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## It's Mom's Money and I want it Now: A Review of Whether the Conservatee Should Continue To Pay The Attorney Fees of Feuding Parties

Juliana Wright

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# It's Mom's Money and I want it Now: A Review of Whether the Conservatee Should Continue To Pay The Attorney Fees of Feuding Parties

Juliana Wright\*

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## I. INTRODUCTION

In the mid-2000s, the world sat front-row as Britney Spears's infamous downward spiral unraveled.<sup>1</sup> Her many notorious antics included attacking a car with an umbrella and driving with her baby in her lap as she sped away from paparazzi.<sup>2</sup> However, no moment seemed to signify she had hit rock bottom more

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1. Stephanie Marcus, *10 Years Later, Britney Spears' Head-Shaving Moment is Still Unforgettable*, HUFFPOST (Feb. 17, 2017, 8:50 AM), [https://www.huffpost.com/entry/britney-spears-shaved-her-head-ten-years-ago\\_n\\_58a5cff6e4b07602ad525d50](https://www.huffpost.com/entry/britney-spears-shaved-her-head-ten-years-ago_n_58a5cff6e4b07602ad525d50) (on file with the *University of the Pacific Law Review*).

2. *Id.*; Spears: *Baby Driving Incident "a Mistake,"* BILLBOARD (Feb. 10, 2016), <https://www.billboard.com/articles/news/59724/spears-baby-driving-incident-a-mistake> (on file with the *University of the Pacific Law Review*).

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than when she walked into a hair salon in 2007 and shaved her head completely bald.<sup>3</sup> To a judge, these unusual acts demonstrated Britney Spears's mental incompetence to manage her career and finances.<sup>4</sup> As a result, the court appointed both her father and attorney as co-conservators of her estate.<sup>5</sup> This meant they controlled her finances by collecting her income, paying her bills, and managing her investments.<sup>6</sup>

For over a decade, the two co-conservators managed her finances while her estate paid for their services.<sup>7</sup> If someone opposed how they managed her estate, the estate would pay for the litigation.<sup>8</sup> This is because the current California Probate Code allows attorneys to collect their fees through the conservatee's estate—in this case, Britney Spears's estate—regardless of who wins or loses.<sup>9</sup> For someone like Britney Spears, and the affluent in general, attorney fees are insignificant in terms of their overall wealth.<sup>10</sup> However, many conservatees cannot afford the attorney fees of feuding parties.<sup>11</sup>

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3. Marcus, *supra* note 1.

4. *See id.* (detailing a series of events that led to Britney losing her freedom and a judge awarding a conservatorship of her estate).

5. Melody Chiu, *Britney Spears' Dad Jamie Asks to Step Down as Conservator After Alleged Altercation with Her Son*, PEOPLE (Sept. 6, 2019, 3:05 PM), <https://people.com/music/britney-spears-dad-temporarily-steps-down-conservator/> (on file with the *University of the Pacific Law Review*); Laura Newberry, *Britney Spears Hasn't Fully Controlled Her Life for Years. Fans Insist It's Time to #FreeBritney*, L.A. TIMES (Sept. 18, 2019, 10:00 AM), <https://www.latimes.com/california/story/2019-09-17/britney-spears-conservatorship-free-britney> (on file with the *University of the Pacific Law Review*).

6. *See* JUDICIAL COUNCIL OF CAL., HANDBOOK FOR CONSERVATORS, at 1-3 (rev. ed. 2016), <https://www.courts.ca.gov/documents/handbook.pdf> (on file with the *University of the Pacific Law Review*) (detailing the role of a conservator is to step into the shoes of the conservatee and manage the income, pay bills, etc. as the conservatee would have had she not lacked the requisite capacity to do so).

7. *See* Chiu, *supra* note 5 (noting that Britney's father was appointed conservator in 2008 and is now, in 2019, requesting of the court to remove him as conservator); *see also* CAL. PROB. CODE § 2641(a)-(b) (West 2019) (explaining that the conservator can be compensated for the services rendered while acting in the capacity of the conservator).

8. *See* CAL. PROB. CODE § 2623(b) (West 2019) (explaining that the conservatee's estate should not compensate the conservator's attorney fees unless the court determines that the conservator opposed the objection in good faith and in the best interest of the conservatee).

9. *See* CAL. PROB. CODE § 2640(d) (West 2019) (noting that the conservatee's estates does not pay the conservator's attorney fees for unsuccessfully opposing a petition unless the court determines that the opposition was made in good faith and in the best interest of the conservatee); *see also* Newberry, *supra* note 5 (noting that Britney Spear's father, Jamie Spears, filed for temporary conservatorship in Los Angeles County Superior Court in 2008, which became permanent later that year, meaning that the conservatorship is subject to California law, especially the California Probate Code).

10. *See* Allison Schonter, *Britney Spears' Net Worth Revealed in Court Documents*, POPCULTURE.COM (Aug. 13, 2019, 11:11 PM), <https://popculture.com/celebrity/2019/08/13/britney-spears-net-worth-revealed-court-documents/> (on file with the *University of the Pacific Law Review*) (revealing Britney Spears's net worth of \$59 million).

11. *See* Interview with Elizabeth A. Ikemire, Attorney, Law Office of Elizabeth A. Ikemire, in Sacramento, Cal. (Sept. 13, 2019) (notes on file with the *University of the Pacific Law Review*) (noting that the attorney's fees add up quickly when family members fight, which results in very little left over for the aging parent who relies on the money for caregiving expenses).

Take for instance the real-life case of Mother Doe (“Doe”).<sup>12</sup> Doe is healthy and expected to live for many years, although she is often forgetful and requires caregiving assistance for which her estate pays.<sup>13</sup> Her daughter, Darla, quit her job and moved in with Doe to provide the caregiving assistance her mother requires.<sup>14</sup> While some children may have done this for free, Darla did not.<sup>15</sup> Instead, Doe paid Darla for the caregiving services rather than a third-party caregiver.<sup>16</sup> After a few years, Darla managed to spend nearly \$200,000 of her mother’s money.<sup>17</sup> When Doe’s son, Steve, learned of his sister’s spending behavior, he hired an attorney to petition the court to place Doe in a conservatorship and appoint him as the conservator.<sup>18</sup> Darla, in return, hired her own attorney to object to Steve’s petition to become conservator.<sup>19</sup> Additionally, the court appointed an attorney to represent Doe and her interests in the lawsuit.<sup>20</sup> In total, there were three attorneys representing three different parties on one conservatorship matter, all of whom Doe’s estate will pay when the parties resolve the case.<sup>21</sup>

A year has passed since the initial filing of the case, and the feuding brother and sister have not reached an agreement.<sup>22</sup> Instead, the brother and sister continue to quarrel while the attorney fees increase.<sup>23</sup> Meanwhile, the amount of money remaining in Doe’s estate for her caregiving expenses continues to dwindle with each day the parties fail to reach an agreement.<sup>24</sup>

In California, the conservatee’s estate pays the litigation fees if the attorney can prove she did her work in good faith.<sup>25</sup> Additionally, she must prove her work was “just and reasonable” under the circumstances and in the best interest of the conservatee.<sup>26</sup> There is a set of factors that help guide courts with determining

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12. See *id.* (detailing the events from an actual conservatorship case being heard in the Sacramento County Probate Court; the names of the parties to the lawsuit and minor facts have been changed to maintain confidentiality).

13. *Id.*

14. *Id.*

15. *Id.*

16. Ikemire, *supra* note 11.

17. *Id.*

18. *Id.*

19. *Id.*

20. *Id.*

21. *Id.*

22. Ikemire, *supra* note 11.

23. *Id.*

24. *Id.*

25. See CAL. PROB. CODE § 2641(c) (West 2019) (stating that the conservator is not compensated for unsuccessfully opposing a petition “unless the court determines that the opposition was made in good faith, based on the best interests of the ward or conservatee”).

26. See CAL. PROB. CODE § 2653(c)(1) (West 2019) (awarding attorney’s fees to the petitioner if the court removes the conservator); Marc Alexander & William M. Hensley, *Conservatorship Attorney’s Fees: Comply with California Rules of Court or Suffer the Consequences*, CAL. ATT’Y’S FEES (Aug. 21, 2008), <https://www.calattorneysfees.com/2008/08/conservatorship.html> (on file with the *University of the Pacific Law Review*).

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whether to award compensation; however, more often than not, the court awards the fees.<sup>27</sup> This might be because courts “struggle to evaluate competing claims of siblings and have a limited attention span to parse through them.”<sup>28</sup> Unfortunately, family feuds will continue, and, if “siblings cannot find middle ground,” the conservatee’s estate “end[s] up in the hands of a third party conservator . . . after many thousands of dollars in legal fees.”<sup>29</sup> Mother Doe’s predicament is a perfect example of this.<sup>30</sup> While Doe’s estate continues to shrink, this question still looms: was this family feud between brother and sister really in the best interest of their mother?<sup>31</sup>

This Comment examines the current California Probate Code and the California Rules of Court and proposes an amendment that limits the circumstances under which the conservatee’s estate pays attorney fees.<sup>32</sup> The amendment underscores the idea that the conservatee’s estate is no longer responsible for paying all attorney fees in a disputed conservatorship case.<sup>33</sup>

Part II of this Comment explores conservatorships generally and lays the foundation for their purpose, benefits, and pitfalls.<sup>34</sup> To better understand the events that led to the current law, Part III details the most recent overhaul of California’s Probate Code with the Omnibus Conservatorship and Guardianship Reform Act of 2006.<sup>35</sup> Part IV provides insight into why judges award attorney fees by exploring the case law that led to the current interpretation of “just and reasonable,” as well as the California Rules of Court’s “reasonableness” factors.<sup>36</sup> Lastly, Part V presents a proposed model rule that reflects the amendment to California’s existing law.<sup>37</sup>

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27. See CAL. RULE OF CT. 7.756 (West 2019) (listing a multitude of non-exhaustive factors for the court to consider when determining whether the award compensation); Ikemire, *supra* note 11.

28. Jeffrey S. Galvin, *Parent Custody Battles Leave Everyone Bruised*, DOWNEY BRAND (June 27, 2016), <https://www.trustontrial.com/2016/06/parent-custody-battles-leave-everyone-bruised/> (on file with the *University of the Pacific Law Review*).

29. *Id.*

30. See Ikemire, *supra* note 11 (noting that after a year of litigation, the brother and sister have not found common ground, but instead, they continue waste their mother’s money as the fight to control her and her estate).

31. *Id.*

32. *Infra* Parts III–V.

33. *Infra* Part V.

34. *Infra* Part II.

35. *Infra* Part III.

36. *Infra* Part IV.

37. *Infra* Part V.

## II. CONSERVATORSHIPS

Not all conservatorships are bad.<sup>38</sup> They serve an important role in American society because they allow an individual to legally make decisions on behalf of another who cannot make the decision for herself, either because of a physical or psychological impairment.<sup>39</sup> Allowing attorneys to collect their fees from the conservatee's estate should encourage, rather than discourage, someone from filing a petition with the court for the appropriate reasons.<sup>40</sup> If Darla was truly swindling Doe, the notion of attorney fees should not discourage Steven from filing a conservatorship petition, even if he does not have money to pay the attorney up front.<sup>41</sup> The same should be true for any vulnerable parent who might be susceptible to phone scammers or greedy family members.<sup>42</sup> The purpose of the conservatorship is to fight to protect the conservatee's interests rather than to gain control over the conservatee.<sup>43</sup> As a result, there is a delicate balance between preserving court accessibility and safeguarding the conservatee.<sup>44</sup> Any amendment to the probate code or rules of court must reflect this delicate balance.<sup>45</sup>

This Part further explores the functions of a conservatorship.<sup>46</sup> Section A distinguishes the role of a conservator from that of the conservatee to delineate the significantly different legal functions of each.<sup>47</sup> Section B compares and contrasts the characteristics of a conservatorship with a guardianship and the role those characteristics serve in this Comment.<sup>48</sup> Section C provides insight into the conservatorship process in California by illustrating the legal procedure from beginning to end.<sup>49</sup> Section D concludes with a brief look at the conflict between conservatorships and core principles of American Jurisprudence.<sup>50</sup>

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38. See JUDICIAL COUNCIL OF CAL., *supra* note 6, at 1-3 (detailing the role of a conservator is to step into the shoes of the conservatee and manage the income, pay bills, etc. so that the conservatee can continue to live her life without hiccup).

39. See *id.* (detailing the role of a conservator is to step into the shoes of the conservatee to make financial decisions for the conservatee because the conservatee cannot).

40. See Ikemire, *supra* note 11 (explaining that legal fees should not deter someone from filing a petition for conservatorship if a loved truly required a conservatorship to protect them from financial abuse).

41. See *id.* (explaining that legal fees should not the son from filing a conservatorship petition if he truly believed that his sister was stealing money from their mother).

42. See *id.* (explaining that legal fees should not deter someone from filing a petition for conservatorship if a loved truly required a conservatorship to protect them from financial abuse).

43. Interview with Jeffrey S. Galvin, Attorney, Downey Brand, in Sacramento, Cal. (Jan. 10, 2020) (notes on file with the *University of the Pacific Law Review*).

44. See *id.* (noting that any amendment to the probate code or rules of court should not discourage an interested party from filing a claim to protect and safeguard a parent's interests).

45. *Id.*

46. *Infra* Part II.

47. *Infra* Section II.A.

48. *Infra* Section II.B.

49. *Infra* Section II.C.

50. *Infra* Section II.D.

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A. The Role of the Conservator vs. the Conservatee

A conservatorship is a court proceeding whereby a judge appoints a responsible party to care for and manage the affairs of another individual.<sup>51</sup> “The person appointed is called the ‘conservator,’ and the person who the conservator looks after is called the ‘conservatee.’”<sup>52</sup> A conservator is often a court-appointed individual or organization who safeguards and manages the financial affairs and/or personal care needs of a person who a judge or jury determined is unfit to manage her own affairs.<sup>53</sup> Conservators often are a spouse, son, daughter, parent, relative, public guardian, or even a professional fiduciary.<sup>54</sup> The court entrusts the conservator with significant responsibility because she makes decisions on behalf of the conservatee as though she is the conservatee.<sup>55</sup> The conservator’s goal is to help the conservatee live their best life possible for however long the conservatee lives or for the length of the conservatorship.<sup>56</sup>

Conservatees are often elderly or infirm.<sup>57</sup> However, Britney Spears’s conservatorship serves as evidence that even young adults sometimes need financial assistance and caregiving oversight.<sup>58</sup> Thus, conservatees range in age because people of all ages can lack the mental or physical ability to manage their own affairs.<sup>59</sup>

There is a legal distinction between a conservator of a person versus a conservator of an estate.<sup>60</sup> When a court appoints a conservator of a person, the conservator has a legal duty to manage the conservatee’s personal needs, such as living arrangements, transportation, food, clothing, and health care appointments.<sup>61</sup> “A conservator of [a] person can make sure the conservatee takes his or her medication and discourage interaction with individuals who promote self-destructive behavior . . . [whereas a] conservator of [an] estate can ensure that the conservatee is protected from third parties seeking to financially exploit the

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51. Karina Stanhope, “Stronger” Now – California Conservatorships Can Provide a Helping Hand to Young Adults, DOWNEY BRAND (May 30, 2016), <https://www.trustontrial.com/2016/05/stronger-now-california-conservatorships-can-provide-a-helping-hand-to-young-adults/> (on file with the *University of the Pacific Law Review*).

52. *Id.*

53. JUDICIAL COUNCIL OF CAL., *supra* note 6, at 1-1.

54. *Id.* at 1-2.

55. *Id.*

56. *Id.* at 1-1.

57. Stanhope, *supra* note 51.

58. See Newberry, *supra* note 5 (noting that the conservatorship of Britney Spears and her estate was filed in 2008); see also *Britney Spears Biography*, BIOGRAPHY (Nov. 14, 2019), <https://www.biography.com/musician/britney-spears> (on file with the *University of the Pacific Law Review*) (showing that Britney Spears was born in 1981 and would therefore have been roughly twenty-seven years of age); Stanhope, *supra* note 51.

59. JUDICIAL COUNCIL OF CAL., *supra* note 6, at 1-1.

60. Stanhope, *supra* note 51.

61. JUDICIAL COUNCIL OF CAL., *supra* note 6, at 1-2 to 1-3.

conservatee.”<sup>62</sup> When a court appoints a conservator of an estate, the conservator is responsible for the conservatee’s financial affairs, such as collecting the conservatee’s income, paying their bills, and investing their assets.<sup>63</sup> The conservator also has the legal discretion to spend the estate’s funds for the benefit of the conservatee’s family.<sup>64</sup>

It is worth noting, however, that not all spending lacks scrutiny.<sup>65</sup> The conservator must obtain court approval in certain situations and submit an accounting of all income and expenses to the court for review after the first year of the conservatorship and biennially thereafter.<sup>66</sup> The accounting provides a financial picture of whether the conservator is using and investing the conservatee’s assets appropriately.<sup>67</sup> The court file examiner may require the conservator to further explain the appropriateness of an expense if evidence suggests the conservator misused the conservatee’s funds.<sup>68</sup> If the conservator cannot justify the expenses, the court might surcharge the conservator, meaning the conservator must pay back any inappropriate expense.<sup>69</sup>

### B. Conservatorships vs. Guardianships

In California, a conservatorship refers to the court appointment of an individual to manage the affairs of an incapacitated adult—whether it is over a person, a person’s estate, or both.<sup>70</sup> A guardianship is the court appointment of an individual to manage the affairs of a minor.<sup>71</sup> There are “many states [that] use the term ‘guardianship’ instead of ‘conservatorship’ when referring to the same duties for adults,” which means that what might classify as a conservatorship in California is actually a guardianship in another state, or vice versa.<sup>72</sup> Some state courts grant guardianships to allow a guardian to make health-related decisions for an incapacitated person.<sup>73</sup> However, in those same states, a court grants a

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62. Stanhope, *supra* note 51.

63. JUDICIAL COUNCIL OF CAL., *supra* note 6, at 1-3

64. *Id.* at 5-9.

65. *See id.* at 5-44 (describing how the conservator must obtain court approval for certain activities such as investments, selling the home, selling or borrowing assets, etc.); Ikemire, *supra* note 11.

66. *See* JUDICIAL COUNCIL OF CAL., *supra* note 6, at 1-2, 5-44 (describing how the conservator must obtain court approval for certain activities such as investments, selling the home, selling or borrowing assets, etc.); Ikemire, *supra* note 11.

67. Ikemire, *supra* note 11.

68. *Id.*

69. *Id.*

70. Michael Gilfix et al., *The Difference Between Conservatorship and Guardianship in California*, GILFIX & LA POLL ASSOCIATES LLP: ESTATE PLANNING BLOG (May 13, 2016), <https://www.gilfix.com/2016/05/the-difference-between-conservatorship-and-guardianship-in-california/> (on file with the *University of the Pacific Law Review*).

71. *Id.*

72. *Id.*

73. *What is the Difference Between Conservatorship and Guardianship?*, MOTLEY FOOL (Oct. 17, 2016), <https://www.fool.com/knowledge-center/what-is-the-difference-between-conservatorship-and.aspx> (on file with



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conservatorship to allow a conservator to make financially related decisions on behalf of an incapacitated person.<sup>74</sup>

While this Comment explores the intricacies of conservatorships and guardianships in other states to help shape a proposed model rule, the model rule presented applies only to California conservatorships.<sup>75</sup> Therefore, unless otherwise noted, the term “conservatorship” used throughout this Comment refers to California conservatorships.<sup>76</sup>

*C. Insight Into the Conservatorship Process in California*

The conservatorship process begins when an interested party files a petition in a California Superior Court requesting a conservatorship of a person, a person’s estate, or both.<sup>77</sup> The petitioner can request to appoint herself as the conservator, or she may request to appoint a private fiduciary, a family friend, or relative.<sup>78</sup>

When submitting the petition, the petitioner must establish the need for a conservatorship with clear and convincing evidence.<sup>79</sup> This threshold requirement often causes the petitioner to exaggerate the conservatee’s condition to convince the court that the conservatee is in dire need of an immediate conservatorship.<sup>80</sup> However, the court does not rely solely on the petition when making its determination.<sup>81</sup> The court also reviews the Capacity Declaration to decide whether a conservatorship is necessary.<sup>82</sup> A Capacity Declaration provides a “complete medical overview of the proposed conservatee,” which the petitioner must include with the initial filing documents.<sup>83</sup> The conservatee’s physician completes this form, rather than the petitioner, which restrains the court from imposing a conservatorship based solely on any exaggerated conditions pled in the initial filing.<sup>84</sup>

The conservatee’s physician conducts a medical examination to measure the

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the *University of the Pacific Law Review*).

74. *Id.*

75. *Infra* Parts II–V.

76. *Infra* Parts II–V.

77. Jeffrey S. Galvin, *The Uncertain Role of Court Appointed Counsel in California Conservatorship Cases*, DOWNEY BRAND (May 20, 2019), <https://www.trustontrial.com/2019/05/the-uncertain-role-of-court-appointed-counsel-in-california-conservatorship-cases/> (on file with the *University of the Pacific Law Review*).

78. *Id.*

79. *Id.*

80. Ikemire, *supra* note 11.

81. *Id.*

82. *Id.*; Anette Gomez, *What is a Capacity Declaration in a California Probate Case?*, JUST DOCUMENT PREPARATION, <https://justdocprep.com/what-is-a-capacity-declaration-in-a-california-probate-case/> (last visited Apr. 11, 2020) (on file with the *University of the Pacific Law Review*).

83. Gomez, *supra* note 82; see Ikemire, *supra* note 11 (explaining how the medical form acts as a safeguard to a court authorizing conservatorship petitions based solely on the alleged facts in the petition).

84. Ikemire, *supra* note 11.

conservatee’s mental capabilities.<sup>85</sup> The physician assesses the conservatee’s alertness, ability to process information, memory, logical reasoning, general mood, and other cognitive faculties.<sup>86</sup> For each category, the physician indicates whether there is no impairment, moderate to major impairment, or even whether the conservatee is so impaired that the physician cannot conduct an assessment.<sup>87</sup> This information is invaluable to the court because it helps it to determine whether the conservatee requires a conservatorship or not.<sup>88</sup>

The court clerk sets an initial hearing date once the petitioner files the case in the respective superior court, at which point the petitioner gives notice to the conservatee’s close family members.<sup>89</sup> A judge may appoint counsel for the proposed conservatee in select cases under California Probate Code §§ 1470–1471.<sup>90</sup> The court-appointed counsel is not the same attorney representing the petitioner, but rather, is an attorney selected from a rotating list of attorneys “who have volunteered to serve as court-appointed counsel.”<sup>91</sup> The court-appointed counselor meets with the conservatee, reviews the petition and any other pleadings on file, and speaks with any interested family members and/or their attorneys.<sup>92</sup>

The role of the court-appointed counselor is to represent the conservatee and her wishes rather than what the counselor believes is best for the conservatee, which is reflected in a report the counselor submits to the court.<sup>93</sup> For example, the conservatee may not want to be placed in a conservatorship.<sup>94</sup> The court-appointed counselor—who the court appointed to zealously represent the conservatee—must then request for the court to not impose a conservatorship even if the conservatee truly needs one.<sup>95</sup> Therefore, while it may appear that the court-appointed counselor is a neutral third party who could report candidly to the court regarding whether a conservatorship is necessary—or whether the real issue is the result of a rivalry between siblings rather than mom’s mental capacity—the counselor is bound by ethical duties to represent the client and not her best interest.<sup>96</sup> “Meanwhile, the court’s probate investigator conducts a limited investigation and reports on the propriety of the conservatorship.”<sup>97</sup> The investigator examines the conservatee’s living arrangements, quality of care, financial situation, and physical

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85. Gomez, *supra* note 82.

86. CAL. JUDICIAL COUNCIL, FORM NO. GC-335, CAPACITY DECLARATION–CONSERVATORSHIPS (2019), <https://www.courts.ca.gov/documents/gc335.pdf> (on file with the *University of the Pacific Law Review*).

87. *Id.*

88. Gomez, *supra* note 82.

89. Galvin, *supra* note 77.

90. *Id.*

91. *Id.*

92. *Id.*

93. *Id.*

94. *Id.*; Ikemire, *supra* note 11.

95. Galvin, *supra* note 77; Ikemire, *supra* note 11.

96. See Galvin, *supra* note 77 (“California law generally imposes duties of confidentiality and loyalty on attorneys without any express exception for those appointed to represent proposed conservatees.”).

97. *Id.*

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and mental treatment.<sup>98</sup> The investigator submits a report to the court for it to consider when weighing whether to grant or revoke the conservatorship.<sup>99</sup>

### D. Conservatorships vs. Core Principles of American Jurisprudence

American society values individuals controlling their own lives and making decisions without governmental or societal intrusion.<sup>100</sup> This concept is known as self-determination.<sup>101</sup> The definition of “self-determination” is a person possessing the legal right to determine her own fate by choosing how she wishes to live her life.<sup>102</sup> It is not only a core principle of international law, but also a principle of American jurisprudence.<sup>103</sup> Conservatorships, however, violate this core principle because they strip a conservatee of her decision-making rights.<sup>104</sup> A conservatorship can strip the conservatee of her basic freedom to contract or associate with whoever she wishes.<sup>105</sup> The conservator now makes these decisions.<sup>106</sup>

Conservatorships can cause and have caused conservatee’s to suffer at the hands of the conservator because the conservator controls the conservatee’s fate.<sup>107</sup>

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98. SB 1716, 2006 Leg., 2005–2006 Sess. (Cal. 2006), [https://leginfo.ca.gov/faces/billNavClient.xhtml?bill\\_id=200520060SB1716](https://leginfo.ca.gov/faces/billNavClient.xhtml?bill_id=200520060SB1716) (on file with the *University of the Pacific Law Review*).

99. *Id.*

100. See Legal Info. Inst., *Self-Determination (International Law)*, CORNELL L. SCH., [https://www.law.cornell.edu/wex/self\\_determination\\_%28international\\_law%29](https://www.law.cornell.edu/wex/self_determination_%28international_law%29) (last visited Jan. 3, 2020) (on file with the *University of the Pacific Law Review*) (inferring that self-determination is a core principle of American law—not just international law); see also *Self-Determination*, MERRIAM-WEBSTER DICTIONARY, <https://www.merriam-webster.com/dictionary/self-determination> (last visited Jan. 3, 2020) (on file with the *University of the Pacific Law Review*) (defining self-determination as the “free choice of one’s own acts or states without external compulsion”).

101. See *Self-Determination*, *supra* note 100 (defining self-determination as the “free choice of one’s own”).

102. See Legal Info. Inst., *supra* note 100 (denoting self-determination as “the legal right of people to decide their own destiny in the international order”); see also *Self-Determination*, *supra* note 100 (defining self-determination as the “free choice of one’s own acts or states without external compulsion”).

103. Legal Info. Inst., *supra* note 100.

104. *Principles: Conservatorship of Persons with Disabilities*, DISABILITY RTS. CAL. (Mar. 24, 2017), <https://www.disabilityrightsca.org/legislation/principles-conservatorship-of-persons-with-disabilities> (on file with the *University of the Pacific Law Review*).

105. Stanhope, *supra* note 51.

106. See *id.* (explaining how a conservator is a person appointed to manage the affairs of another adult, including making the conservatee take medication, deciding who they socialize with, and protect them from third parties).

107. See *Infra* Part III (detailing the financial abuse many conservatees suffered at the hands of the conservator prior to legislative reform); see generally Robin Fields et al., *When a Family Matter Turns into a Business*, L.A. TIMES (Nov. 13, 2005), <https://www.latimes.com/local/la-me-serve13nov13-story.html> (on file with the *University of the Pacific Law Review*) (revealing specific conservatorship cases in which the conservator abused her fiduciary duties and stole from the very people she was legally-bound to safeguard from abuse).

While a “conservatorship began as a way to help families protect enfeebled relatives from predators and self-neglect,” they have become a way to “take basic freedoms from grown men and women and give [those freedoms to] conservators.”<sup>108</sup> Conservators gain “sweeping power over [the conservatee’s] property . . . money . . . and the smallest details of their lives.”<sup>109</sup> As a result, the California Probate Code sets a high threshold for granting a conservatorship.<sup>110</sup> The threshold requires that the conservatorship be the least restrictive alternative required to protect the conservatee.<sup>111</sup> However, once the petitioner or proponent of the conservatorship overcomes the burden of proof necessary to establish a conservatorship, the conservatee is ripe for potential abuse because someone other than the conservatee is choosing how she lives her life.<sup>112</sup>

### III. THE BEGINNING OF A NEW ERA: CALIFORNIA’S OMNIBUS CONSERVATORSHIP AND GUARDIANSHIP REFORM ACT OF 2006

Prior to 2006, conservatorships were increasing in number, yet California rarely regulated them.<sup>113</sup> This area of law became a trade whereby professional conservators “turn[ed] what had been a family matter into a business.”<sup>114</sup> While conservatorships were intended to safeguard the elderly and infirm, this new breed of conservator failed to uphold its legal duty by taking advantage of the conservatee.<sup>115</sup> This Part highlights the events that led to and the legal significance of California’s Omnibus Conservatorship and Guardianship Reform Act of 2006.<sup>116</sup> To provide an understanding of the reform’s significance, Section A details stories of conservators exploiting the system.<sup>117</sup> Section B tells the story of one particular conservatorship that resonated with a California assembly member, therefore influencing him to act.<sup>118</sup> To shed light on what the Legislature intended versus the law that it actually enacted, Section C concludes with a discussion of the reform act’s legislative history.<sup>119</sup>

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108. Fields et al., *supra* note 107.

109. *Id.*

110. Stanhope, *supra* note 51.

111. CAL. PROB. CODE § 1800.3 (West 2019); Stanhope, *supra* note 51; *Principles: Conservatorship of Persons with Disabilities*, *supra* note 104.

112. Stanhope, *supra* note 51.

113. Fields et al., *supra* note 107.

114. *Id.*

115. *Id.*

116. *Infra* Part III.

117. *Infra* Section III.A.

118. *Infra* Section III.B.

119. *Infra* Section III.C.

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A. Exposing the Crimes

In 2005, the Los Angeles Times (“L.A. Times”) published a series of articles exposing a new breed of conservators who abused their power.<sup>120</sup> This new breed employed questionable tactics to take advantage of vulnerable individuals to control their wealth.<sup>121</sup> The L.A. Times investigated the work of California’s professional conservators and discovered that “seniors [could] lose their independence with stunning swiftness”—sometimes without even knowing it.<sup>122</sup>

In one instance, a conservator stole money from an eighty-eight year-old female conservatee and invested it in a restaurant belonging to the conservator’s friend; the money was supposed to pay the conservatee’s taxes.<sup>123</sup> In another instance, a conservator sold a conservatee’s home to herself at a discount, which the conservator’s daughter then resold for triple the price.<sup>124</sup> Conservators have increased their earnings by running up their fees on miscellaneous tasks.<sup>125</sup> For instance, a conservator charged \$170 in fees to deliver \$49.93 worth in groceries to the conservatee.<sup>126</sup> In another example, a conservator charged the conservatee’s estate \$1,700 to attend the conservatee’s funeral.<sup>127</sup>

While these examples represent some of the more egregious cases, the reality was that once a court appointed a conservator, it was difficult and expensive to remove the conservator.<sup>128</sup> Shortly after the L.A. Times published its findings, it became evidence that California desperately needed to overhaul its conservatorship laws.<sup>129</sup>

B. The Rise of Reform

Emmeline Frey was a ninety-three year-old widow when the court discovered her conservator misappropriated her finances.<sup>130</sup> The conservator entrusted her own car-salesman-turned-overnight-investor son to invest \$100,000 of

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120. Fields et al., *supra* note 107.

121. *Id.*

122. *See id.* (detailing the story of Helen Jones, who at the time was an eighty-seven-year-old woman, who became involved in a conservatorship when a private fiduciary petitioned the court to become Helen’s conservator without ever meeting Helen; the court granted without ever interviewing Helen).

123. *Id.*

124. *Id.*

125. *Id.*

126. Fields et al., *supra* note 107.

127. *Id.*

128. *Id.*

129. Jack Leonard & Robin Fields, *Gov. Signs Conservator Reform Bills*, L.A. TIMES (Sept. 28, 2006), <https://www.latimes.com/archives/la-xpm-2006-sep-28-me-conservator28-story.html> (on file with the *University of the Pacific Law Review*).

130. *Id.*

Emmeline's assets.<sup>131</sup> Needless to say, Emmeline lost her \$100,000 and died before she could personally recoup any losses.<sup>132</sup> Emmeline's story, among many others published in the L.A. Times exposé, encouraged former California Assemblyman Dave Jones of Sacramento to write one of the four reform bills that later became the California Omnibus Conservatorship and Guardianship Reform Act of 2006.<sup>133</sup>

The L.A. Times articles highlighted a very plausible fear that a conservator could easily gain control over a person's affairs, steal her money, and isolate the conservatee from family members.<sup>134</sup> The Legislature realized that the current judicial system failed to provide the necessary oversight required to catch the rampant abuse, so it pledged to correct the deficiencies.<sup>135</sup>

The purpose of the reform bills were to "strengthen oversight of professional conservators through a system of state licensure and also require greater supervision of their work by the judges who appoint them."<sup>136</sup> Conservators would be required to obtain a license through the Department of Consumer Affairs; the judicial system would provide educational training and assistance for all participants, including non-professionals, so that families would not be required to consult a professional for help; and, the court would establish a watchdog to investigate complaints and prevent abuse.<sup>137</sup>

Unfortunately, these articles were not the first attempt at exposing conservators stealing from conservatees.<sup>138</sup> Similar scandals prompted reform, but previous governors vetoed any reform legislation.<sup>139</sup> This time around, however, former Governor Arnold Schwarzenegger "heed[ed] calls to overhaul California's troubled conservatorship system" and signed the reform bills into law in the fall of 2006.<sup>140</sup>

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131. *Id.*

132. *Id.*

133. *Id.*

134. *Id.*

135. Hearing on AB 1363 Before the S. Judiciary Comm., 2006 Leg., 2005–2006 Sess. 23 (Cal. 2006) (on file with the *University of the Pacific Law Review*).

136. Leonard & Fields, *supra* note 129.

137. Hearing on AB 1363 Before the S. Judiciary Comm., *supra* note 135.

138. *See* Leonard & Fields, *supra* note 129 (noting that "scandals involving thefts by conservators have prompted sporadic efforts to increase regulation").

139. *See id.* (noting that while there were previous "scandals" involving conservator theft of the conservatee, "three previous government vetoed legislation aimed at reform").

140. *Id.*

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*C. The Legislative History Behind the Reform*

The California Assembly introduced the first of four reformation bills in January 2006.<sup>141</sup> Three other bills followed in April 2006.<sup>142</sup> Each bill underwent a series of committee reviews before former Governor Schwarzenegger eventually signed them into law.<sup>143</sup> The report from the June 27, 2006 Senate Judiciary Committee Analysis of Senate Bill 1363 noted that the committee held informational hearings for the purpose of shedding light on the problems surrounding the current conservatorship system in California.<sup>144</sup> The “major complaint discussed at these informational hearings” involved the ongoing litigation between the conservator—who family and friends suspected of mismanaging the conservatee’s finances.<sup>145</sup> This becomes a significant issue because the court more often than not requires the conservatee’s estate to pay the litigation fees for all attorneys involved in the dispute.<sup>146</sup> To put an end to this practice, the bill aimed to prohibit the conservator and her attorney from receiving any compensation for unsuccessfully opposing a petition, especially if the court removed the conservator from her position for cause.<sup>147</sup> As such, the conservator could not charge the conservatee’s estate for her litigation expenses and would be personally liable to pay her attorney fees.<sup>148</sup>

However, in a later report from the August 31, 2006 Assembly Committee Analysis, the committee amended the language to provide that the conservator and her attorney would not receive compensation for unsuccessfully opposing a

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141. *AB-1363 Omnibus Conservatorship and Guardianship Reform Act of 2006*, CAL. LEGIS. INFO., <https://leginfo.ca.gov/faces/billAnalysisClient.xhtml> (last visited Jan. 10, 2020) (on file with the *University of the Pacific Law Review*).

142. See Hearing on AB 1363 Before the S. Judiciary Comm., *supra* note 135 (reporting pending related legislation as the following: SB 1116, SB 1550, and SB 1716); see also *SB-1116 Conservatorship*, CAL. LEGIS. INFO., [http://leginfo.ca.gov/faces/billAnalysisClient.xhtml?bill\\_id=200520060SB1116](http://leginfo.ca.gov/faces/billAnalysisClient.xhtml?bill_id=200520060SB1116) (last visited Jan. 10, 2020) (on file with the *University of the Pacific Law Review*) (reporting that the first committee review of the bill was April 26, 2006); *SB-1550 Professional Fiduciaries Act*, CAL. LEGIS. INFO., [http://leginfo.ca.gov/faces/billAnalysisClient.xhtml?bill\\_id=200520060SB1550](http://leginfo.ca.gov/faces/billAnalysisClient.xhtml?bill_id=200520060SB1550) (last visited Jan. 10, 2020) (on file with the *University of the Pacific Law Review*) (showing that the first committee review of the bill was also not until April 18, 2006); *SB-1716 Conservatorships*, CAL. LEGIS. INFO., [http://leginfo.ca.gov/faces/billAnalysisClient.xhtml?bill\\_id=200520060SB1716](http://leginfo.ca.gov/faces/billAnalysisClient.xhtml?bill_id=200520060SB1716) (last visited Jan. 10, 2020) (on file with the *University of the Pacific Law Review*) (showing that the first committee review of the bill was also not until April 26, 2006).

143. See *SB-1116 Conservatorship*, *supra* note 142 (showing SB 1116 undergoing series of both Senate and Assembly Floor Analyses); see also *SB-1550 Professional Fiduciaries Act*, *supra* note 142 (showing SB 1550 undergoing a series of both Senate and Assembly Floor Analyses); *SB-1716 Conservatorships*, *supra* note 142 (showing SB 1716 undergoing a series of both Senate and Assembly Floor Analyses).

144. Hearing on AB 1363 Before the S. Judiciary Comm., *supra* note 135.

145. *Id.*

146. See Ikemire, *supra* note 11 (stating that there are oftentimes three attorneys involved, one for the conservator, one for the petitioner, and one for the conservatee and that it is rare for a judge to no approve all of the attorney fees involved).

147. Hearing on AB 1363 Before the S. Judiciary Comm., *supra* note 135.

148. *Id.*

petition “without good cause.”<sup>149</sup> This means the conservator and her attorney can receive compensation for unsuccessfully opposing a petition so long as they opposed the petition with good cause.<sup>150</sup> Furthermore, the petitioner could only recoup her litigation costs in an unsuccessful petition if the court found that she filed the petition in the best interest of the conservatee.<sup>151</sup> As a result, the conservatee could still end up paying the petitioner’s attorney fees even if the petitioner lost, so long as the petitioner could prove she initially filed the claim in the best interest of the conservatee.<sup>152</sup>

In summary, while the Legislature intended to preserve the conservatee’s financial assets by placing parameters on when to award compensation to a conservator and/or petitioner, the existing law permits both parties to recoup their expenses if either proves they acted in good faith and in the best interest of the conservatee.<sup>153</sup> The Legislature codified this language in numerous sections of the California Probate Code; but what does it mean to act in the best interest of the conservatee?<sup>154</sup> The next Part further explores this idea by detailing that courts have interpreted “the best interest of the conservatee” to mean that an attorney acts in “good faith” and is “just and reasonable” under the circumstances.<sup>155</sup>

#### IV. INTERPRETING “GOOD FAITH” AND “REASONABLE” IN CONSERVATORSHIP MATTERS

The terms “good faith” and “reasonable” are littered throughout the probate code.<sup>156</sup> The California Legislature and judicial system have provided a myriad of interpretations of these terms over the years.<sup>157</sup> This Part explores these interpretations, particularly as they relate to attorney fees in conservatorship

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149. Concurrence in Senate Amendments, Analysis of AB 1363, at 1 (Ca1. 2006) (on file with the *University of the Pacific Law Review*).

150. *Id.*

151. Hearing on AB 1363 Before the S. Judiciary Comm., *supra* note 135.

152. *See id.* (inferring from the legislative history that it was the legislature’s intent to allow the petitioner to receive reimbursement for her expenses, but “the court must find that the petition was filed in the best interest of the conservatee”).

153. *Compare id.* (outlining the Legislature’s intent to prohibit conservators from receiving compensation for unsuccessfully opposing a claim), *with* Concurrence in Senate Amendments, *supra* note 149 (noting the additional language added in the final draft analysis that would allow the conservator to receive compensation if the court believed she acted in good faith and in the best interest of the conservatee, even if she unsuccessfully opposed the petition).

154. *See generally* CAL. PROB. CODE §§ 2640–53 (West 2019) (noting the codification of the terms “good faith” and “best interest of the conservatee” in the reformed law); *Infra* Part IV (interpreting “good faith” and “reasonable” to mean the conservator considered the conservatee’s quality of care, financial well-being, and living arrangements above all else).

155. *Infra* Part IV.

156. *See generally* PROB. §§ 2640–53 (noting the codification of the terms “good faith” and “best interest of the conservatee” in the reformed law).

157. *See* Guardianship of Cookingham, 45 Cal. 2d. 367, 370 (1955) (detailing an example of how a court has interpreted the terms to coincide with trust law, such that the duties owed are interpreted as being similar to that of a trustee).



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matters.<sup>158</sup> Underpinning this section is Probate Code § 2640(d), which provides the following:

[T]he guardian or conservator shall not be compensated from the estate for any costs or fees that the guardian or conservator incurred in unsuccessfully opposing a petition, or other request or action, made by or on behalf of the ward or conservatee, unless the court determines that the opposition was made in good faith based on the interests of the ward or conservatee.”<sup>159</sup>

Section A examines the case law to see how common law transformed the California Probate Code, and conversely how the court system interpreted the terms “good faith” and “reasonable.”<sup>160</sup> Section A also highlights the significance of judicial discretion in fee compensation cases.<sup>161</sup> Section B narrowly considers the case law surrounding the “reasonableness factors” that a judge considers when determining whether to award fees.<sup>162</sup>

A. Case Review

California Probate Code § 2647 requires the court to approve both attorney and conservatorship fees.<sup>163</sup> The conservator cannot pay herself, her attorney, or opposing counsel without court approval.<sup>164</sup> “If [the conservator] does not obtain the court’s permission when it is required, she may be removed as conservator or be required to reimburse the estate from her own personal funds, or both.”<sup>165</sup> In *Conservatorship of Bower*, the court noted that the Legislature enacted this code section, as well as §§ 2640–2646, as a way to protect those who need a conservatorship from people who will “treat [the conservatee’s] estate as blank checks.”<sup>166</sup>

While the court must approve attorney fees in a conservatorship matter, there is no concrete rule governing when to and when not to award these fees.<sup>167</sup>

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158. *Infra* Sections IV.A–B.

159. CAL. PROB. CODE § 2640(d) (West 2019).

160. *Infra* Section IV.A.

161. *Infra* Section IV.A.

162. *Infra* Section IV.B.

163. CAL. PROB. CODE § 2647 (West 2019); *Conservatorship of Bower*, 202 Cal. Rptr. 3d 297, 307 (Cal. Ct. App. 2016).

164. *Conservatorship of Bower*, 202 Cal. Rptr. at 307.

165. Lawrence M. Friedman & June O. Starr, *Losing It in California, Conservatorship and the Social Organization of Aging*, 73 WASH. U. L.Q. 1501, 1509 (1995).

166. *Conservatorship of Bower*, 202 Cal. Rptr. at 307.

167. *See generally* CAL. PROB. CODE §§ 2640–53 (West 2019) (noting that a court must use judicial discretion when awarding or not awarding compensation, which the court weighs whether the conservator and her attorney acted reasonably and in good faith).

However, from a review of the case law in this area, is it evident that courts defer to judicial discretion when awarding attorney fees.<sup>168</sup>

When the law tasks courts with determining whether to award compensation, a judge often looks to each party's status and position in the case.<sup>169</sup> A judge may look to whether the party seeking compensation was the petitioner or the conservator, whether the party successfully petitioned for conservatorship, or whether the party unsuccessfully opposed the petition for conservatorship.<sup>170</sup> While many areas of law adopt the American Rule—which requires each side to pay its respective attorney fees regardless of who wins the case—*In re Moore's Estate* established that a court can award compensation to an unsuccessful petitioner.<sup>171</sup> However, a court only awards compensation when the unsuccessful petitioner initiated the proceeding in good faith.<sup>172</sup> Other courts adopted this precedent, eventually influencing the Legislature to codify the caveat of “good faith” into law.<sup>173</sup>

When determining the meaning of “good faith,” the California Supreme Court in *Guardianship of Cookingham* established that a probate court must rely on “equitable considerations relating to the law of trusts.”<sup>174</sup> As evidenced in *Conservatorship of Lefkowitz*, probate courts hold firm to this principle today.<sup>175</sup> *Lefkowitz* is a prominent probate case and courts often cited to it when resolving matters relating to fee compensation.<sup>176</sup> Like *Cookingham*, the court in *Lefkowitz* equated conservatorships to trust law.<sup>177</sup> In the court's analysis, it notes that while a trustee may incur expenses, the law limits her right to reimbursement to “those expenses which are reasonably necessary or appropriate to carry out the purposes of the trust.”<sup>178</sup> The law does not entitle the trustee to indemnity if she incurs

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168. See generally *id.* (noting that a court must use judicial discretion when awarding or not awarding compensation, which the court weighs whether the conservator and her attorney acted reasonably and in good faith); see, e.g., *In re Jacobson's Guardianship*, 30 Cal.2d 312, 325 (1947) (noting that “the allowance of counsel fees in a matter such as this rests largely in the discretion of the court in the first instance and the order under review will not be disturbed unless an abuse of discretion is plainly involved”); *In re O'Conner's Estate*, 28 Cal. App. 2d 527, 531 (1938) (stating “that such allowances always rest in the discretion of the trial court”); *In re Clanton's Estate and Guardianship*, 171 Cal. 381, 387 (1915) (noting that “allowance of attorney's fees to guardian incurred in settlement of final account is within the court's discretion”).

169. *Conservatorship of Lefkowitz*, 50 Cal. App. 4th 1310, 1313 (1996).

170. *Id.* at 1315–16.

171. Will Kenton, *American Rule*, INVESTOPEDIA (Sept. 24, 2019), <https://www.investopedia.com/terms/a/american-rule.asp> (on file with the *University of the Pacific Law Review*); *In re Moore's Estate*, 258 Cal. App. 2d 458, 461 (1968).

172. *In re Moore's Estate*, 258 Cal. App. 2d at 461.

173. See generally CAL. PROB. CODE §§ 2640–53 (West 2019) (noting the use of “good faith” throughout the code sections).

174. *Guardianship of Cookingham*, 45 Cal. 2d. 367, 370 (1955).

175. *Conservatorship of Lefkowitz*, 50 Cal. App. 4th 1310, 1314 (1996).

176. Edward J. Corey, Jr., Margaret G. Lodise & Peter S. Stern, *Crisis in Conservatorships*, 12 CAL. TR. & EST. Q. 43 (2007).

177. *Conservatorship of Lefkowitz*, 50 Cal. App. 4th at 1314.

178. *Id.*

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expenses beyond what would benefit the trust estate.<sup>179</sup>

The court is ultimately guided by the underlying principle that any fees incurred—whether the trustee’s fees or the attorney fees—must reasonably benefit the trust for the court to award compensation.<sup>180</sup> Additionally, the trustee’s decision to accrue such fees must be “properly motivated,” meaning that the trustee acted with a good faith belief her action would benefit the trust.<sup>181</sup> In summary, “a trustee may not be indemnified for an expense unless the trustee subjectively believed that the expense was necessary or appropriate to carry out the purpose of the trust and that belief was objectively reasonable.”<sup>182</sup>

In this context, the term “trustee” is akin to the term “conservator” because the expectation is the same for both.<sup>183</sup> The court in *Lefkowitz* requires the conservator to advance the interests of the conservatee much like the obligation of the trustee to advance the trust’s interests.<sup>184</sup> Thus, “a conservator is bound to act with reasonable prudence and pursuant to a good-faith belief that its actions will tend to accomplish the purpose of its trust by benefiting the conservatee.”<sup>185</sup> The notion of “good faith” is so essential to a court’s decision that the court in *Conservatorship of Cornelius* authorized attorney fees simply because a party filed a petition in good faith even though the court never established the conservatorship.<sup>186</sup> The mere fact that a daughter petitioned the court with a good faith belief that her father needed a conservatorship was enough for the court to award her compensation, regardless of the fact that the court never imposed a conservatorship on the father.<sup>187</sup>

Conversely, the court in *Lefkowitz* reduced both the attorney and conservator’s fees because self-interest motivated the conservator.<sup>188</sup> The conservator in *Lefkowitz* opposed a petition for her removal.<sup>189</sup> She did not oppose the court replacing her with a successor trustee, but rather she opposed the manner in which the court would have removed her.<sup>190</sup> It was her practice to step down as conservator when a willing family member expressed a desire to become the

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179. *Id.*

180. *Id.*

181. *Id.*

182. *Id.*

183. *Conservatorship of Lefkowitz*, 50 Cal. App. 4th at 1313–14.

184. *Id.* at 1314.

185. *Id.*

186. *Conservatorship of Cornelius*, 200 Cal. App. 4th 1198, 1200 (2011).

187. *See id.* at 1205 (“petition[ing] to appoint a permanent conservator, and appointment of a temporary conservatory pending resolution of that petition, may well benefit the conservatee even if a permanent conservatorship is never established”; further, there was evidence to support that Cornelius benefitted from the temporary conservatorship, though not a permanent one, so the court awarded the daughter attorney fees).

188. *Conservatorship of Lefkowitz*, 50 Cal. App. 4th at 1316.

189. *Id.*

190. *Id.*

conservator.<sup>191</sup> She would step down without a court ordering her to do so.<sup>192</sup> However, the fact that a family member did petition the court for her removal caused her to become defensive, and so she objected to her removal.<sup>193</sup> Consequently, the court believed that her self-interest and not the interest of the conservatee motivated her decision to oppose the petition.<sup>194</sup> She let her ego and reputation as a professional conservator guide her decision, which the court deemed was incompatible with “good faith” because it harmed the conservatee’s interest.<sup>195</sup> In the end, the court reduced the amount of fees her and her attorney could collect from the conservatee’s estate.<sup>196</sup>

Other courts have held that “good faith” exists when the petition provides substantial evidence supporting the need for a conservatorship.<sup>197</sup> Examples of substantial evidence include declarations from family members confirming the “conservatee’s compromised physical and mental state and susceptibility to fraud”; a capacity declaration from a physician detailing a concern for the conservatee’s judgment; reports from the court-appointed investigator who concludes that the conservatee is emotionally and financially ripe for abuse; and a report from the conservatee’s court-appointed counsel detailing a concern for the conservatee’s capacity.<sup>198</sup>

All of these cases confirm that the petitioner or objector must act in good faith, that is, acting in a manner that places the conservatee’s best interests above all else.<sup>199</sup> Furthermore, it is not enough to act in good faith belief, the party’s good faith belief must also be objectively reasonable or reasonably prudent.<sup>200</sup> Yet, because there is no concrete rule governing when someone does or does not act reasonable or in good faith, the determination is largely subjective and left to judicial discretion.<sup>201</sup>

### *B. California Rules of Court “Reasonableness” Factors*

Each court has a set of rules that govern the manner in which a court conducts its business.<sup>202</sup> “Each jurisdiction has its own procedure for how court rules are

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191. *Id.*

192. *Id.*

193. *Id.*

194. *Conservatorship of Lefkowitz*, 50 Cal. App. 4th at 1316.

195. *Id.*

196. *Id.*

197. *Conservatorship of Cornelius*, 200 Cal. App. 4th 1198, 1206 (2011).

198. *Id.*

199. *Conservatorship of Lefkowitz*, 50 Cal. App. 4th at 1314.

200. *Id.*

201. Jeffrey S. Galvin, *California Courts May Scrutinize Conservator Fees*, DOWNEY BRAND (Oct. 3, 2018), <https://www.trustontrial.com/2018/10/california-courts-may-scrutinize-conservator-fees/> (on file with the *University of the Pacific Law Review*).

202. Goodson Law Library, *Court Rules*, DUKE U., <https://law.duke.edu/lib/research-guides/court-rules/> (last visited Apr. 12, 2020) (on file with the *University of the Pacific Law Review*).

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promulgated, which is generally some combination of legislative or judicial action.”<sup>203</sup> Some courts may refer to its rules as either “rules of court” or “rules of procedure.”<sup>204</sup> Regardless of the terminology, the rules apply to various types of courts and function as “internal operating procedures.”<sup>205</sup>

The California Rules of Court are applicable to all courts within the state, including probate courts.<sup>206</sup> Rule 7.756 of the California Rules of Court details a list of factors a judge may consider when deciding whether to award compensation in conservatorship matters.<sup>207</sup> The court in *Conservatorship of Presha* applied the reasonableness factors when reviewing a conservator’s request for fee compensation.<sup>208</sup> The court reviewed the conservator’s bill and expressed concern with a few of the charges.<sup>209</sup> One particular expense signaled a red flag.<sup>210</sup> The court questioned why the conservator charged the conservatee’s estate to review a bank statement just to confirm the bank had the conservator’s correct mailing address.<sup>211</sup> Yet, it was evident the bank did have her correct mailing address because she received the bank statement to her home.<sup>212</sup> There were many similar billing expenses that appeared questionable and unwarranted, so the court requested a review of the conservator’s billing practices.<sup>213</sup> The court found that she charged eight different clients a total of 3.6 hours for what appeared to be one trip to a bank.<sup>214</sup> The court conceded that it was possible for her to have spent a total of 3.6 hours at the bank and charged each of the clients their respective proportional share of her time.<sup>215</sup> However, there were multiple instances of this behavior which convinced the court to reduce her fees.<sup>216</sup>

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203. *Id.*

204. *Id.*

205. *Id.*

206. CAL. RULE OF CT. 1.4 (West 2019).

207. *See* CAL. RULE OF CT. 7.756 (West 2019) (listing the following “standards for determining just and reasonable compensation . . . (1) the size and nature of the conservatee’s or ward’s estate; (2) the benefit to the conservatee or ward, or his or her estate, of the conservator’s or guardian’s services; (3) the necessity for the services performed; (4) the conservatee’s or ward’s anticipate future needs and income; (5) the time spent by the conservator or guardian in the performance of the services; (6) whether the services performed were routine or required more than ordinary skill or judgment; (7) any unusual skill, expertise, or experience brought to the performance of services; (8) the conservator’s or guardian’s estimate of the value of the services performed; and (9) the compensation customarily allowed by the court in the community where the court is located for the management of conservatorships or guardianships of similar size and complexity”).

208. *Conservatorship of Presha*, 26 Cal. App. 5th 487, 491 (2018).

209. *Id.*

210. *See id.* at 491 (describing the expense required to review a bank statement to confirm the bank had her correct mailing address when it was evident that the bank did have her correct mailing address because the letter was delivered to the conservator).

211. *Id.*

212. *Id.*

213. *Id.* at 490.

214. *Conservatorship of Presha*, 26 Cal. App. 5th at 492–93.

215. *Id.* at 493.

216. *Id.* at 494.

On appeal, the appellate court applied the reasonableness factors outlined in Rule 7.756.<sup>217</sup> Factor number five, i.e., “the time spent by the conservator or guardian in the performance of services,” was particularly helpful to the court.<sup>218</sup> The court believed the conservator inaccurately reported her time as evidenced from the above examples, so it reduced her fees accordingly.<sup>219</sup> The court also used factor number three, i.e., “the necessity for the services performed.”<sup>220</sup> The court concluded that when it reviewed the bank statement and other miscellaneous documents, there were many unnecessary expenses.<sup>221</sup> Factor number eight, i.e., “the conservator’s or guardian’s estimate of the value of the services performed,” was the final factor the court considered.<sup>222</sup> The court concluded that many of the conservator’s tasks were clerical in nature of which an office assistant could have performed at a lower pay rate.<sup>223</sup> As a result, the court believed that the conservator overestimated the value of her services.<sup>224</sup>

While the court still chose to compensate the conservator and her attorney, the court reduced her fees by nearly 45%.<sup>225</sup> *Conservatorship of Presha* serves as a notice to conservators and private fiduciaries that a judge has the ultimate discretion to determine what is just and reasonable under the law.<sup>226</sup> “A probate judge, on his or her own initiative, may scrutinize and reduce the requested fees, and may go so far as to examine the fiduciary’s billings submitted to courts in other cases. As long as the judge has a reasonable bases for reducing [the] fees.”<sup>227</sup>

## V. MODEL RULE

In 2013, California Senator Jim Beall introduced Senate Bill 156 in an attempt to place even more stringent restrictions on attorney fees in conservatorship matters.<sup>228</sup> The purpose of the bill was to prevent the conservatee’s estate from having to pay litigation expenses when the court removed the conservator “for cause” in a petition where the conservatee objected to the conservatorship.<sup>229</sup>

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217. *Id.* at 500.

218. *Id.*

219. *Id.*

220. *Conservatorship of Presha*, 26 Cal. App. 5th at 500.

221. *Id.*

222. *Id.*

223. *Id.* at 491.

224. *Id.*

225. Galvin, *supra* note 201.

226. *Id.*

227. *Id.*

228. *See generally* Hearing on SB 156 Before the S. Judiciary Comm., 2013 Leg., 2013–2014 Sess. 1 (Cal. 2013) (on file with the *University of the Pacific Law Review*) (describing a proposed amendment the existing probate code whereby the losing party would pay the opposing party’s costs, including attorney’s fees, rather than seek reimbursement from the conservatee’s estate, which reduces the judge’s discretion to award costs to the non-prevailing even if the non-prevailing party acted in the best interest of the conservatee).

229. *See id.* (highlighting a notable case where a San Jose man contested his own conservatorship and won,

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The bill introduced a “two-way fee shifting provision” whereby the losing party pays.<sup>230</sup> If the court reduced the conservator’s fees as a result of a petition filed with the court, the court deemed the petitioner as the prevailing party and charged her costs against any compensation the conservator received.<sup>231</sup> The conservator would be personally liable for any unsatisfied amount.<sup>232</sup> If, however, the court does not reduce the conservator’s compensation, then the court presumes the conservator is the prevailing party and the court may order the opposing party to pay her own litigation expenses, as well as the expenses the conservator incurs.<sup>233</sup> Senate Bill 156 passed in both the Assembly and Senate, but eventually, former Governor Jerry Brown vetoed the bill because he feared it would eliminate the court’s discretion to award compensation as a judge should see fit.<sup>234</sup> Case law similarly confirms the notion that the law must preserve judicial discretion due to the fact that no concrete law exists to define when someone does or does not act reasonably or in good faith.<sup>235</sup> Instead, case law demands that this determination rest solely with the judge.<sup>236</sup>

Judicial discretion is a cornerstone of law.<sup>237</sup> When a judge renders a holding, another judge is not inclined to overturn the lower court’s decision “unless an abuse of discretion is plainly involved.”<sup>238</sup> Governor Brown recognized the significance of judicial discretion when he vetoed Senate Bill 156.<sup>239</sup> The Legislature drafted and passed Senate Bill 156 as an answer to when to award attorney fees in a conservatorship matter as opposed to when a party should bear its own costs.<sup>240</sup> However, Governor Brown knew that if he voted to enact the bill, it would directly limit a judge’s discretion for awarding attorney fees and he could

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but the existing law required the judge to order the man to pay out nearly \$150,000 in fees to the conservator’s attorney who objected to the man’s petition to remove his own conservatorship).

230. *See id.* (interpreting the language of the bill infers the losing party pays because the court may hold the non-prevailing party “personally liable to the guardianship or conservatorship estate for the amount ordered” or “for any amount that remains unsatisfied”).

231. *Id.*

232. *Id.*

233. *Id.*

234. *SB-156 Conservatorships and Guardianships: Attorney Fees*, CAL. LEGIS. INFO., [https://leginfo.ca.gov/faces/billStatusClient.xhtml?bill\\_id=201320140SB156](https://leginfo.ca.gov/faces/billStatusClient.xhtml?bill_id=201320140SB156) (last visited Jan. 10, 2020) (on file with the *University of the Pacific Law Review*).

235. Galvin, *supra* note 201.

236. *Id.*

237. *See* U.S. CONST. art. III (providing a branch of the government devoted to judicial power and discretion).

238. *In re Jacobson’s Guardianship*, 30 Cal. 2d 312, 325 (1947).

239. *SB-156 Conservatorships and Guardianships: Attorney Fees*, *supra* note 234.

240. *See id.* (noting in the Legislative Counsel’s Digest that “[t]his bill would instead prohibit the guardian or conservator from being compensated from the estate for any costs or fees, including attorney fees, incurred in defending the compensation in the petition, if the court reduces or denies the compensation requested in the petition”).

not allow that to happen.<sup>241</sup>

The fact that the Legislature recently attempted to resolve the attorney fee issue but failed means that another attempt at amending the probate code requires the preservation of judicial discretion.<sup>242</sup> As a result, this Comment proposes only subtle amendments to the Probate Code and Rules of Court without sacrificing judicial discretion.<sup>243</sup> The model rule focuses on California Probate Code § 2640.1 and the Rules of Court's reasonableness factors.<sup>244</sup>

Currently, California Probate Code § 2640.1 allows the petitioner to collect her fees, including attorney fees, from the conservatee's estate even if the court appoints someone other than who the petitioner had requested the court to appoint.<sup>245</sup> For example, if the petitioner appoints herself to become the conservator but the court appoints someone else, she can still request for the court to have her fees paid out of the conservatee's estate.<sup>246</sup> However, the same code section does not permit the petitioner to collect her fees if she requests to appoint someone other than herself and the court appoints that person to serve as conservator.<sup>247</sup> This omission in the probate code might encourage a petitioner to appoint herself rather than a neutral third party out of fear of not being awarded fee compensation.<sup>248</sup>

It might come as no surprise that when a son or daughter requests to appoint themselves in a position to control a parent's estate, the other siblings become defensive.<sup>249</sup> Eventually, each sibling competes to control the parent while accusing the other sibling of wrongdoing.<sup>250</sup> The judge becomes the family counselor having to parse through the facts to decide which sibling is the good one versus the bad one.<sup>251</sup> The process can be adversarial and as a result each sibling arms themselves with an attorney, causing the escalation in attorney fees to begin—but this need not be the case.<sup>252</sup>

The Legislature should amend California Probate Code § 2641.1 to allow the court to award compensation to the petitioner and her attorney from the

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241. *Id.*

242. *See id.* (highlighting the governor's veto messages in which Governor Brown stated, "[t]his bill would eliminate a court's discretion to compensate a guardian or conservator from the conservatee's estate for costs incurred to defend a fee request if the court reduces the fee request by even a small amount"; therefore, Governor Brown did not sign the bill because it limited judicial discretion).

243. *Infra* Part V.

244. *Infra* Part V.

245. CAL. PROB. CODE § 2640.1 (West 2019).

246. *Id.*

247. *Id.*

248. *Id.*

249. *Id.*; Galvin, *supra* note 43.

250. Galvin, *supra* note 28.

251. *See* Galvin, *supra* note 43 (stating that there tends to always be a "good" party and a "bad" party in conservatorship cases, and so it is up to the judge to decide who is the respective party by parsing through the family drama).

252. PROB. § 2640.1.



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conservatee's estate in the event the petitioner requests to appoint a neutral third party—even if the third party does not become the conservator or even if the court does not impose a conservatorship on the proposed conservatee.<sup>253</sup> The point is that when the petitioner seeks to appoint someone other than herself, she is motivated to protect the parent's best interest and not a self-interest to control the parent and their estate.<sup>254</sup> This amendment would prevent the court from having to determine which sibling is truly acting in the best interest of the parent.<sup>255</sup> Instead, the court is simply inclined to appoint a neutral third party because the parent truly needs help.<sup>256</sup>

Conversely, the Legislature should amend California Probate Code § 2641.1 to scrutinize any compensation requests from a petitioner who initially requests to appoint herself, but the court did not appoint her or did not impose a conservatorship.<sup>257</sup> That is not to say that the petitioner should not be compensated when she loses her case, but rather, the court should be more encouraged to apply the Rules of Court's reasonableness factors to determine whether her request was truly in the best interest of the proposed conservatee.<sup>258</sup>

In turn, the Legislature should also amend the Rules of Court's reasonableness factors to coincide with the above amendments to include a factor that gives preference to neutral third-party appointments.<sup>259</sup> A judge should consider the appointment of a third party to be more reasonable and in good faith because there is less evidence of self-interest.<sup>260</sup> Conversely, a judge should be encouraged to authorize fees to the party who opposes the petition if she recommends appointing a neutral third party rather than defending her status as the conservator.<sup>261</sup>

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253. *Id.*; *see supra* Part V (highlighting a gap in the law in which a court can award attorney fees to a petitioner in a who appoints herself as conservator even if the court does not ultimately appoint the petitioner as the conservator, whereas, a court cannot award fees to a petition who appoints a third party to serve as conservator, and the court does not appoint that third party).

254. *See* Conservatorship of Lefkowitz, 50 Cal. App. 4th 1310, 1316 (1996) (highlighting that the court reduced the conservator's fee compensation because she was motivated by self-interest and not the conservatee's best interests).

255. *See* Galvin, *supra* note 43 (stating that there tends to always be a "good" party and a "bad" party in conservatorship cases, and so it is up to the judge to decide who is the respective party by parsing through the family drama).

256. *See id.* (explaining that it can be easier for a court to appoint a third party to serve as a conservator rather than parse through the family drama to determine who is the "good" versus "bad" party in the pending conservatorship case).

257. *See* PROB. § 2640.1 (showing that the code is currently written to permit the court to award compensation to the conservator regardless of whether she wins or loses so long as she appointed herself as the conservator).

258. CAL. RULE OF CT. 7.756 (West 2019); *see supra* Part V (highlighting how the reasonableness factors are a great tool for courts to use rather than awarding fees outright).

259. RULE OF CT. 7.756; *see supra* Part V (noting the gap in existing law that restricts courts from awarding fees to a petitioner who initially petitions for a third party to serve as conservator rather than the petitioner herself, which lends itself to starting conflict among family).

260. Galvin, *supra* note 43.

261. *Id.*

Additionally, the Legislature should amend the Rules of Court to appoint a guardian ad litem or a similar party as opposed to or in addition to the court-appointed counsel.<sup>262</sup> The guardian ad litem could act in the best interest of the conservatee rather than be required to zealously represent the conservatee's wishes.<sup>263</sup> Therefore, the guardian ad litem could paint a realistic portrait of what is truly going on in the case.<sup>264</sup>

## VI. CONCLUSION

The purpose of a conservatorship is to fight to protect the conservatee's interests rather than to gain control over the conservatee.<sup>265</sup> The goal of the proposed amendments presented in this Comment is to promote a return to this mindset by encouraging more judicial discretion when reviewing petitions for fee compensation, while at the same time giving preference to parties who are truly acting in the best interest of the conservatee.<sup>266</sup> The hope is that these amendments promote safeguarding the elderly and infirm, which is the essence of a conservatorship.<sup>267</sup>

If the Legislature adopted the aforementioned amendments today, and the court applied them to the case of Doe, the judge would then approach fee request petitions with more skepticism than previously.<sup>268</sup> Because neither Darla nor Steven petitioned for the court to appoint a neutral third party, the judge should apply the amended reasonableness factors to determine whether either party was acting in Doe's best interest or whether either was motivated by an interest to oust the other sibling.<sup>269</sup> Additionally, the guardian ad litem could report to the court that the case is dragging on due to a sibling rivalry and not due to whether Doe needs a conservatorship.<sup>270</sup> As a result, the judge would hopefully be more inclined

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262. CAL. RULE OF CT. 7.1101 (West 2019); Galvin, *supra* note 77.

263. RULE OF CT. 7.1101; Galvin, *supra* note 77; Ikemire, *supra* note 11.

264. See Galvin, *supra* note 77 (stating that the guardian ad litem "would investigate the situation, assess the conservatee's interests, and report that assessment to the court . . . Appointment of a [guardian ad litem] would ensure that the judge hears two distinctive perspectives on the imposition and terms of the conservatorship: one from the court appointed counsel who focuses on the client's expressed preferences and the other from the [guardian ad litem] who focuses on the clients best interests and who can report freely on communications with interested parties").

265. See Galvin, *supra* note 43 (stating that the purpose of a conservatorship is to protect the conservatee's interests and gain control over their assets).

266. *Supra* Part V.

267. Fields et al., *supra* note 107.

268. See *supra* Part V (noting how in *Conservatorship of Presha* the court used the reasonableness factors to parse through fraudulent billings to conclude that it should only award half of the conservatorship fees, which is an approach more courts should adopt).

269. See *supra* Part V (explaining how the reasonableness factors could be amended to encompass additional factors not yet enumerated).

270. See *supra* Part I (detailing how guardian ad litem are necessary to represent the true best interests of the conservatee rather than a court-appointed counselor who faces a conflict between representing the conservatee's best interest versus their desired outcome).

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to require each party to pay their own attorney fees because neither is acting in Doe's best interest as they drag out the litigation.<sup>271</sup>

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271. *See supra* Part I (explaining how a guardian ad litem would be able to tell the court that the on-going litigation is the result of feuding siblings and nothing else, so they should pay their respective fees because they are not acting in their mother's best interest).