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PERSPECTIVE

A deep dive into Senate Bill 724, the new conservatorship bill

By Clifford L. Klein

Notwithstanding the dangers of celebrity-legislating, the attention to conservatorships created by the Britney Spears case has engendered a productive discussion about current conservatorship law and a series of proposed reforms in Senate Bill 724 (Allen). Although there has unlikely been a conservatorship similar to Britney Spears in American history, the case highlights important questions for all these proceedings about the right to representation, the role of appointed counsel, the right to counsel of one's choice, and the appropriate goals of advocacy by conservatee's counsel.

SB 724 would settle the long conflict about the proper role of a lawyer representing a proposed conservatee: Should attorneys advocate for what they believe are the best interests of their clients, regardless of the client's wishes? Or should the lawyer advocate for the client's position regardless of whether they think it is in the client's best interest?

In the American adversarial system, a lawyer's role is to represent their client, regardless of their belief in what is best for them. No one would expect a lawyer to tell a judge that a defendant would benefit from a prison or probationary sentence rather than an acquittal. A criminal defense attorney may believe that a dose of confinement would be useful for a young offender, as would drug treatment or anger management programs as a condition of probation, yet it is inconceivable that the lawyer would argue for a result contrary to their client's wishes. In this regard, the U.S. Supreme Court recently held that the Sixth Amendment guarantees a defendant the right to insist that his counsel refrain from admitting guilt, notwithstanding his experienced lawyer's tactical belief that a confession offered the defendant his best chance to avoid the death penalty. *McCoy v. Louisiana*, 138 S. Ct. 1500 (2018).

The same legal principles apply in civil and family law cases. No one would suggest an attorney for a spouse has the independent obligation to argue that their client, against his wishes, should pay more money for child or spousal support because it could be in their client's long-term interest to preserve family harmony, even if true.

Yet, in the conservatorship arena, some attorneys do argue for results they believe are in their client's best interest, even if their client objects to the argument. This new law, if enacted, would require a lawyer to argue in accordance with the client's wishes. The lawyer would still have the obligation to initially counsel their client as to what their best interests could be, while deferring to their client's ultimate decision as to how they wish to proceed. However, should the client reject their advice, no matter how sound, it has always been the attorney's role in every other type of legal proceeding other than with conservatorships, to vigorously argue their client's case. The proposed conservatee, as with every other defendant in a civil or criminal case, should have their day in court.

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It is the judge's role to decide the "best interests" of the conservatee. The party petitioning to establish the conservatorship has the responsibility to present their case, which typically includes a best interest analysis. The judge also has a report from a court investigator, which includes an assessment of the conservatee's wishes and needs. A report from a psychiatrist is typically filed. Thus, a judge is provided with information about the conservatee's best interests and need not rely on counsel for the conservatee to articulate that information. The only person in the courtroom with an ethical duty of loyalty to the conservatee is his or her counsel. If counsel abrogates that duty of loyalty and argues against the client's wishes, the client is effectively left defenseless.

Some judges fear that chaos in a courtroom would result if the client's wishes were articulated and pursued by counsel. The client may lose, the litigation may be expensive, the conflict may enhance friction in the family already reeling by the filing of the conservatorship petition itself, and of course, the client, because of a diminished mental state, may not understand that what they want is not consistent with what they need.

If the case is so clear-cut on the question of best interests, there is little downside considering the eventual result. The conservatee's attorney does not have an obligation to call witnesses who have irrelevant testimony. Family members generally understand the conservatee's deficits, and thus do not take personal offense at any accusations. As with some of my former colleagues, I cannot recall in my six years hearing conservatorship cases, any courtroom management problems with disruptive or unnecessarily lengthy hearings any different

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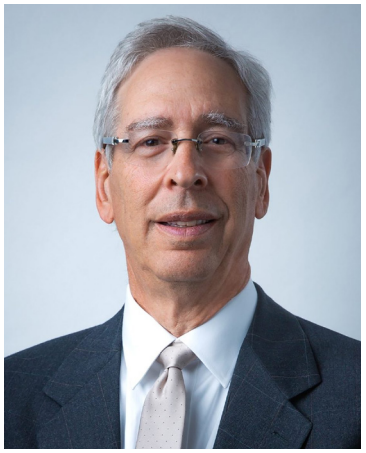

than in criminal, juvenile or mental health courts. A trial may take an afternoon of court time, but the conservatee has the important satisfaction of talking with and being heard by a judge.

I believed as a judge my responsibility was to determine the best interests of the conservatee, after vigorous advocacy between the litigants. I expected counsel to be honest with their client and give them their best advice, in private – but always remembering their role was to represent and effectuate their client's wishes. If a court-appointed attorney insisted on arguing best interests over a client's wishes, I removed the attorney and appointed new counsel.

SB 724 requires counsel for a conservatee to provide "zealous advocacy." There is some concern about this requirement. Assuming there is a workable courtroom definition of the word "zealous," I question whether this adjective in a statute will determine the style and personality of a litigator, rather than the content of their arguments. My experience as a judge is that attorneys are often unaware of whether they are being too passive or confrontational, e.g. zealous. Perhaps the incorporation into the statute the requirements in Business and Professions Code Section 6000 et seq.to: maintain the respect due to the courts of justice and judicial officers will temper zealous style as opposed to zealous content.

This proposed law has additional merits. In Los Angeles and San Diego counties, every proposed conservatee has an appointed attorney. This practice goes further than current state law, which mandates appointment of counsel only upon request. With this bill the conservatee does not have to ask for a lawyer in order to get one. Those conservatees who do not understand how a lawyer may assist them and how a conservatorship may impinge on their independence would get free counsel to advise them on the life-changing issues that accompany lack of capacity to manage one's personal care and finances. Providing counsel for these individuals eliminates the pitfalls of self-representation.

The bill also provides that a conservatee should have the freedom to retain the lawyer of their choice. This choice cannot be without limits, as a judge would retain the authority to insure the conservatee both has the capacity to make this decision and has exercised it independently rather than due to the influence of family members who may have conflicting interests. There are factors which can assist the judge at a capacity hearing to evaluate the conservatee's reasons, such as whether the attorney represented their client in previous years, or having a psychiatrist testify regarding capacity.

While there are issues specific to conservatorship petitions that are not present in other types of criminal and civil cases, no issue supersedes the foundations of the American legal tradition, the right of representation and our adversarial system of justice. ■