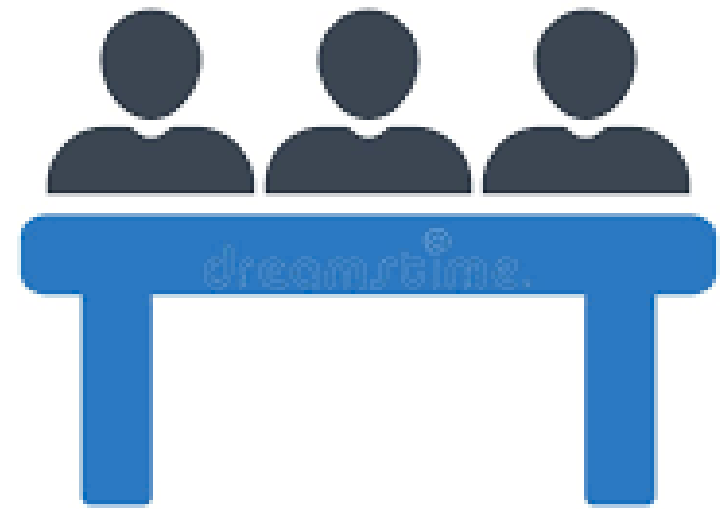


Who's On First?

What you need to know
when working with
incapacitated clients as
Court Appointed Counsel
or *Guardian Ad Litem*



MEET OUR PANEL MEMBERS



Presented by: Mark Schmuck

Research Attorney – Probate at Contra Costa Superior Court

- Mr. Schmuck is the Probate Research Attorney for the Contra Costa County Superior Court, where he has served since 2021.
- Prior to joining the court, Mr. Schmuck spent 16 years as a litigator focusing on elder law, trust and probate, **financial elder abuse**, conservatorships, disputed property claims, and related appeals. He also served on the panel as court-appointed counsel for conservatees in the Santa Clara County Superior Court.
- Mark received his JD from the Santa Clara University School of Law in 1999, and his BA in Political Science from the University of California at Berkeley, where he was a member of the University of California Marching Band.





About the presenter

- Lara Heisler has been practicing law for over 20 years and her practice is focused on conservatorships and guardianships. She grew up in Contra Costa County and is passionate about serving the community where she grew up and is raising her children.
- She lives in Walnut Creek with her husband, daughter, and son. Lara is not only active in the local legal community, but she is committed to involvement in her children's school, assisting with field trips and the annual fundraising gala.
- Bar Admissions:
- California State Bar
- New York State Bar (Inactive)
- Heisler Rosenfeld Zaragoza LLP is a family-oriented boutique law firm located in Contra Costa County and serving clients throughout California

Melissa Schmitt- Partner at the Schmitt Law Firm, APC

Melissa offers high-quality estate planning services to families in the Bay Area, California. She worked at a top-rated boutique trust and estate firm since the time she was licensed to practice in California in 2016 through July 2024.

- Ms. Schmitt understands that discussing wills and estate planning can be overwhelming and uncomfortable for most people, and takes a comprehensive, highly engaged approach to each individual situation. She assists her clients with estate planning, probate and trust litigation, health care directives, contested and non-contested conservatorships, guardianships, elder abuse litigation, corporate disputes, fiduciary representations, fiduciary surcharge actions and accounting.

A skilled and competent professional, Ms. Schmitt's litigation skills have been hugely endorsed by her peers, adversaries and former clients. She frequently accepts appointments as a counsel in conservatorship and guardianship proceedings at the Contra Costa County and Santa Clara County courts. As a board member of the Santa Clara University School of Law – La Raza Law Student Association, she also provided school students with an awareness of certain concepts and laws, encouraging them to pursue the legal profession.



AGENDA

- Overview of Applicable Laws
 - AB 1194
 - Probate Code §1471
 - Probate Code §1850
 - Probate Codes §1863
 - California Rules of Court Rule 7
 - Business & Professions Code §6068; Evidence Code §952
 - California Rules of Professional Conduct 1.1
- Applying the Law – Role of CAC
- Applying the Law – Role of GAL
- Hypothetical/Case Study Discussion





OVERVIEW OF CONSERVATORSHIP LAW

How it used to be when you were appointed to represent a proposed conservatee:



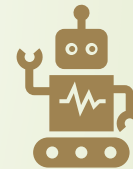
Balancing act between
“best interests” and
advocacy.



Advocacy was
generally not “zealous.”

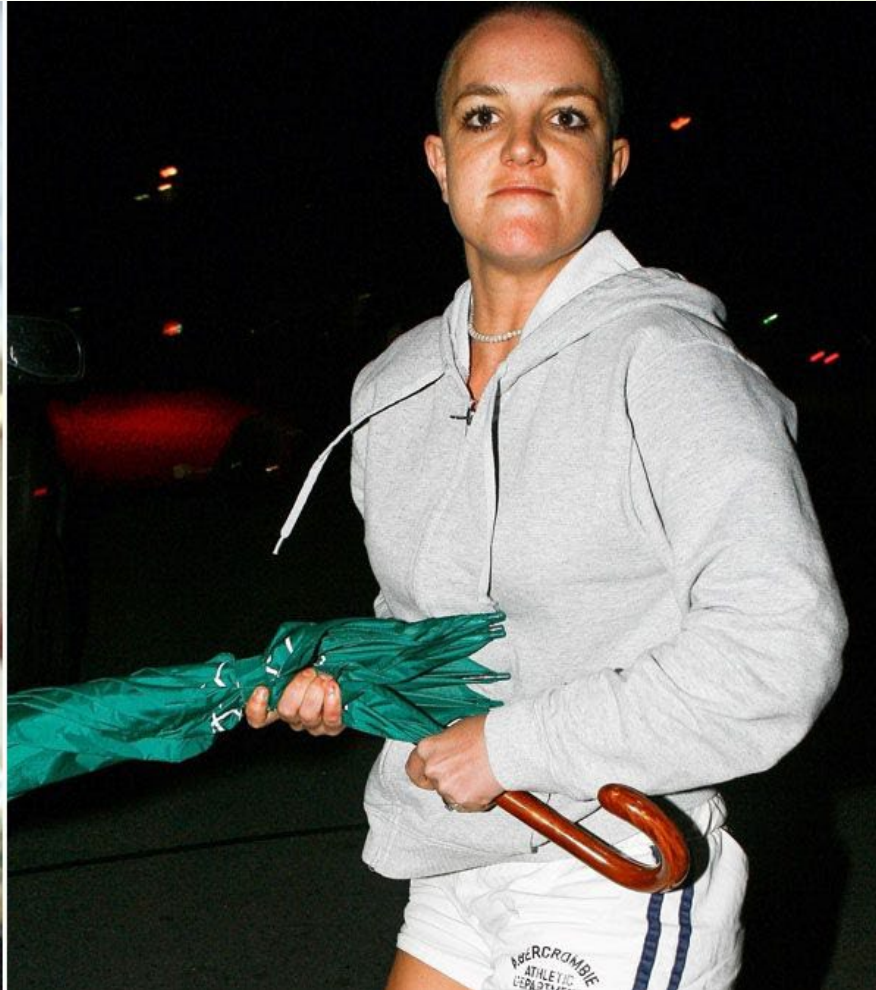
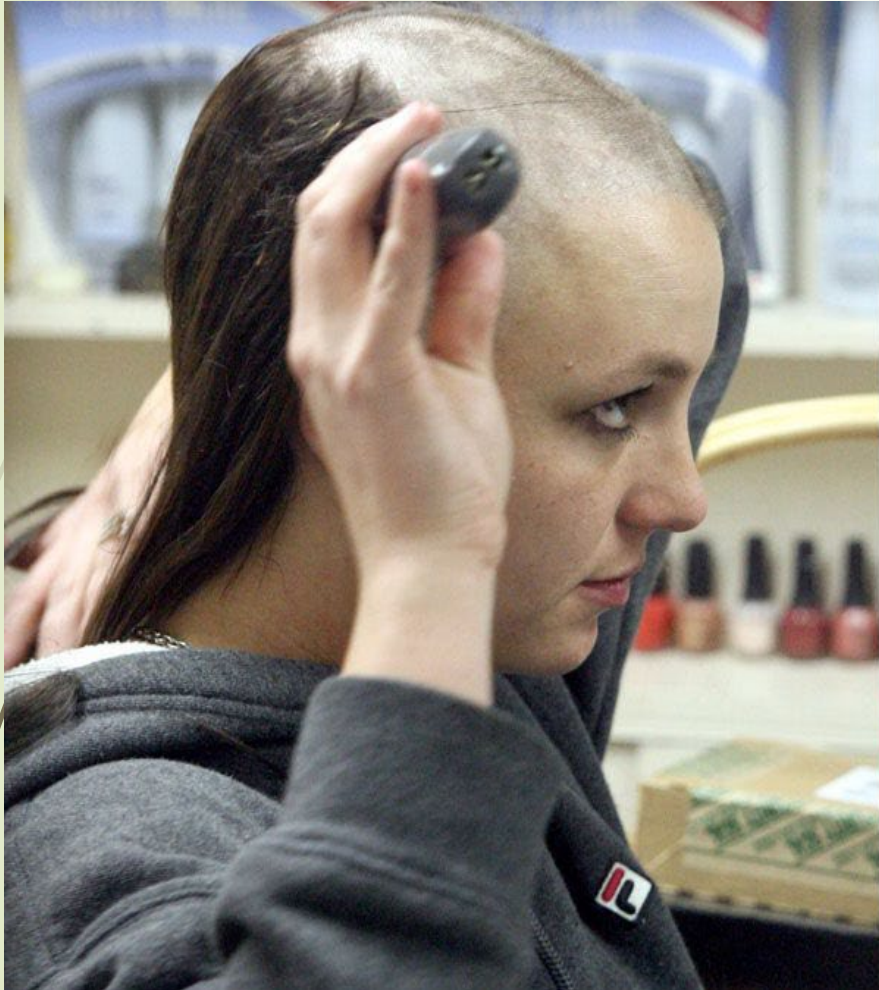


Winks and Nods to the
Court



What changed?

It's Britney, B* & \$%.



OVERVIEW OF AB 1194

- **What?**
- Broad changes to conservatorship and guardianship law.
- Changes to the California Business and Professions Code and the California Probate Code.
- In general, designed to empower conservatees to have more say in decisions being made about their lives and to increase scrutiny of private fiduciaries.
- Expands the duties of court investigators and the courts in overseeing conservatorships.
- Changes also involve the subject of terminating conservatorships or situations where the conservatee wishes to do so.
- Also, proposed conservatees and conservatees given more power to contest the establishment or maintenance of a conservatorship.





Overview of Relevant Changes for Court Appointed Counsel

AB 1194 includes amended laws that directly or indirectly affect court-appointed counsel's (CAC's) practice, including:

- **Probate Code section 1471** - clarifies that CAC shall act as **zealous advocates** representing the wishes of the client in conservatorship proceedings instead of representing the “best interests” of the client. Role of CAC is not akin to that of a guardian ad litem. Also amended to require a **conservatee** be **allowed to retain preferred counsel** even if that counsel is not on the court's list of court approved court-appointed attorneys.
- **Probate Code section 1850** - amended to now require that an **annual investigation** by the court investigator occur after the establishment of a conservatorship. Previously, reviews every two years were allowable.
- **Probate Code section 1863** - modified and added to the statutes governing the hearing process for **termination** of conservatorships.



Probate Code §1471

- **Section 1471** was changed to make clear the role of counsel appointed by the court to represent conservatees, proposed conservatees, and persons alleged to lack legal capacity.
- Statutory language stating counsel was to represent the “interests” of the person was removed. Additionally, the statute now states that the role of counsel is that of “**a zealous, independent advocate representing the wishes of their client**”
- The amendments also directs that the court **shall allow** representation by the preferred attorney of the person **unless the attorney cannot provide zealous advocacy or has a conflict of interest.**
- Before AB 1194, some California jurisdictions expected CAC to state both the proposed conservatee’s wishes and their best interests. There were some conflicting ethics opinions.

Probate Code section 1471 (cont'd)



Text of Probate Code section 1471
Effective: January 1, 2022

§ 1471. Mandatory appointment;
proceedings

(a) If a conservatee, proposed conservatee, or person alleged to lack legal capacity is unable to retain legal counsel and requests the appointment of counsel to assist in the particular matter, whether or not that person lacks or appears to lack legal capacity, *the court shall, at or before the time of the hearing, appoint an attorney ... in the following proceedings...*

Probate Code section 1471 (cont'd)

- A proceeding to establish ... transfer a conservatorship or to appoint a ... conservator.
- A proceeding to terminate the conservatorship.
- (3) A proceeding to remove the conservator.
- (4) A proceeding for a court order affecting the legal capacity of the conservatee.
- (5) A proceeding to obtain an order authorizing removal of a temporary conservatee from the temporary conservatee's place of residence.
- (continued...)



Probate Code section 1471 (cont'd)

(b) If a conservatee or proposed conservatee has not retained legal counsel and does not plan to retain legal counsel, whether or not that person lacks or appears to lack legal capacity, the court shall, at or before the time of the hearing, appoint the public defender or private counsel to represent the person in any proceeding listed in subdivision (a).

(c) In any proceeding to establish a limited conservatorship, if the proposed limited conservatee has not retained legal counsel and does not plan to retain legal counsel, the court shall immediately appoint the public defender or private counsel to represent the proposed limited conservatee.

The proposed limited conservatee shall pay the cost for that legal service if they are able. This subdivision applies irrespective of any medical or psychological inability to attend the hearing on the part of the proposed limited conservatee as allowed in Section 1825.

(continued...)

Probate Code section 1471 (cont'd)

- (d) If a ... person alleged to lack legal capacity expresses a preference for a particular attorney to represent them, the court shall allow representation by the preferred attorney, even if the attorney is not on the court's list of a court-appointed attorneys, and the attorney shall provide zealous representation as provided in subdivision (e). However, an attorney who cannot provide zealous advocacy or who has any conflict of interest with respect to the representation of the conservatee, proposed conservatee, or person alleged to lack legal capacity shall be disqualified.
- (e) The role of legal counsel of a conservatee, proposed conservatee, or a person alleged to lack legal capacity is that of a zealous, independent advocate representing the wishes of their client, consistent with the duties set forth in Section 6068 of the Business and Professions Code and the California Rules of Professional Conduct.
- (f) In an appeal or writ ... if a conservatee ... is not represented by legal counsel, the reviewing court shall appoint legal counsel to represent the conservatee ... before the court.



RULES APPLICABLE TO CAC BUT NOT NECESSARILY TO PROPOSED CONSERVATEE'S OR CONSERVATEE'S CHOSEN COUNSEL



Probate Code section 1456 –specifies the qualifications of, annual number of hours of education, particular educational subject matter, and reporting requirements for CAC appointed pursuant to Sections 1470 and 1471.

Cal. Rules of Court, Rule 7.1101 & Rule 7.1103 & Rule 7.1105 - minimum qualifications, annual education requirements, and certification requirements for CAC. (Adopted, eff. Jan. 1, 2020.)

Local Rules of the Superior Court of California, County of Alameda, Rule 7.820 - appointment of legal counsel for conservatees and proposed conservatees.

California Rules of Professional Conduct Rule 1.6(a) Confidential Information of a Client

- (a) A lawyer shall not reveal information protected from disclosure by Business and Professions Code section 6068, subdivision (e)(1) unless the client gives informed consent,* or the disclosure is permitted by paragraph (b) of this rule.



Bus. & Prof. Code section 6068(e)

- It is the duty of an attorney to do all of the following:
 - [...]
 - (e)(1) To maintain inviolate the confidence, and at every peril to himself or herself to preserve the secrets, of his or her client.
- (2) Notwithstanding paragraph (1), an attorney may, but is not required to, reveal confidential information relating to the representation of a client to the extent that the attorney reasonably believes the disclosure is necessary to prevent a criminal act that the attorney reasonably believes is likely to result in death of, or substantial bodily harm to, an individual.



Attorney-Client Privilege – Evidence Code section 952

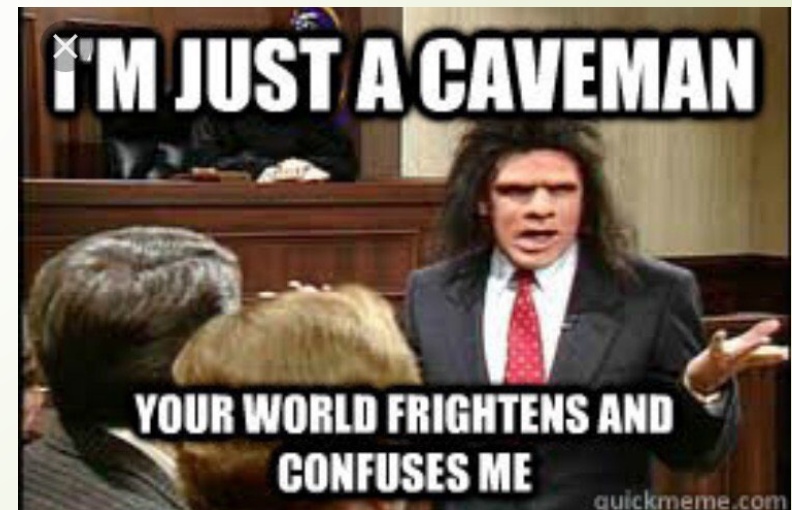
- In California, a client and other 3rd parties can all meet together with client's attorney in certain situations without triggering destruction of confidentiality and waiver of the attorney-client privilege in litigation. For example, if all the other 3rd parties "are present to further the client's interest," then there is not necessarily waiver.
- This did not used to be the law in California, but it is now.
- Evidence Code section 952 - confidential communication between client and lawyer:
- "As used in this article, 'confidential communication between client and lawyer' means information transmitted between a client and his or her lawyer in the course of that relationship and in confidence by a means which, so far as the client is aware, **discloses the information to no third persons other than those who are present to further the interest of the client in the consultation** or those to whom disclosure is reasonably necessary for the transmission of the information or the accomplishment of the purpose for which the lawyer is consulted, and includes a legal opinion formed and the advice given by the lawyer in the course of that relationship." (Emphasis added.)



OVERVIEW OF ROLE OF COURT APPOINTED COUNSEL



**ZEALOUS ADVOCACY FOR
CLIENT'S WISHES.**



Duration of Appointment in a Conservatorship

How long does CAC serve?

- relieved as counsel by the Court?
- serve until conservatorship terminated?
- serve until conservatee passes?



Overview of the Role of Guardian Ad Litem



Guardian Ad Litem: FIGHTING FOR BEST INTERESTS



What is a Guardian Ad Litem?

- ▶ A guardian ad litem or GAL is appointed by a court to look out for another person's *best interests* during a legal case. The [Probate Code](#) specifically provides for the appointment of guardian ad litem in probate cases.
- ▶ In California civil cases, a guardian ad litem may be appointed under [Code of Civil Procedure section 372](#) for a minor or for an adult “who lacks legal capacity to make decisions” by the court in which the proceeding is pending. [California Judicial Council Form CIV-010](#) must be used to seek the appointment of a guardian ad litem in a civil case. A “relative or friend” of an adult lacking competence to make decisions may apply for appointment of a GAL or the court may act on its own motion.
- ▶ [Probate Code section 1003](#), however, controls the appointment of guardians ad litem in proceedings under the Probate Code. Section 1003 permits any interested person to seek the appointment of a guardian ad litem “at any stage of a proceeding.”



When is a Guardian Ad Litem Appointed?

- In California, the court may appoint a guardian ad litem when someone who is the subject of a case lacks the legal capacity to make decisions.
- The probate court can appoint a guardian ad litem on its own motion or at the request of a “personal representative, guardian, conservator, trustee, or other interested person.”
- The Probate Code allows for these appointments at any stage of the probate proceedings.
- **Who Can be Appointed a Guardian Ad Litem by a Probate Court?**
- The probate court can appoint a GAL for incapacitated persons, unborn persons, minors, persons whose identity or address is unknown, unascertained persons, or a class of persons who are not ascertained or not in being.
- **How Long Does a Guardian Ad Litem Serve?**
- Once appointed, a guardian ad litem will serve for the length of the case. In some instances, a GAL may withdraw or may be replaced. However, outside of these situations, the GAL will remain on the case for its entirety.



What considerations factor into the court's discretion to appoint a GAL?

- ▶ The need for a guardian ad litem may be obvious in some situations and a closer call in others. In the former situation, the court may require appointment of a GAL even if the parties are silent. Often, however, the issue may be more subtle, leaving a tactical choice as to whether to seek a GAL.
- ▶ Once appointed, a GAL in a sense is a “guardian of the galaxy,” especially when the represented interests – like those of unborn descendants – are nebulous. Without a client to give direction, the GAL has to reach his or her own conclusions as to what is in the best interests of the person(s) he or she is to champion.
- ▶ Catch 22: Does the proposed conservatee need to be assessed for capacity before a GAL is appointed? What if the proposed conservatee (who is subjected to undue influence) objects to an assessment?

When (and Why) Does Someone with a Temporary or General Conservator Need a GAL?

- Probate Code section [372](#) permits a conservator to represent the interest of a conservatee without having to appoint a GAL. However, the court can appoint a GAL for an adult who is under a conservatorship if needed.
- [California Judicial Council Form CIV-010](#) must be used to seek the appointment of a guardian ad litem in a civil case. A “relative or friend” of an adult lacking competence to make decisions may apply for appointment of a GAL or the court may act on its own motion.
- [Probate Code section 1003](#), however, controls the appointment of guardians ad litem in proceedings under the Probate Code. Section 1003 permits any interested person to seek the appointment of a guardian ad litem “at any stage of a proceeding.”
- A probate judge may appoint a GAL for minors, incapacitated persons, unborn persons, unascertained persons, persons whose identity or address is unknown, or a class of persons who are not ascertained or not in being – the question being whether the representation of an interest would be inadequate without a GAL to advocate for the interest.
- Applications to appoint a guardian ad litem in California probate court must be made using [Judicial Council Form DE-350/GC-100](#), not the form for civil cases.
-





Contra Costa County Rule 7.63 Qualifications for Guardians ad Litem

a) Representation of guardian ad litem

A guardian ad litem must be an attorney or must be represented by an attorney.

(b) Waiver of beneficiary rights A guardian ad litem may not waive or disclaim any substantive rights of the beneficiary without prior approval by the Court.

Attorney's rates: The standard maximum attorney's fees for guardianships, conservatorships and extraordinary probate services is set forth below. The Court will consider higher hourly rates upon a showing of good cause. The standard maximum attorney's legal assistant rate is \$175.00 per hour.

Contra Costa GALS: Specifically chosen by the Court

Alameda GALS: Rotating list of qualified attorneys

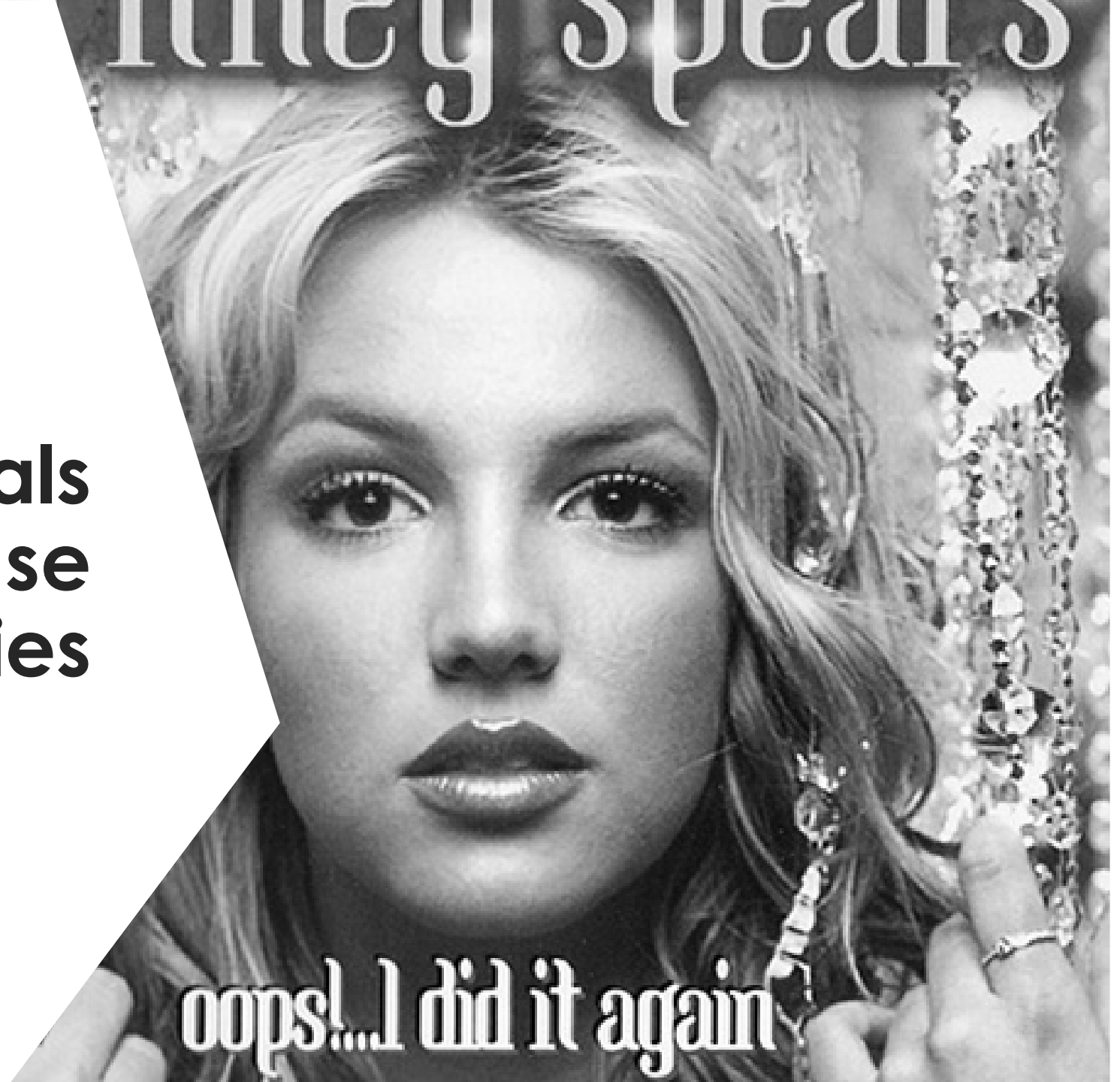
WHO DOES WHAT?

- Role of CAC
- Role of GAL
- Role of Conservator (p/e)
- Role of Trustee
- Role of Court Investigator
- Role of Capacity Evaluator/730 Expert
- Role of Judge
- Role of Professional Fiduciaries
- Role of APS/Law Enforcement





Hypotheticals and Case Studies



Hypothetical #1

- ▶ Connie is an 83-year-old widow whose husband of 38 years, Harold, died approximately 18 months ago.
- ▶ As she aged, Connie's mental capabilities began to fade, mostly exhibited by some mild memory loss, but also some poor judgment in financial matters.
- ▶ In fact, most recently, Connie nearly invested a significant amount of her hard-earned money towards a "scientific" exploration of the planet Venus led by noted "researcher" Nole Ksum and his partner Pike Kindell in order to determine if the soil on Venus can be used as a sustainable farm to grow the universe's most comfortable pillows, all for the low, low price of \$19.95.

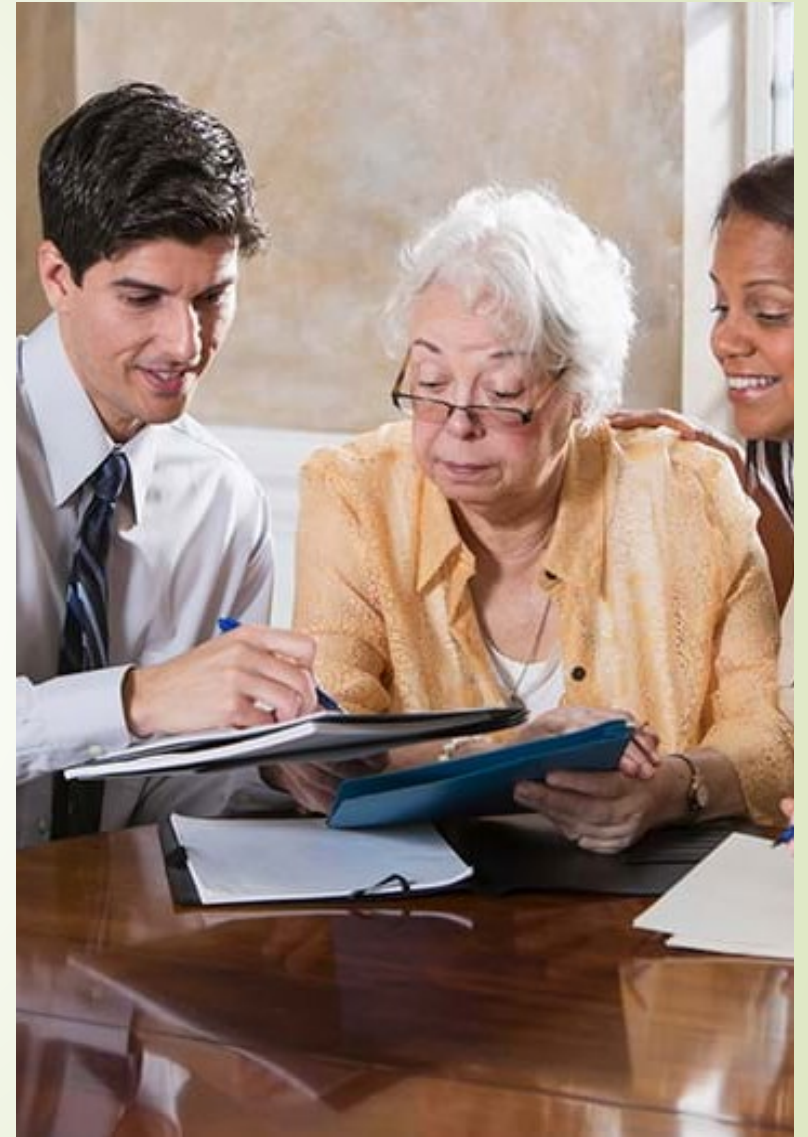




- Over their lives, Connie and her late husband worked hard to build a partnership with a nearby Native American tribe to build a chain of casino-laundromats called Spin & Win, valued now at over \$170 million.
- Following her husband's death, Connie became the President and CEO of Spin & Win, with her son, Sammy, serving as Vice President and COO.
- Connie's estate plan, which she established with her husband 10 years prior to his death, specifically states that, upon Connie's death, her entire fortune is to remain in trust for her five children equally (after specific gifts of cash are made to nieces and nephews), and following their respective deaths, the fortune is to be distributed to Connie's grandchildren. Connie also nominated Sammy as her conservator and successor trustee should it be needed.

► Connie always had grandchildren, nieces and nephews in her ear to try to convince her to change her estate plan so that some family members would get more than others after her death, but, until recently, along with the advice of her attorney, she had been able to resist that pressure.

► That changed six months ago, when chief casino lint remover, Ima Badguy, convinced Connie to amend her estate plan so that one-third of her entire fortune was to be distributed outright to Ima after Connie's death. He also convinced Connie to nominate him as her conservator in writing if it became necessary.





- Sammy filed an *ex parte* application to have himself appointed as Connie's temporary conservator of the person and estate, without notice to Ima Badguy and about half of Connie's family. He also filed a general conservatorship petition, including a request for powers to treat a major neurocognitive disorder.
- The court granted the temporary conservatorship petition and appointed Sammy as temporary conservator of the person and estate over some objections.
- At the time of the filing of the petitions, the court appointed Rachel Righteous as Connie's counsel pursuant to Probate Code section 1471.



- Once word got out that a conservatorship proceeding was underway, other “helpful” family members filed their own petitions, including Ima Badguy, seeking to have himself appointed based on the newly-executed “nomination” of him as conservator.
- The Capacity Declaration from Connie’s primary physician stated that Connie was experiencing some cognitive decline consistent with early onset of Alzheimer’s Disease, and that Connie was susceptible to undue influence. However, Connie’s doctor would not opine one way or another as to whether she had the mental capacity to make medical or financial decisions. He instead recommended that she undergo an examination by a geriatric psychiatrist or neurologist in order to better pinpoint Connie’s difficulties.

► The court investigator assigned to Connie's case, Inego Montoya, filed his report prior to the first hearing on Sammy's conservatorship petition.

► In his report, Inego reported that there was a tremendous amount of conflict in Connie's family regarding the operation of Spin & Win and about how Connie should be cared for.

► Overall, Inego recommended that Sammy be appointed as Connie's conservator but, if that caused problems, a private professional fiduciary should be appointed.

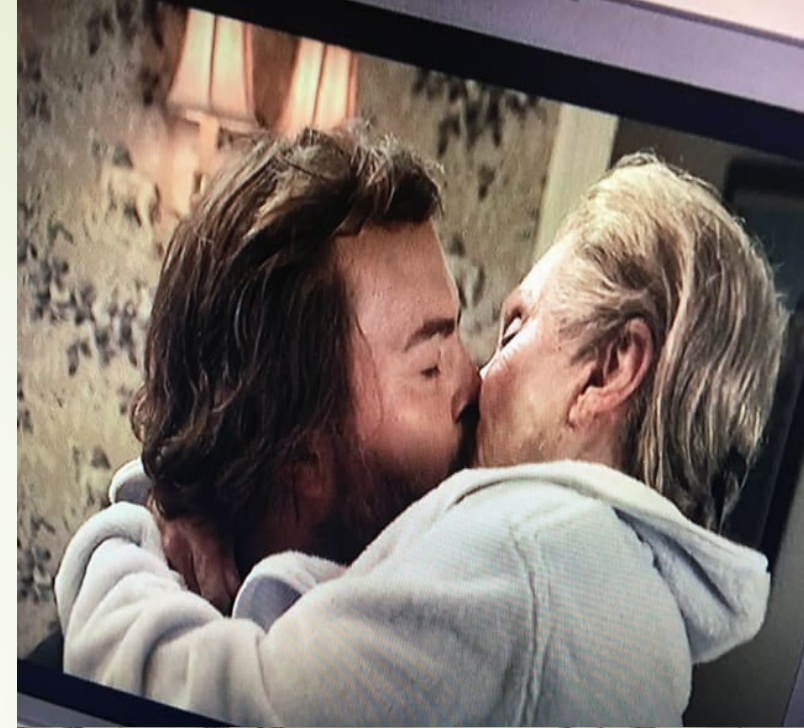
► Inego also reported that Connie objected to the petition, stating that she did not feel like a conservatorship was necessary ("I'm just fine! I have no memory problems! Why is that box of Tide looking at me funny!?") and that she did not want Sammy to be her conservator.



➤ As is required, Rachel met privately with Connie ahead of the first hearing on the conservatorship petitions. Connie was open with her thoughts, but occasionally Connie trailed off into stories that did not logically connect with the conversations at hand.

➤ When Rachel asked about how she felt about Ima Badguy, Connie blushed, looked away, and said “A lady doesn’t talk about such things.”

➤ Rachel confirmed that Connie did, in fact, object to the petitions.





► While the home was generally clean, Rachel noticed that there were empty boxes of laundry detergent and fabric softener in several unusual places.

► Most unusual was that there were empty boxes of detergent in all of the chairs of the dining room table.

► At the conclusion of the meeting, Rachel privately began to think that a conservatorship might be necessary.



At the initial hearing on the petitions, Rachel appeared on Connie's behalf and announced Connie's objection to all conservatorship petitions and that she demanded a jury trial on the issue of the need for a conservator.

In addition, Rachel requested that the court appoint a guardian *ad litem* for Connie pursuant to Probate Code section 1003.

Rachel never publicly expressed her doubts about Connie's capacity or her personal belief that a conservator was necessary.

HOW DO WE BEST SERVE CONNIE?



HOW DO WE SERVE CONNIE?

- How does the Court Investigator – Inego Montoya- see his role?
- What is the scope of the GAL's role?
- How does Rachel represent Connie given Connie's position and Rachel's reservations?
- Can Rachel be both a “**zealous advocate**” and a “**counselor at law**”?
- Can Louise hire whatever attorney she wants if there hasn't been a determination of incapacity?
 - What if Connie wants Rachel to file motions or oppositions that have no merit?
 - What if the PPF doesn't want to get into the family drama?
 - Is a Guardian ad litem appropriate?
 - Who asks for the appointment?
 - What if the PPF filed a Petition for Substituted Judgment on behalf of Connie to disinherit Bob?
 - Should the PPF be getting medical reports, taking a position at all?
 - **But wait. There's more...**



HYPOTHESIS #2:

**In re: Gus and Gladys Grandparents
Conservatorship/Trustee Suspension**



- Gladys Granny and her husband, Gus Grandpa, were aging in place at their Lafayette estate.
- Dutiful Dora lives in So Cal, but is devoted to her grandparents and visits often. Her parents are deceased.
- Gus was diagnosed with terminal brain cancer in 2019. Gladys was appointed as his conservator during the worst of the pandemic.
- Lisa Lawyer was his court appointed counsel in 2019. Everyone agreed that a conservatorship was appropriate for Gus, who was behaving erratically and would rebuke Gladys' efforts to help him as his POA.
- Lisa Lawyer convinced Gus that a conservatorship was in his best interests and shared her reasonings with the Court, despite Gus' initial objection.
- But wait.... There's more.



In 2021, Doris took Gladys to a doctor's appointment, and Gladys was diagnosed with vascular dementia and mild cognitive impairment.

The doctor suggested a neurological assessment for Gladys, then told her to quit smoking and lose weight. Gladys told Dora she would never see that quack again.

Dora visits when she can, but Gus and Gladys needed in-home help.

In 2021, Gus and Gladys hired minimum wage caregivers from Craig's List, Ashlee Aid and her cousin, Hunky Handyman.

Ashlee provided loving care to the couple and Hunky did some odd jobs around the house. This arrangement lasted a year, until Gus died in late 2022.

But wait. There's more.





- Within 2 weeks of Gus' death, Hunky declared his love for Gladys, and he and Ashlee moved in with Gladys.
- Gladys loves Hunky and has paid him \$250,000 to "fix up the house." (No discernable work has been done.)
- Gladys loves Ashlee also. Ashlee helps Gladys with showering and other intimate care, does light housekeeping, and redirects Gladys when she awakens in the middle of the night. Gladys takes Ashlee with her to the salon and out to lunch daily – Ashlee is her best friend.
- When Dora, who was Gladys' POA and successor Trustee, found out, she obtained temporary conservatorship of Gladys and temporary suspension of Gladys as Trustee of the Grandparent Family Trust.
- Dora filed for an EARO against Hunky and it was granted.
- However, Ashlee still lives with Gladys, and provides care in exchange for rent. Gladys and Ashlee refuse to let Dora in the house, so Dora is struggling to get a Capacity Declaration.
- Gladys wants to disinherit Dora, and she has signed a deed granting the Lafayette house to Ashlee.
- But wait. There's more...

➤ Gladys is furious at Dora, and hired an experienced probate attorney Alan Aggressive to object to the conservatorship and trustee suspension. The Court confirmed Alan as CAC. The Court appointed a GAL on its own motion.

➤ CAC filed a glowing capacity evaluation from Gladys' dermatologist.

➤ CAC objects to all medical exams, and argues that Gladys is able to manage her affairs with a little help from Ashlee.

➤ Dora is worried that at the next hearing, CAC will be successful arguing that Dora has presented no evidence of Gladys' incapacity, and that the GAL should be dismissed.

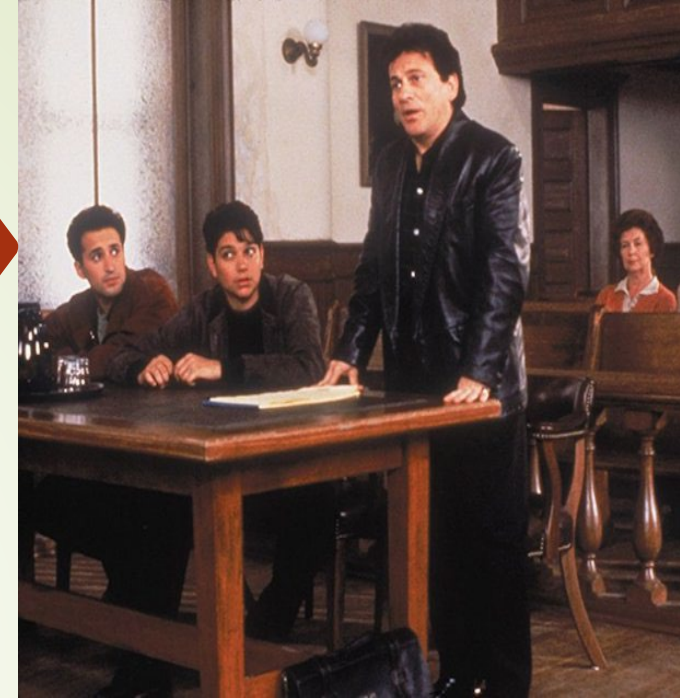
➤ Dora has noticed Gladys' deposition, but it has been rescheduled several times due to "medical issues."

➤ WHAT DO WE DO?



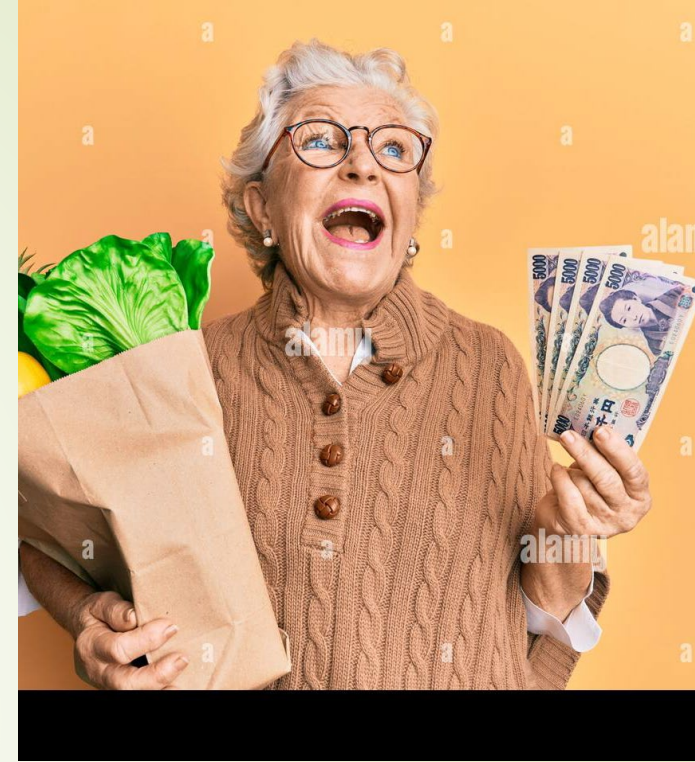
How do we serve Gladys?

- Who advances arguments about Undue Influence?
- Can Lisa Lawyer be appointed as GAL since she is familiar with the case?
- Is there ever a time that the GAL and CAC can be the same person?
- Does the GAL do discovery?
- What information must be shared between the parties (isn't protected by privilege e.g. a non-favorable medical evaluation) – CAC and GAL and conservator and Court Investigator?
- Is there a role for a GAL in mediation?
- Who signs a settlement agreement?
- What is the role of Court Investigator or GAL in trial?
- When is the GAL done? When is CAC done? When is the CI done?
- What if the CAC fights the appointment of a GAL? Or GAL gets dismissed because there isn't a finding of incapacity?



➤ **Let's talk about fees.**

- Whose job is it to keep fees manageable?
- There's a half dozen professionals involved, fees in and of themselves can be contrary to the conservatee's best interest.
- What if counsel is pushing conservatee to fight the conservatorship to the bitter end "on principle" no matter what it costs? (Even though there are no assets outside of the Trust and the parties can agree not to dispute the AHCD?)





Who's On First – What is the Essential Function of Each Player?

Court Appointed Counsel	Guardian Ad Litem	Court Investigator
<p>Zealous advocacy for client's wishes.</p> <p>"Like all lawyers, the court-appointed attorney is obligated to keep [his] client fully informed about the proceedings at hand, to advise the client of [her] rights, and to vigorously advocate on [her] behalf. (Bus. & Prof. Code, S 6068, subd. (c); Conservatorship of David L. (2008) 164 Cal.App.4th 701, 710.</p> <p>A proposed LPS conservatee has a statutory right to effective assistance of counsel]; Conservatorship of Benvenuto (1986) 180 Cal.App.3d 1030, 1037, fn. 6l</p> <p>"Implicit in the mandatory appointment of counsel is the duty of counsel to perform in an effective and professional manner."]; see Mary K. [(1991) 234 Cal.App.3d12651272; conservatorship of Ivey (1986) 186 Cal.App.3d 1559, 1566.)</p> <p>The attorney must also refrain from any act or representation that misleads the court (Bzs.& Prof. Code, S 6068, subd. (d); Rules Prof. Conduct, rule 5-200(8).)" (Conservatorship of John L., supra,48 Cal.4that i3i, 151-152.)</p>	<p>Best Interests</p> <p>The historical origin for a GAL is the doctrine of <i>parens patriae</i>, Latin for "parent of the people." Under <i>parens patriae</i>, the King of England was the "parent" with the duty to protect disabled citizens. See <i>Conservatorship of Wendland</i> (2001) 26 Cal.4th 519, 535.</p> <p>Present day authority—two statutes: Code of Civil Procedure section 372 & Probate Code section 1003.</p> <p>A GAL is not acting as a court-appointed attorney. Thus, a GAL does not have a "client." A GAL nevertheless has a fiduciary duty to ascertain and act solely in the best interest of her ward.</p> <p>"[T]he GAL does not advocate for her client the way an attorney does – her job is acting in the ward's best interest, and the ward may not agree with the GAL's decisions." <i>McClintock v. West</i> (2013) 219 Cal.App.4th 540, 551-552.</p> <p>A GAL may be appointed by the court to represent the interest of any of the following persons: 1) a minor, 2) an incapacitated person, 3) an unborn person, 4) an unascertained person, or 5) a person whose identity or address is unknown. Prob. Code §1003.</p>	<p>A court investigator conducts an independent investigation to guide the determination of whether a temporary or general conservatorship is in the best interests of a proposed conservatee. (See <i>Conservatorship of Cornelius</i>, 200 Cal.App.4th at 1206.)</p> <p>"[A]ppointment of a court investigator and receipt of the investigator's report are intended to protect the rights of the proposed conservatee." (<i>Conservatorship of Sides</i>, 21 Cal.App.3d at 1094.)</p> <p>"The duty of the court investigator is to ensure that a proposed conservatee who is not expected to attend the hearing is aware of her rights and to make certain determinations concerning the conservatee, appointment of counsel, and the establishment of a conservatorship.</p> <p>The investigator then must provide this information to the court in a written report before the hearing.</p> <p>(See Prob. Code, §§ 1826, subd. (a)(1), 2250.6, subd. (a)(6); see also <i>Conservatorship of Sides</i>, supra, 21 Cal.App.3d at 1094.)</p>

Which Cases Need Which Professionals?

Court Appointed Counsel	Guardian Ad Litem	Court Investigator
<p>Discretionary: Court may appoint "private legal counsel" for a conservatee or proposed conservatee in any proceeding if the person is not otherwise represented by legal counsel and the court finds that "the appointment would be helpful to the resolution of the matter or is necessary to protect the person's interests." Probate Code sec 1470(a).</p> <p>Mandatory: If the subject person "is not represented by legal counsel and does not plan to retain counsel, whether or not such person lacks or appears to lack legal capacity, the court shall, at or before the time of the hearing, appoint the public defender or private counsel to represent the person" in five proceedings (establish conservatorship/appoint conservator, terminate, remove conservator, order affecting legal capacity, removal of temp. conservatee from residence)</p> <p>Prob. Code sec 1471(a); limited conservatorships. Prob. Code sec 1471(b); Failure of conservator to file accounting. Prob Code sec 2620.2(c)(4)</p>	<p>Incapacitated Person: For a person who lacks legal capacity to make decisions "if the court determines that the representation of the interest otherwise would be inadequate." Prob. Code sec 1003(a)(2). For incapacitated spouse re: petitions requesting approval of a spousal property transaction. Prob. Code sec 3100 et seq. May be appointed where there are conflicting positions on the best interest of an incompetent individual, and the court would like a neutral to investigate and report back. <i>In re Estate of Snowball</i> (1909) 156 Cal. 235, 237</p> <p>GAL may be appointed for a person who has not yet been conserved. CCP §372-§373. See <i>In re Sarah D</i> (2001) 887 Cal.App.4th 661, 667.)</p> <p>Where there is a prima facie showing of potential undue influence.</p>	<p>All conservatorships</p>

Who is Qualified to Serve in Each Role?

Court Appointed Counsel	Guardian Ad Litem	Court Investigator
<p>Each court has its own procedure. If conservatee expresses a preference for a particular attorney, the court must allow representation by the preferred attorney "even if the attorney is not on the court's list of court appointed attorneys." Prob. C. §1471(c).</p> <p>An attorney with a conflict of interest shall be disqualified. Prob. C. §1471(c).</p> <p>Contra Costa has a panel. Solano uses PD office/private counsel. Alameda uses LAS. Each county is different.</p>	<p>A GAL may be, but is not required to be, a licensed attorney. There is no order of preference or priority.</p> <p>Appointment left to the discretion of the trial court.</p> <p><i>D.G. v Superior Court</i> (1979) 100 Cal.App.3d 535, 546.</p>	<p>Two years of employment experience performing casework or investigations in a legal, financial, law enforcement or social services setting.</p> <p>Additional continuing education requirements. CRC 10.478</p>

Who Can Request the Appointment of GAL?

Court Appointed Counsel	Guardian Ad Litem	Court Investigator
<p>Each court has own procedure; can be done on court's own motion or on party's request (Form GC-005)</p> <p>Ethical Issue: Can CAC ever request appointment of a GAL or is that a breach of confidentiality as admission of client's incapacity?</p>	<p>Any party has the ability to seek the appointment of a GAL – petitioner, objector, temporary conservator, trustee.</p> <p>Ethical Issue: Should a party be able to “cherry pick” a particular GAL by petitioning for appointment?</p> <p>Is that Ok? Should the court always make the selection off a rotating list?</p> <p>Is it OK for the Court to “cherry pick” a GAL?</p> <p>Can any “interested party” petition for appointment of a GAL?</p>	<p>There’s an argument to be made that the court investigator SHOULD be the one to request GAL in cases where capacity/undue influence is an issue.</p> <p>Cis and GALs are informants, not advocates. Make recommendations, not arguments.</p>

Advocacy – is it expected? Is it forbidden? Who does What?

Court Appointed Counsel	Guardian Ad Litem	Court Investigator
<p>“The role of legal counsel of a conservatee, proposed conservatee, or a person alleged to lack legal capacity is that of a zealous, independent advocate representing the wishes of their client, consistent with the [statutory] duties.”</p> <p>B&P sec 6068 and Cal Rules of Prof. Conduct". Prob. C. §1471(d)</p> <p>No more best interest/advocacy hybrid. Zealous advocacy required.</p> <p>Ethical Issue: What if client is unconscious and GAL might be needed? Communication skills are not a prerequisite for appointment of counsel.</p> <p>See <i>Wendland v. Superior Court</i> (App. 3 Dist. 1996) 56 Cal.Rptr.2d 595, 49 Cal.App.4th 44.</p> <p>Ethical Issue: CAC is still a counselor at law. How much “counseling” is appropriate when client wants advocacy for clearly dangerous or losing positions?</p>	<p>A GAL protects and manages legal rights.</p> <p><i>Williams v. Superior Court</i> (2007) 147 Cal.App.4th 36, 47.</p> <p>A GAL is not an advocate. “[T]he GAL does not advocate for her client the way an attorney does – her job is acting in the ward’s best interest, and the ward may not agree with the GAL’s decisions.”</p> <p><i>McClintock v. West</i> (2013) 219 Cal.App.4th 540, 551-552.</p> <p>“Eyes and ears of the Court.”</p>	<p>Makes recommendations.</p> <p>Arm of the court.</p> <p>Provides confidential information to court.</p>

What is Shared with or Reported to the Court?

Court Appointed Counsel	Guardian Ad Litem	Court Investigator
<p>Background facts, Conservatee's wishes, legal arguments supporting Conservatee's wishes. Traditional attorney/client relationship.</p> <p>Court appreciates written reports, but will accept oral reports.</p> <p>Ethical Issues: Under new laws requiring pure advocacy, are reports of counsel even appropriate?</p> <p>We would not provide courts a "report" about a client in other circumstances. Should CAC avoid providing reports of counsel and simply engage in advocacy through pleadings, oral arguments, and discovery?</p>	<p>Typically, a report of the GAL investigation is sufficient to highlight issues, concerns, or problems without filing a complaint, petition, or objection. <i>Berry v. Chaplin</i>, 74 Cal.App.2d at 657.</p> <p>GAL is not an advocate advancing the position of a client, but is an advisor to the court and protector of a ward of the court.</p> <p>CONSERVATOR: Should conservators (temporary or general, professional or layperson) be providing status reports to the Court? If so, how often?</p>	<p>Written report required five days before hearing. Prob. C. §1826(a)(10). See above for content.</p> <p>Reports served on attorney for conservatee & petitioner, conservatee, relatives within first degree, anyone court orders. Prob. C. §§1826(a)(10)-(11).</p>

Who Holds Which Privileges?

Court Appointed Counsel	Guardian Ad Litem	Court Investigator
<p>Same privileges as any client. Attorney-client privilege is sacrosanct.</p>	<p>Because not a party, no attorney-client privilege.</p>	<p>No privileges.</p>

Confidentiality?

Court Appointed Counsel	Guardian Ad Litem	Court Investigator
<p>Will receive confidential filings (eg screening forms, CI reports).</p> <p>Ethically obligated to maintain the confidences of client. B&P §6068, Evid. §954. HIPAA applies.</p> <p>Report is served on parties, but not necessarily in public court file. <i>Conservatorship of Schaeffer</i> (2002) 98 Cal.App.4th 159.</p> <p>Not entitled to APS reports.</p> <p>ON ORDER: “Pursuant to Civil code Section 56.10(b)(1), counsel shall have access and authority to review and copy the medical records of the attorney’s client (the proposed conservatee) designated above without the consent of the client. Copies of the Court’s record including the Court Investigator’s report are to be provided at no cost to the attorney and the attorney’s office staff as long as the attorney remains counsel of record in this case. Copied records will be mailed to the attorney four days after the filing of this order.”</p> <p>Ethical Issue: <i>If CAC is required to advocate for client’s wishes, is it a problem that CAC is the professional entitled to medical records?</i></p> <p><i>Should it be GAL instead, under the new law?</i></p> <p><i>How should it impact CAC to learn from medical records that client lacks capacity when advocating for dangerous or losing positions?</i></p>	<p>Will receive confidential filings (eg screening forms, CI reports), minute orders. HIPAA applies.</p> <p>No duty of confidentiality; no duty of loyalty to a client.</p> <p>Not expressly entitled to APS reports</p>	<p>Will receive confidential filings (eg screening forms, CI reports), minute orders, APS investigations.</p> <p>Health care provider is authorized to disclose medical information about a conservatee to CI re any investigation required or authorized in conservatorship, if conservatee is unable to give informed consent.</p> <p>CC §56.10(c)(12).</p>

Immunity?

Court Appointed Counsel	Guardian Ad Litem	Court Investigator
<p>No immunity, but only duties are to client.</p> <p><i>Hall v Kalfayan</i> (2010) 190 Cal.App.4th 927, 937.</p>	<p>Quasi-judicial immunity.</p> <p><i>McClintock v. West</i> (2013) 219 Cal.App.4th 540</p>	<p>Quasi-judicial officer with absolute common law immunity.</p> <p><i>Fisher v. Pickens</i> (1990) 225 Cal.App.3d 708, 712.</p>

Participant in Discovery?

Court Appointed Counsel	Guardian Ad Litem	Court Investigator
<p>Limited to promoting client's wishes.</p>	<p>Is a party for discovery purposes and is not exempt from the rules of discovery.</p> <p><i>Regency Health Services v. Superior Court</i> (1998) 64 Cal.App.4th 1496, 1503-1504.</p>	<p>No, except as witness.</p>

Participant in Settlement?

Court Appointed Counsel	Guardian Ad Litem	Court Investigator
<p>Yes, active participant. Guided by client's wishes.</p>	<p>A GAL has no authority to enter into an agreement compromising the claims of his or her ward without the approval of the court that appointed the GAL.</p> <p><i>Scruton v. Korean Air Lines</i> (1995) 39 Cal.App.4th 1596.</p> <p>Ethical Issue: Despite not entering into the agreement, should GAL be present to assure that ward's best interests are front and center?</p>	<p>No role.</p>

Participant at Trial?

Court Appointed Counsel	Guardian Ad Litem	Court Investigator
Absolutely.	<p>Litigation: Because the court is the guardian, and the GAL is the investigator for the court (charged with understanding the legal rights and individual circumstances of the ward), the GAL should be circumspect before making an objection or affirmative filing, absent instruction.</p> <p>Typically, a report of the GAL investigation is sufficient to highlight issues, concerns, or problems without filing a complaint, petition, or objection. See <i>Berry v. Chaplin</i>, 74 Cal.App.2d at 657 (court charged with protecting ward's interests).</p> <p>TRIAL: No role at trial except as witness.</p> <p>Ethical Issue: Who calls GAL as witness? Conservator? Court Appointed Counsel? Objector?</p>	<p>A party may subpoena the testimony of the court investigator for trial and may seek admission of the court investigator's report into evidence.</p> <p><i>Conservatorship of Manton</i> (1985) 39 Cal.3d 645, 651. Subject to the rules of evidence.</p> <p>CIs could qualify as experts, business records, etc.</p>

When Does it End?

Court Appointed Counsel	Guardian Ad Litem	Court Investigator
If appointed by court, representation ceases on death, termination or further order of court, or by replacement by client. Prob. C. §1471(c)	Appointment lasts for duration of case.	<p>Mandatory annual review is no longer required." Prob. C. §§1850(a)(2), (f).</p> <p>If temp conservatorship, CI must make second visit on general. Prob. C. §1826(f).</p>