By Hon. John H. Sugiyama (Ret.)

# Asymmetrical Conservatorship Litigation

*Well-meaning participation early in the process may inadvertently significantly increase the financial cost burden on the conservatee.*

The financial burden of litigation involving the establishment of conservatorships is imbalanced. The person whose care and well-being presumably are the motivating factors compelling the litigation bears most, if not all, of that substantial burden.

For other kinds of litigation, each party usually pays its own attorney fees. Through that symmetrical relationship, the parties equally face the possibility of financial exhaustion. For conservatorships, however, the conservatee frequently must pay the attorney fees for all of the parties embroiled in the litigation. In the context of this article, the term "proposed conservatee" may perhaps be technically more precise. As a matter of linguistic convenience, however, "conservatee" will be used. Given that asymmetrical relationship, the parties can subject the conservatee to collectively imposed financial ruin.

Conservatorship litigation thus cries out for early neutral evaluation followed by mediation. A neutral evaluator can describe, and answer questions about, the nature of the conservatorship process and an assessment of the possible consequences of a conservatorship not being granted. In this article, the benefits to be derived from the invocation of such alternative dispute resolution processes will be addressed. The discussion will center on procedures followed in California. There, the terms "conservatorship" and "conservatee" are used. In other states, many of the same practices likely will be encountered, but the terminology may be different, with the principal terms being "adult guardianship" and "adult ward." For ease of reference in this article, California's terminology and statutory scheme will be used.

## Burdens Imposed

A conservatorship presumably serves to benefit the conservatee, the person who is the subject of the process. Someone, often a relative, but sometimes a friend or a public guardian, may perceive that the conservatee no longer has the capacity to make informed medical or financial decisions or is subject to undue influence by others who may seek to take advantage of her. Once the process is initiated through the filing of a petition for temporary conservatorship and a related petition for general conservatorship, however, the conservatee, or her estate, will be confronted with a daunting array of expenses, even before any substantive care is provided.

Even if the petitions are uncontested, the court will appoint a guardian ad litem (G.A.L.) or counsel for the conservatee. As a predicate requirement, the appointment of a G.A.L. should not be confirmed until a finding of the conservatee's lack of capacity has been made. Also, the G.A.L. could conceivably retain her own counsel. Thus, to avoid these potential issues, some courts may prefer instead to appoint counsel under California Probate Code § 1470(a). In so doing, the court may order the conservatee's estate to pay the fees of appointed counsel pursuant to California Probate Code § 1470(c)(1).

The court additionally could order a neuropsychiatric or psychological evaluation of the conservatee, as well as a separate geriatric care assessment. The conservatee's estate presumably could be charged with the fees billed by the neuropsychiatrist or psychologist, and the geriatrician. Cal. Prob. Code § 2640. Although the costs of such



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evaluations will vary from state to state and from jurisdiction to jurisdiction, fees in the range of $2,500 to $5,000 for single reports may be expected. Furthermore, the conservatee's estate will be obligated to pay the attorney fees incurred by the party that filed the uncontested petitions for temporary and general conservatorship. *Id.* Again, although billing rates will vary, fees of $375 to $500 an hour or even higher should be expected. These rates are drawn from just one predominantly urban county in California. They obviously will vary from county to county and state to state. They will, however, only increase over time.

Rather than request her own appointment, the petitioning party has the option of seeking the appointment of a professional fiduciary to serve as the temporary conservator and later as the general conservator of both the conservatee's person and estate. If appointed, the professional fiduciary in turn routinely will retain counsel. The conservatee's estate will bear the fees charged by the professional fiduciary and counsel. *Id.* The fees charged by the former can amount to several hundred dollars each month. The fees charged by the latter likely will be in the same range as the rates charged by attorneys for any petitioning party.

As may be discerned, the conservatee's estate may face substantial financial commitments even before any substantive care is provided. The depletion of assets will be accelerated if other parties choose to contest various facets of the conservatorship.

## Sources of Conflict

Conflicts may arise over the establishment of a conservatorship in at least two different situations. In one—whether a conservatorship is warranted at all—the immediate financial impact, although unintended, may become significant if not addressed at the outset of the proceeding. In the other —disagreement about the specifics of the conservatorship—the longer-term financial consequences, perhaps unappreciated, will become devastating if not also addressed early in the proceeding.

Disagreement about whether a conservatorship is warranted and well-meaning participation by friends and family early in the process may inadvertently significantly increase the financial cost burden on the conservatee. Often an elderly person who has lived alone in a community may eventually begin to experience a cognitive decline. At this point, a relative or several working together may seek to establish conservatorships of the person and estate for the elderly person. The elderly person, perceiving her situation differently from the relatives or perhaps being incapable of recognizing her declining mental capacity, may seek help from friends.

As often occurs, the friends may appear at the initial hearing on the temporary conservatorship to express some level of concern on behalf of the elderly person. Their interest may range from expressions of bewilderment about the nature of the process to pronouncements of an intent to object on behalf of the elderly person. The court, protective of the integrity of its processes, likely will continue the matter, giving the friends an opportunity to formalize any objections in writing and to retain counsel if desired.

That very process, although appropriate and perhaps unavoidable, will increase the financial burden borne by the conservatee's estate if the friends persist through multiple hearings before having their concerns allayed. From hearing to hearing, the attorneys for the petitioning party and the conservatee will continue billing at their standard rates, totaling between them hundreds of dollars just for each continued hearing.

Under these circumstances, the conservatee, the relatives, and the friends would benefit from early neutral evaluation, most obviously to stop the financial toll on the conservatee's estate. A neutral evaluator can describe, and answer questions about, the nature of the conservatorship process. Often such discussions devolve into an assessment of the consequences of a conservatorship not being granted. Medical care could be impaired because of privacy restrictions imposed on physicians. Financial assets could be mismanaged because of yet other privacy restrictions imposed on financial institutions. Oversight of the medical and financial needs of the conservatee by the court and its investigative staff would not occur.

A more difficult situation arises, with the probability of an even greater financial burden being imposed, when relatives, often adult children or siblings of the conservatee, disagree about various facets of a conservatorship and choose to litigate their different positions. For ease of reference, these relatives will simply be called parties. The parties may be prompted to act by an array of perceptions:

- That a conservatorship is unnecessary because the conservatee suffers from no cognitive decline.
- That a conservatorship is unnecessary because less costly alternatives, such as a durable power of attorney and an advanced health care directive, have been duly executed.
- That, although a conservatorship may be necessary, a different party from the one nominated in the moving petitions should serve as the conservator.
- That, although a conservatorship may be necessary, a professional fiduciary rather than a party should serve as the conservator.

In acting on these perceptions, the parties may also be motivated by other interests that often are financially related. They may be apprehensive that the nominated conservator may misuse or misappropriate the conservatee's financial assets or that that person will be able to conceal earlier acts of misuse or misappropriation. They may also be concerned that the nominated conservator lacks the ability to manage the conservatee's financial assets prudently and that that person will dissipate those resources precipitously.

The parties may initially believe that their concerns and interests will be vindicated through a trial. As litigation becomes prolonged, however, they may begin to doubt whether a trial will result in a satisfactory outcome. They may come to understand that the court may render a decision that will not match their expectations.

Also, at some moment, the parties may learn that the fees billed by all counsel could conceivably be paid through the conservatee's estate if their services are deemed to have been performed in the best interests of the conservatee or facilitated the appointment of a conservator. Cal. Prob. Code § 2640.1(a), (c)(1); *see Estate of Moore*, 258 Cal. App. 2d 458, 461–62 (1968). They thus may realize that their familial dispute will result in the depletion of assets available for the conservatee's care. They also may then grasp that an indirect consequence of prolonged litigation will be a diminution of their potential inheritance upon the death of the conservatee.

If a state does not have a provision comparable in effect to California Probate Code § 2640.1, the conservatee's estate may not necessarily be obligated to pay the attorney fees of the parties involved in establishing the conservatorship. Nevertheless, the fees generated by the conservatee's counsel and any expert witnesses retained on her behalf will still become substantial if litigation becomes prolonged.

## Benefits of Early Mediation

The unpredictability of a totally satisfactory trial result and the certainty of a reduction in any future inheritance should make relatively early mediation appealing to the parties. Counsel would also benefit from such mediation for different reasons.

First, counsel should not accept any fees from any party without prior judicial review and approval. *See* Cal. Prob. Code § 2640(a)(3). In some counties, this requirement may not be strictly enforced, leaving unreviewed retainers amounting to several thousand dollars. Nevertheless, the court may eventually become aware of the improper acceptance of fees if reimbursement of the retainer as well as an award of additional fees is sought from the conservatee's estate. In such instance, the court may both order the return of the retainer and grant a lesser amount of fees to be paid from the conservatee's estate. Through mediation, counsel could seek to negotiate the amount of fees that will be paid, without involving the court.

Second, counsel who insist on proceeding to trial may face belated criticism from the parties when the latter become aware of the full extent of the financial burden that could be imposed on the conservatee's estate. *See id.* § 2640.1. Again, mediation would provide counsel with a forum through which the parties could be informed about the anticipated legal fees and the source of their payment. This process of collective discussion by the parties about the financial impact of their litigation can eliminate criticism directed at

counsel, particularly because the attorney fees incurred will increase from several thousand dollars for an uncontested conservatorship to perhaps over $100,000 for one that is decided through trial.

Apart from the financial savings, the parties themselves would benefit in additional ways by pursuing mediation. They may have doubts about the fitness of any one of their own to serve as a responsible conservator. Nevertheless, if forced to decide after trial, the court could be constrained to choose a family member rather than a professional fiduciary to serve as the conservator. *Id.* § 1812(b), (c); *see Conservatorship of Ramirez*, 90 Cal. App. 4th 390, 399–400 (2001). The rationale for such selection is that the court has the duty to manage the conflict between family members, who have statutory priority of appointment. Mediation, however, would allow the parties to avoid any uncertainty about which conservator will be chosen to serve. As a compromise, they could agree on the appointment of a professional fiduciary. They could also devise a process for removal of the professional fiduciary should any concerns about performance arise.

The parties could also use mediation for resolving other disputes over the care of the conservatee that may not be included in any court decision. Visitation schedules, access to health care information, and financial accountings are sources of conflict. Each of these matters could be addressed through mediation.

Moreover, some parties may perceive that the conservatee's operative estate plan was executed when she lacked capacity or was subjected to undue influence. To avoid separate estate or trust litigation that unavoidably would impose thousands of additional dollars in legal fees, they, with the concurrence of the G.A.L., could address that matter through the conservatorship mediation. They conceivably could negotiate the filing of a petition for substituted judgment that could restore the estate plan to terms that protect the interests of the conservatee and her intended beneficiaries. *See* Cal. Prob. Code §§ 15400 et seq. To mitigate the possibility of ongoing conflict, they could also agree to terms that would restrict any subsequent efforts to modify their agreed-upon estate plan.

The parties thus could act creatively to craft a comprehensive, confidential resolution of their conservatorship dispute. The asymmetrical nature of trial-directed conservatorship litigation will be brought into greater balance. The financial burden that would be wreaked on the conservatee's estate will be substantially reduced. More critically, the emotional toll that would be inflicted on the conservatee and those concerned with her health and well-being will be avoided. Early neutral evaluation and mediation accordingly should be viewed as the principal, not the alternative, processes for the resolution of conservatorship disputes.

*Hon. John H. Sugiyama (Ret.) is an arbitrator and mediator at JAMS with experience in a myriad of legal fields and disciplines adjudicating complex matters through trial and resolving them through alternative dispute resolution processes. Judge Sugiyama presided for 18 years on the Contra Costa County Superior Court. During the last nine years of his judicial career, he served as the supervising judge for the Probate Division. He may be reached at jsugiyama@jamsadr.com.*

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