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## Chapter 565: One More Law to Reform Conservatorships and Guardianships; But Is It Needed?

Erik R. Beauchamp

### *Code Sections Affected*

Financial Code §§ 765.5, 6850.5 (new); Probate Code §§ 2111.5, 2401.6 (new); §§ 2351, 2359, 2401, 2403, 2620 (amended).  
AB 1950 (Pacheco); 2000 STAT. Ch. 565

### I. INTRODUCTION

Conservatorships have existed for a few decades and guardianships have been in use since at least the middle ages.<sup>1</sup> Historically, a guardian had possession of his ward's<sup>2</sup> property and, except for the amount needed for the ward's support, all income went to a guardian personally, so that a guardian could profit enormously from the relationship.<sup>3</sup> Suspicion of corruption led to reforms.<sup>4</sup>

Unfortunately, the reasons for suspicion have not changed even with reform, and the problems associated with guardianships have also developed with conservatorships.<sup>5</sup> In at least one highly publicized scandal, the operators of a private conservatorship company in Riverside County, who had charge of hundreds of wards, may have bilked their wards' estates out of over \$1 million.<sup>6</sup> The great

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1. 12 B.E. WITKIN, *SUMMARY OF CALIFORNIA LAW, Wills and Probate* § 819 (9th ed. 1987 & Supp. 1999) [hereinafter *Witkin-Wills*]; Lawrence Friedman & Mark Savage, *Taking Care: The Law of Conservatorship in California*, 61 S. CAL. L. REV. at 273, 273-74 (1988); A. Frank Johns, *Ten Years After: Where is the Constitutional Crisis With Procedural Safeguards and Due Process in Guardianship Adjudication?*, 7 ELDER L.J. 33, 38-58 (1999).

2. The technical term for the person being tended to by a conservator is a "conservatee," and the technical term for a person being tended to by a guardian is a "ward." Friedman & Savage, *supra* note 1, at 275 n.3. Because the law of conservatorships and the law of guardianships are so similar, the term "ward" will be used within this article to refer to a "conservatee" of a conservatorship, as well as a "ward" of a guardianship. See *Witkin-Wills, supra* note 1, §§ 890-903 (enumerating many of the provisions common to both guardianships and conservatorships).

3. Robert B. Fleming & Carolyn J. Robinson, *Care of Incompetent Adults: A Brief History of Guardianship*, ARIZ. ATT'Y, Dec. 1993, at 16, 17.

4. *Id.*

5. See Christopher Manes, *Guardian Angels*, CAL. LAW. (Jan. 2000), at 35 (recounting a scandal in which a conservatorship company was alleged to have bilked wards out of millions of dollars); see also Friedman & Savage, *supra* note 1, at 273-90 (describing some of the problems in California conservatorships such as elder abuse and neglect).

6. Manes, *supra* note 5, at 35.

power a guardian or conservator has over her ward can lead to abuse.<sup>7</sup> Seeking to remedy some of the abuse, mostly from conservatorships, the Legislature passed Chapter 565.<sup>8</sup> However, Chapter 565 only addresses a few of the problems arising from conservatorships and may not address the core of the problem that led to the Riverside County scandal.<sup>9</sup> Moreover, some of the issues that Chapter 565 attempts to clarify have already been addressed in prior law.<sup>10</sup>

## II. EXISTING LAW

### A. General Concepts

Guardianships and conservatorships come in two basic forms: *of the person* and *of the estate*.<sup>11</sup> A guardian or conservator *of the person* has custody of the ward and ensures that the ward's daily needs are met.<sup>12</sup> The guardian or conservator *of the person* also takes care of the ward's educational needs.<sup>13</sup> A guardian or conservator *of the estate* has the duty to manage and control a ward's estate and finances.<sup>14</sup> Often, one person is in charge of both the person and the estate.<sup>15</sup> Sometimes, one person takes on the responsibilities of a person and another person takes on the responsibilities of an estate.<sup>16</sup>

Another type of conservatorship, created in 1980, is the limited conservatorship for Developmentally Disabled Adults.<sup>17</sup> This conservatorship was "designed to encourage the development of maximum self-reliance and independence" of certain

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7. Friedman & Savage, *supra* note 1, at 277; Manes, *supra* note 5, at 35.

8. See ASSEMBLY COMMITTEE ON THE JUDICIARY, COMMITTEE ANALYSIS OF AB 1950, at 3 (Apr. 25, 2000) (reporting on the problems of the "guardianship and conservatorship system" exposed by the conservatorship scandal in Riverside County and noting that Chapter 565 seeks to help remedy those problems).

9. See Manes, *supra* note 5, at 40 (describing some reform ideas such as IRS-style audits, and lamenting that some reforms may never be satisfactory); see also Letter from Christopher S. Manes, Attorney at Law, Law Offices of Howard L. Sanger, to Stephanie Abeyta, Staff Member, Office of California Assemblymen Rod Pacheco (February 14, 2000) (on file with *McGeorge Law Review*) (arguing that Chapter 565 does not address some issues such as the hiring of members of a conservator's family where the conservator has no direct financial interest).

10. See CAL. PROB. CODE § 2101 (West 1991) (explaining that guardianship and conservatorship relationships are "subject to the law relating to trusts"); see also 11 B.E. WITKIN, SUMMARY OF CALIFORNIA LAW, *Trusts*, § 67 (9th ed. 1987 & Supp.1999) [hereinafter *Witkin-Trusts*] (noting that a trustee breaches his duty by self-dealing or operating under a conflict of interest).

11. CAL. PROB. CODE § 2400 (West 1991); *id.* at § 2350 (West 1991); *Witkin-Wills*, *supra* note 1, § 819.

12. CAL. PROB. CODE § 2351 (West 1991).

13. *Id.*

14. *Id.* § 2401 (West 1991).

15. *Witkin-Wills*, *supra* note 1, § 819.

16. Friedman & Savage, *supra* note 1, at 280.

17. CAL. PROB. CODE § 1801 (West 1991 & Supp. 2000); *Witkin-Wills*, *supra* note 1, § 980; see CAL. PROB. CODE § 1420 (West 1991) (defining developmental disability as a "disability which originates before an individual attains 18, continues, or can be expected to continue, indefinitely, and constitutes a substantial hardship" and can include "mental retardation, cerebral palsy, epilepsy, and autism").

developmentally disabled adults who did not need absolute supervision and could take on more of the responsibility for the care of themselves and their estates.<sup>18</sup>

The main difference between a guardianship and a conservatorship is that a guardianship is used for a minor, while a conservatorship is used for an adult who has become incompetent.<sup>19</sup> However, for married minors who are incompetent, a court usually appoints a conservator *of the person* for their daily needs, but appoints a guardian *of the estate* to take care of their financial issues.<sup>20</sup> Much of the difference between a conservatorship and a guardianship is merely semantics, but guardianship law provides for consideration of the rights of parents, whereas conservatorship law is concerned with the mental and physical capacity of a person.<sup>21</sup> The types of conservatorships are arranged according to the particular capacity *of the person*, such as a limited conservatorship for the developmentally disabled or a conservatorship for an absentee.<sup>22</sup> Generally, the duties of a guardian and conservator are the same and are enacted under the same code sections.<sup>23</sup>

### B. When an Appointment Should Be Made

A conservator *of the person* can be appointed for a person “who is unable to provide properly for her personal needs for health, clothing, food, or shelter,” and a conservator *of the estate* can be appointed “for a person who is substantially unable to manage [her] own financial resources or resist fraud or undue influence.”<sup>24</sup> Additionally, a conservator *of the estate* can be appointed for an absentee.<sup>25</sup> Of course, a guardian is usually appointed when a ward is a minor.<sup>26</sup>

A petition for guardianship or conservatorship begins the process.<sup>27</sup> Typically, a relative petitions for a conservatorship, but often the process is initiated by a public agency or by a friend of the conservatee.<sup>28</sup> A prospective ward can also petition for a conservatorship.<sup>29</sup> A prospective ward or a relative petitioning for a

18. CAL. PROB. CODE § 1801 (West 1991); *Witkin-Wills*, *supra* note 1, § 980.

19. *Witkin-Wills*, *supra* note 1, § 822.

20. *Id.* § 851; CAL. PROB. CODE § 1515 (West 1991).

21. *See Witkin-Wills*, *supra* note 1, §§ 819-820 (comparing the law of guardianships to the law of conservatorships and discussing the various types of conservatorships each of which are based on a ward’s inability to care for herself or her own estate).

22. *Id.* § 862. An absentee is a person, such as a member of the armed forces stationed overseas, who cannot properly take care of her estate due to her absence. CAL. PROB. CODE § 1840 (West 1991).

23. *See* CAL. PROB. CODE § 2351 (West 1991) (detailing some of the duties of both guardians and conservators, such as caring for, controlling, taking custody of, and ensuring the education of the ward).

24. *Id.* § 1801 (West 1991).

25. *Id.* § 1803 (West 1991).

26. *Id.* § 1500 (West 1991); *Witkin-Wills*, *supra* note 1, § 847.

27. *See Witkin-Wills*, *supra* note 1, §§ 853, 865 (illustrating the procedure involved in petitioning the court for a guardianship or conservatorship—the first step in establishing a guardianship or conservatorship).

28. CAL. PROB. CODE § 1803; *Id.* § 2900 (West 1991 & Supp. 2000); Friedman & Savage, *supra* note 1, at 280.

29. CAL. PROB. CODE § 1820 (West 1991).

conservatorship may nominate a specific conservator, and courts often grant the request.<sup>30</sup> Yet, depending on the circumstances, the court may appoint someone else.<sup>31</sup> In the case of a guardianship, parental rights and the wishes of the child are often taken into consideration, but the court makes the final determination of whether the proposed guardian is suitable.<sup>32</sup>

After a petition is filed, but before a hearing, a court investigator creates a report regarding the circumstances of the proposed ward and submits it to the appropriate court.<sup>33</sup> At the hearing and based on this report, the court appoints a guardian or conservator if the court determines a guardianship or conservatorship is necessary.<sup>34</sup>

A guardianship *of the person* or *of the estate* is terminated when the ward dies or reaches the age of majority, but a guardianship *of the person* is also terminated when the ward is married or adopted.<sup>35</sup> A conservatorship only terminates upon the death of the ward or by court order.<sup>36</sup> A limited conservatorship is also terminated for those reasons but is also terminated by the death of the conservator.<sup>37</sup> Nevertheless, most conservatorships are continued after the death of the conservator, which protects the ward, so she merely needs another conservator; however, the relationship between the deceased conservator and the ward ends.<sup>38</sup>

### C. Powers of Guardian or Conservator

A guardian or conservator *of the estate* manages the ward's assets and uses the income for the support and maintenance of the ward.<sup>39</sup> If the income is not enough for the support and management of the ward, the guardian or conservator can sell or mortgage estate assets.<sup>40</sup> The guardian or conservator may also maintain the ward's home, pay debts, and pay for services for the ward.<sup>41</sup>

A guardian or conservator *of the person* has "the care, custody, and control of, and has charge of the education of [the ward]."<sup>42</sup> However, the court may limit the powers of a conservator depending on the circumstances.<sup>43</sup> These powers relate to the living arrangements, the daily needs, and the medical necessities of the ward.<sup>44</sup>

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30. *Witkin-Wills*, *supra* note 1, § 864.

31. CAL. PROB. CODE §§ 1810-1812 (West 1991 & Supp. 2000).

32. *Id.* §§ 1500-1501 (West 1991); *Witkin-Wills*, *supra* note 1, §§ 848-850, 852, 859.

33. CAL. PROB. CODE § 1826 (West 1991 & Supp. 2000).

34. *Id.* § 1514 (West 1991 & Supp. 2000); *id.* § 1827 (West 1991).

35. *Id.* § 1600 (West 1991 & Supp. 2000).

36. *Id.* § 1860 (West 1991).

37. *Id.* § 1860.5 (West 1991).

38. *Witkin-Wills*, *supra* note 1, § 881.

39. CAL. PROB. CODE §§ 2401, 2420 (West 1991).

40. *Id.* § 2420.

41. *Id.* §§ 2431, 2457 (West 1991).

42. *Id.* § 2351 (West 1991).

43. *Id.*

44. See *Witkin-Wills*, *supra* note 1, §§ 913-918 (detailing the powers of a guardian and conservator *of the person*).

#### D. Fiduciary Duties

The relationship between a guardian or conservator and her ward “is subject to the law relating to trusts.”<sup>45</sup> The office of a guardian or conservator, as that of a trustee, is onerous, and a guardian or conservator can be personally liable for losses if she neglects her duties.<sup>46</sup> In some cases, if a trustee neglects her duties, she is personally liable for losses even if those losses are not a direct result of her neglect.<sup>47</sup> For instance, if a trustee commingles trust assets with her own and a loss occurs, she is personally liable.<sup>48</sup> A trustee must also invest trust funds prudently, meaning that the assets should be diversified and should not be placed in risky ventures.<sup>49</sup> Although letting all the assets sit in a checking account may be safe, it is also imprudent.<sup>50</sup> In the modern era of investing, however, as long as a portfolio is well balanced, the trustee is safe from liability.<sup>51</sup> A trustee is given some flexibility, but some common investments such as a second mortgage can be considered improper.<sup>52</sup>

A trustee must also avoid conflicts of interest and avoid engaging in self-dealing.<sup>53</sup> Thus, a trustee cannot use trust property for her own profit or “take part in any transaction in which the trustee has an interest adverse to the beneficiary.”<sup>54</sup> In other words, a trustee cannot utilize trust assets to employ a business in which she has an interest.<sup>55</sup> These fiduciary duties of a trustee are also the fiduciary duties of a guardian or conservatee for the benefit of a ward.<sup>56</sup>

45. CAL. PROB. CODE § 2101 (West 1991 & Supp. 2000).

46. See *Witkin-Wills*, *supra* note 1, § 891 (stressing that a guardian is absolutely liable for losses if she surrenders control over assets).

47. G. Michael Richwine, *How Individual Trustees Can Avoid Liability and Breaches of Trust*, 24 EST. PLAN. 481, 482 (1997); see, e.g., *In re McCabe's Estate*, 98 Cal. App. 2d 503, 504, 220 P.2d 614, 616 (1950) (finding that although the trustee proved that she had spent money in support of the beneficiary, the trustee was still liable for the amount of assets originally given to the beneficiary plus interest, because the trustee commingled the trust assets with her own).

48. See *In re McCabe's Estate*, 98 Cal. App. 2d at 504, 220 P.2d at 616 (ruling that placing trust funds in accounts that cause these funds to be indistinguishable from the other assets in the account constitutes a mingling of assets, and trustees are liable for the losses that result); see also *Witkin-Trusts*, *supra* note 10, § 74 (detailing a trustee's duty to keep property separate from her own property and from trusts belonging to others).

49. See *Witkin-Trusts*, *supra* note 10, § 79 (defining the prudent investor rule).

50. See *Lynch v. Redfield*, 9 Cal. App. 3d 293, 298, 88 Cal. Rptr. 86, 89 (1970) (stating that a trustee should invest funds so that the funds will produce income rather than sit idle for an unreasonable length of time).

51. *Witkin-Trusts*, *supra* note 10, § 82A.

52. See *id.*, § 79 (stating that second mortgages are not proper investments). Second mortgages can be risky because if the lender of the first mortgage forecloses, the lender of the second mortgage might not be able to recover her investment. RESTATEMENT (THIRD) OF PROPERTY, § 4.5 (1994). However, there may be some circumstances where a second mortgage is permissible. RESTATEMENT (THIRD) OF TRUSTS, PRUDENT INVESTOR RULE § 227 cmt. n (1992).

53. *Witkin-Trusts*, *supra* note 10, § 67, 70.

54. CAL. PROB. CODE § 16004 (West 1991).

55. *Id.*

56. *Id.* § 2101 (West 1991 & Supp. 2000).

Specific provisions also exist for the sale of property by a guardian or conservator.<sup>57</sup> A guardian or conservator may sell real property, but only if the court specifically gives approval to the guardian or conservator either for a specific transaction or to sell real estate generally.<sup>58</sup> Sales of securities and personal property under \$5,000 per calendar year can generally be made without court approval, but all other personal property sales require court approval.<sup>59</sup>

Leases are subject to similar restrictions.<sup>60</sup> A guardian or conservator cannot lease property without court approval unless the lease is for \$1,500 a month or less and for a term not greater than two years.<sup>61</sup> Moreover, the power to lease may be obtained in advance by the court.<sup>62</sup> In addition, a guardian or conservator cannot borrow money without court approval, but the court can grant this power in advance.<sup>63</sup> A guardian or conservator may only borrow money to “pay, reduce, extend, or renew” an existing loan or to “erect, alter, or repair” buildings or improve property owned by the ward.<sup>64</sup> The powers granted in advance to lease, sell, or borrow without the need to petition are given only if they are “to the advantage, benefit, and best interest” of the ward’s estate.<sup>65</sup>

#### E. Accountings and Statewide Registry

State law requires that a guardian or conservator make “accountings”<sup>66</sup> after one year from the time of appointment and, thereafter at least every two years unless otherwise ordered by a court.<sup>67</sup> Upon the death of a ward, a guardian or conservator must make two final accountings for the period before and the period after the date of death.<sup>68</sup> Only guardians or conservators *of the estate* need to file an accounting.<sup>69</sup> A guardian or conservator can petition the court to have her acts approved or

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57. See *Witkin-Wills*, *supra* note 1, §§ 934-943 (detailing the powers of a guardian or a conservator to sell and lease the ward’s property and the procedures for using that power).

58. *Id.* § 934, 947-49.

59. *Id.* §§ 934-945.

60. See *id.* §§ 934-43 (detailing the sales and lease transaction which require court approval).

61. *Id.* § 939.

62. *Id.* §§ 947-949.

63. *Id.* § 938, 947-949.

64. *Id.* § 938(b).

65. CAL. PROB. CODE § 2590 (West 1991).

66. An accounting is a report of all income earned by a ward’s estate, the expenses and losses incurred by the ward’s estate, the value and contents of any assets in the ward’s estate, and any other disbursements made from the estate. CAL. PROB. CODE § 1061 (West Supp. 2000).

67. 1998 Cal. Stat. ch. 581, sec. 22, at 38 (amending Probate code section § 2620).

68. *Id.*

69. See CAL. PROB. CODE § 2600 (West 1991) (clarifying that only a conservator or guardian *of the estate* is required to file an accounting); *Conservatorship of Munson*, 87 Cal. App. 3d 515, 518, 152 Cal. Rptr. 12, 13 (1978) (deciding that no guardianship or conservator *of the person* need file an accounting).

confirmed.<sup>70</sup> A guardian or conservator usually seeks approval or confirmation if she might be subject to liability when doubt is raised about an action.<sup>71</sup>

Private professional conservators and guardians are required to register with the county clerk in the jurisdiction where they are appointed, and no court can appoint a private professional conservator or guardian unless they are so registered.<sup>72</sup> In 1999, Chapter 409 was signed into law, requiring private professional guardians and conservators to also register with a new statewide registry maintained by the Department of Justice.<sup>73</sup> When registering, conservators and guardians must file a “signed declaration” with the registry.<sup>74</sup> This declaration includes information about a conservator’s or guardian’s educational background, professional experience, list of current wards, and the amount of assets under her supervision.<sup>75</sup> The declaration must also disclose whether the conservator or guardian has been removed for cause or resigned as well as the circumstances of removal or resignation.<sup>76</sup> Similar information was previously required to be filed with the clerk in each county court, but other counties could not access this information easily.<sup>77</sup> Since January 1, 2000, any complaint against a conservator or guardian “found to be meritorious by the court” must be forwarded by the clerk of the court to the statewide registry.<sup>78</sup> A court must examine the statewide registry before appointing a guardian or conservator unless it is urgent that one be appointed.<sup>79</sup>

#### F. Remedies for Breach

The guardian or conservator can be removed for mismanagement of an estate, failure to file an inventory or account, incapacity, gross immorality, a felonious conviction, adverse interest, or bankruptcy.<sup>80</sup> She can also be removed if it is in the best interest of the ward.<sup>81</sup>

A ward can also sue the guardian or conservator if a duty is breached.<sup>82</sup> If damages occur as a result of a breached duty, the ward can recover those damages plus interest.<sup>83</sup> Moreover, a ward can move to set aside acts made by the guardian

70. CAL. PROB. CODE §§ 2359, 2403 (West 1991).

71. *Witkin-Wills*, *supra* note 1, § 925.

72. CAL. PROB. CODE § 2340 (West 1991 & Supp. 2000).

73. *Id.* § 2850 (West 1991 & Supp. 2000).

74. *Id.* § 2850(b) (West 1991 & Supp. 2000).

75. *Id.*

76. *Id.* § 2850(b)(8).

77. CAL. PROB. CODE § 2342 (West 1991 & Supp. 2000); SENATE FLOOR, COMMITTEE ANALYSIS OF AB 925, at 5 (Aug. 27, 2000).

78. CAL. PROB. CODE § 2850(e).

79. *Id.* §§ 2851, 2853 (West 1991 & Supp. 2000).

80. *Id.* § 2650 (West 1991 & Supp. 2000).

81. *Witkin-Wills*, *supra* note 1, § 967. The best interest of the ward is a catch-all provision giving the court great discretion to remove a guardian or conservator for a reason not enumerated in the statute. *Id.*

82. *Witkin-Trusts*, *supra* note 10, § 133.

83. *Id.*

or conservator, such as the sale of property.<sup>84</sup> In this situation, bona fide purchasers<sup>85</sup> may retain their rights in the property; however, if losses occur, the guardian or conservator must pay the difference.<sup>86</sup> Moreover, the ward can obtain any profits the guardian or conservator made and any profit the estate would have received but for the breach, plus interest.<sup>87</sup> Nevertheless, the court may excuse the damages if the guardian or conservator acted “reasonably and in good faith under the circumstances.”<sup>88</sup> The ward can also be reimbursed by a surety if the guardian or conservator was required to be bonded.<sup>89</sup>

### G. Types of Conservators and Guardians

There are many types of conservators and guardians.<sup>90</sup> A conservator or guardian may be a relative or friend, a private fiduciary company, a charitable corporation, or the public guardian.<sup>91</sup> A relative or friend is someone close to the ward whom the court believes will have the ward’s interests at heart.<sup>92</sup> Often, the relative or friend was helping the ward even before the petition for conservatorship was filed and may have actually initiated the petition.<sup>93</sup> If a relative or friend is willing and able to care for a ward, that person may be appointed by the court.<sup>94</sup>

A private fiduciary company is a company that profits by being a conservator of a ward’s person or estate.<sup>95</sup> Such a fiduciary company will have many wards.<sup>96</sup> A private fiduciary company, like all conservators or guardians, is compensated for all “reasonable expenses,” but is also compensated for any service by the company

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84. *Id.*

85. A bona fide purchaser is defined as one who buys for value without notice of any adverse claims. BLACK’S LAW DICTIONARY 1249 (7th ed. 1999).

86. CAL. PROB. CODE § 2401.3 (West 1991); *Witkin-Trusts*, *supra* note 10, § 138.

87. CAL. PROB. CODE § 2401.3 (West 1991).

88. *Id.*

89. See *Witkin-Wills*, *supra* note 1, §§ 909-911 (illustrating the requirements of bonding of guardians and conservators).

90. See *id.* §§ 848-850, 897, 892, 903-907 (recounting numerous cases in which the guardian was a relative and discussing private fiduciary companies, charitable corporations, and the public guardian); see also Friedman & Savage, *supra* note 1, at 279-81 (explaining that the public guardian is called upon when the proposed ward has no family or friends to take care of her and citing an example of a ward whose neighbor and another acquaintance became the conservators of the ward).

91. Friedman & Savage, *supra* note 1, at 279-81.

92. See CAL. PROB. CODE § 1810 (West 1991) (stating that a court will only appoint a proposed conservator if the appointment is in the best interests of the ward); see also Friedman & Savage, *supra* note 1, at 282 (discussing a case in which a neighbor, who was “friendly to the ward,” was appointed conservator); *Witkin-Wills*, *supra* note 1, § 859 (pointing out that a nominee for guardianship will not be appointed if she is deemed unsuitable).

93. See Friedman & Savage, *supra* note 1, at 280 (noting that, if the public guardian does not petition the court, a relative usually petitions the court and proposes to be the conservator). The court investigator usually acquiesces to this arrangement. *Id.*

94. *Supra* note 92 and accompanying text.

95. *Witkin-Wills*, *supra* note 1, § 897.

96. See CAL. PROB. CODE § 2340 (West 1991 & Supp. 2000) (establishing that part of the definition of a private professional conservator is a person or entity with two or more wards).

that the court “determines is just and reasonable.”<sup>97</sup> The public guardian is a government agency, usually run by a county, that takes care of those for whom no one else cares.<sup>98</sup> Frequently, these individuals are indigent.<sup>99</sup>

The reasons why one type of conservator is chosen over another vary from case to case.<sup>100</sup> For instance, a private fiduciary company is appropriately chosen if no relative comes forward to take on the responsibilities of a conservator or guardian, and money is available to pay for the company’s services.<sup>101</sup> However, the public guardian is the last resort when no one else will take on such responsibility.<sup>102</sup>

## H. Judicial Issues

### 1. Judicial Conflicts of Interest

Existing law also requires that judges<sup>103</sup> refrain from conflicts of interest.<sup>104</sup> In fact, judges must follow a higher standard than guardians and conservators because judges oversee the actions of guardians and conservators.<sup>105</sup> The rationale is that since the judiciary has such great power over society, the judiciary must be beyond reproach.<sup>106</sup> Judges must not be involved in any business or transaction with any person who might come before her or the court in which she serves.<sup>107</sup> A judge may only be an executor or trustee for members of her own family,<sup>108</sup> and “only if such service will not interfere with proper performance of judicial duties.”<sup>109</sup> A judge should discourage similar involvement of her own family in order to dispel any hint of impropriety.<sup>110</sup> However, a judge is not reasonably expected to know of all the

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97. *Id.* § 2623 (West 1991).

98. Friedman & Savage, *supra* note 1, at 279-80.

99. *Id.*

100. *See, e.g.,* Raymond Smith, *New Conservatorship Claim Family Split, Money Looted, 3 People Say*, PRESS-ENTER. (Riverside, Cal.), June 5, 1999, at A1 (exemplifying one California case in which a private conservator was appointed when the situation with the ward’s mother as conservator became unsatisfactory); *see also Witkin-Wills, supra* note 1, § 897 (defining a private conservator company as a conservator that cares for a ward’s person or estate for profit).

101. *Witkin-Wills, supra* note 1, § 897.

102. Friedman & Savage, *supra* note 1, at 279-80.

103. A judge is defined within the California Code of Judicial Ethics as “an officer of the state Judicial system . . . who performs judicial functions.” CAL. CODE OF JUD. ETHICS Canon 6(A) (2000). This definition includes magistrates, court commissioners, referees, court-appointed arbitrators, judges of the State Bar Court, temporary judges, and special masters. *Id.*

104. *Id.* Canon 4 (1999). A conflict of interest is defined as a “real or seeming incompatibility between one’s private interests and one’s public or fiduciary duties.” BLACK’S LAW DICTIONARY 295 (4th ed. 1999).

105. *See* CAL. CODE OF JUD. ETHICS Preamble (1999) (stating that judges must be beyond reproach because they “interpret and apply the laws that govern us”).

106. *Id.*

107. *Id.* Canon 4(D)(1) (1999).

108. *See id.* Terminology (1999) (defining a member of the judge’s family as a “spouse, child, grandchild, parent, grandparent, or other relative or person with whom the judge maintains a close familial relationship”).

109. *Id.* Canon 4(E)(1) (1999).

110. *Id.*

business dealings in which her family is involved.<sup>111</sup> Judges who break these rules can be sanctioned depending on the severity of the offense.<sup>112</sup> Such sanctions can range from a reprimand to removal.<sup>113</sup>

To guide the ethical conduct of employees of the courts, a Model Code of Ethics for the Court Employees of California was created.<sup>114</sup> Each trial and appellate court is required to adopt its own rules of ethical behavior based on this Model Code.<sup>115</sup> The Code requires that court employees refrain from any actual impropriety or from the appearance of impropriety; additionally, employees may not use confidential information for their "personal advantage."<sup>116</sup>

## 2. Judicial Immunity

Judges have immunity from defending "civil suit[s] in the exercise of their judicial functions."<sup>117</sup> In fact, judges retain immunity even when they act maliciously or corruptly.<sup>118</sup> The policy undergirding this rule is that a judge should be free from the possibility of defending suits and personal detriment to himself when exercising his authority, so that justice can be administered properly.<sup>119</sup>

However, the rule comes from the common law, and a statute can overturn it.<sup>120</sup> In *Frost v. Geernaert*, the plaintiff attempted to sue seven judges and argued that a Government Code Section 822.2 made the judges liable if they were "guilty of fraud, corruption, or actual malice."<sup>121</sup> The section merely referred to "public employees," but the term "employee" was defined in Government Code Section 810.2 to include a "judicial officer."<sup>122</sup> However, Section 810.2 was amended to include judicial officers in 1977, after the enactment of the Section 822.2, and the legislature's stated intent in the bill amending Section 810.2 did not state that this inclusion was meant to expand judicial liability and, in fact, may have been to confine the liability of government employees.<sup>123</sup> Therefore, the court ruled that the

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111. See *id.* Canon 4(D)(5) Advisory Committee Commentary (1999) (stating that a judge cannot reasonably be expected to control or know about all the business dealings of her family).

112. *Id.* Preamble (1999).

113. Mike Kataoka, *Judge's Actions Questioned: Lawyer Faults Connection to Inland Woman's Trust*, PRESS-ENTER. (Riverside, Cal.), May 28, 1999, at A1.

114. 2 B.E. WITKIN, CALIFORNIA PROCEDURE, *Courts* § 400 (4th ed. 1996) [hereinafter *Witkin-Courts*].

115. *Id.*

116. MODEL CODE OF ETHICS FOR THE COURT EMPLOYEES OF CALIFORNIA Tenet 4-6 (1994). Copies of the MODEL CODE OF ETHICS FOR COURT EMPLOYEES OF CALIFORNIA are available from the administrative offices of California Courts. *Witkin-Courts*, *supra* note 114, § 400.

117. *Tagliavia v. County of Los Angeles*, 112 Cal. App. 3d 759, 761, 169 Cal. Rptr. 467 (1980).

118. *Id.*

119. *Id.*

120. *Frost v. Geernaert*, 200 Cal. App.3d 1104, 1107, 246 Cal. Rptr. 440, 441 (1988).

121. *Id.* at 1108, 246 Cal. Rptr. at 442.

122. *Id.*

123. *Id.*

judges had judicial immunity even though a strict reading of the statute may have shown that the judges could be liable.<sup>124</sup>

### III. THE PROBLEM

Ultimately, the problem with conservatorships and guardianships is that the wards, either minors or adults, unable to care for their persons or estates, are inherently vulnerable.<sup>125</sup> The guardian or conservator has great power over the ward, and the ward may have little ability to resist if they discover that their conservator or guardian has breached their trust.<sup>126</sup> A ward cannot simply call an attorney to have a conservator or guardian removed.<sup>127</sup> Many wards are senile, so they will probably not be taken seriously by those with whom they come into contact.<sup>128</sup> Some wards are so severely disabled that they are unable to attend the hearings establishing their status as wards.<sup>129</sup> Occasionally, conservators or guardians prevent their wards from seeing other people to avoid the discovery of the conservator's or guardian's nefarious purposes.<sup>130</sup> Essentially, a ward has to rely on the integrity of a conservator or guardian.<sup>131</sup>

Integrity on the part of the conservator was completely missing when the Riverside Conservatorship Scandal was publicized in 1999.<sup>132</sup> West Coast Conservatorships was a private fiduciary company that served as the conservator for many wards, almost all of whom were elderly.<sup>133</sup> For a long time, the owner of West Coast was able to obtain assets from wards for her own benefit.<sup>134</sup> She often referred business to an in-home health care business that she owned.<sup>135</sup> The alleged thefts and

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124. *Id.* at 1109, 246 Cal. Rptr. at 443.

125. See CAL. PROB. CODE § 1801 (West 1991 & Supp. 2000) (allowing a conservatorship *of the estate* to be created when the prospective ward cannot resist fraud); see also Friedman & Savage, *supra* note 1, at 274 (demonstrating that the wards in one average California county are almost always old and vulnerable).

126. See Friedman & Savage, *supra* note 1, at 273-74 (stating that a conservator has great power over a ward and showing examples of wards who have great difficulty communicating because of illnesses like stroke and senility).

127. *Id.* at 277.

128. *Id.*

129. *Id.* at 280-81.

130. See Manes, *supra* note 5, at 36 (giving one egregious example where the conservator made it difficult for relatives to see the ward in order to hide the fact that the conservator was stealing from the ward).

131. See Friedman & Savage, *supra* note 1, at 273 (noting that many wards cannot take care of themselves and cannot complain so they must rely on their conservator); see also Manes, *supra* note 5, at 40 (asserting that the conservatorship system relies on the goodwill of others).

132. See Manes, *supra* note 5, at 35-40 (detailing how one conservatorship company may have stolen over \$1 million from its wards).

133. *Id.* at 35.

134. *Id.*

135. *Id.* at 37.

misappropriation of funds totaled close to \$1 million.<sup>136</sup> Consequently, the owner and some of her associates now face severe criminal and civil penalties for breach of trust and outright theft.<sup>137</sup>

West Coast was able to steal so much money from its wards for such a long time because the system failed.<sup>138</sup> The district attorney's office failed to investigate even when complaints were made.<sup>139</sup> More disconcerting, the County's probate judge, William H. Sullivan, may have trusted West Coast and its owner more than he should have.<sup>140</sup> Investigators and relatives notified the judge of possible fraud, but West Coast explained away the allegations in a manner that was suspicious.<sup>141</sup> Nevertheless, the judge accepted the explanations.<sup>142</sup> The judge assessed a surcharge against West Coast when he discovered that the owner of West Coast was "farming out work to her own health care company," but he did not do much more than that.<sup>143</sup>

Additionally, the judge may have had his own conflicts of interest.<sup>144</sup> Although no evidence was found indicating that the judge profited from the irregularities at West Coast, his extensive real estate dealings allegedly included buying property from a ward of a conservatorship over which he presided.<sup>145</sup> He also was alleged to have acted as a trustee of a trust for a non-relative in violation of the Code of Judicial Ethics.<sup>146</sup> After the West Coast scandal broke out, Judge Sullivan asked to be reassigned, but ultimately announced his retirement under a cloud of controversy.<sup>147</sup>

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136. Mike Kataoka, *Civil Suit Filed in Trust-Fund Scandal: The Defendants, Accused of Defrauding Clients of a Private Conservatorship Firm in Riverside, Already Face Criminal Charges*, PRESS-ENTER. (Riverside, Cal.), May 19, 2000, at B1 [hereinafter Kataoka-Civil Suit Filed].

137. *Id.*; Manes, *supra* note 5, at 40.

138. *See id.* (reporting the findings of an investigator who discovered that the system's checks and balances, such as the judge's and district attorney's oversight, may have broken down, allowing West Coast to steal its wards' assets).

139. *Id.* at 37.

140. *See id.* at 39 (detailing the judge's dealings with West Coast and emphasizing the judge's failure to address the investigators' suspicion of fraud).

141. *Id.* at 39.

142. *Id.*

143. *Id.*

144. *See id.* (detailing the judge's conflicts of interest with conservatorships over which he presided).

145. *Id.*; Raymond Smith, *Riverside Conservator Under Investigation: A Riverside County Probe Into Financial Services Company Raises Questions About How People Are Appointed to Protect the Financially Vulnerable*, PRESS-ENTER. (Riverside, Cal.), Mar. 30, 1999, at A1.

146. Mike Kataoka, *Probate Judge's Actions Raise Ethical Questions: Sullivan Denies Doing Anything Improper*, PRESS-ENTER. (Riverside, Cal.), Apr. 18, 1999, at A3 [hereinafter Kataoka-Probate Judge's Actions].

147. *Id.*; Mike Kataoka, *Judge in Probate Cases to Retire: Career Brought Questions, Praise*, PRESS-ENTER. (Riverside, Cal.), Nov. 19, 1999, at A1.

The axe fell on more than one head in the scandal; other officials and agencies were also blamed.<sup>148</sup> Basically, the system failed to protect the wards.<sup>149</sup> West Coast was able to steal from its wards and exercise self-dealing in managing its wards' funds, because the judge, the local Probate Bar, and other institutions looked the other way.<sup>150</sup> The owner of West Coast was "well-connected" in Riverside society.<sup>151</sup> The community must have had difficulty believing that someone so well-known could have been stealing from her wards.<sup>152</sup> To make matters worse, the Probate Bar was so close-knit that when one relative of a ward wanted to remove West Coast, she had to go outside the county to find an attorney.<sup>153</sup> In Riverside County, the fraud, interwoven among insiders, was difficult to unravel.<sup>154</sup>

Widespread theft by conservatorship companies is not the only cause for concern.<sup>155</sup> The relatives of wards who are appointed as conservators or guardians also steal money from their wards and some do not care enough to give the proper care that a ward needs.<sup>156</sup> Such neglect is inconsistent with the role of a conservator or a guardian, which requires the exercise of care and concern for the ward.<sup>157</sup> Care and concern are primary to the role of a conservator or guardian.<sup>158</sup> Without this inherent element, wards of conservatorships or guardianships are prone to being abused.<sup>159</sup>

In 1996, an estimated 449,924 elderly persons were abused or neglected by others.<sup>160</sup> Financial abuse and exploitation<sup>161</sup> accounted for 30.2% of all elderly

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148. See Manes, *supra* note 5, at 35 (explaining that many people were indicted or lost their jobs in the scandal, and government agencies, including the public defender's office and district attorney's office, were blamed).

149. *Id.*

150. See *id.* (explaining an investigator's report that the system broke down and that all concerned, including the judge and the Probate Bar, were to blame).

151. *Id.* at 38.

152. See *id.* at 40 (charging that, according to one investigator, all the officials and attorneys involved covered for one another, allowing West Coast to regularly take money from its wards for a long time).

153. *Id.* at 36, 40.

154. *Id.*

155. See National Center on Elder Abuse, *The Basics: What Is Elder Abuse*, available at <http://www.gwjapan.com/NCEA/basic/index.html> (last visited July 14, 2000) (copy on file with *McGeorge Law Review*) [hereinafter *Elder Abuse Basics*] (stating that family and other caregivers often exploit elders financially).

156. See *id.* (asserting that caregivers often neglect their wards); see also *Witkin-Wills*, *supra* note 1, § 847-855, 864 (illustrating that a conservator or guardian may be a relative of the ward).

157. See Manes, *supra* note 5, at 40 (emphasizing that, according to a professional conservator, a conservator must care about her charges).

158. See *id.* at 35 (revealing that cases of conservator mismanagement slipped through the cracks even when signs of trouble were brought in front of a judge).

159. See *id.* (same).

160. NATIONAL CENTER ON ELDER ABUSE AT THE AMERICAN PUBLIC HUMAN SERVICES ASSOCIATION, THE NATIONAL ELDER ABUSE INCIDENCE STUDY Executive Summary 4 (1998) [hereinafter *ELDER ABUSE STUDY*] (copy on file with *McGeorge Law Review*).

161. Financial and Material Exploitation is defined as "[i]llegal or improper use of an elder's funds, property, or assets." NATIONAL CENTER ON ELDER ABUSE, *Types of Elder Abuse in Domestic Settings*, available at <http://www.gwjapan.com/NCEA/basic/fact1.pdf> (last visited Sept. 7, 2000) (copy on file with *McGeorge Law Review*).

abuse.<sup>162</sup> Family members were the most frequent abusers, as they were responsible for 89.6% of all abuse.<sup>163</sup> Friends, neighbors, and professional care-givers made up the rest.<sup>164</sup> More than half of the abused were not able to completely take care of themselves, and at least 45% were confused at least part of the time.<sup>165</sup> Of course, confused and incapacitated individuals are just the sort of people who need a conservatorship.<sup>166</sup> Worse yet, the vast majority of abuse goes unreported.<sup>167</sup> This is not surprising, because the victims are confused, unable to care for themselves, and vulnerable.<sup>168</sup> Financial abuse and exploitation of the elderly, as well as other types of elderly abuse, are a huge problem.<sup>169</sup>

Moreover, the number of elderly Americans is increasing.<sup>170</sup> The baby boom generation is becoming older, and as a result, at least one in five Americans will be 65 years old or older in 2030.<sup>171</sup> The increase in the elderly population will perpetuate the need for conservatorships and conservators.<sup>172</sup>

Another problem is that there may not be enough people who want to be a conservator.<sup>173</sup> Caring for the elderly is a stressful undertaking.<sup>174</sup> The fiduciary duties involved in being a conservator *of the estate* are onerous.<sup>175</sup> In his own defense, Judge Sullivan said that he often appointed West Coast as conservator for wards because he had “few other choices for qualified private professional conservators in Riverside.”<sup>176</sup> Few people really want to be caregivers; therefore, the

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162. ELDER ABUSE STUDY, *supra* note 160, pt. IV, at 7.

163. *Id.* at Executive Summary 10.

164. *Id.*

165. *Id.* at Executive Summary 9.

166. See CAL. PROB. CODE § 1801 (West 2000) (stating the condition a ward should be in for a conservator *of the estate* and *of the person* to be appointed).

167. See ELDER ABUSE STUDY, *supra* note 160, at Executive Summary 9, 18 (asserting that elder abuse is under-reported, that many elderly people are unable to take care of themselves and are confused, and that elder abuse is difficult to detect because elders are often isolated).

168. *Id.*

169. See ELDER ABUSE STUDY, *supra* note 160, at Executive Summary 5 (illustrating that in 1996, 21,427 out of 115,110 reports of abuse and neglect of the elderly nationwide were reports of financial or material exploitation).

170. Lynn Friss Feinberg, *Options for Supporting Information and Family Caregiving*, Executive Summary, available at <http://www.asaging.org/pew/feinberg/feinberg-exsum.html> (last visited Aug. 8, 2000) (copy on file with *McGeorge Law Review*).

171. *Id.* The number of elderly in 2030 will be “more than twice” the number of elderly in 1995. *Id.*

172. See *id.* (arguing that increased demands will be “placed on family and other information caregivers”).

173. See Kataoka-Probate Judge’s Actions, *supra* note 146, at A3 (reporting that Judge Sullivan claimed to have few choices available in appointing conservators in Riverside County); see also Denise M. Brown, *The Care Giving Years: Six Stages to a Meaningful Journey*, available at [http://www.aarplifeanswers.com/article\\_library/documents/12639.pdf](http://www.aarplifeanswers.com/article_library/documents/12639.pdf) (last visited Aug. 8, 2000) (copy on file with *McGeorge Law Review*) (lamenting that people tend not to provide emotional support to those caring for an elderly relative).

174. Elder Abuse Basics, *supra* note 155.

175. See *Witkin-Wills*, *supra* note 1, § 891 (warning that a guardian is absolutely liable for losses if she surrenders control over the ward’s assets); *supra* text accompanying note 46.

176. Kataoka-Probate Judge’s Actions, *supra* note 146, at A3.

choices are truly limited.<sup>177</sup> With the increased need for conservatorships, the lack of those willing to be conservators, and the potential for abuse, it is questionable whether the system can be kept afloat.<sup>178</sup>

#### IV. CHAPTER 565

##### A. *Prohibition Against Referring Business*

Chapter 565 prohibits a guardian or conservator of the estate or of the person who is required to register with the Statewide Registry<sup>179</sup> from hiring or referring “any business to an entity in which he or she has a financial interest” without court approval.<sup>180</sup> Furthermore, to get court approval, the conservator must disclose any financial interest to the court.<sup>181</sup> The financial interests that require disclosure include “ownership interest in a sole proprietorship, a partnership, or a closely held corporation,” ownership of more than one percent of the shares in a corporation traded publicly, or the status of “an officer or a director of a corporation.”<sup>182</sup>

##### B. *Prohibition Against Court Officials Transacting in Estate Property*

Chapter 565 also prohibits court officials or employees who have duties or responsibilities related to “(1) the appointment of a conservator or guardian, or (2) the processing of any document related to a conservator or guardian” from “purchasing, leasing, or renting any real or personal property” from the ward’s estate.<sup>183</sup> This prohibition also extends to persons related by blood or marriage to a court official or employee.<sup>184</sup> However, such persons may purchase, but not rent or lease, the ward’s real or personal property if the purchase is made at a public sale.<sup>185</sup> On the other hand, if a prohibited transaction is made, “rescission of purchase, lease, or rental of the property” will occur.<sup>186</sup> Additionally, the court can impose civil

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177. *See id.* (reporting that Judge Sullivan complained that he had few choices when appointing conservators); *see also* Denise M. Brown, *supra* note 173 (stating that society does not support the idea of caring for the elderly); *see also* Lawrence A. Frolik, *Guardianship Reform: When the Best is the Enemy of the Good*, 9 STAN. L. & POL’Y REV. 347, 351 (1998) (lamenting that a court may not have many choices as to who to appoint as a guardian).

178. Kataoka-Probate Judge’s Actions, *supra* note 146, at A3; Feinberg, *supra* note 170; Manes, *supra* note 5, at 40.

179. *Supra* notes 73-79 and accompanying text.

180. CAL. PROB. CODE §§ 2351, 2401 (amended by Chapter 565).

181. *Id.*

182. *Id.*

183. *Id.* § 2111.5 (enacted by Chapter 565).

184. *Id.* Chapter 565 legally defines a person related by blood or marriage as a spouse or a relative within “the second degree of lineal or collateral consanguinity” of the person in question or spouse of the relative as defined. *Id.* Second degree of lineal or collateral consanguinity includes grandchildren, grandparents, siblings, and anyone closer. 23 AM. JUR. 2D *Descent and Distribution* §§ 53, 55 (1983).

185. CAL. PROB. CODE § 2111.5 (enacted by Chapter 565).

186. *Id.*

penalties “equal to three times” the resulting losses, if any, against the guardian, conservator, or the court official or relative.<sup>187</sup> If no losses are incurred, the court will impose a \$5,000 fine.<sup>188</sup> The court can also “assess punitive damages.”<sup>189</sup> These penalties and punitive damages are assessed in addition to any other rights or remedies provided by law.”<sup>190</sup>

### C. *Statement of Family or Affiliate Relationship When Seeking Court Approval*

When a guardian or conservator *of the estate* petitions the court for an approval of a “purchase, lease, or rental” of estate property, he or she must give the court a statement of any “family or affiliate relationship between the guardian or conservator and the purchaser, lessee, or renter” and a relationship with any agent the guardian or conservator hires.<sup>191</sup> A family relationship is defined as a “person’s spouse or relatives within the second degree of lineal or collateral consanguinity of a person or person’s spouse.”<sup>192</sup> An affiliate relationship means an entity, such as a company or other person, with some control, usually financial, over the guardian or conservator.<sup>193</sup>

The new law regarding the provision of a statement of a family or affiliate relationship to the court for approval of estate property transactions also applies to guardianships and conservatorships *of the person*.<sup>194</sup> Upon a violation, the court will impose civil penalties “equal to three times” the resulting losses, if any, against the guardian, conservator, or relative.<sup>195</sup> If there are no losses, the court will impose a \$5,000 fine.<sup>196</sup> The court can also “assess punitive damages.”<sup>197</sup> Moreover, these penalties and punitive damages are assessed in addition to any other rights or remedies provided by law.”<sup>198</sup>

### D. *Fee Reimbursement Prohibition and Accounting Provisions*

Chapter 565 further protects wards of guardianships and conservatorships through its fee reimbursement prohibition and accounting provisions.<sup>199</sup> The new law also prohibits a conservator or guardian from receiving reimbursement from the

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187. *Id.*

188. *Id.*

189. *Id.*

190. *Id.*

191. CAL. PROB. CODE § 2403 (amended by Chapter 565).

192. *Id.*

193. *Id.*

194. *Id.* § 2359 (amended by Chapter 565).

195. *Id.* §§ 2359, 2403 (amended by Chapter 565).

196. *Id.*

197. *Id.*

198. *Id.*

199. *Id.* § 2401.6 (enacted by Chapter 565). *Id.* § 2620 (amended by Chapter 565).

ward's estate when the guardian or conservator is assessed a fee or surcharge because she breached a fiduciary duty to the ward.<sup>200</sup> The new law requires banks, trust companies, and savings and loan associations to send to courts a copy of each document regarding the status of an account when a guardian or a conservator opens an account or changes the name of an account to reflect the conservatorship or guardianship.<sup>201</sup>

When the first accounting is made, the guardian or conservator must give the court a copy of all bank or investment account statements with estate assets for "the period immediately preceding the date" of appointment and the statements "immediately preceding the date the accounting is filed."<sup>202</sup> For subsequent accountings and for the final accounting, the guardian or conservator must submit account statements for the most recent period to the court.<sup>203</sup> These statements are confidential and are only "subject to discovery" by court order.<sup>204</sup>

## V. ANALYSIS

### A. *What is Really New?*

One problem with the Riverside Conservatorship scandal is that the probate judge for the county seemed to overlook many of the suspicious actions of West Coast Conservatorships that ultimately led to the theft of over \$1 million.<sup>205</sup> Had the judge been cognizant of West Coast's actions, he might have been able to prevent or limit the alleged thefts.<sup>206</sup> Chapter 565 prohibits guardians and conservators from referring business to companies in which they have an interest.<sup>207</sup> However, state law prior to the enactment of Chapter 565 already prohibited guardians and conservators from profiting from such obvious conflicts of interest.<sup>208</sup> Therefore, the enactment of Chapter 565 was not necessary for the judge involved in the Riverside scandal to

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200. CAL. PROB. CODE § 2401.6 (enacted by Chapter 565).

201. CAL. FIN. CODE §§ 765.5, 6850.5 (enacted by Chapter 565).

202. CAL. PROB. CODE § 2620(a) (amended by Chapter 565).

203. *Id.*

204. *Id.*

205. Manes, *supra* note 5, at 39; Mike Kataoka & Raymond Smith, *Trustees 'Devoured' Estates, Panel Told: Ex-Employees of West Coast Conservatorships Say in Court Documents That Nearly \$1 Million Was Taken*, PRESS-ENTER. (Riverside, Cal.), May 2, 2000, at A1.

206. *See* Manes, *supra* note 5, at 39 (noting that the thefts involved in the West Coast scandal were perhaps made possible because Judge Sullivan and other officials did not become suspicious even when irregularities were brought to their attention).

207. CAL. PROB. CODE §§ 2351, 2401 (amended by Chapter 565).

208. *Witkin-Trusts*, *supra* note 10, §§ 67, 70.

have prevented, or at least limited, the losses of the wards.<sup>209</sup> The judge already had the power of the law to interrupt such conflicts of interest.<sup>210</sup>

Similarly, judges and court employees are prohibited from buying property from wards.<sup>211</sup> The California Code of Judicial Ethics prevents judges from buying property from wards, and the Model Code of Ethics for Court Employees of California requires court employees to refrain from impropriety or hints of impropriety.<sup>212</sup> Certainly, buying from an estate of a ward who comes before the court that the employee serves would constitute at least a hint of impropriety and would be prohibited.<sup>213</sup>

The prohibition against allowing relatives from engaging in similar activity is new.<sup>214</sup> In the Code of Judicial Ethics, a judge is encouraged to make sure relatives do not have dealings with someone coming before a judge's court, but a judge is not expected to know about all of his family's financial dealings.<sup>215</sup> Accordingly, a court employee's family is not mentioned in the Code of Ethics for Court Employees of California.<sup>216</sup> Chapter 565 prohibits relatives of judges and court employees from buying or leasing property in a ward's estate.<sup>217</sup> Before Chapter 565, whether the purchase or lease of a ward's estate by a judge or court employee involved in the conservatorship or guardianship was improper was unclear,<sup>218</sup> but Chapter 565

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209. See Manes, *supra* note 5, at 40 (quoting investigators who stated that had the judge in the case and others not covered for one another, the scandal might not have occurred); see also *supra* Part II.D-F (enumerating the fiduciary duties of guardians and conservators and the remedies available to wards and their families through the courts).

210. See CAL. PROB. CODE § 2653(b) (West 1991) (stating that a court may remove a guardian or conservator, revoke powers, or require accountings depending on the court's judgment).

211. CAL. PROB. CODE § 2111.5 (enacted by Chapter 565).

212. CAL. CODE OF JUD. ETHICS, Canon 4(D)(1)(b) (1999); MODEL CODE OF ETHICS FOR THE COURT EMPLOYEES OF CALIFORNIA Tenet 5-6 (1994).

213. See MODEL CODE OF ETHICS FOR THE COURT EMPLOYEES OF CALIFORNIA, Guidelines for Tenet Six (1994) (mandating that court employees refrain from any "activity that gives the impression that court employees can be improperly influenced in the performance of their official duties").

214. Compare CAL. PROB. CODE § 2111.5 (enacted by Chapter 565) (providing that a relative of a court official or employee with duties "related to the appointment of" or "processing of any document related to" a conservator or guardian is prohibited from purchasing, leasing, or renting property from a ward's estate), with CAL. CODE OF JUD. ETHICS, Canon 4(D)(5) Advisory Committee Notes (1999) (noting that a judge cannot reasonably be expected to control or know about all the business dealings of her family), and MODEL CODE OF ETHICS FOR THE COURT EMPLOYEES OF CALIFORNIA Tenet 5-6 (1994) (requiring court employees to refrain from impropriety or hints of impropriety, but not mentioning anything regarding an employee's relatives).

215. CAL. CODE OF JUD. ETHICS, Canon 4(D)(5) Advisory Committee Comments.

216. See MODEL CODE OF ETHICS FOR THE COURT EMPLOYEES Tenet 5-6 (requiring court employees to refrain from impropriety or hints of impropriety, but not mentioning the families of court employees).

217. CAL. PROB. CODE § 2111.5 (enacted by Chapter 565).

218. See MODEL CODE OF ETHICS FOR THE COURT EMPLOYEES OF CALIFORNIA Tenet 5-6 (prohibiting impropriety or hints of impropriety on part of court employees); see also CAL. CODE OF JUD. ETHICS, Canon 4(D)(5) Advisory Committee Comments (requiring a judge to refrain from impropriety or hints of impropriety and to encourage her family to do the same but pointing out that a judge cannot reasonably be expected to control or know about all the business dealings of her family).

clearly prohibits such purchases and leases and even specifies which relatives are included in the prohibition.<sup>219</sup>

The requirement that an individual provide a statement of “family or affiliate relationship” to the court when seeking court approval for a purchase, lease, or other transaction does not add a duty to the job of a conservator or guardian.<sup>220</sup> To sell, lease, or transact business with a close relative or with an entity in which a conservator or guardian has a financial interest is surely a conflict of interest.<sup>221</sup> The way to avoid the restriction associated with this conflict of interest is to get court approval of the transaction.<sup>222</sup> In trying to remedy a conflict of interest by getting the court’s approval, a conservator or guardian would likely inform the court of the relationships that create the concern anyway.<sup>223</sup> The most significant new provisions of Chapter 565 are the penalties imposing three times the losses or \$5,000 if there are no losses due to breaches of duty.<sup>224</sup> However, the ward has always been able to rescind the transaction, obtain any profits the guardian or conservator made, and recoup the losses or any profits that the estate should have made but for the breach of duty.<sup>225</sup> Therefore, the new penalties may not be necessary because alternate remedies already exist.<sup>226</sup>

Chapter 565 also impedes judicial immunity, which is troubling. Since judicial immunity comes from common law, this statute overrules it unless a court can find some way to exclude the term “court official” from the statute.<sup>227</sup> However, the statute seems fairly clear that it includes judges. Chapter 565 makes the distinction between court employees and court officials.<sup>228</sup> Moreover, the bill analyses make mention of the problem with the conflict of interest of the probate judge in the

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219. CAL. PROB. CODE § 2111.5 (enacted by Chapter 565).

220. Compare *id.* § 2403(c)(1) (amended by Chapter 565) (stating that when a guardian or conservator seeks approval for a sale or lease of a ward’s property, she provides a statement “disclosing the family or affiliate relationship between the guardian and conservator” and the purchaser or lessee), with *id.* § 2101 (West 1991 & Supp. 2000) (stating that the fiduciary duties of conservators and guardians is “governed by the law of trusts”), and *Witkin-Trusts*, *supra* note 10, §§ 67, 70 (stating that a trustee must not engage in conflicts of interests or self-dealing).

221. See *Witkin-Trusts*, *supra* note 10, §§ 67, 70 (providing that conflicts of interest and self-dealing are prohibited and giving examples of conflicts of interest and self-dealing).

222. *Witkin-Wills*, *supra* note 1, § 934.

223. See CAL. PROB. CODE § 2403(a) (West 1991) (asserting that a conservator or guardian can get approval or confirmation of her acts); see also *id.* § 2401.3(b) (stating that a court may excuse a conservator’s or guardian’s acts if the guardian “acted reasonably and in good faith”).

224. CAL. PROB. CODE § 2403(c)(3) (amended by Chapter 565); see *supra* Part IV.B (detailing the surcharge created by Chapter 565).

225. See CAL. PROB. CODE § 2401.3(a) (West 1991 & Supp. 2000) (declaring that if a breach of a fiduciary duty is found, the guardian or conservator may be liable for any loss of profit that would not have occurred but for the breach of duty); *id.* § 2401.5 (West 2000) (asserting that if a breach of fiduciary duty is found, the guardian or conservator may be liable for the interest that “accrues at the legal rate of [interest for] judgments” or “interest actually received”).

226. *Id.* § 2401.5 (West 2000).

227. See *supra* notes 120-24 (illustrating a case where the court determined that the legislature did not intend to overrule the common law policy of judicial immunity).

228. CAL. PROB. CODE § 2111.5 (enacted by Chapter 565).

Riverside Conservatorship Scandal.<sup>229</sup> In one bill analysis, the committee gets more specific by saying that “the intent of the bill is to prevent ‘insider deals’ similar to the purchase by the probate judge of a home that belonged to a conservatee.”<sup>230</sup> Most strikingly, the author’s comments in the analysis of the Assembly Committee on the Judiciary states that the class mentioned in the statute includes judges.<sup>231</sup> Therefore, a court could not so easily find judicial immunity as it did in *Frost v. Geernaert*.<sup>232</sup> Now, a judge can be sued, so proper administration of justice—the goal of judicial immunity—might be compromised.<sup>233</sup>

### B. Is More Reform Necessary?

With different groups pressuring legislatures to do something about elder abuse and financial exploitation, legislatures have tried to reform conservatorship laws.<sup>234</sup> Some groups hope that one perfect set of rules will solve all of the problems in the system.<sup>235</sup> The reality is that no set of laws can be perfect.<sup>236</sup> For instance, if a new law made the standards for becoming a guardian or conservator more stringent, some people who probably do not need a conservatorship might retain their independence; however, some incapacitated people may not get the help that they need.<sup>237</sup> These reforms have solved some problems but exacerbated others.<sup>238</sup>

Many competing priorities exist that have shaped the law.<sup>239</sup> For example, one priority is to protect the ward from unscrupulous people, while another is to keep the ward as independent as possible.<sup>240</sup> However, these two priorities are mutually exclusive.<sup>241</sup> Additionally, conservatorships are expensive because of the need for court supervision.<sup>242</sup>

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229. FLOOR ANALYSIS OF AB 1950, SENATE RULES COMMITTEE, at 6 (Aug. 10, 2000); FLOOR ANALYSIS OF AB 1950, SENATE RULES COMMITTEE, at 6 (July 6, 2000); COMMITTEE ANALYSIS OF AB 1950, SENATE JUDICIARY COMMITTEE, at 2 (Apr. 24, 2000); COMMITTEE ANALYSIS OF AB 1950, ASSEMBLY COMMITTEE ON THE JUDICIARY, at 4 (Apr. 25, 2000).

230. COMMITTEE ANALYSIS OF AB 1950, SENATE JUDICIARY COMMITTEE, at 11 (Apr. 24, 2000).

231. COMMITTEE ANALYSIS OF AB 1950, ASSEMBLY COMMITTEE ON THE JUDICIARY, at 3 (Apr. 25, 2000).

232. *Supra* notes 120-24.

233. *See Tagliavia*, 112 Cal. App.3d at 761, 169 Cal.Rptr. at 467 (stating that the policy of judicial immunity is to ensure proper administration of justice).

234. Frolik, *supra* note 177, at 347.

235. *See id.* (proclaiming that we may “hope for too perfect” a system).

236. *Id.* at 351.

237. *Id.* at 350.

238. *Id.*

239. *See id.* at 348 (noting that some believe a good system should stress protecting the incapacitated while others believe a good system should stress independence).

240. *Id.* at 348.

241. *Id.*

242. *See* William M. McGovern, Jr., *Trusts, Custodianships, and Durable Powers of Attorney*, 27 REAL PROP. PROB. & TR. J. 1, 4 (1992) (asserting that burdensome court proceedings in conservatorships are expensive).

Furthermore, the system does not necessarily need more laws.<sup>243</sup> The abuses that took place in Riverside County were already illegal.<sup>244</sup> Under the law prior to Chapter 565, the owner of West Coast Conservators and some of her associates face prison time and civil penalties.<sup>245</sup> Had Judge Sullivan not stepped down, he could have been reprimanded or even removed for his own alleged improprieties.<sup>246</sup> The law that existed before Chapter 565 already provided the means to punish the individuals.<sup>247</sup>

The problem centered not on reforming the law, but on enforcing the existing law.<sup>248</sup> Had Judge Sullivan used the laws that already existed, West Coast would not have been able to defraud so many wards over such a long period of time.<sup>249</sup> Because the majority of judges follow the law, it is unusual for a judge to be disciplined.<sup>250</sup> But when a judge pays little attention to questions brought up by investigators and wards' relatives, new laws are irrelevant.<sup>251</sup> If a judge performs negligently, exploitation of wards is always possible.<sup>252</sup>

### C. Other Solutions

Some mechanisms for reform that might improve oversight have been suggested.<sup>253</sup> Some call for IRS-style random audits of guardianships and conservatorships.<sup>254</sup> These audits would be performed by a State agency which would randomly select a small percentage of guardianships or conservatorships to review their records and investigate the wards' situation.<sup>255</sup> Hopefully, random selection will catch some unscrupulous conservators and guardians and deter others.

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243. See Frolik, *supra* note 177, at 351 (arguing that no matter how many reforms are put in statutes, if the overseers of a conservatorship are corrupt, the statute will be of little use).

244. See Kataoka-Civil Suit Filed, *supra* note 136, at B1 (proclaiming that the owner of West Coast Conservatorships and her associates face civil and criminal penalties).

245. *Id.*

246. Kataoka-Probate Judge's Actions, *supra* note 146, at A1.

247. Kataoka-Civil Suit Filed, *supra* note 136, at B1.

248. See Frolik, *supra* note 177, at 351 (arguing that the reformers should reform those responsible for administering conservatorships and not concentrate on reforming the procedures).

249. See Manes, *supra* note 5, at 37 (asserting that in order for West Coast to get away with what it did for so long, "those responsible for the system's integrity had to ignore a number of warning signs").

250. See Kataoka-Probate Judge's Actions, *supra* note 146, at A1 (noting the findings of a judge who tracks disciplinary actions against judges, to show that disciplinary actions against probate judges are uncommon).

251. See Frolik, *supra* note 177, at 351 (arguing that no matter how many reforms are enacted, if the overseers of a conservatorship are corrupt, the statute will be of little use).

252. See Manes, *supra* note 5, at 35 (proclaiming that when a judge ignores suspicious activities of conservators, wards can be exploited).

253. See *id.* at 40 (enumerating some reforms such as a statewide registry of conservators and IRS-style audits).

254. *Id.*

255. See *id.* (describing IRS-style audits for conservators).

Another suggestion is to delegate some of the duties of judges to other officials who specialize in conservatorship and guardianship issues.<sup>256</sup> With specialized expertise, these officials can make decisions quicker and at less cost.<sup>257</sup> Moreover, they could potentially take their “courts” to the nursing home or wherever the ward resides if necessary.<sup>258</sup> The examination of conservatorships and guardianships at the ward’s residence is not only more comfortable for the ward, but the official can more easily ascertain the ward’s situation.<sup>259</sup> With a graying population, many jurisdictions may make use of this method to cut costs and increase efficiency.<sup>260</sup>

Nonetheless, many commentators suggest that the best solution is to avoid a conservatorship or guardianship altogether.<sup>261</sup> Other alternatives are available that are more flexible, less costly, and avoid judicial scrutiny.<sup>262</sup> Trusts and durable powers of attorney can be used, and most attorneys strongly favor these instruments over a guardianship or conservatorship.<sup>263</sup> However, these instruments also present problems.<sup>264</sup> While they are less costly and more flexible, trusts and durable powers of attorney can lack oversight provisions.<sup>265</sup> As with many aspects of dealing with incapacity, society may just have to rely on the person who takes care of the vulnerable and hope that that person does not take advantage of her position.<sup>266</sup>

## VI. CONCLUSION

As the number of people over age 65 increases, many more conservatorships will be created within the next few decades.<sup>267</sup> Luckily, although the conservatorship system is not perfect, it can produce acceptable results when it is used properly and when existing laws are enforced by judges.<sup>268</sup> Chapter 565 was passed to refine the law in the aftermath of an exemplary case of the system gone awry.<sup>269</sup> Although much of the law prohibiting judges, court employees, conservators, and guardians

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256. Frolik, *supra* note 177, at 353.

257. *Id.*

258. *Id.*

259. *Id.*

260. *Id.*

261. McGovern, *supra* note 242, at 3.

262. *See id.* at 3-4 (arguing that powers of attorney and trusts are better instruments when a person becomes incapacitated).

263. *Id.* at 3.

264. *See id.* at 4 (maintaining that a trust does not require as much supervision as a conservatorship).

265. *See id.* at 16 (noting that most trusts are written to avoid court supervision).

266. *See Manes, supra* note 5, at 40 (suggesting that a main qualification for a conservator is that she care about her ward).

267. *See supra* Part III (warning that the population is getting older and that more conservatorships will eventually be needed).

268. *See supra* Part V.B (arguing that the existing laws can solve many of the problems with conservatorships if they are properly enforced).

269. *See* SENATE COMMITTEE ON THE JUDICIARY, COMMITTEE ANALYSIS OF AB 1950, at 5 (June 13, 2000) (pointing to the Riverside conservatorship scandal when arguing for the need of Chapter 565).

from acting under conflicts of interest and self-dealing already exists, the new provisions under Chapter 565 decrease the likelihood that court officials, judges, conservators, and guardians will be able to take advantage of their positions by sending business to their relatives, or by selling or leasing property to their relatives at low prices.<sup>270</sup> As the elderly population increases and more people need conservators, more caring individuals are needed because caring is the most important qualification of a conservator. However, new laws cannot make people more caring or more diligent in their duties. If the problem is to be solved, individual judges, conservators, or relatives of wards will have to care about the well-being of their wards and keep a sharp lookout for potential abuse.

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270. *Supra* Part V.A.