.

Given the recent changes in California law emphasizing that the conservator must explore non-conservatorship alternatives like supported decision-making alternatives, and the ongoing requirement that the conservatorship be the least restrictive alternative, the advocacy role of the PDO in contesting initial petitions is more critical than ever. Given these expectations, the PDO should evaluate the scope of their services regarding the initiation of conservatorship petitions and keep data regarding the outcomes. In Nevada in 2021, the GAP avoided, or the court denied the initiating petition, 18 percent of the time.

Role of the Public Defender and Case Handling

Unlike for other vulnerable populations, such as juvenile dependents, California has no official performance standards for appointed attorneys in probate conservatorship proceedings. Thus, attorneys are left to determine what case handling performance standards are required.

The current practice for the PDO is as follows. Prior to a hearing, the attorney makes an initial assessment of the client's needs, spending between 30 minutes and two hours with them. During this time, the attorney will determine the conservatee's ability to understand the request and the legal process. The attorney will also hear the desires of the conservatee and assess their need for the conservatorship. A typical conservatorship hearing before the judge lasts about two hours; seven to ten cases are reviewed weekly, each lasting approximately ten to twenty minutes.

As reported by the PDO, there are approximately 3000 post-adjudication cases, for which the PDO is attorney of record. General conservatorship cases can date back decades and last a lifetime. The PDO usually only becomes active again in an older case when a report is made by the conservator, conservatee or an interested third party. If the conservatee has the ability, they can request an action such as a less restrictive placement, a modification, or a termination. Often this is not possible for a conservatee, due to their cognitive impairment. Since the PDO is not actively monitoring all these cases it cannot be aware of the conservatee's current needs or requirements.

Conversely, in Nevada, the attorney provides advocacy to its conservatees for the conservatorship proceeding and after with active monitoring of the conservatee's status. During the first year, the Nevada model requires that the attorney contact the client personally at the six-month and twelve-month mark. Thereafter, meaningful follow-up visits must occur every six months, by either an attorney or a client advocate. The goal of a follow-up visit is to advise a conservatee of their rights, to review whether the conservatorship is still appropriate or can be modified, and to perform a welfare check.

In the County, modification or termination of a probate conservatorship appears to be largely a matter of chance in post-adjudicated cases. In contrast, legal defense services in adult criminal, juvenile delinquency, and child dependency proceedings are more established. Seniors and adults with mental disabilities also deserve zealous and competent legal defense services with more ongoing scrutiny.

Caseloads

Based on interviews with legal defense advocates in California, the Civil Grand Jury learned that the ideal caseload for probate conservatorship attorneys is 80-90 new cases per year, with no more than 140 total new and post adjudicated cases. These figures assume proactive case management of conservatorships.

Nevada GAP attorneys and staff manage probate conservatorship cases very differently than the PDO. Most notably, they actively monitor cases where they are attorney of record and the work that they do on those cases is structured with regular monitoring. It is worth noting that Clark County, Nevada and Santa Clara County have similar populations. As of this writing the GAP had 18 attorneys handling approximately 2800 clients for an average caseload of about 155 cases per attorney. The PDO's probate conservatorship attorney handles approximately 300 new probate conservatorship cases a year and is attorney of record for 3000 post adjudicated cases. Under a more robust case management model, one attorney could not provide zealous advocacy for over 3000 clients.

Contesting the Conservatorship Post-Adjudication

In California, Probate Code section 1863 was recently amended by the Britney Spears legislation to basically reverse the burden of proof and make it harder to maintain a conservatorship. Prior to January 1, 2022, California Probate Code section 1863(b) stated: “[i]f the court determines that the conservatorship is no longer required or that the grounds for establishment of a conservatorship of the person or estate, or both, no longer exist, the court shall make this finding and shall enter judgment terminating the conservatorship accordingly.” A legal expert advised the Civil Grand Jury that in the past this was interpreted to place the burden of proof on the conservatee because of the word “if.” Today, the statute reads that “[u]nless the court determines, on the record and by clear and convincing evidence, that (1) conservatee still meets the criteria for appointment of a conservator...and (2) a conservatorship remains the least restrictive alternative needed for the conservatee’s protection...the court shall enter judgment terminating the conservatorship.” Inclusion of the word “unless” places the burden of proof on the person trying to maintain the conservatorship, and not on the conservatee. Also, the use of the standard “clear and convincing” raises the level of proof required to prove the need for a conservatorship. California has therefore made it much harder to defend a conservatorship in the face of a petition to terminate. Thus, as of

January of this year, the law around terminating conservatorships has been amended such that the burden has changed; it is now more difficult to maintain a conservatorship in the face of a petition to terminate.

In Nevada, in 2020 the GAP reported that 652 adult conservatorship cases were terminated, this included LPS and death of the conservatee. In the past two and a half years, the PDO filed nine petitions to terminate probate conservatorship. The Civil Grand Jury requested LPS termination numbers, but they were not supplied and the PDO does not track deaths. Although, it is impossible to compare the data, nine petitions in two and a half years appears to be quite insubstantial. In addition to lack of outcome tracking, another contributing factor to the disparity is likely because the GAP actively monitors their cases for opportunities to terminate and modify conservatorships. This is not the case-handling model in the County. The Nevada model of proactive management appears to be yielding changes to probate conservatorship in the form of termination and modification at much higher rates than the PDO's approach.

Conservatorship Funding

The Civil Grand Jury investigated whether funding was a barrier to the provision of proactive probate conservatorship legal services. State law places the burden on counties to fund legal services for indigents in probate conservatorship cases. In this county, those legal services are provided by the PDO. The County's fiscal year 2021-2022 budget funded the PDO at approximately \$75 million with 284 full-time positions. The PDO is responsible for distributing those resources and currently allocates 2.5 full-time employees to probate conservatorship, only one of which is an attorney. The Civil Grand Jury learned that the PDO has not made a specific budget request for resources to handle probate conservatorship proceedings. Thus, the Civil Grand Jury cannot evaluate whether there is a financial barrier to the provision of the services this report calls for.

Training and Performance Standards

According to Local Rule of Court 7.1103, an attorney appointed to represent a proposed conservatee or conservatee must complete certain educational requirements for representing probate conservatees by completing at least three hours of training annually directly relating to probate conservatorship subjects. The current PDO attorney handling probate conservatorships is compliant. While this type of training is good and helpful, the Civil Grand Jury's concern is that there is currently just one lawyer in the PDO that is handling probate conservatorships. This leaves little opportunity for cross-training and peer-to-peer collaboration. Further, the supervisor of this division is not required to have probate conservatorship expertise.

The Civil Grand Jury learned that there is no PDO manual or guide for handling probate conservatorships. The Civil Grand Jury was very impressed with the compassion and knowledge of the current attorney handling probate conservatorships. But it is important to note that the PDO rotates its attorneys among departments approximately every two years. Because probate law requires so much expertise, most attorneys stay at least four years in the assignment. However, without formal specialized training for incoming attorneys and/or a manual, when a probate attorney leaves for another position, their institutional knowledge leaves with them.

The Civil Grand Jury learned that in addition to no probate law instruction, there are no formal performance standards or probate case reviews. The direct supervisor is not required to have expert knowledge in probate law. This is concerning because a conserved client may have trouble questioning the quality of their representation due to compromised cognitive status. It is therefore essential for the entity that oversees the appointed attorney to adopt quality assurance controls and monitoring standards.

It is important to note that there are a fair number of appeals in criminal cases regarding claims of ineffective assistance of counsel, thereby allowing appellate courts to routinely establish binding precedents that create guardrails protecting litigants from deficient practices and unjust results. Appeals and precedents instruct attorneys and judges on the parameters of the practice of law in certain types of cases. In conservatorship legal services, however, appeals are rare and appellate courts are deprived of an opportunity to issue published opinions that would set expectations for more systemic handling of these types of cases. It is therefore even more important that there be established standards on self-governance and safeguards in local jurisdictions for conservatorship legal defense.

Data and a Strategic Plan

In general, the Civil Grand Jury cannot make meaningful statistical comparisons between the PDO and the Nevada model for many reasons. Two of the most significant reasons are that the PDO and the GAP aggregate their data in disparate ways and the PDO does not collect comprehensive data. A strategic plan to develop program goals and an efficient method to collect and aggregate data would ensure that going forward the PDO will be able to demonstrate a more comprehensive approach to providing zealous advocacy for some of the County's most vulnerable citizens.

CONCLUSION

The Civil Grand Jury acknowledges that there are several differences between California law and Nevada law regarding probate conservatorships that make a direct comparison difficult. However, Nevada's and California's perspective of their roles as counsel for conservatees is essentially the same; they both define counsel's role as a zealous advocate. Nevada appoints council for all purposes during the existence of the conservatorship. California requires, as opposed to allows, the appointment of counsel when a probate conservatorship is initiated and for other conservatorship-related events.

The Civil Grand Jury is mindful that representing a person of questionable capacity presents a very challenging responsibility for the PDO because determining the client's wishes is often difficult. The client may be confused or make bad decisions and insist that the lawyer advocate for those decisions. Recent changes to California law make it clear that the PDO is to act as a zealous advocate for the conservatee's wishes. The exact nature of the scope of these legal obligations is beyond the expertise of the Civil Grand Jury, but the PDO should certainly examine how their current representation model comports with best practices as well as the changes in California law expressly requiring zealous advocacy of the conservatee's wishes.

Ideally, the PDO will adopt a proactive case management model for all cases for which it is attorney of record. That representation should provide sufficient time for the client to assert their wishes; and where the client does not have the ability to express their wishes, the attorney can still work to protect the client's legal interests. This should include, among other things, ensuring there is no less restrictive alternative to conservatorship and that other due-process procedures are followed. And given the recent emphasis in the law on ensuring that conservatorships are narrow and the least restrictive under the circumstances to leave the client with as much autonomy and personal freedom as possible, the PDO has a new, evolving, important, and ongoing role to play.

Regardless of the differences between California and Nevada, the Nevada model provides viable ideas for achieving better outcomes for conservatees through a robust role that the Civil Grand Jury believes the PDO should evaluate.

FINDINGS AND RECOMMENDATIONS

Finding 1

The PDO found it difficult to compile conservatorship data that was requested by the Civil Grand Jury because of the limited tracking of outcomes and other limitations in the case management software used by the PDO. Their system does not track post-adjudication conservatorship cases, which makes it impossible to collect and analyze data, track outcomes, and efficiently monitor the status of older cases.

Recommendation 1a

The PDO should develop a tracking system that is capable of accurate, detailed, and timely data collection. This recommendation should be implemented by March 30, 2023.

Recommendation 1b

The PDO should develop data analytics that establish metrics in conservatorship cases and track data on subjects like conservatorships denied or avoided, proceedings that result in protecting the conservator, and cases that are terminated. This recommendation should be implemented by June 30, 2023.

Finding 2

The PDO indicated that they are the attorney of record for more than 3000 probate conservatees.

Recommendation 2

The PDO should ascertain which of their conservatorship cases should be terminated due to the conservatee's death. This recommendation should be implemented by June 30, 2023.

Finding 3

The PDO does not actively monitor post-adjudicated probate conservatorship cases in the County where an estate is not involved.

Recommendation 3a

The PDO should review all probate conservatorship cases where they are attorney of record to determine what case management and case monitoring responsibilities are owed to these clients based on changes to various California laws that expressly require zealous advocacy and new standards for establishing and maintaining a probate conservatorship. To be implemented by June 30, 2023.

Recommendation 3b

The PDO should adopt a proactive case management model for all cases for which it is attorney of record. This recommendation should be implemented by June 30, 2023.

Finding 4

The PDO currently has one attorney assigned to handle probate conservatorships. The number of proposed conservatees that will need representation from the PDO is likely to grow because of the mandatory appointment and the gaining population in the County. Under the new legislative guidelines that have recently been enacted (e.g., zealous advocacy, changes to conservatorship standards), it seems infeasible that one attorney can provide sufficient representation for the number of conservatees in the County that will need representation from the PDO.

Recommendation 4a

The PDO should research and determine the ideal caseload per attorney and the staffing needed to accommodate a proactive style of case management that accounts for recent legislative changes. This recommendation should be implemented by June 30, 2023.

Recommendation 4b

The PDO should evaluate its resource needs to best serve the growing needs of conservatees in the County and request appropriate funding from the County. This recommendation should be implemented by June 30, 2023.

Finding 5

The current PDO attorney is compliant in the required probate conservatorship training. The Civil Grand Jury's concern is that there is currently just one lawyer in the PDO that is handling probate conservatorships. This leaves little opportunity for cross-training and peer-to-peer collaboration. Further, the supervisor of this division is not required to have probate conservatorship expertise.

Recommendation 5

The PDO should cross train staff specific to conservatorship law and develop written materials to ensure that institutional knowledge is maintained despite attorney turnover. This recommendation should be implemented by June 30, 2023.

Finding 6

A cognitively impaired client may struggle to challenge or complain about the quality of their legal representation. The PDO does not have formal performance standards or probate case reviews, and the direct supervisor is not required to have expertise in probate law.

Recommendation 6a

The PDO should establish detailed performance standards and quality management standards for conservatorship attorneys. These standards should be monitored by a supervisor knowledgeable in conservatorship law and advocacy. This recommendation should be implemented by March 30, 2023.

Recommendation 6b

The PDO should randomly select a percentage of cases for quality review for each attorney annually. New attorneys should submit for review all written pleadings to the supervisor in the first year. This recommendation should be implemented by June 30, 2023.

Recommendation 6c

The PDO should have regular staff meetings for all staff handling probate conservatorships to discuss policies and cases to ensure uniformity in service and goals. This recommendation should be implemented by March 30, 2023.

Finding 7

The Nevada Model has a standing order with the court to establish access to clients' records. This saves a significant amount of time and resources.

Recommendation 7

The PDO should explore streamlined ways for attorneys to get needed information in preparation for probate conservatorship cases. For example:

- Hospital records
- Doctors' office records
- Bank records
- Family records
- Guardian records
- Regional center records

This recommendation should be implemented by June 30, 2023.

Finding 8

The GAP achieved success by developing a plan that tracked conservatorship-related data, created a training program, and implemented best practices for case management, which were all designed to effectuate client-directed services that embodied the ideal of zealous advocacy.

Recommendation 8

The PDO should consult with a third party to evaluate its current policies and processes for conservatorship defense and develop a strategic plan for best practices. This should include detailed data collection and analysis, caseloads, outcomes, training, staffing, and quality assurance controls. The strategic plan should be re-evaluated regularly. This recommendation should be implemented by June 30, 2023.

Finding 9

The Civil Grand Jury found the PDO's staff to be very helpful and committed to improving the performance of conservatee representation. The dedication of the attorney was evident and appreciated.

Recommendation 9

No recommendation.

REQUIRED RESPONSES

Pursuant to California Penal Code § 933(b) et seq. and California Penal Code § 933.05, the County of Santa Clara 2022 Civil Grand Jury requests responses from the following governing body:

Responding Agency	Findings	Recommendations
The County of Santa Clara	1, 2, 3, 4, 5, 6, 7, 8	1a, 1b, 2, 3a, 3b, 4a, 4b, 5, 6a, 6b, 6c, 7, 8

APPENDIX A

AB 1663: The Probate Conservatorship Reform and Supported Decision-Making Act

Probate Conservatorships	vs.	Lanterman Petris-Short (LPS) Conservatorships
<ul style="list-style-type: none">• Described in the Probate Code of the law.		<ul style="list-style-type: none">• Developed under the Lanterman Petris-Short Act and are governed by the California Welfare and Institutions Code.
<ul style="list-style-type: none">• Includes "limited conservatorships" (for people with intellectual and developmental disabilities), temporary conservatorships, and probate conservatorships.		<ul style="list-style-type: none">• Includes procedures sometimes referred to as "5150" and "5250" holds.
<ul style="list-style-type: none">• Usually imposed when a court believes a person cannot manage their own affairs due to intellectual and/or developmental disabilities or age-related disabilities such as dementia or Alzheimer's.		<ul style="list-style-type: none">• Typically for those who are experiencing a mental health crisis, are a danger to themselves and others and are used to impose involuntary treatment.
<ul style="list-style-type: none">• The conservator can choose where the conservatee lives, works and spends their time, how they spend their money, and who they see and associate with.		<ul style="list-style-type: none">• The conservator can require the conservatee to be admitted to a psychiatric hospital or other institution, even involuntarily.
<ul style="list-style-type: none">• Are often indefinite and permanent.		<ul style="list-style-type: none">• Are reviewed annually and are often discussed as a part of the debate on homelessness.

BRIAN MAIENSCHEN
ASSEMBLY MEMBER, 7TH DISTRICT

APPENDIX B

Protected Person's Bill of Rights (Guardianship)

Senate Bill 360

Sec. 6.

1. The Legislature hereby declares that, except as otherwise specifically provided by law, each proposed ward has the right to have an attorney before a guardianship is imposed to ask the court for relief, and each ward has the right to:
 - a. Have an attorney at any time during a guardianship to ask the court for relief.
 - b. Receive notice of all guardianship proceedings and all proceedings relating to a determination of capacity unless the court determines that the ward lacks the capacity to comprehend such a notice.
 - c. Receive a copy of all documents filed in a guardianship proceeding.
 - d. Have a family member, an interested party, a person of natural affection, an advocate for the ward or a medical provider speak or raise any issues of concern on behalf of the ward during a court hearing; either orally or in writing, including, without limitation, issues relating to a conflict with a guardian. As used in this paragraph, "person of natural affection" means a person who is not a family member of the ward but who shares a relationship with the ward that is similar to the relationship between family members.
 - e. Be educated about guardianships and ask questions and express concerns and complaints about a guardian and the actions of a guardian, either orally or in writing.
 - f. Participate in developing a plan for his or her care, including, without limitation, managing his or her assets and personal property and determining his or her residence and the manner in which he or she will receive services.
 - g. Have due consideration given to his or her current and previously stated personal desires, preferences for health care and medical treatment and religious and moral beliefs.
 - h. Remain as independent as possible, including, without limitation, to have his or her preference honored regarding his or her residence and standard of living, either as expressed or demonstrated before a determination was made relating to capacity or as currently expressed, if the preference is reasonable under the circumstances.
 - i. Be granted the greatest degree of freedom possible, consistent with the reasons for a guardianship, and exercise control of all aspects of his or her life that are not delegated to a guardian specifically by a court order.

- j. Engage in any activity that the court has not expressly reserved for a guardian, including, without limitation, voting, marrying or entering into a domestic partnership, traveling, working, and having a driver's license.
 - k. Be treated with respect and dignity.
 - l. Be treated fairly by his or her guardian.
 - m. Maintain privacy and confidentiality in all personal matters.
 - n. Receive telephone calls and personal mail and have visitors, unless his or her guardian and the court determine that particular correspondence or a particular visitor will cause harm to the ward.
 - o. Receive timely, effective and appropriate health care and medical treatment that does not violate his or her rights.
 - p. Have all services provided by a guardian at a reasonable rate of compensation and have a court review any requests for payment to avoid excessive or unnecessary fees or duplicate billings.
 - q. Receive prudent financial management of his or her property and regular detailed reports of financial accounting, including, without limitation, reports on any investments or trusts that are held for his or her benefit and any expenditures or fees charged to his or her estate.
 - r. Receive and control his or her salary, maintain a bank account, and manage his or her personal money.
 - s. Ask the court to:
 - i. Review the management activity of a guardian if a dispute cannot be resolved.
 - ii. Continually review the need for a guardianship or modify or terminate a guardianship.
 - iii. Replace the guardian.
 - iv. Enter an order restoring his or her capacity at the earliest possible time.
2. The rights of the ward set forth in subsection 1 do not abrogate any remedies provided by law. All such rights may be addressed in a guardianship proceeding or be enforced through a private right of action.

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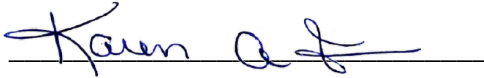
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This report was **ADOPTED** by the County of Santa Clara 2022 Civil Grand Jury on this 20th day of December, 2022.

A handwritten signature in blue ink, appearing to read "Karen Enzensperger", is written over a horizontal line.

Ms. Karen Enzensperger
Foreperson