CONSERVATORSHIP LITIGATION AND LAWYER LIABILITY: A GUIDE THROUGH THE MAZE

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I. INTRODUCTION

The purpose of this Article is twofold: First, to examine one state's (California's) legal framework governing adult protective proceedings ("conservatorships") and aspects thereof specific to the litigation process[1] and, second, to review the state of the law

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nationally regarding the liability exposure of lawyers for guardians and conservators to malpractice claims by wards or conservatees injured by a misguided, fraudulent, or negligent conservator or guardian.

The first part of this Article discusses California's procedural and substantive rules governing conservatorship proceedings with an emphasis on issues arising in litigation. The second part, taking a national approach, discusses the competing theories used in determining whether the attorney for a guardian or conservator may be held liable in a malpractice or other tort action brought directly by the ward or conservatee.

II. CONSERVATORSHIP LITIGATION

In California, a conservator may be appointed for any person who is unable to manage his or her financial resources or properly provide for his or her personal needs, such as, food, clothing, and shelter.[2]

California law authorizes four general types of conservatorships:

1. **Conservatorship of the Person –** A conservatorship under which the conservatee is unable to provide properly for his or her personal needs.[3] The conservator's powers may be "limited" or "unlimited,"[4] and may be "temporary" or "permanent."[5]

2. **Conservatorship of the Estate –** A conservatorship under which the conservatee "is substantially unable to manage his or her own financial resources or resist fraud or undue influence."[6] The powers granted to this type of conservator also may be "limited" or "unlimited," and "temporary" or "permanent."[7]

3. **Limited Conservatorship for the Developmentally Disabled –** This is a form of limited conservatorship of the person, estate, or both.[8] It is designed to help "developmentally disabled adults" lead more "independent, productive, and normal

2. Cal. Prob. Code § 1801(a), (b) (West 2001). Guardianships, once available for "incompetent" adults, are now available only for minors in California. *Id*. § 1500.

3. *Id*. § 1801(a).

4. *Infra* pt. II(B)(1).

5. *Infra* pt. II(B)(3).

6. Cal. Prob. Code § 1801(b) (stating that "[s]ubstantial inability may not be proved solely by isolated incidents of negligence or improvidence").

7. *Infra* pt. II(B)(2)–(3).

8. Cal. Prob. Code § 1801(d).

lives."[9] A "developmentally disabled" conservatee retains "all legal and civil rights except those" that the court has specifically granted to the conservator.[10]

4. **Conservatorship for the "Gravely Disabled" –** Still another type of conservatorship is one that may be established under the Lanterman Petris Short Act for the "gravely disabled."[11] These so-called "LPS" proceedings govern the involuntary commitment of the gravely disabled to appropriate institutions for treatment, an undertaking requiring careful deliberation, and are therefore subject to strict statutory standards.[12]

A. Establishing the Conservatorship

Jurisdiction of guardianship and conservatorship proceedings rests with the superior court sitting in exercise of its probate jurisdiction.[13] The proceedings are initiated by filing a petition for appointment of a conservator.[14] The petition may be filed by the proposed conservatee, the proposed conservatee's spouse or relative, other "interested" persons, or "interested" state or local entities.[15]

In addition to the data contained in the petition, information explaining why a conservatorship is required must be set forth in a "Confidential Supplemental Information" form.[16] The form calls for a brief statement of facts relating to the conservatee (for example, the conservatee's ability to live in his or her residence, the conservatee's inability to provide for personal needs or manage financial resources, or alternatives to conservatorship).[17] Since the form is "confidential," it may not be attached to the petition (which, when filed, becomes a public record).[18] The completed form may be "made available only to the parties, persons given notice of the petition who have requested [the] supplemental information or who have appeared in the pro-

9. *Id*.
10. *Id*.
11. Cal. Welfare & Instns. Code § 5350 (West 1998).
12. *Id*.; *Conservatorship of the Person & Est. of Susan T*., 884 P.2d 988, 989 (Cal. 1994); *Conservatorship of the Person & the Est. of Roulet*, 590 P.2d 1, 11 (Cal. 1979).
13. Cal. Prob. Code § 2200 (2001).
14. *Id*. § 1820.
15. *Id*. § 1820(a).
16. *Id*. § 1821(a).
17. *Id*.
18. *Id*.

ceedings, their attorneys, and the court."[19] However, the court has discretion to release the supplemental information to others upon finding that doing so would be in the conservatee's best interests.[20]

A noticed hearing is required to establish a conservatorship.[21] A minimum fifteen days' notice of the hearing must be given to the proposed conservatee's spouse, domestic partner, various relatives, and certain statutorily specified entities.[22] During this hearing, the court must determine, first and foremost, whether a conservator is needed based on the evidence presented.[23]

In any contested conservatorship, the proposed conservatee has a statutory right to be represented by counsel and to have counsel appointed by the court if he or she is unable to retain an attorney.[24] The proposed conservatee also has statutory rights to appear at the hearing, to oppose the petition, and to object to any or all of the conservator's proposed duties or powers.[25] The proposed conservatee, but not any other party, may demand a jury trial.[26]

The need for a conservatorship ordinarily must be proven by "clear and convincing evidence."[27] This standard is higher than the typical "preponderance of the evidence" standard as a result of the importance the legislature has given to the determination.

An even higher standard of proof applies in conservatorship proceedings for the "gravely disabled" under the LPS Act. Here, the proceedings pose the risk of even greater deprivation of civil liberties than under Probate Code conservatorships, and may place a "lasting stigma" on the individual as being "mentally ill or disordered." For this reason, the safeguard of proof "beyond a

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19. *Id*.

20. *Id*.

21. *Id*. § 1822 (West 2001).

22. Cal. Prob. Code § 1822(a)–(b) (West 2001 & Supp. 2002).

23. *Id*. § 1822(a); *see id*. § 1801 (providing when a conservator may be appointed).

24. Cal. Prob. Code § 1828(a)(6) (West 2001); *see Wendland v. Super. Ct. of Cal.*, 56 Cal. Rptr. 2d 595, 596–598 (Cal. App. 3d Dist. 1996) (concluding that independent counsel must be appointed for a brain-injured conservatee when family members contested the temporary conservator's petition for permanent appointment and her authority to withdraw life support), *rev'd on other grounds*, *Conservatorship of the Person of Wendland*, 28 P.3d 151 (Cal. 2001).

25. Cal. Prob. Code § 1823(b)(5).

26. *Id*. § 1827; *Conservatorship of the Person of Kevin M.*, 56 Cal. Rptr. 2d 765, 768 (Cal. App. 4th Dist. 1996).

27. Cal. Prob. Code § 1801(e) (codifying the holding in *Conservatorship of the Person & Est. of Sanderson*, 165 Cal. Rptr. 217, 222 (Cal. App. 1st Dist. 1980)).

reasonable doubt" is required.[28] Likewise, when a proposed LPS conservator requests that the court impose any special disability on the proposed conservatee — for example, withholding the right to vote, withholding the right to refuse or consent to "routine" medical treatment, or withholding the right to possess a firearm[29] — the burden of "proof beyond a reasonable doubt" applies to *each such special disability*.[30]

After adjudicating the need for a conservatorship, the court appoints the conservator. The Probate Code expressly provides the manner in which prospective conservators are to be considered for appointment.[31] "If the proposed conservatee has sufficient capacity at the time to form an intelligent preference," he or she may nominate a person to act as conservator.[32] "Capacity" for this purpose is a question of fact to be determined at the hearing on the petition for appointment of conservator.[33] The proposed conservatee's choice is afforded great deference.[34] Such nominee "shall" be appointed, unless the court determines that it would not be in the proposed conservatee's "best interests."[35]

The proposed conservatee is nominated in the petition for appointment of a conservator or in a separate writing signed before or after the petition is filed.[36] The statute does not require that the written nomination be witnessed. Even so, a witnessed nomination, with an attestation clause similar to that used in a will, is a good idea because written documentation will reduce the chances of a successful attack on the validity of the nomination.

A conservator also may be nominated by the proposed conservatee's spouse, domestic partner, adult child, parent, brother, or sister.[37] The proposed conservatee's spouse ordinarily may not petition for appointment of a conservator (or be appointed conservator) if the spouse and proposed conservatee are parties to an

28. *Conservatorship of Roulet* 590 P.2d at 11; *Conservatorship of Sanderson*, 167 Cal. Rptr. at 219–220.

29. Cal. Welfare & Instns. Code § 5357.

30. *Conservatorship of the Person of Walker*, 254 Cal. Rptr. 552, 555 (Cal. App. 5th 1989); *but see In re Lois M.*, 263 Cal. Rptr. 100, 100–101, 103 (Cal. App. 1st Dist. 1989) (holding that the lawfulness of detaining the proposed conservatee in a locked mental ward to determine the course of treatment may be proved by the preponderance of evidence).

31. Cal. Prob. Code §§ 1810–1813 (West 2001 & Supp. 2002).

32. Cal. Prob. Code § 1810 (West 2001).

33. *Patin v. Tersip*, 200 P.2d 205, 207 (Cal. App. 2d Dist. 1948).

34. Cal. Prob. Code § 1810.

35. *Id*.

36. *Id*.

37. Cal. Prob. Code § 1811(a) (West 2001 & Supp. 2002).

action for legal separation, marriage dissolution, or annulment.[38] The only exception to this rule, not surprisingly, is if the court finds by clear and convincing evidence that the spouse's appointment is "in the best interests" of the proposed conservatee.[39]

Nomination by a spouse, domestic partner, adult child, parent, or sibling may be made in the petition for conservatorship or orally at the hearing on the petition.[40] Further, the spouse, domestic partner, or parent may make the nomination in an independent writing signed either before or after the petition is filed.[41] Such nomination remains effective despite the spouse's, domestic partner's, or parent's subsequent legal incapacity or death.[42]

The ultimate appointment is within the court's *sole discretion* based on the evidence presented.[43] However, the court's exercise of discretion is guided, in part, by statute. Of persons equally qualified and expected to act in the proposed conservatee's best interests, preference is to be given as follows:

> (1) The spouse or domestic partner of the proposed conservatee or the person nominated by the spouse or domestic partner pursuant to Section 1811.
> (2) An adult child of the proposed conservatee or the person nominated by the child pursuant to Section 1811.
> (3) A parent of the proposed conservatee or the person nominated by the parent pursuant to Section 1811.
> (4) A brother or sister of the proposed conservatee or the person nominated by the brother or sister pursuant to Section 1811.
> (5) Any other person or entity eligible for appointment as a conservator under [the Probate Code] or, if there is no such person or entity willing to act as a conservator, under the Welfare and Institutions Code.[44]

The appointment will be made subject to the various conditions and limitations that might be imposed on the conservator's powers and is evidenced by the court clerk's issuance of letters of conservatorship.[45]

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38. *Id*. § 1813(a).
39. *Id*.
40. *Id*. § 1811(a).
41. *Id*. § 1811(b).
42. *Id*.
43. Cal. Prob. Code § 1812(a) (West 2001).
44. Cal. Prob. Code § 1812(b)(1)–(5) (West 2001 & Supp. 2002).
45. Cal. Prob. Code § 2310 (West 2001).

B. Powers and Duties of a Conservator

The court, in its discretion, may grant the conservator certain administrative powers, which are usually exercisable without notice, hearing, or specific court authorization or instruction. These powers are enumerated in Probate Code Section 2591. Included, for example, are powers to contract for the conservatorship, to operate the conservatee's business, to sell conservatorship property, or to purchase property for the conservatorship.[46] The flexibility and independence thus conferred on the conservator in managing the estate is considerable.

Every California county is required to give certain information to all "private" (non-governmental) conservators relating to the conservator's statutory rights, duties, limitations, and responsibilities.[47] At a minimum, this information must include statements concerning the following:

(1) The rights, duties, limitations, and responsibilities of a conservator.
(2) The rights of a conservatee.
(3) How to assess the needs of the conservatee.
(4) How to use community-based services to meet the needs of the conservatee.
(5) How to ensure that the conservatee is provided with the least restrictive possible environment.
(6) The court procedures and processes relevant to conservatorships.
(7) The procedures for inventory and appraisal, and the filing of accounts.[48]

Private conservators (except trust companies) must sign and file an acknowledgment of receipt of the form and handbook before letters of conservatorship may issue.[49] Failure to receive the information will not relieve conservators of any of their duties or make the county or other public officials liable to any conservatee, conservator, conservatorship, or other person or entity.[50]

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46. *Id*. § 2591(a), (b), (d), (g).

47. *Id*. § 1835(a).

48. *Id*. § 1835(b)(1)–(7). The proper form and guidance can be obtained from *West's California Judicial Council Forms* vol. II, *Duties of Conservator* (form GC-348 (West 2001), and Advisory Committee on Conservatorship, *Handbook for Conservators* (Jud. Council of Conservators 1992).

49. Cal. Prob. Code § 1834(a).

50. *Id*. § 1835(d).

The underlying purpose embodied in the statutory requirements is to impress upon newly appointed conservators that they owe the highest fiduciary standards of care and good faith in the performance of their office.[51]

1. Powers and Duties of a Conservator of the Person

A conservator of the person "has the care, custody, and control of, and has charge of the education of" the conservatee.[52] Conservators of the person are expressly vested with the power to fix the conservatee's residence[53] and, under prescribed conditions, to give or withhold medical treatment.[54] The court has discretion to limit these powers and duties by stating the *specific powers* the conservator does not have and reserving those specified powers to the conservatee.[55]

If granted the power to give or withhold medical treatment, a conservator of the person for a patient in a persistent vegetative state with no realistic hope of recovery may elect to withdraw the conservatee's artificial life support and permit the conservatee a "natural" death.[56] Unless the power to withdraw life-sustaining measures is expressly *withheld* by the court when the conservator's authority is granted,[57] no further court approval is required to exercise this power.[58] However, an attending physician may object to the conservator's election to remove artificial life support for personal, moral reasons, so long as the conservatee may be transferred to another physician who is *willing* to follow the conservator's direction.[59] Due to the sweeping authority Section 2355 gives conservators, courts may invoke Section 2351 (b) and grant only selective conservatorship powers when the

51. *See id*. §§ 1800(a) (stating that the legislature's intent is to protect the rights of conservatees); 2101 (stating that the relationship of "conservator and conservatee is a fiduciary relationship"); 2102 (subjecting conservators to the supervision by courts).

52. *Id*. § 2351(a).

53. *Id*. § 2352(a).

54. *Id*. §§ 1880, 2354–2355.

55. *Id*. § 2351(b).

56. Cal. Prob. Code § 2355(a) (West Supp. 2002) (codifying the decision of *Conservatorship of the Person of Drabick*, 245 Cal. Rptr. 840, 841 (Cal. App. 6th Dist. 1988), *overruled on other grounds, Conservatorship of Wendland*, 28 P.3d 151 (Cal. 2001)).

57. Cal. Prob. Code § 2351(b) (West 2001).

58. *Conservatorship of Drabick*, 245 Cal. Rptr. at 841, 850–851.

59. *Conservatorship of the Person of Morrison* 253 Cal. Rptr. 530, 534 (Cal. App. 1st Dist. 1988).

conservatee is dying.[60] Interested persons may invoke judicial review by a Section 2359 petition for instructions or may request that the power to withhold medical treatment be excluded or limited at the time of the conservator's appointment.[61] Otherwise, judicial involvement in the conservator's decision is limited to reviewing whether the decision was made "in good faith based on medical advice" as required by Section 2355(a).[62]

Absent an express statement of preference by the conservatee while capacitated (a written advance health-care directive), prudence suggests that the conservator obtain prior court approval to withdraw a conservatee's life-sustaining artificial support even if the conservator is vested with unfettered Section 2355 powers. The risk of litigation over the wrongful death of the conservatee is well worth minimizing.

A *limited* conservator of the person has "care, custody, and control of the" conservatee, although to a lesser degree than a regular conservator.[63] Another difference is that he or she is required to secure such treatment, training, and other services "as will assist the limited conservatee in the development of maximum self-reliance and independence."[64] A limited conservator does not have any of the following powers or controls over the limited conservatee unless *specifically* granted by the court in its appointment order:

(1) To fix the residence or specific dwelling of the limited conservatee.
(2) Access to the confidential records and papers of the limited conservatee.
(3) To consent or withhold consent to the marriage of the limited conservatee.
(4) The right of the limited conservatee to contract.
(5) The power of the limited conservatee to give or withhold medical consent.
(6) The limited conservatee's right to control his or her own social and sexual contacts and relationships.
(7) Decisions concerning the education of the limited conservatee.[65]

60. *Conservatorship of Drabick*, 245 Cal. Rptr. at 851.
61. *Id.* at 850–851.
62. Cal. Prob. Code § 2355(a); *Conservatorship of Drabick*, 245 Cal. Rptr. at 852.
63. Cal. Prob. Code § 2351.5(a)(1).
64. *Id.* § 2351.5(a)(2).
65. *Id.* § 2351.5(b)(1)–(7).

2. Powers and Duties of a Conservator of the Estate and Substituted Judgment

Generally, a conservator of the estate is responsible for the conservatee's support and maintenance, debts and expenses, and general management and control of the conservatee's assets and financial affairs, subject to limited court supervision.[66] Ordinarily, the powers of a *limited* conservator of the estate will be stated specifically and expressly in the appointing court's order; if not so restricted, the conservatorship is "unlimited" and therefore, the conservator has authority to exercise all the statutory powers.[67]

The "substituted judgment" doctrine is codified in the Probate Code.[68] Under these provisions, conservators of the estate are afforded considerable flexibility (after obtaining specific court approval) in estate and personal planning for conservatees unable to do such planning for themselves.[69] The doctrine is based on the theory that, were conservatees "competent," they would have taken such action for themselves.[70]

The "substituted judgment" statutes are designed to "protect the conservatorship estate for the benefit not only of the persons who will ultimately receive it from the conservatee or his or her personal representative, but also (and perhaps primarily) of the conservatee himself or herself."[71] The conservator of the estate may petition the court for authority to take specified action for any of the following purposes:

(1) Benefitting the conservatee or the estate.
(2) Minimizing current or prospective taxes or expenses of administration of the conservatorship estate or of the estate upon the death of the conservatee.
(3) Providing gifts for any purposes, and to any charities, relatives, friends (including the other spouse or domestic

66. *Id*. § 1801(b).

67. *See generally id*. §§ 2400–2595 (detailing the statutory powers of a conservator of the estate).

68. *Id*. §§ 2580–2586.

69. *Id*.

70. *In the Matter of the Guardianship of Christiansen*, 56 Cal. Rptr. 505, 522 (Cal. App. 1st Dist. 1967); *In the Matter of the Conservatorship of Wemyss*, 98 Cal. Rptr. 85, 87 (Cal. App. 3d Dist. 1971); *In re Conservatorship of the Estate of Hart*, 279 Cal. Rptr. 249, 252 (Cal. App. 6th Dist. 1991).

71. *Conservatorship of Hart*, 279 Cal. Rptr. at 253.

> partner), or other objects of bounty, as would be likely beneficiaries of gifts from the conservatee.[72]

"Substituted judgment" authority that the court may grant includes, but is not limited to, the following:

> (4) Making gifts of principal or income, or both, of the estate outright or in trust.
> (5) Conveying or releasing the conservatee's contingent and expectant interests in property, including marital property rights and any right of survivorship incident to joint tenancy or tenancy in the entirety.
> (6) Exercising or releasing the conservatee's powers as donee of a power of appointment.
> (7) Entering into contracts.
> (8) Creating for the benefit of the conservatee or others, . . . revocable or irrevocable trusts. A special needs trust [cannot be established] under this article.
> (9) Transferring to a trust created by the conservator or conservatee any property unintentionally omitted from the trust.
> (10) Exercising options.
> (11) Exercising the rights of the conservatee to elect benefit or payment options, to terminate, to change beneficiaries or ownership, to assign rights, to borrow, or to receive cash value in return for a surrender of rights under any of the following:
> (i) Life insurance policies, plans, or benefits.
> (ii) Annuity policies, plans, or benefits.
> (iii) Mutual fund and other dividend investment plans.
> (iv) Retirement, profit-sharing, and employee welfare plans and benefits.
> (12) Exercising the right of the conservatee to elect to take under or against a will.
> (13) Exercising the right of the conservatee to disclaim any interest [acquired by testate or intestate succession or by inter vivos transfer, including surrendering the conservatee's right to revoke a revocable trust].

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72. Cal. Prob. Code § 2580(a)(1)–(3) (West 2001 & Supp. 2002); *In re Conservatorship of the Person & Est. of Romo*, 235 Cal. Rptr. 377, 380 (Cal. App. 1st Dist. 1987); *but see Conservatorship of Hart*, 279 Cal. Rptr. at 252 (substituted judgment order approving gifts to heirs was reversed when the court was "significantly misinformed" regarding prior gifts made by the conservatee and their effect on the conservatee's unified estate and gift tax credit).

> (14) Exercising the right of the conservatee to (i) revoke or modify or (ii) to surrender the right to revoke or modify a revocable trust, [unless the instrument creating the trust] (i) evidences an intent to reserve the right of revocation or modification exclusively to the conservatee, (ii) provides expressly that a conservator may not revoke or modify the trust, or (iii) otherwise evidences an intent that would be inconsistent with authorizing or requiring the conservator to exercise the right to revoke or modify the trust.
> (15) Making an election [available to a surviving spouse under California's spousal property set-aside law].
> (16) Making a will.[73]

A conservator's authority to make a will on behalf of his or her conservatee does not impair the conservatee's right to revoke or amend the will, or even to make a new and inconsistent will, provided the conservatee is later deemed "mentally competent to make a will."[74] Conservatees and proposed conservatees do *not necessarily* lack testamentary capacity.[75] Indeed, conservatorship proceedings neither turn on, nor adjudicate, the issue of a proposed conservatee's capacity to execute a will.[76]

Exercise of substituted-judgment powers requires a noticed hearing on petition of the conservator or any "other interested person."[77] The court may authorize or require the proposed action

> only if it determines all of the following:
>
> (a) The conservatee either (1) is not opposed to the proposed action or (2) if opposed to the proposed action, lacks legal capacity for the proposed action.
> (b) Either the proposed action will have no adverse effect on the estate or the estate remaining after the proposed

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73. Cal. Prob. Code § 2580(b)(1)–(13); *see id*. § 6100.5(c) (verifying conservator's powers, if authorized by a court order, to make a will on behalf of a conservatee not mentally competent to do so); *id*. § 6110(b)(3) (stating that a will signed by a conservator with court authorization meets the requirement of a signed writing); *Johnson v. Kotyck*, 90 Cal. Rptr. 2d 99, 102 & n. 2 (Cal. App. 2d Dist. 1999), *rev. denied*, (Feb. 23, 2000) (stating that a conservator may create a revocable trust or revoke a revocable trust with court permission).

74. Cal. Prob. Code § 6100(b).

75. *Est. of Mann*, 229 Cal. Rptr. 225, 230–231 (Cal. App. 1st Dist. 1986).

76. *Id*.

77. Cal. Prob. Code §§ 2580(a), 2581; *see id*. § 2586 (regarding the court's power to order delivery of a conservatee's will and other estate planning documents to the designated custodian for safekeeping or to the court for examination in connection with the proceedings).

> action is taken will be adequate to provide for the needs of the conservatee and for the support of those legally entitled to support, maintenance, and education from the conservatee, taking into account . . . all [ ] relevant circumstances of the conservatee and [his or her dependents.][78]

In making its requisite determinations, the court must consider all "relevant circumstances," including, but not limited to, the following:

(a) Whether the conservatee has legal capacity for the proposed transaction and, if not, the probability of the conservatee's recovery of legal capacity.
(b) The past donative declarations, practices, and conduct of the conservatee.
(c) The traits of the conservatee [for example, frugality toward self or others, generosity].
(d) The relationship and intimacy of the prospective donors with the conservatee, their standards of living, and the extent to which they would be natural objects of the conservatee's bounty by any objective test based on such relationship, intimacy, and standards of living.
(e) The wishes of the conservatee [if known].
(f) Any known estate plan of the conservatee, if known, [based on] the conservatee's will, any trust of which the conservatee is the settler or beneficiary.
(g) The manner in which the estate would devolve upon the conservatee's death, giving consideration of the age and the mental and physical condition of the conservatee, the prospective devisees or heirs of the conservatee, and the prospective donees.
(h) The value, liquidity, and productiveness of the estate.
(i) The minimization of current or prospective income, estate, inheritance, or other taxes or expenses of administration.
(j) Changes of tax laws and other laws which would likely have motivated the conservatee to alter the conservatee's estate plan.
(k) The likelihood from all the circumstances that the conservatee as a reasonably prudent person would take the proposed action if the conservatee had capacity to do so.

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78. Cal. Prob. Code § 2582(a); *see Guardianship of Christiansen*, 56 Cal. Rptr. at 525 (finding sufficient evidence that the conservatee would not be opposed to the proposed action and that it would have no adverse effect on her estate, but rather be to her advantage).

> (l) Whether any beneficiary is a [disqualified person as defined in] Section 21350.
> (m) Whether a beneficiary has committed physical abuse, neglect, false imprisonment, or fiduciary abuse against the conservatee after the conservatee was substantially unable to manage his or her financial resources, or resist fraud or undue influence, and the conservatee's disability persisted throughout the time of the hearing on the proposed substituted judgment.[79]

Failure to present the court with available evidence of all relevant circumstances could result in reversal of an order allowing a substituted-judgment action.[80] For example, in *In re Conservatorship of the Estate of Hart*,[81] the appellate court reversed an order allowing the conservator to make gifts from the conservatorship estate and remanded the case with directions that the probate court rehear the matter and receive all relevant evidence.[82]

The conservator, a major bank, had petitioned the court to make gifts from the $13.2 million conservatorship estate of an elderly woman with Alzheimer's disease.[83] The gifts were to be made to seven of the conservatee's children and grandchildren in the amounts of $670,000 for the current year and $70,000 per year for five subsequent years.[84] In its substituted-judgment petition, the conservator alleged in conclusory fashion, and without presenting supporting evidence, that the conservatee's full $600,000 federal estate tax exemption equivalent amount was available for the current year's gifts.[85] It alleged that the gifting plan would therefore be at "a no tax cost to the conservatee," the balance of the gifts representing annual-exclusion gifts to the seven donees.[86] The petition was granted over objections of one of the intended donees, who appealed.[87]

The conservator then filed a petition to allow it to make the gifts notwithstanding the appeal, which petition would typically

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79. Cal. Prob. Code § 2583(a)–(m).

80. *In re Conservatorship of the Estate of Hart*, 279 Cal. Rptr. 249, 258 (Cal. App. 6th Dist. 1991).

81. 279 Cal. Rptr. 249 (Cal. App. 6th Dist. 1991).

82. *Id.* at 258.

83. *Id.* at 252, 258.

84. *Id.* at 251.

85. *Id.* at 254.

86. *Id.* at 255 (quoting from the record below).

87. *Id.*

stay execution of an appealed order.[88] This petition was granted as well, and the conservator made the gifts as prayed.[89] The appellant appealed this second order as well.[90]

During the pendency of the appeal, appellant discovered that in the federal gift tax return the conservator prepared to report the allowed, current-year gifts indicated that the conservatee's entire $600,000 federal estate tax exemption equivalent amount was *not* available.[91] In fact, the conservatee "could have given no more than approximately $145,500 (over and above the annual-exclusion gifts) free of federal gift tax, and" she would be required to pay $242,000 in gift tax for the current year's gifts allowed by the probate court.[92]

Noting that California reviewing courts have the power to consider new evidence in appeals from non-jury trials, the appellate court reversed both orders.[93] It held that a substituted-judgment order can be made by the probate court only after it "has been fully informed of all relevant circumstances."[94]

The decision in *Conservatorship of Hart* is significant because it illustrates the importance of maintaining the integrity of the procedure in conservatorship/substituted-judgment proceedings. The appellate court stated that the probate court's decision may not have been in error, even after all evidence was properly considered.[95] Nevertheless, the court reversed the probate court, in effect holding that the ends cannot justify the means, and that the probate court had abused its discretion by failing to receive all relevant information into evidence before its decision.[96] The appellate court placed the burden primarily on the conservator or other petitioner in substituted-judgment proceedings to present all relevant evidence to the court.[97]

The substituted-judgment provisions in the Probate Code simply give the conservator (or other interested person) the right to *request* authority to take certain actions not otherwise

88. *Id.*
89. *Id.*
90. *Id.*
91. *Id.* at 257.
92. *Id.*
93. *Id.*
94. *Id.* at 258.
95. *Id.* at 259.
96. *Id.* at 265.
97. *Id.* at 253.

allowed.[98] The provisions do not, however, impose a duty on the conservator to propose any action. The conservator may not be held liable for a failure to propose any such action.[99] However, as in *Conservatorship of Hart*, once such proceedings are commenced, the petitioner (usually the conservator) has the burden to present all evidence in a fair and balanced manner to the court.[100]

Attorneys representing a terminally-ill or soon-to-be-incapacitated client should consider carefully the extensive opportunities to do pre-mortem estate planning (and to correct errors in existing estate plans to avoid future litigation) that the "substituted judgment" provisions confer upon a conservator of the estate. Attorneys also must remember to investigate thoroughly and to present all the relevant information to the trier of fact to ensure the procedural integrity of the process and minimize the risk of reversal on appeal.

3. Powers and Duties of a Temporary Conservator

A temporary conservator of the person, of the estate, or both, may be appointed for "good cause" pending final determination on a petition for a permanent conservator.[101] Moreover, in exigent circumstances, a temporary conservator may be appointed ex parte.[102]

A temporary conservator's powers are severely limited. Absent a special court order, he or she

> has only those powers and duties of a guardian or conservator that are necessary to provide for the temporary care, maintenance, and support of the ward or conservatee and that are necessary to conserve and protect the property of the ward or conservatee from loss or injury.[103]

In terms of medical treatment, a temporary conservator of the person has only those powers and duties relating to the conservatee's medical treatment that are specified in Section 2354.[104]

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98. Cal. Prob. Code § 2585.

99. *Id*.

100. *Supra* nn. 80–99 and accompanying text.

101. Cal. Prob. Code § 2250(a)(2), (b).

102. *Id*. § 2250(d).

103. *Id*. § 2252(a) (emphasis added); *see O'Brien v. Dudenhoeffer*, 19 Cal. Rptr. 2d 826, 827 (Cal. App. 2d Dist. 1993) (holding that an ex parte order appointing a temporary estate conservator divests the conservatee of legal "capacity to give away his or her real property").

104. Cal. Prob. Code § 2252(b)(2).

Also, a specific court order is required to change the conservatee's residence, absent an emergency or the conservatee's consent.[105] Indeed, a temporary conservator's willful removal of the conservatee from California without court authority constitutes a felony.[106]

A "temporary conservator of the estate may marshal assets and establish" financial institution accounts.[107] A temporary conservator of the estate also may bring a Section 2580 "substituted judgment" proceeding, but the relief sought must be requested in a petition separate from the petition for appointment of the temporary conservator.[108]

C. Elder Abuse Litigation Using a Conservatorship

A conservatorship may be a pragmatic choice if there is a likelihood of litigation involving an elderly or incapacitated person or his or her assets. Litigation typically can develop among family members over an incapacitated relative's care and the management of his or her financial affairs. The conservatorship provisions discussed above[109] provide a flexible and authoritative approach toward a resolution of such disputes.

Litigation also can arise over financial abuse of elders. Elder-abuse litigation is a burgeoning field in light of the aging population and the seemingly never-ending stream of schemes to deprive elderly Americans of their assets.[110] California's Elder Abuse and Dependent Adult Civil Protection Act (EADACPA)[111] provides special remedies for damages actions involving "abuse" (for example, physical or financial abuse, neglect, abandonment, isolation, abduction) of "elders" (sixty-five years and over) and "dependent adults" (adults under sixty-five years with physical or mental limitations).[112]

Interested parties may face a financial dilemma when

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105. *Id*. §§ 2253(a), 2254(a).

106. *Id*. § 2253(g).

107. *Id*. § 2252(b)(3).

108. *Id*. § 2252(c).

109. *Supra* nn. 13–102 and accompanying text.

110. *See* Margaret Graham Tebo, *Elder Law Grows Up: It Takes a Lot More Than a Little Estate Planning to Address the Increasingly Complex Legal Issues Facing Seniors*, 88 A.B.A. J. 42 (March 2002) (explaining that the approach of retirement age for the baby boomers and the increasing complexity of elder law has made elder law a fast-growing field).

111. Cal. Welfare & Insts. Code §§ 15600–15660 (West 2001).

112. *Id*. § 15657.

attempting to recover assets of an elderly relative under EADACPA because they may have to bear the expenses associated with recovery, but might not share in the spoils. Under these circumstances, appointment of a conservator may be a good approach. Establishment of a conservatorship may allow use of the elder's remaining assets to recover his or her assets lost to the scheme.[113] It may also allow compensation of the interested party in the form of conservator's fees for recovering the assets and attorney's fees for the legal work involved.[114]

EADACPA authorizes courts experienced in handling the affairs of older adults, namely probate courts to hear elder-abuse cases.[115] The probate court is given concurrent jurisdiction over any civil matter raised in an elder-abuse claim if a conservatorship proceeding was filed before the abuse claim.[116] The probate court has the authority to award compensatory and punitive damages as well as enhanced remedies under EADACPA.[117] Persons found guilty of elder abuse under EADACPA may be held liable for the plaintiff's reasonable attorney's fees and costs, including reasonable fees for the conservator's services in the matter.[118]

In addition, a successful petitioner in probate court may obtain double damages against an elder abuser for wrongfully taking property belonging to the conservatorship estate (a remedy not available in regular civil court).[119] The probate court also offers special, expedited-discovery provisions applicable to probate proceedings.[120]

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113. *Id*.

114. *Id*. § 15657(a).

115. *Id*. § 15657.3(a).

116. *Id*.

117. *Id*. §§ 15657, 15657.03(o).

118. *Id*. § 15657(a); *see* ARA *Living Ctrs.-P., Inc. v. Super. Ct. of San Mateo County*, 23 Cal. Rptr. 2d 224, 228–229 (Cal. App. 1st Dist. 1993) (concerning the retroactivity of EADACPA's 1991 amendments regarding pain and suffering damages and recoverable attorney fees).

119. Cal. Prob. Code § 2619.5

120. *See id*. §§ 8870–8873 (offering interested persons the ability to issue interrogatories, examine witnesses, and require testimony under oath). One potential drawback to litigating an elder-abuse case in probate court is that there is no right to a jury trial, as there would be on the civil side of California's courts. *Id*. § 825.

III. LAWYER LIABILITY IN CONSERVATORSHIP PROCEEDINGS

This Section deals with legal malpractice and other tort liability of lawyers in conservatorship/guardianship proceedings on a national level, with an emphasis on the rules governing potential malpractice liability to the conservatee or ward.

A. Introduction

The first part of this Article examined the myriad of legal issues facing the conservator/guardian and his or her counsel in the establishment, maintenance, and management of an adult-protective proceeding in California. These are, no doubt, similar to the issues faced in protective proceedings in states throughout the country. The reader also is aware of the high fiduciary standards imposed on conservators and guardians in all jurisdictions.[121] When those standards are, for whatever reason — mistake, inadvertence, or greed — breached, and the fiduciary is unable to respond in damages (or "surcharge") to the injured ward or conservatee, the next likely target is the fiduciary's attorney.[122] Yet, the attorney typically has no direct attorney-client relationship with the ward/conservatee. How have the courts nationally dealt with direct causes of action asserted by a ward or conservatee against the lawyer for the fiduciary? The next section of this Article will examine this question, which typically arises in the situation in which the ward or conservatee has made a malpractice claim directly against the attorney.

B. Elements of a Malpractice Claim

Most jurisdictions treat claims for legal malpractice in a manner similar to other claims based on negligence by a professional.[123] Thus, the key elements of a cause of action for legal malpractice may be stated as follows:

1. the attorney is under a duty to use such skill, prudence, and diligence as other members of the profession commonly possess and exercise;[124]

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121. *See* 39 Am. Jur. 2d *Guardian and Ward* § 116 (1999) (stating that guardians and conservators act as fiduciaries and are held to the standards of a trustee).

122. *See infra* pt. III.D. (discussing how courts have handled such situations).

123. Ronald E. Mallen & Jeffrey M. Smith, *Legal Malpractice* vol. 1, § 8.13, 833 (5th ed., West 2000).

124. *Id*. at 843.

2. the attorney has breached that duty by failing to perform with the requisite degree of skill;[125]

3. there is a proximate causal connection between the attorney's negligence and an injury;[126] and

4. causing damage to the "client."[127]

C. The Issue of Standing or "Privity of Contract"[128]

In general, "an attorney may only be held liable in malpractice to his or her 'client.'"[129] Obviously, the conservator could maintain such an action. However, the conservatee has had no prior relationship with the attorney and clearly cannot claim to be the attorney's client.

"The so-called doctrine of 'privity,' requiring the showing of a contractual attorney-client relationship between plaintiff and defendant [before malpractice liability will lie], has a long and storied history."[130] However, the doctrine has been successfully challenged in estate-planning cases[131] and, to a lesser degree, in estate-and-trust-administration cases,[132] both of which have implications in the guardianship-and-conservatorship context. Although courts across the country are not unanimous, "a majority of the states that have considered the issue follow California in holding that the beneficiaries of a defectively drafted will or trust should be" allowed to maintain a malpractice cause of action against the estate-planning attorney.[133] The attorney's estate-planning client has died and by definition cannot maintain an action for malpractice. There is no one to enforce the intent of the deceased client or to promote attorney competence unless disappointed beneficiaries are allowed to sue estate-planning

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125. *Id.*

126. *Id.* at 844.

127. *Id.*; *see Budd v. Nixen*, 491 P.2d 433, 438 (Cal. 1971) (holding that a legal malpractice claim does not arise until the client suffers damage); *Ishmael v. Millington*, 50 Cal. Rptr. 592 (Cal. App. 3d Dist. 1966) (stating that a legal malpractice claim is comprised of duty, breach, proximate cause, and damage, just like other negligence actions).

128. The following discussion is based in part on Bruce S. Ross, *How to Do Right by Not Doing Wrong: Legal Malpractice and Ethical Considerations in Estate Planning and Administration*, in *The Twenty-Eighth Annual Philip E. Heckerling Institute on Estate Planning* 8-1 to 8-67 (John T. Gaubatz ed., Matthew Bender 1994).

129. *Id.* at 8-6.

130. *Id.*

131. *Id.* at 8-8 to 8-9.

132. *Id.* at 8-36.

133. *Id.* at 8-7.

attorneys for depriving them of benefits that they otherwise would have received but for the attorney's negligence.

The landmark case in this area is *Biakanja v. Irving*.[134] The California Supreme Court in *Biakanja* found a duty running to the client's intended beneficiaries after applying the following factors:

> the extent to which the transaction was intended to affect the plaintiff, the foreseeability of harm to him, the degree of certainty that the plaintiff suffered injury, the closeness of the connection between the defendant's conduct and the injury suffered, the moral blame attached to the defendant's conduct, and the policy of preventing future harm.[135]

The estate planning attorney's lack of contractual "privity" with the drafting attorney is thus generally no defense in the estate planning scenario in the majority of jurisdictions that follow *Biakanja*.[136]

In the estate-and-trust-administration context, however, a majority of the courts that have considered the privity issue have reached the opposite conclusion — that lack of privity is a valid defense to a malpractice action brought by a trust or estate beneficiary against the executor's or trustee's attorney.[137] Even in states "that have abolished the 'privity' doctrine as a defense by the estate-planning attorney to an action for malpractice, courts still apply the 'privity' rule to bar a malpractice action by a disgruntled trust or estate beneficiary" during administration of the trust or estate.[138] Generally, the cases do not consider the *Biakanja* factors, but, rather, deem the absence of privity

134. 320 P.2d 16 (Cal. 1958) (in bank).

135. *Biakanja*, 320 P.2d at 19.

136. *Licata v. Spector*, 225 A.2d 28, 31 (Conn. Super. 1966) (using the *Biakanja* factors to allow a third-party beneficiary to bring a malpractice claim); *McAbee v. Edwards*, 340 S.2d 1167, 1169 (Fla. Dist. App. 4th 1976) (citing *Biakanja* to hold that a complaint stated a cause of action for a third-party beneficiary against an attorney); *Ogle v. Fuiten*, 466 N.E.2d 224, 226 (Ill. 1984) (stating that privity is not a requirement for a third-party suit against an attorney); *Succession of Killingsworth*, 292 S.2d 536, 542 (La. 1973) (rejecting lack of privity as a valid defense); *Guy v. Liederbach*, 459 A.2d 744, 752 (Pa. 1983) (maintaining a requirement of privity to sue an attorney in tort, but allowing third-party beneficiaries to recover under a contract theory); *Auric v. Continental Cas. Co.*, 331 N.W.2d 325, 327 (Wis. 1983) (allowing a third-party beneficiary to recover against an attorney despite not having privity with the attorney).

137. Ross, *supra* n. 128, at 8-34.

138. *Id*. at 8-33 to 8-34.

dispositive on the issue of duty to the beneficiaries.[139] These cases represent the courts' predilection toward allowing the beneficiary to sue only the estate representative or trustee via a surcharge proceeding.[140]

If held liable to the beneficiary in the administration context, the estate representative or trustee may then seek exoneration in a malpractice action against his or her lawyer.[141]

> Of course, the executor or trustee who finds himself or herself surcharged as a result of conduct taken in reliance on counsel's advice may be expected to look to the attorney for recompense or indemnification, and privity will not be an issue since there is a direct attorney-client relationship.[142]

In *Goldberg v. Frye*,[143] the California Court of Appeal reemphasized the immunity of the personal representative's attorney from a malpractice claim by the estate's beneficiaries during administration, noting that the attorney's duty to exercise reasonable care is owed to only one party, the estate's fiduciary:

> Particularly in the case of services rendered for the fiduciary of a decedent's estate, we would apprehend great danger in finding stray duties in favor of beneficiaries. Typically in estate administration conflicting interests vie for recognition. The very purpose of the fiduciary is to serve the interests of the estate, not to promote the objectives of one group of legatees over the interests of conflicting claimants. The fiduciary's attorney, as his legal advisor, is faced with the same task of disposition of conflicts. It is of course the purpose and obligation of both the fiduciary and his attorney to serve the estate.

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139. *Id*. at 8-34.

140. *E.g. Est. of Lagios*, 173 Cal. Rptr. 506, 508 (Cal. App. 1st Dist. 1981) (stating that the representative is exclusively liable for estate losses resulting from negligence); *Baldock v. Green*, 167 Cal. Rptr. 157, 162 (Cal. App. 5th Dist. 1980) (finding that imposing liability on an attorney would be unsound when a cause exists against others); *In the Matter of the Estate of the Sol Brooks Irrevocable Trust No. 1*, 596 P.2d 1220, 1222 (Col. App. 2d Div. 1979) (finding that an attorney owed no duty and therefore could not be liable to a beneficiary); *Kramer v. Belfi*, 482 N.Y.S.2d 898, 900 (N.Y. App. 2d Dept. 1984) (finding attorneys could not be liable to beneficiaries absent fraud, collusion, or malice); *In the Matter of the Est. of Newhoff*, 435 N.Y.S.2d 632, 639 (Surrogate's Ct. N.Y. 1980) (stating that a beneficiary's remedy is to seek redress from a fiduciary who may then seek exoneration in malpractice against a lawyer), *aff'd*, 486 N.Y.S.2d 956 (N.Y. App. 2d Dept. 1985)

141. Ross, *supra* n. 128, at 8-34.

142. *Id*.

143. 266 Cal. Rptr. 483 (Cal. App. 4th Dist. 1990).

> In such capacity they are obligated to communicate with, and to arbitrate conflicting claims among, those interested in the estate. While the fiduciary in the performance of this service may be exposed to the potential of malpractice (and hence is subject to surcharge when his administration is completed), the attorney by definition represents only one party: the fiduciary. It would be very dangerous to conclude that the attorney, through performance of his service to the administrator and by way of communication to estate beneficiaries, subjects himself to claims of negligence from the beneficiaries. The beneficiaries are entitled to evenhanded and fair administration by the fiduciary. They are not owed a duty directly by the fiduciary's attorney.[144]

The minority rule, conversely, is that when counsel for the judiciary is not in a contractual relationship with the estate-and-trust beneficiaries, this lack of privity is not a defense to a claim of legal malpractice brought by the beneficiaries against counsel for the fiduciary.[145] The beneficiaries may sue the fiduciary's counsel directly, and the attorney may not claim lack of contractual privity as a defense.

One jurisdiction that has followed the minority rule, however, has not applied the rule consistently. In Ohio, lack of privity was no defense for an attorney for an executor of an estate against the estate's beneficiaries, even when the lack-of-privity defense was available for an attorney in a prior estate-planning case.[146] In *Elam v. Hyatt Legal Services*,[147] the beneficiaries of an estate brought a legal malpractice lawsuit against the estate's attorney, whom they claimed lost their inheritance through negligence. At trial, the beneficiaries alleged that the attorney

> had recorded a certificate of title to certain real estate in the name of the deceased testator husband alone, despite the fact that the decedent's will had bequeathed the husband only a life estate in the property with the remainder devised to the plaintiff beneficiaries.[148]

After the appellate court upheld the attorney's lack-of-privity defense, the beneficiaries appealed to the Supreme Court of Ohio.[149]

The Supreme Court of Ohio held in *Elam* that the estate

144. *Id.* at 489–490 (citations omitted).
145. Ross, *supra* n. 128, at 8-36.
146. *Id.*
147. 541 N.E.2d 616 (Ohio 1989).
148. *Ross*, *supra* n. 128, at 8–37.
149. *Id.*

beneficiaries' interests were vested and that they could therefore maintain their malpractice action.[150]

> A beneficiary whose interest in an estate is vested is in privity with the fiduciary of the estate, and where such privity exists the attorney for the fiduciary is not immune from liability to the vested beneficiary for damages arising from the attorney's negligence.[151]

Having reviewed privity cases in the context of estate planning and estate or trust administration, this Article now turns to the approaches courts have taken to the privity issue in the guardianship or conservatorship situation.

D. Attorney Liability to a Nonclient in Conservatorship or Guardianship Cases

1. Malpractice Liability

Fickett v. Superior Court,[152] the seminal case in the area of attorney liability to a conservatee or ward, stands for the proposition that in an appropriate case the conservatee or ward may maintain a malpractice action directly against the fiduciary's lawyer.[153]

In *Fickett*, the Arizona Court of Appeals faced a situation in

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150. *Elam*, 541 N.E.2d at 618.

151. *Id.*; *see In re Est. of Corbin*, 391 S.2d 731, 732 (Fla. App. 3d Dist. 1980) (stating that personal representatives cannot use the estate for personal gain); *Hermann v. Frey*, 537 N.E.2d 529, 531 (Ind. App. 4th Dist. 1989) (decedent's surviving spouse, the sole heir at law, had standing to pursue a legal malpractice action against the attorney handling the estate where, as personal representative, she had retained the attorney, and was entitled to rely on the attorney's advice with respect to her personal cause of action for wrongful death); *Dean v. Conn*, 419 S.2d 148, 154 (Miss. 1982) (upholding a jury verdict because, whether the estate's attorney who had allegedly failed to ascertain whether the decedent's heirs could be liable in negligence to the heir, posed an issue of fact); *Charleson v. Hardesty*, 839 P.2d 1303, 1306–1308 (Nev. 1992) (holding that a question of fact was presented as to whether a lawyer breached the duty of care owed to beneficiaries, where he allegedly asked the trustee to supply an accounting but never received one and never informed the beneficiary about the lack of an accounting before the trustee filed for bankruptcy with no assets remaining in the trust); *Jenkins v. AVA Lineberry Wheeler*, 316 S.E.2d 354, 351–358 (N.C. App. 1984) (holding that the daughter, sole heir of the deceased mother, had standing to bring an action against the attorney representing the mother's estate, where the daughter alleged that the attorney had failed to advise estate representatives to list a wrongful death action as an asset of the mother's estate, had improperly continued to represent a conflicting interest, and had willfully refused to proceed with a wrongful death action); *In the Est. of Bosico*, 412 A.2d 505, 507 (Pa. 1980) (stating that fiduciaries have a duty of utmost fairness to their beneficiaries).

152. 558 P.2d 988 (Ariz. App. 2d Div. 1976).

153. *Id.* at 990.

which a guardian had embarked on a scheme to misappropriate guardianship funds.[154] The scheme had been discovered, and the guardian had been surcharged $378,789.62, but presumably had spent or lost the misappropriated funds and could not satisfy the judgment.[155]

The plaintiff-ward then turned her attention to the guardian's attorney to recoup her losses.[156] After the ward filed suit, the attorney filed a motion for summary judgment contending that, as a matter of law, the attorney was not liable to the ward because she was not his client.[157]

The trial court denied the attorney's motion, and the attorney appealed.[158] The appellate court affirmed the trial court's decision.[159] The appellate court began its analysis by noting as follows:

> The general rule for many years has been that an attorney could not be liable to one other than his client in an action arising out of his professional duties, in the absence of fraud or collusion. In denying liability of the attorney to one not in privity of contract for the consequences of professional negligence, the courts have relied principally on two arguments: (1) That to allow such liability would deprive the parties to the contract of control of their own agreement; and (2) that a duty to the general public would impose a huge potential burden of liability on the contracting parties.[160]

The court then held that the better approach to determine whether an attorney owes a duty of care to a ward not in privity of contract with the attorney is to balance various factors, including

> the extent to which the transaction was intended to affect the plaintiff, the foreseeability of harm to him, the degree of certainty that the plaintiff suffered injury, the closeness of the connection between the defendant's conduct and the injuries suffered, the moral blame attached to the defendant's conduct, and the policy of preventing future harm.[161]

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154. *Id*. at 989.
155. *Id*. at 989, n. 1.
156. *Id*. at 989.
157. *Id*.
158. *Id*.
159. *Id*. at 992.
160. *Id*. (citation omitted).
161. *Id*. at 990 (citing *Biakanja*, 320 P.2d 16 (Cal. 1958) among other cases) (citations

Applying the *Biakanja* factors, the *Fickett* court reasoned that the attorney-client relationship between an attorney and guardian is intended primarily to benefit the ward.[162] The court also reasoned that the foreseeability of harm to the ward in the event of attorney malpractice (if the attorney knew or should have known of the misappropriation) was clear.[163] The court then held that the attorney "failed to establish the absence of a legal relationship and concomitant duty to the ward," allowing the ward to bring a cause of action directly against the attorney.[164]

It is less than clear what the *Fickett* court meant in this holding. At least one court has interpreted *Fickett* to mean that the attorney and ward had an attorney-client relationship.[165] In *Schwartz v. Cortelloni*,[166] the Illinois Supreme Court cited *Fickett* for the proposition that, "when an attorney undertakes to represent the guardian, that attorney also assumes an attorney-client relationship with the ward."[167]

It is probably incorrect to read *Fickett* so broadly. The cases on which *Fickett* relied do not hold that an attorney-client relationship exists between the attorney and the beneficiaries, only that the attorney owes a duty of care to intended beneficiaries.[168] The holding in *Fickett* does not depend on the existence of an attorney-client relationship, only a duty of care.[169] Further, *Fickett* has been interpreted by the Arizona Supreme Court as holding only that a duty of care runs from the attorney to the nonclient ward.[170]

Fickett's holding that the guardian's attorney owes a basic tort law duty of care to the ward has not been widely accepted. A Minnesota appellate court expressly declined to follow *Fickett* in *Great American Insurance Company v. Perry*,[171] in which the court held that an attorney for a guardian owed no duty to the ward.[172] In *Great American*, as in *Fickett*, the guardian had misappropri-

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omitted).

162. *Id*.
163. *Id*.
164. *Id*. at 991.
165. *Schwartz v. Cortelloni*, 685 N.E.2d 871, 874 (Ill. 1997).
166. 685 N.E.2d 871 (Ill. 1997).
167. *Schwartz*, 685 N.E.2d at 874.
168. *E.g. Biakanja*, 320 P.2d at 19.
169. *Ficket*, 558 P.2d at 990.
170. *Napier v. Bertram*, 954 P.2d 1389, 1394 (Ariz. 1988).
171. 1994 Minn. LEXIS 276 (Minn. App. Mar. 23, 1994).
172. *Id*. at *8.

ated guardianship funds.[173] The guardianship bond was surcharged its face amount of $700,000, and the bonding company bypassed the guardian and brought a legal-malpractice claim in subrogation against the guardian's attorney.[174]

The court in *Great American* began its analysis by noting the general rule that "[a]n essential element of a legal malpractice action is the existence of an attorney-client relationship."[175] The court held that the bonding company had no greater rights in its subrogation claim than the ward would have in a malpractice action against the attorney and that, because the ward did not have an attorney-client relationship with the defendant attorney, the bonding company could not maintain its malpractice action on that basis.[176]

The court then recognized the possibility of an exception to the general rule and applied the *Biakanja* factors to determine whether the attorney owed a duty of care to the ward.[177] The court came to the opposite conclusion from the *Fickett* court. The court in *Great American* held that the ward was not the primary intended beneficiary of the attorney-client relationship between the attorney and the guardian; rather, the guardian was.[178] "The ward was only an indirect beneficiary."[179] The court further stated that the foreseeability of harm of negligent conduct was minimal because the attorney had already been found non-negligent in the guardian's action against him.[180] The court noted that there was no harm to the ward due to the bond payout.[181] Finally, the court expressly declined to follow *Fickett* because "the *Fickett* rule requires an attorney to protect the interests of someone other than the attorney's client, conceivably at the expense of the client's interests."[182]

The *Great American* court rather cavalierly ignored the fact that the guardian's fiduciary duties ran solely to the ward and that the guardian was required to act only in the ward's best interests, considerations surely suggesting a more "direct" than

173. *Id*. at **2–4.
174. *Id*. at **3–4.
175. *Id*. at *4.
176. *Id*. at *5.
177. *Id*. at *6.
178. *Id*.
179. *Id*. at *5.
180. *Id*. at *6.
181. *Id*.
182. *Id*. at *7.

"indirect" relationship between the ward and the guardian's attorney.[183] This "direct" relationship was discussed more fully in *In the Matter of the Disciplinary Proceeding Against William H. Fraser*.[184] There, the Supreme Court of Washington declined to discipline an attorney who had refused to withdraw as a guardian's counsel even though the evidence suggested that the guardian was more interested in receiving money from the guardianship estate for herself than in preserving it for the benefit of the ward.[185] In finding a duty of care running from the attorney to the ward, the court stated, "'the real object and purpose of a guardianship is to preserve and conserve the ward's property for [the ward's] use, as distinguished from the benefit of others.'"[186]

In a very recent decision, an intermediate appellate court in Washington found a duty of care owed directly to the ward by the attorney for the ward's guardian.[187] In *In re the Guardianship of Karan*,[188] the lawyer for the guardian obtained the guardian's appointment but, in violation of the state's law, did not craft the order to require either that a bond be posted or that the guardianship funds be placed in a blocked account.[189] After the guardian, in breach of her fiduciary duty, depleted the trust funds, the successor guardian obtained a judgment against the predecessor guardian, but was unable to recover thereon.[190] The successor guardian then sued the lawyer for malpractice.[191] Utilizing the multi-factor test of *Trask v. Butler*,[192] the court found that the lawyer for the guardian in this case owed a direct duty of care to the ward and that the successor guardian therefore had standing to sue the lawyer for legal malpractice on behalf of the

183. *Id*. at *5.

184. 523 P.2d 921 (Wash. 1974), *overruled*, *In re Disciplinary Proc. Against Boelter*, 985 P.2d 328 (Wash. 1999).

185. *Fraser*, 523 P.2d at 928; *see Wolf v. Mitchell, Silberberg & Knupp*, 90 Cal. Rptr. 2d 792, 799 (Cal. App. 2d Dist. 1999), *rev. denied*, 2000 Cal. LEXIS 2096 (Cal. Mar. 22, 2000) (reversing summary judgment for the defendant-attorney because the third party only had to show that he was the real party in interest).

186. *Fraser*, 523 P.2d at 928 (quoting *In re Michelson*, 111 P.2d 1011, 1015 (Wash. 1941)).

187. *In re the Guardianship of Karan*, 38 P.3d 396, 401 (Wash. App. 3d Div. 2002).

188. 38 P.3d 396 (Wash. App. 3d Div. 2002).

189. *Id*. at 397–398.

190. *Id*. at 398.

191. *Id*.

192. 872 P.2d 1080 (Wash. 1994).

ward.[193] Refusing to lay down a bright-line test, the court nevertheless found: "(1) a legally incompetent infant ward, (2) a non-adversarial relationship, and (3) legal services solely consisting of setting up the guardianship."[194] The court observed, "the legitimate interests of the guardian here are inseparable from those of the ward."[195] The court concluded:

> The profession will not be unduly burdened by finding a duty in this case, because the applicable law mandates either a bond or a blocked account. The obligation to protect the interests of wards in circumstances such as this does not put lawyers in an ethical bind. To require them to inform a would-be guardian that Washington statutes mandate either a bond or blocked account is not a burden on the profession.[196]

It remains to be seen whether *Fickett* and its progeny will become more widely accepted. Cases involving conservatorship and guardianship appear to be more factually analogous to trust-and-estate-administration cases (in which the absence of privity is a bar to malpractice) than to estate-planning cases (in which the opposite is true). One reason supporting the privity rule in administration cases also applies in conservatorship and guardianship proceedings. The conservator or guardian is available as a potential plaintiff to encourage attorney competence and prevent malpractice just as the trustee or personal representative is available as a potential plaintiff in typical trust-and-estate-administration cases (as opposed to estate-planning cases, in which the client is not available to bring a malpractice action). Arguably, therefore, *Fickett* is only an aberration and its application should be limited.

On the other hand, one reason for requiring privity and denying a duty from the attorney to beneficiaries in the trust-and-estate-administration scenario is that there are typically multiple beneficiaries with competing interests, a situation not present in the usual guardianship or conservatorship case. There is typically only one guardian or ward in each protective proceeding. Thus, the attorney would not face the prospect of duties running to parties with conflicting interests. The attorney would owe the ward or conservatee one duty of care, which, under most

193. *Karan*, 38 P.3d at 400–401.
194. *Id*. at 400.
195. *Id*. at 401.
196. *Id*.

circumstances would not conflict with the only other duty owed, the duty to the conservator or guardian.

Nevertheless, if *Fickett* is to become more widely accepted, the privity bar in trust-and-estate-administration cases probably will have to be cut away just as it has been in the estate-planning cases like *Biakanja*.[197] One could certainly argue that the privity rule should be abolished. If an attorney's negligence harms a foreseeable plaintiff (the trust-and-estate beneficiary), why should the attorney be immune from all liability, simply because the fiduciary is available to bear the entire brunt of the beneficiary's action for damages in the first instance? It seems more efficient to allow the plaintiff to sue responsible parties in one lawsuit, rather than forcing the fiduciary to defend one lawsuit by the beneficiary and then initiate a second lawsuit against his or her attorney for malpractice to recoup the losses for which the attorney was responsible.[198] Further, if the estate-planning attorney owes a duty of care to multiple beneficiaries with potentially divergent interests in the estate-planning context, why should the estate or trust administration attorney not owe a duty to the same beneficiaries during administration?

In any event, given the uncertain state of the law, a conservator's or guardian's attorney must be aware of the possibility of malpractice liability to the conservatee or ward. This possibility arises most frequently, as we have seen, in cases involving misappropriation by the conservator or guardian.

The *Restatement (Third) of the Law Governing Lawyers* addresses the misappropriation situation. Section 51, Subsection (4) states that a lawyer owes a duty to use care:

> (4) to a nonclient when and to the extent that:
>
> (a) the lawyer's client is a trustee, guardian, executor, or fiduciary acting primarily to perform similar functions for the nonclient;
>
> (b) the lawyer knows that appropriate action by the lawyer is necessary with respect to a matter within the scope of the representation to prevent or rectify the breach of a

197. *See* A. Frank Johns, *Fickett's Thicket: The Lawyer's Expanding Fiduciary and Ethical Boundaries When Serving Older Americans of Moderate Wealth*, 32 Wake Forest L. Rev. 445, 479 (1997) (concluding that duties running from a guardian's or conservator's attorney to the ward or conservatee will expand nationally under a balancing of factors test).

198. *See Restatement (Third) of the Law Governing Lawyers* § 51(3) (2000) (outlining an approach resembling the *Biakanja* factors and without mentioning "privity").

> fiduciary duty owed by the client to the nonclient, where (i) the breach is a crime or fraud or (ii) the lawyer has assisted or is assisting the breach;
> (c) the nonclient is not reasonably able to protect its rights; and
> (d) such a duty would not significantly impair the performance of the lawyer's obligations to the client.[199]

Subsection (4) imposes a duty in the specific situation in which a conservator's or guardian's lawyer "knows" of an actual or imminent breach of fiduciary duty by his or her client.[200] "Knows" is defined as a situation in which the attorney "has information from which a person of reasonable intelligence . . . would infer that the fact in question exists."[201] The breach must be a crime or a fraud, or, alternatively, the lawyer must have (innocently) assisted in the breach for a duty to be found.[202]

Subsection (4) requires further that the lawyer "know" that action on his or her part in fulfilling his or her duty to the ward or conservatee is necessary to prevent or rectify the breach.[203]

Finally, and most importantly from the lawyer's perspective, taking the action fulfilling the lawyer's duty to the ward or conservatee must not significantly impair the lawyer's obligation to his or her client, the fiduciary.[204] A complete discussion of the ethical issues involved is beyond the scope of this Article. Briefly, the attorney must not disclose client confidences, a situation that would violate ABA Model Rule of Professional Conduct 1.6.[205] The attorney must also remember the prohibition of representing conflicting interests in Model Rule 1.7 if he or she is in a jurisdiction in which an actual attorney-client relationship is recognized between the attorney and the ward or conservatee.[206]

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199. *Id*. § 51(4).
200. *Id*. § 51(4)(b).
201. *Id*. at § 51 cmt. h (quoting *Restatement Second of Torts*, § 12(1) (1965)).
202. *Id*.
203. *Id*. at § 51(4)(b).
204. *Id*. at § 51(4)(d).
205. ABA Model R. of Prof. Conduct 1.6 (2000). On February 5, 2002, the ABA House of Delegates, at its Midyear Meeting in Philadelphia, Pennsylvania, completed its review of the recommendations of the ABA Commission on Evaluation of the Rules of Professional Conduct (the ABA Ethics 2000 Commission), revising and amending the Model Rules. For a complete summary of the revisions, see *Report 401 as Passed by the House of Delegates February 5, 2002* <http://www.abanet.org/cpr/e2k-report_home.html> (Feb. 2002). Revised Model Rules 1.6 and 1.14 are reprinted at 31 Stetson L. Rev. 791, 856–866 (2002).
206. ABA Model R. Prof. Conduct 1.7.

2. Liability for Intentional Torts

Unfortunately, probate attorneys often have generated litigation by engaging in conduct that is more intentional than negligent. California has held, in the trust administration context, that beneficiaries may directly state a cause of action against the attorneys for the former trustees when it is alleged that the attorneys intentionally aided and abetted the trustees in the trustees' breach of their fiduciary duties.[207] In finding that a valid cause of action against the attorneys had been alleged, the court observed as follows:

> These allegations [of the complaint] demonstrate that [respondent attorneys] are accused of active participation in breaches of fiduciary duty by the former trustees. More than the simple rendering of legal advice to respondents' clients is alleged. More than mere knowledge of the breach of fiduciary duty are alleged. Active concealment, misrepresentations to the court, and self-dealing for personal financial gain are described. We find that this is sufficient to state a cause of action for breach of fiduciary duty . . . .[208]

In a footnote, the court distinguished *Goldberg v. Frye* as follows:

> The complaint in *Goldberg* alleged only one cause of action for negligence against the estate's attorney. It did not concern active, knowing participation in breaches of fiduciary duty by the administrator. In this case, appellants have not attempted to state a cause of action for negligence against respondents.[209]

The rationale in *Pierce v. Lyman* is easily applied in the case of guardianship or conservatorship proceedings as well. Thus, even in states in which privity may act as a bar to malpractice

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207. *Pierce v. Lyman*, 3 Cal. Rptr. 2d 236 (Cal. App. 2d Dist. 1991), *superseded by statute on other grounds as stated in Pavicich v. Santucci*, 102 Cal. Rptr. 125 (Cal. App. 6th Dist. 2000).

208. *Pierce v. Lyman*, 3 Cal. Rptr. 2d at 243.

209. *Id.* at 243–244 n. 8; *see Weingarten v. Warren*, 753 F. Supp. 491, 496 (S.D.N.Y. 1990) (applying New York law, the federal court held that trust remaindermen stated a cause of action against the trustee's attorney individually for breach of fiduciary duty and against the attorney individually and as executor of trustee's estate for alleged conversion of trust assets, while at the same time holding that the beneficiaries could not assert a cause of action in malpractice against the attorney). *Pierce* has since been followed in *City of Atascadero v. Merrill Lynch, Pierce, Fenner & Smith, Inc.*, 80 Cal. Rptr. 2d 329 (Cal. App. 1st Dist. 1998), and in *Wolf v. Mitchell, Silberberg & Knupp*, 90 Cal. Rptr. 2d 792 (Cal. App. 2d Dist. 1999).

claims by a ward or guardian, it will probably not prevent a cause of action alleging intentional misconduct.

IV. CONCLUSION

Attorney liability in the conservatorship or guardianship area, and in the broader context of estate planning and administration, is still developing. Lawyers should learn the lessons taught by *Fickett*, *In re Fraser*, and *Karan*, that the privity defense may not be available in a direct cause of action brought by a conservatee or ward. Attorneys must therefore remain informed about the state of the law in the jurisdictions in which they practice and be prepared to conform their conduct to meet the standard of care owed not only to their client, the conservator or guardian, but also to the conservatee or ward for whose benefit the protective proceedings are conducted.