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As agents of the court, guardians ad litem face substantive and ethical dilemmas in family law proceedings

Guards of the House

The appointment of a guardian ad litem or appointed counsel is becoming more frequent and more complicated in an increasingly wider range of family law proceedings. The numerous situations where appointment of a guardian ad litem or counsel may be necessary require practitioners to analyze the permissible scope of authority of persons who act in these representative capacities as well as attempt to clarify some of the ethical, procedural, and substantive issues that remain unresolved in this often overlooked area of the law.

California Court of Appeal Justice Norman L. Epstein summarized the purpose and function of a guardian ad litem under California statutory and case law in a recent opinion, *J.W. v. Superior Court.*[1] The court explained that a guardian ad litem is not a party to an action, but serves as the representative of record of a party. The essential difference between a general guardian and a guardian ad litem is that the former is usually appointed to take care of the person or property of another, while the latter is appointed specifically to prosecute or defend a legal action and may be appointed even though there is a general guardian.[2] Subject to applicable fiduciary duties and the requirement that court approval be obtained for certain acts, a guardian ad litem has the power to assent to procedural steps that will facilitate a determination of the case.

A guardian ad litem represents the interests of a person in legal proceedings who lacks capacity to represent himself or herself in those proceedings.[3] Statutory authority for the appointment of a guardian ad litem in civil proceedings is provided in Code of Civil Procedure Section 372, et seq.[4] There are also multiple Family Code sections that authorize such an appointment,[5] as well as pertinent Probate Code sections.[6] Recent appellate case law has defined the scope of authority entrusted to a guardian ad litem. There remains, however, a lingering perception that the role of a guardian ad litem is vague and undefined, a point of view substantiated by research and surveys conducted with attorneys and actual guardians ad litem.[7] Attorneys who have been appointed as guardians ad litem often have incorrect ideas as to the nature of their role and their authority.

In 1995 the court of appeal in *Scruton* v. *Korean Air Lines Co., Ltd.*,[8] stated clearly that a guardian ad litem's authority on behalf of a

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minor is not the same as an attorney's authority regarding an adult client. A guardian ad litem lacks power to bind a minor (or incapacitated) individual to a settlement agreement absent an independent investigation and approval by the court.[9] A guardian ad litem also lacks the capacity to settle litigation without the express endorsement of the court.[10] A guardian ad litem basically is an officer, and agent, of the court.[11]

Nevertheless, the guardian ad litem's substantive authority is less than absolutely clear. A number of recent appellate decisions highlight the practical significance of this authority and the inherent substantive and ethical dilemmas involved.

The diverse areas of family law involving appointment of a guardian ad litem or appointed counsel include marital dissolutions and legal separations, paternity actions, custody and visitation proceedings, and divisions and transfers involving an incapacitated spouse. In *In re Marriage of Higgason*,[12] the California Supreme Court held that a marital dissolution petition could be filed on behalf of a spouse who was subject to a conservatorship by the spouse's guardian ad litem, provided that the spouse was capable of exercising judgment and expressed a wish that the marriage be terminated. The holding placed in issue the ability of a spouse to make an informed decision and whether the spouse possesses or lacks the required capability to make that decision.

In *Caballero* v. *Caballero*,[13] the Second District Court of Appeal reversed a trial court that had refused to appoint a guardian ad litem to pursue a dissolution proceeding filed by the attorney-in-fact for a wife who suffered from Alzheimer's disease. The opinion noted that Code of Civil Procedure Section 372 provides that a party who is incompetent must appear through a guardian ad litem in a legal separation proceeding. The execution of a durable power of attorney did not give the attorney-in-fact the authority to act as an attorney for the principal; appointment of a guardian ad litem was necessary. *Caballero* avoided the question left open by *Higgason* because the incompetent spouse amended her dissolution petition to request a legal separation. While the case was remanded to the trial court for further hearing on allegations of an alleged conflict of interest, the *Caballero* court held that there exists a rebuttable presumption that the attorney-in-fact, pursuant to the durable power of attorney, be appointed as the incompetent spouse's guardian ad litem.

Other statutory procedures are available to accommodate situations where decisions or transfers are required and one spouse lacks capacity. Probate Code Sections 3100 through 3154 may be used if an anticipated transaction involves community property and if at least one spouse is alleged to lack legal capacity.[14] Probate Code Section 3112 authorizes the court to appoint a guardian ad litem as one of the alternative permitted court orders. If the property that needs to be transferred, or is otherwise at issue, is the incapacitated spouse's separate property, these Probate Code sections may not be used; a conservatorship proceeding may be required in this circumstance.[15] Community property assets, if held in a revocable living trust pursuant to Family Code Section 761, are not subject to the Probate Code provisions for the management and disposition of community property, even when one spouse lacks capacity.[16]

Guardians ad litem are appointed in marital dissolutions and legal separations, paternity actions, custody and visitation proceedings, and divisions and transfers involving an incapacitated spouse.

For paternity cases prior to January 1, 1995, Family Code Section 7635(a) required that a minor child older than the age of 12 be made a party to a paternity proceeding, and allowed children younger than the age of 12 to be joined as parties. It was customary for a guardian ad litem appearing on behalf of a child to be represented by counsel, but the statute did not specifically so provide. Family Code Section 7635 was amended to provide that if a minor child is a party to a paternity proceeding and represented by a guardian ad litem, the guardian ad litem need not be represented by counsel if he or she is related to the child. However, Family Code Section 7635(d) was added to authorize the court to appoint counsel for minors in paternity cases in which custody or visitation is an issue, if doing so would be in the child's best interests. Family Code Section 7541(h) (formerly Evidence Code Section 621) permits either a presumed father or a child's guardian ad litem to bring a motion for blood tests to establish paternity up to two years after the child's birth.

The court may appoint counsel for children in custody or visitation proceedings in cases arising under Family Code Sections 3150 to 3153. The American Academy of Matrimonial Lawyers has adopted and approved standards that set forth guidelines for the appointment and role of counsel and guardians ad litem representing children in custody and visitation matters.[17]

Probate Code Sections 2580 through 2586 incorporate the doctrine of substituted judgment in authorizing actions proposed by a conservator. The enactment of these statutes in 1990, effective July 1, 1991, incorporated the doctrine of substituted judgment previously recognized by California courts.[18] When the doctrine became the statutory law of California, trial courts gained mandated jurisdiction to authorize acts of substituted judgment. Since 1991 the doctrine has been extended to others acting in representative capacities, although without direct statutory authorization, and with less than precise substantive and ethical parameters.

The *Conservatorship of Hart*[19] is a seminal case with its comprehensive discussion of the history of substituted judgment as well as the considerations that are appropriate for the court. Rendered in 1991, *Hart* articulated the standard for the scope of authority of a conservator: "[T]he substituted judgment decision is to be based not on what the conservatee could do but on what a reasonably prudent person in the conservatee's place would do."[20]

Developed originally in the nineteenth

century as a legal fiction incident to the law of lunacy, the doctrine has been modernized into the law of informed consent.[21] The doctrine has been developed and applied not only to day-to-day decisions for incompetents and children but also to the termination of life support for an incompetent, the authorization of sterilization procedures, and forcing the taking of psychotropic medications.[22] Despite numerous cases where this issue is raised, however, the law seems marred with confusion and uncertainty. According to a recent commentator:

> The evolution of the law of substituted judgment has been controversial, and indeed, its application by the courts provides ample cause for skepticism. While the purpose of the doctrine is to act in the interests of the incompetent, there is no guarantee that such purposes are achieved.[23]

The issue of substituted judgment often arises when the representative's judgment will be substituted for the judgment of the client. For example, if an attorney represents a family, not an individual, the attorney may be substituting his or her judgment for that of the family.[24] Recent cases are filled with heart-wrenching, realistic issues that emerged when an attorney, acting as appointed counsel, fills the role of what is, in essence, a putative guardian ad litem. In *Wendland* v. *Superior Court*,[25] a spouse petitioned the court for appointment as conservator for her husband who was brain injured as a result of an automobile accident. The husband was receiving nutrition through a nasogastric tube, but he was not in a persistent vegetative state or terminally ill. The spouse sought appointment so she could terminate the life support of the proposed conservatee. However, the mother and sister of the incapacitated husband petitioned the court to appoint independent counsel to represent the husband. The trial court refused to do so. The court of appeal reversed, holding that the trial court abused its discretion by refusing to appoint counsel for the incapacitated relative.

The trial court had declined to appoint independent counsel based on several factors:

- The proposed conservatee was unable to communicate or give instructions to counsel in any meaningful manner.
- The court-appointed counsel could only side with one party in the controversy.
- The life-and-death issue was already adequately represented by the existing parties (the spouse, and the mother and sister).

The appellate court rejected this reasoning, highlighting the important and sensitive issues involved in disputes concerning an

MCLE Test No. 53

The Los Angeles County Bar Association certifies that this activity has been approved for Minimum Continuing Legal Education legal ethics credit by The State Bar of California in the amount of 1 hour.

1. A guardian ad litem is a party to a legal proceeding.
   True.
   False.

2. A guardian ad litem cannot be appointed unless there is a general guardian.
   True.
   False.

3. The relationship between a guardian ad litem and a minor or incapacitated individual is the same as that between an attorney and an adult client. Thus, a guardian ad litem can bind a minor or incapacitated individual to a settlement agreement without court approval.
   True.
   False.

4. An attorney-in-fact, acting pursuant to a durable power of attorney, may never be appointed a guardian ad litem for the same individual.
   True.
   False.

5. A guardian ad litem must be represented by counsel where the guardian ad litem is related to a child who is a party to a paternity proceeding held after January 1, 1995.
   True.
   False.

6. A guardian ad litem is a proper party to bring a motion for blood tests to establish paternity up to two years after the child's birth.
   True.
   False.

7. The doctrine of substituted judgment is uncodified.
   True.
   False.

8. As applied to conservatorships, the doctrine of substituted judgment holds that the substituted judgment decision is to be based not on what the conservatee could do but on what a reasonably prudent person in the conservatee's place would do.
   True.
   False.

Hypothetical

Wife was seriously injured in a commuter train accident and put on life support. Husband sought appointment as a conservator so he could terminate the life support of Wife/proposed conservatee. Wife's brother and father, however, asked the court to appoint independent counsel for their incapacitated sister/daughter. Evaluate the following three rulings of the trial court. Are the rationales given true or false?

9. Appointment of counsel denied. Appointed counsel is not required for Wife because she would be unable to communicate with her attorney.
True.
False.

10. Appointment of counsel granted. Appointed counsel is required to serve as an advocate for Wife to ensure that the best person is appointed conservator. Appointed counsel is not an adversary against those competing for appointment as a conservator.
True.
False.

11. Appointment of counsel denied. Appointed counsel is not required because family members alone are to be entrusted with the decision to continue or withdraw life support.
True.
False.

12. When an attorney represents an incapacitated client, the attorney may safely assume that his or her obligation as counsel does not include the need to evaluate whether or not a guardian ad litem must be appointed.
True.
False.

13. Under California law, an attorney may initiate conservatorship proceedings on a client's behalf without the client's consent.
True.
False.

14. Under the Domestic Violence Reporting Act, the elder abuse reporting provisions may not be interpreted to require an attorney to violate his or her professional oath and duties.
True.
False.

15. Which one of the following statements is correct?
A. Among the several tools that attorneys may rely upon in assessing a client's mental capacity for purposes of determining whether a guardian ad litem is necessary are the Behavioral Dyscontrol Scale, the Brief Cognitive Rating Score, and the Cambridge Mental Disorders of the Elderly Examination.
B. An attorney, because he or she is not trained to make mental capacity evaluations, may not rely on any tools in making mental capacity evaluations for purposes of determining whether to seek appointment of a guardian ad litem.

16. The authority of guardians ad litem is fixed by statute; thus, guardians ad litem may not take an action unless it is specifically authorized by statute.
True.
False.

17. The sole statutory authority for appointment of a guardian ad litem is Code of Civil Procedure Section 372.
True.
False.

18. If one spouse is alleged to lack legal capacity, and an anticipated transaction involves community property, a guardian ad litem may be appointed.
True.
False.

19. The doctrine of substituted judgment is limited to a proposed action by a conservator.
True.
False.

20. A guardian typically is appointed to take care of the person or property of another. A guardian ad litem is typically appointed to prosecute or defend a legal action.
True.
False.

MCLE Answer Sheet #53

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5.	☐ True	☐ False
6.	☐ True	☐ False
7.	☐ True	☐ False
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9.	☐ True	☐ False
10.	☐ True	☐ False
11.	☐ True	☐ False
12.	☐ True	☐ False
13.	☐ True	☐ False
14.	☐ True	☐ False
15.	☐ A	☐ B
16.	☐ True	☐ False
17.	☐ True	☐ False
18.	☐ True	☐ False
19.	☐ True	☐ False
20.	☐ True	☐ False

incompetent or otherwise legally incapable person and the need for a proper legal representative. The court noted that "communication skills are not a prerequisite for appointment of counsel" under the applicable Probate Code section:[26] "Even an unconscious conservatee may be entitled to counsel."[27] The court cited *Conservatorship of Sides*[28] to justify the need for appointment of independent counsel: "Appointed counsel does not act as an adversary against those competing for appointment as conservator, but serves as an advocate for the conservatee to ensure that the best suited person is appointed conservator."[29]

The court also rejected the rationale that the independent counsel was unnecessary since the conservatee's interests were already represented by his mother and sister. The appellate court noted that:

> [A] person facing the final accounting of death should not be required to rely on the uncertain beneficence of relatives.... [The husband]'s mother and sister are not necessary parties to the conservatorship proceedings instituted by [the husband]'s wife, nor do they necessarily represent his interests.[30]

In reaching its decision, the court used the analogy of the appointment of counsel for minors in proceedings to terminate a parental relationship. In doing so, the court cited the statutes for appointment of a guardian ad litem in those proceedings.[31]

Wendland suggests that the attorney is not supposed to advocate on the client's behalf. Instead, the appointed attorney only should make decisions in lieu of a client who is unable to act independently. The attorney is, in effect, a putative guardian ad litem, put in place to substitute the attorney's judgment for that of the client. Recent commentators have cautioned practitioners that:

> The role of court-appointed counsel in this case and in similar situations is fraught with danger for the attorney. In lieu of representing the client's desires and following instructions, counsel is elevated to the level of a kind of guardian ad litem.[32]

An attorney's failure to seek appointment of a guardian ad litem, particularly when the attorney represents an incapacitated client, could result in a breach of ethical rules and duties of professional responsibility, and even potential malpractice liability.[33] During an initial consultation of a prospective client, among the very first issues the lawyer should address is the mental status of the client. Also, the lawyer should determine upfront if there are children whose rights may be affected by any action taken on the client's behalf.[34]

Two sets of national rules set forth the duty of an attorney to recognize the necessity of the apointment of a guardian: the American Bar Association (ABA) Model Code of Professional Responsibility (ABA Model Code), and the ABA Model Rules of Professional Conduct (ABA Model Rules). Attorneys should consider them both before accepting representation of a potentially incompetent client.

Section EC-7-12 of the Model Code states:

> Any mental or physical condition of a client that renders him incapable of making a considered judgment on his own behalf casts additional responsibilities upon his lawyer. Where an incompetent is acting through a guardian or other legal representative, a lawyer must look to such representative for those decisions which are normally the prerogative of the client to make. If a client under disability has no legal representative, his lawyer may be compelled in court proceedings to make decisions on behalf of the client....The lawyer should consider all circumstances then prevailing and act with care to safeguard and advance the interest of his client.

Rule 1.14 of the Model Rules, states, in pertinent part:

> (a) When a client's ability to make adequately considered decisions in connection with the representation is impaired, whether because of minority, mental disability, or for some other reason, the lawyer shall, as far as reasonably possible, maintain a normal client-lawyer relationship.
>
> (b) A lawyer may seek the appointment of a guardian or take other protective action with respect to a client, only when the lawyer reasonably believes that the client cannot adequately act in the client's interest.[35]

The California rules are unclear at best. California Ethics Opinion No. 1989-112[36] determined that an attorney's initiation of conservatorship proceedings on a client's behalf, without the client's consent, violated the attorney's duty to protect a client's secrets and to avoid conflicts of interest. That opinion expressly rejected ABA Model Rule 1.14(b), which permits such action under certain circumstances. This conflict demonstrates the problems faced by a California attorney in a situation where a guardian ad litem may be warranted.

Assessing mental capacity without a bright-line legal definition of "incapacity" is difficult.[37] There are medical and legal definitions, and the two are not necessarily the same.[38] One option an attorney may consider is the use of a mental status assessment.[39] Numerous measures of cognitive abilities and mental states are available.[40] These tests permit an attorney to seek the appropriate guidance of a diagnostician when there exists a question as to whether the client has the capacity to understand and consent to legal representation. The tests should be undertaken only if the potential client has given consent and agreed to pay for the cost of the assessment.[41]

A demographic shift in the client population will inevitably lead to an increase in the number of cases involving legal incapacity. Older adults constitute a fast-growing potential source of clients for lawyers, particularly in California, which has the nation's largest elderly population.[42] Elder abuse cases also are on the rise, and these frequently require the appointment of a guardian ad litem. The Domestic Violence Prevention Act (DVPA)[43] provides injunctive relief against abuse by a perpetrator related to an elder under specific circumstances.

Attorneys are often the recipients of facts raising concerns of elder abuse. California law expressly recognizes[44] that the elder abuse reporting provisions may not be interpreted to require an attorney to violate his or her professional oath and duties.[45] If an attorney believes that an elder may lack capacity to make decisions involved in initiating or maintaining Domestic Violence Prevention Act proceedings, consideration should be given to the appointment of a guardian ad litem for that purpose. If the elder involved does not consent, the attorney may have to refuse representation.

This area of the law is ripe with potential conflict. Neither the California State Bar Act nor the California Rules of Professional Conduct mention the issue of client capacity. The ABA Model Rules address the problem of a "Client Under a Disability."[46] The comment to Rule 1.14 of the ABA Model Rules is an excellent summary of the attorney's dilemma but may be inconsistent with other ABA Model Rules.[47]

Handling these substantive and ethical issues in Los Angeles County involves diverse policy memoranda and rules of court that provide guidelines clouded by the imprecision of governing rules and standards. On February 20, 1996, the Executive Committee of the Family Law Section of the Los Angeles County Bar Association issued its Policy Memorandum for the Appointment of Minor's Counsel. The decision-making dilemma of appointed counsel is illuminated by the

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somewhat imprecise standard set forth in Paragraph 5 of that policy memorandum.

> The appointed attorney for the minor shall represent his or her client's statutory interests by considering the client's best interests along with the client's legal rights and, where a conflict exists between the child's and her or his attorney's determination as to what is in the child's best interests, the attorney shall so inform the [c]ourt in the same manner that he or she would in the case of a competent client.

The California Rules of Court outline eight factors for the court to consider in determining whether or not to make an appointment of minor's counsel.[48] Section 10.173 of the Probate Policy Memorandum of the Los Angeles Superior Court addresses the appointment of attorneys for conservatees. The language of Section 10.173 is presently undergoing a much-needed revision by a subcommittee of the Probate Section of the Los Angeles County Bar Association.

The poignant passage from Ecclesiastes, "When the guards of the house become shaky,"[49] reminds us that frail, infirm, and legally incapacitated clients need proper, sensitive legal representation in a wide array of family law proceedings. The failure to recognize this need often compounds the underlying problem. Recognition of the legal issues is the initial step; resolution of the surrounding ethical dilemmas is essential. Concerned practitioners must increase their awareness of these issues—and their emotional impact—in order to serve as helpful counselors and wise advocates. ■

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[1] J. W. v. Superior Court, 17 Cal. App. 4th 958, 22 Cal. Rptr. 2d 527 (1993).

[2] Berry v. Chaplin, 74 Cal. App. 2d 652, 658, 169 P. 2d 442 (1946); 4 WITKIN, CAL. PROCEDURE, Pleading No. 65, at 102-03 (3d ed. 1985).

[3] J. W., 17 Cal. App. 4th 958.

[4] CODE CIV. PROC. §372, as amended (effective Jan. 1, 1997). Prior law required that minors who are parties to a legal proceeding appear by a guardian or conservator. CODE CIV. PROC. §372(b) creates an exception to permit minors age 12 and older to appear without a guardian in court proceedings for the purpose of obtaining protective orders under the Domestic Violence Prevention Act against a person whom the minor is dating. The court is authorized to appoint a guardian ad litem to assist minors in these proceedings.

[5] *See, e.g.*, FAM. CODE §§3150, *et seq.* (appointment to represent the best interests of child in custody proceedings); §2332 (appointment of guardian ad litem for an insane spouse in dissolution of marriage); §4000 (guardian ad litem may bring an action for support against a parent on the child's behalf).

[6] *See* PROB. CODE §277 (disclaimer of any beneficiary interest on behalf of minor); §1003 (general authority of court or individuals for guardian ad litem appointment for any probate proceeding for a minor, an incapacitated person, an unborn person, an unascertained person, a person whose identity or address are unknown, or a designated class of persons who are not ascertained or are not in being); §3112 (appointment for spouse whose legal capacity is to be determined in the proceeding); §3140 (appointment for spouse lacking legal capacity); §3601 (order directing payment of expenses, payments, and fees directed to guardian ad litem); §15405 (appointment for minor or unascertained individual for modification or termination by settlor and/or beneficiaries of a trust); and §15804 (notice of appointment of guardian ad litem in cases involving the future interest of the beneficiary of a trust).

[7] William Halikias, *The Guardian Ad Litem for Children in Divorce: Conceptualizing Duties, Roles, and Consultative Services*, FAMILY LAW NEWS, Vol. 18, No. 3, at 31 (1995).

[8] Scruton v. Korean Air Lines Co., Ltd., 39 Cal. App. 4th 1596, 46 Cal. Rptr. 2d 638 (1995).

[9] *Id.*, 39 Cal. App. 4th at 1605.

[10] *Id.*

[11] *See also* Berry v. Chaplain, 74 Cal. App. 2d at 657.

[12] In re Marriage of Higgason, 10 Cal. 3d 476, 110 Cal. Rptr. 897 (1973), *overruled on other grounds by* In re Marriage of Dawley, 17 Cal. 3d 342, 352, 131 Cal. Rptr. 3d (1976).

[13] Caballero v. Caballero, 27 Cal. App. 4th 1139, 33 Cal. Rptr. 2d 46 (1994).

[14] PROB. CODE §§3100-3154.

[15] CALIFORNIA ELDER LAW, AN ADVOCATE'S GUIDE §9.50 (June 1996 update).

[16] PROB. CODE §3002.

[17] Standards Relating to the Appointment of Counsel and Guardians ad Litem for Children in Custody and Visitation Proceedings, approved by the Board of Governors of the American Academy of Matrimonial Lawyers, Nov. 24, 1994.

[18] Guardianship of Christiansen, 248 Cal. App. 2d 398, 56 Cal. Rptr. 505 (1967); Conservatorship of Wemyss, 20 Cal. App. 3d 877, 98 Cal. Rptr. 85 (1971).

[19] Conservatorship of Hart, 228 Cal. App. 3d 1244, 279 Cal. Rptr. 249 (1991).

[20] *Id.*, 228 Cal. App. 3d at 1260.

[21] Louise Harmon, *Falling Off the Vine: Legal Fictions and the Doctrine of Substituted Judgment*, 100 YALE L.J. 1, 16 (1990).

[22] Shannon L. Wilber, *Independent Counsel for Children*, FAMILY LAW NEWS, Sept. 1996, at 5, 8-9.

[23] *Id.*

[24] Russell G. Pearce, *Family Values and Legal Ethics: Competing Approaches to Conflicts in Representing Spouses*, FORDHAM L. REV., Vol. LXII, No. 5, at 1252, 1305-06 (1994).

[25] Wendland v. Superior Court, 49 Cal. App. 4th 44, 56 Cal. Rptr. 2d 595 (1996).

[26] PROB. CODE §1471(b).

[27] Wendland, 49 Cal. App. 4th 44. *See also* Conservatorship of Drabick, 200 Cal. App. 3d 185, 245 Cal. Rptr. 800, *cert. denied sub. nom.*, Drabick v. Drabick, 488 U.S. 958, 109 S. Ct. 399, 102 L. Ed 387 (1988).

[28] Conservatorship of Sides, 211 Cal. App. 3d 1086, 260 Cal. Rptr. 16 (1989).

[29] Wendland, 49 Cal. App. 4th 44.

[30] *Id.*

[31] *See* FAM. CODE §7861 (former CIV. CODE §237.5). The Law Revision Commission compared the discretionary provision of PROB. CODE §1470 to the court's authority under FAM. CODE §3150 to appoint counsel for a minor in a child custody proceeding under the Family Law Act. *See* 20 CAL. L. REV. COM. REP. (1990), at 1235.

[32] Marshal A. Oldman & Susan J. Cooley, *Life Support: Court Appointed Counsel for Conservatees*, L. A. DAILY J., Oct. 16, 1996, at 7.

[33] ARTHUR C. WALSH, ET AL., MENTAL CAPACITY: LEGAL AND MEDICAL ASPECTS OF ASSESSMENT AND TREATMENT §1.04, at 1-7 to 1-9 (1994).

[34] *Id.*, §1.04.

[35] The comments to ABA MODEL RULES OF PROFESSIONAL CONDUCT, Rule 1.14 [Client under a Disability] highlight the inherent dilemmas, provide alternative possible solutions, and reference ethics opinions, writings of experts on the subject, and law review commentaries.

[36] State Bar Standing Committee on Professional Responsibility and Conduct, Formal Opinion No. 1989-112.

[37] CALIFORNIA ELDER LAW, AN ADVOCATE'S GUIDE §2.41.

[38] *See* WALSH, *supra* note 33, §§5-2, 5-3.

[39] *See* Comment to the ABA MODEL RULES OF PROFESSIONAL CONDUCT, Rule 1.14.

[40] *See* WALSH, *supra* note 33, §5-3, n.6, for a list of 11 of the known examinations, including the "Behavioral Dyscontrol Scale" (BDS), the "Brief Cognitive Rating Score" (BCRS), and the "Cambridge Mental Disorders of the Elderly Examination" (CAMDEX).

[41] CALIFORNIA ELDER LAW, AN ADVOCATE'S GUIDE §2.42.

[42] *Id.* at Preface.

[43] FAM. CODE §§6200-6388.

[44] WELF. & INST. CODE §15637.

[45] BUS. & PROF. CODE §6067 (professional oath) or §6068(e) (maintaining client confidences).

[46] ABA MODEL RULES OF PROFESSIONAL CONDUCT, Rule 1.14(b): "A lawyer may seek the appointment of a guardian or take other protective action with respect to a client, only when the lawyer believes that the client cannot adequately act in the client's own interest."

[47] ABA MODEL RULES OF PROFESSIONAL CONDUCT, Rule 1.6 (keeping confidences); Rule 1.2 (the client's authority to determine the purposes of the representation).

[48] CAL. R. OF CT., app., div. 1, §20.5.

[49] Ecclesiastes, ch. 12, verses 1-7.