

COMMISSION ON STATE MANDATES

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January 10, 2014

Ms. Wendy Watanabe
County of Los Angeles Auditor-Controller
500 West Temple Street, Room 525
Los Angeles, CA 90012

Ms. Hasmik Yaghobyan
County of Los Angeles Auditor-Controller's Office
500 West Temple Street, Room 603
Los Angeles, CA 90012

And Parties, Interested Parties, and Interested Persons (See Mailing List)

Re: **Final Staff Analysis and Proposed Statement of Decision, and Notice of Hearing**
Public Guardianship Omnibus Conservatorship Reform, 07-TC-05
Probate Code Sections 1850 et al.
County of Los Angeles, Claimant

Dear Ms. Watanabe and Ms. Yaghobyan:

The final staff analysis and proposed statement of decision for the above-named matter is enclosed for your review.

Hearing

This matter is set for hearing on **Friday, January 24, 2014**, at 10:00 a.m., State Capitol, Room 447, Sacramento, California. Please let us know in advance if you or a representative of your agency will testify at the hearing, and if other witnesses will appear. If you would like to request postponement of the hearing, please refer to section 1183.01(c)(2) of the Commission's regulations.

Special Accommodations

For any special accommodations such as a sign language interpreter, an assistive listening device, materials in an alternative format, or any other accommodations, please contact the Commission Office at least five to seven *working* days prior to the meeting.

Please contact Heidi Palchik at (916) 323-3562 if you have any questions.

Sincerely,

A handwritten signature in black ink, appearing to read "Heather Halsey", written over a white background.

Heather Halsey
Executive Director

ITEM 4
TEST CLAIM
FINAL STAFF ANALYSIS
AND
PROPOSED STATEMENT OF DECISION

Probate Code Sections 1850(a), 1851(a), 2113, 2250(a)-(c), 2250.4(a)-(d); 2352(a)-(f),
2352.5(a)-(e), 2410, 2540(a)-(b), 2543(a)-(d), 2610(a), 2620(a)-(e), 2620.2(a)-(d), 2590,
2591(a)-(q), 2591.5(a)-(d), 2623(a)-(b), 2640(a)-(c), 2640.1(a)-(c), 2641(a)-(b), 2653(a)-(c),
2920(a)-(c), and 2923

Statutes 2006; Chapter 490 (SB 1116), Statutes 2006, Chapter 492 (SB 1716), and
Statutes 2006, Chapter 493 (AB 1363)

Public Guardianship Omnibus Conservatorship Reform

07-TC-05

County of Los Angeles, Claimant

EXECUTIVE SUMMARY

Attached is the proposed statement of decision for this matter. This executive summary and the proposed statement of decision also function as the final staff analysis, as required by section 1183.07 of the Commission on State Mandates' (Commission) regulations.

Overview

This test claim, filed by the County of Los Angeles (claimant), addresses the Omnibus Conservatorship and Guardianship Reform Act of 2006 ("OCRA"), which made comprehensive reforms to California's probate conservatorship program.

Background

A probate conservatorship is a court proceeding where a judge appoints: (1) a conservator of the person for an adult who cannot "provide properly for his or her personal needs for physical health, food, clothing, or shelter"; (2) a conservator of the estate for a person who is substantially unable to manage financial resources or resist fraud or undue influence; or (3) a conservator of the person and the estate. A conservator of the person has custody of the conservatee, ensures that the conservatee's daily needs are met, and has charge of the conservatee's educational needs. A conservator of the estate has the duty to manage and control a conservatee's estate and finances.

The court's appointment of a guardian or conservator affects an individual's liberty interests and, thus, due process rights must be afforded to the proposed conservatee. Under these principles, the court may not establish a conservatorship unless there is clear and convincing evidence that a conservator or guardian is required. The court's determination of these issues begins with the

filing of a petition for conservatorship, investigation into the matter, a trial on the merits of the petition (which, if requested by the proposed conservatee, may be a jury trial), and the appointment of a conservator or guardian. Once a guardian or conservator is appointed, the court maintains jurisdiction over the case and guides the rights of the parties. The relationship of conservator (both of the person and of the estate) and conservatee is a fiduciary relationship. Conservators are required to make accountings of the assets of the estate to the court for settlement and allowance after one year from the time of appointment and, thereafter at least every two years unless otherwise ordered by the court. Upon the death of a conservatee, a conservator must make two final accountings for the period before and the period after the date of death. A conservator can be removed by the court for mismanagement of an estate, failure to file an inventory or account, incapacity, gross immorality, a felonious conviction, adverse interest, or bankruptcy. A conservator can also be removed if it is in the best interest of the conservatee.

Test claim statutes

The OCRA was enacted in response to an in-depth investigatory series published by the *Los Angeles Times* and a joint hearing held by the Assembly and Senate judiciary committees, which brought to light the following abuses in conservatorship proceedings: misuse of California's conservatorship system by private conservators; public guardians who lack the necessary resources to help truly needy individuals; probate courts which do not have sufficient resources to provide adequate oversight to catch abuses of conservatees; and a system that provides no place for those in need to turn to for help. Although the OCRA made sweeping changes to the conservatorship process as a whole, including reforms aimed at professional conservators, probate court proceedings, and educating the public regarding conservatorships, the test claim seeks reimbursement only for those costs incurred as a result of changes made to statutes directly affecting county public guardians.

Claimant asserts that the test claim statutes impose the following new mandated activities upon public guardians:

- On or before January 1, 2008, comply with continuing education requirements established by the California State Association of Public Administrators, Public Guardians, and Public Conservators.
- Begin an investigation within two business days of receiving a referral for conservatorship or guardianship.
- File a petition for appointment as guardian or conservator for the person, the estate, or the person and the estate where there is an imminent threat to the person's health or safety or to the person's estate, and if appointed to serve as guardian or conservator, comply with all activities and incur all costs imposed by Probate Code sections 1400 through 3925, which set forth requirements for all guardianships and conservatorships established under the Probate Code.
- File a petition for appointment as guardian or conservator for the person, the estate, or the person or the estate *when ordered by the court* because there is no one else qualified and willing to act as conservator and it appears to be in the best

interests of the person, and if appointed to serve as guardian or conservator, comply with all activities and incur all costs imposed by Probate Code sections 1400 through 3925, which set forth requirements for all guardianships and conservatorships established under the Probate Code.

- For all cases where the public guardian serves as guardian or conservator, whether voluntarily or as required by statute or court order, comply with new accounting, estate management, inventory and appraisal, residential placement, and temporary conservatorship requirements set forth in the Probate Code.

The test claim states that the amount claimant will incur to serve new populations of conservatees will be: (1) \$71,500 during the 2006-2007 fiscal year; (2) \$370,500 during the 2007-2008 fiscal year; and (3) \$695,500 during the 2008-2009 fiscal year. The statewide cost estimate submitted by claimant indicates that the total statewide cost for counties to serve new populations of conservatees will be: (1) \$3,884,522 during the 2006-2007 fiscal year; (2) \$10,422,061 during the 2007-2008 fiscal year; and (3) \$11,982,260 during the 2008-2009 fiscal year.

Procedural History

Claimant filed the test claim on December 13, 2007. Based on the December 13, 2007 filing date, the potential period of reimbursement for this test claim begins on July 1, 2006. On December 21, 2007, Commission staff deemed the filing complete and numbered it 07-TC-05. On January 30, 2008, the Department of Finance submitted comments agreeing that the test claim statutes require county public guardian to perform some, but not all, of the activities allegedly mandated by the test claim statutes. On April 4, 2008, claimant filed rebuttal comments on the test claim. On May 16, 2008, the Imperial County Public Administrator filed comments supporting the test claim. On May 29, 2008 the San Joaquin County Public Guardian/Conservator filed comments supporting the test claim. On June 9, 2008 the San Diego County Counsel filed comments supporting the test claim.

On October 11, 2013, Commission staff issued the draft staff analysis and proposed statement of decision. On October 25, 2013, the Department of Finance submitted comments concurring with the recommendation in the draft staff analysis that the test claim should be denied. On October 25, 2013, claimant requested an extension of time to file comments on the draft staff analysis and postponement of the hearing, which were granted and this matter was set for hearing on January 24, 2014. On November 25, 2013, claimant requested an additional extension of time to file comments on the draft staff analysis, which was granted. Although claimant requested two extensions of time to file comments, claimant did not file any comments on the draft staff analysis.

Commission Responsibilities

Under article XIII B, section 6 of the California Constitution, local agencies, including school districts, are entitled to reimbursement for the costs of state-mandated new programs or higher levels of service. In order for local government to be eligible for reimbursement, one or more similarly situated local agencies or school districts must file a test claim with the Commission. "Test claim" means the first claim filed with the Commission alleging that a particular statute or executive order imposes costs mandated by the state. Test claims function similarly to class

actions: all members of the class have the opportunity to participate in the test claim process, and all are bound by the final decision of the Commission for purposes of that test claim.

The Commission is the quasi-judicial body vested with exclusive authority to adjudicate disputes over the existence of state-mandated programs within the meaning of article XIII B, section 6. In making its decisions, the Commission cannot apply article XIII B as an equitable remedy to cure the perceived unfairness resulting from political decisions on funding priorities.

Claims

The following chart provides a summary of the claims and issues raised and staff's recommendation.

Subject	Description	Staff Recommendation
<p>Probate Code sections 2920 and 2923, amended by Statutes of 2006, Chapters 492 and 493</p>	<p>Probate Code section 2920 was amended by the 2006 test claim statute to (1) require the public guardian file a petition for appointment as guardian or conservator for the person, the estate, or the person or the estate in the following circumstances: the person is domiciled in the county and requires a guardian or conservator; there is no one else qualified and willing to act; the appointment as guardian or conservator would be in the best interests of the person; and there is an imminent threat to the person's health or safety or to the person's estate; (2) require the court to order the public guardian to apply for appointment as guardian or conservator of the person, the estate, or the person and estate, on behalf of any person domiciled in the county who appears to require a guardian or conservator, if it appears that there is no one else who is qualified and willing to act, and if that appointment as guardian or conservator appears to be in the best interests of the person; and (3) require the public guardian to begin an investigation within two business days of receiving a referral for conservatorship or guardianship.</p> <p>Probate Code section 2923 requires the public guardian to comply with the continuing education requirements established by the California State Association of Public Administrators,</p>	<p><u>Deny</u> – These code sections do not impose a state-mandated program on counties within the meaning of article XIII B, section 6 of the California Constitution.</p> <p>The test claim statutes require the public guardian to perform several activities. However, the activities required by state statute are not eligible for reimbursement.</p> <p>Government Code section 27430 authorizes, but does not require, the county to create the office of public guardian. This authority is based on the county's <i>parens patriae</i> power "to protect incompetent persons." The courts have made clear that reimbursement is not required when requirements imposed by statute are triggered by local government's discretionary decision to participate in a program.</p>

	Public Guardians, and Public Conservators on or before January 1, 2008.	In addition several of the requirements pled are not required by state statute, but are required by court order. Appropriations required to comply with mandates of the courts are not eligible for reimbursement under article XIII B, section 6. (Cal. Const., art. XIII B, § 9.)
Probate Code sections 1850(a), 1851(a), 2113, 2250(a)-(c), 2250.4(a)-(d), 2352(a)-(f), 2410, 2540(a)-(b), 2543(a)-(d), 2610(a); 2620 (a)-(e), 2620.2(a)-(d), 2590, 2591(a)-(q), 2591.5 (a)-(d), 2623 (a)-(b), 2640 (a)-(c), 2640.1(a)-(c), 2641(a)-(b), 2653(a)-(c), as added and amended by Statutes of 2006, Chapters 490, 492, and 493.	These code sections require conservators, courts, and court investigators to perform various activities once a conservatorship is established.	<p><u>Deny</u> – These code sections do not impose a state-mandated program on counties within the meaning of article XIII B, section 6 of the California Constitution.</p> <p>The activities pled from these code sections are either not required of local government, or are mandated or triggered by a court order. Appropriations required to comply with mandates of the courts are not eligible for reimbursement under article XIII B, section 6. (Cal. Const., art. XIII B, § 9.)</p> <p>Even if the activities performed by the public guardian were required by the state, they would not impose a state-mandated program because of the county’s discretionary authority to create the office of public guardian.</p>

Analysis

The following activities are new requirements imposed by the state on the county office of public guardian:

- Comply with the continuing education requirements established by the California State Association of Public Administrators, Public Guardians, and Public Conservators on or before January 1, 2008. (Prob. Code, § 2923.)
- Begin an investigation within two business days of receiving a referral for conservatorship or guardianship. (Prob. Code, § 2920(c).)
- File a petition for appointment as guardian or conservator for the person, the estate, or the person or the estate in the following circumstances: the person is domiciled in the county and requires a guardian or conservator; there is no one else qualified and willing to act; the appointment as guardian or conservator would be in the best interests of the person; and there is an imminent threat to the person's health or safety or to the person's estate. (Prob. Code, § 2920(a)(1).)

All other activities pled are either not required of local government, or are triggered by a court order. Appropriations required to comply with mandates of the courts are not eligible for reimbursement under article XIII B, section 6.¹

Although the activities bulleted above are required by the state, they are triggered by the county's discretionary decision to create the office of public guardian and therefore, the requirements do not create a state-mandated program within the meaning of article XIII B, section 6 of the California Constitution. Government Code section 27430 states that:

- (a) In any county the board of supervisors *may* by ordinance create the office of the public guardian and subordinate position which may be necessary and fix compensation therefor.
- (b) The board of supervisors *may* by ordinance terminate the office of public guardian.² (Emphasis added.)

That decision to create the office of public guardian is a local discretionary decision based on the county's *parens patriae* power "to protect incompetent persons." Like the police powers held by local government, local legislative bodies have broad discretion in the exercise of these powers, both in determining what the interests of the public require and what measures are reasonably necessary for the protection of those interests.

The courts have made clear that reimbursement is not required when requirements imposed by the statute are triggered by local government's discretionary decision to participate in a program.³

¹ Article XIII B, section 9 of the California Constitution.

² Government Code Section 27430 (Stats. 1988, ch. 1199, § 17).

Thus, staff finds that the test claim statutes do not impose a reimbursable state-mandated program within the meaning of article XIII B, section 6 of the California Constitution.

Conclusion

Staff concludes that Probate Code sections 1850(a), 1851(a), 2113, 2250(a)-(c), 2250.4(a)-(d), 2352(a)-(f), 2410, 2540(a)-(b), 2543(a)-(d), 2610(a); 2620 (a)-(e), 2620.2(a)-(d), 2590, 2591(a)-(q), 2591.5 (a)-(d), 2623 (a)-(b), 2640 (a)-(c), 2640.1(a)-(c), 2641(a)-(b), 2653(a)-(c), 2920(a)-(c), and 2923, as added and amended by Statutes 2006, chapters 490, 492, and 493 do not impose a reimbursable state-mandated program within the meaning of article XIII B, section 6 of the California Constitution and Government Code section 17514.

Staff Recommendation

Staff recommends that the Commission adopt the proposed statement of decision to deny this test claim. Staff also recommends that the Commission authorize staff to make any non-substantive, technical corrections to the statement of decision following the hearing.

³ *City of Merced v. State of California* (1984) 153 Cal.App.3d 777; *Department of Finance v. Commission on State Mandates (Kern)* (2003) 30 Cal.4th 727; *Department of Finance v. Commission on State Mandates (POBRA)* (2009) 170 Cal.App.4th 1355.

BEFORE THE
COMMISSION ON STATE MANDATES
STATE OF CALIFORNIA

IN RE TEST CLAIM ON:

Probate Code Sections 1850(a), 1851(a), 2113, 2250(a)-(c), 2250.4(a)-(d); 2352(a)-(f), 2352.5(a)-(e), 2410, 2540(a)-(b), 2543(a)-(d), 2610(a), 2620(a)-(e), 2620.2(a)-(d), 2590, 2591(a)-(q), 2591.5(a)-(d), 2623(a)-(b), 2640(a)-(c), 2640.1(a)-(c), 2641(a)-(b), 2653(a)-(c), 2920(a)-(c), and 2923;

Statutes 2006; Chapter 490 (SB 1116)
Statutes 2006, Chapter 492 (SB 1716)
Statutes 2006, Chapter 493 (AB 1363)

Filed on December 13, 2007

By the County of Los Angeles, Claimant.

Case No.: 07-TC-05

*Public Guardianship Omnibus
Conservatorship Reform*

STATEMENT OF DECISION
PURSUANT TO GOVERNMENT
CODE SECTION 17500 ET SEQ.;
CALIFORNIA CODE OF
REGULATIONS, TITLE 2, DIVISION
2, CHAPTER 2.5, ARTICLE 7.

(Adopted January 24, 2014)

STATEMENT OF DECISION

The Commission on State Mandates (Commission) heard and decided this test claim during a regularly scheduled hearing on January 24, 2014. [Witness list will be included in the final statement of decision.]

The law applicable to the Commission's determination of a reimbursable state-mandated program is article XIII B, section 6 of the California Constitution, Government Code section 17500 et seq., and related case law.

The Commission [adopted/modified] the proposed statement of decision to [approve/deny] the test claim at the hearing by a vote of [vote count will be included in the final statement of decision].

Summary of the Findings

The Commission finds that the following activities are new requirements imposed by the state on the county office of public guardian:

- Comply with the continuing education requirements established by the California State Association of Public Administrators, Public Guardians, and Public Conservators on or before January 1, 2008. (Prob. Code, § 2923.)
- Begin an investigation within two business days of receiving a referral for conservatorship or guardianship. (Prob. Code, § 2920(c).)
- File a petition for appointment as guardian or conservator for the person, the estate, or the person or the estate in the following circumstances: the person is domiciled in the county

and requires a guardian or conservator; there is no one else qualified and willing to act; the appointment as guardian or conservator would be in the best interests of the person; and there is an imminent threat to the person's health or safety or to the person's estate. (Prob. Code, § 2920(a)(1).)

All other activities pled are either not required of local government, or are triggered by a court order. Appropriations required to comply with mandates of the courts are not eligible for reimbursement under article XIII B, section 6.⁴

Although the activities bulleted above are required by the state, they are triggered by the county's discretionary decision to create the office of public guardian and therefore, the requirements do not create a state-mandated program within the meaning of article XIII B, section 6 of the California Constitution. Government Code section 27430 states that:

- (a) In any county the board of supervisors *may* by ordinance create the office of the public guardian and subordinate position which may be necessary and fix compensation therefor.
- (b) The board of supervisors *may* by ordinance terminate the office of public guardian.⁵ (Emphasis added.)]

The decision to create the office of public guardian is a local discretionary decision based on the county's *parens patriae* power "to protect incompetent persons." Like the police powers held by local government, local legislative bodies have broad discretion in the exercise of these powers, both in determining what the interests of the public require and what measures are reasonably necessary for the protection of those interests.

The courts have made clear that reimbursement is not required when requirements are triggered by local government's voluntary decision to participate in a program, reimbursement is not required.⁶

Accordingly, the Commission finds Probate Code sections 1850(a), 1851(a), 2113, 2250(a)-(c), 2250.4(a)-(d), 2352(a)-(f), 2352.5 (a)-(e), 2410, 2540(a)-(b), 2543(a)-(d), 2610(a); 2620 (a)-(e), 2620.2(a)-(d), 2590, 2591(a)-(q), 2591.5 (a)-(d), 2623 (a)-(b), 2640 (a)-(c), 2640.1(a)-(c), 2641(a)-(b), 2653(a)-(c), 2920(a)-(c), and 2923, as added and amended by the test claim statutes do not constitute a reimbursable state-mandated program within the meaning of article XIII B, section 6 of the California Constitution and Government Code section 17514.

⁴ Article XIII B, section 9 of the California Constitution.

⁵ Government Code Section 27430 (Stats. 1988, ch. 1199, § 17).

⁶ *City of Merced v. State of California* (1984) 153 Cal.App.3d 777; *Department of Finance v. Commission on State Mandates (Kern)* (2003) 30 Cal.4th 727; *Department of Finance v. Commission on State Mandates (POBRA)* (2009) 170 Cal.App.4th 1355.

COMMISSION FINDINGS

I. Chronology

- 12/13/2007 Claimant, Los Angeles County, filed the test claim with the Commission.
- 12/21/2007 Commission staff deemed the filing complete and issued a notice of complete test claim filing and schedule for comments.
- 01/30/2008 Department of Finance (Finance) filed comments on the test claim.
- 04/10/2008 Claimant filed rebuttal comments on the test claim.
- 05/16/2008 The Imperial County Public Administrator filed comments on the test claim.
- 05/29/2008 The San Joaquin County Public Guardian/Conservator filed comments on the test claim.
- 06/09/2008 The San Diego County Counsel filed comments on the test claim.
- 10/11/2013 Commission staff issued the draft staff analysis and proposed statement of decision.
- 10/25/2013 Finance filed comments on the draft staff analysis.
- 10/25/2013 Claimant requested an extension of time to file comments on the draft staff analysis and postponement of the hearing.
- 10/28/2013 Claimant's request for an extension of time and postponement of the hearing was granted and this matter was set for hearing on January 24, 2013.
- 11/25/2013 Claimant requested an extension of time to file comments on the draft staff analysis.
- 11/26/2013 Claimant's request for an extension of time until December 13, 2013, to file comments on the draft staff analysis was granted.

II. Background

This test claim addresses three 2006 test claim statutes which are part of the Omnibus Conservatorship and Guardianship Reform Act of 2006 ("OCRA"), a package of four bills that made comprehensive reforms to California's probate system and court oversight of probate conservatorships. The test claim statutes amended and added code sections affecting county public guardians, which are county officers authorized to act as conservators in certain instances.

A probate conservatorship is a court proceeding where a judge, based upon clear and convincing evidence, appoints: (1) a conservator of the person for an adult who cannot "provide properly for his or her personal needs for physical health, food, clothing, or shelter"; (2) a conservator of the estate for "a person who is substantially unable to manage [her] own financial resources or resist fraud or undue influence"; or (3) a conservator of the person and the estate.⁷ A conservator of the person has custody of the conservatee, ensures that the conservatee's daily needs are met, and

⁷ Probate Code section 1801.

has charge of the conservatee’s educational needs.⁸ A conservator of the estate has the duty to manage and control a conservatee’s estate and finances.⁹

The OCRA was enacted in response to an in-depth investigatory series published by the *Los Angeles Times* and a joint hearing held by the Assembly and Senate judiciary committees, which brought to light the following abuses in conservatorship proceedings: misuse of California’s conservatorship system by private conservators; public guardians who lack the necessary resources to help truly needy individuals; probate courts which do not have sufficient resources to provide adequate oversight to catch abuses of conservatees; and a system that provides no place for those in need to turn to for help.¹⁰

A. History of Probate Conservatorships in California and Description of the Legal Process

Conservatorship laws are generally derived from the *parens patriae* power of the state to protect incompetent persons.¹¹ In 1850, the Legislature first authorized the probate court to appoint

⁸ Probate Code sections 2350 through 2359.

⁹ Probate Code sections 2400 through 2595.

¹⁰ Exhibit I, Assembly Third Reading Bill Analysis, A.B. No. 1363, as amended January 24, 2006, p. 4.

¹¹ *Conservatorship of Wendland* (2001) 26 Cal.4th 519, 535, where the California Supreme Court stated that “decisions made by conservators typically derive their authority from a different basis—the *parens patriae* power of the state to protect incompetent persons.”

Under English law at the time of the settling of the American colonies, the King, as *parens patriae*, had the authority to act as “the general protector of all infants, idiots, and lunatics.” (*Hawaii v. Standard Oil Co.* (1972) 405 U.S. 251, 257; *Sullivan v. Dunne* (1926) 198 Cal. 183, 189-190.) After the American Revolution, the *parens patriae* power was vested in the state legislatures, which often delegated the authority to protect minors and incompetents to the courts. (*Hawaii v. Standard Oil Co.*, *supra*, 405 U.S. 251, 257.) In *Late Corporation of the Church of Latter Day Saints v. United States*, the Supreme Court suggested that the *parens patriae* power is like government’s police power, “inherent in the supreme power of every state ... and often necessary to be exercised in the interest of humanity.” ((1890) 136 U.S. 1, 57-58.)

The *parens patriae* power is recognized in existing state law. Since 1932, Welfare and Institutions Code section 17000 has generally required counties to “relieve and support all incompetent, poor, indigent persons, and those incapacitated by age, disease, or accident,” when those persons are not relieved and supported by some other means. To implement this provision, Welfare and Institutions Code section 17001 requires each county to adopt standards of aid and care for the indigent and dependent poor. Although this provision confers upon a county broad discretion to determine eligibility for and the types of relief, it has been held to require counties to provide medical care and general assistance to indigent persons not eligible for such care under other programs. (*Hunt v. Superior Court* (1999) 21 Cal.4th 984.) In addition, and as described further below, Welfare and Institutions Code section 10002, as last amended in 1980, authorizes the county counsel, at the request of the county social services department, to initiate

guardians for the insane, minors, and incompetents.¹² Although the guardianship law was amended many times, guardianships remained limited to the insane, minors, and incompetents until 1957.¹³

In 1957, the Legislature established a new protective relationship of conservatorship based on the belief that the stigma of the label “incompetent” discouraged people from seeking appointment of a guardian. A fifth division was added to the Probate Code to address probate conservatorships.¹⁴ The 1957 statutes “provided that the court could appoint a conservator for a person who was neither insane nor incompetent, but who, for a variety of other reasons, needed direction in the management of his affairs.”¹⁵ As originally enacted, conservators could be appointed for “any adult person who by reasons of advanced age, illness, injury, mental weakness, intemperance, addiction to drugs or other disability, or other cause is unable to properly care for himself or for his property, or who for said causes or for any other cause is likely to be deceived or imposed upon by artful or designing persons”¹⁶

Today, a probate conservator may be appointed by the court for “a person who is unable to provide properly for his or her personal needs for physical health, food, clothing, or shelter,” or for “a person who is substantially unable to manage his or her own financial resources or resist fraud or undue influence,” or for a person who needs both types of services.¹⁷ The appointment of a conservator affects an individual’s liberty interests and, thus, due process rights must be

conservatorship proceedings for the appointment of a public or private conservator when an applicant or recipient of a public social services program is incapable of managing his or her own resources, care, and maintenance.

¹² Statutes 1850, chapter 115.

¹³ *Board of Regents v. Davis* (1975) 14 Cal.3d 33, 37-38.

¹⁴ *Id.*; former Probate Code sections 1701-2207 (Stats. 1957, ch. 1902).

¹⁵ *Board of Regents, supra*, 14 Cal.3d 33, 39.

¹⁶ Former Probate Code section 1751.

¹⁷ Probate Code section 1801, as last amended by Statutes 1995, chapter 842. See also, *Conservatorship of Sanderson* (1980) 106 Cal.App.3d 611, 619-620, where the court explained the reason for the clear and convincing standard as follows:

Balancing the benefit and purpose of the probate conservatorship proceedings against the adverse consequences to the individual clearly suggests the proper standard is clear and convincing proof. [Footnote omitted.] The deprivation of liberty and stigma which attaches under a probate conservatorship is not as great as under an LPS conservatorship [Lanterman-Petris-Short Act, which concerns the involuntary civil commitment to a mental health institution]. However, to allow many of the rights and privileges of everyday life to be stripped from an individual “under the same standard of proof applicable to run-of-the-mill automobile negligence actions” cannot be tolerated.

afforded to the proposed conservatee.¹⁸ Under these principles, the court may not establish a conservatorship unless there is clear and convincing evidence that a conservator is required.¹⁹ The court's order granting or refusal to grant letters of conservatorship is an appealable order.²⁰

Under current law, a petition for the appointment of a conservator filed with the court begins the process. A petition may be filed by the proposed conservatee; spouse or domestic partner of the proposed conservatee; a relative of the proposed conservatee; any interested state or local entity or agency of this state or any interested public officer or employee of this state or of a local public entity of this state; or any other interested person or friend of the proposed conservatee.²¹ The petition must state the reasons why a conservatorship is required, and the alternatives to conservatorship considered by the petitioner and why those alternatives are not available. The petition must set forth the names and addresses of the proposed conservatee's spouse or domestic partner, relatives within the second degree, or other family members to the extent a spouse, domestic partner, or close relative is unknown. The petition must also state facts, if applicable, that the proposed conservatee is a patient of the State Department of Mental Health (DMH) or the State Department of Developmental Services (DDS), or receives benefits payable by the Veterans Administration (VA), and notice must be provided to all these individuals and entities.²² If the petition is filed by a person other than the proposed conservatee, the clerk of the court is required to issue a citation to the proposed conservatee setting forth the time and place of hearing; the legal standards of conservatorship; the affects of a conservatorship; and notice that the court or a court investigator will assist in the understanding of the process and rights, that the person has the right to appear at the hearing and oppose the petition, the right to choose and be represented by legal counsel, the right to have legal counsel appointed by the court if unable to retain legal counsel, and the right to a jury trial.²³

After the petition is filed, a court investigator is assigned to interview the proposed conservatee personally, and explain the assertions in the petition and the elements of the citation issued by the clerk. The investigator also must determine whether it appears that the proposed conservatee suffers from mental health issues that impair the ability to understand the consequences of his or her actions; whether the proposed conservatee is unable to attend the hearing or is willing to

¹⁸ *Conservatorship of Valerie N.* (1985) 40 Cal.3d 143, 162. By statute, a proposed conservatee may be disqualified from voting if not capable of completing an affidavit of voter registration, and may be adjudged unable to provide for personal needs or to manage financial resources. In addition, the adjudication may affect or transfer to the conservator the conservatee's right to contract, to manage and control property, to give informed consent for medical treatment, and to fix a residence. (Prob. Code, § 1823.)

¹⁹ Probate Code section 1801(e), as last amended by Statutes 1995, chapter 842.

²⁰ Probate Code section 1301, as last amended by Statutes 2001, chapter 417.

²¹ Probate Code section 1820, as last amended by Statutes 2001, chapter 893.

²² Probate Code section 1821, as last amended by Statutes 2002, chapter 784; Probate Code section 1822, as last amended by Statutes 2001, chapter 893.

²³ Probate Code section 1823, as last amended by Statutes 1990, chapter 79.

attend; and determine whether the proposed conservatee wishes to contest the petition, or needs or desires legal counsel. The court investigator is then required to report the findings to the court in writing, at least five days before the hearing.²⁴

The court is required to hear and determine the matter of the establishment of the conservatorship according to the law and procedure relating to the trial of civil actions, including trial by jury if demanded by the proposed conservatee.²⁵ Current law requires that the proposed conservatee be produced at the hearing, except where the proposed conservatee is out of the state when served and is not the petitioner, or the proposed conservatee is unable to attend the hearing by reason of medical inability established by affidavit or certificate of a licensed medical practitioner. Emotional or psychological instability is not good cause for the absence of the proposed conservatee from the hearing, unless the instability is likely to cause serious and immediate physiological damage to the proposed conservatee. The court may order that the proposed conservatee need not attend the hearing, however, in circumstances where the court investigator reports that the proposed conservatee has expressly communicated that he or she is unwilling to attend the hearing, does not wish to contest the petition, does not object to an order of conservatorship, and either does not object to the person proposed for appointment as conservator or states a preference that another person act as conservator.²⁶ If the proposed conservatee attends the hearing, the court is required to inform the proposed conservatee of the effect of an order of conservatorship and shall consult with the proposed conservatee to determine his or her opinion concerning the establishment of the conservatorship, the appointment of the proposed conservator, and any order requested in the petition.²⁷ In addition, the following persons may appear at the hearing to support or oppose the petition: the spouse or domestic partner of the proposed conservatee, a relative of the proposed conservatee, or any interested person or friend of the proposed conservatee.²⁸

The petitioner has the burden of proof by clear and convincing evidence that a conservatorship is necessary and required, and the court's determination is based on that standard.²⁹ On appeal, the court will look to see if there is substantial evidence in the record to support the lower court's determination.³⁰ In reviewing the trial court's decision, the court of appeal will view the record in the light most favorable to the judgment below and determine if a reasonable trier of fact

²⁴ Probate Code section 1826, as last amended by Statutes 2002, chapter 784.

²⁵ Probate Code section 1827, as last amended by Statutes 2000, chapter 17.

²⁶ Probate Code section 1825, as added by Statutes 1990, chapter 79.

²⁷ Probate Code section 1828, as added by Statutes 1990, chapter 79.

²⁸ Probate Code section 1829, as last amended by Statutes 2001, chapter 893.

²⁹ Probate Code section 1801.

³⁰ *Sheila S. v. Superior Court* (2000) 84 Cal.App.4th 872, 880-881, where the court stated that "the sufficiency of evidence to establish a given fact, where the law requires proof of the fact to be clear and convincing, is primarily a question for the trial court to determine, and if there is substantial evidence to support its conclusion, the determination is not open to review on appeal."

could find that denial or approval of the petition for conservatorship is appropriate in light of the petitioners' heightened "clear and convincing" burden of proof.³¹

If there is clear and convincing evidence that the appointment of a conservator is required, the trial court exercises its discretion in selecting a conservator for the proposed conservatee, and is guided by what appears to be in the best interests of the proposed conservatee.³² If the proposed conservatee has sufficient capacity at the time to form an intelligent preference, the proposed conservatee may nominate a conservator in the petition or in writing signed either before or after the petition is filed. The court is required to appoint the nominee as conservator unless the court finds that the appointment of the nominee is not in the best interests of the proposed conservatee.³³ The order of preference for the selection of conservator is (1) the proposed conservatee's nominee, the conservatee's spouse, domestic partner, or the person nominated by the spouse or domestic partner; (2) an adult child of the proposed conservatee or the person nominated by the adult child; (3) a parent of the proposed conservatee or the person nominated by the parent; (4) a sibling of the proposed conservatee or the person nominated by the sibling; (5) any other person or entity eligible for appointment or willing to act as a conservator under the Probate Code and the Welfare and Institutions Code.³⁴ Entities eligible for appointment as a conservator, depending on the facts, include trust companies,³⁵ nonprofit charitable corporations,³⁶ DDS,³⁷ DMH,³⁸ the VA,³⁹ county counsel and the county public guardian.⁴⁰ On appeal, the trial court's order appointing a conservator is reviewed for abuse of discretion, and will be reversed only if there was no reasonable basis for the trial court's action.⁴¹

The court order appointing the conservator identifies the duties of the conservator.⁴² Before the appointment is effective, the conservator is required to take an oath to perform the duties of the office according to law and file a bond, if required.⁴³ The appointment is then evidenced by the

³¹ *In re Jasmon O.* (1994) 8 Cal.4th 398, 423.

³² Probate Code section 1812, as last amended by Statutes 2001, chapter 893.

³³ Probate Code section 1810, as added by Statutes 1990, chapter 79.

³⁴ Probate Code section 1812, as last amended by Statutes 2001, chapter 893.

³⁵ Probate Code section 83.

³⁶ Probate Code section 2104.

³⁷ Health and Safety Code section 416.

³⁸ Welfare and Institutions Code section 7284.

³⁹ Military and Veterans Code section 1046.

⁴⁰ Probate Code sections 2900, 2920, and 2922.

⁴¹ *Conservatorship of Ramirez* (2001) 90 Cal.App.4th 390, 403; *Garcia v. County of Sacramento* (2002) 103 Cal.App.4th 67, 81.

⁴² Probate Code section 1830, as added by Statutes 1990, chapter 79.

⁴³ Probate Code section 2300, as added by Statutes 1990, chapter 79.

issuance of letters by the clerk of the court. The appointment of conservatorship is not effective until letters have issued.⁴⁴

Once a conservator is appointed, the conservatorship is subject to the supervision of the court and most actions require court authorization.⁴⁵ The relationship of conservator (both of the person and of the estate) and conservatee is a fiduciary relationship.⁴⁶ Consequently, every conservator assumes the basic obligation of a fiduciary to act prudently and in good faith. A conservator of the person is responsible for “the care, custody, and control of, and has charge of the education of [the conservatee].”⁴⁷ A conservator of the person generally must:

- Determine the needs and level of care of the conservatee and develop a plan for meeting those needs;
- Manage the conservatee’s living situation;
- Manage the conservatee’s health care;
- Arrange for the for the conservatee’s meals;
- Arrange for the for the conservatee’s clothing;
- Arrange for the for the conservatee’s personal care;
- Arrange for the for the conservatee’s housekeeping;
- Arrange for the for the conservatee’s transportation;
- Arrange for the for the conservatee’s recreation and social contact.⁴⁸

A conservator of the estate manages the conservatee’s assets and uses the income for the support and maintenance of the conservatee.⁴⁹ If the income is not enough for the support and management of the conservatee, the conservator can sell or mortgage estate assets.⁵⁰ The conservator may also maintain the conservatee’s home, pay debts, and pay for services for the conservatee.⁵¹ A conservator of the estate generally must:

- Post a bond;
- Determine the needs and level of care of the conservatee and develop a plan for meeting those needs;
- Locate and take control of the assets and make sure they are adequately protected against loss;
- Make an inventory of the assets for the court;

⁴⁴ Probate Code section 2310, as last amended by Statutes 1996, chapter 862.

⁴⁵ Probate Code sections 2351, 2400, et seq.

⁴⁶ Probate Code section 2101.

⁴⁷ Probate Code section 2431.

⁴⁸ Exhibit I, Judicial Council of California’s *Handbook for Conservators*, pp. 27-76.

⁴⁹ Probate Code sections 2401, 2420.

⁵⁰ Probate Code section 2420.

⁵¹ Probate Code sections 2431, 2427.

- Collect all of the conservatee’s income and other money due and apply for government benefits to which the conservatee is entitled;
- Make a budget for the conservatee, working with the conservator of the person, or, if there isn’t one, working with the conservatee or his or her caregiver;
- Pay the conservatee’s bills and expenses on time and in line with the conservatee’s budget;
- Keep track of how trustees or other parties are managing any of the conservatee’s assets;
- Invest the estate assets and income in safe investments that will meet the conservatee’s needs and the court’s requirements;
- Make funeral and burial arrangements;
- Periodically account to the court and to other interested persons regarding income coming into the estate, expenditures, and the remaining conservatorship property;
- Prepare a final report and accounting of the estate when the conservatorship ends.⁵²

Conservators are required to make accountings of the assets of the estate to the court for settlement and allowance after one year from the time of appointment and, thereafter at least every two years unless otherwise ordered by the court.⁵³ Upon the death of a conservatee, a conservator must make two final accountings for the period before and the period after the date of death.⁵⁴ Only conservators of the estate need to file accountings of the assets.⁵⁵

A conservator can be removed for mismanagement of an estate, failure to file an inventory or account, incapacity, gross immorality, a felonious conviction, adverse interest, or bankruptcy.⁵⁶ A conservator can also be removed if it is in the best interest of the conservatee.⁵⁷

B. County Public Guardians

As set forth in detail above, conservatorships of the person or estate require conservators to perform many duties in order to care for and manage conservatees and their assets. Although conservators are often either friends or relatives of the conservatee or private professional conservators retained to serve as conservator for an individual, there are instances where no one is willing or able to serve as conservator. For example, as last amended in 1980, Welfare and Institutions Code section 10002 authorizes the county counsel, at the request of the county social services department, to initiate conservatorship proceedings for the appointment of a public or

⁵² Exhibit I, Judicial Council of California’s *Handbook for Conservators*, pp. 77-142.

⁵³ Probate Code section 1061, as last amended by Statutes 1997, chapter 724; Probate Code section 2620, as last amended by Statutes 2001, chapter 563.

⁵⁴ Probate Code section 2620, as last amended by Statutes 2001, chapter 563.

⁵⁵ *Ibid.*; *Conservatorship of Munson* (1978) 87 Cal.App.3d 515, 518 (deciding that no guardianship or conservator of the person need file an accounting).

⁵⁶ Probate Code section 2650, as added by Statutes 1990, chapter 79.

⁵⁷ *Ibid.*

private conservator when an applicant or recipient of a public social services program is incapable of managing his or her own resources, care, and maintenance.⁵⁸

The Legislature has also authorized counties to create and terminate the office of the public guardian, appoint a public guardian to fill this position, and for the public guardian to act as a guardian or conservator in certain cases, including where no one else is willing or able to serve in that capacity.⁵⁹

In 1945, before probate conservatorships were established, Los Angeles County sponsored Senate Bill 522, which authorized the board of supervisors to create the office of the public guardian in order to allow the county to act as guardian for indigent individuals with mental disorders committed pursuant to the former Welfare and Institutions Code.⁶⁰ According to correspondence sent by the Los Angeles County Counsel recommending that the Legislature create the office of the public guardian, County Counsel stated that:

⁵⁸ Welfare and Institutions Code section 10002, as last amended in 1980, provides in full that:

When an applicant for or recipient of public social services is incapable of managing his own resources and planning or carrying out arrangements for his own care and maintenance, and the applicant or recipient cannot secure the services of a private attorney, if authorized by the board of supervisors, the county counsel at the request of the county department, or the district attorney, if a county counsel does not exist, may initiate and carry out proceedings for the appointment of a public or private guardian or public or private conservator, or for changing the form of legal protection when this is indicated. Costs incurred in such proceedings for the protection of applicants or recipients, when not available from the person's own resources, shall be a proper welfare administrative or service cost, except where a relative engages a private attorney to accomplish this purpose. (Emphasis added.)

Welfare and Institutions Code section 10002 allows counties to initiate a guardianship or conservatorship where appropriate to administer all public social services programs available pursuant to Division 9 of the Welfare and Institutions Code, including: (1) temporary assistance to needy families (the CalWORKs program) provided pursuant to Welfare and Institutions Code sections 11200 to 11526.5; (2) supplementary assistance for the aged, blind, and disabled provided pursuant to Welfare and Institutions Code sections 12000 to 12351; and (3) financial and medical assistance for the indigent (commonly referred to as “general assistance”) provided pursuant to Welfare and Institutions Code sections 17000 to 17609.1.

⁵⁹ See Government Code sections 27430-27436 (Stats. 1988, ch. 1199, § 17) and Former Probate Code section 2920 (enacted by Stats. 1988, ch. 1199, § 72.) Government Code sections 27430-27436 and Probate Code section 2920 are derived from Former Welfare and Institutions Code sections 5175-5189 (Stats. 1945, ch. 907, § 1).

⁶⁰ Exhibit I, Governor’s Bill File, Statutes 1945; Chapter 907, S.B. 522, Correspondence From Los Angeles County Counsel, dated June 8, 1945, pp. 1-3.

In a county as large as Los Angeles County and particularly in the City of Los Angeles there are many people who become mentally ill and who have considerable property but who are without friends or relatives and the public interest requires that these people and their property be protected. It is for such cases that it is necessary and essential that there be a public guardian who will be in a position to look after the person and the estate of any such person who requires such assistance.⁶¹

Before the 1945 bill sponsored by Los Angeles County, former Welfare and Institution Code section 5077 provided that if a mentally disordered person was committed and found to be indigent, the county was responsible for paying for that person's maintenance.⁶² Although the prior code made the county responsible for paying for such maintenance, the former Welfare and Institutions Code did not provide a means for counties to recover the costs of treatment from the person committed, who had assets, or from their estate.⁶³ On the other hand, section 6660 of the former Welfare and Institutions Code provided that the State Department of Institutions could be appointed guardian of the estate of an incompetent person committed to a state hospital if such incompetent person has no guardian.⁶⁴ The purpose of section 6660 was to place the state in a position to reimburse itself from the property of its wards, and for this reason, the Department was authorized to act, under given circumstances, as guardian of the estate of the ward or as administrator of the estate of a deceased ward.⁶⁵

In response, the Legislature authorized counties to create the office of the public guardian in 1945 with the enactment of Welfare and Institutions Code sections 5175 through 5189.⁶⁶ Former Welfare and Institutions Code section 5175 authorized the board of supervisors of any county to "create the office of the public guardian..." and to "appoint a public guardian to fill such office..." but limited the authority to counties with a population of at least one million.⁶⁷ A later amendment removed the population-based limitation. The authority to establish and terminate the office of the public guardian is currently in Government Code section 27430, which provides the following:

(a) In any county the board of supervisors may by ordinance create the office of public guardian and subordinate positions which may be necessary and fix compensation therefor.

⁶¹ *Id.* at p. 2.

⁶² Former Welfare and Institutions Code sections 5077, enacted by Statutes 1937, chapter. 369.

⁶³ *Ibid.*

⁶⁴ Former Welfare and Institutions Code sections 6660, enacted by Stats.1937, chapter 369.

⁶⁵ *In re Abdale's Estate* (1943) 59 Cal.App.2d 445, 446.

⁶⁶ Statute of 1945, chapter 907, section 1.

⁶⁷ Former Welfare and Institutions Code section 5175, enacted by Statutes 1945, ch. 907, § 1. Former Welfare and Institutions section 5177 also provided that the board of supervisors "may by ordinance terminate the office of the public guardian."

(b) The board of supervisors may by ordinance terminate the office of public guardian.⁶⁸

In addition, former Welfare and Institutions Code section 5181, as enacted by Statutes 1945, Chapter 907, section 1, provided that:

In proper cases any such public guardian *may apply* to a court of competent jurisdiction for appointment as guardian of the person and estate or person or estate of any person in the county who is a patient under the provisions hereof or who is a recipient of aid under any of the provisions of this code where it appears that such person requires a guardian and where it appears that such person's estate does not exceed five thousand dollars (\$5,000) in probable value.

In 1965, the Legislature expanded the scope of the office of the public guardian by allowing the public guardian to apply in proper cases as guardian *or conservator* under the probate conservatorship program.⁶⁹ Statutes of 1988, Chapter 1199, section 72, added Probate Code section 2920, which superseded the portions of former Welfare and Institutions Code section 8006.⁷⁰ Probate Code section 2920, as enacted in 1988, similarly provided that, in cases where a person requires a conservator and there is no one else who is qualified and willing to act, the public guardian may apply for appointment as conservator and the court may appoint the public guardian if the appointment is in the best interest of the person. In addition, the statute provided that the public guardian was required to apply for appointment when ordered by the court, upon determination by the court that the appointment was necessary. Probate Code section 2920, as last amended before the 2006 test claim statutes, stated the following:

If any person domiciled in the county requires a guardian or conservator and there is no one else who is qualified and willing to act and whose appointment as guardian or conservator would be in the best interest of the person:

(a) The public guardian may apply for appointment as guardian or conservator of the person, the estate, or the person and estate.

(b) The public guardian shall apply for appointment as guardian or conservator of the person, the estate, or the person and estate, if the court so orders. The court may make an order under this subdivision on motion of an interested person or on the court's own motion in a pending proceeding or in a proceeding commenced for that purpose. The court shall not make an order under this subdivision except after notice to the public guardian for the period and in the manner provided in Chapter 3 (commencing with Section 1460) of Part 1, consideration of the alternatives, and a determination by the court that the appointment is necessary.

⁶⁸ Government Code section 27430 (Stats. 1988, ch. 1199 § 17, operative July 1, 1989).

⁶⁹ Former Welfare and Institutions Code section 5081, enacted by Statutes of 1965, chapter 2055.

⁷⁰ 19 Law.Rev.Comm.Reports 721 (1988).

The notice and hearing under this subdivision may be combined with the notice and hearing required for appointment of a guardian or conservator.⁷¹

Under current law, if the public guardian is appointed guardian or conservator, the public guardian may recover its costs and fees from the estate or ward.⁷² The amount recoverable by the public guardian includes reasonable expenses in execution of the guardianship or conservatorship, as well as compensation for services provided by the public guardian and the attorney of the public guardian, in the amount the court determines is just and reasonable.⁷³

C. Test Claim Statutes – Omnibus Conservatorship and Guardianship Reform Act of 2006

The test claim statutes, as enacted by the OCRA, amended and added several sections to the Probate Code, including Probate Code section 2920. Probate Code section 2920, as amended by the test claim statutes, provides the following (additions or changes indicated by underline):

(a) If any person domiciled in the county requires a guardian or conservator and there is no one else who is qualified and willing to act and whose appointment as guardian or conservator would be in the best interests of the person, then either of the following shall apply:

(1) The public guardian shall apply for appointment as guardian or conservator of the person, the estate, or the person and estate, if there is an imminent threat to the person's health or safety or the person's estate.

(2) The public guardian may apply for appointment as guardian or conservator of the person, the estate, or the person and estate in all other cases.

(b) The public guardian shall apply for appointment as guardian or conservator of the person, the estate, or the person and estate, if the court so orders. The court may make an order under this subdivision on motion of an interested person or on the court's own motion in a pending proceeding or in a proceeding commenced for that purpose. The court shall order the public guardian to apply for appointment as guardian or conservator of the person, the estate, or the person and estate, on behalf of any person domiciled in the county who appears to require a guardian or conservator, if it appears that there is no one else who is qualified and willing to act, and if that appointment as guardian or conservator appears to be in the best interests of the person. However, if prior to the filing of the petition for appointment it is discovered that there is someone else who is qualified and willing to act as guardian or

⁷¹ Section 2920 superseded the first, second, and a portion of the third sentences of former Welfare and Institutions Code section 8006.

⁷² Probate Code section 2942, as added by Statutes 1999, chapter 866.

⁷³ *Ibid.* In addition, Probate Code section 2640.1 authorizes a petitioner to file a petition for an order allowing compensation and reimbursement of costs, in specified circumstances, if the petitioner is not the one appointed by the court.

conservator, the public guardian shall be relieved of the duty under the order. The court shall not make an order under this subdivision except after notice to the public guardian for the period and in the manner provided for in Chapter 3 (commencing with Section 1460) of Part 1, consideration of the alternatives, and a determination by the court that the appointment is necessary. The notice and hearing under this subdivision may be combined with the notice and hearing required for appointment of a guardian or conservator.

(c) The public guardian shall begin an investigation within two business days of receiving a referral for conservatorship or guardianship.⁷⁴

In addition to amending Probate Code section 2920, the OCRA amended and added multiple other statutes to the Probate Code. Claimant asserts that the following provisions of the Probate Code, as added or amended by the OCRA, impose new duties or higher levels of service upon public guardians:

- Probate code section 1850 requires that the court review each conservatorship at set time periods. Probate Code section 1850, as amended by the OCRA⁷⁵: (1) requires that the court investigator visit the conservatee six months after the initial appointment of the conservator, conduct an investigation regarding the appropriateness of the conservatorship and whether the conservator is acting in the best interest of the conservatee; (2) permits the court, upon its own motion or upon the request of any interested person, to order a review of the conservatorship; (3) permits the court to order an accounting of the estate pursuant to Probate Code section 2620; and (4) permits the court to set a timeline for subsequent review of the conservatorship.⁷⁶
- Probate code section 1851 establishes how court investigators shall conduct investigations ordered pursuant to Probate Code 1850. Probate Code section 1851, as amended by the OCRA, requires that “[u]pon request of the investigator, the conservator shall make available to the court investigator during the investigation for inspection and copying all books and records, including receipts and any expenditures, of the conservatorship.”⁷⁷

⁷⁴ Probate Code section 2920, as amended by Statutes 2006, chapter 493. The legislative history of Assembly Bill 1363 indicates that the legislature believed that the “requirements for public guardians to begin investigations within two business days of receiving a referral for conservatorship or guardianship could drive significant reimbursable local costs.” (Exhibit I, Senate Rules Committee Third Reading Bill Analysis, A.B. No. 1363, as amended August 24, 2006, p. 14.)

⁷⁵ Statutes 2006, chapters 492 (S.B. No. 1716) and 493 (A.B. No. 1363) enacted alternate versions of Probate Code sections 1850 and 1851. As A.B. No. 1363 was chaptered after S.B. Bill No. 1716, the amendments codified by Statutes 2006, chapters 493, section 11.5 and 12.5 (A.B. No. 1363) are operative. See Government Code section 9605.

⁷⁶ Statutes 2006, chapter 492.

⁷⁷ Statutes 2006, chapter 492.

- Probate Code section 2113, as added by the OCRA, states: “A conservator shall accommodate the desires of the conservatee, except to the extent that doing so would violate the conservator’s fiduciary duties to the conservatee or impose an unreasonable expense on the conservatorship estate.”⁷⁸
- Probate Code section 2250(a)-(c), which allows for the temporary guardians and conservators, was amended by the OCRA to impose new notice requirements when filing a petition for temporary guardianship or conservatorship.⁷⁹
- Probate Code section 2250.4, as added by the OCRA, exempts proposed temporary conservatees from attending the hearing on a petition for appointment of a temporary guardian or conservator.⁸⁰
- Probate Code Section 2352, which provides a means for fixing the residence of a ward or conservatee and requires that the guardian select the least restrictive appropriate setting that is both available and necessary to meet the needs of the conservatee and is in the best interests of the conservatee, was amended by the OCRA to: (1) require that the residence of a ward or conservatee is the “least restrictive appropriate residence” as described in new Probate Code section 2352.5; and to (2) impose new notice requirements when the ward or conservatee’s address is or may be changed.⁸¹
- Probate Code section 2352.5, as added by the OCRA: (1) creates a presumption that the personal residence of a proposed conservatee is the least restrictive residence for the conservatee; and (2) requires that the conservator, upon appointment, determine the appropriate level of care for the conservatee.⁸²
- Probate Code section 2410, as added by the OCRA, requires the judicial council to adopt a rule of court that establishes uniform standards of conduct for actions that conservators and guardians may take on behalf of conservatees and wards to ensure that their estates are maintained and conserved and to prevent loss or harm to conservatees and wards.⁸³
- Probate Code section 2540 states that the sale of a conservatee’s present or former personal residence, and real or personal property, are subject to court authorization. Probate Code section 2540, as amended by the OCRA, requires the conservator to inform

⁷⁸ Probate Code section 2113 (Stats. 2006, ch. 493, § 13) makes explicit a requirement that already existed in other Probate Code sections regarding a conservators fiduciary duties to a conservatee. See Probate Code sections 1800(e) (Stats. 1990, ch. 79) and 2101 (as amended by Stats. 1993, ch. 293).

⁷⁹ Probate Code section 2250 (a), (b), and (c) (Stats. 2006, ch. 493, § 15).

⁸⁰ Probate Code section 2250.4 (Stats. 2006, ch. 493, § 16).

⁸¹ Probate Code section 2352 (Stats. 2006, ch. 490, § 1).

⁸² Probate Code section 2352.5 (Stats. 2006, ch. 490, § 2).

⁸³ Probate Code section 2410 (Stats. 2006, ch. 493, § 22).

the court why other alternatives to the sale of a conservatee's home, "including, but not limited to, in-home care services, are not available."⁸⁴

- Probate Code section 2543, which established the manner of sale of conservatorship property, was amended by the OCRA to require that sales and other related transactions conform to the provisions of the Probate Code concerning sales by a personal representative "as described in Articles 6 (commencing with Section 10300), 7 (commencing with Section 10350), 8 (commencing with Section 10360), and 9 (commencing with Section 10380) of Chapter 18 of Part 5 of Division 7." Probate Code section 2543 also established a new requirement for appraisal of the conservatee's personal residence before sale.⁸⁵
- Probate Code section 2590 allows the court the power to grant guardians and conservators the powers listed in section 2591. OCRA made minor non-substantive changes to section 2590.⁸⁶
- Probate Code section 2591 contains the list of powers the court may grant to guardians and conservators pursuant to Probate Code section 2590. OCRA amended section 2591(d) to distinguish between the sale of generic real or personal property and sale of a conservatee's personal residence. The amendment of section 2591 also makes the power to sell the private residence of the conservatee subject to the requirements of new Probate Code Section 2591.5 and Probate Code Sections 2352.5 and 2541.⁸⁷
- Probate Code section 2591.5, as added by the OCRA, requires conservators seeking an order under Probate Code section 2590 authorizing a sale of the conservatee's personal residence to "demonstrate to the court that the terms of sale, including the price for which the property is to be sold and the commissions to be paid from the estate, are in all respects in the best interests of the conservatee." New Probate Code section 2591.5 also establishes appraisal requirements for the sale of a personal residence, requires that notice be given prior to the close of escrow, and provides for a good cause exception for applying all the requirements of section 2591.5, except for the appraisal requirements.
- Probate Code section 2610(a), which requires that guardians and conservators file an inventory and appraisal of the estate with the court, was amended by the OCRA to require that the inventory and appraisal is mailed to the ward or conservatee and other interested parties.⁸⁸
- Probate Code section 2620, which requires guardians and conservators to file accountings of the assets of the estate with the court, was amended by the OCRA to: (1) impose new documentation requirements for accountings; (2) make each accounting subject to

⁸⁴ Probate Code section 2540 (Stats. 2006, ch. 490, § 3).

⁸⁵ Probate Code section 2543 (Stats. 2006, ch. 490, § 4).

⁸⁶ Probate Code section 2590 (Stats. 2006, ch. 490, § 5).

⁸⁷ Probate Code section 2591 (Stats. 2006, ch. 490, § 6).

⁸⁸ Probate Code section 2610 (a) (Stats. 2006, ch. 493, § 23).

random and discretionary review by the court; and (3) require guardians and conservators to make all books and records available to any person designated by the court to verify the accuracy of the accounting.⁸⁹

- Probate Code section 2620.2, provides a remedy if the guardian or conservator fails to file an accounting as required by Probate Code section 2620. The OCRA made minor non-substantive changes to section 2620.2.⁹⁰
- Probate Code sections 2623, 2640, 2640.1, and 2641 allow guardians and conservators to recover certain costs, expenses, and compensation for services rendered. Probate code sections 2623, 2640, 2640.1, and 2641, as amended by the OCRA, prohibit guardians and conservators from recovering costs, expenses, and compensation for services rendered unless the court determines that the services are in the best interest of the ward or conservatee.⁹¹
- Probate Code section 2653 allows the court to remove guardians and conservators, revoke the letters of guardianship or conservatorship, and order the guardian or conservator to file an accounting. Probate Code section 2653, as amended by the OCRA: (1) allows the court to award the party that has petitioned to remove a guardian or conservator costs and attorney’s fees; and (2) prohibits guardians and conservators from deducting from, or charging to, the estate his or her cost of litigation.⁹²
- Probate Code section 2923, as added by the OCRA, requires that “On or before January 1, 2008, the public guardian shall comply with the continuing education requirements that are established by the California State Association of Public Administrators, Public Guardians, and Public Conservators.”⁹³

III. Positions of the Parties and Interested Parties

A. Claimant’s Position

Claimant alleges that the test claim statutes constitute a reimbursable state-mandated program or higher level of service within an existing program.⁹⁴ Claimant asserts that under prior law,

⁸⁹ Probate Code section 2620 (Stats. 2006, ch. 493, § 24).

⁹⁰ Probate Code section 2620.2 (Stats. 2006, ch. 493, § 25).

⁹¹ Probate Code sections 2623, 2640, 2640.1, and 2641 (Stats. 2006, ch. 493, §§ 26-29).

⁹² Probate Code section 2653 (Stats. 2006, ch. 493, § 30).

⁹³ Probate Code section 2923 (Stats. 2006, ch. 493, § 33).

⁹⁴ Although claimant asserts that one prior test claim (*Guardianship Petitions* (CSM-4256) and two prior legislatively-determined mandates (*Developmental Disabled Attorneys’ Service* (04-LM-03); *Guardianship/Conservatorship Filings* (04-LM-15)) support this test claim, the prior test claim and legislatively-determined mandates are not relevant to this test claim. The legislatively-determined mandates cited by claimant are irrelevant because the statutes at issue were not before the Commission and do not relate in any way to the public guardian’s duties or functions. Prior test claim CSM-4256, regarding investigations of certain guardianship petitions,

public guardians were not required to serve as conservator for any person or estate unless ordered by the court. Although the OCRA made sweeping changes to the conservatorship process as a whole, including reforms aimed at professional conservators, probate court proceedings, and educating the public regarding conservatorships, the test claim seeks reimbursement only for those costs incurred as a result of changes made to statutes directly affecting county public guardians.⁹⁵

Claimant asserts that the OCRA imposes the following new requirements upon public guardians:

- File a petition for appointment as guardian or conservator for the person, the estate, or the person or the estate where there is an imminent threat to the person's health or safety or to the person's estate, and if appointed to serve as guardian or conservator, comply with all activities and incur all costs imposed by Probate Code sections 1400 through 3925, which set forth requirements for all guardianships and conservatorships established under the Probate Code.
- File a petition for appointment as guardian or conservator for the person, the estate, or the person or the estate when ordered by the court because there is no one else qualified and willing to act as conservator and it appears to be in the best interests of the person, and if appointed to serve as guardian or conservator, comply with all activities and incur all costs imposed by Probate Code sections 1400 through 3925, which set forth requirements for all guardianships and conservatorships established under the Probate Code.
- Begin an investigation within two business days of receiving a referral for conservatorship or guardianship.
- On or before January 1, 2008, comply with continuing education requirements established by the California State Association of Public Administrators, Public Guardians, and Public Conservators.
- For all cases where the public guardian serves as guardian or conservator, whether voluntarily or as required by statute or court order, comply with new accounting, estate management, inventory and appraisal, residential placement, and temporary conservatorship requirements set forth in Probate Code sections 1850(a), 1851(a), 2113, 2250(a)-(c), 2250.4(a)-(d), 2352(a)-(f), 2410, 2540(a)-(b), 2543(a)-(d), 2610(a); 2620 (a)-(e), 2620.2(a)-(d), 2590, 2591(a)-(q), 2591.5 (a)-(d), 2623 (a)-(b), 2640 (a)-(c), 2640.1(a)-(c), 2641(a)-(b), 2653(a)-(c), 2920(a)-(c), and 2923, as added and amended by the OCRA. Claimant also asserts that these code

sought reimbursement for costs incurred by court staff during guardianship investigations. The Commission found that these activities were not contained in prior law and thus constituted a new program or higher level of service and a reimbursable state mandate. However, test claim CSM-4256 did not relate in any way to duties or function of public guardians.

⁹⁵ A full summary of the changes made by OCRA has been provided by the Administrative Office of the Courts. (Exhibit I, Administrative Office of the Courts' Summary of Omnibus Conservatorship and Guardianship Reform Act of 2006.)

sections require public guardians to provide higher levels of service to guardianships and conservatorships established before the enactment of the OCRA.

Claimant alleges that the test claim statutes have caused claimant to incur additional costs to serve new populations of conservatees pursuant to Probate Code section 2920(a) and (b).⁹⁶ The test claim states that the amount claimant will incur to serve new populations of conservatees pursuant to Probate Code section 2920(a) and (b) will be: (1) \$71,500 during the 2006-2007 fiscal year; (2) \$370,500 during the 2007-2008 fiscal year; and (3) \$695,500 during the 2008-2009 fiscal year.⁹⁷ The statewide cost estimate submitted by claimant, which was developed by surveying other counties, indicates that the total statewide cost for counties to serve new populations of conservatees pursuant to Probate Code section 2920(a) and (b) will be: (1) \$3,884,522 during the 2006-2007 fiscal year; (2) \$10,422,061 during the 2007-2008 fiscal year; and (3) \$11,982,260 during the 2008-2009 fiscal year.⁹⁸

On October 25, 2013, claimant requested an extension of time to file comments on the draft staff analysis and postponement of the hearing, which were granted and this matter was set for hearing on January 24, 2014. On November 25, 2013, claimant requested an additional extension of time to file comments on the draft staff, which was granted. Although claimant requested two extensions to file comments, claimant did not file any comments on the draft staff analysis.

B. Department of Finance's Position

Finance submitted written comments on December 28, 2007. Finance believes that the test claim statutes "may have" created a reimbursable state mandate for the following activities:

- Requiring the public guardian to apply for appointment as a guardian or conservator when there is an imminent threat to a person's health, safety or estate.
- Requiring the court to order the public guardian to apply for appointment on behalf of any person domiciled in the county if no one else is qualified and willing to act and if that appointment is in the best interest of the person.
- Beginning an investigation to determine if a conservatorship is necessary within two business days of receiving a conservatorship referral.
- Requiring the public guardian to comply with continuing education requirements.⁹⁹

On October 25, 2013, Finance submitted comments concurring with the recommendation in the draft staff analysis that the test claim should be denied "because the activities that form the basis of the test claim are either not required of local government because they are borne out of the

⁹⁶ Exhibit A, test claim, dated December 12, 2007, section VI ("State-Wide Cost Survey"), pp. 126-176.

⁹⁷ *Id.* at section VI, pp. 128-139.

⁹⁸ *Id.* at section VI, p. 127.

⁹⁹ Exhibit B, Department of Finance Comments on the test claim, pp. 1-2.

local agency's discretionary decision to create an office of the public guardian or are triggered by a court order."¹⁰⁰

C. Position of Interested Parties

The Imperial County Public Administrator submitted written comments on May 16, 2008. The San Joaquin County Public Guardian/Conservator submitted written comments on May 29, 2008. The San Diego County Counsel submitted written comments on June 9, 2008.¹⁰¹ The interested parties support the approval of this test claim as a reimbursable state-mandated program.

IV. Discussion

Article XIII B, section 6 of the California Constitution provides in relevant part the following:

Whenever the Legislature or any state agency mandates a new program or higher level of service on any local government, the state shall provide a subvention of funds to reimburse such local government for the costs of such programs or increased level of service, except that the Legislature *may, but need not*, provide a subvention of funds for the following mandates:

- (1) Legislative mandates requested by the local agency affected.
- (2) Legislation defining a new crime or changing an existing definition of a crime.
- (3) Legislative mandates enacted prior to January 1, 1975, or executive orders or regulations initially implementing legislation enacted prior to January 1, 1975.

The purpose of article XIII B, section 6 is to “preclude the state from shifting financial responsibility for carrying out governmental functions to local agencies, which are ‘ill equipped’ to assume increased financial responsibilities because of the taxing and spending limitations that articles XIII A and XIII B impose.”¹⁰² Thus, the subvention requirement of section 6 is “directed to state-mandated increases in the services provided by [local government] ...”¹⁰³

Reimbursement under article XIII B, section 6 is required when the following elements are met:

1. A state statute or executive order requires or “mandates” local agencies or school districts to perform an activity.¹⁰⁴

¹⁰⁰ Exhibit H, Department of Finance comments on the Draft Staff Analysis and Proposed Statement of Decision filed October 25, 2013.

¹⁰¹ Exhibit D, Imperial County Public Administrator's comments in support of test claim; Exhibit E, San Joaquin County Public Guardian/Conservator's comments in support of test claim; Exhibit F, San Diego County Counsel's comments in support of test claim.

¹⁰² *County of San Diego v. State of California* (1997) 15 Cal.4th 68, 81.

¹⁰³ *County of Los Angeles v. State of California* (1987) 43 Cal.3d 46, 56.

¹⁰⁴ *San Diego Unified School Dist. v. Commission on State Mandates (San Diego Unified School Dist.)* (2004) 33 Cal.4th 859, 874.

2. The mandated activity either:
 - a. Carries out the governmental function of providing a service to the public; or
 - b. Imposes unique requirements on local agencies or school districts and does not apply generally to all residents and entities in the state.¹⁰⁵
3. The mandated activity is new when compared with the legal requirements in effect immediately before the enactment of the test claim statute or executive order and it increases the level of service provided to the public.¹⁰⁶
4. The mandated activity results in the local agency or school district incurring increased costs, within the meaning of section 17514. Increased costs, however, are not reimbursable if an exception identified in Government Code section 17556 applies to the activity.¹⁰⁷

The determination whether a statute or executive order imposes a reimbursable state-mandated program is a question of law.¹⁰⁸ The Commission is vested with exclusive authority to adjudicate disputes over the existence of state-mandated programs within the meaning of article XIII B, section 6.¹⁰⁹ In making its decisions, the Commission must strictly construe article XIII B, section 6, and not apply it as an “equitable remedy to cure the perceived unfairness resulting from political decisions on funding priorities.”¹¹⁰

B. The 2006 Test Claim Statutes Do Not Impose a Reimbursable State-Mandated Program or Higher Level of Service Upon Local Agencies Because the Required Activities are Triggered by Local Discretionary Decisions.

As described below, the test claim statutes impose new requirements on the county public guardian. The Commission finds, however, that these requirements do not result in a state-mandated new program or higher level of service on counties within the meaning of article XIII B, section 6 of the California Constitution.

1. The test claim statutes impose some new requirements on the public guardian.

a) Probate Code sections 2920 and 2923

Probate Code section 2923, as amended in 2006, requires that the public guardian comply with the continuing education requirements established by the California State Association of Public

¹⁰⁵ *Id.* at 874-875 (reaffirming the test set out in *County of Los Angeles, supra*, 43 Cal.3d 46, 56.)

¹⁰⁶ *San Diego Unified School Dist., supra*, 33 Cal.4th 859, 874-875, 878; *Lucia Mar Unified School District v. Honig* (1988) 44 Cal.3d 830, 835.

¹⁰⁷ *County of Fresno v. State of California* (1991) 53 Cal.3d 482, 487; *County of Sonoma v. Commission on State Mandates* (2000) 84 Cal.App.4th 1265, 1284; Government Code sections 17514 and 17556.

¹⁰⁸ *County of San Diego, supra*, 15 Cal.4th 68, 109.

¹⁰⁹ *Kinlaw v. State of California* (1991) 53 Cal.3d 482, 487.

¹¹⁰ *County of Sonoma, supra*, 84 Cal.App.4th 1265, 1280 [citing *City of San Jose, supra*].

Administrators, Public Guardians, and Public Conservators on or before January 1, 2008. This requirement is new.

In addition, Probate Code section 2920(c), as added by the 2006 test claim statute, requires that “[t]he public guardian shall begin an investigation within two business days of receiving a referral for conservatorship or guardianship.” The claimant acknowledges that investigations were conducted before the 2006 legislation to determine whether a petition for conservatorship should be filed by the public guardian’s office, and under county policies and procedures, investigations began within *ten days* of the referral and took three to four days to complete.¹¹¹ Although an investigation would have been necessary to make that determination, investigations were not expressly required by state law for probate conservatorships before the enactment of the 2006 test claim statutes.¹¹² The Senate Floor Analysis of the 2006 bill that added this requirement, acknowledged that the requirement to begin an investigation within two business days of the referral could increase county costs as follows:

Requirements for public guardians to begin investigations within two business days of receiving a referral for a conservatorship or guardianship could drive significant reimbursable local costs. Los Angeles County has estimated its workload could increase by as much as 50 percent, at a cost of \$1.8 million annually. If that cost were to hold true for the rest of the state, reimbursable costs could be in the \$5 million range annually.

There is no funding in the 2006 Budget Act for the activities required by this bill.¹¹³

The Commission finds the requirement to begin an investigation within two business days of receiving a referral for conservatorship is new.

The 2006 test claim statute also amended Probate Code section 2920(a) and (b), which now provides the following (new language reflected in underline):

(a) If any person domiciled in the county requires a guardian or conservator and there is no one else who is qualified and willing to act and whose appointment as guardian or conservator would be in the best interests of the person, then either of the following shall apply:

(1) The public guardian shall apply for appointment as guardian or conservator of the person, the estate, or the person and estate, if there is an imminent threat to the person's health or safety or the person's estate.

¹¹¹ Test claim, pages 17-20.

¹¹² With respect to guardianships for minors, prior state law required investigations be done by “the county agency designated to investigate potential dependency” in cases where the proposed guardian is a non-relative. (Prob. Code, § 1513.) This test claim does not seek reimbursement for the duties or appointment as guardian of a minor.

¹¹³ Exhibit I, Senate Rules Committee Third Reading Bill Analysis, A.B. No. 1363, as amended August 24, 2006, p. 14.

(2) The public guardian may apply for appointment as guardian or conservator of the person, the estate, or the person and estate in all other cases.

(b) The public guardian shall apply for appointment as guardian or conservator of the person, the estate, or the person and estate, if the court so orders. The court may make an order under this subdivision on motion of an interested person or on the court's own motion in a pending proceeding or in a proceeding commenced for that purpose. The court shall order the public guardian to apply for appointment as guardian or conservator of the person, the estate, or the person and estate, on behalf of any person domiciled in the county who appears to require a guardian or conservator, if it appears that there is no one else who is qualified and willing to act, and if that appointment as guardian or conservator appears to be in the best interests of the person. However, if prior to the filing of the petition for appointment it is discovered that there is someone else who is qualified and willing to act as guardian or conservator, the public guardian shall be relieved of the duty under the order. The court shall not make an order under this subdivision except after notice to the public guardian for the period and in the manner provided for in Chapter 3 (commencing with Section 1460) of Part 1, consideration of the alternatives, and a determination by the court that the appointment is necessary. The notice and hearing under this subdivision may be combined with the notice and hearing required for appointment of a guardian or conservator.

Section 2920(a)(1), as amended, now requires the public guardian to file a petition for appointment as guardian or conservator for the person, the estate, or the person or the estate in the following circumstances: the person is domiciled in the county and requires a guardian or conservator; there is no one else qualified and willing to act; the appointment as guardian or conservator would be in the best interests of the person; and there is an imminent threat to the person's health or safety or to the person's estate. In such cases, the public guardian is required to comply with the statutory process to draft and file a petition for appointment with the court, and the law and procedure for the civil trial on the petition, including a trial by jury if demanded by the proposed conservatee.¹¹⁴ The public guardian has the burden of proof by clear and convincing evidence that a conservatorship is necessary and required. The requirements to file a petition for conservatorship and act as the petitioner at trial when there is no one else willing or qualified to act and there exists an imminent threat to the person's health and safety or to the person's estate, are new requirements imposed on the public guardian. Under prior law, the public guardian had the discretion to decide whether to file a petition in these circumstances.

The claimant also alleges that Probate Code section 2920(b), as amended in 2006, imposes a new requirement on county public guardians to apply for appointment as guardian or conservator of the person, the estate, or the person and estate, on behalf of any person domiciled in the county who appears to require a guardian or conservator, if it appears that there is no one else who is qualified and willing to act, and if that appointment as guardian or conservator appears to be in the best interests of the person, *when ordered by the court*. The Commission disagrees and finds

¹¹⁴ Probate Code 1820, et seq., 1827.

that section 2920(b) does not impose new require counties to perform any activities. Probate Code section 2920, as it existed immediately before the 2006 amendment, gave the court the authority to require the public guardian to apply for appointment as guardian or conservator in the same circumstances. Before the 2006 amendment, section 2920 stated in relevant part the following:

If any person domiciled in the county requires a guardian or conservator and there is no one else who is qualified and willing to act and whose appointment as guardian or conservator would be in the best interest of the person:

[¶]

(b) The public guardian shall apply for appointment as guardian or conservator of the person, the estate, or the person and estate, if the court so orders. The court may make an order under this subdivision on motion of an interested person or on the court's own motion in a pending proceeding or in a proceeding commenced for that purpose. The court shall not make an order under this subdivision except after notice to the public guardian for the period and in the manner provided in Chapter 3 (commencing with Section 1460) of Part 1, consideration of the alternatives, and a determination by the court that the appointment is necessary. The notice and hearing under this subdivision may be combined with the notice and hearing required for appointment of a guardian or conservator.

The 2006 amendment, with the language that begins “the court shall order,” now requires *the court* to order the public guardian to apply for appointment as guardian or conservator of the person, the estate, or the person and estate, on behalf of any person domiciled in the county who appears to require a guardian or conservator, if it appears that there is no one else who is qualified and willing to act, and if that appointment as guardian or conservator appears to be in the best interests of the person. The statute continues to provide, as it did under prior law, that “the court shall not make an order under this subdivision except after notice to the public guardian . . . , consideration of the alternatives, and a determination by the court that the appointment is necessary.” Thus, the findings of the court remain the same and the requirement for the public guardian to file a petition following the court’s order is not new. Therefore, 2920(b), as amended in 2006 does not require public guardians to perform any new activities,

b) The downstream activities required by remaining code sections pled are triggered by the court’s order appointing the public guardian.

The claimant contends that once the court approves a petition filed pursuant to Probate Code section 2920(a)(1) or (b), then the county is mandated by the state to comply with *all* activities and incur all costs imposed by Probate Code sections 1400 through 3925 to act as conservator or guardian of the person, the estate, or of the person and estate. The Commission disagrees with this position. Although the public guardian has fiduciary duties once appointed, all duties of the conservator are triggered by a court order and are not a mandate of the state.

Article XIII B, section 6 does not require reimbursement for activities or costs required by the courts. The plain language of section 6 requires state reimbursement whenever “the Legislature or any State agency” mandates a new program or higher level of service. That section was specifically designed to preclude the state from shifting financial responsibility for governmental

functions to local agencies, which are ill-equipped to undertake increased financial responsibilities because they are subject to taxing and spending limitations under articles XIII A and XIII B.¹¹⁵ In this regard, local revenues subject to the spending limit of article XIII B include “any authorization to expend during a fiscal year the proceeds of taxes levied by or for that entity and the proceeds of state subventions to that entity (other than subventions made pursuant to Section 6) exclusive of refunds of taxes.”¹¹⁶ However, some local expenditures are specifically *excluded* from the spending limit, including “appropriations required to comply with mandates of the courts or the federal government, which without discretion, require an expenditure for additional services or which unavoidably make the provision of existing services more costly.”¹¹⁷ There is no spending limit on costs incurred to comply with the mandates of the courts. Accordingly, it has been held that state subvention is not required when the expenditures are *not* subject to limitation.¹¹⁸

In this case, Probate Code section 2920 imposes requirements only for filing a petition for appointment and does not change the court’s authority to appoint a guardian or conservator under existing law, or its authority and jurisdiction once the appointment has been ordered. Pursuant to Probate Code section 1812, the selection of a conservator of the person or estate, or both, is “solely in the discretion of the court and, in making the selection, the court is to be guided by what appears to be in the best interests of the proposed conservatee.” Once the court has selected the conservator, the court issues an order of appointment, which establishes the powers granted to and duties imposed on the conservator. The guardian or conservator has management and control of the estate “only to the extent specifically and expressly provided in the appointing court’s order.”¹¹⁹ Where the court determines it appropriate in the circumstances of the particular conservatee, the court, in its discretion, may limit or expand the powers and duties of the conservator by order of the court.¹²⁰ The court may also insert in the order of appointment conditions for providing for the care, treatment, education, and welfare of the conservatee.¹²¹ In addition, the court has the authority to include in the order modifications of the legal capacity of the conservatee by broadening or restricting the power of the conservatee, or by including limitations or conditions on the exercise of the authority granted to the conservatee as the court determines to be appropriate.¹²² The court may also “insert in the order of appointment

¹¹⁵ *County of San Diego v. State of California* (1997) 15 Cal.4th 68, 81.

¹¹⁶ Article XIII B, section 8(b); *Redevelopment Agency of the City of San Marcos v. Commission on State Mandates* (1997) 55 Cal.App.4th 976, 986-987.

¹¹⁷ Article XIII B, section 9(b), defining appropriations that are “not” subject to limitation.

¹¹⁸ *Hayes v. Commission on State Mandates* (1992) 11 Cal.App.4th 1564, 1581.

¹¹⁹ Probate Code section 2401.

¹²⁰ Probate Code sections 1830, 2351, and 2590.

¹²¹ Probate Code section 2358.

¹²² Probate Code section 1873.

conditions not otherwise obligatory providing for the care and custody of the property of the ward or conservatee.”¹²³

After the initial order of appointment, the court “may authorize and instruct the guardian or conservator, or approve and confirm the acts of the guardian or conservator, in the administration, management, investment, disposition, care, protection, operation, or preservation of the estate, or the incurring or payment of costs, fees, or expenses in connection therewith.”¹²⁴ Requests to move the conservatee’s residence out of state, sell the conservatee’s residence, and requests to have certain medical procedures performed, are subject to the court’s prior order and approval.¹²⁵

While some actions of the conservator are authorized or required by statute without the need of a specific court order (including those related to filing and serving an inventory and appraisal of the assets 90 days after appointment, presenting an accounting of the assets of the estate to the court for settlement and allowance, and participating in the court’s review of the conservatorship six months after appointment), these activities occur as a direct result of the court’s order of appointment.¹²⁶

The courts have made clear that the proper focus when determining if a state-mandated program exists is to look at the nature of the claimant’s participation in the underlying program itself.¹²⁷ Here, these activities are triggered by court order and not a mandate of the state. Appropriations required to comply with mandates of the courts are not eligible for reimbursement under article XIII B, section 6.

The claimant also contends that reimbursement is required for all new activities imposed by the test claim statutes following the appointment of the public guardian by the court based on the local discretionary decisions to file a petition for conservatorship pursuant to Probate Code section 2920(a)(2), or a petition to act as a temporary guardian or conservator pursuant to Probate Code section 2250. The Commission disagrees. As stated above, the downstream activities are triggered by an order of the court, and are based on the continuing jurisdiction of the court during the term of the conservatorship or guardianship. Moreover, these costs are further triggered by the local discretionary decisions of the public guardian’s office to file a petition and start the legal process. Requirements triggered by local discretionary decisions are not mandated by the state.¹²⁸

¹²³ Probate Code section 2402.

¹²⁴ Probate Code section 2403.

¹²⁵ Probate Code sections 2352, 2357, and 2591.5.

¹²⁶ See, for example, Probate Code 2450 et seq., 2610, and 2620.

¹²⁷ *Department of Finance v. Commission on State Mandates (Kern High School Dist.)* (2003) 30 Cal.4th 727, 743.

¹²⁸ *Ibid.*

- c) Probate Code sections 1850(a), 1851(a), 2410, 2590, 2591(a)-(q), 2623 (a)-(b), 2640 (a)-(c), 2640.1(a)-(c), 2641(a)-(b), and 2653(a)-(c) do not require local agencies to perform activities, but impose requirements on the courts, court investigators, and judicial council.

And, finally, claimant asserts that Probate Code section 1850(a), 1851(a), 2410, 2590, 2591(a)-(q), 2623 (a)-(b), 2640 (a)-(c), 2640.1(a)-(c), 2641(a)-(b), and 2653(a)-(c), require the public guardian to perform new activities or higher levels of service when serving as guardian or conservator pursuant to the Probate Code. However, these Probate Code sections, as amended by the test claim statutes, do not apply to the public guardian. Rather, they require courts, court investigators, and the judicial council perform the following activities:

- Probate code section 1850(a) requires that the court review each conservatorship at set time periods. Probate Code section 1850(a), as amended by the OCRA¹²⁹: (1) requires that the court investigator visit the conservatee six months after the initial appointment of the conservator, conduct an investigation regarding the appropriateness of the conservatorship and whether the conservator is acting in the best interest of the conservatee; (2) permits the court, upon its own motion or upon the request of any interested person, to order a review of the conservatorship; (3) permits the court to order an accounting pursuant to Probate Code section 2620; and (4) permits the court to set a timeline for subsequent review of the conservatorship.¹³⁰
- Probate code section 1851(a) establishes how court investigators shall conduct investigations ordered pursuant to Probate Code 1850. Probate Code section 1851(a), as amended by the OCRA, requires that “[u]pon request of the investigator, the conservator shall make available to the court investigator during the investigation for inspection and copying all books and records, including receipts and any expenditures, of the conservatorship.”¹³¹
- Probate Code section 2410, as added by the OCRA, requires the judicial council to adopt a rule of court that establishes uniform standards of conduct for actions that conservators and guardians may take on behalf of conservatees and wards to ensure that their estates are maintained and conserved and to prevent loss or harm to conservatees and wards.¹³²

¹²⁹ Statutes 2006, chapters 492 (S.B. No. 1716) and 493 (A.B. No. 1363) enacted alternate versions of Probate Code sections 1850 and 1851. As A.B. No. 1363 was chaptered after S.B. Bill No. 1716, the amendments codified by Statutes 2006, chapters 493, section 11.5 and 12.5 (A.B. No. 1363) are operative. See Government Code section 9605.

¹³⁰ Probate Code section 1850 (Stats. 2006, chapter 493 § 11.5)

¹³¹ Probate Code section 1850 (Stats. 2006, chapter 493 § 12.5)

¹³² Probate Code section 2410 (Stats. 2006, chapter 493 § 22).

- Probate Code section 2590, as last amended before the 2006 test claim statutes, allows the *court* to grant guardians and conservators the powers listed in section 2591. The OCRA made minor non-substantive changes to section 2590.¹³³
- Probate Code section 2591(a)-(q) contains the list of powers the *court* may grant to guardians and conservators pursuant to Probate Code section 2590. The OCRA amended section 2591(d) to distinguish between the sale of generic real or personal property and sale of a conservatee’s personal residence. The amendment of section 2591 also makes the power to sell the private residence of the conservatee subject to the requirements of new Probate Code Section 2591.5 and Probate Code Sections 2352.5 and 2541.¹³⁴
- Probate Code sections 2623(a)-(b), 2640(a)-(c), 2640.1(a)-(c), and 2641(a)-(b), as last amended before the 2006 test claim statutes, allow guardians and conservators to recover certain costs, expenses, and compensation for services rendered. Probate code sections 2623(a)-(b), 2640(a)-(c), 2640.1(a)-(c), and 2641(a)-(b), as amended by the OCRA, prohibit guardians and conservators and guardians from recovering costs, expenses, and compensation for services rendered unless the *court* determines that the services were in the best interest of the ward or conservatee.¹³⁵
- Probate Code section 2653(a)-(c), as last amended before the 2006 test claim statutes, allows the *court* to remove guardians and conservators, revoke the letters of guardianship or conservatorship, and order the guardian or conservator to file and accounting. Probate Code section 2653, as amended by the OCRA: (1) allows the court to award the party that has petitioned to remove a guardian or conservator to recover costs and attorney’s fees; and (2) prohibits guardians and conservators from deducting from, or charging to, the estate his or her cost of litigation.¹³⁶

d) New requirements imposed by the test claim statutes on the county public guardian

Based on the above analysis, the Commission finds that only the following requirements are new and are imposed on the county public guardian:

- Comply with the continuing education requirements established by the California State Association of Public Administrators, Public Guardians, and Public Conservators on or before January 1, 2008. (Prob. Code, § 2923.)
- Begin an investigation within two business days of receiving a referral for conservatorship or guardianship. (Prob. Code, § 2920(c).)
- File a petition for appointment as guardian or conservator for the person, the estate, or the person or the estate in the following circumstances: the person is domiciled in the county and requires a guardian or conservator; there is no one else qualified and willing to act;

¹³³ Probate Code section 2590 (Stats. 2006, chapter 490 § 5).

¹³⁴ Probate Code section 2591 (Stats. 2006, chapter 490 § 6).

¹³⁵ Probate Code sections 2623, 2640, 2640.1, and 2641 (Stats. 2006, chapter 493 §§ 26-29).

¹³⁶ Probate Code section 2653 (Stats. 2006, chapter 493 § 30).

the appointment as guardian or conservator would be in the best interests of the person; and there is an imminent threat to the person's health or safety or to the person's estate. (Prob. Code, § 2920(a)(1).)

2. The new requirements imposed upon the public guardian by the test claim statutes are not mandated by the state, since they are triggered by the counties' decision to establish the office of public guardian.

The new requirements imposed on the public guardian are not mandated by the state. Government Code section 27430 authorizes the county to create and terminate the office of the public guardian as follows:

- (a) In any county the board of supervisors *may* by ordinance create the office of the public guardian and subordinate position which may be necessary and fix compensation therefor.
- (b) The board of supervisors *may* by ordinance terminate the office of public guardian.¹³⁷ (Emphasis added.)

Pursuant to Government Code section 14, which states that "may is permissive," the plain language of Government Code section 27420 must be interpreted as authorizing the county to create the office of the public guardian and terminate the office of the public guardian at any time.¹³⁸ As stated the California Supreme Court, the creation of the office of public guardian is permissive:

The provisions relating to the office of public guardian are contained in Article 9, Ch. 1, part 1, Div. 6, sections 5175-5189, added to the Welfare and Institutions Code in 1945. Stats. 1945, ch. 907. Section 5175 permitted the board of supervisors of Los Angeles county to 'create the office of public guardian and such subordinate positions as may be necessary and fix compensation therefor', and to make the necessary appointments. The use of the word 'create' does not constitute the provision an unlawful delegation of the power vested in the legislature by Article XI, section 5, of the State Constitution. *The effect of the legislative language is to create the office of public guardian with permissive utilization thereof in accordance with the Code provisions depending on subsequent local action.* There are familiar instances of the creation of offices by the state legislature with permissive establishment thereof depending on future action of the local political entity... The legislative choice of language in describing the local action is merely fortuitous. The effect of the board's ordinance was to exercise the right to establish the office of public guardian created by the legislature in adding the pertinent sections to the Welfare and Institutions Code.¹³⁹

¹³⁷ Government Code Section 27430 (Stats. 1988, ch. 1199, § 17).

¹³⁸ See also *Martello v. Superior Court of Los Angeles* (1927) 200 Cal. 400, 408 (holding that a sovereign power may abolish any office that it creates).

¹³⁹ *Brown v. Overshiner* (1952) 38 Cal.2d 432, 435 (emphasis added; internal citations omitted).

Thus, there is no requirement in state law forcing counties to create the office of public guardian. That decision is a local discretionary decision based on the county's *parens patriae* power "to protect incompetent persons."¹⁴⁰ Like the police powers held by local government, local legislative bodies have broad discretion in the exercise of these powers, both in determining what the interests of the public require and what measures are reasonably necessary for the protection of those interests.¹⁴¹

The courts have held in similar cases that reimbursement is not required in these circumstances. In *City of Merced v. State of California*, the city argued that it was subject to a reimbursable mandate when required by statute to compensate a business owner for the loss of business goodwill pursuant to exercising the power of eminent domain to take the underlying property. The court of appeal concluded that the underlying exercise of the eminent domain power was a discretionary act, and that therefore no downstream activities required by statute were mandated by the state.¹⁴²

In accord is *Department of Finance v. Commission on State Mandates (Kern)*, in which a state statute required districts maintaining school site councils to comply with the state's open meetings laws, including preparing and posting an agenda in advance, and keeping council meetings open to the public. The court recognized that the notice and hearing requirements could be found to generate activities not previously required, but there was no mandate under the law to establish a school site council in the first instance, and therefore the activities and costs claimed were not mandated by the state. The California Supreme Court reaffirmed *City of Merced*, and held that where activities alleged to constitute a mandate are conditional upon participation in another or an underlying voluntary or discretionary program, or upon the taking of discretionary action, there can be no finding of a state-mandate program.¹⁴³

More recently, the court in *Department of Finance v. Commission on State Mandates* held that school districts that choose to employ peace officers and have a school police department are not mandated by the state to comply with the requirements of the Peace Officer Procedural Bill of Rights Act (POBRA).¹⁴⁴ Consistent with the prior decisions of the court, the court stated that "[t]he result of the cases discussed above is that, if a local government participates 'voluntarily,' i.e., without legal compulsion or compulsion as a practical matter, in a program with a rule requiring increased costs, there is no requirement of state reimbursement."¹⁴⁵ The court further held that the Legislature's recognition of the need for local governmental entities to employ

¹⁴⁰ *Conservatorship of Wendland, supra*, 26 Cal.4th 519, 535, where the California Supreme Court stated that "decisions made by conservators typically derive their authority from a different basis—the *parens patriae* power of the state to protect incompetent persons."

¹⁴¹ *Saunders v. City of Los Angeles* (1969) 272 Cal.App.2d 407, 412.

¹⁴² *City of Merced v. State of California* (1984) 153 Cal.App.3d 777.

¹⁴³ *Department of Finance v. Commission on State Mandates (Kern)* (2003) 30 Cal.4th 727, 743.

¹⁴⁴ *Department of Finance v. Commission on State Mandates (POBRA)* (2009) 170 Cal.App.4th 1355, 1357.

¹⁴⁵ *Id.* at pp. 1365-1366.

peace officers when necessary to carry out their basic functions did *not* persuasively supported a claim of practical compulsion. The “necessity” that is required is facing “certain and severe penalties such as double taxation or other draconian consequences,” based on concrete evidence in the record.¹⁴⁶ “Instinct is insufficient to support a legal conclusion” of a state-mandated program.¹⁴⁷

The discretion to create the office of the public guardian is a policy decision of the county and is not mandated by the state.

Accordingly, the Commission finds that the test claim statutes do not impose a state-mandated program on counties within the meaning of article XIII B, section 6 of the California Constitution.

V. Conclusion

Based on the foregoing, the Commission concludes that Probate Code sections 1850(a), 1851(a), 2113, 2250(a)-(c), 2250.4(a)-(d), 2352(a)-(f), 2410, 2540(a)-(b), 2543(a)-(d), 2610(a); 2620 (a)-(e), 2620.2(a)-(d), 2590, 2591(a)-(q), 2591.5 (a)-(d), 2623 (a)-(b), 2640 (a)-(c), 2640.1(a)-(c), 2641(a)-(b), 2653(a)-(c), 2920(a)-(c), and 2923, as added and amended by Statutes 2006, chapters 490, 492, and 493 do not impose a reimbursable state-mandated program within the meaning of article XIII B, section 6 of the California Constitution and Government Code section 17514.

¹⁴⁶ *Id.* at p. 1367.

¹⁴⁷ *Id.* at p. 1369, concurring opinion by Justice Blease and Presiding Justice Scotland.

DECLARATION OF SERVICE BY EMAIL

I, the undersigned, declare as follows:

I am a resident of the County of Solano and I am over the age of 18 years, and not a party to the within action. My place of employment is 980 Ninth Street, Suite 300, Sacramento, California 95814.

On January 10, 2014, I served the:

Final Staff Analysis and Proposed Statement of Decision and Notice of Hearing
State Authorized Risk Assessment Tool for Sex Offenders (SARATSO), 08-TC-03
Penal Code Sections 290.3 et al.
County of Los Angeles, Claimant

by making it available on the Commission's website and providing notice of how to locate it to the email addresses provided on the attached mailing list.

I declare under penalty of perjury under the laws of the State of California that the foregoing is true and correct, and that this declaration was executed on January 10, 2014 at Sacramento, California.



Heidi J. Palchik
Commission on State Mandates
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COMMISSION ON STATE MANDATES

Mailing List

Last Updated: 1/7/14

Claim Number: 07-TC-05

Matter: Public Guardianship Omnibus Conservatorship Reform

Claimant: County of Los Angeles

TO ALL PARTIES, INTERESTED PARTIES, AND INTERESTED PERSONS:

Each commission mailing list is continuously updated as requests are received to include or remove any party or person on the mailing list. A current mailing list is provided with commission correspondence, and a copy of the current mailing list is available upon request at any time. Except as provided otherwise by commission rule, when a party or interested party files any written material with the commission concerning a claim, it shall simultaneously serve a copy of the written material on the parties and interested parties to the claim identified on the mailing list provided by the commission. (Cal. Code Regs., tit. 2, § 1181.2.)

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