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Elder Protection Court, an Introduction

By Hon. Julie Conger

Imagine a Probate Court in which the judge appoints a conservator, freezes the bank account of a relative who has defrauded the conservatee, and obtains swift restitution before sentencing the defendant who has stolen the money.

Imagine that same court imposing drug, alcohol and gambling counseling conditions upon a woman who has been stealing her mother's Social Security income, and at the same time providing Adult Protective Services referrals for the elderly parent.

Imagine that same court issuing a domestic violence restraining order against a violent husband in a dissolution action, and at the same time appointing temporary conservatorship to address the dementia problems.

Imagine that same court resolving a neighborhood dog dispute involving an elderly landowner and, upon recognizing serious self-neglect and hoarding problems involving the petitioner, addressing these issues within the context of the conservatorship court.

This is the same court which handles a landlord-tenant case involving an elderly widow who has rented out a room to an abusing and harassing tenant who will not vacate, and who needs to obtain a restraining order against her grandson who is using her premises to deal drugs.

And finally, this same court can swiftly garner restitution as a condition of probation

in a criminal case involving mortgage fraud cases involving elderly victims, and at the same time resolve a myriad of civil cases emanating from the schemes.

This is the underlying concept of the Elder Protection Court, an innovatively calendared court project begun in Alameda County, California and expanding to other courts in the San Francisco Bay Area. Just as traditionally there is a Juvenile division of a county court, this is a special department of the courts established addressing issues involving seniors, the elderly and disabled adults, recognizing that one of the most important missions of our justice system is the protection of the most vulnerable members of our society.

The majority of the cases heard in the Alameda County Elder Protection Court involve felony allegations in which the victim is of age 65 or older; these cases include Penal Code Section 368 (Elder Abuse) as well as other felonies (robberies, burglaries, sexual assaults, fraud and theft) in which the victim is aged or disabled. California Statutes give priority to criminal cases in which the victim is of age 70 or greater (Cal. Penal Code 1048(b)(2)); however, direct calendaring of ALL elder-related felonies ensures expedited resolution of these matters.

California law authorizes conditional examinations for witnesses who are 65 or older and dependent adults; application is made with three days notice to the opposing party, and the testimony may be video taped. (Cal.

Penal Code sections 1335-1343) The Elder Protection Court is equipped with video equipment and these conditional examinations, in which the witnesses are subject to full confrontation and cross-examination, are fully admissible at trial if the witness is no longer available for testimony. (Cal. Penal Code 1345)

The practice of holding conditional examinations as soon as a criminal case is charged has multiple benefits. In the first place, it eliminates the hearsay problems of Crawford vs. Washington, 541 U.S. 36 (2004), which essentially eliminated any elder abuse hearsay exceptions previously in existence. Secondly, it gives both the prosecution and the defense the opportunity to examine the strengths and weaknesses of the case, putting both sides in an improved position to negotiate ultimate resolution. And finally, it eliminates the defense strategy of delay and encourages swift settlement of these cases.

Along with the criminal calendar, the Elder Protection Court hears all restraining orders which have allegations of elder abuse, whether termed elder protection orders, civil harassment or domestic violence. These cases, which frequently involve self-represented litigants, are specially set at 11:00 am, a time most convenient for seniors to attend court proceedings. The Elder Court judge makes a point of special review of requests for temporary restraining orders involving allegations of elder abuse, assuring that these filings receive immediate attention so that the elderly litigants are not required to wait in a court office or to return on another day after judicial review.

Probate matters with allegations of elder abuse are also handled by the Elder Court judge. As the Elder Protection Court concept develops, all matters involving elder abuse, whether filed in the civil courts, family courts, landlord-tenant courts or other branches, would all be referred to this one judge. The

benefits to this arrangement are evident: for example, a prosecutor handling the criminal elder abuse calendar is able to review allegations on the restraining order calendar, often brought by *pro se* litigants, to determine whether criminal prosecution is merited. Restraining orders, issued both in criminal and civil matters, are synchronized and are not in conflict. Civil elder abuse cases with allegations of financial abuse and fraud can be resolved simultaneously with underlying criminal actions, since restitution may be ordered and recovered as part of criminal sanctions.

The Elder Protection Court is aided by victim-witness personnel, usually from the District Attorneys' Office, who assist senior witnesses in preparation for testimony. In addition, the employment of an elder case manager, a court employee, to assist all victims of elder abuse is of great benefit. Such an individual can assist in providing services such as drug and alcohol counseling referrals, family reunification services, referrals to Adult Protective Services and Senior Legal Aid, supervised visitation etc., even in cases outside the criminal system. For self-represented seniors, the development of a Senior Self-Help center is of great merit.

Judicial leadership and involved participation in resolving these cases is essential and is the key to the success of this project. It is important to secure the initial cooperation and participation of essential stake-holders in the Elder Protection Court (District Attorney, Public Defender, private criminal and civil Bar members) who may exhibit resistance to another "boutique" court. However, the experience of the Alameda County court has been that these participants see that their cases are given special attention by the Elder Court judge, that the litigants they represent receive fair and swift justice through the Elder Protection Court, and thus they become enthusiastic participants.

In the criminal arena, it is important that the Elder Court judge follow each case through to final disposition; when probation is granted, frequent progress reports ensure timely repayment of restitution and compliance with terms and conditions of probation such as drug and alcohol counseling, anger management programs, batterers' counseling, and gambling addiction programs. In cases involving seniors swindled by real estate or consumer fraud, the Elder Court judge can condition an appropriate sentence upon an upfront payment of restitution that will expedite repayment to the victims, and will facilitate accompanying civil fraud cases.

Community outreach is another key element to the development of an Elder Protection Court. Many counties have initiated the formation of an Elder Abuse Council, parallel to a Domestic Violence Council, which includes representatives from all agencies and organizations that deal with issues involving seniors and dependent adults. (District Attorneys, Public Defenders, Probation, County Counsel, Public Guardian, Adult Protective Services, representatives of local government, Legal Aid attorneys, attorneys from the local bar who deal with Elder Law, Area Agencies on Aging, local Senior Centers, and all other such agencies). Judicial officers must be cautious that these councils represent all sides of the issue of elder abuse, for if only the prosecutorial faction is represented the appearance of judicial impartiality may be compromised.

In addition to providing a forum for networking, Elder Abuse Councils can play a key role in community education on the issue of elder abuse. Local merchants and banks should be alerted to observing patterns of behavior which give warnings of elder abuse; training of law enforcement personnel in recognizing and addressing these situations is particularly essential.

Though still in incipient stages, the concept of an Elder Protection Court which so

completely addresses the needs of our seniors is a visionary paradigm for the court of the future which truly provides access to our most needy community members. Judicial officers who are interested are encouraged to contact the National Center for State Courts website on Elders and the Courts.

The Implications of an Aging Population for the State Courts

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In less than 25 years, the number of Americans over age 65 will double to over 70 million. The corresponding increase in cases within the jurisdiction of probate courts as well as those concerning elder abuse will present numerous challenges to the state courts.

The Baby Boom generation has greatly affected the state courts at each of its life stages. When this population bulge was in its teen years during the 1960s and 1970s, there was a deluge of delinquency and status-offense cases, and the juvenile courts found themselves in the constitutional and policy spotlight. Attention shifted to the criminal courts as this generation moved into your adulthood, resulting in the development of caseload management to move the unprecedented number of cases through the judicial process. Next, divorce, domestic-violence, and child-neglect-and-abuse caseloads ballooned as boomers married and began raising families. The courts responded with increased use of alternative dispute resolution and specialized calendars and programs to handle the surge of cases. As the post-World War II generation enters the latter portions of its life cycle, the probate courts will become the focus. This article suggests some of the likely impacts for which they will need to

prepare and offers an example of one area in which these changes have already begun.

Population Trends

According to U.S. Census Bureau projections, the percentage of Americans age 65 or older will increase from 12.4 percent in 2000, to 19.6 percent in 2030. This represents a doubling of the number of older people from 35 million in 2000 to 71.5 million in 2030. By 2050, 5 percent of the U.S. population will be age 85 or older.

The number of older Americans living in poverty will increase as well. In 2002, 21 percent of people age 65 and over were living in poverty and an additional 10 percent were classified as low-income. If these rates remain steady, the number of poor or low-income elderly will increase from about 13.6 million in 2002, to over 27 million by 2030 (Smith and Kohl, 2007: 13).

The Implications of These Trends for the State Courts

This substantial increase in both the number and proportion of older Americans will propel the courts handling probate matters into the limelight. The caseload will increase greatly in most areas of traditional probate-court jurisdiction, including wills and estates, mental-health matters, establishment of guardianship, and disputes over eligibility for and the scope of governmental services for ill, disabled, or elderly persons.

There is also likely to be an increase in cases in criminal, civil, family and probate courts involving all allegations of elder abuse and misconduct by fiduciaries (guardians, conservators, trustees, personal representatives, executors, etc.) similar to the explosion of child-neglect-and-abuse and spousal-partner-abuse cases over the past two decades.

[A] 2004 survey of Adult Protective Services (APS) investigations showed a twenty percent increase since 2000 in the combined total of reports of elder and vulnerable adult

abuse and neglect. Indeed, at any point in time, between one and two million vulnerable elders may be experiencing mistreatment. Furthermore, current estimates suggest that there may be at last five million elderly victims of financial abuse each year (Uekert and Dancy, 2007, citing Teaster et al., 2006).

Court managers will need to develop new case management strategies and tools to handle the newly expanding caseloads. Specialized problem-solving calendars (e.g., Alameda County, California, Superior Court's Elder Protection Court program, which provides civil remedies and hears felony elder-and-dependent-adult abuse cases), mediation services, and other programs will be needed to address the court-related needs of older persons effectively. Court management information systems will have to be modified to count these expanded caseloads and measure the courts' ability to dispose of them in a fair, timely, and effective manner.

Access to justice will become an even more significant issue. In addition to ADA compliance within the courthouse, the use of remote-access technology, such as videoconferencing, will need to be enhanced for those unable to come to the courthouse. Specialized legal assistance, counseling, and information services will need to be expanded greatly to enable isolated older people to learn of and utilize the means available to them under the law for protecting themselves and their property and for enforcing their rights. Expanded resources for self-represented elderly litigants will also be required (e.g., the 13th Judicial Circuit's Elder Justice Center in Hillsborough County [Tampa], Florida), as well as more "user-friendly" court processes (see ABA and NJC, 2007).

Training will have to be provided regarding the nature of addiction and the cycle of spousal/partner abuse. Among the objectives

These criticisms have led to development and adoption of several sets of national recommendations (ABA, 1989; ABA and NJC, 1991; Wingspan 2002), standards (commission on National Probate Standards, 1993; National Guardianship Association, 2000), and changes to the Uniform Acts addressing guardianship (National Conference of Commissioners on Uniform State Laws, 2007). As important, they have led to action by individual courts and state court systems to provide needed training, safeguards, and oversight. Examples of individual court programs include:

- The Maricopa County (Phoenix) Arizona Superior Court has implemented “rigorous case management, staff investigators and accountants, trained volunteer monitors, use of bonding and restricted accounts to secure assets, and a database to track and flag key case events.”;
- Probate Courts 1 and 2 in Tarrant County (Fort Worth) Texas have adopted distinct effective approaches to guardianship monitoring with one relying “heavily on legal staff and experienced volunteer visitors, while the other combines the skill of social workers (and social work students) with legal staff for detailed training and monitoring of every case each year”;
- The 2nd Judicial District Court in Ramsey County (St. Paul), Minnesota and the 17th Judicial Circuit Court in Broward County (Fort Lauderdale), Florida “are beginning to use e-filing systems for accountings by guardians” to identify anomalies and respond effectively to potential problems in individual cases; and
- The Suffolk County (Riverhead), New York, Supreme Court has established a model guardianship court “that uses

a ‘problem-solving restorative jurisprudence approach,’ including mediation, a resource coordinator, volunteer advocates, and the ability to integrate all pending cases involving the incapacitated person” (Karp and Wood, 2007: 2).

State court efforts are exemplified by:

- The Utah Administrative Office of the courts’ statewide, Web-based system to enable guardians and conservators to prepare and file reports and accountings online, as well as make requests to modify or terminate guardianships; and
- The Georgia Administrative Office of the courts’ handbook for implementing court-visitor programs using community volunteers.

These local-and state-court initiatives, though not yet widespread, demonstrate the progress that has been made in the area of guardianship. Furthermore, they provide reassurance that the broader challenges presented by the graying of the Baby Boom generation can be met. To assist in this effort, NCSC, with generous support from the Retirement Research Foundation is establishing a Center for Elders and the Courts as a clearinghouse for the courts on aging issues, elder abuse, and guardianship. (For more information regarding the Center for Elders and the Courts, contact Dr. Brenda Uekert at Buekert@ncsc.org).

