



Spring 2-24-2023

Overprotected but Unrepresented: An Argument for Mandatory Appointment of Counsel and Against Automatic General Conservatorships in California

Maria de los Angeles Reyes Olmedo

Follow this and additional works at: <https://digitalcommons.lmu.edu/llr>

Recommended Citation

Maria de los Angeles R. Olmedo, *Overprotected but Unrepresented: An Argument for Mandatory Appointment of Counsel and Against Automatic General Conservatorships in California*, 56 Loy. L.A. L. Rev. 369 (2023).

Available at: <https://digitalcommons.lmu.edu/llr/vol56/iss1/13>

This Developments in the Law is brought to you for free and open access by the Law Reviews at Digital Commons @ Loyola Marymount University and Loyola Law School. It has been accepted for inclusion in Loyola of Los Angeles Law Review by an authorized administrator of Digital Commons@Loyola Marymount University and Loyola Law School. For more information, please contact digitalcommons@lmu.edu.

OVERPROTECTED BUT UNREPRESENTED: AN ARGUMENT FOR MANDATORY APPOINTMENT OF COUNSEL AND AGAINST AUTOMATIC GENERAL CONSERVATORSHIPS IN CALIFORNIA

*María de los Ángeles Reyes Olmedo**

Conservatorships are restrictive arrangements that must be reserved for people with severe intellectual and/or developmental disabilities. However, California probate courts unnecessarily impose conservatorships and forego less restrictive alternatives for the sake of administrative convenience. While AB 1194 will ameliorate California's paternalistic conservatorship system, this Note advocates for requiring courts to appoint counsel to all conservatees and proposed conservatees in every conservatorship proceeding, and to enact conservatorships only after proving less restrictive methods are insufficient. Humans—regardless of their dis/ability—deserve to age with dignity in a conservatee-centric system that does not violate their constitutional, federal, and state rights.

* J.D. Candidate, May 2023, LMU Loyola Law School. I would like to thank the *Loyola of Los Angeles Law Review* editors and staff for your feedback and encouragement. My deepest appreciation to Professor Sande Buhai for her mentorship and insight. Lastly, I want to thank all the people whose existence is resistance. *Sí se puede.*

TABLE OF CONTENTS

I. INTRODUCTION	371
II. DUE PROCESS PLUS: BACKGROUND ON DUE PROCESS, TITLE II, AND CONSERVATORSHIPS	375
A. Constitutional Guarantee to Counsel	375
B. The Americans with Disabilities Act Heightens the Due Process Requirement	378
C. Conservatorships: Narrow Intention and Broad Application	381
III. ANALYSIS AND CRITIQUE OF NATIONAL AND STATE-LEVEL SYSTEMIC DEFICIENCIES WITHIN THE CONSERVATORSHIP SYSTEM	386
A. California's Conservatorship System: Many Acts and Little Action	391
B. Blueprints for Improvement: Looking to Other States' Conservatorship Systems	394
1. Alaska's Mediation Model	394
2. Washington's Burden-Shifting Accommodation Rule	396
3. Minnesota's Conservator Audit System	398
IV. HOW AB 1194 AIMS TO CHANGE CALIFORNIA'S CONSERVATORSHIP SYSTEM	399
A. Ensuring Proper Representation Through Chosen or Appointed Counsel	399
B. Increased Responsibility and Accountability for the Probate Court and Its Agents	402
VII. PROPOSAL: AB 1194 PLUS	405
VIII. CONCLUSION	409

I. INTRODUCTION

If a right-to-counsel provision had been in place in California in 2008, Britney Spears would not have been trapped in an unnecessarily restrictive “voluntary” conservatorship¹ for nearly fourteen years.² When Spears’s father filed a conservatorship petition, Spears requested to be represented by an attorney of her choosing.³ However, her request was denied by now-retired Judge Reva Goetz, who appointed Sam Ingham as Spears’s attorney.⁴ Ingham, instead of zealously advocating on Spears’s behalf, charged her estate over \$3 million in attorney’s fees⁵ after advising her not to challenge her conservatorship.⁶ Through this appointment, Judge Goetz violated Spears’s constitutional right to counsel, as well as section 1470 of the California Probate Code regarding the appointment of private legal counsel.⁷ Thus, Spears was forced to stay in an abusive and traumatizing⁸ conservatorship where she was required to take medications

1. Conservatorships and guardianships are similar in that they both grant an individual legal authority over another individual. Guardianships are usually invoked to care for minors, and conservatorships are generally reserved for adults. However, terminology varies from state to state, and several states also employ the term “guardianship” when referring to care arrangements for adults. This Note will solely discuss adult care and favor the term “conservatorship,” but will employ “guardianship” to respect and reflect the term used by the particular states and scholars when referring to care arrangements for adults. *Compare* *Brown v. Labow*, 69 Cal. Rptr. 3d 417, 427 (Ct. App. 2007) (“In 1979, the [California] Legislature converted all adult guardianships into conservatorships.”), with 6 MINN. PRAC. 3D, *Methods of Practice* § 37.6 (West 2021) (differentiating the appointment of a “guardianship”—proper for an adult who is “incapacitated and [their] needs cannot be met by less restrictive means,” from a “conservatorship”—proper for an adult who is “unable to manage [their] property and business affairs due to an impairment”).

2. Graham Bowley, *Experts Said It Was Unusual to End Conservatorship Without a Mental Health Screening*, N.Y. TIMES (Nov. 12, 2021), <https://www.nytimes.com/2021/11/12/arts/music/britney-spears-psychological-evaluation-conservatorship.html> [<https://perma.cc/F2HE-Z3G7>].

3. Joe Coscarelli et al., *Britney Spears Can Hire a New Lawyer of Her Choice, Judge Rules*, N.Y. TIMES (Sept. 30, 2021), <https://www.nytimes.com/2021/07/14/arts/music/britney-spears-conservatorship-lawyer.html> [<https://perma.cc/A6GH-EQUZ>].

4. Rachel Rippetoe, *Atty Champions #FreeBritney as Example of Probate Failings*, LAW360 PULSE (Feb. 12, 2021, 12:51 PM), <https://www.law360.com/pulse/articles/1354831/atty-champions-freebritney-as-example-of-probate-failings> [<https://perma.cc/AYL3-NMSE>].

5. Ryan Naumann, *Britney Spears’ Lawyer Samuel Ingham Rolling in the Dough, Was Paid over \$3 Million from Singer in Conservatorship*, RADARONLINE (June 25, 2021, 11:31 AM), <https://radaronline.com/p/britney-spears-lawyer-samuel-ingham-3-million-conservatorship/> [<https://perma.cc/48B8-LDTY>].

6. Elizabeth Wagmeister, *Britney Spears’ Court-Appointed Lawyer Resigns from Conservatorship Case*, VARIETY (July 6, 2021, 4:15 PM), <https://variety.com/2021/music/news/britney-spears-samuel-ingham-resign-conservatorship-1235012511/> [<https://perma.cc/7GAD-LD5S>].

7. *See* Rippetoe, *supra* note 4.

8. Caroline Vakil, *California #FreeBritney Conservatorship Bill Becomes Law*, THE HILL (Oct. 1, 2021, 1:48 PM), <https://thehill.com/homenews/state-watch/574920-california-freebritney-conservatorship-bill-becomes-law/> [<https://perma.cc/YM2F-NC4B>].

against her will, and was prevented from marrying and having children by involuntarily having an intrauterine device inserted into her body as a form of birth control.⁹

Conservatorships are a state law process generally heard in probate court and meant to protect an adult deemed vulnerable and unable to care for themselves and/or their finances.¹⁰ Thus, conservatorships can be granted over the person, their estate, or both.¹¹ Although this arrangement did not receive mainstream attention prior to Spears's legal battle, the U.S. Department of Justice (DOJ) estimates that 1.3 million adults are under conservatorships nationally and conservators control over \$50 billion in assets.¹² In California alone, the conservatorship system manages nearly \$13 billion¹³ from 70,000 conservatorships,¹⁴ and 5,000 new conservatorship petitions are filed annually.¹⁵ Given that by 2035 there will be more people over the age of sixty-five than under the age of eighteen living in California, the amount of conservatorships and assets under conservatee control will undoubtedly increase.¹⁶

In 1987, House Representative Claude Pepper stated: "The typical [conservatee] has fewer rights than the typical convicted felon."¹⁷

9. Andrew Dalton, *Britney Spears Tells Judge: 'I Want My Life Back,'* AP NEWS (June 23, 2021), <https://apnews.com/article/britney-spears-conservatorship-hearing-575ce4b7be0465603ad2e0e5df970809> [<https://perma.cc/55CQ-LNN8>]; Emma Specter, *Britney Spears's Forced IUD Is a Chilling Example of the Threats to Reproductive Freedom*, VOGUE (June 24, 2021), <https://www.vogue.com/article/britney-spears-forced-iud> [<https://perma.cc/6SCM-4PTE>].

10. Rebekah Diller, *Legal Capacity for All: Including Older Persons in the Shift from Adult Guardianship to Supported Decision-Making*, 43 FORDHAM URB. L.J. 495, 500 (2016).

11. SARAH ANDERS ET AL., CONSERVATORSHIP REFORM IN CALIFORNIA: THREE COST-EFFECTIVE RECOMMENDATIONS 1 (2009), <http://www.canhr.org/reports/2009/09ConservReformReport.pdf> [<https://perma.cc/9R4P-PAYS>].

12. U.S. DEP'T OF JUST., FINANCIAL EXPLOITATION IN THE CONTEXT OF GUARDIANSHIPS AND OTHER LEGAL ARRANGEMENTS 12 (2017), <https://www.justice.gov/file/1064496/download> [<https://perma.cc/2HKG-ZR4J>].

13. Andie Judson, *The Price of Care: Investigating California Conservatorships*, ABC10 (May 31, 2021, 11:44 AM), <https://www.abc10.com/article/news/local/abc10-originals/investigating-california-conservatorships-the-price-of-care-series/103-a0593dd2-f00c-4fc6-93e8-7e0f6912b4bb> [<https://perma.cc/64PG-95QJ>].

14. THOMAS F. COLEMAN, SPECTRUM INST., FUNDING AND FEES REVIEW PROJECT: REPORTING ON THE USE OF PUBLIC FUNDS AND THE SEIZURE OF PRIVATE ASSETS TO PAY FOR LEGAL SERVICES IN CONSERVATORSHIPS 11 (2021), <https://spectruminstitute.org/public-funding-report.pdf> [<https://perma.cc/M49T-FALU>].

15. *Id.*

16. *Projections*, CAL. DEP'T OF FIN., <https://dof.ca.gov/Forecasting/Demographics/Projections/> [<https://perma.cc/V6ZY-2QV2>] (follow "P2-B County Population by age" hyperlink to download the Excel sheet outlining county population statistics).

17. SUBCOMM. ON HEALTH & LONG-TERM CARE, ABUSES IN GUARDIANSHIP OF THE ELDERLY AND INFIRM: A NATIONAL DISGRACE, H.R. REP. NO. 100-641, at 4 (1987).

That same year, the Associated Press described the guardianship system as a “dangerously burdened and troubled system that regularly puts elderly lives in the hands of others with little or no evidence of necessity.”¹⁸ Since then, the resulting negative media attention led to more than 270 federal and state laws implementing procedural due process protections for conservatees/proposed conservatees (C/PCs),¹⁹ such as the Adult Guardianship and Protective Proceedings Jurisdiction Act of 2007.²⁰ In California, the negative coverage was such that the Judicial Council²¹ published a handbook instructing court agents on how to respond to negative media coverage and how to do damage control through positive publicity.²² Subsequent protections improved conservatorships by favoring the PC’s presence at the conservatorship hearing, requiring a functional clinical evaluation, and limiting the conservator’s authority over the conservatee;²³ however, they failed to prevent unnecessary conservatorships.²⁴

The purpose of conservatorships is commendable: “[E]nsure the care and protection of people who need it, while maintaining their personal agency as much as practical.”²⁵ However, in 1997, after a national survey of conservatorships throughout a thirty-five-year span, elder law scholar A. Frank Johns was unable to find clear indications

18. Fred Bayles, *Guardians of the Elderly: An Ailing System Part I: Declared ‘Legally Dead’ by a Troubled System*, AP NEWS (Sept. 19, 1987), <https://apnews.com/article/1198f64bb05d9c1ec690035983c02f9f> [<https://perma.cc/PD7D-SMD3>].

19. Jennifer Moyer & Aanand D. Naik, *Preserving Rights for Individuals Facing Guardianship*, 305 J. AM. MED. ASS’N 936, 936 (Mar. 2, 2011); Michael L. Perlin, “*Striking for the Guardians and Protectors of the Mind*”: *The Convention on the Rights of Persons with Mental Disabilities and the Future of Guardianship Law*, 117 PENN STATE L. REV. 1159, 1172 (2013).

20. *Uniform Adult Guardianship and Protective Proceedings Jurisdiction Act*, UNIF. L. COMM’N (Oct. 30, 2022, 2:08 PM), <https://www.uniformlaws.org/committees/community-home?CommunityKey=0f25ccb8-43ce-4df5-a856-e6585698197a> [<https://perma.cc/ZSK2-6QKJ>]. This Act was adopted in all states but Florida, Kansas, Michigan, and Texas, and addresses multistate jurisdictional conflicts to simplify a conservatee changing their state of residence and allows for a conservator to register out-of-state court orders in a local court. *Id.*

21. “The Judicial Council is the policymaking body of the California courts . . . [and] is responsible for ensuring the consistent, independent, impartial, and accessible administration of justice.” *Judicial Council*, CAL. CTS., <https://www.courts.ca.gov/policyadmin-jc.htm> [<https://perma.cc/3LBZ-ZBTW>].

22. JUD. COUNCIL OF CAL., *MEDIA HANDBOOK FOR CALIFORNIA COURT PROFESSIONALS* (Fran Haselsteiner ed., 2007).

23. AM. BAR ASS’N, *ASSESSMENT OF OLDER ADULTS WITH DIMINISHED CAPACITY: A HANDBOOK FOR PSYCHOLOGISTS* 126–30 (2008), <https://www.apa.org/pi/aging/programs/assessment/capacity-psychologist-handbook.pdf> [<https://perma.cc/D37V-AMCX>].

24. Sean Burke, *Person-Centered Guardianship: How the Rise of Supported Decision-Making and Person-Centered Services Can Help Olmstead’s Promise Get Here Faster*, 42 MITCHELL HAMLIN L. REV. 873, 879 (2016).

25. *Conservatorship of Navarrete*, 273 Cal. Rptr. 3d 86, 94 (Ct. App. 2020).

of conservatorship arrangements having a positive impact on conservatees' lives.²⁶ Similarly, in 2012—fifteen years after his initial survey—Johns lamented that the conservatorship system continues to prioritize a conservatee's property over the conservatee as a person.²⁷ Furthermore, conservatorship placement turns into an adversarial process when several individuals—including judges, court investigators, and conservators—are tasked with pursuing what *they* deem to be in the “best interest” of the proposed conservatee.²⁸ Although sometimes well-meaning, those individuals frequently incorrectly assume that people with intellectual and developmental disabilities (IDDs) are unable to make autonomous decisions and must be placed in conservatorships.

Tragically, the C/PC is simultaneously the most directly affected and most overlooked individual in a conservatorship process. And without counsel overseeing capacity determination proceedings, advocating for less restrictive alternatives, and ensuring the conservator meets their burden of care, a C/PC would be permanently stripped of their right to make decisions regarding every aspect of their life—including housing, health care and reproduction,²⁹ marriage, finances, work, and their social life³⁰—and unable to challenge their confinement.

This Note will argue that California probate courts commit constitutional, federal, and state violations by failing to appoint counsel

26. See generally A. Frank Johns, *Guardianship Folly: The Misgovernment of Parens Patriae and the Forecast of Its Crumbling Linkage to Unprotected Older Americans in the Twenty-First Century—A March of Folly? Or Just a Mask of Virtual Reality?*, 27 STETSON L. REV. 1, 22–66 (1997); A. Frank Johns, *Person-Centered Planning in Guardianship: A Little Hope for the Future*, 2012 UTAH L. REV. 1541, 1542–43 (2012) (stating that his survey “uncovered evils in guardianship: removing all individual rights; denying access, connection, and voice to those lost in guardianship’s gulag; and still continuing a process rooted in systemic perversities”).

27. NAT’L COUNCIL ON DISABILITY, BEYOND GUARDIANSHIP: TOWARD ALTERNATIVES THAT PROMOTE GREATER SELF-DETERMINATION FOR PEOPLE WITH DISABILITIES 9 (2018), https://ncd.gov/sites/default/files/NCD_Guardianship_Report_Accessible.pdf [<https://perma.cc/NJ5R-KFNJ>].

28. COLEMAN, *supra* note 14, at ii, 32–33.

29. From the early 1900s, up until the 1970s, laws requiring the sterilization of “unfit” citizens were common. Courts argued that denying extending the “right” of sterilization to institutionalized adults and adults with IDDs who were living with a guardian violated their right to equal protection under the Fourteenth Amendment. *The Right to Self-Determination: Freedom from Involuntary Sterilization*, DISABILITY JUST., <https://disabilityjustice.org/right-to-self-determination-freedom-from-involuntary-sterilization/#cite-ref-2> [<https://perma.cc/GN3M-D8S9>]; see, e.g., *In re Est.* of K.E.J., 887 N.E.2d 704, 716–17 (Ill. App. 2008); *In re Grady*, 426 A.2d 467, 475 (N.J. 1981) (asserting that the court’s judgment, and not the parents’ decision, substitutes the “incompetent’s consent”).

30. ANDERS ET AL., *supra* note 11, at 14–15.

to all conservatees and proposed conservatees. Courts must automatically appoint counsel to all C/PCs after a proposed conservator files a conservatorship request³¹ to ensure compliance with the Americans with Disabilities Act, to avoid unnecessary conservatorships, and to ensure C/PCs have meaningful participation in conservatorship proceedings.³² Furthermore, this Note will examine the default general conservatorship arrangement in California by comparing it to conservatorship variations in other states. By highlighting these arrangement alternatives, this Note aims to outline what a conservatee-centric conservatorship system could look like in California.

II. DUE PROCESS PLUS: BACKGROUND ON DUE PROCESS, TITLE II, AND CONSERVATORSHIPS

A. *Constitutional Guarantee to Counsel*

The informed consent doctrine asserts that every human being has a right to determine what is done to their body, and lack of such consent in a medical context constitutes assault for which the perpetrator is liable.³³ However, the legal system has infringed upon the bodily autonomy of individuals deemed to have IDD to the point of forced sterilization.³⁴ Given this precedent, it is vital that C/PCs are afforded counsel that will zealously advocate to uphold their constitutional right to bodily (decisional and spatial) autonomy granted by the Fourteenth Amendment's due process clause.³⁵

31. COLEMAN, *supra* note 14, at 12.

32. *See infra* Section II.B.

33. *Cruzan v. Dir., Mo. Dep't of Health*, 497 U.S. 261, 269 (1990).

34. *See Buck v. Bell*, 274 U.S. 200, 205–08 (1927) (asserting that “[t]hree generations of imbeciles are enough” when justifying the involuntary sterilization of a woman deemed “feeble minded,” and rejecting Carrie Buck’s claim that her Fourteenth Amendment rights were violated by being sterilized against her will). The reasoning in *Buck v. Bell* was discredited by subsequent case law, but the case was not explicitly overturned despite subsequent research uncovering that Carrie Buck did not have IDD. *Buck v. Bell: Inside the SCOTUS Case That Led to Forced Sterilization of 70,000 & Inspired the Nazis*, DEMOCRACY NOW! (Mar. 17, 2016), https://www.democracynow.org/2016/3/17/buck_v_bell_inside_the_scotus [<https://perma.cc/4E78-RFM2>]; *see also Skinner v. Oklahoma ex rel. Williamson*, 316 U.S. 535, 541 (1942) (striking down sterilization as violating the equal protection clause, but subsequently cited as part of substantive due process jurisprudence); *Loving v. Virginia*, 388 U.S. 1, 12 (1967) (citing *Skinner* in asserting that denying individuals the “basic civil right[]” to marry based on race deprives individuals of their liberty without due process); *Griswold v. Connecticut*, 381 U.S. 479, 502 (1965) (White, J., concurring) (citing *Prince v. Massachusetts*, 321 U.S. 158, 166 (1944), in affirming that the state cannot enter into private realms without substantial justification).

35. *See* Nathan S. Chapman & Kenji Yoshino, *The Fourteenth Amendment Due Process Clause*, NAT’L CONST. CTR., <https://constitutioncenter.org/interactive-constitution/interpretation/amendment-xiv/clauses/> [<https://perma.cc/WLT7-7XZ8>]; *Bowers v. Hardwick*, 478 U.S. 186,

The Fourteenth Amendment guarantees individuals the right to procedural and substantive due process.³⁶ Procedural due process addresses the steps the government must follow before depriving an individual of life, liberty, or property.³⁷ In *Mullane v. Central Hanover Bank & Trust Co.*,³⁸ the Court held that due process requires the interested party be given notice in a way that is “reasonably calculated” to reach that individual.³⁹ It follows that, in the context of conservatorships, the court and proposed conservator are depriving the PC of their constitutional right if they fail to notify the PC about the conservatorship process in a way that is accessible to the PC.⁴⁰

Regarding substantive due process, the Supreme Court asserts that some rights and liberties are so fundamental that they cannot be infringed upon even if they are not enumerated in the Constitution—including two rights that probate courts routinely deny C/PCs: the right to marry⁴¹ and the right to choose whether to use contraception.⁴² Additionally, substantive due process requires that C/PCs be afforded a right to counsel, right to a jury trial, and right to appeal.⁴³ However, conservatorship trials are basically unheard of,⁴⁴ and are essentially reserved for wealthy families interested in protecting their assets.⁴⁵ Notably, in Los Angeles County, between 1980 and 2018 there were

204 (1986) (Blackmun, J., dissenting) (stating that the Supreme Court has recognized “both the decisional and spatial aspects of the right to privacy”).

36. Chapman & Yoshino, *supra* note 35.

37. U.S. CONST. amend. XIV.

38. 339 U.S. 306 (1950).

39. *Id.* at 314, 318.

40. *See id.* at 320.

41. *See Loving v. Virginia*, 388 U.S. 1 (1967) (holding that the right to marry is a constitutionally protected right).

42. *See Griswold v. Connecticut*, 381 U.S. 479 (1965) (ruling that the government cannot infringe upon the freedom of married couples to buy and use contraception); Dalton, *supra* note 9 (noting that both the right to marry and the right to choose whether to use contraception were denied to Spears while she was under a conservatorship).

43. Letter from Robin M. Black, Legal Serv. Manager, Alta Cal. Reg'l Ctr., to Thomas F. Coleman, Legal Dir., Spectrum Inst. (Mar. 17, 2017), <https://spectruminstitute.org/request.pdf> [<https://perma.cc/FYP9-XDTA>]; CAL. PROB. CODE §§ 1827, 1801(e) (2022).

44. THOMAS F. COLEMAN, SPECTRUM INST., PROBATE CONSERVATORSHIPS: FLAWS & FIXES 12 (2021), <https://disabilityandguardianship.org/flaws-and-fixes.pdf> [<https://perma.cc/8PT4-ENJS>].

45. COAL. FOR ELDER & DEPENDENT ADULT RTS., CONSERVATORSHIP IN CRISIS: CIVIL RIGHTS VIOLATIONS & ABUSES OF POWER 15 (2015), https://apha.confex.com/apha/143am/webprogram/Handout/id3640/Handout—Poster_336114.pdf [<https://perma.cc/Q5XB-M9FD>].

only two limited conservatorship appeals.⁴⁶ Similarly, between 2015 and 2019 there were only three general conservatorship appeals.⁴⁷

Stereotypes regarding people with IDD's have allowed for decades of unjustified discriminatory practices and conservatorship abuse that do not serve a compelling, important, or legitimate government interest and violate even the most deferential standard of review. In *Frontiero v Richardson*,⁴⁸ the Supreme Court asserted that the Constitution recognizes higher values than speed, efficiency, and administrative convenience.⁴⁹ Thus, it follows that said interests do not justify depriving people of their constitutional rights and unnecessarily placing them in conservatorships when there are less restrictive alternatives. Similarly, in *City of Cleburne v. Cleburne Living Center, Inc.*,⁵⁰ the Court applied a less deferential “rational basis plus” review to strike down a city ordinance requiring a special permit to operate a group home for people with disabilities.⁵¹ In *Cleburne*, the Court stated that a regulation might be subject to heightened scrutiny if it is geared towards a group with a characteristic that is (1) an immutable trait, (2) with a history of purposeful discrimination, (3) rendering the group members relatively politically powerless compared to nonmembers.⁵²

Both disability—an oftentimes visible characteristic—and age—a highly visible characteristic—are immutable traits that contribute to the discrimination C/PCs experience. While seniors are disenfranchised to a lesser extent than people with IDD's, C/PC oftentimes exist at the intersection of both identities; and thus, they experience the brunt of the discrimination aimed at both demographics. Also, conservatees have historically been grossly deprived of political power by being excluded from the electoral process. For example, conservatees in California were not able to vote until 2008.⁵³ Thus, to rectify the historical discrimination against C/PCs—an insular minority that holds less political power than nonmembers due to immutable

46. COLEMAN, *supra* note 44, at 13.

47. *Id.*

48. 411 U.S. 677 (1973).

49. *Id.* at 690 (where Congress passed a law granting military members with dependents an increased housing allowance and medical benefits, men could always claim their wife as a dependent, but women faced additional requirements to claim their husband as a dependent).

50. 473 U.S. 432 (1985).

51. *See id.*

52. *Id.* at 442–45.

53. *See* S.B. 589, 2015–2016 Leg., Reg. Sess. (Cal. 2015).

traits⁵⁴—“due process plus” requires the automatic appointment of counsel to all PCs.⁵⁵

B. The Americans with Disabilities Act Heightens the Due Process Requirement

The Americans with Disabilities Act of 1990 (ADA) built upon section 504 of the Rehabilitation Act of 1973⁵⁶ to combat the discrimination people with disabilities face in their daily life.⁵⁷ Through the ADA, Congress acknowledged that institutional barriers and prejudice prevent individuals with physical and mental disabilities from enjoying equal access to services, but these disabilities do not diminish their right to full participation in all aspects of society.⁵⁸

The ADA purposefully defined “disability” broadly to cover not only people who presently have a disability that substantially limits one or more major life activities,⁵⁹ but also people who have “a record of such an impairment,” or are “regarded as having such an impairment.”⁶⁰ A state court, as a public entity that receives federal funding

54. *United States v. Carolene Prods. Co.*, 304 U.S. 144, 152 n.4 (1938) (asserting that constitutionality will not be presumed when a regulation is the result of prejudice against a discrete and insular minority).

55. Disability and age are not currently quasi-suspect classifications for the purpose of Fourteenth Amendment violations, yet future literature could argue that conservatees should be elevated to a “quasi-suspect class” to force conservatorship regulations to face intermediate scrutiny and be more narrowly tailored. *See Cleburne Living Ctr.*, 473 U.S. 432 (holding disability is not a suspect class); *Mass. Bd. of Ret. v. Murgia*, 427 U.S. 307 (1976) (holding age is not a suspect class). *But see Cleburne Living Ctr.*, 473 U.S. at 456 (Marshall, J., concurring in part and dissenting in part) (pointing out that the opinion applied a heightened level of scrutiny to invalidate a zoning ordinance discriminating against people with disabilities); *Murgia*, 427 U.S. at 318 (Marshall, J., dissenting) (asserting the opinion did apply a heightened level of scrutiny by focusing on the character of the classification in question, the importance to the class discriminated against, and the state interests asserted to support the classification); *United States v. Virginia*, 518 U.S. 515, 533 (1996) (finding that regulations based on stereotypes not “exceedingly persuasive justification” for gender-based male-only school admissions; however, regulations serving an important government purpose—such as promoting equal opportunity and advancing the full development of a person’s talent and capacities—could survive intermediate scrutiny if the regulation is substantially related to the objective).

56. *Protecting Students with Disabilities*, U.S. DEP’T OF EDUC. (Jan. 10, 2020), <https://www2.ed.gov/about/offices/list/ocr/504faq.html> [<https://perma.cc/9QPP-QJXG>].

57. *Americans with Disabilities Act*, Pub. L. No. 101-336, 104 Stat. 327, 328 (1990).

58. *Id.* at 328–29.

59. *See* 28 C.F.R. § 35.104 (2022) (explaining that major life activities include “caring for one’s self, walking, seeing, hearing, speaking, breathing, learning, and working”).

60. *Id.*; *see also The Americans with Disabilities Act Amendments Act of 2008*, U.S. EQUAL EMP. OPPORTUNITY COMM’N, <https://www.eeoc.gov/statutes/americans-disabilities-act-amendments-act-2008> [<https://perma.cc/R6VZ-PJ8S>] (emphasizing that the definition of “disability” should be interpreted broadly—rejecting the narrow interpretation of several Supreme Court decisions—to provide “coverage of individuals to the maximum extent permitted” by the ADA, and “to

and provides public services, must comply with Title II of the ADA⁶¹ or risk losing funding for violating the general non-discrimination provision of the ADA⁶²—asserting that “no individual with a disability shall, on the basis of disability, be excluded from participation in or be denied the benefits of services, programs, or activities of a public entity.”⁶³ If the court fails to abide by the ADA, a complaint can be filed against that court by the individual or class of individuals facing discrimination, or by a third party on their behalf.⁶⁴

The ADA requires that public entities provide reasonable modifications so their communication is similarly effective towards all recipients.⁶⁵ Modifications by public entities are reasonable if they do not create an undue administrative or financial burden⁶⁶ considering factors such as the nature and cost of the modification, and the entity’s type of operation and financial resources.⁶⁷ However, because a modification is contingent on a request, courts justify their nonobservance on the C/PC’s failure to submit a request⁶⁸—even though in a

make it easier for an individual seeking protection under the ADA” to establish that they have a disability).

61. See *State and Local Governments (Title II)*, U.S. DEP’T OF JUST.: C.R. DIV., https://www.ada.gov/ada_title_II.htm [<https://perma.cc/35A3-GHNR>].

62. See *id.*; U.S. DEP’T OF JUST., ADA TITLE III TECHNICAL ASSISTANCE MANUAL, <https://www.ada.gov/taman3.html> [<https://perma.cc/QBW8-T36B>]; CAL. GOV. CODE § 11135 (2022). Note that Title I and Title II use slightly different terminology to refer to the adjustments that entities must make for individuals. While Title I—applying to employers—requires reasonable “accommodations,” and Title II—applying to public entities—requires reasonable “modifications,” both terms are commonly used interchangeably. Americans with Disabilities Act, Pub. L. No. 101-336, 104 Stat. 327, 331, 337 (1990). See generally DENNIS STEINMAN & SEAN O’DAY, REASONABLE ACCOMMODATION BEYOND PHYSICAL ACCESS (1999), https://www.kelrun.com/files/2013/05/ADA_CLE_Article.pdf [<https://perma.cc/X93K-FV2S>].

63. See U.S. DEP’T OF JUST., AMERICANS WITH DISABILITIES ACT: TITLE II REGULATIONS 153 (2010), https://www.ada.gov/regs2010/titleII_2010/titleII_2010_regulations.pdf [<https://perma.cc/B3L7-S4JV>].

64. *Id.* at 52; JUD. COUNCIL OF CAL. ACCESS AND FAIRNESS ADVISORY COMM., RESPONDING TO REQUESTS FOR ACCOMMODATIONS BY PERSONS WITH DISABILITIES: QUESTIONS AND ANSWERS ABOUT RULE OF COURT 1.100 FOR COURT PERSONNEL (2007), <https://www.courts.ca.gov/documents/access-fairness-q-a-responding.pdf> [<https://perma.cc/7VES-LY9S>].

65. *ADA Requirements: Effective Communication*, U.S. DEP’T OF JUST.: C.R. DIV. (2014), <https://www.ada.gov/effective-comm.htm> [<https://perma.cc/74TV-MPND>]. “Reasonable modifications” include (1) modifications to rules, policies, or practices; (2) removing architectural, communication, or transportation barriers; and (3) providing auxiliary aids or services that a person needs to participate in a program, service, or activity. Americans with Disabilities Act, Pub. L. No. 101-336, 104 Stat. 327, 337 (1990).

66. U.S. DEP’T OF JUST., AMERICANS WITH DISABILITIES ACT TITLE II REGULATIONS 51–52 (2010), https://www.ada.gov/regs2010/titleII_2010/titleII_2010_regulations.pdf [<https://perma.cc/B3L7-S4JV>].

67. U.S. DEP’T OF JUST., *supra* note 62, § 4.3600 (stating that the “undue burden” definition is identical to the “undue hardship” under Title I).

68. See STEINMAN & O’DAY, *supra* note 62, at 12.

conservatorship proceeding, the court is on notice that the interested party likely has a disability that precludes them from making the request. Furthermore, courts routinely classify modifications as “undue hardships” to justify non-compliance.⁶⁹ Thus, while the ADA significantly improved the lives of people with physical disabilities by requiring easily observable infrastructure modifications, people with IDD did not benefit to the same degree because the accommodations they require are oftentimes momentary, such that noncompliance is not readily detectible, and thus, not easily sanctioned.⁷⁰

Apart from the due process mandated by the Constitution regardless of the legal proceeding, Title II creates a “due process plus”⁷¹ hybrid performance standard under which probate courts and its agents discriminate against litigants with disabilities when they fail to ensure these litigants are afforded meaningful participation in the legal proceedings.⁷² Thus, “procedural due process plus” demands courts provide necessary services and accommodations to the C/PC—such as making a hearing accessible through an interpreter.⁷³ Similarly, “substantive due process plus” requires the C/PC be appointed counsel knowledgeable of conservatorship law to ensure the C/PC is given equal access to justice.⁷⁴

Knowledge of disability, and not a request for accommodation, triggers a public entity’s duty to provide accommodation. In *Robertson v. Las Animas County Sheriff’s Department*,⁷⁵ the court asserted that a public entity is required to provide accommodation when it has “knowledge that the individual is disabled, either because the disability is obvious or because the individual (or someone else) has

69. Whether accommodating a disabled worker would constitute an “undue hardship” for the employer hinges on a fact-specific assessment including: an employer’s business size, composition, and structure of its workforce, as well as the value of the employee’s work, and the nature and cost of accommodation needed. *See generally* Dean v. Mun. of Metro. Seattle-Metro, 708 P.2d 393 (Wash. 1985).

70. THOMAS F. COLEMAN, SPECTRUM INST., DUE PROCESS PLUS: ADA ADVOCACY AND TRAINING STANDARDS FOR APPOINTED ATTORNEYS IN ADULT GUARDIANSHIP CASES 4 (2015), <http://disabilityandguardianship.org/spectrum/white-paper/white-paper.pdf> [<https://perma.cc/7KK3-3DWA>].

71. *Id.* at 27.

72. *Id.*

73. *See id.* at 22.

74. *See id.* at 45. For an overview of the performance and competency standards required of probate appointed counsel, *see id.* at 55.

75. 500 F.3d 1185 (10th Cir. 2007).

informed the entity of the disability.”⁷⁶ Similarly, in *Belton v. Georgia*,⁷⁷ the court held that the state of Georgia was liable under Title II because it failed to provide deaf Georgians with access to public mental health services equal to those afforded to non-deaf citizens.⁷⁸ Analogously, judges violate the ADA’s equal access and participation provision by conditioning accommodation upon request when the very nature of a conservatorship request puts a judge on notice that the PC is likely to have a disability that probably makes it impossible for them to request accommodation, and likely interferes with their meaningful participation in the legal proceedings.⁷⁹ Thus, for a C/PC to have meaningful participation in conservatorship proceedings, a judge should automatically appoint qualified counsel who is able to request proper accommodations.⁸⁰

C. Conservatorships: Narrow Intention and Broad Application

A conservatorship is arguably the court system’s “most consequential civil restriction,”⁸¹ and a petition for this arrangement should trigger appointment of a properly trained attorney who will advocate for the conservatee’s best interest by demanding the least restrictive arrangement and, if a conservatorship is necessary, ensure the conservatee retains all the rights and liberties they are capable of exercising.⁸²

Limited conservatorships were intended for adults with IDD and instruct the court to delineate the rights delegated to the conservator to allow the conservatee to retain as much liberty as possible.⁸³

76. *Id.* at 1196.

77. No. 1:10-CV-0583-RWS, 2012 WL 1080304 (N.D. Ga. Mar. 30, 2012).

78. *Id.* at *16. The court also noted that Georgia failed to show that no reasonable accommodations could be made to correct its institutional failures. *Id.*

79. THOMAS F. COLEMAN, SPECTRUM INST., COMPLIANCE WITH THE ADA REQUIRES THE SACRAMENTO COUNTY SUPERIOR COURT TO APPOINT LAWYERS FOR ALL PROPOSED CONSERVATEES 3 (2018), <https://tomcoleman.us/publications/sacramento-essay.pdf> [<https://perma.cc/PGE3-E49P>].

80. CAL. R. CT. 10.17 (2022).

81. Press Release, Evan Low, Assemb., Cal. State Assemb., Gov. Newsom Signs Conservatorship Reform Bill Authored by Assemblymember Evan Low, Senators Ben Allen and John Laird (Oct. 1, 2021), <https://a28.asmdc.org/press-releases/20211001-gov-newsom-signs-conservatorship-reform-bill-authored-assemblymember-evan> [<https://perma.cc/WK6M-676L>].

82. THOMAS F. COLEMAN, SPECTRUM INST., CONSERVATORSHIP REFORM FROM COMPLAINTS TO SOLUTIONS 5, 13 (2021), <https://disabilityandguardianship.org/symposium.pdf> [<https://perma.cc/DSC7-ACLX>].

83. L.A. CNTY. BAR ASS’N, CONSERVING BRITNEY: THE LAW, THE FACTS ABOUT CONSERVATORSHIPS, AND THE FUTURE (2021), <https://www.lacba.org/docs/default-source/emc>

Meanwhile, general conservatorships are more restrictive and were intended for cognitively impaired older adults with conditions including dementia, Alzheimer's disease, coma, and severe mental illness.⁸⁴ However, probate courts favor general conservatorships⁸⁵ because the petitioner simply requests all rights available under the relevant state law, and the court can grant the request in its entirety.⁸⁶ Meanwhile, under a limited conservatorship, the proposed conservator must specify the rights they are requesting, and the court must adjudicate on the reallocation of rights.⁸⁷ Thus, even if the conservatorship is requested because of a temporary condition, probate courts default to a general conservatorship that remains in effect until the conservatee passes away or meets the arbitrary burden of showing the conservatorship is no longer necessary.⁸⁸

In establishing a limited conservatorship, the process is supposed to be as follows: A proposed conservator files a petition with the court,⁸⁹ and the PC and their agents⁹⁰—family members and any regional center the PC obtains services from⁹¹—are notified of this petition.⁹² A regional center is a private nonprofit organization that provides services—including educational programs, medical services, and transportation assistance—to individuals with IDD.⁹³ A judge

-events/072921tes---conserving-britney---program-materials.pdf [https://perma.cc/WH3B-DH XW].

84. *Id.*; see, e.g., Michael J. Jenuwine, *The State of Adult Guardianship in Indiana: An Empirical Perspective*, in WHO'S OVERSEEING THE OVERSEERS? A REPORT ON THE STATE OF ADULT GUARDIANSHIP IN INDIANA 37, 46 (2012), <https://www.in.gov/courts/iocs/files/ad-guard-2012-full-report.pdf> [https://perma.cc/JDS6-GR3F] (where filings broke down as follows: dementia comprised 25.8 percent, cognitive and intellectual impairment comprised 22 percent, and severe mental illness comprised 10.5 percent).

85. Leslie Salzman, *Guardianship for Persons with Mental Illness—A Legal and Appropriate Alternative?*, 4 ST. LOUIS U. J. HEALTH L. & POL'Y 279, 305 (2011).

86. *Abuse of Power: Exploitation of Older Adults by Guardians and Others They Trust: Hearing Before U.S. S. Spec. Comm. on Aging*, 115th Cong. 2 (2018) [hereinafter *Abuse of Power Hearing*] (statement of Nina A. Kohn, Assoc. Dean for Rsch. & Online Educ., Syracuse Univ. Coll. L.).

87. *Id.*

88. Salzman, *supra* note 85, at 305; DISABILITY RTS. CAL., LIMITED CONSERVATORSHIPS & ALTERNATIVES 4, 9 (2015), <https://www.disabilityrightsca.org/system/files/file-attachments/557801.pdf> [https://perma.cc/5UU5-JRS3].

89. The petition to establish a conservatorship can be filed by the PC themselves, a spouse or domestic partner, a relative, or an interested entity or individual. CAL. PROB. CODE § 1820(a) (2022). The petition filed must prove through clear and convincing evidence that the conservatorship is needed. *Id.* § 1801(e).

90. DISABILITY RTS. CAL., *supra* note 88, at 2.

91. *Id.*

92. *Description of Services*, REG'L CTR. OF ORANGE CNTY., <https://www.rcocdd.com/consumers/description-of-services/> [https://perma.cc/8UXK-K266].

93. *Id.*

then assigns a court investigator to the case and appoints an attorney to represent the conservatee.⁹⁴ Next, the investigator informs the PC about the petition process and its possible ramifications, asks whether the PC wants to object to the proposed conservator, and assesses whether the PC can attend the hearing.⁹⁵ Concurrently, a regional center analyzes whether the PC would benefit from being placed in a conservatorship and prepares a report stating the nature and degree of the PC's disability, including the degree of assistance needed and the PC's physical and mental condition.⁹⁶

Furthermore, a PC to a limited conservatorship has the right to be informed about the rights that may be delegated to the conservator, be represented by an attorney of their choosing (otherwise the judge will appoint counsel), challenge the conservatorship, and request a jury trial.⁹⁷ In contrast, in a proceeding for a general conservatorship, a judge does not have to appoint counsel to the PC, and, given the all-or-nothing nature of a general conservatorship, the judge does not have to inform the PC which rights may be delegated to the conservator since all rights will be swiftly reallocated to the conservator. Clearly, it is illogical that counsel is automatically appointed for limited conservatorships, but is only appointed upon request or at the judge's discretion for the more restrictive general conservatorship.⁹⁸ Because conservatorship proceedings are likely to result in a judge with limited training regarding conservatorship law⁹⁹ granting the conservator complete legal authority over the conservatee and/or their estate, it is even more vital for C/PCs to be afforded counsel in general conservatorship proceedings than in limited conservatorships proceedings.

California law recognizes three types of conservators: (1) relatives and friends, (2) licensed professional fiduciaries (LPFs),¹⁰⁰ and

94. DISABILITY RTS. CAL., *supra* note 88, at 2.

95. *Id.*

96. *Id.* at 3. If the proposed conservator is also a service provider, the report must also analyze whether they are a suitable option to provide the required care. *Id.*

97. *Id.* at 3–4.

98. 15 WITKIN, SUMMARY OF CALIFORNIA LAW, *Wills and Probate* §§ 963, 964 (11th ed. 2022); DISABILITY RTS. CAL., *supra* note 88, at 1; Melinda Hunsaker, *Limited Conservatorships: A Delicate Balance*, ORANGE CNTY. LAW., Nov. 2008, at 26. See *infra* Part III for discussion regarding AB 1194 requiring appointment of counsel in certain proceedings.

99. AD HOC COMM. ON PROB. L. & PROC., UTAH STATE CTS., FINAL REPORT TO THE UTAH JUDICIAL COUNCIL 38 (2009), <https://www.utcourts.gov/committees/adhocprobate/Guardian.Conservator.Report.pdf> [<https://perma.cc/T3VT-PT5G>].

100. ASSEMBLY FLOOR ANALYSIS: CONCURRENCE IN SENATE AMENDMENTS, Assemb. B. 1194, 2021–2022 Leg., Reg. Sess. (Cal. Sept. 8, 2021) [hereinafter AB 1194 ASSEMBLY FLOOR

(3) public guardians.¹⁰¹ The conservator, or co-conservators, must be eighteen years or older¹⁰² and abide by California's Probate Code.¹⁰³ While family members are given priority and do not need to be licensed,¹⁰⁴ professional conservators caring for two or more unrelated individuals must be licensed.¹⁰⁵ Because LPFs and public guardians are paid by the conservatee's estate or family,¹⁰⁶ the court must approve their fees and allow the conservatee's family to object to fees they consider excessive.¹⁰⁷

While a conservator of a person is responsible for the conservatee's medical care, living arrangements, and any other daily decisions assigned by the judge, a conservator of an estate is legally empowered to make decisions regarding the conservatee's finances and assets¹⁰⁸—including entering into contracts, suing on behalf of the conservatee, defending the conservatee in a lawsuit, and investing the conservatee's assets.¹⁰⁹ And while a conservatee in a limited conservatorship retains all rights a court does not explicitly delegate to the conservator,¹¹⁰ judges routinely take away the right for a conservatee to: decide where to live, access confidential records, enter into contracts, consent to medical treatment, marry, control social and sexual contacts, and make decisions regarding their education.¹¹¹ Thus, if a conservatee wants to regain these rights, they have the burden of requesting a court hearing

ANALYSIS]. An LPF is a court-appointed third party, not related to the conservatee, appointed to oversee a person's well-being (including care, housing, and medical attention), their estate, or both. *Id.* An LPF is licensed and regulated by the Professional Fiduciaries Bureau, a subsection of the Department of Consumer Affairs. *Id.*

101. Kenneth Heisz, *Beware of the Con in Conservatorships: A Perfect Storm for Financial Elder Abuse in California*, 17 NAT'L ACAD. ELDER L. ATT'YS 33, 41 (2021).

102. DISABILITY RTS. CAL., *supra* note 88, at 2.

103. Heisz, *supra* note 101, at 35.

104. The general hierarchy of conservator appointments is: the person chosen by the C/PC, a spouse or domestic partner, an adult child of the C/PC, a parent or sibling of C/PC, and an LPF or public guardian. L.A. CNTY. BAR ASS'N, *supra* note 83.

105. CAL. BUS. & PROF. CODE § 6501(e)–(f)(1)(A) (2022).

106. Heisz, *supra* note 101, at 42.

107. *Id.*

108. Harmeet Kaur, *Conservatorships Explained: What They Are and Who They're Supposed to Help*, CNN (June 24, 2021, 7:39 PM), <https://www.cnn.com/2021/06/24/us/conservatorship-britney-spears-explainer-trnd/index.html> [<https://perma.cc/VL2F-QZN7>].

109. L.A. CNTY. BAR ASS'N, *supra* note 83.

110. *See id.* In a limited conservatorship, the conservator is only granted powers tailored to permit a developmentally disabled person to care and manage their affairs commensurate with their ability to do so. *Id.*

111. L.A. CNTY. BAR ASS'N, *supra* note 83.

to attempt to show that they do not need to be under a conservatorship.¹¹²

Importantly, a right that cannot be delegated to the conservator is the conservatee's right to select their counsel.¹¹³ In *Michelle K. v. Superior Court*,¹¹⁴ the court asserted that a conservatee's fundamental right to liberty requires that they retain their right to be represented by counsel of their choosing, even if they are under a conservatorship.¹¹⁵ Thus, even if a conservator is a conservatee's legal representative for most purposes, the conservator "may not replace the [conservatee's lawyer] with counsel of his choice."¹¹⁶

And although people with IDD in less restrictive arrangements are more likely to have a better quality of life,¹¹⁷ once a person is placed in a conservatorship, they are disproportionately likely to be institutionalized.¹¹⁸ Alarming, between 60 percent and 97 percent of conservatees are ultimately institutionalized.¹¹⁹ Although qualitative and quantitative data overwhelmingly supports less restrictive arrangements, this deliberate and incremental stripping of individual rights is justified as being for the welfare of the conservatee. And while a judge can swiftly terminate a limited conservatorship by giving a court order deeming the arrangement unnecessary, there is minimal research data on the frequency in which rights are restored.¹²⁰ Similarly, the default general conservatorship order has an unlimited duration, and the arrangement generally lasts until the conservatee passes away.¹²¹

112. DISABILITY RTS. CAL., *supra* note 88, at 4.

113. *Michelle K. v. Superior Ct.*, 164 Cal. Rptr. 3d 232, 262–63 (Ct. App. 2013).

114. 164 Cal. Rptr. 3d 232 (Ct. App. 2013).

115. *Id.* at 256–57.

116. *Id.* at 256.

117. NAT'L CORE INDICATORS, NATIONAL CORE INDICATORS DATA HIGHLIGHT: WHAT DO NCI DATA TELL US ABOUT PEOPLE WITH IDD WHO HAVE GUARDIANS COMPARED TO THOSE WHO DON'T (2021), https://www.ncilegacy.com/upload/core-indicators/NCI_Data_Highlight_Guardianship_2021_Final.pdf [<https://perma.cc/BQ5L-V3H9>].

118. Margaret "Jenny" Hatch et al., *Unjustified Isolation Is Discrimination: The Olmstead Case Against Overbroad and Undue Organizational and Public Guardianship*, 3 INCLUSION 65, 70 (2015).

119. *Id.*

120. DISABILITY RTS. CAL., *supra* note 88, at 9; ERICA WOOD ET AL., COMM'N ON L. & AGING, AM. BAR ASS'N, RESTORATION OF RIGHTS IN ADULT GUARDIANSHIP: RESEARCH & RECOMMENDATIONS 18 (2017), https://www.americanbar.org/content/dam/aba/administrative/law_aging/restoration%20report.authcheckdam.pdf [<https://perma.cc/EFP9-E6N3>] ("While, on paper, each state provides for 'termination of the order and restoration of rights,' there are no data on the frequency with which restoration occurs and under what circumstances.")

121. ERICA WOOD ET AL., *supra* note 120, at 18.

III. ANALYSIS AND CRITIQUE OF NATIONAL AND STATE-LEVEL SYSTEMIC DEFICIENCIES WITHIN THE CONSERVATORSHIP SYSTEM

The current national and state-level conservatorship model conflicts with constitutional due process and Title II of the ADA¹²² by unlawfully isolating people with IDD's.¹²³ In *Olmstead v. L.C.*,¹²⁴ the Court was concerned with segregation perpetuating stereotypes about people with IDD's, devaluing their existence, and lessening their opportunities to enjoy full participation in their community.¹²⁵ Thus, the Court linked unjustified isolation to disability-related discrimination¹²⁶ and interpreted Title II as instructing public entities to provide services in the most integrated and least restrictive way possible.¹²⁷ Nevertheless, more than two decades after *Olmstead*, conservatorships continue to defy the Court's holding by foregoing less restrictive alternatives and implementing general conservatorships.¹²⁸

In 1994, The Center for Social Gerontology conducted a national study with alarming findings: 94 percent of conservatorship petitions were granted, only 13 percent of orders limited the conservator's power in any way, merely a third of the PCs were represented by counsel during their hearings, medical testimony was rarely heard at proceedings, and the focus was so much on expediency that a quarter of the hearings lasted less than five minutes.¹²⁹ While little improvement has been made to the conservatorship system since 1994, senior fraud has become a national concern as medical improvements lead to longer lifespans.¹³⁰ Senior fraud is now a multi-billion-dollar industry,

122. NAT'L COUNCIL ON DISABILITY, *supra* note 27, at 28.

123. Rachel Mattingly Phillips, Note, *Model Language for Supported Decision-Making Statutes*, 98 WASH. U. L. REV. 615, 624 (2020) (citing Salzman, *Rethinking Guardianship (Again): Substituted Decision Making as a Violation of the Integration Mandate of Title II of the Americans with Disabilities Act*, 81 U. COLO. L. REV. 157, 206–09 (2010)).

124. 527 U.S. 581, 581–82, 597, 600–01 (1999). Two women with IDD's and mental illness were voluntarily committed to a psychiatric state-run facility but were subsequently denied “freedom from undue restraint”—violating the Fourteenth Amendment due process clause and ADA Title II—after their treating professionals concluded the women could be deinstitutionalized. *Id.* at 581, 588. The Court held that “[u]njustified isolation . . . is properly regarded as discrimination based on disability” since institutional isolation perpetuates societal stereotypes about people with IDD's and diminishes the quality of life of the institutionalized individual. *Id.* at 597, 600–01.

125. Salzman, *supra* note 85, at 283.

126. *Olmstead*, 527 U.S. at 597.

127. See Salzman, *supra* note 123; Salzman, *supra* note 85.

128. NAT'L COUNCIL ON DISABILITY, *supra* note 27, at 28–29.

129. Pamela B. Teaster et al., *Wards of the State: A National Study of Public Guardianship*, 37 STETSON L. REV. 193, 199 (2007) (citing LAUREN BARRITT LISI ET AL., NATIONAL STUDY OF GUARDIANSHIP SYSTEMS: FINDINGS AND RECOMMENDATIONS 3 (1994)).

130. AB 1194 ASSEMBLY FLOOR ANALYSIS, *supra* note 100.

with seniors being robbed of more than \$3 billion every year.¹³¹ Thus, conservatorships could be a highly beneficial societal safeguard for vulnerable seniors and people with IDD, but overarching problems plaguing the U.S. conservatorship system truncate its potential.

For example, there is apprehension regarding: a general lack of conservatorship data; general conservatorships as the default over less restrictive alternatives raising due process concerns; capacity assessments used to examine C/PCs not being standardized; appointed counsel with high caseloads not acting in the best interests of the C/PCs; and a severe lack of oversight of abusive conservators.¹³²

The lack of recent data on existing conservatorships and newly filed conservatorship applications is a national problem that prevents a qualitative and quantitative assessment of conservatorships,¹³³ and makes it difficult for policymakers to determine where reform is most dire.¹³⁴ Additionally, because a conservatorship dramatically curtails people's autonomy and agency, conservatorships should not be appointed unless clear and convincing evidence proves an individual "is unable to receive or evaluate information or make or communicate decisions, even with appropriate supportive services, technological assistance, or supported decision making."¹³⁵ However, people are commonly wrongfully placed under unnecessarily restrictive conservatorships¹³⁶ because their capacities are not adequately assessed through standardized assessments.¹³⁷

Focus on docket expediency has resulted in an inadequate screening process for potential conservators,¹³⁸ which allows individuals with significant financial problems and criminal convictions to be

131. *Elder Fraud*, FED. BUREAU INVESTIGATIONS, <https://www.fbi.gov/scams-and-safety/com-mon-scams-and-crimes/elder-fraud> [<https://perma.cc/3CQ9-NBGZ>].

132. THOMAS F. COLEMAN, SPECTRUM INST., CAPACITY ASSESSMENTS IN CALIFORNIA CONSERVATORSHIP PROCEEDINGS (2020), <https://tomcoleman.us/publications/2020-california-ca-capacity-report.pdf> [<https://perma.cc/4TCU-77SY>] (providing a detailed analysis and several recommendations surrounding capacity assessments in California conservatorship proceedings).

133. NAT'L COUNCIL ON DISABILITY, *supra* note 27, at 2.

134. *Id.* at 2–3.

135. NAT'L CONF. COMM'RS ON UNIF. STATE LAWS, UNIFORM GUARDIANSHIP, CONSERVATORSHIP, AND OTHER PROTECTIVE ARRANGEMENTS ACT § 301 (2017).

136. *Abuse of Power Hearing*, *supra* note 86 (statement of Nina A. Kohn, Assoc. Dean for Rsch. & Online Educ., Syracuse Univ. Coll. L.).

137. See Brenda K. Uekert & Richard Van Duizend, *Adult Guardianships: A "Best Guess" National Estimate and the Momentum for Reform*, in FUTURE TRENDS IN STATE COURTS 107, 107 (2011).

138. See U.S. GOV'T ACCOUNTABILITY OFF., GAO-10-1046, GUARDIANSHIPS: CASES OF FINANCIAL EXPLOITATION, NEGLIGENCE, AND ABUSE OF SENIORS 7–8 (2010), <https://www.gao.gov/assets/gao-10-1046.pdf> [<https://perma.cc/PWR7-EPTT>].

entrusted with the lives of vulnerable persons and their multi-million-dollar estates.¹³⁹ Inadequate follow-up procedures further exacerbate the problem by allowing for conservators to continue receiving federal benefits after violating the Probate Code when they fail to act in the conservatee's best interest.¹⁴⁰ To illustrate, the U.S. Government Accountability Office (GAO) analyzed conservatorship cases between 1990 and 2010 and found hundreds of incidents of physically abusive, neglectful, and exploitative conservators.¹⁴¹ In twenty closed cases, GAO found that conservators stole \$5.4 million in assets from 158 conservatees.¹⁴² For example, a Missouri conservator used embezzled money to purchase a Hummer and write checks to exotic dancers while forcing his eighty-seven-year-old conservatee with Alzheimer's disease, clothed in a dirty shirt and diaper, to live in the conservator's basement.¹⁴³ In Kansas, a conservator and his wife sexually and physically abused residents in their "dirty and bug-infested" unlicensed group home, charging Medicare for "therapy" services they allegedly provided twenty conservatees with IDD who they videotaped engaging in forced sexual activities.¹⁴⁴

The judicial system's outdated technical infrastructure further aggravates the lack of conservator supervision and deficient conservatorship data compilation. Without proper data programs, courts are unable to detect conservators charging fees inconsistent with their fiduciary duties,¹⁴⁵ and allow them to proceed with impunity.¹⁴⁶ Overall, inadequate conservator supervision,¹⁴⁷ coupled with limited prosecution resulting from outdated technical infrastructure, results in a "perfect storm" for ongoing exploitation, abuse, and neglect.¹⁴⁸

Currently, section 1471 of the California Probate Code directs probate courts to appoint a public defender or private counsel to represent a C/PC.¹⁴⁹ However, severe underfunding and exorbitant

139. NAT'L COUNCIL ON DISABILITY, *supra* note 27; *Abuse of Power Hearing*, *supra* note 86 (statement of Nina A. Kohn, Assoc. Dean for Rsch. & Online Educ., Syracuse Univ. Coll. L.).

140. U.S. GOV'T ACCOUNTABILITY OFF., *supra* note 138, at 7–8.

141. *Id.*

142. *Id.* at 7.

143. *Id.* at 10.

144. *Id.*

145. *Abuse of Power Hearing*, *supra* note 86 (statement of Nina A. Kohn, Assoc. Dean for Rsch. & Online Educ., Syracuse Univ. Coll. L.).

146. *See* U.S. GOV'T ACCOUNTABILITY OFF., *supra* note 138, at 7–8.

147. Uekert & Van Duizend, *supra* note 137, at 109.

148. U.S. DEP'T OF JUST., *supra* note 12, at 26.

149. CAL. PROB. CODE § 1471 (2022).

caseloads¹⁵⁰—up to 450 clients annually¹⁵¹—force court-appointed counsel to forego advocating for less restrictive alternatives and rush through the bureaucratic process.¹⁵² For example, the time allotted per case in Los Angeles courts is ten hours.¹⁵³ And because under the current arrangement conservatees are an afterthought following criminal case appointments,¹⁵⁴ Brendon Woods—a public defender in Alameda County, California¹⁵⁵—stresses the importance of county supervisors establishing an Office of Conservatorship Defense separate from the Public Defender Office.¹⁵⁶

Furthermore, historically marginalized demographics are disproportionately placed in restrictive conservatorships without access to counsel.¹⁵⁷ For example, approximately 21 percent of conservatees in Los Angeles County are Black—which is disproportionately high considering only 9 percent of the county’s population identifies as Black or African American.¹⁵⁸ Additionally, a study conducted in Minnesota found that family members acting as conservators were most likely to financially exploit the conservatee, and the victims were disproportionately women.¹⁵⁹

As in a criminal proceeding where the burden of proof is on the prosecution to prove the accused is guilty, in a conservatorship proceeding the burden of proof should be on the conservator requesting that the conservatorship be kept in place. However, the burden is wrongfully placed on an individual who has been deemed legally

150. COLEMAN, *supra* note 14, at 1.

151. *Id.* While 450 was the number of annual cases provided by counties willing to disclose their caseload assignments, several counties’ public defender departments refused to comply with the public records requests. *Id.*

152. *Id.* at iii.

153. COLEMAN, *supra* note 44, at 12.

154. COLEMAN, *supra* note 14, at iii.

155. *Id.* at iv.

156. *Id.* (coupling the request with adequate financial support and a reasonable caseload limit).

157. See S. L. Reynolds & K. H. Wilber, *Protecting Persons with Severe Cognitive and Mental Disorders: An Analysis of Public Conservatorship in Los Angeles County, California*, 1 AGING & MENTAL HEALTH 87 (1997).

158. In 2020–2021, there was a total of 1,695 conservatorships in Los Angeles County. Of the 1,157 conservatorships for which race was known, 242 of the conservatees were African American. E-mail from Connie D. Draxler, Los Angeles County Dep’t of Mental Health, to author (May 6, 2022, 12:57 PST) (on file with author); *QuickFacts: Los Angeles County, California*, U.S. CENSUS BUREAU (2021), <https://www.census.gov/quickfacts/fact/table/losangelescountycalifornia/HSG010221> [<https://perma.cc/55AC-474P>] (click the “select a fact” drop-down menu, and select “Black or African American” from the menu).

159. Brenda K. Uekert et al., *Conservator Exploitation in Minnesota: An Analysis of Judicial Response*, NAT’L CTR. FOR STATE CTS., Sept. 2018, at 1–3, https://www.eldersandcourts.org/_data/assets/pdf_file/0019/5833/ovc-brief-2.pdf [<https://perma.cc/T5BB-TR65>].

incompetent to disprove that judgment. Apart from courts giving conservators great discretionary authority, it is also highly unlikely that the conservator will support the termination of an arrangement they are economically incentivized to maintain.¹⁶⁰ Thus, regardless of whether a conservatorship is necessary, it is extremely difficult to modify or terminate once implemented.¹⁶¹

During a restoration proceeding, a party asks the court to restore the conservatee's rights after a conservatorship was implemented.¹⁶² Although most states allow any interested individual to petition the restoration of a conservatee's rights,¹⁶³ if conservatorships were implemented as a last resort—as they should be—there would be little need for restoration proceedings.

While conservatorship reform has improved rights restoration proceedings on paper, “[f]or the vast majority of people under [conservatorships], ‘there will not be a return to liberty.’”¹⁶⁴ Although the right to petition for rights restoration is part of the conservatee's due process protection, such petitions are under-litigated because the process is ineffective and the rules are unclear.¹⁶⁵ Furthermore, while most states recognize an individual's right to counsel in proceedings *before* a conservatorship is granted,¹⁶⁶ less than a third of states require courts to appoint counsel for unrepresented conservatees in rights restoration proceedings.¹⁶⁷ Evidently, for a person to reap the full benefits

160. See AD HOC COMM. ON PROB. L. & PROC., UTAH STATE CTS., *supra* note 99, at 5.

161. Jenica Cassidy, *Restoration of Rights in the Termination of Adult Guardianship*, 23 ELDER L.J. 83, 85 (2015).

162. See ERICA WOOD ET AL., *supra* note 120, at 42.

163. NAT'L COUNCIL ON DISABILITY, *supra* note 27, at 24.

164. *Id.* at 25 (first citing Cassidy, *supra* note 161, at 85; then citing Kristin Booth Glen, *The Perils of Guardianship and the Promise of Supported Decision Making*, 48 CLEARINGHOUSE REV. J. POVERTY L. & POL'Y 17, 17 (2014); and then citing Nina A. Kohn & Catheryn Koss, *Lawyers for Legal Ghosts: The Legality and Ethics of Representing Persons Subject to Guardianship*, 91 WASH. L. REV. 581, 583 (2016)).

165. Cassidy, *supra* note 161, at 95–96 (citing to a study noting that 51 percent of the rights restoration petitions were submitted in cases regarding older adults and stating that it is especially uncommon for rights restoration hearings to be held regarding people with traumatic brain disabilities, mental illness, and IDD); Glen, *supra* note 164, at 21; Patricia M. Cavey, *Realizing the Right to Counsel in Guardianships: Dispelling Guardianship Myths*, ELDER'S ADVISOR, Summer 2000, at 26, 31.

166. See AM. BAR ASS'N COMM'N ON L. & AGING, REPRESENTATION AND INVESTIGATION IN GUARDIANSHIP PROCEEDINGS (2021), https://www.americanbar.org/content/dam/aba/administrative/law_aging/chartrepresentationandinvestigation.authcheckdam.pdf [<https://perma.cc/ZBD6-64W2>].

167. Cassidy, *supra* note 161, at 95, 100 (“Twelve jurisdictions including the District of Columbia, statutorily require the court to appoint counsel for an unrepresented protected individual in a restoration proceeding.”)

of representation by counsel, they must have representation throughout the entire conservatorship process—from the filing of the conservatorship request, throughout the duration of the conservatorship, all the way up to an appeal and right restoration proceeding.

While the paternalistic nature of conservatorships is subsiding slightly, judges still reject evidence of a conservatee’s ability to thrive under a less restrictive arrangement and deny restoring a conservatee’s rights based on concerns that the person might make decisions the judge considers harmful.¹⁶⁸ Conservatees are further dissuaded from filing rights restoration petitions because the fees and the burden of proof in challenging the conservatorship are allocated differently by jurisdiction, court, and case.¹⁶⁹

A. California’s Conservatorship System: Many Acts and Little Action

Civil confinement through a conservatorship is similarly restrictive to criminal confinement in a penitentiary.¹⁷⁰ Thus, California courts affirm that due process protects the right to an attorney at key points of the conservatorship process (including proceedings to establish and terminate a conservatorship),¹⁷¹ and the right to effective and independent counsel in conservatorship proceedings protects many of the same rights as the Sixth Amendment¹⁷² (including a right for a conservatee to be heard when their attorney is not providing effective assistance).¹⁷³

However, what is a law without a loophole? For example, while the “Notice of Conservatee’s Rights” asserts that “the conservator must give due regard to the preferences of the conservatee and to encourage the conservatee’s participation in decision-making,”¹⁷⁴ the California Probate Code allows a public guardian to seize a

168. *Id.* at 94–95, 106–121.

169. *Id.* at 104–107, 111–114.

170. COAL. FOR ELDER & DEPENDENT ADULT RTS., *supra* note 45, at 15.

171. Conservatorship of David L., 79 Cal. Rptr. 3d 530, 536 (Ct. App. 2008); CAL. PROB. CODE § 1471(a) (2022).

172. *David L.*, 79 Cal. Rptr. 3d at 536.; *Michelle K. v. Superior Ct.*, 164 Cal. Rptr. 3d 232 (Ct. App. 2013); U.S. CONST. amend. VI (“In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed.”).

173. *David L.*, 79 Cal. Rptr. 3d at 536.

174. Cal. Cts., GC-341, Notice of Conservatee’s Rights 1 (2008), <https://www.courts.ca.gov/documents/gc341.pdf> [<https://perma.cc/25WS-9573>].

conservatee's real and personal property—including homes and bank accounts—prior to a hearing on said seizure.¹⁷⁵

California was one of the first states to recognize elder abuse by enacting the Elder Abuse Act of 1982, which intended to facilitate prosecution of elder abuse and neglect claims.¹⁷⁶ However, few criminal or civil cases were successful due to unmet burdens of proof, court delays, and lack of prosecution incentives.¹⁷⁷ In 2005, the Los Angeles Times's exposé “Guardians for Profit” shed light on the rampant elder abuse within California's conservatorship system left unaddressed by the Elder Abuse Act.¹⁷⁸ This exposé investigated professional conservators in over 2,400 conservatorship cases in California between 1997 and 2003.¹⁷⁹ The investigation found that only two of the fifty-eight county courts in California ever removed conservators¹⁸⁰—even when conservators lacked training and routinely ignored their conservatees' preferences regarding their living situation, finances, and social interactions.¹⁸¹ Furthermore, probate courts “frequently overlooked incompetence, neglect and outright theft”¹⁸²—including a conservator charging \$1,700 to attend their own conservatee's funeral service, and another conservator selling her conservatee's home to herself at below market price.¹⁸³ The report also found that court investigators were unable to prevent this abuse because of severe underfunding and exorbitant caseloads. To illustrate, even though between 1995 and 2005 the conservatorship caseload in Los Angeles County increased 38

175. CAL. PROB. CODE § 2900(a)(1) (2022).

176. Heisz, *supra* note 101, at 36.

177. *Id.*

178. See Robin Fields et al., *When a Family Matter Turns into a Business*, L.A. TIMES (Nov. 13, 2005, 12:00 AM), <https://www.latimes.com/archiarc/la-xpm-2005-nov-13-me-conserve13-story.html> [<https://perma.cc/9GHK-G3Q4>]; Jack Leonard et al., *Justice Sleeps While Seniors Suffer*, L.A. TIMES (Nov. 14, 2005, 12:00 AM), <https://www.latimes.com/news/la-me-conserve14nov14-story.html> [<https://perma.cc/7U49-7ZMZ>].

179. Heisz, *supra* note 101, at 37.

180. *Id.* at 38.

181. *Id.*

182. *Id.* (quoting Leonard et al., *supra* note 178).

183. *Id.* at 37; see also *Santa Clara County's Court-Appointed Personal and Estate Managers Are Handing out Costly and Questionable Bills*, MERCURY NEWS (June 30, 2012, 8:11 AM), <https://www.mercurynews.com/2012/06/30/santa-clara-countys-court-appointed-personal-and-estate-managers-are-handing-out-costly-and-questionable-bills/> [<https://perma.cc/3UH7-SVZM>] (stating how similar events occurred in the county of Santa Clara, such as when a conservator charged a Belmont dementia patient \$1,062 to celebrate her own birthday).

percent—from 1,024 to 1,408¹⁸⁴—the number of court investigators remained stagnant at ten investigators.¹⁸⁵

The Los Angeles Times exposé brought about the Omnibus Conservatorship and Guardianship Reform Act of 2006.¹⁸⁶ The Omnibus Act was comprised of several bills addressing the most pressing issues within the conservatorship system, including the need to: protect the right of conservatees to stay in their homes and prevent the unnecessary sale of their personal residence;¹⁸⁷ increase surveillance of LPFs;¹⁸⁸ expand the scope of court investigators' evaluations; and increase communication between the court and the conservatee.¹⁸⁹ The Omnibus Act also intended to make it more costly to establish and maintain conservatorships¹⁹⁰ by implementing additional educational requirements for conservators and court staff (including judges, attorneys, and court investigators), and requiring reconsideration of conservator appointment petitions.¹⁹¹ However, most of these changes were never implemented due to budget cuts following the 2008 economic recession.¹⁹² In 2021, Assembly Bill 1194 (“AB 1194”) provided tentative hopefulness that the safeguards the Omnibus Act intended to bring into effect in 2006 will finally be enforced.¹⁹³

184. Heisz, *supra* note 101, at 38.

185. *Id.*

186. *The Role of the Courts in Protecting California's Increasing Aging and Dependent Adult Population: Hearing Before the S. Comm. on Judiciary Oversight*, 2015–2016 Leg., Reg. Sess. 2–3 (Cal. 2015).

187. S.B. 1116, S., 2005–2006 Leg., Reg. Sess. (Cal. 2006) (placing the burden of proof on the party opposing the conservatee remaining in their home to disprove at a hearing the presumption that the least restrictive living arrangement is a conservatee's personal residence).

188. S.B. 1550, 2005–2006 Leg., Reg. Sess. (Cal. 2006) (establishing the Professional Fiduciaries Act to supervise professional fiduciaries appointed by the court to provide conservatorship services to the conservatee, and prohibiting courts from appointing a person as private conservator, guardian, or trustee unless they're licensed as such); *The Role of the Courts in Protecting California's Increasing Aging and Dependent Adult Population: Hearing Before the S. Comm. on Judiciary Oversight*, 2015–2016 Leg., Reg. Sess., at 3 (Cal. 2015).

189. S.B. 1716, 2005–2006 Leg., Reg. Sess. (Cal. 2006) (expanding the scope of court investigators' evaluations and providing a protocol for ex parte communications with the court in conservatorship proceedings regarding relevant acts of fiduciaries or matters affecting the conservatees).

190. Press Release, Evan Low, *supra* note 81.

191. Assemb. B. 1363, 2005–2006 Leg., Reg. Sess. (Cal. 2006).

192. Press Release, Evan Low, *supra* note 81.

193. *See id.* (discussing how AB 1194 will call for a formal review of the state's conservatorship system years after the 2006 Omnibus Act's reforms failed to be implemented due to economic reasons).

B. Blueprints for Improvement: Looking to Other States' Conservatorship Systems

1. Alaska's Mediation Model

Since 2005, Alaska has avoided unnecessary conservatorships and contentious hearings by implementing a noteworthy mediation program¹⁹⁴ to conservatorship cases which knowledgeable judges and professionals believed would require costly proceedings to resolve.¹⁹⁵ After analyzing 103 mediations,¹⁹⁶ Alaska's Judicial Council found that through this program, about eighty-five contested hearings were avoided between 2005 and 2009.¹⁹⁷ Not only did these mediations conserve judicial resources, but they also protected participants from the trauma and adversarial nature of a contested court proceeding.¹⁹⁸

Procedurally, after the court received a conservatorship petition, a judge appointed an attorney and a court investigator to assess whether a conservatorship was needed, or whether they recommended alternative possibilities be explored through mediation.¹⁹⁹ The project sought mediators with experience relevant to conservatorships and provided them with specialized training before starting the project.²⁰⁰ Furthermore, to ensure C/PCs had meaningful participation in these proceedings, mediators provided their services via telephone when necessary.²⁰¹ Professionals noted that petitions for conservatorships are often filed when caretakers are unaware of what other options are available.²⁰² Thus, the mediations addressed less restrictive options and concerns regarding the finances of the C/PC, the level of care required, and the allocation of decision-making responsibilities among individuals responsible for the C/PC.²⁰³

194. TERESA W. CARNS & SUSAN MCKELVIE, ALASKA JUD. COUNCIL, ALASKA'S ADULT GUARDIANSHIP MEDIATION PROJECT EVALUATION 1 (2009), <http://www.ajc.state.ak.us/publications/docs/research/AdultGuard03-09.pdf> [<https://perma.cc/DYV3-JHFX>].

195. *Id.*

196. *Id.*

197. *Id.* at 8.

198. *Id.* at 8, 14 (while contested hearings were avoided, an uncontested court proceeding was still part of the conservatorship process, since the agreement reached in mediation had to be ratified by a judge).

199. *Id.* at 5.

200. *Id.* at 15.

201. *Id.* at 1.

202. *Id.* at 5.

203. *Id.* at 13.

The success of the program created by the Alaska Court System and the Mental Health Trust Authority²⁰⁴ was measured by whether: (1) participants reached agreements on some or all of the issues, (2) mediation resulted in plans that enhanced the care and safety of the C/PC, (3) mediation avoided a contested court proceeding, and (4) participants experienced mediation as a satisfactory process.²⁰⁵ Parties were most likely to agree on: (1) whether a conservator was needed and who it should be, (2) the level of care needed, (3) the living arrangements, and (4) who should make decisions regarding the C/PC's finances and property.²⁰⁶ However, mediation was not as successful in resolving disagreements regarding decisions made exclusively by a conservator, and how the conservators should deal with disagreements among themselves.²⁰⁷

Knowing that the alternative to mediation was a court hearing, participants in 87 percent of the mediations reached an agreement in some or all issues addressed.²⁰⁸ Encouragingly, 91 percent of the participants expressed satisfaction with the mediation results, and asserted they would recommend mediation to others because they felt listened to and felt their concerns were understood.²⁰⁹ Indeed, this conservatorship mediation system empowered parties to be active participants and encouraged communication focused on understanding the participants' concerns.²¹⁰ For example, Adult Protective Services (APS) and the attorneys involved stated that post-mediation, they had a better understanding of the views of the other parties because of their interactions throughout the process.²¹¹ And despite APS's involvement in difficult mediations for "high risk" adults—older adults with

204. *Id.* at 14 (explaining how the Alaska mediation project was modeled after pilot programs implemented in 2001 by The Center for Social Gerontology, Inc. in Florida, Ohio, Oklahoma, and Wisconsin, which had similarly positive results to the Alaska project); *see also* SUSAN J. BUTTERWICK ET AL., THE CTR. FOR SOC. GERONTOLOGY, EVALUATING MEDIATION AS A MEANS OF RESOLVING ADULT GUARDIANSHIP CASES 124 (2001), http://www.tcsg.org/mediation/SJI_01.pdf [<https://perma.cc/G3Y7-ZN4J>] (discussing further the agreements reached in The Center for Social Gerontology's pilot programs).

205. CARNES & MCKELVIE, *supra* note 194, at 6.

206. *Id.* at 6–7.

207. *Id.* at 7.

208. *Id.* at 1.

209. *Id.*

210. *Id.*

211. *Id.* at 9.

severe incapacitations such as dementia²¹²—95 percent of the cases APS was involved in resulted in an agreement.²¹³

The Alaska project covered all costs of the mediation services, noting that legal fees can be a deterrent from seeking legal aid.²¹⁴ The average cost per referral was \$1,380—including capacitating the mediator, paying travel expenses for the mediator and interpreter, drafting the paperwork for the program, and teleconference and room rental costs.²¹⁵

2. Washington's Burden-Shifting Accommodation Rule

In 2018, Washington's Office of Administrative Hearings (OAH) adopted a rule to ensure that courts provide proper accommodation to self-represented parties so they can meaningfully participate in adjudicative proceedings.²¹⁶ This rule provides that

if, during any stage of an adjudicative proceeding, the administrative law judge or any party has a reasonable belief that an otherwise unrepresented party may be unable to meaningfully participate in the adjudicative proceeding because of disability, with that party's consent the administrative law judge shall refer the party to the agency ADA coordinator and delay commencing or resuming the adjudicative proceeding until the accommodation request is addressed by the ADA coordinator.²¹⁷

Hence, the burden is shifted away from the party with a disability to the judge or any other party to the proceeding.²¹⁸ The rule's verbiage incentivizes the judge to err on the side of caution by asserting that the judge "shall," as opposed to "may," refer a party.²¹⁹

212. *Id.* at 7.

213. *Id.* at 1.

214. *Id.* at 17.

215. *Id.*

216. LORRAINE LEE & JOHNETTE SULLIVAN, WASH. STATE OFF. OF ADMIN. HEARINGS, WAC 10-24-010: SUITABLE REPRESENTATIVES AS ADA ACCOMMODATION TWO-YEAR ASSESSMENT REPORT 1 (2020), <https://perma.cc/N5SS-YB9C>.

217. WASH. ADMIN. CODE § 10-24-010(3) (2022) (emphasis added); LEE & SULLIVAN, *supra* note 216, at 2 (noting that this rule was drafted assuming that parties in OAH hearings do not need lawyers to represent them, and assistance from SRs will suffice to satisfy as accommodation).

218. WASH. ADMIN. CODE § 10-24-010(3) (2022).

219. *Cf.* CAL. R. CT. 1.100 (2022) (where the term "may" is used regarding the provision of accommodations).

Because the focus is on the party as an individual, the presence of a legal guardian, relative, or friend does not affect the ADA coordinator’s meaningful participation determination.²²⁰ In assessing the party’s ability for meaningful participation, the coordinator must consider the party’s understanding of the nature and object of the proceeding, the party’s ability to make informed decisions, and their ability to evaluate and respond to allegations.²²¹

If the coordinator finds the party is unable to meaningfully participate in the proceeding due to a disability, the coordinator will evaluate the party’s limitations through an interactive process and assess whether a suitable representative (SR) is the most sensible option.²²² If an SR is needed, the coordinator will consider the needs identified in the assessment, the party’s preferences, and the expertise of the individual being considered as an SR.²²³ To ensure unbiased representation, employees of the OAH cannot be representatives,²²⁴ and the party has the last word on whether to accept or reject the SR’s appointment.²²⁵

Apart from determining whether a party can participate meaningfully with accommodations or if an SR is needed,²²⁶ this rule also requires: (1) training all OAH employees who interact with parties with disabilities, (2) developing an OAH online self-paced training program that individuals must complete to qualify as SRs, (3) establishing a network of SRs, and (4) instituting an internal process to collect data and feedback to further improve the accommodation rule.²²⁷

After a report shed light on the need for “legal counsel [to] be appointed for *every* Proposed Protected Person, regardless of means,”²²⁸ the Supreme Court of Nevada turned to the Legal Aid Center of Southern Nevada (LACSN)—a nonprofit organization providing free representation both to conservatees and proposed

220. WASH. ADMIN. CODE § 10-24-010(7) (2022).

221. *Id.* § 10-24-010(7)(a)–(b).

222. *Id.* § 10-24-010(8)(b).

223. *Id.* § 10-24-010(11)(a)–(b).

224. *Id.* § 10-24-010(11)(c).

225. *Id.* § 10-24-010(12).

226. LEE & SULLIVAN, *supra* note 216, at 1.

227. *Id.* at 1–2, 5 (explaining that after two years, the network of SRs included six attorneys and three legal services organizations and future goals for OAH include securing funding to reinforce the SR network, and identifying organizations and entities that can provide SRs with professional liability coverage with few geographical limitations).

228. SUP. CT. NEV., FINAL REPORT, NEVADA SUPREME COURT’S COMMISSION TO STUDY THE ADMINISTRATION OF GUARDIANSHIPS IN NEVADA’S COURTS 130 (2016) (emphasis added).

conservatees—to provide competent counsel in all conservatorship proceedings.²²⁹

In 2020 alone, LACSN represented 2,613 clients, and 48 percent of the cases it closed avoided or terminated conservatorships.²³⁰ For example, LACSN helped Tim, a fifty-eight-year-old man, be released from a hospital where he was involuntarily detained for three months.²³¹ After minimal interaction, a doctor signed an order stating Tim could not leave until he was placed under a conservatorship—based in part on his being in between housing.²³² The judge denied the hospital’s conservatorship petition and ordered Tim’s release after LACSN presented Tim’s history of independent living and his ability to pay for housing with his retirement income.²³³

3. Minnesota’s Conservator Audit System

In 2018, Minnesota was the only state in the U.S. that mandated conservators to record and submit all financial transactions through a software application.²³⁴ A professional auditing team in the Minnesota Judicial Branch reviewed conservators’ accounting submissions²³⁵ and, if they found financial abuse, they promptly recommended the court order the conservator be removed, or that they repay the funds to the conservatee.²³⁶

An audit of conservatorships between 2012 and 2015 found financial exploitation in 22 percent of the conservatorships.²³⁷ Victims ranged from eighteen to ninety-seven years old, and approximately half of the thirty-one victims were over the age of sixty-five.²³⁸ The

229. COLEMAN, *supra* note 14, at 63, 75; COMM’N TO STUDY THE ADMIN. OF GUARDIANSHIPS IN NEV.’S CTS., NEV. SUP. CT., MAY 20, 2016, MEETING MATERIALS 7 (2016), <https://perma.cc/FJZ7-52ZT> (LACSN also receives referrals from other Nevada courts, Elder Protective Services, Las Vegas Metropolitan Police Department, and direct requests from people currently under guardianships); LEGAL AID CTR. OF S. NEV., 2020 ANNUAL REPORT 5 (2020), https://www.lacsn.org/images/annual-reports/lacsn_annual_report_2020.pdf [<https://perma.cc/U9D5-Q6HM>].

230. LEGAL AID CTR. OF S. NEV., *supra* note 229, at 5.

231. *Id.*

232. *Id.*

233. *Id.*

234. BRENDA K. UEKERT ET AL., NAT’L CTR. FOR STATE CTS., CONSERVATOR EXPLOITATION IN MINNESOTA: AN ANALYSIS OF JUDICIAL RESPONSE 1 (2018), https://www.eldersandcourts.org/_data/assets/pdf_file/0019/5833/ovc-brief-2.pdf [<https://perma.cc/T5BB-TR65>].

235. *Id.*

236. *Id.* at 1, 3.

237. *Id.* at 1–2 (stating that following the audit report, the judges ordered the removal of twenty conservators, while also ordering eight conservators to repay funds to the conservatee).

238. *Id.* at 3.

two groups that were particularly affected by financial exploitation were individuals living in a skilled nursing, memory care, or assisted living facility, and women—making up 64 percent and 70 percent of the exploited persons, respectively.²³⁹

Presiding judges stated that although the audit system was helpful, the conservatee’s assets need more protection.²⁴⁰ Notably, family members were to blame for nearly three quarters of the financial exploitation cases, and the victim’s children were the most likely exploiters.²⁴¹

IV. HOW AB 1194 AIMS TO CHANGE CALIFORNIA’S CONSERVATORSHIP SYSTEM

Following astounding support from both the Senate (38–0) and the Assembly (76–0), California Governor Gavin Newsom signed AB 1194 into law in September 2021.²⁴² This bill, sometimes referred to as the “Free Britney Bill,” will go into effect in 2024 and encompasses a broad spectrum of amendments to the California Business and Professions Code and the Probate Code to ameliorate the systemic deficiencies in California’s conservatorship system.²⁴³

A. *Ensuring Proper Representation Through Chosen or Appointed Counsel*

With the implementation of the AB 1194 counsel provision, California probate courts will be a mere ninety-two years late in upholding the Supreme Court’s 1932 assertion that “the right to counsel being conceded, a defendant should be afforded a fair opportunity to secure counsel of [their] own choice.”²⁴⁴

239. *Id.*

240. *Id.* at 4.

241. *Id.* at 2–3 (noting that professional conservators perpetrated the financial exploitation crimes not carried out by family members, with one professional conservator responsible for four exploitation cases).

242. Carlena Tapella & Weintraub Tobin, *Governor Gavin Newsom Signs Sweeping Conservatorship Reform Bill*, JD SUPRA (Oct. 7, 2021), <https://www.jdsupra.com/legalnews/governor-gavin-newsom-signs-sweeping-5848698/> [<https://perma.cc/EM2D-ULUS>]. For a more in-depth breakdown and analysis of AB 1194, please refer to THOMAS F. COLEMAN, SPECTRUM INST., ZEALOUS ADVOCACY STANDARDS FOR LEGAL SERVICE PROVIDERS IN CONSERVATORSHIPS (2021), <https://disabilityandguardianship.org/zealous-advocacy-contents.pdf> [<https://perma.cc/BQ9H-7YWE>].

243. Press Release, Evan Low, *supra* note 81; Assemb. B. 1194, 2021–2022 Leg., Reg. Sess. (Cal. 2021).

244. *Powell v. Alabama*, 287 U.S. 45, 53 (1932).

While the Probate Code section on discretionary appointment of legal counsel states that a court may appoint private counsel for a C/PC in any proceeding if the person is unrepresented,²⁴⁵ lawyers generally refused to interpret this statute as giving judges the right to determine whether C/PCs were fit to retain their own counsel.²⁴⁶ Nevertheless, California judges have refused to allow a conservatee their choice of counsel on the grounds that the conservatee lacks legal capacity.²⁴⁷ However, AB 1194 unambiguously asserts that C/PCs have the right to hire counsel of their choosing,²⁴⁸ otherwise, the court must appoint counsel to offer representation to C/PCs unable to pay for an attorney.²⁴⁹

It is vital that courts to automatically appoint counsel in all conservatorship proceedings because attorneys are oftentimes hesitant to represent C/PCs out of concern regarding the C/PC's legal capacity, possible communication barriers, payment of legal fees, and the likelihood of success.²⁵⁰ However, the current court-appointed counsel seldom satisfy their job description. Regional center workers who interact with these attorneys assert that besides lacking basic training on how to communicate with individuals with IDD's,²⁵¹ appointed counsel are generally uninformed about conservatorship law and "nearly always support removal or restriction of their own client's civil rights" instead of advocating for the least restrictive arrangement.²⁵² Furthermore, these attorneys are often unable to even communicate with their assigned client because they will falsely claim to speak the C/PC's language²⁵³—effectively robbing the C/PC of meaningful participation in the legal proceeding.

In 2007, the Judicial Council recommended the automatic appointment of counsel in conservatorship proceedings.²⁵⁴ However, economic issues and red tape prevented the enactment of a right-to-

245. CAL. PROB. CODE § 1470 (2022).

246. Rippetoe, *supra* note 4.

247. *See id.* (describing proceedings in the Britney Spears conservatorship).

248. Tapella & Tobin, *supra* note 242.

249. *Id.*

250. Cassidy, *supra* note 161, at 102; Kohn & Koss, *supra* note 164, at 583–84.

251. Letter from Robin M. Black to Thomas F. Coleman, *supra* note 43.

252. *Id.*; COLEMAN, *supra* note 82, at 16 (noting that the Judicial Council could address the general lack of training afforded to individuals involved in the conservatorship system by producing more comprehensive and cohesive training for ADA coordinators, judges, conservators, physicians, psychologists, psychiatrists, social workers, and other individuals involved in conservatorships).

253. Letter from Robin M. Black to Thomas F. Coleman, *supra* note 43.

254. CHRISTINE PATTON, JUD. COUNCIL OF CAL., PROBATE CONSERVATORSHIP TASK FORCE RECOMMENDATIONS TO THE JUDICIAL COUNCIL: STATUS OF IMPLEMENTATION 27 (2008).

counsel provision.²⁵⁵ Similarly, California courts have sporadically interpreted appointment of legal counsel as not being conditioned on a request,²⁵⁶ instead basing appointment on whether it was necessary to protect the conservatee’s interests.²⁵⁷ However, people facing conservatorship placement should not have to rely on the discretion of benevolent judges to have meaningful participation through competent representation.

Considering that conservatorships are highly restrictive arrangements and California recognizes that the right to effective and independent counsel protects many of the same rights as the Sixth Amendment,²⁵⁸ appointment of counsel in a conservatorship should more closely mirror the Sixth Amendment right to counsel by automatically attaching to the PC once a conservatorship application is filed.²⁵⁹ A criminal conviction and conservatorship placement can similarly deprive individuals of their liberty, but only defendants in a criminal proceeding have the Sixth Amendment right to have counsel present at *all* critical stages of the case²⁶⁰—unless the defendant knowingly, intelligently, and voluntarily waives that right.²⁶¹ However, in a conservatorship proceeding, the court is on notice that the PC may not be able to knowingly, intelligently, and voluntarily waive their right to counsel. Because the initial proceeding is a determinative hearing that can result in the PC being permanently deprived of their rights, this hearing should be interpreted as a critical stage that requires appointed counsel present.

Furthermore, while relevant codes and rules of professional conduct instruct attorneys to be diligent in representing the interests of their clients,²⁶² in practice, judges “reward” attorneys who abide by the arbitrary ten-hours-per-case limit by assigning them more cases—

255. *Id.*

256. *See* *Wendland v. Superior Ct.*, 56 Cal. Rptr. 2d 595 (Ct. App. 1996) (interpreting section 147 of the California Probate Code (Appointment of Legal Counsel) as not conditioning appointment of counsel on an explicit request from an unconscious conservatee).

257. *Id.*

258. *See supra* Section III.A.

259. U.S. CONST. amend. VI (the right to counsel automatically attaches to the accused once adversarial judicial proceedings start); *Kirby v. Illinois*, 406 U.S. 682, 688 (1972).

260. *Brewer v. Williams*, 430 U.S. 387, 398 (1977).

261. *Von Moltke v. Gillies*, 332 U.S. 708, 734 (1948).

262. Andrew R. Verriere, *California Expands Conservatorship Protections*, BLOOMBERG L. (Oct. 12, 2021, 1:00 AM), <https://news.bloomberglaw.com/tax-insights-and-commentary/california-expands-conservatorship-protections> [<https://perma.cc/EQR2-SUAR>]; Assemb. B. 1194, 2021–2022 Leg., Reg. Sess. (Cal. 2021); CAL. RULES OF PRO. CONDUCT r. 1.3 (2018).

which results in a higher paycheck.²⁶³ These perverse incentives favoring quantity over quality keep the probate dockets moving along at such a rate that during the 2015–2016 fiscal year, there were zero probate jury trials, despite there being 11,585 probate cases.²⁶⁴ Because the quality of the attention afforded to the C/PC is an afterthought of the conservatorship system, C/PCs must be afforded counsel in *all* proceedings to enjoy equal participation and protection under the law.

*B. Increased Responsibility and Accountability
for the Probate Court and Its Agents*

Decades after the Los Angeles Times exposé highlighted the egregious abuse and fraud perpetrated by LPFs,²⁶⁵ the over 800 LPFs in California continue to operate with minimal surveillance and near impunity.²⁶⁶ For example, an investigation in 2021 revealed that LPF licenses were not revoked when an LPF in San Diego forged their conservatee’s signature on checks and sold the conservatee’s car without their knowledge, nor when an LPF in Contra Costa entered a nursing home with a notary and tried to force a patient with Alzheimer’s to sign documents to assign the LPF as her conservator.²⁶⁷ Meanwhile, abuse that was considered sufficiently serious to revoke a fiduciary’s license was an LPF in San Diego withdrawing \$920,000 directly from their conservatee’s trust fund to finance her gambling²⁶⁸ and an LPF in Santa Clara diverting \$16.2 million to invest in real estate and startup companies without the conservatee’s knowledge.²⁶⁹ Thus, to increase transparency, beginning January 2023, LPFs must disclose the hourly rate for their services on their website,²⁷⁰ and, like appointed counsel,²⁷¹ LPFs will not be allowed to receive compensation

263. COLEMAN, *supra* note 44, at 12.

264. JUD. COUNCIL OF CAL., 2017 COURT STATISTICS REPORT: STATEWIDE CASELOAD TRENDS 2006–2007 THROUGH 2015–2016 at 111, 165 (2017), <https://www.courts.ca.gov/documents/2017-Court-Statistics-Report.pdf> [<https://perma.cc/J5A9-GTXX>].

265. Fields et al., *supra* note 178.

266. Blaine F. Aikin, *What You Need to Know About Professional Fiduciaries*, INV. NEWS (June 3, 2019), <https://www.investmentnews.com/what-you-need-to-know-about-professional-fiduciaries-79777> [<https://perma.cc/U98S-QKBK>].

267. Judson, *supra* note 13.

268. *Id.* In 2011, this fiduciary was sentenced to eighteen months in prison. *Id.*

269. *Id.*

270. CAL. BUS. & PROF. CODE § 6563 (2022); *see also* Assemb. B. 1194, 2021–2022 Leg., Reg. Sess. (Cal. 2021); AB 1194 ASSEMBLY FLOOR ANALYSIS, *supra* note 100 (explaining that before entering into a contractual relationship, an LPF without a website must disclose their fees to a prospective client or a qualified relative).

271. *See supra* Section II.A.

from the conservatee’s estate unless the incurred fees are “in the best interest of the conservatee.”²⁷²

Following AB 1194, the Professional Fiduciaries Bureau—a government agency established in 2007—is now tasked with investigating any complaint referred to it by the public.²⁷³ This provision seeks to curtail abuse by revoking an LPF’s license if they knowingly, intentionally, or willfully violate a legal duty or breach a fiduciary duty through gross negligence or gross incompetence which results in serious physical, financial, or mental harm to the conservatee.²⁷⁴ As a consequence of their misconduct, LPFs may have to pay the conservatee up to \$10,000 for each abusive act, while non-professional conservators may be fined up to \$1,000 per offense.²⁷⁵

Continuing with the heightened level of diligence required from the court and its agents, the court investigator for a pending conservatorship must now obtain physical and mental health records from the PC’s health care providers²⁷⁶ to holistically analyze whether a less restrictive arrangement is possible. Additionally, when a conservatorship is deemed necessary, six months into the arrangement the court investigator must assess whether the conservatorship remains the least restrictive arrangement.²⁷⁷ If so, the court investigator must ask the conservatee if they are content with their current conservator,²⁷⁸ and may order the conservator to submit accounting records if they suspect financial abuse.²⁷⁹ Similarly, while all ex parte communications between any party and the court were previously prohibited,²⁸⁰ the court investigator can now oversee ex parte communications regarding a conservatee’s well-being or a fiduciary’s performance.²⁸¹ Furthermore, in the spirit of transparency, courts must disclose the ex parte communications to all parties—unless they must be kept secret to protect the conservatee.²⁸²

Furthermore, because it is illogical for a conservator abusing the conservatee and/or the conservatee’s estate to request an investigation

272. CAL. PROB. CODE §§ 1851, 2640–2641 (2022).

273. CAL. BUS. & PROF. CODE § 6580 (2022).

274. *Id.*

275. *Id.* § 2112.

276. *Id.* § 1826.

277. *Id.* §§ 1850–1851.

278. *Id.* § 1850.

279. *Id.* § 1851.

280. Tapella & Tobin, *supra* note 242.

281. CAL. PROB. CODE § 1051 (2022).

282. Tapella & Tobin, *supra* note 242.

into their own wrongdoing, AB 1194 broadened the scope of who can petition abuse investigations. Previously, only the conservator, the conservatee, or the conservatee’s counsel could petition an abuse investigation,²⁸³ but now courts must investigate *all* allegations from “any interested person” with personal knowledge of the conservatee which establish a *prima facie* case of abuse.²⁸⁴

AB 1194 also shifted the burden for terminating a conservatorship, noting that conservatees are rarely able to file said petition due to their disabilities and the general inaccessibility of the legal process.²⁸⁵ Thus, conservatorship termination is no longer conditioned on the conservatee’s request and the conservatee no longer carries the burden of proving they do not need to be in a conservatorship. Instead, AB 1194 tasks the court, its agents, and the conservator with proving through clear and convincing evidence that the conservatorship is necessary as the least restrictive arrangement.²⁸⁶

And while AB 1194 requires Judicial Council to present a report by January 2024 identifying changes to further improve conservatorships and better serve and protect C/PCs,²⁸⁷ unless the Legislature approves the “low-to-mid tens of millions” of dollars it will cost to implement AB 1194 annually,²⁸⁸ courts are not required to enforce the amendments.²⁸⁹ Although California has a projected \$31 billion surplus for the 2022–2023 fiscal year²⁹⁰ and the visibility of Britney Spears’s conservatorship makes the funding more likely, courts with substantial conservatorship caseloads assert they will have to add a fully-staffed probate department—including judges, courtroom staff, and attorneys—to accommodate conservatorship hearings likely

283. CAL. PROB. CODE § 1851.6 (2022); CAL. WELF. & INST. CODE § 15610.07 (2022) (noting that “abuse of an elder or a dependent adult” includes “[p]hysical abuse, neglect, abandonment, isolation, abduction, or other treatment with resulting physical harm or pain or mental suffering”; deprivation of goods or services by the conservator; and financial abuse).

284. CAL. PROB. CODE § 1851.6 (2022).

285. See Assemb. B. 1194, 2021–2022 Leg., Reg. Sess. (Cal. 2021); NAT’L COUNCIL ON DISABILITY, *supra* note 27.

286. CAL. PROB. CODE §§ 1860.5, 1863 (2022).

287. Assemb. B. 1194, 2021–2022 Leg., Reg. Sess. (Cal. 2021). The report will analyze the 2018–2019 fiscal year and include: the number of petitions filed, granted, and denied; the number of conservatorships under court supervision; an analysis of courts’ compliance with statutory timeframes; and the number of filings by or on behalf of the conservatee challenging a conservator’s action).

288. AB 1194 ASSEMBLY FLOOR ANALYSIS, *supra* note 100.

289. Tapella & Tobin, *supra* note 242.

290. Emily Hoeven, *California’s \$31 Billion Surplus: More Stimulus Checks Possible*, CAL MATTERS (Nov. 18, 2021), <https://calmatters.org/newsletters/whatmatters/2021/11/california-stimulus-checks/> [<https://perma.cc/SYT5-T89N>].

doubling after AB 1194 goes into effect.²⁹¹ Additionally, because courts are not funded on a workload basis and the far-reaching economic impact of COVID-19 will likely result in budget cuts, the saturation of conservatorship hearings will result in delays until the general funds increase the courts' budgets.²⁹²

VII. PROPOSAL: AB 1194 PLUS

COVID-19 exacerbated seniors' health risks and isolation,²⁹³ and magnified the need for sweeping conservatorship reform. As of May 2021, seniors accounted for nearly 80 percent of pandemic-related deaths, with racial and ethnic minorities being disproportionately affected—particularly those with limited education and income.²⁹⁴ By 2050, there will be approximately eighty-six million adults sixty-five and older in this country.²⁹⁵ In California alone, this demographic is projected to grow more than 65 percent and rise from approximately six million to more than nine million by 2030.²⁹⁶ Thus, as the senior population increases, so does the need for a humane conservatorship system that safeguards their quality of life.

In 2017, California's Judicial Council considered the automatic appointment of counsel in every conservatorship proceeding following the Los Angeles Times exposé and the Omnibus Act.²⁹⁷ However, it took fifteen more years for AB 1194 to finally provide C/PCs the right to counsel²⁹⁸—albeit only for *specific* proceedings.²⁹⁹ Access to counsel for hearings outside of those provided for by this code still rests on the C/PC's cognitive and economic ability to retain counsel. Thus, this Note stresses that courts must be required to appoint counsel to *all* C/PCs—regardless of the proceeding—to properly uphold the C/PC's constitutional, federal, and state rights.

291. AB 1194 ASSEMBLY FLOOR ANALYSIS, *supra* note 100.

292. *Id.*

293. AMERICA'S HEALTH RANKINGS, 2021 SENIOR REPORT 9 (2021), <https://perma.cc/D5M7-BG7H>.

294. *Id.* at 3.

295. *Id.*

296. Matt Levin, *For Aging California, Is the Future Florida?*, CALMATTERS (June 23, 2020), <https://calmatters.org/economy/2019/04/aging-california-future-is-florida/> [<https://perma.cc/NZ4Q-43QZ>] (noting that California's senior population is larger than Oregon's entire population, and “[i]f Californians over the age of 80 formed their own state . . . its population would warrant more congressional representatives than Delaware”).

297. See discussion *supra* Sections II.A and III.A; PATTON, *supra* note 254, at 27.

298. CAL. PROB. CODE § 1471(d) (2022).

299. *Id.* § 1471(a).

Apart from mandatory appointment of counsel being paramount for lessening the disparity in access to legal representation for proposed conservatees, other changes that are long overdue in the California conservatorship system include: shifting the legal burden of the “request for accommodation” away from the proposed conservatee; employing mediation as a platform to explore less restrictive assistance options—such as supported decision-making; adopting a standardized competency test to assess the need for a conservatorship; developing a referral system of counsel knowledgeable of conservatorship law; and implementing an audit system facilitated through a web-based filing system to combat conservatorship financial abuse.

Although California’s request for accommodations rule states that judges or any “other person with an interest in attending any proceeding” can request accommodations for a person who has “a physical or mental medical condition . . . or are regarded as having such a condition,”³⁰⁰ this rule is only triggered when the affected individual submits a formal request.³⁰¹ Thus, the Judicial Council should follow in Washington’s footsteps³⁰² and amend this rule to create an affirmative duty for courts to provide accommodations to litigants with known or obvious IDD without requiring requests—acknowledging that the nature of the proceeding is sufficient notice that accommodations are likely necessary.³⁰³

A mediation program like that in Alaska would prohibit probate courts and their agents from continuing to violate the ADA requirement that conservatorships be considered only after less restrictive alternatives prove ineffective.³⁰⁴ Mediations mirror the intent of conservatorships by centering on the interests and needs of the parties involved, and making self-determination a tenet of their proceedings.³⁰⁵ In a pre-conservatorship mediation, the governing jurisdictional mediation guidelines could be supplemented with ADA-formulated mediation guidelines that provide mediators,

300. CAL. R. CT. 1.100 (2022).

301. *Id.*

302. *See* WASH. ADMIN. CODE § 10-24-010(3) (2022).

303. COLEMAN, *supra* note 44, at 14.

304. Letter from Robin M. Black to Thomas F. Coleman, *supra* note 43; CAL. PROB. CODE § 1821(a)(3) (2022) (although California forms request that petitioners list all the conservatorship alternatives they have considered, and why those options are not feasible, petitioners are not made to comply with this regulation); NAT’L COUNCIL ON DISABILITY, *supra* note 27, at 29.

305. CAL. R. CT. 3.853 (2022).

administrators, and participants with supplemental direction on issues unique to disability-related disputes.³⁰⁶ Furthermore, because capacity to participate in a mediation is not properly determined solely by a party's medical condition or diagnosis, the ADA Mediation Guidelines instruct the mediator to "evaluate a party's capacity on a case-by-case basis, if and when a question arises regarding a party's capacity to engage in the mediation process," by considering factors such as: the party's ability to understand "the nature of the mediation process, who the parties are, the role of the mediator . . . and the issues at hand."³⁰⁷ Mediations are also optimal to assess the need for a conservatorship because the confidentiality rules as to information shared during a mediation do not extend to criminal proceedings.³⁰⁸ Thus, if the mediator finds that actions by the proposed conservator towards the proposed conservatee give rise to criminal charges, the mediator might be required to testify in court and provide any information gathered during the mediation proceedings to support those charges.³⁰⁹

Supported decision-making (SDM)—while not yet legally recognized in California³¹⁰—is a humane alternative to a conservatorship.³¹¹ The "reasonable modification" language in the ADA could be interpreted to require courts to provide people with IDD equal access in court proceedings.³¹² An SDM agreement can be formalized with the signature of either a notary or two witnesses, and ended at any time

306. MELISSA BRODRICK ET AL., ADA MEDIATION GUIDELINES 1 (2000), <https://perma.cc/58UR-ATX8>.

307. ADA Mediation Standards Work Grp., ADA MEDIATION GUIDELINES 5–6 (2000), <https://perma.cc/T667-CS66>.

308. *See* CAL. EVID. CODE §§ 1115–1129 (2022).

309. *See id.* § 1129(d) ("A mediator cannot testify in any subsequent *civil* proceeding about any communication or conduct occurring at, or in connection with, a mediation." (emphasis added)).

310. *See U.S. Supported Decision-Making Laws*, CTR. FOR PUB. REPRESENTATION, <https://supporteddecisions.org/resources-on-sdm/state-supported-decision-making-laws-and-court-decisions> [<https://perma.cc/9BSL-PUB5>] (some states limit who may serve as a supporter, as well as the scope of decisions that can be included in the agreement); Zachary Allen & Dari Pogach, *More States Pass Supported Decision-Making Agreement Laws*, 41 J. AM. BAR ASS'N. COMM'N ON L. & AGING 159, 159–60 (2019), <https://perma.cc/HKL4-4AJ9> (legally recognized by eleven states and the District of Columbia).

311. AM. BAR ASS'N COMM'N ON L. & AGING, STATE ADULT GUARDIANSHIP LEGISLATION SUMMARY: DIRECTIONS OF REFORM – 2018, at 2 (2018), <https://perma.cc/H7KW-D8QG>.

312. *See* 42 U.S.C. §§ 12131–12134; 29 U.S.C. § 794; NAT'L CONF. COMM'RS ON UNIF. STATE LAWS, UNIFORM GUARDIANSHIP, CONSERVATORSHIP, AND OTHER PROTECTIVE ARRANGEMENTS ACT § 301(a)(1)(A) (2017) (stating that a court can only appoint a conservator if it finds by clear and convincing evidence that "the respondent lacks the ability to meet essential requirements for physical health, safety, or self-care because the respondent is unable to receive and evaluate information or make or communicate decisions, even with appropriate supportive services, technological assistance, or supported decision making").

without court involvement.³¹³ The supporters assisting the individual are generally family members, friends, or professionals who empower the individual to make their own choices by providing them with information to understand the consequences of their potential personal and financial decisions.³¹⁴

If less restrictive alternatives are proven unsuccessful—but before a conservatorship is imposed—a PC must undergo a capacity assessment and be deemed unable to make some or all necessary life decisions.³¹⁵ Although capacity assessment guidelines were promulgated in 2005,³¹⁶ to this day, there is neither a standardized competency assessment³¹⁷ nor score.³¹⁸ The conservatorship system must prioritize standardizing competency assessments to preclude judges and other individuals unfit to make medical determinations from arbitrarily interpreting these assessments.

However, if a medical specialist finds that a standardized competency test score proves that a conservatorship is necessary, the automatic appointment of counsel that this Note recommends could be facilitated by a Nevada-inspired referral system. The conservatorship system, by referring C/PCs to established organizations with a network of qualified probate attorneys, would avoid the cost of recruiting and training attorneys to serve as court-appointed counsel, and prevent the conflict of interest that arises when judges assign cases to court-appointed attorneys. Also, by affording all C/PCs counsel, fewer people would be placed in conservatorships, and in turn, fewer conservatorships would be revisited for possible termination.

313. ACLU, HOW TO MAKE A SUPPORTED DECISION-MAKING AGREEMENT: A GUIDE FOR PEOPLE WITH DISABILITIES AND THEIR FAMILIES 22, <https://perma.cc/4QQB-HNC6>; Phillips, Note, *supra* note 123, at 635 (SDM operates under the assumption that all adults involved are competent to enter into a binding arrangement).

314. NAT'L GUARDIANSHIP ASS'N, POSITION STATEMENT ON GUARDIANSHIP, SURROGATE DECISION MAKING, AND SUPPORTED DECISION MAKING 1 (2017), <https://perma.cc/JNM4-8ZLN> 9.

315. ALTA CAL. REG'L CTR., UNDERSTANDING CONSERVATORSHIP: A RESOURCE FOR FAMILIES 2 (2008), <https://perma.cc/3455-25HD>; JUD. COUNCIL OF CAL., HANDBOOK FOR CONSERVATORS 178, 186–89, 286 (rev. ed. 2016).

316. AM. BAR ASS'N, *supra* note 23, at iii (when evaluating an individual's capacity and need for a conservatorship, medical specialists must consider: (1) the existence of a specific medical condition causing diminished capacity; (2) the condition's effect on cognition; (3) how the condition affects the person's daily functions; (4) the person's values and preferences; (5) past and immediate risks; and (6) possible ways to improve the person's capacity—including medication and technology).

317. *Id.* at 5.

318. *Id.* at 39.

Additionally, California’s probate courts should implement an audit system, like that in Minnesota, to address abuse by conservators. The current technical infrastructure is too outdated to carry out the increased vigilance AB 1194 requires—including conducting background checks to screen proposed conservators, and assisting the Professional Fiduciaries Bureau in investigating conservator fees.³¹⁹ An audit system would be best supported by a web-based filing system through which involved parties could file all mandatory forms,³²⁰ and which would analyze accounting documents to alert the court of possible financial abuse.³²¹ Furthermore, a web-based filing system would address the lack of current conservatorship data³²² by compiling up-to-date and localized quantitative information³²³—such as the average length of time between petitions being filed and their hearing date, the percentage of C/PCs represented by counsel, and the exact number of conservatorships in California.³²⁴ If this information was accessible online, the public would be less wary of the conservatorship system,³²⁵ and interested parties could target their legislative proposals to address issues evidenced by the data.³²⁶

VIII. CONCLUSION

For decades on end, conservatorships have been hastily and unnecessarily implemented for the sake of judicial expediency, leaving involuntary litigants to fend for themselves. The conservatorship system has become desensitized to “remov[ing] from a person a large part of what it means to be an adult: the ability to make decisions for

319. *See Abuse of Power Hearing*, *supra* note 86 (statement of Nina A. Kohn, Assoc. Dean for Rsch. & Online Educ., Syracuse Univ. Coll. L.) (as suggested by the Uniform Guardianship, Conservatorship, and Other Protective Arrangements Act presented in 2018); U.S. DEPT OF JUST., *supra* note 12, at 21.

320. *See* ANDERS ET AL., *supra* note 11, at 5–9 (petitioners without internet access could use courts’ terminals to file mandatory forms, including conservatorship petitions, orders granting conservatorships, and conservators’ annual accounting forms; although it would cost approximately \$197,000 for a county to create and implement a web-based filing system for a decade, once the program is developed, it could be easily implemented in other counties).

321. *Id.* at 6.

322. *Id.* at 7.

323. *Id.*

324. JUD. COUNCIL OF CAL., 2021 COURT STATISTICS REPORT: STATEWIDE CASELOAD TRENDS 2010–11 THROUGH 2019–20, at 86, 160–63 (2021), <https://perma.cc/8AWQ-QA64> (the exact number of conservatorships in California is unknown because the Annual Court Statistics Report joins the conservatorship and guardianship data under the probate umbrella).

325. ANDERS ET AL., *supra* note 11, at 7. *See id.* for a more in-depth breakdown of how an online filing system would function.

326. *Id.*

oneself . . . [and] terminate[s] this fundamental and basic right with all the procedural rigor of processing a traffic ticket.”³²⁷

Optimistically, the increased zeitgeist awareness afforded by Britney Spears’s conservatorship will prevent a repeat of the fleeting outrage that left the conservatorship system unchanged decades ago. Ushering in the enactment of, and compliance with, AB 1194 provisions—particularly the appointment of counsel and implementing the least restrictive alternatives—will be a triumph for upholding bodily and spatial autonomy, and a step towards destigmatizing conservatorships and the individuals placed under this arrangement.

Lastly, while it is vital to enact laws that uphold the civil rights of C/PCs, it is equally crucial for society to confront and unlearn the prejudices that continue to manifest through policies that injure seniors and people with IDD, and which we reinforce through our daily interactions with these human beings.

327. AD HOC COMM. ON PROB. L. & PROC., *supra* note 99, at 3.