

Legal Network News

CALIFORNIA ADVOCATES FOR NURSING HOME REFORM

Spring 2009

Volume 20 No. 1

Conservatorship's Promise of Protection Threatened by Failure to Regulate

by Linda Paquette, Esq.

Conservatorship is the legal proceeding that promises protection for victims of elder abuse. Yet thousands of the elderly, a 2004 AARP report warned, are robbed of their freedom and life savings by the legal system created for their protection.¹ Reform legislation that followed a 2005 *LA Times* expose ignored the issue of court appointed private attorneys who are bleeding conservatorship estates with exorbitant court approved fees.² Worse than high fees is advocacy by a court appointed attorney that is contrary to the wishes of the proposed conservatee, their client. Take for example, the case of Christine G.

Christine G. had a 1996 trust that stated her wish to avoid nursing home residency, regardless of cost. She wisely named as successor trustee, a person who was not also a beneficiary. She made her beautician a beneficiary, grateful the beautician was helping with driving. In 2004, when Mrs. G. was 96 and disabled by dementia, her beautician took her to the attorney who prepared the beautician's family trust. He became Mrs. G.'s attorney by amending her trust. The amendment increased the beautician's share from 25% to 75% and made the beautician the successor trustee. The same attorney represented the beautician when she declared herself successor trustee. The beautician placed Mrs. G. in a nursing home to avoid the cost of in home care and leased Mrs. G.'s residence for one year, to seal the deal.

A conservatorship petition was filed to stop the abuse. Mrs. G.'s niece fought for her aunt's return home. The private attorney appointed by the court to represent Mrs. G. opposed returning Mrs. G. to live in her home. She told the court Mrs. G. would suffer loneliness at home. She told the court Mrs. G. would better benefit from the socialization a nursing home offers. She said this when Christine G. was sleeping in a room with two others, with four feet of closet for personal belongings. What Mrs. G. directed in her trust should be ignored, her court appointed attorney said.

The niece obtained a court order requiring Mrs. G.'s return home, but it was costly. The court appointed attorney's opposition forced the matter to a four-day trial. That was

It did not matter that others did not like what she advocated, the court said, when it ordered the fee paid from Mrs. G.'s money. The niece's appeal of the fee order is pending.

In a San Diego case, the court appointed attorney told the court her proposed conservatee client did not need to be present when the issue of whether she was advocating as he wished was heard. No need to wait for his return from the bathroom, she said. Regularly appointed by the court, her \$10,222 fee request was ordered paid by the client whose inability to object was assured by his bathroom absence. Appeals are pending.

In a Los Angeles case, the court appointed attorney opposed the conservator's petition for restoration of capacity. Incapacity is sometimes temporary. Stroke victims recover. She does not care about voting, he told the court. There was thus no need, he argued, to restore her right to vote. He did not explain to his client that the petition was pending, and that it could restore her right to be a director of her charitable trust - something that was important to her. It would also have restored her right to again use the attorney she selected to represent her in the conservatorship proceeding and would have terminated the services of the court appointed attorney. The court dismissed the restoration petition at the court appointed attorney's request. No appeal is pending. His court-approved fees to date are \$18,290, paid by the conservatee.

Private attorneys are appointed in Los Angeles and San Diego counties, in contrast to the appointment of public defenders in other counties. Financial self-interest does not tempt public defenders. Their paychecks remain the same, regardless of outcome. The advocacy of private counsel is not similarly income neutral. Because there is no complaint procedure, private attorneys have nothing other than conscience to resist the temptation of overworking a case. We know from the current financial crisis, that is not enough. The morally bankrupt among us require regulation. There is presently nothing to control the temptation to overcharge a client who did not select them and cannot terminate them. An appeal by family, which begins with a \$755 filing fee, is too costly to be a viable alternative.

beneficial to the attorney, because it increased her fees. The court awarded her more than \$17,000 to oppose Mrs. G.'s wish to avoid a nursing home.

Conservatorship of David L. (2008) 164 Cal.App.4th 701 held that court appointed counsel in conservatorship proceedings owe the same duty of loyalty as court appointed counsel in criminal proceedings. The loss of rights is simi-

-
1. Barry Yeoman, "Stolen Lives," *AARP Magazine* [January&February 2004].
 2. The reforms focused on the regulation and licensing of private conservators.

Conservatorship Abuses..... (cont. on page 6)

Conservatorship Abuses..... (cont. from page 4)

lar and substantial the court said. The statutory requirement to appointed counsel is intended to insure that the proposed conservatee is not erroneously deprived of liberty or property. The case, even when cited, is not followed by trial courts. High case loads tempt understaffed probate judges to rely on court appointed attorneys to read the file and determine the case. Their view of the facts and law are often rubber stamped by the court, without revision. Those who disagree are deemed clogs in the system for obstructing quick resolution or worse, for forcing a time consuming trial as in the Mrs. G. case.

Those who challenge court appointed attorneys by raising the *David L.* case thus ostracize themselves from the mainstream to their financial detriment. There is a clannishness among the same attorneys and same professional conservators appearing before the same judges. Those reporting wrong conduct are ignored or get their heads lopped off, observed one official, in a 2000 *California Lawyer* article on millions stolen by one conservator in Riverside county despite years of multiple family complaints.³ For this reason, as the *LA Times* exposé revealed, court supervision is not enough. The reform legislation which followed required the licensing of private conservators with standards of conduct specific to them. Missing is something similar for private court appointed attorneys which follows the holding of the *David L.* case. Though Los Angeles county set high standards for qualifying private attorneys for its court appointments, it has no procedure for policing conduct once appointed. This wrongly assumes that all are morally equal, ignoring the reality of human nature. The legislature should step in to set a statewide procedure.

(Linda Paquette is a Los Angeles attorney. Since 1990 she has represented family, private conservators, and has acted as court appointed counsel for proposed conservatee).

3. Christopher Manes, "Guardian Angels," *California Lawyer*, January 2000