Northern Illinois University Law Review

Volume 43 | Issue 1 Article 2

11-1-2022

Beyond #FreeBritney: A Legal Analysis of the Conservatorship System in the United States

Ashleigh M. Zurek
Northern Illinois University

BEYOND #FREEBRITNEY: A LEGAL ANALYSIS OF THE CONSERVATORSHIP SYSTEM IN THE UNITED STATES

ASHLEIGH M. ZUREK*

In this article the author will explore the state of conservatorships in the United States and how, too often, individuals with disabilities are abused and taken advantage of in this structure. The author will discuss particular areas of conservatorship abuse, including: financial abuse, physical abuse, exploitation, and death. The author will then proceed to discuss potential solutions to curb conservatorship abuse and how best to improve the conservatorship system in the United States. Particular solutions discussed include: special needs trusts, federal legislation (past, current, and future), and supported decision-making.

* J.D. Candidate, 2023, Northern Illinois University College of Law. I would like to thank my faculty advisor, Meredith Stange, for being an excellent resource and providing much needed guidance and counsel throughout the writing process. I would also like to thank my friends and family for their endless love, support, and encouragement.

I. INTRODUCTION

In April of 2019, the world was introduced to the conservatorship system in the United States through a very unexpected source: fans of pop princess, Britney Spears.[1] A fan podcast, *Britney's Gram*, received information from an alleged former member of Britney's legal team that Britney was being held against her will in a conservatorship ran by her father.[2] The fan podcast then broadcasted that information to millions and millions of fans, who were outraged by the situation.[3] Social media was bombarded with a rallying cry: #freebritney.[4] As this movement gained momentum, more and more information was released about the abusive conditions under which Britney Spears was held under the conservatorship. She was forced to work against her will; she was not allowed to remove her IUD; and she was not allowed to get remarried.[5] The list of the freedoms that were constricted by the conservatorship went on and on. As of November 12, 2021, Britney's conservatorship was terminated after nearly 14 years of abuse.[6] This is a rare happy ending that many other conservatees never reach.

Britney Spears's situation is unfortunately not a unique one. Thousands of individuals are stripped of their rights without due process of law and placed under conservatorships that are unnecessary and abusive. Although Britney's situation has brought much needed attention to a broken system, there is still much work that needs to be done.

This Comment first gives an overview of the conservatorship system in the United States. It is important to note that conservatorships are intended to *protect* individuals with disabilities.[7] However, that need to protect must be balanced with the individual's dignity, autonomy, and self-determination that are essential cornerstones of United States citizenship.[8] Once conservatorships have been sufficiently defined, the particular areas of conservatorship abuse will be discussed. These areas of abuse include: financial abuse,

---

1. Jill Gutowitz, *All Your Questions About Britney Spears's Latest Mental-Health Crisis, Answered*, VULTURE (Apr. 24, 2019), https://www.vulture.com/2019/04/whats-going-on-with-britney-spearss-mental-health-crisis.html [https://perma.cc/X7LG-K5NY].

2. *Id.*

3. *Id.*

4. *Britney Spears: Singer's Conservatorship Case Explained*, BBC NEWS (Nov. 12, 2021), https://www.bbc.com/news/world-us-canada-53494405 [https://perma.cc/K4GU-B5R3].

5. *Id.*

6. Zoe C. Jones & Mandy Aracena, *Britney Spears' Conservatorship is Terminated After More Than 13 Years*, CBS NEWS (Nov. 12, 2021), https://www.cbsnews.com/live-updates/britney-spears-conservatorship-hearing-2021-11-12/?intcid=CNM-00-10abd1h [https://perma.cc/LN5U-65VD].

7. Nat'l Couns. on Disabilities, *Beyond Guardianship: Toward Alternatives That Promote Greater Self-Determination* (Mar. 22, 2018), https://ncd.gov/sites/default/files/NCD_Guardianship_Report_Accessible.pdf [https://perma.cc/6C3R-84HV].

8. *Id.*

physical abuse, exploitation, death, and erroneous conservatorships. Then, this Comment will go on to explore potential solutions to curb conservator abuse in the United States. Several avenues have been discussed, such as: (1) comprehensive special needs trusts, (2) past, present, and future federal legislation (including the Freedom and Right to Emancipate from exploitation [FREE] Act), and (3) alternatives to conservatorships, specifically the supported decision-making model. Each of these will be discussed at length in the Comment. For purposes of this Comment, conservatorship and guardianship will be used interchangeably.

II. THE CONSERVATORSHIP SYSTEM

HISTORY OF CONSERVATORSHIPS

Conservatorships have a deep, yet shockingly undocumented, legal history.[9] The earliest statutory guardianship, also known as a conservatorship, in England emerged in 1660, but existed within the common law for many years before that.[10] In 1641 during colonial America, the colony of Massachusetts had a guardianship law on its books.[11] These conservatorship laws were deemed necessary because in a society that recognizes private ownership of property, there must be a system in place to handle the affairs of individuals who are not "*sui juris,"* or, fully capable of making decisions on their own behalf.[12] Historically, there are two situations in which someone was appointed a guardian or conservator: (1) minors who inherit or obtain property, or (2) individuals who are deemed "insane or incompetent."[13] The first situation was much easier for the law to engage with; an individual either is or is not a minor. There is not a whole lot of gray area.[14] The second situation posed a greater issue and is something the legal system is still wrestling with today. When does the legal system deem an individual incompetent and strip them of their rights?

The answer to this question has greatly evolved over the years. In the 1900s, many individuals who were deemed incompetent by the legal system certainly wouldn't be deemed incompetent by today's standards.[15] Back then, in order to be deemed incompetent, an individual merely needed to be considered a "misfit or deviant" by societal standards.[16] That brings us to the

9. Lawrence M. Friedman, Joanna L. Grossman, & Chris Guthrie, *Guardians: A Research Note,* 40 Am. L. J., 1, 146 (1996) https://scholar.smu.edu/cgi/viewcontent.cgi?article=1090&context=law_faculty [https://perma.cc/V77T-4H38].

10. *Id.*

11. *Id.*

12. *Id.*

13. *Id.*

14. Friedman, Grossman, & Guthrie, *supra* note 10.

15. *Id.*

16. *Id.*

modern era. Today, judges are given a lot of power in determining whether or not an individual is capable of making sound decisions on their own behalf.[17] Oftentimes, it is assumed that the mere presence of an intellectual, psychosocial, or sensory disability is enough to determine that an individual lacks the legal capacity to exercise his or her rights.[18]

MODERN CONSERVATORSHIPS IN THE UNITED STATES

A modern conservatorship, also referred to as a guardianship or a curatorship, is a legal process by which an individual or organization is appointed to oversee the affairs of another individual who is deemed incapable of making sound decisions on their own behalf.[19] The scope of the conservatorship can vary.[20] In a limited conservatorship, the conservatee loses the ability to exercise some rights, but retains the ability to exercise other rights.[21] Conversely, in a plenary or general conservatorship, the conservatee retains none of their rights.[22] Conservatorships are governed by state law; there is currently no federal law to regulate conservatorships.[23] Despite there being fifty-one different conservatorship laws in the books,[24] many similarities exist between conservatorships from state to state. For example, regardless of the state, the rights at issue in conservatorships tend to be the same.[25] Additionally, in order for someone to be placed into a conservatorship, there must be a judicial determination of incapacitation. Generally, this is process starts when someone files a petition with the court seeking an appointment of a conservator for the allegedly incapacitated individual.[26] Finally, regardless of the state, the conservatorship process must comply with Due Process

17. Edie L. Greene, *Deciding to Let Others Decide: Judging the Need for Guardianship and Conservatorship,* 22 PROB. & PROP 47-50 (Jan./Feb. 2008).

18. Robert Dinserstein, "Implementing Legal Capacity Under Article 12 of the UN Convention on the Rights of Persons with Disabilities: The Difficult Road from Guardianship to Supported Decision-Making." *Human Rights Brief* 19, no. 2 (2012), https://digitalcommons.wcl.american.edu/cgi/viewcontent.cgi?article=1816&context=hrbrief [https://perma.cc/XNR5-MX8U].

19. *What is Guardianship?,* NAT'L GUARDIANSHIP ASS'N, https://www.guardianship.org/what-is-guardianship/ [https://perma.cc/5JNS-7844].

20. Nat'l Couns. on Disability, *supa* note 8.

21. *Id.*

22. *Id.*

23. Dinerstein, R. D. (2006). Guardianship and its alternatives. In S. Pueschel (Ed.), *Adults with Down syndrome* (pp. 235–258). Baltimore, MD: Paul H. Brookes Publishing Co.

24. *Id.* Conservatorship laws exist in all fifty states plus Washington D.C.

25. Nat'l Couns. on Disability, *Beyond Guardianship: Toward Alternatives That Promote Greater Self-Determination,* https://ncd.gov/sites/default/files/NCD_Guardianship_Report_Accessible.pdf [https://perma.cc/6C3R-84HV].

26. *Guardianship: Key Concepts and Resources*, THE UNITED STATES DEPARTMENT OF JUSTICE, https://www.justice.gov/elderjustice/guardianship-key-concepts-and-resources [https://perma.cc/T9Z5-8U36].

Clause of the 14th Amendment of the US Constitution.[27] In order to do this, states must ensure due process protections for the allegedly incapacitated individual.[28] The due process protections vary from state to state, but generally these protections include: (1) notice of the petition to the allegedly incapacitated individual, (2) right to appear at hearing on the need for a conservatorship and present evidence, and (3) right to appeal the judicial determination.[29]

RIGHTS AT ISSUE

Generally, there are three sorts of rights that are at issue in conservatorships: (1) rights that can be taken from an individual but not given to another individual; (2) rights that can be taken from a person and exercised by someone else on their behalf; and (3) rights that a guardian needs a court order to exercise on the individual's behalf.[30]

The first category of rights at issue in conservatorships, rights that can be taken from an individual, but not given to another individual, include rights such as: the right to marry, the right to vote, the right to drive, and the right to seek and retain employment.[31] The next category, rights that can be taken from a person and exercised by someone else on their behalf, include: the right to contract, the right to sue and defend lawsuits, the right to apply for government benefits, the right to manage money or property, the right to decide where to live, the right to consent to medical treatment, and the right to decide with whom to associate or be friends with.[32] And the final category of rights at issue, rights that a guardian needs a court order to exercise on the individual's behalf, include rights such as: the right to commit the person to a facility or institution, the right to consent to biomedical or behavioral experiments, the right to file for divorce, the right to consent to the termination of parental rights, and the right to consent to sterilization or abortion.[33]

Many of these rights have been deemed fundamental by the Supreme Court of the United States, which is why a conservatorship is meant to be utilized only when all other less restrictive options have been exhausted.[34]

---

27. U.S. CONST. amend. XIV, §1. "…nor shall any State deprive any person of life, liberty, or property, without due process of law…"

28. *Guardianship: Key Concepts and Resources*, THE UNITED STATES DEPARTMENT OF JUSTICE, https://www.justice.gov/elderjustice/guardianship-key-concepts-and-resources [https://perma.cc/T9Z5-8U36].

29. *Id.*

30. Nat'l Couns. on Disability, *supa* note 8.

31. *Id.*

32. *Id.*

33. *Id.*

34. The right to choose where to live and who to associate with was established as a fundamental right in *Moore v. City of East Cleveland* (431 U.S. 494); the right to marry was established as a fundamental right in *Loving v. Virginia* (388 U.S. 1); the right to travel was

JUDICIAL DETERMINATION OF INCAPACITATION

Ultimately, incapacity is a social and legal construct; it isn't necessarily provable through any specific scientific methods.[35] Because of this, judges have a lot of power in determining whether an individual is incapable of making sound decisions on their own behalf.[36] A judge must weigh the costs and benefits of the proposed conservatorship; unfortunately, in weighing these costs and benefits, there is no bright-line rule for judges to follow.[37] Generally, incapacity for purposes of a conservatorship requires the existence of some condition, either physical or mental, that puts the person at risk.[38] More specifically, the court may appoint a conservator if clear and convincing evidence shows (1) that the person to be protected has severely impaired perception or communication skills; (2) the person cannot take care of his or her basic needs to such an extent as to be threatening to life or health; and (3) the impaired perception or communication skills cause life-threatening disability.[39]

DUE PROCESS PROTECTIONS

The Fourteenth Amendment of the United States Constitution prohibits the states from depriving "any person of life, liberty, or property, without due process of law."[40] Because a conservatorship strips a conservatee of many rights, virtually restricting their liberty and access to their property, the judicial appointment of a conservator must be applied through due process of law.[41] In determining what procedures are necessary, the balancing test articulated by the Supreme Court in *Mathews v. Eldridge* must be applied.[42]

In *Mathews v. Eldridge,* plaintiff's social security benefits were terminated with neither notice nor hearing.[43] He brought suit, challenging the constitutionality of the administrative procedures that resulted in termination of

---

established as a fundamental right in *Shapiro v. Thompson* (394 U.S. 618); and the right to make medical decisions regarding one's body was established as a fundamental right in *Cruzan by Cruzan v. Director, Missouri Dept. of Health* (493 U.S. 951).

35. Nat'l Couns. on Disability, *supa* note 8.

36. Greene, *supra* note 18.

37. *Id.*

38. Lauren Krohn, J.D., *Cause of Action to Establish Involuntary Conservatorship for Estate of Adult Person*, 6COA2d 625 (1994).

39. *Id.*

40. U.S. CONST. amend. XIV, §1. "…nor shall any State deprive any person of life, liberty, or property, without due process of law…"

41. Susan G. Haines & John J. Campbell, *Defects, Due Process, and Protective Proceedings*, MARQUETTE ELDER'S ADVISOR, Vol. 2 Issue 1, https://scholarship.law.marquette.edu/cgi/viewcontent.cgi?referer=&httpsredir=1&article=1328&context=elders [https://perma.cc/WR5K-B5X6].

42. Mathews v. Eldridge*,* 424 U.S. 319 (1976).

43. *Id.*

his benefits.[44] The Supreme Court ultimately held that no evidentiary hearing is required before terminating social security benefits, and therefore, the administrative procedures were constitutional.[45] The Court also articulated a three-prong analysis to determine what procedures are necessary to comply with due-process.[46] Those three prongs are: (1) the private interest that will be affected by the government action; (2) the risk of an erroneous deprivation of the private interest and the added value of additional procedural safeguards; and (3) the government's fiscal and administrative burdens that additional procedural safeguards would impose.[47] These three prongs will be balanced against each other to determine what procedures are necessary to comply with due-process.[48] For example, if the private interests that will be affected are fundamental, the procedures necessary to comply with due-process are going to be more stringent than if the private interests affected were not fundamental.

In applying the first prong of the *Mathews* test to conservatorships, it is clear that the private individual rights involved are fundamental. Once placed in a conservatorship, a conservatee loses their right to choose where to live and who to associate with, the right to marry, the right to travel, the right to make medical decisions regarding one's body, and more.[49] Because these rights are deemed fundamental,[50] the broadest due process procedures should apply.[51]

The second prong of the *Mathews* test weighs the risk of erroneous deprivation of the individual interest through current procedures and the probable value of additional procedural safeguards.[52] In conducting this analysis, the court should focus on how likely it is an individual may be erroneously deprived of their rights by being placed in an unnecessary conservatorship.[53] The risk of erroneous deprivation varies from state to state; for example, in a state that provides conservatees with numerous opportunities to challenge the conservatorship, the risk of erroneous deprivation is low.[54] In contrast, in a

---

44. *Id.*
45. *Id.*
46. *Id.*
47. Mathews v. Eldridge, 424 U.S. 319 (1976).
48. *Id.*
49. Haines & Campbell, *supra* note 42.
50. The right to choose where to live and who to associate with was established as a fundamental right in *Moore v. City of East Cleveland* (431 U.S. 494); the right to marry was established as a fundamental right in *Loving v. Virginia* (388 U.S. 1); the right to travel was established as a fundamental right in *Shapiro v. Thompson* (394 U.S. 618); and the right to make medical decisions regarding one's body was established as a fundamental right in *Cruzan by Cruzan v. Director, Missouri Dept. of Health* (493 U.S. 951).
51. *Id.*
52. Mathews v. Eldridge, 424 U.S. 319 (1976).
53. Haines & Campbell, *supra* note 42.
54. *Id.*

state that does not provide those opportunities, the conservatee does not have a meaningful opportunity to object to the conservatorship.[55] This means there is a higher risk of erroneous deprivation.[56]

The final prong of the *Mathews* test is the government's interest in the procedure currently in place and the government cost to implementing additional or alternative procedures.[57] Turning to conservatorships, governments do have an interest in protecting the well-being of individual citizens.[58] The interaction between the government's interest and the government's cost will vary from state to state based on what due process proceedings currently exist in the state.[59] Certain states currently have sufficient due process proceedings., so the cost of additional or different due process proceedings will be non-existent or low.[60] However, in a state that has minimal due process proceedings, the cost of additional or different due process proceeding will be high.[61] This cost will need to be balanced against the other two prongs of the *Mathews* test in order to ensure proper due process proceedings are afforded.[62]

Through the application of the *Mathews* test, states have determined three procedural safeguards that are generally necessary in conservatorship proceedings: (1) notice of the petition to the allegedly incapacitated individual, (2) right to appear at hearing on the need for a conservatorship and present evidence, and (3) right to appeal the judicial determination.[63] These procedural safeguards are generally required because the rights at issue are so integral to the allegedly incapacitated individual's independence and decision-making authority.[64] Each of the previously mentioned procedural safeguards give the allegedly incapacitated person a meaningful opportunity to contest the proceedings and state their case.[65]

---

55. *Id.*
56. *Id.*
57. Mathews v. Eldridge*,* 424 U.S. 319 (1976).
58. Haines & Campbell, *supra* note 42.
59. *Id.*
60. *Id.*
61. *Id.*
62. *Id.*
63. *Guardianship: Key Concepts and Resources*, THE UNITED STATES DEPARTMENT OF JUSTICE, https://www.justice.gov/elderjustice/guardianship-key-concepts-and-resources [https://perma.cc/T9Z5-8U36].
64. Haines & Campbell, *supra* note 42.
65. *Id.*

ONCE A CONSERVATOR IS APPOINTED

Once a conservator is appointed it is very difficult for the conservatee to end the conservatorship.[66] However, there is the lack of data and other resources available regarding ending conservatorships, so the exact difficulties faced by conservatees attempting to end their conservatorships is hard to articulate with any substantial accuracy.[67] The National Council on Disability (NCD) in its 2018 repo rt, *Beyond Guardianship: Toward Alternatives That Promote Greater Self-Determination for People with Disabilities,* found that virtually no data on restoration of rights exists, making it impossible to determine how many individuals have attempted to end their conservatorships and to determine whether courts provide notice to conservatees of their right to end their conservatorships.[68] From data available, conservatorships typically don't end until the conservatee dies.[69] There are some instances in which the court will terminate the conservatorship prior to the conservatee's death, including the conservatee's condition improves to the point they no longer need the guardian, the conservatee's support systems improve to the point a less restrictive alternative to the conservatorship is realistic, and evidence exists to show that the conservatee no longer needs the conservator.[70] However, these instances are quite rare.[71]

III. CONSERVATORSHIP ABUSE

Because a conservatorship strips a conservatee of many of their rights, the system was originally intended as a last resort only to be used once all other avenues have been exhausted.[72] In fact, all but twelve states include a phrase in their conservatorship states requiring use of a less restrictive alternative if available.[73] However, due to a systemic lack of oversight and

66. *Guardianship: Key Concepts and Resources*, THE UNITED STATES DEPARTMENT OF JUSTICE, https://www.justice.gov/elderjustice/guardianship-key-concepts-and-resources [https://perma.cc/T9Z5-8U36].

67. Nat'l Couns. on Disability, *Beyond Guardianship: Toward Alternatives That Promote Greater Self-Determination,* https://ncd.gov/sites/default/files/NCD_Guardianship_Report_Accessible.pdf [https://perma.cc/6C3R-84HV].

68. *Id.*

69. *Id.*

70. *Id.*

71. *Guardianship: Key Concepts and Resources*, THE UNITED STATES DEPARTMENT OF JUSTICE, https://www.justice.gov/elderjustice/guardianship-key-concepts-and-resources [https://perma.cc/T9Z5-8U36].

72. NATIONAL GUARDIANSHIP ASSOCIATION, *supra* note 6.

73. ABA COMMISSION ON LAW & AGING, *Least Restrictive Alternative References in State Guardianship Statutes*, https://www.americanbar.org/content/dam/aba/administrative/law_aging/06-23-2018-lra-chart-final.pdf [https://perma.cc/9XR3-9ZWZ].

accountability, conservatorships are fraught with abuse.[74] This abuse can manifest in many different ways including financial abuse, physical abuse, exploitation, and death.

A. FINANCIAL ABUSE

Given the broad powers conservators are granted over conservatees' finances, financial abuse is a common issue faced in the conservatorship system.[75] Elderly individuals in particular are vulnerable to this sort of abuse. The U.S. Government Accountability Office released a report in 2010 detailing hundreds of cases of elder abuse at the hands of conservators over the course of ten years.[76] During that time, a total of $5.4 million was stolen from conservatees.[77] Often, this abuse is conducted by professional conservators, who manage the affairs of hundreds of conservatees at a time. Two of the more prolific conservators who have been investigated for and convicted of abuse are April Parks and Rebecca Fierle.

April Parks was a professional Nevada conservator who owned and ran the professional conservatorship company, A Private Professional Guardian, LLC.[78] She spent years controlling the affairs of thousands of vulnerable individuals, draining their bank accounts and selling off their assets for her own gain.[79] Nevada law at the time allowed for a professionally licensed conservator, with verification from a physician stating that the proposed conservatee was incapable of handling their own affairs, to file an *ex parte* motion[80] for temporary conservatorship.[81] Ms. Parks had a physician's assistant who worked with her who would provide the verification that the proposed conservatee was incapable of handling their own affairs.[82] Once that verification

---

74. David Godfrey, *Challenges in Guardianship and Guardianship Abuse*, ABA COMMISSION ON LAW AND AGING, https://www.americanbar.org/groups/law_aging/publications/bifocal/vol-42/vol-42-issue-4-march-april-2021/challenges-in-guardianship-and-guardianship-abuse/ [https://perma.cc/FD75-AAJH].

75. Patrick Hicks, *What You Need To Know About Conservatorship Abuse*, TRUST & WILL, https://trustandwill.com/learn/conservatorship-abuse [https://perma.cc/QYJ7-S7BJ]

76. GAO, *Guardianships – Cases of Financial Exploitation, Neglect, and Abuse of Seniors*, https://www.gao.gov/assets/gao-10-1046.pdf [https://perma.cc/S9BP-Y8DM].

77. *Id.*

78. Matthew Hoffman, *Breaking Down the Law: Elder Abuse and the Case of April Parks,* NEWS 3 LAS VEGAS, https://news3lv.com/news/local/breaking-down-the-law-elder-abuse-and-the-case-of-april-parks [https://perma.cc/2LPW-YSUC].

79. *Id.*

80. *Ex Parte Motion,* Black's Law Dictionary (10th ed. 2014). "A motion made to the court without notice to the adverse party; a motion that a court considers and rules on without hearing from all sides." *Id.*

81. Matthew Hoffman, *Breaking Down the Law: Elder Abuse and the Case of April Parks,* NEWS 3 LAS VEGAS, https://news3lv.com/news/local/breaking-down-the-law-elder-abuse-and-the-case-of-april-parks [https://perma.cc/2LPW-YSUC].

82. *Id.*

was signed, Ms. Parks would file the *ex parte* motion and be appointed as a temporary conservator.[83] From there, she would move the conservatee to an assisted living facility and have them heavily medicated, to the point they would appear incapacitated.[84] She would then apply for full conservatorship and was appointed as a full conservator a majority of the time.[85] This was because the Nevada courts at the time were wary of family members seeking appointment as conservator[86] and preferred to appoint a third party conservator, ironically, to prevent abuse.[87] Once Ms. Parks was appointed as full conservator was when she unleashed her abuse on her conservatees.[88] She would bill upwards of 24 hours per day, draining the conservatees' bank accounts in order to pay her invoices.[89] In March of 2017, Nevada grand jury indicted April Parks on more than 200 felony charges, including racketeering, theft, exploitation, and perjury.[90] She pled guilty to exploitation, theft, and perjury in November of 2018 and was sentenced to sixteen to forty years in prison.[91]

Another conservator who operated similarly to April Parks is Rebecca Fierle, a professional conservator out of Florida.[92] Ms. Fierle made millions while controlling the affairs of hundreds of individuals.[93] In a September 2019 investigation conducted by the county comptroller of Orange County, Florida, it was discovered that Ms. Fierle was receiving a significant amount of payments without reporting them to the court.[94] In a ten-year span, Ms. Fierle received $3,956,325.00 in unreported payments.[95] The investigation also revealed that some of the payments received by Ms. Fierle were made on behalf of conservatees for whom she wasn't even a conservator for.[96] At the time of this Comment, no criminal charges have been filed against Ms.

---

83. *Id.*
84. *Id.*
85. *Id.*
86. Matthew Hoffman, *Breaking Down the Law: Elder Abuse and the Case of April Parks,* NEWS 3 LAS VEGAS, https://news3lv.com/news/local/breaking-down-the-law-elder-abuse-and-the-case-of-april-parks [https://perma.cc/2LPW-YSUC].
87. *Id.*
88. *Id.*
89. *Id.*
90. Colton Lochhead, *Grand Jury Indicts Nevada Guardian on More Than 200 Charges,* LAS VEGAS REVIEW JOURNAL, https://www.reviewjournal.com/crime/grand-jury-indicts-nevada-guardian-on-more-than-200-charges/ [https://perma.cc/93HA-APGB].
91. David Ferrara, *Ex-Nevada Guardian to Serve Up to 40 Years Behind Bars, ,* LAS VEGAS REVIEW JOURNAL, https://www.reviewjournal.com/crime/courts/ex-nevada-guardian-to-serve-up-to-40-years-behind-bars-1565690/ [https://perma.cc/222L-ZJBT].
92. Phil Diamond, CPA, *Investigation of Payments Made to Professional Guardian – Rebecca Fierle,* ADVENTHEALTH, https://www.occompt.com/download/Audit%20Reports/rpt479.pdf [https://perma.cc/9PQ7-Z6YX].
93. *Id.*
94. *Id.*
95. *Id.*
96. *Id.*

Fierle in relation to the financial abuse of her conservatees. Rebecca Fierle was able to take advantage of her conservatees for so long because of the lack of oversight in the conservatorship system and is a prime example of why more oversight is necessary to curb conservatorship abuse.

These are only a few examples of the sort of financial abuse that exists within the conservatorship system in the United States today. Although the Nevada law that enabled April Parks to abuse her clients has been changed[97], the Florida laws that Rebecca Fierle is *still* currently operating under have not been amended.

B. PHYSICAL ABUSE

Physical abuse is also a major concern for individuals with disabilities who are placed into conservatorship, particularly for the elderly or individuals with physical disabilities that inhibit movement. In 2010, the GAO drafted a report to the chairman of special committee on aging in the United States Senate.[98] This report specifically looked at cases of neglect and abuse of seniors in conservatorships.[99] Due to lack of screening requirements for conservators, it is incredibly easy for unsuitable candidates to become conservators for the sole purpose of abusing their conservatees.[100] The GAO report summarizes ten cases of conservatorship abuse, one of which will be discussed below.

In November of 2005, a Kansas social worker and his wife were sentenced to prison for involuntary servitude and fraud.[101] They were appointed as conservators for at least twenty individuals, two of whom were seniors.[102] The conservators sexually and physically abused their victims, and then billed Medicare for the cost of this "therapy."[103] All of their conservatees were kept in an unlicensed group home, in filthy living conditions, and forced

---

97. Matthew Hoffman, *Breaking Down the Law: Elder Abuse and the Case of April Parks,* NEWS 3 LAS VEGAS, https://news3lv.com/news/local/breaking-down-the-law-elder-abuse-and-the-case-of-april-parks [https://perma.cc/2LPW-YSUC]. "Under the new laws, a petition for temporary guardianship has to be served on the propose Ward, their spouse; their children; their siblings if no spouse or children; the parents of the proposed ward, if alive; the facility currently caring for the proposed ward; the department of health and human services, if the proposed ward is receiving Medicaid benefits; and the VA if the proposed ward is receiving VA benefits… when an application for guardianship over an adult is made, the Court will appoint an attorney for the proposed ward." *Id.*

98. GAO, *Guardianships – Cases of Financial Exploitation, Neglect, and Abuse of Seniors*, https://www.gao.gov/assets/gao-10-1046.pdf [https://perma.cc/S9BP-Y8DM].

99. *Id.*

100. *Id.*

101. *Id.*

102. *Id.*

103. GAO, *Guardianships – Cases of Financial Exploitation, Neglect, and Abuse of Seniors*, https://www.gao.gov/assets/gao-10-1046.pdf [https://perma.cc/S9BP-Y8DM].

to engaged in nude farm work.[104] The state failed to act for three years because there was no meaningful reporting system in place for conservators. This egregious abuse and neglect was made possible due to the systemic lack of oversight in the conservatorship system. Had more oversight existed, many disabled individuals would have been saved from years of abuse and neglect. In its report, the GAO reasoned that the years of abuse and neglect were caused in part by state courts failing to communicate with federal agencies about abusive conservators, state courts failing to adequately screen potential guardians, and most significantly, state courts failing to adequately oversee conservators after their appointment.[105]

C. EXPLOITATION

The Oxford Dictionary defines exploitation as "the action or fact of treating someone unfairly in order to benefit from their work." [106] Because conservatorships leave conservatees with very little ability to exercise their rights, they are incredibly vulnerable. Britney Spears is one of the most prolific instances of conservatorship exploitation. She was forced to work against her will for years, while her father, Jamie Spears, who was appointed as her conservator in 2008, profited from her work.[107] Throughout the course of the conservatorship, Britney demonstrated her level of capacity; she was able to perform regularly without any issue.[108] She also sought out her own attorney on multiple occasions in an attempt to free herself from the conservatorship.[109] Unfortunately, because of the rights-restricting nature of conservatorships generally, she was deemed unfit to hire her own attorney.[110] And thus the cycle of exploitation continued, as a direct result of the lack of oversight in the conservatorship system.

D. DEATH

In the most severe of cases, a conservator's abuse can result in the conservatee's death. In Florida, professional conservator Rebecca Fierle was arrested and charged with aggravated abuse of an elderly person and neglect of

---

104. *Id.*
105. *Id.*
106. *Exploitation,* Oxford Languages (2021).
107. Ronan Farro & Jia Tolentino, *Britney Spears's Conservatorship Nightmare,* THE NEW YORKER, https://www.newyorker.com/news/american-chronicles/britney-spears-conservatorship-nightmare [https://perma.cc/UH9M-RBYQ].
108. *Id.*
109. *Id.*
110. *Id.*

an elderly person on February 10, 2020.[111] One of the individuals in her care died at the age of 74 under suspicious circumstances.[112] The person who died did not want a do not resuscitate order (DNR), and said many times that he wanted to live.[113] Additionally, his treating medical professionals believed that he was capable of making end-of-life medical decisions for himself and advised Ms. Fierle.[114] Despite this, Ms. Fierele ordered doctors not to perform any life prolonging medical procedures and demanded that the individual in her care's feeding tube be capped.[115] Doctors advised that the feeding tube not be capped, as it would likely cause the patient's death; the patient himself requested that the feeding tube not be capped.[116] Ms. Fierle ignored everyone and had the feeding tube capped, which resulted in her conservatee's death.[117] In addition to the criminal case, the conservatee's family also filed a wrongful death action against Ms. Fierle.[118] Both cases are currently still pending in Orange County, Florida.

Another example of conservatorship abuse resulting in death is Carl DeBrodie, a developmentally disabled Missouri man.[119] He was a resident of Second Chances Homes of Fulton, and was placed under a conservatorship ran by Sherry Paulo.[120] In 2014, DeBrodie was prescribed meal supplements to help maintain his weight.[121] Because of his disabilities, DeBrodie was unable to administer his own medication and relied on Paulo to make sure he was receiving his medication as needed.[122] Unfortunately, Paulo stopped administering the supplements in 2015, and she forced DeBrodie to live in the basement without access to his medication, running water, sunlight, or fresh air.[123] In order to keep DeBrodie's family and medical professionals from

---

111. *Guardian Rebecca Fierle-Santoian Arrested and Charged,* FLORIDA DEPARTMENT OF LAW ENFORCEMENT, http://www.fdle.state.fl.us/News/2020/February/Guardian-Rebecca-Fierle-Santoian-arrested-and-char [https://perma.cc/4LWS-FE9V].

112. *Id.*

113. *Id.*

114. *Id.*

115. *Id.*

116. *Guardian Rebecca Fierle-Santoian Arrested and Charged,* FLORIDA DEPARTMENT OF LAW ENFORCEMENT, http://www.fdle.state.fl.us/News/2020/February/Guardian-Rebecca-Fierle-Santoian-arrested-and-char [https://perma.cc/4LWS-FE9V].

117. *Id.*

118. Complaint, Kimberly Stryker v. Rebecca Fierle, et. al., 2020-CA-002960-O.

119. Sitter, Phillip, *'Most culpable person' in Carl DeBrodie death, cover-up gets 17.5 years in prison,* FULTON SUN, https://www.fultonsun.com/news/2020/sep/01/most-culpable-person-carl-debrodie-death-cover--ge/ [https://perma.cc/8SV8-P77A].

120. *Id.*

121. *Id.*

122. *Id.*

123. Sitter, Phillip, *'Most culpable person' in Carl DeBrodie death, cover-up gets 17.5 years in prison,* FULTON SUN, https://www.fultonsun.com/news/2020/sep/01/most-culpable-person-carl-debrodie-death-cover--ge/ [https://perma.cc/8SV8-P77A].

knowing what Paulo was doing to DeBrodie, she falsified medical records.[124] In September of 2016, DeBrodie suffered a medical emergency that caused him to stop breathing.[125] Paulo, despite knowing CPR and first aid, did not attempt to revive DeBrodie, nor sought emergency medical attention.[126] Instead Paulo watched DeBrodie die.[127] DeBrodie's body was then left in a bathtub in the basement for several days, until Paulo wrapped his body in plastic, placed it in a trash can, and then encased it all in concrete.[128] Even after his death, Paulo continued to falsify medical records, reporting to the family that DeBrodie was enjoying snacks and dancing to music.[129] Almost a year after his death, in April of 2017, DeBrodie was reported missing and his body was subsequently found.[130]

One final example of conservatorship abuse resulting in death is the case of Ashley Yates and Jessica Drake, Texas conservators charged with the care of Michael Hickson.[131] In 2017, Hickson suffered sudden cardiac arrest that resulted in severe brain injury and spinal cord injury.[132] His injuries caused severe disability and he was unable to care for himself or make decisions regarding his care on his own behalf.[133] His wife filed a petition for conservatorship, which was contested by another family member.[134] While awaiting a hearing, Family Eldercare was appointed as temporary conservator of Hickson.[135] Within the organization, Yates and Drake were appointed to care for Hickson.[136] Shortly after being transported to Family Eldercare, Hickson contracted COVID-19 and was transported to the hospital.[137] While hospitalized, Yates and Drake instructed doctors to write a DNR (do-not-resuscitate) order, despite Hickson's wife very vocally opposing this.[138] They also refused to allow Hickson's wife to visit him.[139] Ultimately, as a result of the

---

124. *Id.*
125. *Id.*
126. *Id.*
127. *Id.*
128. Sitter, Phillip, *'Most culpable person' in Carl DeBrodie death, cover-up gets 17.5 years in prison,* FULTON SUN, https://www.fultonsun.com/news/2020/sep/01/most-culpable-person-carl-debrodie-death-cover--ge/ [https://perma.cc/8SV8-P77A].
129. *Id.*
130. *Id.*
131. Complaint, Melissa Hickson, et al. v. Family Eldercare, Inc., et al., D-1-GN-21-001080 (126th Judicial District).
132. *Id.* at 9-10.
133. *Id.*
134. *Id.* at 12.
135. Complaint at 13, Melissa Hickson, et al. v. Family Eldercare, Inc., et al., D-1-GN-21-001080 (126th Judicial District).
136. *Id.* at 14-15.
137. *Id.* at 33.
138. *Id.* at 35.
139. *Id.* at 51.

DNR order, Hickson passed away.[140] Hickson's wife filed suit against Family Eldercare on March 10th of 2021.[141] The case is currently still pending in the District Court of Travis County, Texas.

These cases demonstrate that conservatorship abuse can be a life-or-death issue. Had effective systems been in place to oversee conservatorships, the abuses described above could have been detected and stopped long before they resulted in the conservatees' deaths. For past, present, and future victims of abuse, steps must be taken to improve the conservatorship system, eliminate the abuse, and protect the vulnerable.

IV. ERRONEOUS OR UNNECESSARY CONSERVATORSHIPS

Another area of concern regarding conservatorships is the risk of individuals being placed in conservatorships that are unnecessary. This can happen in a number of different ways. Sometimes, once a petition alleging incapacity is filed with the courts, the allegedly incapacitated person is not afforded a meaningful opportunity to defend the allegation of incapacitation.[142] Other times, judges will, by default, impose full conservatorships for the sake of expediency or ease.[143] This results in individuals being stripped of rights unnecessarily. Two examples of erroneous or unnecessary conservatorships will be discussed below.

In the 1987 case, *Matter of Evatt*, an Arkansas court, acting pursuant to a provision of the Arkansas temporary guardianship statute, signed a ninety-day *ex parte* order of temporary conservatorship of Evatt.[144] No notice of the hearing was given as the statute did not require any notice to be given.[145] After the order was signed, Evatt was then picked up by the local Sheriff and transported to the local jail.[146] Evatt was placed in this temporary conservatorship against his will and he was not given a meaningful opportunity to show that it was unnecessary.[147] Evatt brought suit challenging the constitutionality of the statute, stating that he was denied procedural due process

---

140. *Id. 54.*

141. Complaint, Melissa Hickson, et al. v. Family Eldercare, Inc., et al., D-1-GN-21-001080 (126th Judicial District).

142. Nat'l Couns. on Disability, *Beyond Guardianship: Toward Alternatives That Promote Greater Self-Determination,* https://ncd.gov/sites/default/files/NCD_Guardianship_Report_Accessible.pdf [https://perma.cc/6C3R-84HV].

143. "It's just easier for them, and honestly, it's easier for us too." Quoting Shannon Butler, master guardian and board member with the National Guardianship Association. Heidi Blake & Katie J.M. Baker, *Beyond Britney: Abuse, Exploitation, and Death Inside America's Guardianship Industry,* BUZZFEED NEWS, https://www.buzzfeednews.com/article/heidiblake/conservatorship-investigation-free-britney-spears [https://perma.cc/WR7X-8JE9].

144. *Matter of Evatt,* 72 S.W.2d 851 at 852 (Ark. 1987).

145. *Id.*

146. *Id.*

147. *Id.*

because he was placed in a conservatorship without notice, and after the conservatorship was granted, was not given a review or safeguard hearing.[148] The Supreme Court of Arkansas agreed, striking down the temporary conservatorship statute as an unconstitutional denial of procedural due process.[149] This erroneous and unnecessary conservatorship demonstrates the need for more guiding standards for conservatorship proceedings in the United States. With more consistent and more safeguarding due process protections in conservatorship proceedings across the United States, the risk of an individual with disabilities being placed in an erroneous and unnecessary conservatorship greatly decreases, and will allow the conservatorship structure to function as intended: as a last-resort option for individuals incapable of making their own decisions.[150]

V. SPECIAL NEEDS TRUSTS

One potential solution to conservatorship abuse is to avoid the conservatorship entirely. According to the National Council on Disability, the way the conservatorship system exists currently in the United States, individuals with disabilities are funneled through a "school-to-[conservatorship] pipeline" that is fraught with abuse.[151] However, a comprehensive trust can eliminate the need for a conservatorship in the first place: "If a person has planned carefully, it is not necessary to have a guardian of the person appointed to make that person's important health and welfare decisions. Instead, there may be …a living trust..."[152] Although this solution exists, it can be particularly tricky for individuals with developmental disabilities. Special needs trusts are notoriously complicated, and the family members of individuals with developmental disabilities may not have the knowledge or resources to establish a comprehensive special needs trust. Although this option is available, it is not the best way to combat conservatorship abuse in any sort of meaningful way because of its inaccessibility to a vast majority of the population.

VI. CONSERVATORSHIP REFORM - FEDERAL REGULATIONS

In order for meaningful change to occur within the conservatorship system of the United States, there needs to be more federal oversight. Although

148. *Id.*

149. *Matter of Evatt,* 72 S.W.2d 851 at 853 (Ark. 1987).

150. Nat'l Couns. on Disabilities, *Beyond Guardianship: Toward Alternatives That Promote Greater Self-Determination,* https://ncd.gov/sites/default/files/NCD_Guardianship_Report_Accessible.pdf [https://perma.cc/6C3R-84HV].

151. *Turning Rights into Reality,* NATIONAL COUNCIL ON DISABILITY, https://ncd.gov/sites/default/files/NCD_Turning-Rights-into-Reality_508_0.pdf

152. Robert S. Hunter, 20 Ill. Prac., Estate Planning & Admin. §279:1 (4th Ed.).

conservatorship laws are a creature of state law, federal oversight would require that state conservatorship laws meet certain standards in order to protect allegedly incapacitated individuals in conservatorship proceedings.[153] In order to determine the best form of federal oversight moving forward, this Comment will examine past efforts that have been made for federal regulation of conservatorships, current efforts, and what future efforts should be made.

PAST EFFORTS

There has been a push for conservatorship reform on the federal level since the 1980s.[154] Three conservatorship reform bills were introduced into the 100th Congress, H.R. 5275, S. 2765, and H.R. 372.[155] Although none of these bills became law, they aim to resolve the same issue conservatorships today are facing: lack of government oversight. This illuminates the core issue, that although legislators have been aware of these issues for decades, virtually no changes have been made and the conservatorship system is still nearly just as flawed as it was back then.

H.R. 5275 and S. 2765 are virtually the same, and will therefore be discussed together. These bills were slightly modified and reintroduced in 1989 in the 101st Congress as H.R. 1702 and S. 235.[156] These bills, had they been made into law, would have granted allegedly incapacitated individuals the following rights: (1) the nonwaivable right of prompt notice that includes specified required contents; (2) the right to a convenient forum; (3) the right to be present at all proceedings, unless disability prevents attendance; (4) the right to counsel; and (5) the right to an independent professional guardianship evaluation team of specified membership to examine the individual, report, and be available for cross examination during the guardianship proceedings; (6) the right to a jury in a guardianship proceeding, as well as the right to present evidence, call witnesses, and cross examine; and (6) the right to a competent and trained guardian. [157] These bills would also require conservators to report to the court at least annually on the financial, mental, physical, and personal status of the incapacitated person and would require the courts to at least annually investigate as to the well-being of individuals protected under their conservator orders.[158] These bills focus extensively on measures protecting the rights of allegedly incapacitated individuals, and increasing

153. Carol Ann Mooney, *Guardianship Reform: A Federal Mandate, PROBATE & PROPERTY*

154. *Id.*

155. H.R. 5275, 100th Cong. (1988); S. 2765, 100th Cong. (1988); H.R. 372, 100th Cong. (1988).

156. H.R. 1702, 101st Cong. (1989); S. 235, 101st Cong. (1989).

157. *Id.*

158. *Id.*

fundamental fairness in conservatorship proceedings across the United States. Unfortunately, neither of these bills left committee, nor were they ever made into law.[159]

H.R. 372 amends title XIX (Medicaid) of the Social Security Act to reduce the Federal share of Medicaid payments to States which fail to adopt, within two year of the bill's enactment, the rights, standards, and duties concerning conservatorships that are outlined in the bill.[160] The bill attempts to target similar issues to H.R. 1702 and S. 235 – the lack of rights available to allegedly incapacitated individuals and the lack of fundamental fairness in conservatorship proceedings. H.R. 372 does this by requiring adequate and timely notice to allegedly incapacitated individuals of: any and all conservatorship proceedings, the rights afforded to the allegedly incapacitated individual in the course of the proceedings, and the possible consequences of a determination of incapacity.[161] The bill would also require that states only allow a determination of incapacity be made when the allegedly incapacitated individual is present at the hearing, or they explicitly waive the right to appear.[162] This bill also focuses on conservator competency and would require conservators to complete or agree to complete training specific to the legal, economic, and psychosocial needs of conservatees.[163] Like H.R. 1702 and S. 235, H.R. 372 was referred to committee, never left, and was never made into law.[164]

CURRENT EFFORTS: THE FREEDOM AND RIGHT TO EMANCIPATE FROM EXPLOITATION (FREE) ACT

In the wake of #freebritney, legislation has been proposed to address the abuse within the conservatorship structure. One such proposal is the Freedom and Right to Emancipate from Exploitation (FREE) Act.[165]

The FREE Act allows the Secretary of Health and Human Services to make grants eligible to States for State-employed caseworkers, legal guardians, and conservators for legal incompetent adults if the states comply with certain eligibility requirements.[166] These eligibility requirements include: (1) the State maintain an up-to-date database of all legal guardianships and conservatorships that have been established for legally incompetent adults under State law; (2) the State require a caseworker who is a State employee to be appointed to each conservatee to assist and advocate for the conservatee; (3)

159. *Id.*
160. S. 372, 101st Cong. (1989).
161. *Id.*
162. *Id.*
163. *Id.*
164. *Id.*
165. Freedom and Right to Emancipated from Exploitation Act, H.R. 4545, 117th Cong. (2021).
166. *Id.*

that State law guarantees conservatees the right to communicate with their caseworker and to petition a court to replace their conservator; and (4) that any conservator or guardian meet financial disclosure requirements that the State may establish.[167] If awarded a grant, the State may only use the funds to pay the salaries of State employees who are serving as caseworkers for, legal guardians, or conservators for legally incompetent adults, and to cover related administrative expenses.[168] The State also must submit an annual report to Congress outlining (1) how the funds were used; (2) the number of adults under legal guardianship or conservatorships in the State at the end of the fiscal year; (3) the number of petitions for guardianship or conservatorship submitted to the courts of the State in the fiscal year; (4) the ratio of the number of individuals under legal guardianship or conservatorship in the State to the number of State-employed legal guardians of, or conservators for, the individuals during the fiscal year; and (5) the number of individuals int eh State who were emancipated from a legal guardianship or conservatorship during the fiscal year.[169]

By requiring the submission of an annual report to Congress and requiring that States maintain up-to-date databases of all legal guardianships and conservatorships, the information available on legal guardianships and conservatorships in the United States would be greatly increased.[170] This would help States to notice abuse and require them to act sooner.

Unfortunately, this particular piece of legislation has been stuck in committee since 2020, as Congress turned its attention to the COVID-19 pandemic.[171]

FUTURE EFFORTS

Outside of the legislation already proposed, disability rights groups have been pushing for additional federal regulations to curb conservatorship abuse.[172] Some recurring themes include: (1) people under a certain age cannot be put under a guardianship for longer than a certain amount of years; (2)

---

167. *Id.*

168. *Id.*

169. *Id.*

170. Freedom and Right to Emancipated from Exploitation Act, H.R. 4545, 117th Cong. (2021).

171. Walser, Adam, *#FreeBritney movement inspires bill to end exploitation & abuse in guardianship and conservatorship,* ABC ACTION NEWS, https://www.abcactionnews.com/news/local-news/i-team-investigates/the-price-of-protection/freebritney-movement-inspires-law-aimed-at-ending-exploitation-and-abuse [https://perma.cc/8GFY-YM8G].

172. *Turning Rights into Reality,* NATIONAL COUNCIL ON DISABILITY, https://ncd.gov/sites/default/files/NCD_Turning-Rights-into-Reality_508_0.pdf; Nat'l Couns. on Disability, *Beyond Guardianship: Toward Alternatives That Promote Greater Self-Determination,* https://ncd.gov/sites/default/files/NCD_Guardianship_Report_Accessible.pdf [https://perma.cc/6C3R-84HV].

requiring education requirements for conservators; (3) mandatory legal representation for disabled individuals; and (4) stricter and more consistent definition of disabled.

i. People under a certain age cannot be put under a conservatorship for longer than a certain amount of years

Disability rights groups have long observed what is known as the "School-to-[conservatorship] pipeline" that exists for youth with intellectual or developmental disabilities.[173] The Individuals with Disabilities Education Act (IDEA)[174] generally requires the school to transfer all of their parents' educational rights to the individual with disabilities once they reach the age of majority.[175] Meaning that the individual with disabilities will be able to make decisions regarding their education for as long as they are entitled to receive special education services.[176] However, this transfer does not occur if the adult student is subject to a conservatorship.[177] The National Council on Disability has commented that many schools, intentionally or unintentionally, are pressuring parents towards placing their disabled adult child into a conservatorship.[178] This is likely because of lack of funding and information available to educators.[179] Oftentimes, educators do not have the funding to properly facilitate a program that allows individuals with disabilities will be able to make decisions regarding their education.[180] Additionally, many educators simply aren't aware that alternatives to conservatorships exist.[181]

Federal legislation should be enacted limiting the number of years that individuals under the age of twenty-five can be placed under conservatorships for. Once an individual is placed under a conservatorship, it is incredibly hard to get out of it. For young people, this can be incredibly devastating. By limiting the number of years that young people can be placed under conservatorships for, the negative effects of a conservatorship can be limited. Another way to avoid the "School-to-[conservatorship] pipeline" is to make federal funds to state schools can also be contingent on education requirements for special education teachers. If a school wants to receive federal funding, special education teachers must receive training on alternatives to conservatorships.

---

173. *Turning Rights into Reality,* NATIONAL COUNCIL ON DISABILITY, https://ncd.gov/sites/default/files/NCD_Turning-Rights-into-Reality_508_0.pdf

174. Individuals with Disabilities Education Act, 20 U.S.C. 20 §1400 (1990).

175. *Id.*

176. *Id.*

177. *Id.*

178. *Id.*

179. *Turning Rights into Reality,* NATIONAL COUNCIL ON DISABILITY, https://ncd.gov/sites/default/files/NCD_Turning-Rights-into-Reality_508_0.pdf

180. *Id.*

181. *Id.*

By placing limits on how long young individuals can be placed under conservatorships, the "School-to-[conservatorship] pipeline" that exists for youth with intellectual or developmental disabilities can be circumvented, and youth with disabilities can have more protection against unnecessary and potentially exploitative and abusive conservatorships.[182]

ii. Education requirements for conservators

A conservator exercises a lot of power on behalf of another individual. In other positions in which an individual has power over another, there are stringent educational requirements.[183] However, there are absolutely no educational requirements in place for conservators. Because of the amount of power that a conservator has over their conservatee, ensuring that conservators are well educated and will be able to neutrally make decisions for the benefit of their conservatee is integral. One way to ensure conservators are able to do this and to improve the conservatorship system in the United States is to require any third-party conservators to undergo some sort of educational requirement. Four states (Arizona, Florida, Texas, and Washington) currently require conservators to be certified in the state and three states require conservators to be licensed (Alaska, California, and Nevada).[184]

Alaska's conservator statute is § 8.26.010 of the Alaska statutory code.[185] The statute requires that any individual who is in the business of private conservatorship must be licensed.[186] There is an exception written into the statute for any individual working as a conservator for a single individual or for two individuals who are related to each other.[187] Presumably, this exception is to account for family members acting as conservator for another family member. The Alaska conservator and guardian license applications are very thorough; they require fingerprinting and background checks, two years relevant experience in professional client casework or an associate degree in a closely related field, and a guardianship certification by a nationally recognized guardianship organization.[188] Pursuant to § 8.26.080

182. *Id.*

183. For example, attorneys and doctors both are in positions that give them a lot of power over other individuals. Attorneys help individuals represent clients in the legal system. Doctors are responsible for the health and well-being of their patients. Both attorneys and doctors are required to go to years of schooling to ensure proper training.

184. State Guardian Certification, ABA COMMISSION ON LAW AND AGING, https://www.americanbar.org/content/dam/aba/administrative/law_aging/2020-chrt-st-guard-cert.pdf [https://perma.cc/6YAQ-APYJ].

185. ALASKA STAT. § 8.26.010 (2008).

186. *Id.*

187. *Id.*

188. Application Packet for Private Professional Full Guardian License, STATE OF ALASKA DEPT. OF COMMERCE, COMMUNITY, & ECONOMIC DEVELOPMENT, https://www.commerce.alaska.gov/web/portals/5/pub/gco4218.pdf [https://perma.cc/989G-88W2].

of the Alaska statutory code, licensed conservators must file an annual report at the end of each year.[189] The annual report must contain the following: (1) evidence of the continuing existence of a conservatorship court order, (2) a list of all conservatees and case numbers, (3) financial statements, (4) letter stating that conservator has filed all required court reports, and (5) copies of all tax documents.[190] The stringent requirements necessary to become a conservator help to weed out individuals looking to abuse the system. The educational, experience, and certification requirement ensures that individuals becoming conservators have the ability to competently provide the services of a conservator. The background check required flags individuals who have been convicted of fraud, misrepresentation, material omission, misappropriation, theft, conversion, or any other crime the state determines would affect an individual's ability to be a conservator within ten years and bars them from becoming a licensed conservator.[191] Further, by requiring annual reports be filed, the state can keep tabs on conservators and notice any potential abuses in a timely manner.

iii. Mandatory legal representation for disabled individuals

The Sixth Amendment of the United States Constitution requires that criminal defendants have the assistance of counsel for their defense.[192] This is because the right to liberty that is at stake in a criminal trial is of such importance, it is unconscionable to throw a criminal defendant in jail if they did not have legal representation available throughout the duration of the case. Similarly, in conservatorships, the alleged incapacitated person is at risk of losing their liberty. In theory, it is unconscionable to strip anyone of their rights without legal representation. Therefore, an allegedly incapacitated person should have counsel made available to them at any conservatorship proceedings. However, making this ideal a reality may prove more difficult than it appears at first blush.

Creating a public defender-esque system for conservatorship proceedings would be incredibly costly to the government. The public defender system in the United States costs upwards of $5.3 billion to run annually.[193] And the system is notoriously overworked.[194]

---

189. ALASKA STAT. § 8.26.080 (2008).

190. *Id.*

191. Application Packet for Private Professional Full Guardian License, STATE OF ALASKA DEPT. OF COMMERCE, COMMUNITY, & ECONOMIC DEVELOPMENT, https://www.commerce.alaska.gov/web/portals/5/pub/gco4218.pdf [https://perma.cc/989G-88W2].

192. U.S. CONST. amend. VI, "In all criminal prosecutions, the accused shall enjoy the right…to have the Assistance of Counsel for his defence [sic]."

193. Laughland, Oliver, *The human toll of America's public defender crisis,* THE GUARDIAN, https://www.theguardian.com/us-news/2016/sep/07/public-defender-us-criminal-justice-system [https://perma.cc/7JP5-7GD5].

194. *Id.*

However, California has already created a statutory right to counsel in conservatorship proceedings, which may be a good model to follow.[195] California Probate Code §1471(a) recognizes the right to an attorney at key stages of the conservatorship process.[196] These stages include any proceedings to terminate the conservatorship, proceedings to remove a conservator, or any proceeding for a court order affecting the legal capacity of the conservatee.[197] In an ideal world, in any conservatorship proceeding, the alleged incapacitated person would be provided with counsel. There would be a government organization in place, much like public defenders, that would provide indigent alleged incapacitated persons with counsel to represent them in guardianship proceedings. Because this may be too costly, an alternative to this proposed action is mimicking California's statutory scheme.

iv. Stricter definition of "incapacitated" (who can be placed under a conservatorship/guardianship in the first place)

As discussed above, judges have a lot of discretion in determining incapacity for purposes of conservatorships. Although that discretion is needed, as no legislator could foresee every possible way that an individual could be incapacitated, that discretion needs to be balanced with clear, defined rules. Too often, the mere presence of an intellectual or developmental disability is enough to warrant a legal determination of incapacitation and subsequently, enough to warrant an individual be placed under a conservatorship.[198] Objectively, the mere presence of an intellectual or developmental disability generally should not be sufficient to warrant a conservatorship; individuals with intellectual or developmental disabilities are oftentimes capable of making their own decisions.[199] Conservatorships are intended for individuals incapable of making their own decisions and they should only be used as a last resort after all other less restrictive options have been exhausted.[200] By creating a more narrow legal definition of incapacitation in the context of conservatorships, it would be much more difficult for courts to impose erroneous conservatorships. A way for the federal government to ensure states create a narrower legal definition is to incentivize the states to do so. This can be done by conditioning certain funds on the state having a sufficiently narrow definition of incapacitated in the context of conservatorships. Narrowing the definition of incapacitated is particularly pressing in the context of conservatorships because the rights at play are so fundamental.[201]

---

195. Cal. Prob. Code §1471(a).
196. *Id.*
197. *Id.*
198. Nat'l Couns. on Disability, *supra* note 8.
199. *Id.*
200. *Id.*
201. *Supra* note 35 & 51.

VII. ALTERNATIVES TO CONSERVATORSHIPS – SUPPORTED DECISION MAKING

In the wake of the disability rights movement, there has been a concerted effort to steer courts away from conservatorships, and towards alternative protections for individuals with disabilities. Once such alternative is supported decision making. According to Robert Dinerstein, director of the Disability Rights Law Clinic at the American University Washington College of Law, supported decision making is defined as "a series of relationships, practices, arrangements, and agreements, or more or less formality and intensity, designed to assist an individual with a disability to make and communicate to others decisions about the individual's life."[202] In other words, individuals with disabilities are not totally stripped of their rights and are still able to exercise their rights with the support of a designated support person.[203] Many European counties have replaced conservatorships with supported decision making with great success.[204]

Inclusion Europe, a human rights organization that advocates for disability rights, determined eight key elements necessary for a supported decision-making system.[205] These elements include: (1) promotion and support of self-advocacy, (2) using mainstream mechanisms for the protection of the best interests of a person, (3) replacing traditional guardianship by a system of supported decision-making, (4) supporting decision-making, (5) selection and registration of support persons, (6) overcoming communication barriers, (7) preventing and resolving conflicts between supporter and supported person, and (8) implementing safeguards.[206] Any supported decision-making system that would be implemented in the United States should take these elements into consideration because they are integral to promoting the rights of individuals with disabilities. A supported decision-making system should prioritize the autonomy and the rights of individuals with disabilities.

In the United States, nine states currently have laws regarding supported decision-making.[207] These states include Texas, Delaware, the District of

---

202. Robert Dinserstein, "Implementing Legal Capacity Under Article 12 of the UN Convention on the Rights of Persons with Disabilities: The Difficult Road from Guardianship to Supported Decision-Making." *Human Rights Brief* 19, no. 2 (2012), https://digitalcommons.wcl.american.edu/cgi/viewcontent.cgi?article=1816&context=hrbrief [https://perma.cc/XNR5-MX8U].

203. *Id.*

204. *Id.*

205. Inclusion Europe, *Key Elements of a System for Supported Decision-Making,* https://inclusion-europe.eu/wp-content/uploads/2015/03/15.Position_Supported_Decision_Making_EN.pdf [https://perma.cc/CG6N-8G2Q].

206. *Id.*

207. The states that currently have supported-decision making laws include: Texas, Delaware, the District of Columbia, Alaska, Wisconsin, North Dakota, Nevada, and Rhode Island. Autistic Self Advocacy Network, *Supported Decision-Making: Why the Right to Make*

Columbia, Alaska, Wisconsin, North Dakota, Nevada, and Rhode Island.[208] A select few of these laws will be analyzed below.

The Texas supported decision-making law is known as the "Supported Decision-Making Agreement Act."[209] The purpose of this act, which was enacted in 2015, was to provide a less restrictive alternative to conservatorships for adults who need assistance with decisions regarding daily living.[210] The law is fairly straightforward. An adult who needs assistance with decisions regarding daily living may voluntarily enter into a supported decision-making agreement with a supporter.[211] The supporter may be authorized to: (1) provide supported decision-making, including assistance in understanding the options, responsibilities, and consequences of the adult's life decisions, without making those decisions on behalf of the adult with a disability; (2) assist the adult in accessing, collecting, and obtaining information that is relevant to a given life decision, including medical, psychological, financial, educational, or treatment records, from any person; (3) assist the adult with a disability in understanding the authority of the support and the nature of their relationship; and (4) assist the adult in communicating the adult's decisions to appropriate persons.[212] The agreement is meant to be based on trust and confidence, and is meant to preserve the decision-making authority of the adult who needs assistance with decisions regarding daily living.[213] A unique hallmark of the Texas law is the inclusion of a section requiring the reporting of suspected abuse, neglect, or exploitation.[214] This section requires anyone who receives a copy of the supported decision-making agreement or is aware of the agreement and has cause to believe that the supporter is abusing, neglecting, or exploiting the supportee to report the alleged abuse, neglect, or exploitation.[215]

The Delaware supported decision-making law is known as the "Supported Decision-Making Act." The Delaware law contains a robust statement of purpose, describing not only the purpose, but the guiding principles behind the act.[216] These principles include that all adults should be able to live in the manner they wise and that the values, beliefs, wishes, cultural norms, and traditions that an adult holds should be respected.[217] These principles are

---

Choices with Support Matters, https://autisticadvocacy.org/actioncenter/issues/choices/sdm/ [https://perma.cc/X2TC-R4EQ].

208. *Id.*

209. The Supported Decision-Making Agreement Act, Tex. Est. T. 3, Ch. 1357 (2015).

210. *Id.*

211. *Id.* at §1357.051.

212. *Id.*

213. *Id.* at §1357.052.

214. *Id.* at §1357.102.

215. *Id.*

216. 80 Del. Laws, c. 427, §9402A, https://delcode.delaware.gov/title16/c094a/index.html.

217. *Id.*

evident throughout the law; emphasis is placed on the autonomy of adults. All adults are presumed to be capable of making decisions unless the court determines otherwise.[218] Further, the law bars the court from using the existence of a supported decision-making agreement as evidence of incapacity.[219]

The District of Columbia supported decision-making law is articulated in the Code of the District of Columbia §7-21B.[220] This law has four sections: a definitions section, a section describing execution of a supported decision-making agreement, a section describing a supported decision-making agreement, and a rules section.[221] This law has more stringent requirements for who can be a supporter.[222] For example, someone cannot be a supporter if they have abused, neglected, or exploited the supported person, inflicted harm upon a child, elderly person, or person with disability, or has been convicted of certain criminal offenses within seven years.[223] By having more requirements for whom can be a supporter, this law offers more protection for individuals with disabilities.[224]

Potential federal legislation on supported decision-making would likely follow the District of Columbia model.[225] This model is the most protective of individuals with disabilities and also provides a comprehensive template for a supported decision-making agreement.[226] Federal legislation on supported decision-making should also incentivize states to enact supported decision-making laws of their own. For example, the legislation could make government funds for certain health services contingent on the state having a supported decision-making agreement.

Since its inception, the United States has always recognized the importance of autonomy. The Declaration of Independence states that all men are created equal, and that they are entitled to certain unalienable rights, including life, liberty, and the pursuit of happiness.[227] However, conservatorships strip individuals of those rights, evoking a "civil death" for the individual, preventing them from participating in society in any meaningful way

---

218. *Id.*
219. *Id.*
220. Supported Decision-Making Agreements, Code of District of Columbia §7-21B (2018).
221. *Id.*
222. *Id.*
223. *Id.* These criminal offenses include: a sexual offense, aggravated assault, fraud, firs-degree theft, forgery, or extortion.
224. Supported Decision-Making Agreements, Code of District of Columbia §7-21B (2018).
225. *Id.*
226. *Id.*
227. THE DECLARATION OF INDEPENDENCE para. 2 (U.S. 1776).

on their own.[228] Supported decision making protects the individual while preserving their dignity and autonomy.

VIII. CONCLUSION

The #freebritney movement brought much needed attention to the conservatorship system in the United States. Although the movement was successful in freeing Britney from the abusive conservatorship she was under, hundreds, possibly thousands more individuals are still being held unnecessarily in abusive conservatorships. Through the use of comprehensive special needs trusts, increased federal regulations, and increased use of alternatives to conservatorships, the conservatorship system in the United States can be reformed and made better for future generations.

228. Robert Dinserstein, "Implementing Legal Capacity Under Article 12 of the UN Convention on the Rights of Persons with Disabilities: The Difficult Road from Guardianship to Supported Decision-Making." *Human Rights Brief* 19, no. 2 (2012), https://digitalcommons.wcl.american.edu/cgi/viewcontent.cgi?article=1816&context=hrbrief [https://perma.cc/XNR5-MX8U].