

**CRISIS IN
CONSERVATORSHIPS**

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I. INTRODUCTION

California's conservatorship legislation will undergo substantial change on January 1, 2007, following the signature by Governor Schwarzenegger of a package of four legislative bills on September 27, 2006.¹ The Omnibus Conservatorship and Guardianship Reform Act of 2006 provides enhanced protections for conservatees, creates a regulatory system for professional conservators and guardians and mandates the creation of standards for background and education for court staff, court investigators, attorneys appointed to represent conservatees and the judges who hear conservatorship matters.

Tragically, however, the Act provides no funding for those who must administer the new laws. Conservatorships were already expensive for all involved, petitioners, proposed conservators, conservatees and the court system. By increasing the number and complexity of the procedures meant to protect vulnerable seniors, the Act will also increase the expense of conservatorships. And, unless the courts and the offices of the court investigators receive more funding, these procedures will fail to provide the intended protections.

Beginning with a discussion of the events to which the Act is a reaction, this article explains the changes wrought by the Omnibus Conservatorship and Guardianship Reform Act of 2006.

A. The Evolution of Conservatorships

California's conservatorship laws have changed substantially over the past fifteen years. Largely in response to criticism that the system was insensitive to the special needs of functionally impaired adults, the Legislature has increased protections for conservatees or proposed conservatees and made it more difficult to obtain an order of conservatorship. The Due Process in Competence Determinations Act,² adopted in 1995,

requires petitioners to demonstrate specific impairments that prevent the proposed conservatee from managing his or her financial affairs, from resisting undue influence, or giving informed consent for medical treatment, before a court may make findings of incapacity in those areas. The dementia statutes adopted in 1996³ require petitioners to present specific evidence of incapacity, and to correlate that evidence with the need for secure placement or administration of dementia medications, before a court may authorize a conservator to exercise those powers. These legislative efforts sprang from a perception that it had become too easy for a petitioner to rely upon a one-sentence medical finding that, because a conservatee was senile, he or she should be conserved and placed in a locked setting. Much of this legislation brought additional protections, such as mandatory appointment of an attorney for a proposed conservatee, mandatory professional declarations to support conservatorship petitions, and enhanced duties of the court investigators to determine whether the so-called "dementia powers" were warranted.⁴

In the late 1990s, a private professional conservator evaded the oversight of courts in Riverside County, defrauding several conservatees and their estates. The Legislature responded by enacting laws effective in 2000, requiring stricter accounting procedures and tighter deadlines for providing accountings to the Court. In 2001, the Legislature rewrote the accounting sections of the conservatorship law to require a conservator or guardian of the estate to provide original account statements at the end of each account period and at the start of the conservatorship or guardianship⁵ and to establish deadlines for having accountings on file, with a range of alternative remedies where the conservator or guardian failed to have the accounting timely filed.⁶ That same year, the Legislature added provisions requiring institutions in which conservatorship or guardianship assets were held to file statements with the Court in affidavit form certifying the existence and contents of accounts owned by or on behalf of a conservatee or ward.⁷

In concert with the above changes, the Legislature began regulating private professional conservators. In 1991, the Legislature required private professional conservators to register in each county where they sought appointed as a conservator or guardian.⁸ In 2000, the statewide registry, maintained by the Department of Justice, was established.⁹ In 2004, Assembly Bill 1155¹⁰ mandated creation of background and education requirements for private professional

conservators and guardians and established guidelines for continuing education and led to the adoption of two extensive rules of court developed by the Judicial Council, which became effective on January 1, 2006.¹¹

B. The Los Angeles Times Critique of the System

The conservatorship laws thus evolved continuously since the major overhaul of the Probate Code in 1990.¹² Gradually, the laws came to reflect society's increased sensitivity to the needs of vulnerable seniors and the belief that isolated problems and difficulties should not cause seniors to lose their independence. The laws also reflected a growing awareness of the need to regulate and professionalize professional fiduciaries. Yet, in November 2005, the Los Angeles Times published four articles purportedly on private professional conservators,¹³ which brought heart-wrenching descriptions of neglect, abuse, incompetency, and lack of oversight by the judicial system onto the newspaper's front page. The study was journalistic, sensational and flawed. The articles reported specific outrages, but gave no consideration to the thousands of cases that are well handled throughout the state's court system.

Several themes emerged from the four articles:

First, the social agencies and court systems in some of California's most populous counties cannot cope with the problems of their county's impaired and vulnerable citizens. The articles called for substantial increase in court funding, staffing, and training.

Second, the existing statutes are not to blame. Most of the abuses described in the articles occurred because the courts charged with oversight were overwhelmed by their caseloads and could not enforce the existing laws. The articles related anecdote after anecdote of vulnerable people abused, robbed, removed from their houses, deprived of their friends and their dignity, all because some court systems could not do that which the law mandates. The articles quoted judges who said they had too many cases and did not know what was going on in their courts. The articles ignored that in many counties, vigorous and competent court investigators visit their conservatees, respond to complaints about abuse, and immediately seek court action when abuse is detected. No acknowledgment was accorded the many probate examiners who competently review conservatorship accountings, calling to the court's attention all but the insignificant problems. No

mention was made of the many times an investigator or examiner has signaled to the court the need to appoint an attorney for a conservatee or proposed conservatee. The articles ignored the protections provided by bonds and blocked accounts,¹⁴ by the laws that prohibit improper sales of a conservatee's assets¹⁵ and those that provide special protections for the conservatee's home.¹⁶ Again, it was not the present law that failed to protect the people whose stories the Los Angeles Times told. The courts failed and did so largely because they lack the resources necessary to succeed.

Third, the articles recount an absence of available communications channels for conservatees and their families. Many of the stories depict helpless and vulnerable individuals who could not get through to the court, nor find a lawyer or an advocate to do so on their behalf. In some instances, the courts simply did not respond to reported abuses. Again, this problem underscores the need for changes in the way the conservatorship system is funded, but also for changes in the law that permits communication to the courts.

Fourth, the articles target the temporary conservatorship system. The present conservatorship law permits imposition of temporary conservatorships in urgent circumstances without a hearing.¹⁷ As a result, according to the Los Angeles Times, many individuals find themselves under conservatorship without due notice, and often discover they are conserved only when they are denied access to their accounts.

Fifth, the articles point out that present law does not effectively regulate private professional conservators. The articles told several stories of private professional conservators who improperly managed conservatorship assets and abused their appointments to profit from their posts.

The response to the Los Angeles Times articles was prompt. The Judicial Council formed a task force on conservatorships, which in March 2006 held hearings in southern and northern California. The task force solicited input from attorneys, staff persons, court investigators, private professional fiduciaries, public guardians and administrators, advocacy group members, and the family members of conservatees. The task force will synthesize this information and make recommendations to the Judicial Council for additional changes to the conservatorship law.

The Legislature also responded quickly. Assemblyman Dave Jones (D., Sacramento) held

hearings before the Assembly Judiciary Committee and introduced amendments on January 4, 2006, to a bill he had introduced in the first session of the 2005-2006 Legislature.¹⁸ The amendments turned Assembly Bill 1363 into an omnibus bill that included a substantial licensing section and an overhaul of those sections of the Probate Code related to the criticisms generated by the Los Angeles Times series. Senator Jack Scott (D., Pasadena) introduced Senate Bill 1116¹⁹ on the same date as a placeholder, to be amended during the session to protect the ability of conservatees to stay in their personal residences. Senator Liz Figueroa (D., Fremont), also held hearings and subsequently introduced Senate Bill 1550,²⁰ to provide for licensing and regulation of private professional fiduciaries on February 23, 2006. Senator Debra Bowen (D., Redondo Beach) who had earlier sponsored measures to tighten up accounting practices²¹ and regulation of professional fiduciaries²² introduced Senate Bill 1716²³ on February 24, 2006, which addressed the problem of ex parte communications with the court and proposed a number of changes in the functions of court investigators.

The above four bills underwent many amendments before their final passage. The components of the Omnibus Conservatorship and Guardianship Reform Act of 2006, as chaptered, are: Senate Bill No. 1116 (Scott),²⁴ which focuses narrowly on protecting the rights of conservatees to stay in their homes and establishes presumptions regarding what is a conservatee's least restrictive residence; Senate Bill No. 1550 (Figueroa),²⁵ which added the Professional Fiduciaries Act to the Business and Professions Code; Senate Bill No. 1716 (Bowen),²⁶ which adds to the Probate Code a new section explicitly permitting ex parte communications to the court regarding actions by fiduciaries or matters involving conservatees; and Assembly Bill No. 1363 (Jones),²⁷ which revises the roles of court investigators, tightens up temporary conservatorship procedures, introduces more rigorous accounting requirements, creates more court oversight and mandates educational requirements for all court personnel who deal with conservatorships. Each bill carried the proviso that it would not become operative unless the other three bills were enacted and became effective on January 1, 2007, presenting Governor Schwarzenegger with the predicament of vetoing the entire package, should he fail to sign any one of the bills.

The Trusts and Estates Section had a hand in each of the bills, either through discussions with sponsors and the legislative committees that worked on

the legislation or in some cases through direct drafting in conjunction with authors of the bills. The Judicial Council's Advisory Committee on Probate and Mental Health contributed to the drafting of Senate Bill 1116. The Professional Fiduciary Association of California ("PFAC") contributed to Senate Bill 1550, the Professional Fiduciaries Act, which is arguably the most revolutionary part of the conservatorship bill package and which, despite the efforts of PFAC, has many problems.

II. SENATE BILL 1550: THE PROFESSIONAL FIDUCIARIES ACT

A. Introduction

The most controversial of the bills signed by Governor Schwarzenegger is Senate Bill 1550,²⁸ which creates the Professional Fiduciaries Act. The Professional Fiduciaries Act was conceived in the belief that professional fiduciaries are nothing more than fiduciaries for profit, and are "part of a young, growing and largely unregulated trade in California."²⁹ Professional fiduciaries are also perceived as a "new breed of entrepreneur" who turned a "family matter into a business" and ultimately failed to safeguard the very people the system was meant to protect.³⁰ Although there have been documented cases of professional fiduciaries who commit financial abuse, the Los Angeles Times' conclusion was grossly overstated. Nonetheless, in response to the outcry from the series of articles, Senate Bill 1550 was born.

Effective July 1, 2008, the definition of "professional fiduciary" will be expanded beyond conservators and guardians to include trustees, agents under durable powers of attorney for health care and agents under a powers of attorney for finance.³¹ The extended definition of "professional fiduciary" potentially encompasses hundreds of individuals who are not professional fiduciaries either by intent or any reasonable standard.

Additionally, the Act repeals Chapter 13 (commencing with section 2850) of the Probate Code³² relating to the statewide registry for private professional fiduciaries.³³ Sections 2850 and following establish a process for regulating the initial qualifications and continuing education of private professional conservators, guardians, and trustees. These statutes required such fiduciaries to register with their individual counties and the Department of Justice, consequent to the

passage of Assembly Bill 1155 (Liu) of 2004.³⁴ The regulatory process of Section 2850 had been in existence only since 2006, and would not have been fully effective until 2007, but it was already creating effective oversight of professional fiduciaries. The new Act unnecessarily creates a complicated statutory scheme where none was needed.

Perhaps this is why, of the four conservatorship bills signed by Governor Schwarzenegger, only Senate Bill 1550 included a signing message. There, Governor Schwarzenegger stated, "clean-up legislation will be necessary in the next legislation session" because the bill "establishes an unnecessary and complicated mechanism of transferring" responsibilities and jurisdiction over the regulation of professional fiduciaries "which is not justified and will leave consumers and the general public more confused by this regulatory scheme."³⁵ It appears that, but for the fact that these four conservatorship bills tied into a single package, Governor Schwarzenegger would have vetoed Senate Bill No. 1550.

B. The Act's Statutory Scheme

1. *The Legislature's Stated Reasons for Enacting the Professional Fiduciaries Act*

In reaction to the Los Angeles Times articles, the Legislature stated:

. . . professional fiduciaries are not adequately regulated at present. The lack of regulation can result in the neglect or the physical, emotional or financial abuse of the vulnerable clients that professional fiduciaries are supposed to serve. Unless there is a strengthened accountability, abuses of people who are unable to take care of themselves or their property by professional fiduciaries will increase.³⁶

2. *Who Is a Professional Private Fiduciary Under Sen. Bill No. 1550?*

Senate Bill 1550 defines "professional fiduciary" as:

a. A person who acts as a conservator or guardian for two or more persons at the same time who are not related to the professional fiduciary or to each other by blood, adoption, marriage, or registered domestic partnership; or

b. A person who acts a trustee, agent under a durable power of attorney for health care, or agent under a durable power of attorney for finances, for more than three people or more than three families, or a combination of people and families that totals more than three at the same time who are not related to the professional fiduciary by blood, adoption, marriage, or registered domestic partnership.³⁷

"Professional fiduciary" does not include a personal representative of an estate.³⁸ Nor does "professional fiduciary" include any of the following:

1. trust companies defined in Section 83 of the Probate Code;³⁹

2. FDIC-insured institutions or holding companies, subsidiaries or affiliates;⁴⁰

3. persons employed by a trusts companies defined in Section 83 of the Probate Code or by an FDIC-insured institution who are acting in the course and scope of their employment;⁴¹

4. public officers or agencies, including the public guardian and public conservator, when that public officer or agency is acting in the course and scope of official duties, or any regional center for persons with developmental disabilities as defined in Section 4620 of the Welfare and Institutions Code.

5. persons whose sole activity as a professional fiduciary is as a broker-dealer, broker-dealer-agent or investment advisor, regulated under Corporate Security Law of 1968.

3. *Licensing Requirements for Professional Fiduciaries*

Senate Bill 1550 sets forth specific licensing requirements and after July 1, 2008, prohibits any person who comes within the definition of "professional fiduciary" from holding himself or herself out to the public as such, unless that person is licensed under Business and Professions Code Section 6530, et seq. Licensing is not required for licensed California attorneys, certified public accountants and persons enrolled as agents before the Internal Revenue Service.

To qualify for a license, a person must meet the requirements of Business and Professions Code section 6530, which include those of section 6533(g), set forth below.

(1) A baccalaureate degree of arts or sciences from a college or university accredited by a nationally recognized accrediting body of colleges and universities or a higher level of education.

(2) An associate of arts or science degree from a college or university accredited by a nationally recognized accrediting body of colleges and universities, and at least five years of experience of substantive fiduciary responsibilities working for a professional fiduciary, public agency, or financial institution acting as a conservator, guardian, trustee, personal representative, or agent under a power of attorney.

(3) Experience of not less than three years, prior to July 1, 2008, with substantive fiduciary responsibilities working for a public agency or a financial institution acting as a conservator, guardian, trustee, personal representative, or agent under a durable power of attorney.

C. Trap for Unwary Attorneys and Clients

One criticism of Senate Bill 1550 is that some who agree to serve as trustees or as agents under a power of attorney may fit the statutory definition of a “professional fiduciary,” yet be ignorant of the statutory scheme, or not qualified under its strict licensing requirements. The statute’s over breadth, discussed below, means that practitioners now should inquire into the background of each person a client designates as trustee or agent under a power of attorney. Practitioners must evaluate the potential risk of nominating as a fiduciary one who inadvertently falls within the strictures of Senate Bill 1550 and should advise clients accordingly.

D. Clients’ Choices Unnecessarily Limited

Another criticism of Senate Bill 1550 is that it defines “professional fiduciary” to include not only court appointed fiduciaries, but those fiduciaries thoughtfully chosen by the very person whose affairs the fiduciary may manage. The first group of fiduciaries—primarily conservators and guardians—often are selected by the court, which is aided by a credentialing and licensing requirement. By contrast, the second group—trustees and agents under powers of attorney—usually are selected by the trustor or the principal. For these people—our clients—the credentialing and licensing requirements of Senate Bill 1550 impose the Legislature’s definition of “most qualified” on what should be a free choice.

Yet the law presumes, and it is usually true, that settlors and principals are competent to nominate fiduciaries of their own choosing. Often, this choice is informed by considerations broader than specific education and testing in a narrow field. Typically, settlors and principals select their fiduciaries from among their family, friends and professional acquaintances. Relying on personal knowledge and experience, the settlor or principal may consider religion, work ethic, child rearing and charitable philosophies when making their choice. Nominees may be active or inactive educators, physicians, lawyers and accountants, investment advisors and the like, all skilled professionals but not necessarily possessed of the skills essential to the job at hand. No matter, advisors can be hired. The fiduciary’s most important characteristics are good judgment and common sense. The testator or principal is in the best position to make those choices, and his or her choice should be honored, absent a showing of undue influence or incapacity.

Limiting the client’s choice of fiduciary is particularly problematic for those whose estate plans employ multiple trustees or other agents, each selected on the basis of his or her unique knowledge, philosophy and skill. As institutional trustees increase their minimum account size and restrict the type of assets they are willing to administer, it makes no sense to limit the pool of otherwise qualified fiduciaries from which the competent client may choose. This is particularly true given that there has been no demonstrated need for such limitations.

E. Sanctions For Non-Compliant Fiduciaries

The Professional Fiduciaries Act creates several grounds upon which a professional fiduciary’s license can be suspended or revoked and this author approves of those measures meant to ensure that unscrupulous, unskilled or unqualified individuals will not serve as professional fiduciaries. The problem is, to penalize professional fiduciaries, they must be identified and Senate Bill 1550 defines as “professional” many fiduciaries who are serving at the request of a trusted friend and have no idea that they are deemed “professional” under the new statutory scheme. For the settlors and principals who nominated these unsuspecting “professional” fiduciaries, the consequences may come as an unpleasant surprise.

Consider the agent serving under a friend's power of attorney who, unbeknownst to him, is later nominated as an agent under three other durable powers of attorney. It is not clear whether these later nominations would immediately invalidate the agent's present power. If it did not, would that result change if a court later became involved? Is the result different if the agent is not just a nominee, but is acting for more than three principals? And does the answer to that question depend on whether the agent for some reason finds himself in court? Could the unwitting "professional" fiduciary be subject to sanctions or other civil or criminal penalties or fines for acting as an unlicensed agent? Would the agent's actions be invalid because the agent was not licensed? No one yet knows.

The professional fiduciary who acts without the required accreditation, degree or experience, and fails to become licensed, faces a myriad of consequences. For example, the fiduciary who does not comport with the Act's licensing requirement may be sued by the Department of Consumer Affairs' professional fiduciaries bureau. Sanctions include, among other things, possible criminal prosecution, suspension and/or revocation of the fiduciary's license.

III. OVERSIGHT OF THE CONSERVATORSHIP SYSTEM

Senate Bill 1550 encompasses only the definition and licensing of professional fiduciaries. The other components of the Omnibus Guardianship and Conservatorship Act are three other bills, Assembly Bill 1363, Senate Bill 1116 and Senate Bill 1716. These bills are best understood by considering the particular areas of law affected.

A. Educational Requirements for Court Officials

New Probate Code Sections created: 1456-1458

Effective Dates:

January 1, 2007 for Section 1457

January 1, 2008 for Sections 1456 and 1458

New Probate Code section 1456 requires the Judicial Council to promulgate a rule of court by January 1, 2008, that will establish qualifications and continuing education requirements, including course content, for court staff attorneys, court investigators, probate examiners, attorneys appointed under Sections 1470 and 1471, and probate judges who hear conservatorship

matters. The Judicial Council's deadline is January 1, 2008 and it will work in conjunction with "interested parties," including the California Judges Association, the California Association of Superior Court Investigators, the California Public Defenders Association, the County Counsels' Association of California, the State Bar of California, the National Guardianship Association, the Association of Professional Geriatric Care Managers and others. The education mandate of Section 1456 may be unnecessary, however, because attorneys already have mandatory continuing education requirements, judges have Judicial Council educational mandates and court investigators--probably the best trained of all--are usually drawn from the ranks of social workers experienced in dealing with problems of the elderly.

B. Education of Lay Persons

For nonprofessional conservators and guardians, the Judicial Council must develop a user-friendly video or internet-based educational program of no more than three hours in length, to be viewed either before or after appointment. The section now provides at the statewide level what most major counties already provide: a video course on how to be a conservator. Few counties offer a three-hour training, however, and the longer training will be helpful to provide more background for nonprofessional guardians and conservators.

C. Evaluation of the System

New Probate Code section 1458 mandates the Judicial Council to (1) measure court effectiveness in conservatorship cases by studying conservatorship practice in three selected counties through compiling statistics and analyzing compliance with statutory time frames, and (2) provide recommendations for statewide performance measures, for best practices to protect the rights of conservatees, and for court staffing needs. The Judicial Council is to report its findings to the Legislature by January 1, 2008, and presumably there will be further legislative changes as a result of the Judicial Council's findings. As previously mentioned, shortly after publication of the Los Angeles Times articles, the Chief Justice created a Probate and Conservatorship Task Force ("PCTF"). In Spring, 2007, the PCTF will report to the Judicial Council and the report will likely influence the Judicial Council's recommendations to the Legislature.

The above underscores a considerable flaw in the Omnibus Act. Through it, the Legislature enacted

sweeping changes in conservatorship law, without waiting for the study the Act mandated. The authors of this article believe a more reasonable approach would have been for the Legislature to focus on a few specific problems with conservatorship practice, while concurrently looking for ways to increase funding for the courts.

IV. PROTECTION OF THE CONSERVATEE'S PERSONAL RESIDENCE

Probate Code Sections Affected: 2253, 2352, 2352.5 (new), 2540, 2543, 2590, 2591, 2591.5 (new)

Effective dates: July 1, 2007, Probate Code Section 2253

January 1, 2007, all other sections

Presently, Probate Code section 2352 requires on the one hand, that a conservatee's residence be the least restrictive appropriate setting that is both available and necessary to meet the needs of the conservatee, and on the other, that it be in the best interests of the conservatee. This was the standard prior to the recodification of the conservatorship law in 1990 and because the standard was unchanged by recodification, practitioners and the courts thought the standard was clear. It was troubling, therefore, that the Los Angeles Times articles and the testimony given before the Legislature and the Judicial Council task force implied that many conservatees had been moved out of their homes, or had their homes sold, under circumstances that did not seem to meet the requirements of the Code.

Senator Jack Scott, working with substantial input from the Judicial Council's Probate and Mental Health Advisory Committee and, during the amendment phase of the legislation, with the Trusts and Estates Executive Committee, prepared legislation that establishes a presumption that the personal residence of a proposed conservatee is the least restrictive residence for him or her, provides notice requirements prior to removing a conservatee from his or her personal residence, and establishes more stringent requirements for the sale of a conservatee's residence. Additionally, the legislation imposes new guidelines for moving a temporary conservatee from his or her residence and provides for a change of venue when a conservatee is moved to a county where a family member resides.

A. In General

Probate Code section 2352 has been cleaned up to separate guardianship from conservatorship provisions. Previously, notice of a change of residence could be made after the fact and only to the court. New Section 2352 will require notice 15 days prior to the move and to all persons entitled to notice of the filing of a petition to establish a conservatorship or guardianship. This change responds to complaints about moving conservatees without providing notice of the change of address to their family members. Notice before the move, new subdivision (e), was introduced at the request of the Trusts and Estates Section Executive Committee.

B. Presumption that Personal Residence is Least Restrictive

New Probate Code section 2352.5(a) states:

. . . it shall be presumed that the personal residence of the conservatee at the time of commencement of the proceeding is the least restrictive appropriate residence for the conservatee. In any hearing to determine if removal of the conservatee from his or her personal residence is appropriate, that presumption may be overcome by a preponderance of the evidence.

This language underwent considerable revision. At one point, legislative staffers were pressing for a clear and convincing evidence standard, and the wording of the statute made it appear that a hearing would be necessary prior to permitting any move of a conservatee from his or her personal residence. The statute now permits a move from the personal residence without a hearing, unless someone objects. If there is an objection to the move, the objection will be heard and the conservator must show by a preponderance of evidence that the personal residence is not the least restrictive appropriate residence. Coupled with the new notice provisions of Section 2352, Section 2352.5(a) will likely lead to more hearings in connection with moving a conservatee, but the section clearly provides enhanced protection for conservatees.

The rest of Section 2352.5 establishes how a conservator should evaluate the level of care existing at the beginning of the conservatorship. The conservator must consider what would be necessary to keep the conservatee in the personal residence, what might be done to return a conservatee to the personal residence if he or she is not living there, or what problems might prevent the return of the conservatee to his or her

personal residence. The conservator must file a declaration regarding placement within 60 days of appointment. Additionally, “the conservator shall evaluate the conservatee’s placement and level of care if there is a material change in circumstances affecting the conservatee’s needs for placement and care.” Section 2352.5(e) exempts from the other provisions of the section developmentally disabled conservatees who are conserved by the Department of Developmental Services or Regional Centers.

C. Sale of a Conservatee’s Present or Former Residence

1. The Sale Process

Probate Code section 2540 will require the conservator to inform the court why there are no alternatives, such as in-home care services, to the sale of a conservatee’s home. The amended statute does not, however, establish a mandatory court investigation at the time a Section 2540 petition is filed. Further, the statute exempts sales from the Section 2540 protections when a conservator has been granted powers under Sections 2590 and 2591.

Section 2543, which describes the manner of sale of conservatorship property, has been expanded. Previously, the statute referred to “the provisions of this code concerning sales by personal representative.” Now the statute specifically identifies those provisions by referring to “the provisions of this code concerning sales by a personal representative as described in Articles 6 (commencing with Section 10300), 7 (commencing with Section 10350), 8 (commencing with Section 10360), and 9 (commencing with Section 10380) of Chapter 18 of Part 5 of Division 7.” The drafters believed that conservatorship practitioners had a bad track record for following the correct sale procedures, independent of the abuses reported in the Los Angeles Times series. The new specificity is meant to reduce bargain sales and other questionable sales transactions, by including the requirements for reappraisal for sale and sale at a minimum price as an integral part of the conservatorship statute. The above amendments to Section 2543 do not change the substance of the law, but rather restate prior (sufficient) law in an effort to force conservators to follow that law.

By contrast, new Section 2543(c) ventures into new territory, reflecting the Legislative Analysts’ opinions that the real estate market was so volatile, a one-year reappraisal statute was no longer reasonable.

New Section 2543(c) will require reappraisal for sale of a conservatee’s personal residence if the existing appraisal predates the confirmation hearing by more than six months. The court may waive the requirement if it is in the best interests of the conservatee to rely upon an earlier appraisal, so long as that appraisal was conducted not more than 12 months prior to the confirmation hearing.

2. Conservator’s Powers Regarding Sales

Probate Code sections 2590 and 2591, which deal with independent exercise of powers by guardians and conservators of the estate, were amended to prevent end runs around the new and existing restrictions in Probate Code sections 2540 and 2541 regarding sales of personal residences of conservatees. The existing independent powers statutes permit sales of property, without distinguishing between sales of the personal residence and other sales. The change to Probate Code section 2590 was modest and subtle: the limiting phrase “and if consistent with Section 2591,” now modifies the clause in Probate Code section 2590 that defines the power of a conservator to act independently, linking it to the express limitation regarding sale of the conservatee’s personal residence now found in Probate Code section 2591(d)(2).

Changes to Probate Code section 2591 and the addition of new Probate Code section 2591.5 make the restrictions on sale of a personal residence much clearer. Probate Code section 2591, subdivision (d), distinguishes between sale of generic real property and sale of a conservatee’s personal residence, and subdivision (d)(2) requires the conservator to follow the protective proceedings of new Section 2591.5 to conduct such a sale only after complying with the conditions of Sections 2352.5 and 2541. These latter provisions respectively require the conservator, prior to selling the personal residence, to determine that it is not suitable for the conservatee to stay in the personal residence and to determine that the sale is for the advantage, benefit, and best interest of the ward or conservatee, the estate, or the ward or conservatee and those legally entitled to support, maintenance, or education from the ward or conservatee.

Probate Code section 2591.5 requires conservators to “demonstrate to the court that the terms of sale, including the price for which the property is to be sold and the commissions to be paid from the estate, are in all respects in the best interests of the conservatee.” The disclosures required by this requirement would presumably avoid some of the worst aspects of the

bargain sales carried out to benefit conservators and their friends. The reappraisal and sale at minimum offer price provisions of Section 10309 must be applied, and a new six-month reappraisal requirement prior to date of the sale contract applies. The new statute does have a good cause exception for applying all the requirements of Probate Code section 2591.5, except the reappraisal. Further, the conservator is obliged to serve a copy of the final escrow statement within fifteen days of close of escrow on all persons entitled to notice of the petition for appointment for a conservator as well as on all persons who have requested special notice.

Some jurists have noted informally that the failure to extend the good cause exception to the reappraisal requirement may cause substantial losses to conservatorship estates where it is necessary to carry out disaster sales in order to recoup something for the estate where the alternative is to lose the entire property in foreclosure. This caveat aside, the new provisions—if applied by the courts—should provide substantial protections to conservatees and allow family members to stay informed about sales of conservatees' residences. There remains one substantial loophole: the statutory changes did not modify the notice provisions of Section 2592. Notice of petitions under Sections 2590 and 2591 is not required to be given to all persons who must be noticed at the inception of a conservatorship, and although the requirement to send a final escrow statement to all such persons is helpful, it does come after the fact of the sale.

D. Moving a Conservatee from the Personal Residence Under a Temporary Conservatorship

To protect a vulnerable or neglected senior, it may be critical to have a conservator appointed quickly so that the senior may be moved to a safe environment. If the move involves taking a person from his or her personal residence, under the new law, there will be a tension between the need to provide the conservatee with immediate relief from abuse or neglect and the policy that favors keeping a conservatee at home. The authors predict this tension will be felt most acutely in temporary conservatorships.

Probate Code section 2253 is modified by amending subsection (b) to require a court investigation prior to moving a conservatee the default. Under the amended statute, the court investigator must interview the conservatee, make the determinations listed in the

Code, and report to the court two days before the hearing requesting permission to move the conservatee, unless the court for good cause orders otherwise. The statute previously called for the court investigation only “if the court so directs.” Now, a petitioner who would relocate a temporary conservatee must persuade the court that an investigation is not necessary. In urgent situations, the court may find such good cause, but the authors predict that in most cases, the court will require an investigation before allowing the move. Finally, it is not clear whether the court investigation that may be conducted prior to the appointment of a temporary conservator will suffice as the “good cause” necessary to excuse a Section 2253(d) investigation.

E. Change of Residence and Change of Venue

*Probate Code Sections Affected: 2215
Effective Date: January 1, 2007*

Presently, Sections 2210 through 2216 describe the process for transferring a conservatorship or guardianship proceeding to another county within the state. The existing statute requires the court to find that a change of venue is in the best interests of the conservatee before venue may be changed. Assembly Bill 1363 adds new Section 2215(b)(2), establishing the standard for determining the best interests of the conservatee. This section would require that, upon a request to transfer the proceedings from the county in which the proceedings were initially brought to a county where the conservatee now resides and where a second degree relative also resides, such transfer be granted if it is in the best interests of the conservatee. The statute further provides that, where a previous order approving a change of residence has been entered, the requested change shall be presumed to be in the best interests of the conservatee absent a showing of clear and convincing evidence that the transfer will harm the conservatee. There were many complaints brought to the attention of the Legislature by family members of conservatees who struggled to have cases moved to their counties when they arranged for the move of a conservatee to their proximity. The new statute now creates a presumption that it is in the best interests of the conservatee to have venue changed if the conservatee has been moved to the county in which a person listed in Probate Code section 1821 lives.

It is not clear what would constitute harm to a conservatee under the new standard. Would the fact that

the conservator lives in a different county and now has to spend additional travel time visiting the conservatee, or adjust to different court proceedings (perhaps even find different counsel!), thus incurring additional fees and expenses for the conservatorship, constitute the necessary showing of harm? Unfortunately, there also seems to be no limit on when or where such a proceeding could be brought. The conservatee could have been living in the new county for a lengthy period of time and the relative or other petitioner could decide that the relative disagreed with the rulings being made in the conservatorship and could bring such a petition. Mere evidence that, on balance, it is in the best interests of the conservatee to maintain the proceeding in the county where it was originated would presumably not meet the standard for a showing of harm to the conservatee.

Whether this new provision results in significant increases in requests for transfers of proceedings remains to be seen.

V. ENHANCING THE SCOPE OF INVESTIGATIONS AND THE DUTIES OF COURT INVESTIGATORS

*Probate Code Sections Affected: 1826, 1850, 1850.5 (new), 1851, 2250.6 (new), 2253
Effective Dates: July 1, 2007*

Most experienced conservatorship practitioners in counties with vigorous and adequately staffed court investigation units find that the role performed by the court investigator in the conservatorship process is adequate. In these counties, the court investigators provide suitable protections, bring to the court's attention the conservatee's objections, and assure that conservatees are adequately represented. The anecdotes recounted in the Los Angeles Times series highlighted the catastrophes that might occur when there are no periodic court investigations and conservatees are ignored for years. The existing law is quite clear and, to many minds, completely satisfactory to provide oversight for conservatorships. The new legislation, and in particular Assembly Bill 1363, looks at the court investigation as a panacea that can correct and detect all problems, but only if the role of the court investigator is expanded. In fact, if the court investigators throughout the state were able to perform the duties already assigned to them by the law, the oversight failures so vividly described in the Los Angeles Times series likely would not have taken place.

A. Prior to Appointment of a Conservator

Probate Code section 1826, as amended, sets out the scope of duties for the court investigator. Because the section is so long, only excerpts are presented below:

(a) . . . The court investigator also shall do all of the following:

(1) Interview the petitioner and the proposed conservator, if different from the petitioner.

(2) Interview the proposed conservatee's spouse or registered domestic partner and relatives within the first degree.

(3) To the greatest extent possible, interview the proposed conservatee's relatives within the second degree, as set forth in subdivision (b) of Section 1821, neighbors, and, if known, close friends, before the hearing.

. . .

(1) Mail, at least five days before the hearing, a copy of the report referred to in subdivision (k) to all of the following: . . .

(3) The proposed conservatee.

(4) The spouse, registered domestic partner, and relatives within the first degree of the proposed conservatee who are required to be named in the petition for appointment of the conservator, unless the court determines that the mailing will result in harm to the conservatee.

. . .

(q) Any investigation by the court investigator related to a temporary conservatorship also may be a part of the investigation for the general petition for conservatorship, but the court investigator shall make a second visit to the proposed conservatee and the report required by this section shall include the effect of the temporary conservatorship on the proposed conservatee.

The changes in this section provide for more thorough questioning of the individuals involved in a proposed conservatee's life, including his or her relatives, neighbors, and close friends. Although the prior statute did not require such wide ranging interviews, many court investigation units routinely

carried out interviews with as many family members and persons close to the conservatee as the court investigator could locate. The statutory change further burdens the court investigators, but should provide helpful data to the court about the need for a conservatorship and the existence of alternatives. Mailing the report to the conservatee, spouse, domestic partner and first degree relatives has the positive effect of informing persons close to the conservatee of the court investigator's findings, so the family members can, if they choose, object in a timely fashion. The negative effect of such wider disclosure is to reveal the frailties of the individual to his or her family and perhaps violate his or her privacy. New Section 1826(q) requires that there be a second investigation prior to the permanent hearing, even though there was an investigation under new Section 2250.6, discussed below.

B. At the Review of the Conservatorship

Many courts consider conservatorships as always "open," subject to review upon receipt of a complaint or inquiry, and if necessary the court investigator will initiate an informal investigation without any statutory authority. Sections 1850 and 1851 codify this common practice. Assembly Bill 1363 has two alternate versions of these sections, because when the bills were moving through the Legislature, Senate Bill 1716 also amended these sections.

1. Delay in Effective Dates

All amendments enhancing the duties of the court investigators are effective July 1, 2007. This delay will give the court investigation units the opportunity to hire and train new investigators and new staff. Their functional workloads are nearly doubled by the amendments in these sections.

2. Six Month Investigation Reviews

The most controversial provision in amended Section 1850 is its requirement for an investigation six months after the initial appointment of the conservator, in accordance with the provisions of subdivision (a) of Probate Code section 1851. Specifically, the court investigator must:

. . . report to the court regarding the appropriateness of the conservatorship and whether the conservator is acting in the best interests of the conservatee regarding the conservatee's placement, quality of care, including physical and mental treatment,

and finances. The court may, in response to the investigator's report, take appropriate action including, but not limited to:

(A) Ordering a review of the conservatorship pursuant to subdivision (b).

(B) Ordering the conservator to submit an accounting pursuant to subdivision (a) of Section 2620.

3. Annual Court Investigation Reviews

New subsection 1850(a)(2) sets the default review date "one year after the appointment of the conservator and annually thereafter," but the court is given the discretion, after the first one-year review, to set the next review at two years "if the court determines that the conservator is acting in the best interest interests of the conservatee."

Even if the court sets the following review at two years, new Section 1850(a)(2) provides:

The court shall require the investigator to conduct an investigation pursuant to subdivision (a) of Section 1851 one year before the next review and file a status report in the conservatee's court file regarding whether the conservatorship still appears to be warranted and whether the conservator is acting in the best interests of the conservatee. If the investigator determines pursuant to this investigation that the conservatorship still appears to be warranted and that the conservator is acting in the best interests of the conservatee regarding the conservatee's placement, quality of care, including physical and mental treatment, and finances, no hearing or court action in response to the investigator's report is required.

4. Court Reviews at Any Time

Probate Code section 1850 permits the court, on its own motion or upon request by any interested person, to

(b) . . . take appropriate action including, but not limited to, ordering a review of the conservatorship, including at a noticed hearing, and ordering the conservator to present an accounting of the assets of the estate pursuant to Section 2620.

(c) Notice of a hearing pursuant to subdivision (b) shall be provided to all persons listed in subdivision (b) of Section 1822.

In cases that begin with a temporary conservatorship, there will be a court investigation (1) at the time of the temporary conservatorship, (2) at the time there is a change of residence of the temporary conservatee (good cause exception), (3) prior to the appointment of a permanent conservator, (4) six months after the appointment of a permanent conservator, (5) one year after the appointment of a permanent conservator, (6) one year thereafter, for the life of the conservatorship, either as a full review or an investigation and status report followed by a full review a year later, and (7) whenever the court believes it is appropriate to order an investigation. No funding has been earmarked for these additional court investigations, which will undoubtedly strain the resources of the court investigators' offices. The authors anticipate the repeated investigations will also increase the cost to the conservatees.

C. Reviews of Limited Conservatorships

New Section 1850.5 was added to differentiate limited conservatorships from general ones. While retaining the explicit power of the court to call for a review at any time, the new section preserves the prior statutory scheme which required reviews of limited conservatorships at the end of one year and biennially thereafter.

D. Duties of Court Investigator at Time of Review

Modifications to Probate Code section 1851 enhance somewhat the description of what a court investigator is to do at the time of a review ordered pursuant to Section 1850. The investigator shall visit to the conservatee without prior notice to the conservator, except as ordered by the court for necessity or to prevent harm to the conservatee. In determining whether the conservator is acting in the best interests of the conservatee, the evaluation is to include "an examination of the conservatee's placement, the quality of care, including physical and mental treatment, and the conservatee's finances."

As in the pre-appointment review, the court investigator, "[t]o the greatest extent possible, . . . shall interview individuals set forth in subdivision (a) of Section 1826, in order to determine if the conservator is acting in the best interests of the conservatee." The court investigator shall mail his or her report to the conservatee's spouse or registered domestic partner, the

conservatee's relatives in the first degree, and if there are no such relatives, to the next closest relative, unless the court determines that the mailing will result in harm to the conservatee.

Most court investigators already review placement, treatment of the conservatee, quality of care, and the conservatee's finances as a matter of routine. By codifying these specific requirements, the Legislature has made clear that these subjects of the investigation are mandatory. The enhanced requirements will lengthen the process of the court investigation, at least in those venues where the court investigator does not yet inquire into these subjects, but the now mandatory inquiry is the best practice.

E. Court Investigator Duties in Temporary Conservatorships

The first of the Los Angeles Times articles described many temporary conservatees who had received no notice of the temporary conservatorship and who had had no opportunity to object. The Legislature responded by importing into the temporary conservatorship statutes the general conservatorship requirements of Section 1826. Now, Section 2250.6 requires a court investigation either before the hearing on a petition for appointment of a temporary conservator, or, where it is not feasible to carry out the investigation prior to the hearing, as in the case of an ex parte application for appointment of temporary conservator, within two court days of the hearing. No matter whether the investigation is conducted prior to or after the hearing, the investigator must interview the following people: the conservatee; the petitioner and if different from the petitioner, the proposed conservator; the conservatee's spouse or domestic partner; the conservatee's relatives within two degrees; and the conservatee's neighbors and close friends. The advisement of the (proposed) temporary conservatee described in Section 2250.6(a)(2) and (b)(2) is taken nearly verbatim from Section 1826(b), including explanations of the citation, which may not yet have been served upon a proposed temporary conservatee, and the right to a jury trial, which does not exist in the case of a temporary conservatorship. After the investigation, the court investigator must report to the court regarding the proposed conservatee's ability and willingness to attend the hearing, whether the proposed conservatee desires to contest the establishment of a conservatorship, and whether the proposed conservatee objects to the nominated conservator or prefers someone different.

If the investigation takes place after the appointment of a temporary conservator, the court investigator must inform the court within three court days of the interview whether the temporary conservatee objects to the appointment of the temporary conservator or requests an attorney. And if the court investigator believes that the temporary conservatorship is inappropriate, the court investigator shall "immediately," which is defined as no more than two court days following the investigation, inform the court in writing.

It remains to be seen what will be the effect of the above changes. In some counties, a petition for conservatorship may not be heard for 10 to 12 weeks after the petition is filed and often, the delay is due to an overburdened court investigator's inability to conduct the necessary pre-hearing investigation any sooner. In those counties, some practitioners file petitions for temporary conservatorship almost as a matter of routine, to shorten the time it would otherwise take to get help for the proposed conservatee. The above changes should reduce the number of such unnecessary petitions for temporary conservatorship. Of concern, however, is the possibility that the above changes will also delay the granting of temporary conservatorships in cases where an expedited process is necessary to save the proposed conservatee from harm or to obtain for the proposed conservatee proper medical care. The conservatorship process will become more open to the scrutiny of the proposed conservatee's family and friends and the court will make better decisions, when a decision is rendered. The authors just hope that these changes eliminate only unnecessary temporary conservatorships.

VI. INCREASED SENSITIVITY TO CONSERVATEE RIGHTS AND WISHES

Probate Code Sections Affected: 1830, 2113 (new), 2623, 2640, 2640.1, 2641

Effective Dates: January 1, 2007, except that notice under Probate Code Section 1830 may not be effective before January 1, 2008

A. Notice of Conservatee's Rights

New Section 1830(c) provides:

An information notice of the rights of conservatees shall be attached to the order. The conservator shall mail the order and the attached information notice to the conservatee and the

conservatee's relatives, as set forth in subdivision (b) of Section 1821. By January 1, 2008, the Judicial Council shall develop the notice required by this subdivision.

Again, the delay between the legislation's effective date, January 1, 2007, and the date the Judicial Council form may be expected, one year later, is the cause of some confusion. Perhaps the notice requirement may be ignored until the Judicial Council issues a form of notice, but if not, after January 1, 2007, practitioners must notify conservatees of their rights, presumably drawn from Section 1823.

B. Explicit Protection for the Wishes of the Conservatee

New Section 2113 provides:

A conservator shall accommodate the desires of the conservatee, except to the extent that doing so would violate the conservator's fiduciary duties to the conservatee or impose an unreasonable expense on the conservatorship estate.

New Section 2113 makes an explicit requirement of what was only implicit in the old law: the conservator must consult with and respect the desires of the conservatee. Always, if the wishes of the conservatee were known or could be determined, the conservator had to respect them, provided the conservatee's wishes were in his or her own best interest. Yet in the testimony before the Legislature and in the articles leading to the legislation, many conservatees and interested members of the public complained of wishes that had been ignored, wishes such as the desire to remain in the home, to visit with friends and relatives and to control some spending money. The testimony and articles did not explore whether the ignored wishes were in the conservatee's best interest and now, when a conservatee expresses a wish with which the conservator disagrees, the conservator will face a dilemma. The authors predict that Section 2113 will lead to an increase in petitions for instructions in these cases.

C. New Restrictions on Charging Estates for Opposing Actions by or on Behalf of Conservatees, or Defending Conservator's Actions

New Section 2113 should be read in the conjunction with amended Section 2623(b), which provides that a conservator cannot be compensated for fees and costs "incurred in unsuccessfully opposing a

petition, or other request or action, made by or on behalf of a ward or conservatee unless the court determines that the opposition was made in good faith, based on the best interests of the ward or conservatee.” Counsel representing a conservator is likely to advise that where there is controversy, the conservator is best protected by seeking court instruction. After all, it would be hard to argue that the conservator’s action in seeking the instruction was not in good faith and, if instructed by the court, the conservator would then have protection for the fees and costs incurred in the particular action. This same language is now incorporated in Probate Code sections 2623, 2640 and 2641 regarding the award of fees and compensation to the conservator.

Several of the Los Angeles Times accounts involved struggles between conservatees and fiduciaries that ended up with the conservatee paying the attorney fees for both sides. Superficially unfair, this result is an inescapable element of the law of fiduciary relationships. In conservatorships, the law must allow for payments from the estate to conservators and their counsel. Otherwise, few would be willing to serve as conservators and almost none as their counsel. Recognizing this, the law charges the court with determining whether a fiduciary accused of wrongdoing is defending the exercise of a duty owed to the ward or conservatee or whether the fiduciary is defending a self-interested action, unrelated to the fiduciary’s duties. For the defense of duty, the Probate Code presently allows reasonable fees for counsel and just and reasonable fees for the guardian or conservator.

The *Lefkowitz* case, which arose from the Riverside County scandals of the early 1990s, best sets the standard for when it is proper for the court to award fees to a fiduciary or the fiduciary’s attorney in an action brought against the fiduciary by the conservatee or someone acting on the conservatee’s behalf. The court put it simply: if the conservator believed the opposition to the conservatee’s petition was in the best interests of the conservatee, and if the conservator’s belief was objectively reasonable, it would be proper to compensate the fiduciary and counsel for their fees. The present statutory scheme and existing case law permit the courts to determine what is reasonable, or just and reasonable, where a conservator seeks compensation for defending against a petition brought by the conservatee. The Legislature did not agree and has essentially codified *Lefkowitz* by applying an objective standard.

VII. TEMPORARY CONSERVATORSHIPS

Probate Code Sections Affected: 2250, 2250.2(new), 2250.4(new), 2250.6(new), 2250.8(new)

Effective Dates: July 1, 2007, for all but 2250.8, effective January 1, 2007

A perceived failure of the current conservatorship system was the imposition of temporary conservatorships with virtually no notice to conservatees or to their family members and the continuation of those conservatorships with little or no opportunity for the conservatee subsequently to be heard, in particular when the conservatorship was created ex parte.

A. New Notice Requirements

Amended Section 2250 attempts to correct this by imposing strict notice requirements on temporary conservatorships. The amended statute requires personal service upon the conservatee of both the notice and the petition, and further requires that the notice and the petition be mailed to all persons to whom notice must be given of a general conservatorship. The Legislature expressed particular concern about abuse of the good cause exception for personal service on the conservatee and required the Judicial Council, by January 1, 2008, to adopt a rule of court establishing uniform standards for determining what is good cause.

B. New Procedures for Terminating Temporary Conservatorships

The present statute has no provision for terminating a temporary conservatorship prior to the date set in the order making the appointment, except under the provisions of Section 2650. The Legislature amended Section 2250 to institute a procedure to terminate a temporary conservatorship by petition where the conservatorship had been created ex parte. If a noticed petition to terminate was filed more than 15 days before the hearing on the general conservatorship, the hearing would be held within 15 days of filing, and if the petition was filed within 15 days of the hearing on the general conservatorship, it would be heard at the hearing on the establishment of the general conservatorship. Further, if the court investigator reports to the court that the temporary conservatorship appears inappropriate, “the court can consider taking appropriate action on its

own motion," including perhaps terminating or otherwise modifying the temporary conservatorship.

New Section 2250.2 provides for filing a temporary conservatorship under the LPS statutes, and new Section 2250.8 expressly excludes Sections 2250, 2250.4, and 2250.6 from applying to proceedings under Chapter 3 (commencing with Section 5350) of Part 1 of Division 5 of the Welfare and Institutions Code.

C. Attendance at the Hearing

New Section 2250.4 requires that conservatees appear at the hearing on the temporary conservatorship, with very limited exceptions for medical inability or where the conservatee is out of state. If the proposed conservatee has been visited by the court investigator and expresses unwillingness to attend the hearing, but has no opposition to the conservatorship or the proposed conservator, the conservatee need not appear. If the conservatee is unwilling or unable to attend the hearing but does not meet any of the above criteria, the court may only conduct the hearing if it finds that a failure to conduct the hearing will result in substantial harm to the conservatee.

VIII. NEW REQUIREMENTS FOR BOND

Probate Code Sections Affected: 2320, 2321
Effective Date: January 1, 2007, except for 2320(c)(4) effective January 1, 2008

A. Covering the Cost of a Surcharge Action

The Legislature expressed significant concern that, where there was litigation against the conservator, the conservatee's estate frequently bore the expense, even when the conservator was bonded. New Section 2320(c)(4) addresses this concern by increasing the amount of the conservator's bond as follows:

On or after January 1, 2008, [bond must include] a reasonable amount for the cost of recovery to collect on the bond, including attorney's fees and costs. The Judicial Council shall, on or before January 1, 2008, adopt a rule of court to implement this paragraph.

Originally, the legislation did not include that last sentence. The Trusts and Estates Section objected that there would be no way to calculate the new component of the bond. The Legislature responded by adding the last sentence and mandating the Judicial

Council to create an objective statewide standard. As of the printing of this article, the authors do not know what form such a rule will take. Presumably, the calculation will be made using a formula based on the size of the conservatorship estate, something that is often hard to determine at the beginning of a conservatorship. Bond is, of course, payable from the conservatee's estate, so the extra annual charge caused by this amendment will be borne by the conservatee, not the fiduciary.

B. Tightening the Requirements for Bond Waivers

As presently drafted, new Section 2320(c)(4) does not provide for waiver of the "cost of recovery" component of the bond and Section 2321, also amended, bars the court from waiving bond at all "without a good cause determination by the court which shall include a determination by the court that the conservatee will not suffer harm as a result of the waiver or reduction of the bond."

IX. FIDUCIARY MANAGEMENT AND FEES

Probate Code Sections Affected: 2401, 2410(new), 2623, 2640, 2641

Effective Date: January 1, 2007, except that uniform standards will be developed by January 1, 2008

A. New Management Standards

Probate Code sections 2401 and 2410 impose new regulations on fiduciary investments. Section 2401 now limits trust company investments in securities in which the trust company has any interest. The more significant change to the law is the addition of new Probate Code section 2410, which requires as follows.

On or before January 1, 2008, the Judicial Council, in consultation with the California Judges Association, the California Association of Superior Court Investigators, the California State Association of Public Administrators, Public Guardians, and Public Conservators, the State Bar of California, the National Guardianship Association, and the Association of Professional Geriatric Care Managers, shall adopt a rule of court that shall require uniform standards of conduct for actions that conservators and guardians may take under this chapter on behalf of conservatees and wards to ensure that the estate of conservatees or wards are

maintained and conserved as appropriate and to prevent risk of loss or harm to the conservatees or wards. This rule shall include at a minimum standards for determining the fees that may be charged to conservatees or wards and standards for asset management.

Although it is clear that the investment standards appropriate to trusts are not applicable in all circumstances to conservatorships, it seems equally clear that the Judicial Council will adopt rules which clarify the current standards regarding investments by conservators. For some time now, there have been concerns that current law does not allow the conservator to make investments which seem quite ordinary. On the other hand, it would not necessarily be appropriate to impose upon a conservator, charged with maintaining the assets and providing for the conservatee, the standards imposed on a trustee.

The Judicial Council's expected new rule should set standards regarding fees charged by conservators. In the past, the determination of fees has largely been a matter of local court practice. It is not clear whether the rule to be developed will set a mechanism for determining the fee or whether it will merely impose rules as to the information to be provided to assist the court in establishing the fee.

As required by the statute, the Trusts and Estates Section will participate in developing the required rule.

B. Restrictions on Conservator Fees

1. Restrictions for Unsuccessfully Opposing the Conservatee

As mentioned above, a conservator's fees may now be limited where the conservator unsuccessfully opposes the petition or other request for action by or on behalf of the conservatee without good faith and for the best interests of the conservatee.

2. Restrictions Where Petitioner is Unsuccessful but a Conservator is Appointed

The provisions for recovery of fees by a petitioner and the attorney for a petitioner who do not succeed in having the petitioner appointed, even where a conservator is appointed, are revised to require that the court make a determination not only that such fees were reasonable but also that they were incurred for the best interests of the conservatee. The specific concern

expressed by the Legislature was the potential cost to the conservatee of an extended battle over who should be appointed conservator. Presumably, under the revised code section, the actual cost of the petition for conservatorship and the fees for such petition will be recoverable, but the fees and costs of litigation over who is appointed will not be reimbursable.

3. Restrictions on Fees in the Case of Removal

Where a petition for removal is filed and granted, Section 2653 will now provide that the costs of the removal petition may be charged to the conservator as follows:

(1) The court shall award the petitioner the costs of the petition and other expenses and costs of litigation, including attorney's fees, incurred under this article, unless the court determines that the guardian or conservator has acted in good faith, based on the best interests of the ward or conservatee.

(2) The guardian or conservator may not deduct from, or charge to, the estate his or her costs of litigation, and is personally liable for those costs and expenses.

These provisions bring conservatorship litigation in line with the provision of the Probate Code regarding what trustees may or may not appropriately charge to trust estates. It remains to be seen whether this statute will substantially alter the payment of fees as the conservator would, in any event, have had to petition the court for the fees during the period of the litigation and the court would, presumably, have considered the fact that the conservator was removed for cause in determining whether fees were appropriate.

X. INVENTORIES AND ACCOUNTINGS

Probate Code Sections Affected: 2610, 2620, 2620.2

Effective Dates: January 1, 2007 for 2610 and 2620.2, except the notice required in 2610 will not be prepared by Judicial Council before January 1, 2008; July 1, 2007 for 2620

A. Disclosure of the Inventory to the Conservatee and Family Members

Section 2610, as amended by Assembly Bill 1363, will require conservators to file their inventories within 90 days of appointment, and to serve the

inventory not only on the conservatee, but also on the conservatee's spouse or domestic partner and relatives within the first degree (and if no such relatives exist, on the next closest relative). Only where such notice would harm the conservatee can it be waived. These requirements are meant to protect the conservatee by increasing the accuracy of the inventory and alerting family members to whether the conservator is marshaling assets as required. Unfortunately, the new requirements further invade the conservatee's privacy by circulating information to a wider range of individuals.

The conservator must send with the inventory a notice instructing recipients how to object to the inventory. A form of the notice shall be developed by the Judicial Council by January 1, 2008. As with the other forms the Judicial Council must develop, it is not clear what will be the effect of the one-year delay between the effective date of the statute (January 1, 2007) and the Judicial Council's deadline for producing a form of notice.

B. New Forms for Accountings and New Documentary Requirements

The new legislation also requires the Judicial Council to develop forms for standard and simple accountings by January 1, 2008, and after that time, all accountings must be submitted on the Judicial Council form.

Even before the new forms are available, conservators and guardians must comply with new rules regarding submission of the documents that support their accountings. If the conservator is a professional fiduciary, account statements for all periods will be required for all accountings. New Sections 2620(c)(4) and (5) also require all conservators to submit the original closing escrow statements for sales of real property and bill statements (presumably invoices) from care facilities.

Probate Code section 2620(e) now provides as well that "[t]he guardian or conservator shall make available for inspection and copying, upon reasonable notice, to any person designated by the court to verify the accuracy of the accounting, all books and records, including receipts for any expenditures, of the guardianship or conservatorship." Such inspection is separate and apart from any discovery which might be sought by an objecting beneficiary and is available to the court even in a case where no one has filed an objection.

Although it seems clear that the Court has always had the power to review an account in any manner it saw fit, new Section 2620(d) makes each accounting subject to "random or discretionary, full or partial review by the court," meaning the court may take whatever steps it wants to require additional documentation from a guardian or conservator.

As detailed above, the court investigators and probate examiners will be trained to review accountings in greater detail and these additional tools will presumably work to allow closer scrutiny of conservatorship accountings. The new provisions of Probate Code section 2620 are effective on July 1, 2007.

C. Enhanced Sanctions for Late Accountings

Finally, Probate Code section 2620.2 is amended to provide stricter time lines and penalties for failure to provide an accounting as required under Section 2620. Where the conservator fails to file such an accounting, the court may order it filed and set for hearing within 30 days of the date of the court's order. The conservator may, on a showing of cause, extend that deadline for 30 days. However, if the accounting is then not filed, the court may remove the conservator, suspend the conservator and appoint a temporary conservator to compile the accounting with the expenses of the temporary conservator surcharged to the conservator's bond, or appoint an attorney pursuant to Probate Code section 1470 to represent the conservatee with the costs of that appointment again charged to the conservator's bond.

The authors question whether the new deadlines and penalties will make accountings a better way to detect wrongdoing. The abuses that spurred the Legislature into action were not caused by fiduciaries who are a little late in assembling their accountings. The problem is the fiduciaries who cannot produce accountings at all or who have embezzled assets.

The amendments to Section 2620.2, effective January 1, 2007, cut the time provided to produce the accounting from 60 to 30 days after issuance of notice to the fiduciary and counsel for the fiduciary. The court is permitted to extend this time, "upon cause shown," by an additional 30 days, which for nonlicensed fiduciaries can be extended by 30 additional days.

In the author's opinion, the new overly rigid scheme offers conservatees no more substantial

protection and may penalize both professional and family-member conservators.

Consider, for instance, the case where a fiduciary is stricken with a health condition that makes it impossible to comply with the newly reduced time deadlines. The court is required to impose a sanction, such as appointment of a temporary conservator, to complete the accounting. The new statute takes away from the court its ability to consider the mitigating circumstances of the distressed fiduciary and instead imposes on him or her all the fees awarded to the replacement fiduciary and counsel.

XI. EX PARTE COMMUNICATIONS WITH THE COURT

Probate Code Sections Affected: 1051

Effective Dates: January 1, 2008

One of the recurring themes of the Los Angeles Times series was the difficulty conservatees and their family members have in being heard by the court. In the past, many courts routinely referred complaints to the court investigator, but some returned the communications to the sender, with a notation that ex parte communications would be ignored by the court.

Senator Bowen's bill addresses that matter directly by permitting ex parte communications regarding conservators and conservatees. New Section 1051(b) permits the court to refer to the court investigator or take other appropriate action in response to an ex parte communication regarding either a fiduciary, about the fiduciary's performance of his or her duties and responsibilities, or a person who is subject to a conservatorship or guardianship. The court is required to disclose the ex parte communication to all parties and counsel, and may for good cause dispense with such disclosure if necessary to protect a ward or conservatee from harm. The Judicial Council is directed to develop a rule to implement this section prior to January 1, 2008.

XII. NEW MANDATES AND EDUCATIONAL REQUIREMENTS FOR THE PUBLIC GUARDIAN

Probate Code Sections affected: 2920, 2923 (new)

Effective Dates: January 1, 2007 (Section 2920); January 1, 2008 (Section 2923)

The fourth Los Angeles Times article was a scathing assault on the Los Angeles County Office of Public Guardian. The Legislative response was to amend Section 2920, the mechanism by which the public guardian could petition for conservatorship when such a petition appeared necessary to protect an individual, or when the court ordered such a petition. Now, under Section 2920 as revised, the public guardian must petition for conservatorship "if there is an imminent threat to the person's health or safety or the person's estate." Further, should the public guardian not file on its own, the court is now mandated to order the public guardian to file for appointment where there is no one else qualified and willing to act, if an appointment of guardian or conservator appears to be in the best interests of that person. In these circumstances, the public guardian must begin its investigation within two business days of receiving a referral under new subdivision(c) of Probate Code section 2920.

New Probate Code section 2923 requires the public guardian, and presumably the deputies working in the office of the public guardian, to comply with continuing education requirements established by the California State Association of Public Administrators, Public Guardians, and Public Conservators.

XIII. MISCELLANEOUS ISSUES

Probate Code Sections Affected: 1610, 1822, 1829, 2701

Effective Dates: January 1, 2007

A. Clean Up of Probate Code Sections 1610 and 1829

A typographical error in the first line of Probate Code section 1610 has been corrected and the word "registered" has been added to "domestic partner" in Section 1829(b).

B. Unnecessary Statutory Language

The new version of Probate Code section 1822 contains paragraph (f), which refers to development of a form for notice by the Judicial Council. As initially

drafted, Assembly Bill 1363 required the court to provide free assistance to parties and relatives involved in the conservatorship process. Although this mandate was removed from the statute during the course of its passage, paragraph (f) which requires the Judicial Council to draft a form to effectuate the notice appears to have inadvertently been left in the legislation. As detailed in this article, it is more than likely that clean up legislation will be proposed and this section would presumably be deleted in any such legislation.

C. Revisions to Requests for Special Notice

Probate Code section 2701 has been amended to delete language that caused requests for special notice to be deemed withdrawn three years after they had been served. A request for special notice will continue in place indefinitely now, creating an additional burden on conservators and their counsel to review files for dormant requests.

XIV. CONCLUSION

Seniors are a vulnerable and disadvantaged class of citizens in need of protection. For the past decade, California has led the nation in its efforts to protect the elderly and disabled. The conservatorship system is far from perfect and there have been serious problems in those counties that have been unable to enforce the existing law. However, the conservatorship system is not “despicable” or “corrupt.” Unfortunately, notwithstanding the California Legislature’s best intentions, the Omnibus Conservatorship and Guardianship Reform Act of 2006 is an overbroad, and in many instances unnecessary, statutory scheme. The passage of time will be the ultimate judge as to whether the intended consequences of the four bills will achieve their intended result.

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ENDNOTES

¹Sen. Bill No. 1116 (Scott, Stats. 2006, ch. 490); Sen. Bill No. 1550 (Figueroa, Stats. 2006, ch. 491); Sen. Bill No. 1716 (Bowen, Stats. 2006, ch. 492); Assem. Bill No. 1363 (Jones, Stats. 2006, ch. 493). All bills were

passed in the 2005-2006 Regular Session. Although the effective date of all bills is January 1, 2007, many of the provisions, most notably those affecting licensing of professional fiduciaries and those expanding the duties of court investigators, do not take effect until July 1, 2007, January 1, 2008, or July 1, 2008.

² . Sen. Bill No. 730 (1995-1996 Reg. Sess) Stats. 1995, ch. 842, Prob. Code, §§ 810-814

³ Sen Bill No. 1481 (1995-1996 Reg. Sess.) Stats. 1996, ch. 910, effective 1/1/98.

⁴ *Ibid.*, Prob. Code, § 2356.5.

⁵ Assem. Bill No. 1250 (1999-2000 Reg. Sess.) Stats. 2000, ch. 565, amending Prob. Code § 2620.

⁶ Sen. Bill No. 240 (1999-2000 Reg. Sess.) Stats. 2001, ch. 359, amending and completely rewriting Prob. Code § 2620.2.

⁷ Assem. Bill No. 1286 (2001-2002 Reg. Sess.) Stats. 2001, ch. 563, adding Prob. Code §§ 2890-2893.

⁸ Assem Bill No. 759 (1999-2000 Reg. Sess.) Stats. 1990, ch. 79, § 14, effective 7/1/91, Prob. Code, §§ 2340-2343.

⁹ Assem Bill No. 925 (1999-2000 Reg. Sess.) Stats. 1999, ch. 409, Prob. Code, §§ 2850-2854.

¹⁰ (2003-2004 Reg. Sess.) Stats. 2004, ch. 625.

¹¹ Cal. Rules of Court, Rules 7.1010 and 7.1060.

¹² Stats. 1990, ch. 79, § 14.

¹³ Fields et al., *Guardians for Profit: When a Family Matter Turns into a Business*, Los Angeles Times, (Nov. 13, 2005) p.1; Fields et al., *Guardians for Profit: Justice Sleeps While Seniors Suffer* (Nov. 14, 2005) p. 1; Fields et al., *Guardians for Profit: Missing Money, Unpaid Bills and Forgotten Clients* (Nov. 15, 2005) p. 1; Fields et al., *Guardians for Profit: For Most Vulnerable, a Promise Abandoned* (Nov. 16, 2005) p. 1.



¹⁴ Prob. Code, § 2320.

¹⁵ Prob. Code, § 2543.

¹⁶ Prob. Code, § 2541(b).

¹⁷ Prob. Code, §§ 2250 et seq.

¹⁸ Assem. Bill No. 1363 (2005-2006 Reg. Sess.) Stats. 2006, ch. 493.

¹⁹ (2005-2006 Reg. Sess., ch. 490).

²⁰ (2005-2006 Reg. Sess., ch. 491).

²¹ Stats. 2001, ch. 359, § 4.

²² Stats. 2004, ch. 548, § 3.

²³ (2005-2006 Reg. Sess., ch. 492).

²⁴ Stats. 2006, ch. 490.

²⁵ Stats. 2006, ch. 491.

²⁶ Stats. 2006, ch. 492.

²⁷ Stats. 2006, ch. 493.

²⁸ (2005-2006 Reg. Sess., ch. 490).

²⁹ Fields et al., *Guardians for Profit: When a Family Matter Turns Into A Business*, Los Angeles Times (Nov. 13, 2005) p.1.

³⁰ *Id.*

³¹ Sen. Bill No. 1550 (2005-2006 Reg. Sess.) Stats. 2006, ch. 491, Bus. & Prof. Code, § 6500 (b)(f).

³² All further statutory references are to the Probate Code unless otherwise indicated.

³³ Prob. Code, §§ 2850 through 2855.

³⁴ Assem. Bill No. 1155 amended Prob. Code § 2342.5 (alternative annual statements for authorized conservators of certain tax-exempt entities; filing a petition for appointment) and section 2850 (maintenance; use and disclosure; conservator, guardian, and trustee requirements) and added Prob. Code § 2344 (education and experience requirements; statewide register pre-conditions; exemption).

³⁵ Governor Arnold Schwarzenegger signing message to Members of the California State Senate on Sen. Bill No. 1550 (2005-2006 Reg. Sess.).

³⁶ Sen. Bill No. 1550, Stats. 2006, ch. 491, § 2, Subsection (d).

³⁷ Bus. & Prof. Code, § 6500(f).

³⁸ Personal Representative was included in the early versions of the Bill, but was removed by Amendment dated August 24, 2006.

³⁹ Sen. Bill No. 1550 (2005-2006 Reg. Sess.) Stats. 2006, ch. 491, Ch. 6, Art. 1, (f)(1).

⁴⁰ *Id.* at (f)(2).

⁴¹ *Id.* at (f)(3).