BACKGROUND PAPER FOR HEARING

December 7, 2005

PROPOSAL FOR REGULATING CONSERVATORS

JOINT COMMITTEE ON BOARDS, COMMISSIONS, AND CONSUMER PROTECTION

Senator Liz Figueroa, Chair

SUBJECT: SHOULD CALIFORNIA ESTABLISH A REGULATORY PROGRAM FOR CONSERVATORS?

SUMMARY: This hearing will consider the issues and facts regarding the need for the establishment of conservator regulation in California.

Existing state law:

1) Provides for the appointment of conservators, guardians, trustees, personal representatives, and agents with durable powers of attorney for finances by civil courts pursuant to various provisions of law, including the California Probate Code.

2) States Legislative intent to protect the rights of persons placed under conservatorship, including by:

   a) Providing for an assessment of the person's needs in order to determine the appropriateness and extent of a conservatorship and to increase the conservatee's functional abilities to whatever extent possible.
   c) Providing that the health and psychosocial needs of the proposed conservatee are met.
   d) Providing that the periodic review of the conservatorship by the court investigator shall consider the best interests of the conservatee.
   e) Ensuring the conservatee's basic needs for physical health, food, clothing, and shelter are met.
   f) Providing for the proper management and protection of the conservatee's real and personal property.

3) Provides that a "conservator of the person" may be appointed for a person who is unable to provide properly for his or her personal needs for physical health, food, clothing, or shelter; a

"conservator of the estate" may be appointed for a person who is substantially unable to manage his or her own financial resources or resist fraud or undue influence; or a conservator for both the person and estate may be appointed.

4) Defines "private professional conservator" as a person or entity appointed as conservator of the person or estate, or both, of two or more conservatees at the same time who are not related to the conservator by blood or marriage, except a bank or other entity authorized to conduct the business of a trust company or any public officer or public agency including the public guardian, public conservator or other agency of the State of California.

5) Defines "private professional guardian" as a person or entity appointed as guardian of the person or estate, or both, of two or more wards at the same time who are not related to the guardian by blood or marriage, except a bank or other entity authorized to conduct the business of a trust company or any public officer or public agency including the public guardian, public conservator or other agency of the State of California.

6) Requires private professional conservators and private professional guardians to register annually with the court clerk of each county in which the conservator or guardian provides services. The registration requires the person to submit specified information including education and background information.

7) Requires the Department of Justice (DOJ) to maintain a Statewide Registry for the purpose of overseeing conservators, guardians and trustees, and the coordination of complaint information among courts. Specified conservators, guardians or trustees must register with the Registry and re-register every three years thereafter and provide specified information regarding educational background and professional experience. Among those required to register are private professional conservators and private professional guardians.

8) Requires the Judicial Council to develop qualifications and educational requirements for private professional conservators and private professional guardians, and requires private professional conservators and private professional guardians, to meet the educational requirements established by the Judicial Council prior to any appointment or registering.

Legislative History:

1. **AB 4015 (Connelly, 1988)** would have established a licensing regulatory scheme for private professional conservators under the Department of Consumer Affairs. That bill was vetoed by Governor Deukmejian citing insufficient justification; inappropriate involvement of the executive branch in the executive branch; vagueness and ambiguity of the regulatory scheme, administering agency, and funding source.

2. **SB 1823 (Marks, 1996)** sponsored by California State Association of Public Administrators, Guardians and Conservators, as introduced, sought to establish new regulations governing court-appointed conservators; amended to establish certain professional standards for conservators. Vetoed by Governor Wilson.

3. **AB 2020 (Burton, 1996)**, originally sought to establish Statewide Registry for private professional guardians and conservators (similar to AB 925 below); as amended, would have

revised existing local registration requirements. Died on Assembly floor.

4. **AB 925 (Hertzberg, Chapter 409, Statutes of 1999)**, PFAC, established the Statewide Registry of Private Conservators, Guardians and Trusteess, to be maintained by the Department of Justice, for conservators and guardians.

5. **SB 1881 (O'Connell, 2000)**, sponsored by PFAC, as introduced, would have established licensing and regulation for professional fiduciaries, including: conservators, guardians and trustees. Amended, the bill would have required the Department of Consumer Affairs to conduct a study of the potential licensing and regulation of professional fiduciaries. Vetoed by Governor Davis.

6. **AB 2612 (Liu, 2004)** states Legislative intent to create certification and education requirements for professional conservators, as defined. Died in Assembly without hearing.

O*ther bills focus on abuses by conservators, guardians and trustees, rather than on direct licensure or regulation:*

7. **SB 1868 (Hughes, 1998)** sought to create a pilot project in Los Angeles County to combat financial abuse of elders and dependent adults with Riverside, San Francisco and Ventura Counties also being eligible to participate if monies were appropriated by the Legislature for this purpose. (see SB 163 and SB 1742 below). Vetoed by Governor Wilson.

8. **SB 163 (Hughes, 1999)** sought to create a three-county pilot project to combat financial abuse of elders and dependent adults. Vetoed by Governor Davis.

9. **SB 1742 (Hughes, Chapter 813, Statutes of 2000)** authorizes the public guardian of a qualified county to take immediate control of property belonging to an elder person for a 5 day period if a specially trained peace officer makes a determination that there exists a significant danger that the elder person will lose all or a portion of his or her property because of the mental incapacity of the elder person or fraud or misrepresentation.

10. **AB 1950 (Pacheco, Chapter 565, Statutes of 2000)** prohibits a guardian or conservator from referring work to or hiring any entity in which he or she has a financial interest, bars anyone connected with the conservatorship or guardianship process from accessing the estate for their own personal benefit, prevents the estate of a ward or conservatee from being subject to any fees in connection with any surcharges imposed upon the guardian or conservator for breach of their fiduciary duty, and requires guardians and conservators to make certain accountings.

11. **AB 2253 (Jackson, 2000)**, would have authorized employees or agents of financial institutions to report suspected financial abuse of elders or dependent adults. Died on Assembly floor.

12. **AB 1286 (Pacheco, Chapter 563, Statutes of 2001)** prohibits the court from waiving the bond requirement in conservatorship cases without good cause. Requires guardians and conservators to file original account statements received from institutions, including account

statements of their wards or conservatees, as part of the periodic accounts filed by the guardians or conservators with the court.

13 **AB 1517 (Canciamilla, Chapter 232, Statutes of 2001)** expands and clarifies the powers of the public guardian to take control of the property of an elder subject to financial abuse, including the power to take temporary control of property prior to applying for a guardianship or conservatorship.

14 **SB 140 (Bowen, Chapter 359, Statutes of 2001)** tightens the requirements as to the bond to be filed by a guardian or conservator, and the procedures to be followed when a guardian or conservator fails to file a required account with the court.

15. **AB 3036 (Corbett, Chapter 1115, Statutes of 2002)** requires courts to implement procedures to have each guardian complete and return a status report annually. Makes implementation contingent on the court having resources available to take on the new responsibilities under the bill.

16. **SB 294 (Soto, Chapter 629, Statutes of 2003)** requires trustees that administer more than 5 trusts to register with the Statewide Registry.

17. **AB 1155 (Liu, Chapter 625, Statutes of 2004)** requires the Judicial Council, by January 1, 2006, to adopt court rules establishing educational standards for guardians and conservators.

18. **AB 2687 (Canciamilla, Chapter 888, Statutes of 2004)** expands the authority of the public administrator to take control of a decedent's property that is subject to loss, waste, injury or misappropriation.

19. **SB 1248 (Bowen, Chapter 548 of 2004)** narrowed the exemption of trustees that was contained in SB 294 above to ensure better oversight of trustees.

The Current Proposal

The issue before the Joint Committee seeks to address inequities in conservatorships and guardianships in California by receiving testimony and input from interested parties regarding the current status of conservatorships, and whether a greater oversight by the state is warranted and what should be the nature of that oversight.

In particular, the proposal seeks to protect vulnerable persons under conservatorship and guardianship in California by:

1) Establishing a licensing and regulatory system over persons who, for compensation, act as a conservator, guardian, or trustee for more persons not related to the professional fiduciary.

2) Prohibiting any person from acting as a conservator, guardian or trustee unless he or she is so licensed.

3) Prohibiting a court from appointing a conservator or guardian unless he or she is licensed.

It is further anticipated that the current proposal will consider whether a public agency or other entity should have a licensed person in its employ in order to serve as conservator or guardian.

BACKGROUND

Conservators serve one of the most vulnerable and rapidly growing segments of the state's population; the elderly. The professional fiduciaries must make a broad range of complex decisions that seriously affect conservatees, including where he or she lives, home care arrangements, major medical decisions, control of all of the conservatee's financial matters from bank accounts to investment and tax decisions. The conservatee may be unable to evaluate the competency or honesty of the conservator, the quality of the care received, or articulate concerns regarding his or her care.

Recent legislation regarding conservators and guardians has been enacted in response to reports of widespread financial fraud and abuse perpetrated on the elderly and dependent adults by their conservators or guardians. In 1999, AB 925 (Hertzberg, Chapter 409) required all private professional conservators and guardians to register in a Statewide Registry maintained by the Department of Justice. AB 925 also anticipated the fact that as baby boomers age, certain ones may become incapable of taking care of themselves, and the number of conservatorship cases will increase, and a central Registry of conservators, guardians and trustees will be essential to keeping track of how conservators manage these cases.

A recent series of articles in the *Los Angeles Times*, has further raised issues regarding inequities and abuses in conservatorships and deficiencies in the oversight of conservators in the state. The articles have raised issues with private professional conservators, public conservators, and with court oversight of conservatorships. This hearing seeks input regarding problems which may exist in California's system of conservatorship and solutions which protect those vulnerable citizens under conservatorship.

The legal proceeding for establishing a conservatorship is begun by submitting a petition to the county probate court requesting to be appointed as conservator over the individual. An unscrupulous conservator may go as far as to falsely tell the judge that the elder has dementia or other mental illnesses in order to gain control.

Probate courts face an enormous backlog of cases and are hard pressed to resolve their case loads. This, coupled with the shortage of trained staff to fulfill oversight and investigative requirements can lead judges to rubber stamp petitions without adequate review and input from the individual who is about to lose control of their life.

Courts also may grant emergency appointments on the same day a professional conservator makes the request. Originally, emergency appointments were meant to assist elders who are in imminent danger. However, emergency appointments are now a common method of gaining control over an elder. Based on a conservator's statement that the elder is unable to attend the legal hearing, judges are bypassing assessments and safeguards while waiving requirements that the elder be present during the court hearing which oftentimes last only several minutes.

The *Los Angeles Times* found that in Southern California between 1997 and 2003 there were 1,160 emergency appointments. Of those, 56 percent were granted without notice to the elder; 64 percent were granted before the elder received legal counsel; and, 92 percent were granted before the court's own investigation had been completed.

Once a conservatorship has been placed over an individual, the court is supposed to monitor a conservator's conduct, scrutinize their financial reports and ensure that the elder is receiving proper care, including disciplining or removing a conservator who misuses their authority. Yet, due to resource limitations, court oversight may be minimal and superficial. As a result courts may be unable to identify incompetence, neglect, fraud and outright theft.

What is a conservator and why are people brought under conservatorship?

A conservator is appointed by a probate court judge to protect and manage the care or finances, or both, of someone who has been found by a judge to be unable to do so. That person is called the conservatee. A conservator may be a person or an organization, and may be a private professional conservator, a public conservator or a family member of the conservatee.

The *Handbook for Conservators*, published by the Judicial Council of California, introduces conservatorships in this way:

> There are all kinds of conservatees. Many are elderly people, while some are younger people with temporary or permanent mental or physical disabilities. They come from all walks of life and many cultures. What they have in common is that they are human beings who need help to live the best life possible.
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> Some conservatees can no longer shop for food or cook; others need help bathing and dressing. Some need medical care or help cleaning the house. Others can't drive and need help getting around. Some conservatees are isolated and need social activities and contact with other people.
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> Still other conservatees can't keep track of their money or remember to pay their bills. Some give away large sums of money to strangers; others need help managing their investments.
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> Just as there are many kinds of conservatees, there are many kinds of conservators. What conservators have in common is their willingness to help someone who needs assistance in making his or her way in the world. A conservator might be the conservatee's wife, husband, daughter, son, mother, father, brother, sister, other relative, or friend. If there is no suitable relative or friend who is willing to serve, the conservator might be a private professional conservator or a county agency called a public guardian or public conservator.

How many conservatorships are there?

According to the Judicial Counscil of California's Administrative Office of the Courts, every year approximately 5,500 new conservatorship cases are filed in the courts in California; they represent a little more than 10 percent of total probate cases, with the rest consisting of the decedent's estate, trust, and guardianship. The duration of conservatorship varies substantially from case to case. Estimates based on different data sources from the courts suggest an average duration of approximately 6 to 8 years, which leads to an estimate of approximately 33,000 to 44,000 active cases statewide.

There are some 1300 persons registered with the Attorney General's Statewide Registry of Private Conservators, Guardians and Trustees overseeing more than $1.5 billion in assets In Southern California, professionals are handling 15 percent of all conservatorships. These numbers will surely grow as more and more baby boomers enter retirement age and more private citizens decide to become professional conservators.

What recourse does a conservatee have?

By law, Californians have the right to oppose being assigned to a conservator. However, elders who face the prospect of becoming a ward often have little say in the matter.

Once an elder is under the control of a conservator, it can be costly and extremely difficult to reverse the legal order. If the elder decides to fight for the remove of the conservatorship, the appeal process is lengthy and a conservator can call into question the elder's motive, mental state and seek a litany of expert evaluations. Even the legal expenses of the conservator is often charged to the conservatee's estate, including the conservator's legal bills and all fees associated with the review process.