What if Britney Spears lived in Australia? Disrupting the binary framing of guardianship versus supported decision-making

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Britney Spears' conservatorship has been rightly criticized for denying her civil and human rights, and indeed conservatorships and guardianships continue to be tools of abuse of some of our most vulnerable citizens. The Convention on the Rights of Persons with Disabilities requires recognition of legal capacity and decision-making for all adults with disability, and arguably also requires abolition of guardianship. It further requires that people with disability be provided with supports for decision-making according to practices of "supported decision-making". Yet while there is broad commitment to implementing supported decision-making, there is still significant resistance to totally abolishing guardianship. This article provides a more sophisticated and informed understanding of what guardianship is, and how guardianship systems can be reformed, to encourage less restrictive alternatives and maximize the use of supported decision-making.

It does this by comparing the California conservatorship system with guardianship systems in two Australian states. In California, conservators are appointed by courts bound by due process, while in Australia, administrative tribunals operate under informal rules of natural justice. Ironically, the Australian systems are much more likely to result in less restrictive alternatives than guardianship (including supported decision-making). If Ms. Spears had lived in Australia, it is unlikely that she would have been placed under guardianship, and if she had been, it would not have lasted thirteen years. Abolishing rather than reforming guardianship systems, without understanding how they operate, or what will replace them, risks defunding current systems of support for vulnerable citizens, in the name of upholding civil and human rights.

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I. INTRODUCTION

From 2018 there had been much publicity in the United States and internationally about the conservatorship of the pop-star Britney Spears, up to its termination in September 2021. Ostensibly suffering from a mental illness, Ms. Spears had been placed under the conservatorship of her father and other co-conservators who were granted full power to make decisions about her personal life and finances. The Court only terminated the conservatorship after it had been in place for thirteen years, and Ms. Spears had finally been given the opportunity to publicly voice her resistance to it and describe it not just as unnecessary, but also abusive. The continued imposition of the conservatorship on Ms. Spears has been widely criticised as an infringement of her civil and human rights, including under the *United Nations Convention on the Rights of Persons with Disabilities* (CRPD),[1] adding fuel to calls for the abolition of conservatorship and adult guardianship regimes worldwide. Article 12 of the CRPD provides that people with disabilities—including cognitive disabilities associated with mental illness, intellectual disabilities, acquired brain injury or aged dementia—have a right to "enjoy legal capacity," to make their own decisions or be supported to make their own decisions "on an equal basis with others."[2] Conservatorship and adult guardianship ("guardianship") are both legal arrangements that deny an adult's legal capacity to varying extents and vest decision-making power in a substitute—i.e. a conservator or guardian.

There is wide if not universal consensus among disability scholars and advocates that adults with cognitive disabilities should be supported to make their own decisions where possible (referred to as "supported decision-making"),[3] but there is entrenched disagreement as to whether or not article 12 allows for

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[1] U.N. Convention on the Rights of Persons with Disabilities, *opened for signature* Mar. 30, 2007, 2515 U.N.T.S. 15 (entered into force May 3, 2008).

[2] *Id.*

[3] *See, e.g.*, ROSEMARY KAYESS & THERESE SANDS, CONVENTION ON THE RIGHTS OF PERSONS WITH DISABILITIES: SHINING A LIGHT ON SOCIAL TRANSFORMATION (2020); RON MCCALLUM, THE UNITED NATIONS CONVENTION ON THE RIGHTS OF PERSONS WITH DISABILITIES: AN ASSESSMENT of AUSTRALIA'S LEVEL OF COMPLIANCE 46–55 (2020); THOMAS F. COLEMAN, CAPACITY ASSESSMENTS IN CALIFORNIA CONSERVATORSHIP PROCEEDINGS (2020).

or requires a substitute to make a decision as a last resort.[4] This article seeks a resolution of the article 12 debate by reframing it from a choice between supposedly antithetical, binary opposites—i.e. supported decision-making versus substitute decision-making—to demonstrate how supported decision-making can and must operate outside of but also within conservatorship or guardianship relationships. I approach this by comparing the conservatorship system in California, as it applied to Ms. Spears, with the guardianship systems in two Australian jurisdictions as applied in a sample of reported tribunal decisions. This comparison reveals how the existence of conservatorship systems such as that in California have led to the simplistic and inaccurate binary framing of conservatorship (and guardianship) as always rights-denying and supported decision-making as always rights-affirming.

The analysis explains how the California system does in practice invariably effect a wholesale deprivation of civil rights with no or little hope of reprieve, thus promoting the binary framing and oppositional positioning of guardianship versus supported decision-making. By way of comparison and contrast, the Australian systems demonstrate how supported decision-making can be framed as providing a continuum of low to high decision support both outside of but also *within* guardianship, by applying a least restrictive alternative,[5] with decision-making by a guardian as a last resort. The insights from this comparison can serve not only to redesign conservatorship or guardianship regimes from a binary to a continuum model that is more compliant with the CRPD, but also to

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[4] *See, e.g.*, Joseph Dute, *Should Substituted Decision-Making be Abolished?*, 22 EUR. J. HEALTH L. 315 (2015); Tina Minkowitz, *Legal Capacity: Fundamental to the Rights of Persons with Disabilities*, 56 INT'L REHAB. REV. 25 (2007); Fiona Morrisey, *The United Nations Convention on the Rights of Persons with Disabilities: A New Approach to Decision-making in Mental Health Law*, 19 EUR. J. HEALTH L. 423 (2012); Amita Dhanda, *Legal Capacity in the Disability Rights Convention: Stranglehold of the Past or Lodestar of the Future*, 34 SYRACUSE J. INT'L L. & COM. 429 (2007); Gerard Quinn & Anna Arstein-Kerslake, *Restoring the 'Human' in 'Human Rights': Personhood and Doctrinal Innovation in the UN Disability Convention*, *in* CAMBRIDGE COMPANION TO HUMAN RIGHTS LAW 36 (Costas Douzinas & Conor Gearty eds., 2012); Theresia Degener, *Editor's Foreword*, 13 INT'L J.L. CONTEXT 1 (2017); Gerard Quinn & Abigail Rekas-Rosalbo, *Civil Death: Rethinking the Foundations of Legal Personhood for Persons with a Disability*, 56 IRISH JURIST 286, (2016); Eilionóir Flynn & Anna Arstein-Kerslake, *The Support Model of Legal Capacity: Fact, Fiction, or Fantasy?*, 32 BERKELEY J. INT'L L. 124 (2014); MICHAEL BACH & LANA KERZNER, L. COMM'N ONT., A NEW PARADIGM FOR PROTECTING AUTONOMY AND THE RIGHT TO LEGAL CAPACITY (2010); Nandini Devi, *Supported Decison-Making and Personal Autonomy for Persons with Intellectual Disabilities: Article 12 of the Convention on the Rights of Persons with Disabilities*, 41 J.L. MED. & ETHICS 792 (2013); Clíona de Bhailís & Eilionóir Flynn, *Recognising Legal Capacity: Commentary and Analysis of Article 12 CRPD*, 13 INT'L J.L. CONTEXT 6 (2017); ANNA ARSTEIN-KERSLAKE, RESTORING VOICE TO PEOPLE WITH COGNITIVE DISABILITIES (2017); Kristin Booth Glen, *Changing Paradigms:Mental Capacity, Legal Capacity, Guardianship and Beyond*, 44 COLUM. HUM. RTS. L. REV. 93 (2012). For arguments that Article 12 allows for substitute decision-making and guardianship as a last resort, *see, e.g.*, JULIA DUFFY, MENTAL CAPACITY, DIGNITY AND THE POWER OF INTERNATIONAL HUMAN RIGHTS (2023); Jillian Craigie et al., *Legal Capacity, Mental Capacity and Supported Decision-making: Report from a Panel Event*, 62 INT'L J.L. & PSYCHIATRY 165 (2019); WAYNE MARTIN et al., THREE JURISDICTIONS REPORT (2016); Kjersti Skarstad, *Ensuring Human Rights for Persons wtih Intellectual Disabilities?*, 22 INT'L J. HUM. RTS. 774 (2018); Silvana Galderisi, *The UN Convention on the Rights of Persons with Disabilities: Great Opportunities and Dangerous Interpretations*, 18 WORLD PSYCHIATRY 47 (2019); Margaret Isabel Hall, *Mental Capacity in the (Civil) Law: Capacity, Autonomy, and Vulnerability*, 58 MCGILL L.J. 61 (2012) (arguing that article 12 allows for retention of substitute decision-making or guardianship as a last resort).

[5] For an explanation of "least restrictive," *see infra* Section III.B.

resolve the debate around article 12 by disrupting the oppositional binarism that drives it. Overall, the comparative legal study illustrates that the interpretation of article 12 as requiring abolition of guardianship is underpinned by a limited understanding of guardianship that has ignored the variability in systems worldwide—differences in the substantive laws, how they are applied, and the legal systems in which they operate. Ultimately, the less adversarial systems in the Australian states—that discourage use of attorneys—keep costs of proceedings down to ensure accessibility to frequent and substantive reviews and revocations.

This article begins in section one by setting out article 12 CRPD, how it promotes supported decision-making, and also the debate around whether or not it requires abolition of substitute decision-making. Section two describes the circumstances of Ms. Spears' case to the extent that they are ascertainable. Section three compares and contrasts the substantive laws of California conservatorship with the guardianship laws of the two Australian states of Queensland and Victoria. It describes how the substantive provisions of the California law applied to Ms. Spears and how the laws in Queensland and Victoria would have been more effective in upholding Ms. Spears' civil and human rights. Section four compares and contrasts the court procedures in California conservatorship law with the informal tribunal processes of the Australian states, demonstrating how the different legal system in Australia would have more effectively allowed Ms. Spears to exercise her rights. Section five provides a summary of the key differences between Californian and Australian law and practice and the implications of these for interpreting, applying and upholding the right to legal capacity. Section six concludes by admonishing against the risks of a simplistic and inaccurate binary framing of conservatorship and guardianship as always rights-denying and supported decision-making as always and inevitably rights affirming for people with a cognitive disability.

II. ARTICLE 12 CRPD

When the CRPD was adopted in 2006 it was hailed as a "paradigm shift" in disability rights, with article 12 at its foundation. Article 12 CRPD "Equal recognition before the law" provides that:

> 1. States Parties reaffirm that persons with disabilities have the right to recognition everywhere as persons before the law.
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> 2. States Parties shall recognize that persons with disabilities enjoy legal capacity on an equal basis with others in all aspects of life.
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> 3. States Parties shall take appropriate measures to provide access by persons with disabilities to the support they may require in exercising their legal capacity.

Paragraph (2) of article 12 provides a right to recognition of legal capacity

and paragraph (3) that supports must be provided for people to exercise their legal capacity. While Australia ratified the CRPD in 2008,[6] the U.S. Senate has failed to ratify it since it was signed by President Obama on behalf of the United States in 2009. Despite this, the CRPD—and article 12 in particular—has been influential in the United States in promoting the introduction of supported decision-making particularly as an alternative to conservatorship or guardianship, and its influence is ongoing.[7]

A. *From Guardianship to Supported Decision-Making*

In the United States the term "guardianship" is often used (as in Australia) to describe the legal institution whereby a person or entity is given power by a court to make decisions for an adult;[8] however, in California this is called "conservatorship."9 Depending on the court order, such decisions may relate to personal matters, financial matters or both, and decisions by conservators and guardians are binding on the adult and on third parties. In Australia, "guardianship" is the term used when the appointee has power to make decisions over personal matters, and "administration" is the term usually used when the appointee has financial decision-making powers.[10] In this article I use the more generic term "guardianship" to refer to all or any of these institutions, unless the context requires the more specific term (i.e., conservatorship, guardianship or administration). These institutions all have the same origin, evolving from the English Courts' parens patriae jurisdiction, having the function of furthering the state's obligation to protect its most vulnerable citizens.[11] As illustrated in more detail below, the tests for when a guardian may be appointed vary, but often depend on whether an adult lacks "capacity" or "mental capacity." Definitions of "capacity" vary, but it is widely defined in legislation according to a functional test of whether the adult is capable of understanding factors relevant to a decision, weighing those factors, and then communicating the

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6 Austl. L. Reform Comm'n, Equality, Capacity and Disability in Commonwealth Laws 36 (2014).

7 See, e.g., Arc N. Va. & Burton Blatt Inst. Syracuse Univ., "I Learned that I Have a Voice in My Future": Summary Findings, and Recommendations of the Virgina Supported Decision-Making Pilot Project 10 (2021) [hereinafter Arc N. Va.]; Kristin B. Glen, Supported Decision-Making: What You Need to Know and Why, 23 N.Y. State Bar Ass'n. Health L.J. 327 (2018); Megan S. Wright, Dementia, Cognitive Transformation, and Supported Decision Making, 20 Am. J. Bioethics 88 (2020); Jonathan G. Martinis et al., Supported Decision-Making as an Alternative to Guardianship, in Handbook of Positive Psychology in Intellectual and Developmental Disabilities: Translating Research into Practice 36 (Karrie A. Shogren et al. eds., 2017); Karen Andreasian et al., Revisiting S.C.P.A 17-A: Guardianship for People with Intellectual and Developmental Disabilities, 18 City U. N.Y. L. Rev. 287 (2015).

8 Juliana Wright, It's Mom's Money and I Want It Now: A Review of Whether the Conservatee Should Continue to Pay the Attorney Fees of Feuding Parties, 52 U. Pac. L. Rev. 963, 969 (2021).

9 Cal. Prob. Code, §§ 1400–2893 (1990); id. § 1400 ("cited as the Guardianship-Conservatorship Law").

10 See Guardianship and Administration Act 2000 (Qld) ch 3 (Austl.); Guardianship and Administration Act 2019 (Vic) s 3.

11 Mary J. Quinn & Howard S. Krooks, The Relationship Between the Guardian and the Court, 2012 Utah L. Rev. 1611 (2012); Margaret Bushko, Toxic: A Feminist Legal Theory Approach to Guardianship, 81 Md. L. Rev. Online 141, 145–47 (2022).

decision in some way.[12]

Guardianship systems began to emerge in the West in the 1970s when countries including the United States and Australia began a program of de-institutionalizing people with disabilities, in large part responding to revelations of abuse suffered behind closed doors.13 Historically, the appointed guardian would always make decisions that protected the adult's 'best interests,' and this decision-making principle still dominates much contemporary guardianship legislation.14 However, the best interests principle has been widely criticized by disability advocates and scholars including the United Nations Committee on the Rights of Disabilities that oversees implementation and monitors states' compliance with the CRPD (CRPD Committee).15 This is because the best interests principle allows a substitute to make a decision contrary to the adult's own "will and preferences" thereby denying their autonomy and privileging an ethos of paternalism and protection.16 Because of this, even before the advent of the CRPD the best interests principle began to be replaced by "substituted judgment" principle, whereby the guardian makes a decision according to the adult's will and preferences expressed at the time that they still had capacity.17 Use of substituted judgment has since been extended in legislation and practice so that a guardian may be required to make a decision that either respects or adheres to the person's will and preferences expressed when the decision is actually made (i.e. at a time when the adult lacks capacity).18 This development

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12 Ben White et al., Adults Who Lack Capacity: Substitute Decision-Making, in Health Law in Australia 149 (3d ed. 2018); A. Kimberly Dayton, Guardianship in the U.S.: Themes and Commonalities Across the States, in Comparative Perspectives on Adult Guardianship 232, 239 (A. Kimberly Dayton ed., 2014).

13 *See* Olmstead v. L.C., 527 U.S. 581 (1999) (holding that "unjustified isolation in an institution was discrimination based on disability"); Alexandra Wallin, *Living in the Gray: Why Today's Supported Decision-Making-Type Models Eliminate Binary Solutions to Court-Ordered Guardianships*, 57 SAN DIEGO L. REV. 433, 465–66 (2020); Frances Owen & Gillian MacKinnon, *The Right to Community Living*, *in* THE HUMAN RIGHTS AGENDA FOR PERSONS WITH INTELLECTUAL DISABILITIES 53 (Dorothy Griffiths et al. eds., 2012). *See also* OFFICE OF THE PUBLIC ADVOCATE (QLD), SUBMISSION TO THE SENATE STANDING COMMITTEE ON COMMUNITY AFFAIRS, INQUIRY INTO VIOLENCE AND ABUSE IN INSTITUTIONAL AND RESIDENTIAL SETTINGS 5 (JUNE 2015) (for deinstitutionalization in Australia).

14 *See, e.g.*, ARC N. VA., *supra* note 7; Nina A. Kohn, *Legislating Supported Decision-Making*, 58 HARV. J. LEGIS. 313, 327–44 (2021); S. A. Crane, *Is Guardianship Reform Enough? Next Steps in Policy Reforms to Promote Self-Determination Among People with Disabilities*, 8 J. INT'L AGING L. & POL'Y 182, 182–83 (2015).

15 *See* Comm. on the Rts. of Prs. with Disabilities on its Eleventh Session, General Comment No. 1, Art. 12: Equal Recognition Before the Law, at ¶ 21, U.N. Doc. CRPD/C/GC/1 (May 19, 2014) [hereinafter General Comment No. 1] (stating that "[t]he 'will and preferences' paradigm must replace the 'best interests' paradigm to ensure that persons with disabilities enjoy the right to legal capacity on an equal basis with others."); *see, e.g.*, Dute, *supra* note 4, at 317.

16 Anna Arstein-Kerslake & Eilionóir Flynn, *The General Comment on Article 12 of the Convention on the Rights of Persons with Disabilities: A Roadmap for Equality before the Law*, 20 INT'L J. HUM. RTS. 471, 484 (2016); Dute, *supra* note 4.

17 ALLEN BUCHANAN & DAN W. BROCK, DECIDING FOR OTHERS 112, 117 (Cambridge University Press, 1st ed. 1989); Nicole M. Arsenault, *Start with a Presumption She Doesn't Want to Be Dead: Fatal Flaws in Guardianships of Individuals with Intellectual Disability*, 35 L. & INEQ. 23, 39 (2017).

18 Kimberly A. Dayton, *Standards for Health Care Decision-Making: Legal and Practical Considerations*, 2012 UTAH L. REV. 1362.

of decision-making principles from best interests to will and preferences reflects the gradual replacement of the rhetoric and policy of protection, with the language and ethos of autonomy and civil and human rights.

It was in this context that article 12, in stating that people with disability had a right to legal capacity on an equal basis with others, was hailed as a paradigm shift for disability human rights.19 Paragraph (3) of article 12 requires adults to be provided with supports to exercise legal capacity so that in many cases, adults with cognitive disabilities will still be able to make own decisions that are legally recognized as their own. For example, these supports may be in the form of personal mentoring or communication assistance, and once provided, may obviate the need for a guardian.[20] Since the adoption of the CRPD by the UN General Assembly in 2006, both the practice and law of supported decision-making have steadily evolved from their beginnings in the 1990s in Canada,[21] and these developments have been commended by disability advocates and scholars alike.

B. *Contention Around Interpreting Article 12 CRPD*

Yet potentially hampering the development of consistent frameworks for supported decision-making has been the ongoing contention around how to interpret article 12: whether or not it continues to allow the retention of decision-making by substitutes as a last resort in cases where even with available supports, an adult does not have decision-making capability. This disagreement led to the CRPD Committee publishing in 2014 its General Comment No. 1: Article 12 Equal Recognition before the law (General Comment No 1) [22] which provides that an adult's will and preferences must be given effect to in all cases, with substitute decision-making and guardianship in particular being abolished (the abolitionist position). General Comment No. 1 states that when it is difficult to discern an adult's will and preferences, then a "best interpretation" of their will and preferences must nevertheless be made and acted upon as the adult's own decision (best interpretation principle).

Criticisms have been made of the best interpretation principle, amounting to a concern that a "decision" elicited by using it may amount to substitute

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[19] See, e.g., Gerard Quinn, Professor of L., Univ. of Galway, Personhood and Legal Capacity: Perspecitves on the Paradigm Shift of Article 12 CRPD at HPOD Conference at Harvard Law School (Feb. 20, 2010); Jill Stavert, Paradigm Shift or Paradigm Paralysis? National Mental Health and Capacity Law and Implementing the CRPD in Scotland, 7 LAWS 1 (2018); Eliana J. Theodorou, Supported Decision-making in the Lone-star State, 93 N.Y.U. L. REV. 973 (2018).

[20] See, e.g., Robert D. Dinerstein, 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, 19 HUM. RTS. BRIEF 8, 10–11 (2012).

[21] See Shih-Ning Then, Evolution and Innovation in Guardianship Laws: Assisted Decision-Making, 35 SYDNEY L. REV. 133 (2013); Robert M. Gordon, The Emergence of Assisted (Supported) Decision-Making in the Canadian Law of Adult Guardianship and Substitute Decision-Making, 23 INT'L J.L. & PSYCHIATRY 61 (2000).

[22] See General Comment No. 1, supra note 15.

decision-making but not recognized as such.[23] Critics have opined that as a matter of hard reality, the cognitive impairments experienced by some adults mean that in some hard cases, a person may not have decision-making ability, and that to attribute a decision to them is therefore ethically and legally challenging, especially if their "decision" results in harm. Hard cases may include decision-making by people with cognitive disability associated with psychosis, severe and profound intellectual disability, advanced aged dementia or some acquired brain injuries. Critics of General Comment No. 1 interpret article 12 as allowing for decision making by substitutes as a last resort in hard cases, when an adult, after being provided with all available supports, is still unable as a matter of fact to make a decision which can be attributed to them as their own ("the retention position").

This article argues, however, that there is an alternative way of framing the debate over article 12 other than as a competition between the above two polarized positions—abolition versus retention. It does this by showing how the more contemporary guardianship legislation and practices in Queensland and Victoria disrupt the binary framing by promoting supported decision-making outside of but also within guardianship relationships. In contrast, the conservatorship system in California much more readily results in a wholesale and longer-term denial of an adult's civil and political rights, thereby bolstering the abolitionist position, underpinned as it is by an assumption that guardianship is always rights denying while supported decision-making is always rights affirming.[24]

II. BRITNEY SPEARS – WHAT WE ARE TOLD HAPPENED

It is impossible to be fully certain of all the relevant facts surrounding Britney Spears' conservatorship, partly because most of the hearings were closed, and court documents sealed. Nevertheless, many of the "facts" around Britney Spears' conservatorship have not only been made publicly available through a sensationalist world media, but corroborated by more reliable outlets

[23] Terry Carney, Supported Decision-Making for People with Cognitive Impairments: An Australian Perspective?, 4 LAWS 37, 45 (2015); Malcolm Parker, Getting the Balance Right: Conceptual Considerations Concerning Legal Capacity and Supported Decision-Making, 13 J. BIOETHICAL INQUIRY 381, 387 (2016).

[24] *See* General Comment No. 1, *supra* note 15.

including *Forbes Magazine*,[25] the *New York Times*[26] and the *New Yorker*,[27] as well as transcripts from U.S. Senate hearings on conservatorship reform.[28] Given the lack of access to actual court documents, this article does not purport to present a forensic examination of Ms. Spears' case, but uses it as a focus to consider how such abuses could occur within what is widely known and reported about California conservatorship legislation and practice.

A. *Leading up to the Conservatorship*

In 2008 Britney Spears was reported widely in the media as having mental health concerns and as allegedly abusing substances. The "evidence" of her mental collapse includes that she had been seen driving her car with her baby on her lap, and then some months later almost dropped the baby while being followed by paparazzi into a cafe. By early 2007 she was involved in a serious child custody dispute with her ex-husband and in February 2007 was widely reported as having shaved off her long hair.[29] A few days later she was filmed "attacking" a photographer's car with an umbrella. The New Yorker writes that it was these two latter incidents that "cemented her image as 'crazy.'" Having lost custody of her two children, in January 2008, Ms. Spears refused to release one of them at the end of their visit; as a consequence, police and an ambulance were called and Ms. Spears was placed under what is known as a "5150 hold."[30] Section 5150 of California's Welfare and Institutions Code ("Welfare and Institutions Code")[31] allows a person to be placed on a 72-hour involuntary detention for assessment, evaluation and crisis intervention. A "5150 hold" is available when "as a result of a mental health disorder" someone "is a danger to others, or to himself or herself, or gravely disabled."[32] At around this time, Ms. Spears' father—and other people in her life—were concerned that she had come

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[25] *See, e.g.*, Danielle Mayoras & Andy Mayoras, *Making Sense of the Britney Spears Conservatorship and #FreeBritney*, FORBES MAG. (May 15, 2019), https://www.forbes.com/sites/trialandheirs/2019/05/15/making-sense-of-the-britney-spears-conservatorship-and-freebritney/?sh=46e8c4fb4b74; Madeline Berg, *Britney Spears' Full Statement Against Her Consevatorship*, FORBES MAG. (June 23, 2021), https://www.forbes.com/sites/maddieberg/2021/06/23/britney-spears-full-statement-against-her-conservatorship/?sh=158c397021bd.

[26] *See, e.g.*, Lauren Herstike, *This is What Britney Has Wanted for 13 Years.' Her Supporters Cheered the Ruling/ Finally Hearing From Britney Spears*, N.Y. TIMES (Sept. 29, 2021), https://www.nytimes.com/2021/09/29/arts/music/britney-spears-fans-conservatorship.html; Julia Jacobs, *What is Actually Happening with Britney Spears?*, N.Y. TIMES (May 17, 2021), https://www.nytimes.com/2019/05/17/arts/music/britney-spears-conservatorship-mental-health.html.

[27] Ronan Farrow & Jia Tolentino, *Britney Spears's Conservatorship Nightmare*, NEW YORKER (July 3, 2021), https://www.newyorker.com/news/american-chronicles/britney-spears-conservatorship-nightmare.

[28] *Toxic Conservatorships: The Need for Reform: Hearing before the Subcomm. on the Const. of the Senate Comm. On the Judiciary*, 117th Cong. (2021).

[29] Farrow & Tolentino, *supra* note 26.

[30] *Id.*

[31] CAL. WELF. & INST. CODE § 5150(a) (2022).

[32] *Id.*

under the influence of a new manager whose intentions were allegedly nefarious. Their concerns were that the manager may embezzle Ms. Spears' fortune or encourage her to spend it unwisely, and potentially ruin her career. When she continued to exhibit signs of stress, anxiety and illicit drug use, Ms. Spears was placed in the hospital under a second "5150 hold."

At that time, Ms. Spears' father applied under the California Probate Code ("the Probate Code") for a conservatorship over his daughter, allegedly to protect her from the supposed undue influence of her manager. The conservatorship was granted after a short hearing with her father appointed as conservator for personal matters and co-conservator with attorney Andrew Wallet, for financial matters. The Court made a finding that Ms. Spears did not have the capacity to appoint her own attorney, so the Court appointed an attorney for her from a panel, to represent her at the hearing and throughout her conservatorship. The conservatorship was initially ordered on a temporary basis but was soon made permanent, subject to termination by the Court.[33] The effect of the order for conservatorship was that the conservators had decision making power over all Ms. Spears' financial and personal matters.[34]

B. *During the Conservatorship*

While subject to the conservatorship, Ms. Spears—apparently with her mental health much improved—started performing and recording again, thereby adding substantial income to her already significant wealth.[35] It was in 2018 that Ms. Spears began posting messages on her public Instagram account which raised concerns about the conservatorship arrangement and the #FreeBritney movement gained strength. In 2018 Ms. Spears' attorney advised that she oppose having her father as conservator; in response, both Mr. Spears and his co-conservator stepped down, leading to Jodi Montgomery, a professional "fiduciary," being named conservator.[36] The co-conservator had been receiving $426,000 annual salary in fees,[37] her attorney had been receiving $520,000 per year, and her father Mr. Spears $130,000 per year.[38]

In 2021, apparently emboldened by support from her fans, Ms. Spears began to pursue having the conservatorship terminated. It has been reported that although she had previously been almost silent on the issue in public, she had been trying to take legal action for several years, "citing mismanagement by her father and the extreme legal costs involved."[39] On June 23, 2021, she appeared

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[33] Farrow & Tolentino, *supra* note 27.

[34] Anna-Drake Stephens, *"Don't You Know That You're Toxic?": A Look at Conservatorships Through the #FreeBritney Movement*, 45 L. & PSYCH. REV. 223, 228 (2021).

[35] *See id.* at 228–29.

[36] *Id.* at 230.

[37] *Id.* at 229.

[38] *Id.* at 235; Farrow & Tolentino, *supra* note 27.

[39] Jem Aswad, *Read Britney Spears' Full Statement Against Conservatorship: 'I am Traumatized'*, VARIETY (June 23, 2021), https://variety.com/2021/music/ news/britney-spears-full-statement-conservatorship-1235003940/.

in open court, making a twenty-four-minute statement expressing her desire for the thirteen-year conservatorship to end.[40] She stated that she hadn't appeared in court for a long time because she didn't think that the court had previously listened to her.[41] She asserted she had been forced to go on tour in 2018 against her will, having been told that her management company would sue her if she refused, and that because of the conservatorship she couldn't seek her own advice about that contract. "So out of fear, [she] went ahead and . . . did the tour."[42] Following that, she wanted a break but was told by her father that timelines didn't permit one, so she went ahead choreographing and rehearsing four days a week and teaching other dancers in the show.[43] She claimed that her conservators had decided where she lived, worked and "received therapy," coerced her into taking medication, undertaking a costly drug rehabilitation program,[44] and had refused to allow her to see her friends, marry[45] or have her contraceptive device removed.[46] She said to the Judge in open court:

> Ma'am, I didn't know I could petition the conservatorship to end it. I'm sorry for my ignorance, but I honestly didn't know that.
>
> I'm not lying. I just want my life back. And it's been 13 years. And it's enough. It's been a long time since I've owned my money. And it's my wish and my dream for all of this to end without being tested . . . . it makes no sense . . . to . . . be told, I'm not good enough. But I'm great at what I do. And I allow these people to control what I do ma'am. And it's enough. It makes no sense at all.
>
> All I want is to own my own money, for this to end, and my boyfriend to drive me in his f*****g car.[47]

After hearing her testimony, the wealth-management firm that was a co-conservator of Ms. Spears' estate resigned, and she was soon allowed to engage her own attorney.[48] The Court finally made an order in September 2021 to end her conservatorship.[49]

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[40] *Id.*

[41] *Id.*

[42] *Id.*

[43] Aswad, *supra* note 39.

[44] *Id.*

[45] Kelly Wynne, *Jamie Lynn Spears, Paris Hilton Comment On #FreeBritney and Britney Spears Health*, NEWSWEEK (Apr. 23, 2019, 11:24 AM), https://www.newsweek.com/jamie-lynn-spears-paris-hilton-freebritney-britney-spears-health-1403576.

[46] Abigail Abrams, Britney Spears' Case Highlights Flaws in Conservatorship System, TIME, July 19, 2021, at 10; Robyn M. Powell, From Carrie Buck to Britney Spears: Strategies for Disrupting the Ongoing Reproductive Oppression of Disabled People [comments], 107 VA. L. REV. ONLINE 248, 248 (2021).

[47] Aswad, supra note 39.

[48] Abrams, supra note 46.

[49] Heather Swadley, How #FreeBritney Exposes the Need to Disable the Model Rules of Professional Conduct, 43 MITCHELL HAMLINE J. PUB. POL'Y & PRAC. 2 (2022).

III. SUBSTANTIVE LAW OF CONSERVATORSHIP AND GUARDIANSHIP

The summary of the substantive provisions of guardianship laws in California and the two Australian states is included in Appendix A. The following sections provide an overview, an explanation of the underpinning doctrine of the least restrictive alternative, and a comparison of the threshold tests for appointment of guardians and their decision-making powers once appointed. The descriptions and comparisons focus not just on the text of the legislation but also how it is applied in practice. The summary in Appendix A, and the descriptions below, show that the differences between the Californian jurisdiction and the Australian ones is not so much in the text of the laws but in how they are applied in practice.

The Probate Code provisions described are those that applied to Ms. Spears, although amendments were passed in 2021 and 2022 in response to the publicity over her plight.[50] The potential effect of these amendments is considered later in the article.[51]

A. *Overview*

1. California

In California there are two broad types of conservatorships available. One is granted under the Welfare and Institutions Code for an adult with a mental health condition, and the other is under the California Probate Code (Probate Code). While Ms. Spears was initially subject to orders under the Welfare and Institutions Code—two "5150 holds"[52]—she was never made subject to a conservatorship under that Act. Her conservatorship was granted under the Probate Code Division 4 (Parts 1 to 4), alternatively called the "Guardianship-Conservatorship Law." In California, Superior Courts may order: (1) a conservatorship of the estate to make decisions on financial matters, (2) a conservatorship of the person to make decisions on personal matters, or (3) a combined conservatorship of the person and estate.[53] Personal matters include accommodation, service, health care and social contact.

2. Australia

As in the United States, Australian guardianship law is in the domain of state legislatures, and the two jurisdictions chosen for comparison with California are Queensland and Victoria. They have been chosen because their guardianship legislation has been recently updated, making it more compliant with the CRPD and especially article 12. Queensland's *Guardianship and Administration Act 2000*, (Qld) (GAA Qld), was significantly amended in 2020 and in 2019 Victoria repealed its guardianship legislation and replaced it with

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[50] A.B. No. 1194, 2021–2022 Sess. (Cal. 2021); A.B. No. 1663, 2021–2022 Sess. (Cal. 2022), which became The Probate Conservatorship Reform and Supported Decision-Making Act of 2022.

[51] See infra Section V.B.

[52] Farrow & Tolentino, supra note 27.

[53] CAL. PROB. CODE § 1801 (2021).

the *Guardianship and Administration Act 2019* (Vic) (GAA Vic). Even before these legislative changes, Victoria also had some legislative recognition of supported decision-making.[54] As in California, in Queensland and Victoria an adult may have a decision-maker appointed for financial matters (an "administrator"), a guardian to make decisions on personal matters, or both.

B. *The Least Restrictive Alternative*

The doctrine of the "least restrictive alternative" originally developed in U.S. constitutional law to prescribe that the state could only intervene into personal lives in a way that was least restrictive of their civil rights, and to achieve a legitimate purpose.[55] This was later applied to mental health and guardianship law to drive de-institutionalization in the United States and Australia in the 1980s and 1990s, so that community treatment and care is considered less restrictive and a preferable alternative to inpatient or institutional care.[56]

A "least restrictive" approach to guardianship, demands that the outcome of decisions be the least restrictive available, so that community living is preferable to institutional living. However, the least restrictive mandate also applies to the right to legal capacity and the decision-making process itself, demanding the application of three strategies.[57] First, it requires that a guardian only be appointed as "a means of last resort," i.e. after all other options less restrictive of legal capacity have been investigated.[58] Supported decision-making is widely recognised by the CRPD Committee and others as a less restrictive option than guardianship, as are decision-making under advance directives or power of attorney. Advance directives and powers of attorney recognise a person's autonomy to the extent that they allow for them to choose in advance what decision will be made, or who will make it, at a later time when they have impaired capacity. The second strategy is to tailor a guardianship order so that it only gives authority for decision-making in specific areas of a person's life where they require protection or assistance.[59] For example, an order may be limited to making decisions only on healthcare, accommodation, or finances, and may also be limited in duration. This contrasts with a "plenary" order which empowers a guardian to make decisions in all areas of a person's life. A third strategy is for a guardian once appointed to make decisions consistent with the

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[54] Powers of Attorney Act 2014 (Vic) s 7 (allowing for the appointment by an adult of a "supportive attorney").

[55] Shelton v. Tucker, 364 U.S. 479 (1960); *see* Andreasian et al., *supra* note 7, at 302.

[56] Julia Duffy et. al., *What Does 'Least Restrictive or 'Less Restrictive' Mean in Mental Health Law? Contradictions and Confusion in the Case of Queensland, Australia*, 49 AM. J.L. & MED. (forthcoming 2023).

[57] Audrey S. Garfield, *Elder Abuse and the States' Adult Protective Servcies Response: Time for a Change in California*, 42 HASTINGS L.J. 859, 910 (1991) ("The premise of the doctrine of the least restrictive alternative is that any substitute decision making should intrude on individual autonomy only to the extent necessary … and should place the least possible restrictions on individual liberties and civil rights."); *see* Andreasian et al., *supra* note 7, at 302.

[58] Rebekah Diller, *Legal Capacitiy for All: Including Older Persons in the Shift from Adult Guardianship to Supported Decision-Making*, 43 FORDHAM URB. L.J. 495, 507 (2016).

[59] *Id.* at 506; Andreasian et al., *supra* note 7, at 309–10.

adult's will and preferences, according to the substitute judgement principle (see *supra* at Part I), rather than imposing their own perceptions of the adult's best interests.

1. California

The Probate Code affirms the importance of "least restrictive" accommodation alternatives[60] so that an adult can preferably live in a community setting of their choice, rather than in an institution.[61] It further states that:

> A conservatorship of the person or of the estate shall not be granted by the court unless the court makes an express finding that the granting of the conservatorship is the least restrictive alternative needed for the protection of the conservatee.[62]

Allowing for the least restrictive approach to guardianship, the legislation first permits the court to decide that a conservatorship is not "appropriate" including wherein the court may cite the availability of support for decision-making as its rationale (albeit supported decision-making is not expressly referenced).[63] Second, it provides that the court must determine the "extent" of powers granted, which (as explained further *infra*) allows for powers to be limited to certain domains, e.g. finance, accommodation, or health.[64] Third, while the Probate Code is notable for its multiple references to best interests decision-making, it does allow for and even urge a substitute judgement approach in some circumstances.[65] Fourth, the Probate Code allows for the ordering of a "limited conservatorship" but this is only available for a conservatee with "developmental disabilities,"[66] and thus not available to Ms. Spears. Limited conservatorships in California are designed to "promote and protect the well-being of the individual . . . to encourage the development of

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[60] CAL. PROB. CODE § 1800 (2021) ("(d) Provide that community-based services are used to the greatest extent to allow the conservatee to remain as independent and in the least restrictive setting as possible"); *id.* § 1851.1 (explaining that a court investigator must make a finding as to whether continuing the conservatorship is the "least restrictive alternative….").

[61] *See id.* § 1800(d).

[62] *Id.* § 1800.3(b).

[63] *Id.* § 1800(b).

[64] CAL. PROB. CODE § 1800(b).

[65] *E.g.*, *id.* § 1800 ("Provide that the periodic review of the conservatorship by the court investigator shall consider the best interests of the conservatee . . ."); *id.* § 1810 ("The court shall appoint the nominee as conservator unless the court finds that the appointment of the nominee is not in the best interests of the proposed conservatee."); *id.* § 1812(a) ("the selection of a conservator . . . is solely in the discretion of the court and . . . the court is to be guided by what appears to be for the best interests of the proposed conservatee."); *id.* § 1852 ("removal of the existing conservator is in the best interest of the conservatee . . . .").

[66] CAL. PROB. CODE § 1801(d); *id.* § 1420 ("'Developmental disability' means a disability that originates before an individual attains 18 years of age" and is "expected to continue, indefinitely, and constitutes a substantial handicap for the individual." This "includes intellectual disability, cerebral palsy, epilepsy, and autism . . . but does not include other handicapping conditions that are solely physical in nature.").

maximum self-reliance and independence" and does not necessarily result in legal incompetence.[67] However, the commentary suggests that these limited conservatorships are rarely utilised.[68]

2. Australia

The GAA Qld and GAA Vic both include the "least restrictive" alternative as an over-arching principle.[69] Queensland and Victoria also now have overriding human rights legislation—the *Human Rights Act 2019* (Qld) and the *Charter of Human Rights and Responsibilities Act 2006* (Vic)—that restate most of the commonly promoted civil rights, including the right to equality before the law, the right to freedom of movement, and the right to liberty and security of the person. This human rights legislation also obliges courts, tribunals and other government decision-makers (not private guardians) to make decisions that are "less restrictive" of the human rights enumerated.[70]

In Queensland and Victoria as in California, less restrictive alternatives than guardianship would include relying on supported decision-making or "enduring powers" of attorney for finances and healthcare[71] (the equivalent of "living wills" or "health care proxies" and "durable" powers of attorney in the United States). Powers of attorney are considered by the CRPD Committee and others as less restrictive of the right to legal capacity because the adult appoints the decision-maker of their choice, unlike in a guardianship process where the tribunal (or court) has ultimate say.[72] An additional less restrictive option for

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[67] *Id.* § 1801(d).

[68] Sydney J. Sell, *A Potential Civil Death: Guardianship of Persons with Disabilities in Utah*, 2019 UTAH L. REV. 215, 223. *See also* Deja Kemp-Salliey, The Effect of the #FreeBritney Movement on Bipartisanship Legislation: How a Pop Star's Battle for Freedom Exposed Corruption in the American Conservatorship System, at 30 (May 2022) (Honors Thesis, Pace University) (explaining how limited conservatorships "are often overlooked in favour of full conservatorships."); Dayton, *supra* note 12, at 240 ("[T]he vast majority of guardianships and conservatorships in the U.S. are actually plenary in nature . . . ."). *But see* Bushko, *supra* note 10, at 164 (noting one instance where a limited conservatorship was granted in California); Barbara Alison Imle, "The Call is Coming from Inside the House:" Tracing Experiences in the Institutionally-Centered Process of Establishing Limited Conservatorships in California (Jan. 20, 2023) (Ph.D. dissertation, Portland State University).

[69] *Guardianship and Administration Act 2000* (Qld) ch 2 s 5(d) ("[T]he right of an adult with impaired capacity to make decisions should be restricted, and interfered with, to the least possible extent."); *Guardianship and Administration Act 2019* (Vic) pt 1 s 8(1)(c) ("[P]owers, functions and duties under this Act should be exercised, carried out and performed in a way which is the least restrictive of the ability of a person with a disability to decide and act as is possible in the circumstances.").

[70] *Human Rights Act 2019* (Qld) s 13(2); *Charter of Human Rights and Responsibilities Act 2006* (Vic) s 7(2).

[71] For enduring powers of attorney, *see Powers of Attorney Act 1998* (Qld) ch 3 pt 2 s 32; *Powers of Attorney Act 2014* (Vic) pt 3.

[72] Sascha Callaghan & Christopher James Ryan, *An Evolving Revolution: Evaluating Australia's compliance with the Convention on the Rights of Persons with Disabilities" in Mental Health Law*, 39 UNSW L.J. 596, 617 (2016) ("Allowing patients control over who their proxy decision-maker is, and the conditions under which decisions can be made by that person (through the terms of a grant of power of attorney, for example), is an important development in mental health law and a more concrete step towards the supported decision-making model envisaged in the CRPD."); *see* Andrew

health care decision-making is reliance on a system of default decision-makers who can make health care decisions without any need for an appointment, on an as needed, short term basis. The legislation in each state establishes a default list of decision-makers in order of hierarchy and availability, with a spouse listed first, followed by an unpaid carer, then by others in roles of lessening degrees of familiarity.[73]

Notably, unlike the Probate Code, the GAA Qld and GAA Vic eschew any references to "best interests" in favour of statements affirming the importance of human rights, respecting an adult's will and preferences,[74] and supporting them to make decisions.[75] It is described below how in the GAA Qld and GAA Vic the imperative to apply the least restrictive approach is more integrally and iteratively threaded throughout the legislation than in the Probate Code.

C. *Appointing a Conservator or Guardian*

Threshold tests for appointment of a conservator in California cast a potentially much wider net than those applying to guardianship in the Australian states. And yet even when the Probate Code does allow and sometimes even mandates the court to apply the test as narrowly as possible (i.e. the least restrictive alternative), Ms. Spears' case and wider commentary reveals that in practice courts fail to follow that mandate.

1. The Different Threshold Tests

a. California

Under the Probate Code, a conservator can be appointed for an adult

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Peterson et al., *Supported Decision Making With People at the Margins of Autonomy*, 21 AM. J. BIOETHICS 4, 6 (2020) ("Legal mechanisms such as durable powers of attorney, health care proxies or other modalities can provide targeted assistance for adults affected by dynamic impairments and may "avoid the stigma and indignity" of guardianship."); *see also Practical Tool for Lawyers: Steps in Supporting Decision-Making*, AM. BAR ASS'N 1 (2016) (showing state statutes prioritize less restrictive legal options: for financial decisions, appropriate use of joint accounts and durable powers of attorney, and for personal and health decisions, advance directives, living will, and use of state default consent laws).

[73] *Powers of Attorney Act 1998* (Qld) s 62; *Medical Treatment Planning and Decisions Act 2016* (Vic) s 55.

[74] *Guardianship and Administration Act 2000* (Qld) ch 2A, ss 11B(8) and (10); *id.* ch 6, s 81(2) (referring to "views, wishes and preferences" in the "General Principles"); *Guardianship and Administration Act 2019* (Vic) s 8, 9, 31 (referring to "will and preferences" in the "General principles," "Decision-making principles," and "Factors to consider in determining the need for guardian or administrator").

[75] *Guardianship and Administration Act 2000* (Qld) s 5 ("This Act acknowledges . . . (a) an adult's right to make decisions is fundamental to the adult's inherent dignity; (b) the right to make decisions includes the right to make decisions with which others may not agree; . . . (d) the right of an adult with impaired capacity to make decisions should be restricted, and interfered with, to the least possible extent; (e) an adult with impaired capacity has a right to adequate and appropriate support for decision-making."); *Guardianship and Administration Act 2019* (Vic) s 7 ("The primary object of this Act is to protect and promote the human rights and dignity of persons with a disability by . . . having regard to the Convention on the Rights of Persons with Disabilities, [recognizing] the need to support persons with a disability to make, participate in and implement decisions that affect their lives.").

whether or not they have a disability or impairment and whether or not they have mental capacity.[76] For a conservatorship of the person, a conservator may be appointed merely because an adult is unable to provide properly for his or her personal needs for physical health, food, clothing, or shelter.[77] It is only if decision-making power over healthcare is sought that a threshold of mental incapacity applies, thus narrowing the potential net.[78]

The test for appointment of a conservator of the estate is also very wide, so that a conservator may be appointed where the adult is "substantially unable to manage his or her own financial resources or resist fraud or undue influence."[79] The alternative test of "fraud or undue influence" requires considering the general "vulnerability of the victim," whether that vulnerability is caused by "disability" or "impaired cognitive function," or other factors including "isolation," "dependency," and "emotional distress."[80] The breadth of this test is evident in extending the threshold criteria beyond what may be considered atypical cognitive functioning by including a list of factors that indicate broad socio-economic disadvantage or emotional vulnerability. As with a conservator of the person, there is no test of mental incapacity required for appointing a conservator of the estate.[81]

All in all, the threshold tests for imposing a conservatorship in California are extremely wide, potentially catching people without any impaired decision-making capability, but who find themselves situationally disadvantaged or vulnerable. The notable exception is that authority for health care decision-making can only be conferred on a conservator when the adult is found not to have mental capacity. The mental capacity test is a functional one, not dissimilar to those in the GAA Qld and GAA Vic.[82]

b. Australia

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[76] Lawrence Friedman & Mark Savage, *Taking Care: The Law of Conservatorship in California*, 61 S. CAL. L. REV. 273, 284 (1988); Wright, *supra* note 8, at 968 (pointing out that the breadth of the test means that a conservatorship may be imposed when a person lacks "mental *or physical* ability to manage their own affairs") (emphasis added).

[77] CAL. PROB. CODE § 1801(a) (1995); A Frank Johns, *Ten Years After: Where is the Constitutional Crisis with Procedural Safeguards and Due Process in Guardianship Adjudication*, 7 ELDER L.J. 33, 71 (1999) ("No finding of mental disorder is required for this type of conservatorship.").

[78] CAL. PROB. CODE § 1890(c) (1995).

[79] *Id.* § 1801(b).

[80] *Id.* § 86 ("'Undue influence'" has the same meaning as defined in Section 15610.70 of the Welfare and Institutions Code.").

[81] COLEMAN, *supra* note 2, at 70 (noting that the right of an individual to manage financial affairs can be removed without the court having the benefit of a professional capacity assessment that focuses on the criteria mentioned above, often done without any evidentiary hearing whatsoever).

[82] CAL. PROB. CODE § 1881(a) ("A conservatee shall be deemed unable to respond knowingly and intelligently to queries about medical treatment or is unable to participate in a treatment decision by means of a rational thought process."); *id.* § 1881(b)(1)(A)-(D) (noting these two alternative limbs of the test are further defined, so that a conservatee is "unable to respond knowingly and intelligently" if they fail to understand broadly "the nature and serious of any illness, . . . the nature of any medical treatment," the "benefits and risks" of treatment, and the "nature, risks and benefits" of alternatives); *see also id.* § 813 (1995).

In Queensland and Victoria, the first limb of the threshold test for guardianship is always a test of mental incapacity, but there is a second limb that requires there must also be a need for a decision to be made. The precise words differ between the GAA Qld and GAA Vic, but in broad terms they provide that to have capacity an adult must be able to: understand the information relevant to the decision, use and weigh that information to make a decision, and be able to communicate the decision in some way.[83] Notably, the capacity tests are matter-specific: an adult may have the capacity to make decisions on personal matters relating to daily living but not on accommodation or health care, for example.[84] The GAA Qld does cast a potentially wider net than the GAA Vic by adding that to have capacity an adult must also be able to make decisions "freely and voluntarily." In some ways this echoes the wider test for conservatorship of the estate in California.

The second limb of the appointment test under the GAA Qld and GAA Vic requires that, in addition to incapacity, there must be an identified need for a relevant decision or decisions. In Queensland, it must also be likely that the adult themselves would make a decision involving unreasonable risk to their "health, welfare or property," and that the lack of appointment would mean their needs would not be "adequately" met or their "interests . . . not . . . adequately protected."[85] Under the GAA Vic, a guardian or administrator can only be appointed for an adult who has a "disability," defined as a "neurological impairment, intellectual impairment, mental disorder, brain injury, physical disability or dementia."[86] As in Queensland, the adult must also be "[i]n need of a guardian or administrator,"[87] which requires considering the adult's own preferences and also whether it would be more appropriate to have decisions made informally.[88]

In short, the threshold tests for appointment in Queensland and Victoria are narrower than those in California, incorporating a threshold of capacity with a further test of the need for a decision to be made.

2. Appointments in Practice

a. California

For Britney Spears, the application for conservatorship relied on evidence of her mental health collapse, together with concerns that her new manager was exerting undue influence over her financial affairs to her detriment. The

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[83] *Guardianship and Administration Act 2019* (Vic) s 5(1).

[84] *Guardianship and Administration Act 2000* (Qld) sch 4 (defining capacity); *Guardianship and Administration Act 2019* (Vic) s 5(4)(a–b) (providing in the meaning of "*decision-making capacity*" that "[i]f a person does not have decision-making capacity in relation to a mater, it may be temporary").

[85] *Guardianship and Administration Act 2000* (Qld) s 12.

[86] *Id.* s 3(1).

[87] *Id.* ss 30(2)(b), 31.

[88] *Id.* s 31(a–b).

separate application for health care decision-making authority was applied for and granted at the same time as the conservatorship application, so that a medical practitioner had attested to her lack of mental capacity.[89] Many have queried whether she could reasonably have satisfied the test for a conservatorship of the person, i.e. that she was unable to provide properly for her personal needs for physical health, food, clothing or shelter considering the extent of her personal material resources; and yet what is called a "plenary" conservatorship was granted for full decision-making over personal and financial matters.

For Ms. Spears, a less restrictive order could have been limited to only certain areas of her life and could have excluded (or alternatively been limited to) an application for decision-making over health care. A conservatorship of the estate could have excluded certain types of transactions,[90] or it could have been granted without a conservatorship of the person or vice versa.[91] However, the commentary suggests that Ms. Spears' case reflects wider practices in which a court will make a plenary order, as in most cases in California and at least historically in other U.S. states.[92]

b. Australia

Unlike in California, guardianship tribunals in Queensland and Victoria publish on their websites a select number of their reasons for decision;[93] these reveal how the least restrictive principle is applied in practice. Examples of tribunals refusing appointments on the basis that less restrictive options are

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[89] Lawrence M. Friedman & June O. Starr, *Losing it in California: Conservatorship and the Social Organization of Aging*, 73 WASH. U.L.Q. 1501, 1508 (1995) (finding that 77% of conservators of the person in California were granted medical decision-making rights); *see also* Alexus Anderson, *Guardianship: A Violation of the Americans with Disabilities Act and What We Can Do About It.*, 13 U. ST. THOMAS J.L. & PUB. POL'Y 117, 125 (2019) ("Judges . . . simplify the idea of capacity and it becomes routine to deem someone incapacitated.").

[90] CAL. PROB. CODE § 1873(a) (2001) ("In the order appointing the conservator or upon a petition … the court may, by order, authorize the conservatee. . . to enter into transactions or types of transactions as may be appropriate. . . . The court, by order, may modify the legal capacity a conservatee would otherwise have. . . by broadening or restricting the power of the conservatee to enter into transactions or types of transactions as may be appropriate.").

[91] *Id.* § 1800.3(a)(1).

[92] Dayton, *supra* note 12, at 240; Lucy Beadnell & Jonathan Martinis, *Rethinking Guardianship and Substitute Decision-Making: Supported Decision-Making and the Reform of Virgina Law, Policy and Practice to Protect Rights and Ensure Choice*, 39 DEV. MENTAL HEALTH L. 1, 4 (2020) ("Studies suggest that many, if not most, guardianships are overbroad or under. For example, even though 60% of state guardianship laws require courts to impose the least restrictive form of guardianship, *full* or *plenary* guardianship (where the guardian is given the authority to make *all* decisions for the person) is ordered in the vast majority of cases."); Eleanor C. Lanier, *Understanding the Gap between Law and Practice: Barriers and Alternatives to Tailoring Adult Guardianship Orders*, 36 BUFF. PUB. INT. L.J. 155, 156 (2019) ("the best available data indicates that most guardianship orders are plenary, removing rights on a wholesale basis rather than individually tailoring guardianship. To many observers, the imposition of plenary guardianship contracts the unambiguous language in most states favoring a tailored approach").

[93] SUPREME COURT LIBRARY QUEENSLAND, https://www.sclqld.org.au/collections/caselaw (last visited Dec. 13, 2023); VICTORIAN CIVIL & ADMINISTRATIVE TRIBUNAL, https://www.vcat.vic.gov.au/the-vcat-process/decisions (last visited Dec. 13, 2023).

available can be found in *LWW (Guardianship)* ("LWW")[94] and *ZFN (Guardianship)* ("ZFN").[95] In LWW the tribunal declined to make a guardianship appointment for health care and other personal matters because a valid power of attorney covering those matters was already in place. In ZFN the appointment of a guardian for personal matters for social contact decisions was revoked because ZFN's doctor had agreed to her request to act as a mediator between family members on contact issues.[96] Because that informal arrangement was in place to support ZFN in her decision-making, the guardianship appointment was revoked. That the approach in these two cases has some wider application is confirmed by commentators,[97] including Blake et al, who reviewed tribunal decisions made under the GAA Vic for adults with dementia and found that in many cases formal appointment of a guardian was only made when informal support was inadequate or dysfunctional.[98]

There are also ready examples of tribunals in Queensland and Victoria applying the capacity test separately to the discrete domains of an adult's life, thus adhering to the least restrictive approach. For example, in *AAB* there had been a guardian appointed for two years for all personal matters, but on review the tribunal decided not to continue the plenary appointment on the basis that AAB had capacity to make decisions relating to her education and on some minor matters.[99] The personal appointment was therefore limited to the specific domains of: service provision, accommodation, legal matters, social contact (in the context of domestic violence threats) and healthcare. Applying the second limb of the threshold test, the tribunal also found that personal decisions in all of these domains would be required in the very near future on AAB's expected discharge from hospital.

LPF (Guardianship) provides an example of where a finding of impaired capacity was made, but the tribunal applied the second limb of the test to refuse a guardianship appointment.[100] The tribunal found that although there was evidence that LPF lacked capacity, there was no immediate need for any

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[94] LWW (Guardianship) [2022] VCAT 221, paras 36–40.

[95] ZFN (Guardianship) [2022] VCAT 262, paras 33–35.

[96] Meredith Blake et al., *Supported Decision-Making for People Living with Dementia: An Examination of Four Australian Guardianship Laws*, 28 J.L. & MED. 389, 414 (2021) (reviewing twelve tribunal decisions made under the *Guardianship and Administration Act 2019* (Vic) for adults with dementia, and finding no supportive guardianship orders were made. Reasons why not included: no available supporter; evidence of progressive cognitive impairment; and adult didn't have capacity to agree to appointment).

[97] Terry Carney, *Australian Guardianship Tribunals: An Adequate Response to CRPD Disability Rights Recognition and Protection of the Vulnerable over the Lifecourse?*, 10 J. ETHICS MENTAL HEALTH 1, 2 (2017) ("Principles of intervention as a last resort and in the least restrictive manner are legislated and [honored] in practice.").

[98] Blake et al., *supra* note 95, at 415–16 ("conflict between family members was the most common reason for concluding that there was a 'need' to make a guardianship order," citing VIJ (Guardianship) [2020] VCAT 760, para 65); NPD (Guardianship) [2020] VCAT 723, para 62.

[99] AAB [2019] QCAT 245, paras 42–44.

[100] LPF (Guardianship) [2022] VCAT 294, paras 15–17.

personal decisions to be made for him by a guardian.[101] His mother had already been able to arrange the services he needed upon discharge from the hospital, so no further decisions on personal matters were necessary; and she was further appointed only as administrator for financial matters.[102] Other examples show that despite findings of impaired capacity which may have applied more globally, tribunals have limited appointments to domains where decisions are required. In *NHF* the tribunal appointed a guardian limited to accommodation and health care decision-making, and an administrator for financial matters, in a situation where NHF would soon need to make decisions on changing residential aged care providers.[103] Also, in *PCP (Guardianship)* the tribunal declined to make a guardianship order on the basis that there were no personal decisions required to be made, and it therefore appointed administrators only.[104] While the GAA Qld potentially widens the appointment test by including in the definition of capacity that a person has to be able to "freely and voluntarily" make decisions, this criterion appears to be relied upon rarely in Queensland. The tribunal has used it in one rare case example where an adult with suspected cognitive impairment was being wilfully and unduly prevented from having their capacity assessed.[105] The published decisions demonstrate a marked diligence by the tribunals in applying a least restrictive approach.

The examples above suggest that if Ms. Spears had lived in Queensland or Victoria her situation would have been much less likely to have met the threshold tests for appointment of a guardian or administrator, and if it had, the appointments would not have been plenary. Capacity tests would have applied instead of the broader Probate Court tests based on need and disadvantage. In addition, the tribunals would have had to find that there was a need for decisions to be made. Given that Ms. Spears already had accommodations, it would have been likely if she had lived in Queensland or Victoria that the appointment would have been tailored accordingly. Further, if decisions were required only for health care, the tribunals could have declined a guardian appointment on the basis that Ms. Spears' default statutory decision-maker could make decisions while she had impaired capacity. There are several published decisions where tribunals have declined to make guardianship appointments on that basis, relying on the default decision-maker as a less restrictive option.[106]

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[101] *Id.*

[102] *See also* WAI (Guardianship) [2020] VCAT 379 (applying the now repealed *Guardianship and Administration Act 1986* (Vic), the tribunal concluded that while the adult didn't have capacity, there was no need for a guardian because he had adequate accommodation, and good access to services and healthcare).

[103] NHF [2021] QCAT 412.

[104] PCP (Guardianship) [2022] VCAT 364.

[105] *See* SZ [2010] QCAT 64.

[106] *See, e.g.*, REX (Guardianship) [2022] VCAT 396 (depicting where the tribunal declined to appoint a guardian because the adult's daughter had power to make health care decisions as a default decision-maker under the *Medical Treatment Planning and Decisions Act 2016* (Vic) s 55); *see also* KH [2014] QCAT 585 (involving relatives that had been making health care decisions as statutory health attorneys and the tribunal endorsed continuing that approach instead of appointing a guardian).

Significantly though, in the unlikely case that a guardian and administrator with plenary powers had been appointed for Ms. Spears in either of the Australian states, I argue that there are still further substantive and procedural protections that would have limited both the extent of the powers exercised and the length of the appointments.

D. *Conservator and Guardian – Duties and Powers*

1. The Legislation

a. California

In California, not only is the scope of appointment in most cases plenary, but the powers of the conservator are extremely wide and potentially intrusive. The Probate Code provides that for a conservatorship of the person, the conservator "has the care, custody, and control of, and has charge of the education of, the . . . conservatee," and that it can even impose express restrictions on "personal rights . . . including . . . the right to receive visitors, telephone calls, and personal mail."[107] The granting of full health care and medical decision-making powers to a conservator means that they also have "exclusive authority to make health care decisions for the conservatee that the conservator in good faith based on medical advice determines to be necessary."[108]

The Probate Code expressly requires a least restrictive approach to decision-making on health care matters, stating that:

> The conservator shall make health care decisions for the conservatee in accordance with the conservatee's individual health care instructions, if any, and other wishes to the extent known to the conservator. Otherwise, the conservator shall make the decision in accordance with the conservator's determination of the conservatee's best interest. In determining the conservatee's best interest, the conservator shall consider the conservatee's personal values to the extent known to the conservator [emphasis added].[109]

The above section provides as the default position that the conservator must make health care decisions that accord with the adult's own will and preferences, thus applying the less restrictive substituted judgment principle.[110] Only when their will and preferences cannot be discerned should the "best interests"

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[107] CAL. PROB. CODE § 2351 (2015).

[108] *Id.* at § 2355; *see also id.* at § 2356.5 (providing that a person with a "major neurocognitive disorder" including dementia, as defined in the "Diagnostic and Statistical Manual of Mental Disorders, . . . should have a conservatorship to serve his or her unique special needs," and that in such cases the court may expressly authorize a conservator to administer psychotropic medications); Farrow & Tolentino, *supra* note 27 (describing how a psychiatrist's report presented in court alleged that Ms. Spears had "dementia.").

[109] CAL. PROB. CODE § 2355(a) (1999).

[110] For a discussion of substituted judgment as preferred practice because of its respect for autonomy, see Dayton, *supra* note 18, at 1362.

principle be applied. Moreover, the "best interests" principle under the Probate Code requires that the conservator consider the adult's own values, thereby respecting their autonomy.

For a conservator of the estate to be appointed, as explained above, a finding of incapacity is not required; however, once appointed, the Probate Code determines incapacity so that (with limited exceptions) the conservatee cannot "enter into or make any transaction that binds or obligates the conservatorship estate."[111] The overarching duty of the conservator of the estate is a fiduciary one, governed by the law of trusts,[112] meaning that the conservator must act in good faith, "use ordinary care and diligence,"[113] and must use the estate income to support the conservatee.[114] This means that although a conservator must "accommodate the desires of the conservatee," this obligation is only "to the extent that doing so would [not] violate the conservator's fiduciary duties . . . or impose an unreasonable expense on the conservatorship estate."[115] Once again, the least restrictive mandate, in this case that the conservator must "accommodate the desires of the conservatee," is in practice subordinate to and overridden by the exception, such that the conservatee's preferences do not have to be followed if they lead to "unreasonable expense."[116]

b. Australia

In Victoria and Queensland, the same broad powers and duties apply to guardians as administrators, with some particular requirements for health care decision-making. Legislation provides that supported decision-making should take place within the guardian relationship and that the principle of substituted judgment should prevail. The GAA Qld prescribes a system of "structured decision-making" whereby a guardian must as a first step "preserve, to the greatest extent practicable, the adult's right to make the adult's own decision; and . . . if possible, support the adult to make a decision."[117] Second, a guardian has to "take into account any views, wishes and preferences expressed or demonstrated" by the person; and third, if the person's views can't be ascertained, then the guardian has to make a decision using the "substituted judgment" principle.[118] In Queensland there are also special "healthcare

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[111] CAL. PROB. CODE § 1872 (1990); regarding exceptions, *see id.* § 1873 (2002) (stating that the court can authorize the conservatee to enter into limited types of transactions); *id.* § 2430–2431 (2002) (stating that the conservatee retains the right to control an allowance, wages or salary, and to enter into transactions for the "necessaries of life"); *id.* § 2421 (1990) (stating that the conservator can, with court authorization, pay to the conservatee a "reasonable allowance for the personal use of the . . . conservatee").

[112] *Id.* at § 2101; *see id.* § 16000–16106 for trustees' duties.

[113] CAL. PROB. CODE § 2401 (2022); MYRON KOVE et al., BOGERT'S THE LAW OF TRUSTS AND TRUSTEES § 541 (2021); CAL. R. CT. 7.1059 (2023).

[114] CAL. PROB. CODE § 2420 (2012).

[115] *Id.* at § 2113.

[116] *Id.*

[117] *Guardianship and Administration Act 2000* (Qld) s 11B(3)(10).

[118] *Id.*

principles" which although too extensive to reproduce here in full, include that: "any consent to, or refusal of, health care for an adult must take into account . . . individual autonomy (including the freedom to make one's own choices) and independence of persons."[119]

The GAA Vic similarly provides that when a guardian is making a decision for an adult, "the will and preferences of a person with a disability should direct, as far as practicable" the decision.[120] As under the GAA Qld, if the guardian cannot determine will and preferences, then they are to make a decision "as far as practicable" that reflects what the adult's will and preferences "are likely to be" in the circumstances.[121] Where a person's "likely" will and preferences cannot be determined, then the guardian must act in a manner "which promotes the represented person's personal and social wellbeing,"[122] and should only override their preferences "if it is necessary to do so to prevent serious harm to the represented person."[123]

2. Exercising Powers in Practice

a. California

The Probate Code's language of "custody and control" is old fashioned and paternalistic, reflecting what Dayton refers to as the "child-welfare based model of protection from which guardianship derives."[124] Dayton further comments that such a model "accords too much authority to guardians and conservators who lack a complete understanding of their roles and limitations."[125] This archaic language could help explain why Ms. Spears' conservators mistakenly thought they could deny her permission to marry, despite an express statement in the Probate Code precluding that power.[126] We are told that her conservators

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[119] *Id.* s 11C(3)(a); *id.* s 63A(3); *id.* s 67 (asserting a guardian can only make a healthcare decision against an adult's objection, for minor and uncontroversial health care, where it causes "'no distress" or "temporary distress that is outweighed by the benefit to the adult of the proposed health care.").

[120] *Guardianship and Administration Act 2019* (Vic) s 8(1)(b).

[121] *Id.* s 9(1)(b).

[122] *Id.* s 4 ("[T]he personal and social wellbeing of a person is promoted by—(a) [recognizing] the inherent dignity of the person; and (b) respecting the person's individuality; and (c) having regard to the person's existing supportive relationships, religion, values and cultural and linguistic environment; and (d) respecting the confidentiality of confidential information relating to the person; and (e) [recognizing] the importance to the person of any companion animal the person has and having regard to the benefits that may be obtained from the person having any companion animal.") (emphasis omitted); *see also Medical Treatment Planning and Decisions Act 2016* (Vic) s 61.

[123] *Guardianship and Administration Act 2000* (Qld) s 9(1)(e).

[124] Dayton, *supra* note 11, at 243.

[125] Dayton, *supra* note 11, at 243 ("Too often, the child-welfare based model of protection from which guardianship law derives accords too much authority to guardians and conservators who lack a complete understanding of their roles and limitations.").

[126] CAL. PROB. CODE § 1900 (2005) ("[T]he appointment of a conservator of the person or estate or both does not affect the capacity of the conservatee to marry or to enter into a registered domestic partnership."); *see also* Ashley E. Rathbun, *Marrying into Financial Abuse: A Solution to Protect the Elderly in California*, 47 SAN DIEGO L. REV. 244 (2010) (explaining the common law test on capacity to marry).

also exercised total control over her social life and at one stage confiscated her phone.[127] This is consistent with general commentary explaining how "[a] conservator of [a] person can. . . discourage interactions with individuals who promote self-destructive behaviour" and that conservators gain "sweeping power over. . . the smallest details of [the conservatees'] lives."[128]

According to Ms. Spears, her conservators exercised a significant amount of authority over her medical treatment, including her reproductive health care, and denied her reproductive rights by overriding her desire to have her contraceptive device removed.[129] The Probate Code provides that a conservator can only make health care decisions that he or she "in good faith based on medical advice determines to be necessary,"[130] making it relatively clear that, on the information available, decisions on contraceptive use were also beyond her conservators' authority. Further, while a conservator of the estate is also supposed to follow the adult's wishes on expenditure, it is notable that the Probate Code allows the conservator's view of the adult's best interests to override these. It would appear that Ms. Spears' conservators relied on the best interests exception to justify deciding for her that she keep rehearsing and performing, contrary to her will and preference, for the purpose of increasing the value of her estate. While the CRPD Committee and some others have prescribed abolition of guardianship, there has been even more widespread opposition to best interests decision-making.[131] Ms. Spears' case illustrates one reason why the best interests test has been subject to such wide-ranging and virulent criticism. It was and has been more widely used as a "trump card" to undermine and override the least restrictive principle.[132] Ms. Spears' conservators appear

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[127] *See* Farrow & Tolentino, *supra* note 27.

[128] Wright, *supra* note 8, at 968, 973 (quoting Robin Fields et al., *When a Family Matter Turns into a Business*, L.A. TIMES (Nov. 13, 2005), https://www.latimes.com/archives/la-xpm-2005-nov-13-me-conserve13-story.html).

[129] Commentators have pointed out that this is particularly troubling given recent abhorrent policies of eugenics against people with disabilities. *See* Robyn M. Powell, *From Carrie Buck to Britney Spears: Strategies for Disrupting the Ongoing Reproductive Oppression of Disabled People [comments]*, 107 VA. L. REV. ONLINE 248, 248 (2021). *See also* Courtney Lamb, *Reproductive Autonomy: How Chapter 135 Strengthens Invisible Shackles on People's Right to Choose*, 53 U. PAC. L. REV. 288, 288 (2021) (recognizing how "reproductive coercion" is an oppressive strategy used by domestic violence perpetrators).

[130] CAL. PROB. CODE § 2355(a) (2000).

[131] Dute, *supra* note 4, at 317–18.

[132] *General Comment No.1* is particularly critical of "best interests" decision-making. Piers Gooding, *Navigating the "Flashing Amber Lights" of the Right to Legal Capacity in the United Nations Convention on the Rights of Persons with Disabilities: Responding to Major Concerns,* 15 HUM. RTS. L. REV. 50 (2015); CAL. PROB. CODE § 4615 (2022) ("'[H]ealth care' means any care, treatment, service, or procedure to maintain, diagnose or otherwise affect a patient's physical or mental condition."); *id.* § 4617 ("'Health care decision' means a decision made by a patient or . . . conservator . . . regarding the patient's health care, including the following: (a) Selection and discharge of health care providers and institutions. (b) Approval or disapproval of diagnostic tests, surgical procedures, and programs of medication. (c) Directions to provide, withhold, or withdraw artificial nutrition and hydration and all other forms of health care, including cardiopulmonary resuscitation."); *id.* § 2355 (2000) ("trumping" is given some legislative authority when the Probate Code provides that "[t]he conservator may require the conservatee to receive the health care, whether or not the conservatee object.").

to have directly breached the legislation in some respects, but in other ways have arguably operated just within its parameters by relying on the best interests principle to effectively ignore their obligations in order to utilize a least restrictive approach.

b. Australia

As described above, the GAA Qld and GAA Vic more expressly and directly require that guardians' decisions adhere to an adult's will and preferences, subject to limited exceptions. The GAA Qld could also have provided particular protection to Ms. Spears by prohibiting decisions on anything but minor and uncontroversial health care.[133] However, overall, there is little research on or transparency around how guardians and administrators exercise their powers, given that these decisions take place largely in the private sphere. This means that despite the least restrictive mandate, guardians in Queensland and Victoria, as in California, may not always apply it in practice. Commentators have also pointed out there is a risk that the "well-being" exception for decision-making in the GAA Vic may be interpreted widely, so as to be synonymous with "best interests."[134] Moreover, Ms. Spears' case shows how once a conservator or administrator has power to control day to day finances, they are in a position to influence, unduly or abusively, the adult's decisions on personal matters.

This potential for undue influence or abuse means that the substantive provisions of the legislation may only be as strong as the effectiveness and rigour of the oversight mechanisms governing appointment and subsequent review. The commentary on article 12 rarely if ever considers how the different legal systems where guardianship or conservatorship operate can determine to what extent an adult's rights are either denied or upheld.[135] And yet ultimately, access to courts or tribunals to review or revoke guardianship orders plays a key role in ensuring that conservators and guardians comply with legislation that mandates least restrictive alternatives.

Continuing to focus on the example of Ms. Spears, the following section compares how the conservatorship system operates in the California courts with

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[133] *Guardianship and Administration Act 2000* (Qld) s 67.

[134] *See* Piers Gooding & Terry Carney, *Australia: Lessons from a Reformist Path to Supported Decision-Making*, *in* LEGAL CAPACITY, DISABILITY AND HUMAN RIGHTS 263 (Michael Bach & Nicolás Espejo-Yaksic eds., 2023) ("[t]he 'best interests' standard, *at least in name if not in substance*, was replaced with the guiding notion of 'promot[ing] the personal and social wellbeing of a person'") (emphasis added).

[135] In 1997, soon after the tribunal system was introduced in Australia, Carney and Tait studied guardianship and administration appointment processes, comparing the Australian states of Victoria and New South Wales with jurisdictions which relied on court adjudication for their appointments. They concluded that comparison of the substantive legal tests alone failed to reveal why even at that time, Australian tribunals were more likely to reject an application, less likely to impose a plenary order, and orders were more likely to be temporary. They concluded this was because courts gave more deference to medical reports and other professional evidence, while tribunals which were partly constituted by non-lawyers and inquisitorial in nature, were more likely to call additional witnesses and test the evidence. The overall conclusions in this essay, comparing current substantive and procedural law in California with that in two Australian states, are consistent with those arrived at by Carney and Tait over twenty years ago. See Terry Carney & David Tait, The Adult Guardianship Experiment: Tribunals and Popular Justice (1997).

the more accessible, less costly and more transparent tribunal system in the two Australian states.

IV. PROCEDURAL LAW OF CONSERVATORSHIP AND GUARDIANSHIP

A major difference between the California system and those in Queensland and Victoria is that conservatorship proceedings in California are heard in the State Superior Court, the main civil trial court, whereas in Australia they are conducted in informal tribunal settings.[136] A summary of the provisions governing procedures in the conservatorship and guardianship jurisdictions of California and the two Australian states is included in Appendix B.

The following sections provide a further analysis, illustrating how provisions relating to notice and reviews are very similar, but that differences arise in how they are applied (or waived) in practice. There are nevertheless key differences between the rules in the Australian tribunal systems relating to legal representation, costs, and transparency of decision-making. These key differences appear to contribute significantly to the greater responsiveness and accessibility of the tribunal systems, which are much more likely to pursue the least restrictive alternative than are California courts.

A. *Overview of Legislative Provisions*

1. Before the Hearing

All three jurisdictions provide that the adult must be given notice of the application and hearings,[137] but notice can also be waived for urgent applications for temporary conservatorship or guardianship in cases where there is an immediate risk of harm to the adult or their property.[138] The Probate Code includes as a further protection that the proposed conservatee be given information on conservatorship law and on the adult's own rights.[139] In California a temporary order is supposed to remain in place for a maximum

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[136] B.E. WITKIN ET AL., WITKIN SUMMARY OF CALIFORNIA LAW § 1037 (11th ed. 2021); CAL. PROB. CODE § 2100 (1990) (providing that conservatorships are governed by the general procedural provisions of the Probate Code except as otherwise "expressly provided by statute."); CAL. R. CT. 7.1 (2023) (applying to proceedings under the Probate Code, including conservatorship).

[137] CAL. PROB. CODE § 1460(a) (2022); *see also id.* § 1822(a) (providing fifteen days' notice of time and place of the hearing and a copy of the petition). In Queensland the applicant must give notice to the adult at least twenty-eight days after filing with the tribunal, and the tribunal must give the adult at least seven days' notice of the hearing. *Guardianship and Administration Act 2000* (Qld) s 118. In Victoria, the applicant for guardianship or administration must give notice of the application to the adult within seven days of filing. *Victorian Civil and Administrative Tribunal Rules 2018* (Vic) s 4.09. In Victoria the tribunal must give notice of the hearing to the parties (with no specified time period). *Victorian Civil and Administrative Tribunal Act 1998* (Vic) s 99; *Guardianship and Administration Act 2019* (Vic) s 26.

[138] In California, notice of the hearing for a temporary conservatorship has to be given only five days before the hearing and can be shortened or waived by the court "for good cause." CAL. PROB. CODE § 2250(e) (2022). Commentary suggests "good cause" may be: (a) when the person was "in such mental or physical condition that giving the person notice would be useless or detrimental" to them, or (b) where the person could not be located. WITKIN ET AL., *supra* note 135, § 965.

[139] CAL. PROB. CODE § 1823(b)(6) (2023).

period of thirty days, but typically the Court extends this for several months until the hearing for the general application.[140] In Queensland temporary orders can be made for a maximum period of three months (unless "exceptional circumstances" prevail),[141] and in Victoria for an initial twenty-one days with two potential twenty-one day extensions, at which time a longer order can be sought.[142]

In California the court must appoint an investigator who is an officer of the court[143] and who must—before the hearing—interview the parties, investigate the applicant's claims, and compile a report recommending whether or not the conservatorship should be granted. However, for cases of temporary conservatorship the investigator may wait until two days after the hearing to interview the proposed conservatee.[144] In other cases the investigator must find out if the proposed conservatee is attending the hearing[145] and if they have an attorney or still want to engage one.[146] The investigator must also review the petition for conservatorship and the application for authority over health care decision-making, and for the latter conclude whether or not the proposed conservatee has mental capacity.[147] The report must identify the facts and observations supporting the conclusions and determine if the adult wishes to oppose the conservatorship or choice of conservator.[148] The investigator must provide the court, the parties, and their attorneys with a copy of the report at least five days before the hearing, but no copy has to be provided to the proposed conservatee if notice has been waived.[149] The report is confidential but can be released by the court if it would be in the conservatee's best interests.[150]

In the Queensland and Victorian jurisdictions the tribunal registrars have certain obligations to assist the parties, and the tribunal itself conducts the fact-finding inquiry as described below. There is no role equivalent to the court

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[140] *Id.* § 2250(b); *id.* § 2257.

[141] *Guardiansip and Administration Act 2000* (Qld) s 129 (showing that an "interim order" can be given if "there is an immediate risk of harm to the adult." It may be made "on the papers," without notice to any of the parties, and for a maximum period of three months (unless exceptional circumstances prevail)).

[142] *Guardianship and Administration Act 2019* (Vic) ss 36–37 (showing that in Victoria, "urgent" orders can be made for a period of twenty one days, plus an additional twenty-one days in exceptional circumstances).

[143] CAL. PROB. CODE § 1454 (1990); WITKIN ET AL., *supra* note 135, at § 1003(5) (describing the investigator as a "quasi-judicial official, entitled to absolute, common law immunity" and that "the investigator here serves as an arm of the court").

[144] CAL. PROB. CODE § 2250.6(b)(1) (2023).

[145] *Id.* § 1826(a)(3).

[146] *Id.* § 1826(a)(7).

[147] *See id.* § 811; *see also* Nomi Karp & Erica F. Wood, *Guardianship Monitoring: A National Survey of Court Practices*, 37 STETSON L. REV. 143, 148 (2007) (showing information on medical and health care decision-making).

[148] CAL. PROB. CODE § 1826(a)(5)–(6).

[149] *Id.* § 1826(a)(11).

[150] *Id.* § 1826(c)(1).

investigator; however, in Victoria the tribunal can refer a matter before it to the Public Advocate for investigation and report.[151]

2. Hearings, Legal Representation and Costs

a. California

In California, for the hearing on the general conservatorship (and for later hearings), the conservatee must be present unless medically unfit[152] or unwilling to attend and won't oppose the conservatorship or choice of conservator.[153] If the proposed conservatee can't attend and authority is being sought for health care decisions, then the investigator must interview the conservatee and advise them of their rights to oppose the petition and be represented by counsel.[154] In determining whether a person has capacity to make health care decisions there is a rebuttable presumption of capacity,[155] and for all matters to be decided at hearing, the standard of "clear and convincing proof" applies.[156] This is higher than the "preponderance-of-evidence standard"—which is usually applied in civil proceedings—in recognition of the significant restrictions placed on liberties and rights by conservatorship.[157] While courts issue written orders, they don't provide written reasons for their decisions on conservatorships, allowing for little transparency or public accountability for how their discretion is exercised and decisions made.[158] The court has discretion to conduct proceedings in closed court to protect privacy, and while some researchers have been able to access court conservatorship files,[159] the general rule is that they are kept confidential except as between the parties.[160]

In California, where the general rules of civil proceedings apply, both parties may be represented by counsel.[161] If a proposed conservatee is unable to retain

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[151] *Victorian Civil and Administrative Tribunal Act 1998* (Vic) sch 1, pt 9, 35(1).

[152] CAL. PROB. CODE § 1825(b) (1990).

[153] *Id.* § 1825(a)(3).

[154] *Id.* § 1894.

[155] *Id.* § 810.

[156] CAL. PROB. CODE § 1801(e) (1995).

[157] WITKIN ET AL., *supra* note 135, at § 1007(1); Emmanuel Gross, *Human Rights in Administrative Proceedings: A Quest for Appropriate Evidentiary Standards*, 31 CAL. W. INT'L L.J. 216 (2001) (stating that "[t]he clear-and-convincing-evidence standard requires that the evidence be at least seventy percent accurate, meaning that the facts asserted must be highly probable.").

[158] Karp, *supra* note 146, at 182–83.

[159] *See, e.g.*, Heidi Blake & Katie J.M. Baker, *Beyond Britney: Abuse, Exploitation, and Death Inside America's Guardianship Industry*, BUZZFEED NEWS (Sept. 17, 2021, 12:02 PM), https://www.buzzfeednews.com/article/heidiblake/conservatorship-investigation-free-britney-spears.

[160] Cal. Prob. Code § 1821(a) (2023); id. § 1851(b)(2)(e); id. § 1851.1(d); see also Cal. Judges Benchbook: Civ. Proc. Before Trial § 2.150 (March 2022) (stating that electronic access to court files is not allowed in conservatorship proceedings); Friedman & Starr, supra note 88, at 1504.

[161] Commentary explains how the Fourteenth Amendment to the U.S. Constitution provides that no

legal counsel then the court has discretion to appoint one from a specially constituted panel if it would "be helpful to the resolution of the matter or is necessary to protect the person's interests."[162] The general rule in civil proceedings is that an unsuccessful party pays the legal costs of both parties, thereby discouraging applications being made without substance. However, in conservatorship proceedings, even when the applicant (including the conservator or the proposed conservator) makes an unsuccessful petition or application, the adult may be ordered to pay the legal costs of the proceeding.[163]

b. Australia

In Queensland and Victoria, the tribunals must conduct proceedings "with as little formality and technicality, and determine each proceeding with as much speed. . . [as] a proper consideration of the matter[s]" permits.[164] Neither of them are bound by the rules of evidence, but have wide information gathering powers and must follow the rules of natural justice or procedural fairness. "Procedural fairness" has been described as the "duty to act fairly," with the two main rules being that the adult has a "reasonable opportunity to be heard," and that the tribunal must be impartial and not biased.[165] As in California, hearings are open to the public,[166] but subject to the tribunals' discretion to order otherwise to avoid serious harm or injustice.[167] In Queensland where the tribunal gives a notice or decision to a person with impaired capacity, it must do "everything reasonably practicable to communicate the information in the decision or notice to the person"[168] and it also has an express obligation to ensure that the parties understand the proceedings.[169] The standard of proof is generally considered to be "on the balance of probabilities," which has been described as "whether it is established that something is more probable than not, more likely than not,"[170] and therefore potentially lower than the standard in California. Unlike the Californian courts, the tribunals have obligations to give reasons for their

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person shall be deprived of "life, liberty, or property, without due process of law" and that "[c]ourts have held that appointment of guardianship is considered a deprivation of liberty." Sell, *supra* note 67, at 228–29. The right to counsel is thus, in the view of most commentators, required as a matter of due process under Section 1 of the Fourteenth Amendment.

[162] CAL. PROB. CODE § 1470(a) (2008).

[163] Wright, *supra* note 8, at 964.

[164] *Civil and Administrative Tribunal Act 1998* (Vic) s 98; *Civil And Administrative Tribunal Act 2009* (Qld) s 28.

[165] PAMELA O'CONNOR ET AL., PRACTICE MANUAL FOR TRIBUNALS 47–48 (Bill Botter ed., 5th ed. 2020); *Civil and Administrative Tribunal Act 1998* (Vic) ss 97–98; *Civil and Admininistrative Tribunal Act 2009* (Qld) s 103.

[166] *Guardianship and Administration Act 2000* (Qld) s 105; *Open Courts Act 2013* (Vic) s 4.

[167] *Guardianship and Administration Act 2000* (Qld) s 107; *Open Courts Act 2013* (Vic) s 18.

[168] *Civil and Administrative Tribunal Act 2009* (Qld) s 120.

[169] *Id.* s 29.

[170] O'CONNOR et al, *supra* note 164, at 149 (stating but for "serious allegations ... the gravity of the assertion requires a higher level of proof than 'mere balance of probabilities,'" citing Briginshaw v Briginshaw [1938] 60 CLR 336, 343–44).

decisions and for written reasons to be provided on request by the parties.[171] They both publish a number of their written reasons for decisions on guardianship applications (with names suppressed) on their websites.[172]

The *Queensland Civil and Administrative Tribunal Act 2009* (Qld) (QCAT Act) provides that the tribunal's "main purpose. . . is to have parties represent themselves unless the interests of justice require otherwise." An important exception is that "a person with impaired capacity" has a right to representation by a lawyer or can be represented by another person if the tribunal considers the other person to be "appropriate."[173] In Victoria neither the applicant nor the adult has an entitlement to representation as of right (with limited exceptions), but the tribunal has discretion to allow representation by a "professional advocate" (including an attorney) or other person.[174] The adult has a right to have a "support person" present unless the tribunal decides otherwise.[175] Due to the likelihood of and preference for parties to appear in the tribunals unrepresented, the tribunal registrars have statutory obligations to assist the parties in whatever way is necessary.[176] Unlike in California, both tribunals are also "no costs" jurisdictions, so that each party will pay their own costs of proceedings unless the tribunal orders otherwise "in the interests of justice."[177]

c. Summary

In short, in California the applicant has a right to legal representation but the adult's right to representation is qualified and subject to the court's discretion. Overall, however, in California it is more likely that both parties are represented by counsel than in the two Australian jurisdictions, thereby increasing costs of proceedings with a possibility that the adult may have to pay both parties' costs. In Queensland and Victoria, the parties are much less likely to be legally represented, thereby minimising costs, while the adult would only be ordered to pay the other party's costs in exceptional circumstances (if ever).

3. Reviews and Termination

a. California

In California, when the court makes the order for conservatorship it may

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[171] *Civil and Administrative Tribunal Act 2009* (Qld) s 122(2); *Civil and Administrative Tribunal Act 1998* (Vic) s 117(1).

[172] *Civil and Administrative Tribunal Act 2009* (Qld) s 125; *Civil and Administrative Tribunal Act 1998* (Vic) s 147; *see* Terry Carney, *From Guardianship to Supported Decision-Making: Still Seraching for True North?*, 30 J.L. MED. 70, 75 (May 2023) (noting, however, that in Victoria, reasons are requested only in just over one percent of all matters).

[173] *Civil and Administrative Tribunal Act 2009* (Qld) s 43(2)(b)(i), (4)(b).

[174] *Civil and Administrative Tribunal Act 1998* (Vic) s 62.

[175] *Id.* s 63A.

[176] *Civil and Administrative Tribunal Act 2009* (Qld) s 30; *Civil and Administrative Tribunal Act 1998* (Vic) s 32AA.

[177] *Civil and Administrative Tribunal Act 2009* (Qld) s 100–03; *Civil and Administrative Tribunal Act 1998* (Vic) s 109.

provide that it ends at a specific time,[178] but typically no time is provided: it thus continues indefinitely until a court orders otherwise.[179] A petition to terminate can be filed by the conservator, conservatee, spouse, friend or relative or any other interested person, and can also be ordered as a result of a periodic review.[180] At a periodic review the court will check whether: the conservatee wants the conservatorship to end;[181] the conservatorship is still warranted; the conservator is still acting in the conservatee's best interests; and the person still has impaired mental capacity.[182] A review is required within six months of appointment, at the end of the first year, then every one or two years, and can also be instigated by the court or any interested person.[183] For a review, and in response to a petition for termination, a court investigator must interview the conservatee and other relevant people and provide a report to the court, and in the case of a petition for termination, provide a copy to all parties.[184] A conservator of the estate has obligations to regularly report and account to the court.

b. Australia

In Queensland the tribunal must review an appointment of a guardian or administrator: at least every five years; on application by a range of other entities including the adult[185] or an "interested person for the adult," or on its own initiative.[186] On review, the onus to prove the need for continuing the appointment is the same as if the tribunal were hearing an initial application.[187] In Victoria the tribunal is required to review appointments ideally within twelve months, or otherwise within three years of being made unless exceptional circumstances exist. As in the case of conservators of the estate, administrators are required to submit accounts to the tribunal, in most cases annually.

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[178] CAL. PROB. CODE § 1896 (1990).

[179] DISABILITY VOICES UNITED, WITH SUPPORT AND WITHOUT THE COURT: SUPPORTED DECISION-MAKING HANDBOOK FOR PARENTS OF ADULTS WITH DEVELOPMENTAL DISABILITIES IN CALIFORNIA 6 (2020); *see* Jenny B. Davis, *Legally Bound: Renewed Attention on Guardianships Sparks Calls for Reform*, 107 AM. BAR ASS'N J. 53, 53 (2021).

[180] CAL. PROB. CODE § 1861(a) (2001).

[181] *Id.* §§ 1850–51.

[182] *Id.* § 1851(d).

[183] *Id.* § 1850 (b). If an investigator has conducted an investigation and provided a report in the preceding six months (including for an application for temporary conservatorship) then another one is required. Except in the case of a temporary conservatorship, the investigator must make a second visit to the conservatee and the report must include information on the effect of the temporary conservatorship on the conservatee.

[184] *Id.* § 1826(a)(1). People to be interviewed include the conservatee, conservator, spouse, domestic partner, other relatives, neighbors and close friends.

[185] *Guardianship and Administration Act 2000* (Qld) s 29.

[186] For example, *see* GVZ [2020] QCAT 213 (where the tribunal initiated its own review of the administration when it noticed anomalies in accounts filed by the administrator).

[187] *Guardianship and Adminstration Act 2000* (Qld) s 31.

4. Summary and Analysis

In summary, there are many similarities in the procedural rules governing conservatorship or guardianship appointments in the three jurisdictions. The rules for notice of applications, hearings and the rules for attendance, including for temporary orders, are similar in all three; and in not one of the jurisdictions is there a legislated maximum term for a general appointment. Also, in all three jurisdictions regular reviews of appointments are required at set times and on instigation by the parties, tribunal, or court, with the longest maximum review period being five years under the GAA Qld.

This leaves four key differences between the legislation in California on the one hand, and in Queensland and Victoria on the other. First, unlike the Probate Code, the GAA Qld and GAA Vic both provide maximum terms for temporary appointments. Second, the Court is governed by the ordinary rules of civil procedure, including the rules of evidence, while the tribunals in Queensland and Victoria have informal, discretionary rules of procedure governed by natural justice. Third (and related to the second point) is that in California the parties are more likely to be legally represented than in the tribunal jurisdictions. Additionally, California's cost rules favour the applicant (not the conservatee) whereas in the tribunal jurisdictions the default rule is that each party pays their own costs. These two factors are related to one another because the more formal the rules of procedure, the greater likelihood that attorneys are needed and the greater the costs of proceedings (and vice versa).[188]

The fourth key difference between the jurisdictions is that the court does not provide any reasons for its decisions in the conservatorship jurisdiction, nor are investigators' reports published. By way of contrast, in Queensland and Victoria written reasons are provided on request and are selectively published. The next section considers how these three main differences play out in practice, using the case of Ms. Spears as an example.

B. *How Procedures Operate in Practice*

1. Temporary Conservatorships and Guardianships

a. California

In Ms. Spears' case, an application for temporary conservatorship was initially made and granted without notice, at the same time that an application was made for general conservatorship.[189] There were concerns that her fortune could be dissipated, and her health deteriorated if she (and in turn her manager) were given notice of the proceedings. The proceedings thus followed an all too

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[188] Erica Wood, *Recharging Adult Guardianship Reform: Six Current Paths Forward*, 1 J. AGING LONGEVITY L. & POL'Y 9, 45 (2016) (discussing that one of the key inhibitors to applying for restoration of rights can be lack of access by the conservatee to counsel).

[189] The Probate Code allows for an application for temporary conservatorship to be made at the same time as an application for long-term conservatorship. *See* CAL. PROB. CODE § 2250(a) (2019); *see generally id*. Part 4 "Provisions Common to Guardianship and Conservatorship," Ch. 3 "Temporary Guardians and Conservators." *See also* WITKIN ET AL., *supra* note 135, § 1001.

common course whereby a temporary conservatorship was applied for and granted with waiver of due process,[190] and a general conservatorship granted soon after.[191] Commentary describes how temporary conservatorships are often "misused" in this way to override notice and hearing rights "if there is no real emergency and the petitioner simply wants to get a guardianship in place quickly."[192] In any event, perennial delays experienced in hearing dates for general conservatorships have led to applications for temporary conservatorships to be prevalent.[193]

b. Australia

In Queensland and Victoria, the legislation prescribes maximum terms for interim or urgent guardianships, but more significantly, unlike in California there is no reported practice of the tribunals routinely granting such orders. For example, in Queensland in both *HAC*[194] and *MTD,*[195] applications for interim orders were made, but in both cases the tribunal dismissed them on the basis that there was a lack of evidence of "an immediate risk of harm to the health, welfare or property of the adult" and that the *Human Rights Act 2019* (Qld) provided a presumption against appointment. Similarly in Victoria, in *VWA (Guardianship)* the tribunal declined to decide an urgent application for appointment of both guardian and administrator, and ultimately dismissed the substantive application for lack of evidence.[196] Although VWA was diagnosed with mild vascular dementia and exhibited some cognitive decline, the only evidence available independent of the applicant's allegations was that she still had the ability to manage her financial affairs, including the sale of a property of significant value.

Also, unlike California, there is no reported practice of the tribunals in

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[190] Quinn & Krooks, *supra* note 11, at 1634; Kenneth Heisz, *Beware of the Con in Conservatorships: A Perfect Storm for Financial Elder Abuse in California*, 17 NAELA J. 37 (2021). Note that when an application is made for a determination of incapacity and for the conservator to have health care decision-making power, the same notice provisions apply, *See* CAL. PROB. CODE § 1891 (2019); WITKIN ET AL., *supra* note 135, § 1020.

[191] CAL. PROB. CODE § 2250(b) (2019); *see also* Garfield, *supra* note 56, at 933 (explaining the use of this temporary arrangement in the context of elder abuse is disturbing because it is designed expressly to act as a weigh station *en route* to imposition of a full conservatorship).

[192] Erica Wood & Mary Joy Quinn, *Guardianship Systems*, *in* ELDER ABUSE: RESEARCH, PRACTICE & POLICY 370 (XinQi Dong ed., 2019); *see* Robin Fields et al., *When a Family Matter Turns into a* Business, L.A. TIMES (Nov. 13, 2005, 12:00 AM), https://www.latimes.com/local/la-me-conserve13nov13-story.html ("More than half of the professional conservatorships were granted on an emergency basis, which led to procedural safeguards being ignored.").

[193] Kaylee K. Sauvey, *Updating Conservatorship Administration in Light of Britney's Case*, 64 ORANGE CNTY. LAW. 32, 33 (2022) ("In Orange County, where general petitions for appointment of a conservator are being set for hearing several months from the filing, a temporary conservatorship may be a way to handle urgent matters for a conservatee without waiting for the court to make a determination on the general petition. For this reason, temporary conservatorships are commonly sought by proposed conservators.").

[194] HAC [2022] QCAT 104.

[195] MTD [2022] QCAT 89.

[196] VWA (Guardianship) [2021] VCAT 193.

Queensland and Victoria routinely granting long-term appointments once an interim or urgent order is made. For example, in Victoria in *PCP (Guardianship)*[197] the tribunal heard an urgent application for guardianship with PCP and others attending, demonstrating that the notice requirement had not been waived despite the urgency. An order for a temporary guardianship was granted but limited to authority for decisions on accommodation and services. The temporary appointment was for six weeks, with a hearing for the general conservatorship held after four weeks. At that hearing the tribunal dismissed the application for ongoing guardianship on the basis that no further decisions were required for accommodation and services because PCP by that time had accommodation and aged care services in place. The tribunal appointed administrators chosen by PCP herself with the order providing that the administrators must require further express tribunal approval before selling PCP's house.[198]

If the above practices were applied in Ms. Spears' case, it is much less likely that the temporary application would have been made without notice. More significantly, if her mental health crisis had resolved itself by the end of the temporary order, it would have been much more likely that the appointment would have been limited to only an administration order to manage her significant wealth and complex finances.

2. Rules of Court Versus Informal Procedures

a. Legal Representation and Conflicts of Interest

Application of the *California Civil Procedure Rules* in the conservatorship jurisdiction means that the applicant is much more likely to be legally represented, contributing to increased costs of the proceedings. However, legal representation for the adult is much less certain, being subject to the court's discretion, and whether they are allowed to choose their own counsel depends on whether they have capacity to instruct. Ms. Spears wished to choose her attorney for the long term appointment hearing, but found herself in a catch-22 whereby the Court decided that due to her personal circumstances, which it considered justified a conservatorship, she did not have the capacity to choose or instruct an attorney.[199] If she had been able to choose her own attorney, it is much more likely that a least restrictive approach would have been applied. The U.S. disability advocate and attorney Jonathan Martinis has stated that "one of the most dangerous aspects of guardianships is the way that they prevent people

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[197] PCP (Guardianship) [2022] VCAT 364.

[198] *Id.*

[199] *See* Lisa Zammiello, *Don't You Know That Your Law Is Toxic? Britney Spears and Abusive Guardianship: A Revisionary Approach to the Uniform Probate Code, California Probate Code, and Texas Estates Code to Ensure Equitable Outcomes*, 13 EST. PLAN. & CMTY. PROP. L.J. 587, 610 (2021); COLEMAN, *supra* note 3, at 104 ("[T]he Legislature has not defined incapacity to litigate in either the Probate Code or the Code of Civil Procedure. California probate case law does not offer assistance. It is therefore necessary to turn to federal and state civil cases and to California criminal cases which have significant discussions on standards to determine the capacity to litigate.").

from getting their own legal counsel,"[200] and it had been one of Ms. Spears' main complaints about her conservatorship that she had to rely on court appointed counsel.[201] The role of court-appointed counsel is also unclear as to whether they must represent the conservatee's will and preferences, or their best interests. [202] There is further a widely vented criticism in the United States that counsel do not always "zealously" represent their conservatee client, partly due to pervasive conflicts of interest resulting from orders that attorneys' fees be paid from the conservatee's own estate.[203] In Ms. Spears' case, the significant ongoing fees payable to the conservators, their attorneys, and to her own attorney led to a situation where many people continued to profit from ensuring that the conservatorship continued for as long as possible.[204]

It is much less likely in Queensland and Victoria than in California that parties in a guardianship proceeding are legally represented. However, if Ms. Spears were allowed representation in these jurisdictions, she would also have been able to choose and instruct her own attorney. There are no "panel" attorneys in the tribunal jurisdictions, and there is no reported practice of effectively rebutting the presumption of capacity (to instruct an attorney) before the hearing actually takes place. Overall, the absence of attorneys in many if not most applications for guardianship as well as in review proceedings (see below) means that in these jurisdictions the costs are low, thereby in many cases increasing the adult's access to justice and reducing incentives for unwarranted applications for guardianship. An added cost in the California system which doesn't exist in Queensland or Victoria is the costs of the investigator's reports, which may also be recovered from the adult's estate. [205]

However, more problematic in the Queensland and Victorian jurisdictions is the potential for conflict of interest in the administrator's position because administrators can be paid for their services. It is noteworthy that (as in California) this practice has led to allegations of excessive fees being charged by some trustees to the disadvantage of represented adults.[206] These matters are

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[200] Farrow & Tolentino, *supra* note 26 (referring to lawyer and advocate Jonathon Martinis).

[201] Sauvey, *supra* note 192, at 34.

[202] *See* CAL. PROB. CODE § 1471 (2023) (showing counsel has a duty to 'represent the interest' of the conservatee); Johns, *supra* note 76, at 98; Wright, *supra* note 8, at 971; Stephens, *supra* note 33, at 234.

[203] *Id.* § 1470; Swadley, *supra* note 48, at 21; DISABILITY VOICES UNITED, *supra* note 178, at 8 ("Attorneys have often shared that advocating for alternatives [to conservatorship] would be a conflict of interest."); Anderson, *supra* note 88, at 132.

[204] John H. Sugiyama, *Asymmetrical Conservatorship Litigation*, 35 PROB. & PROP. 22, 24–25 (2021) (discussing and analyzing this costs issue more generally).

[205] CAL. PROB. CODE § 1851.5 (2022).

[206] *See, e.g.*, *State Control: Australians Trapped, Stripped of Assets and Silenced,* ABC TV: FOUR CORNERS (Mar. 14, 2022), https://www.abc.net.au/news/2022-03-14/state-control:-australians-trapped,-stripped-of/13795520; Amber Shultz, *Kidnapped by the State,* CRIKEY (Nov. 23, 2021), https://www.crikey.com.au/topic/kidnapped-by-the-state/; Anne Connolly et al., *Queensland's Public Trustee System to be Investigated After Four Corners Report Revealed High Fees and Financial Mismanagement*, ABC TV FOUR CORNERS (Mar. 14, 2022, 7:09 PM),

serious and need to be addressed with rigour and urgency, but I also draw attention to *VWA (Guardianship)*[207] (*see supra* Section IV.B.1.b) where the applicant had sought to be administrator and guardian, but the tribunal dismissed her evidence of the adult's incapacity as unconvincing. Moreover, guardians in Queensland and Victoria are unpaid (unlike professional fiduciaries in California) as volunteer family members or friends, or the Office of the Public Guardian, funded by government appropriation (not by fees), steps in as a last resort. For this reason, and unlike in California (which relies heavily on professional fiduciaries), there is no financial incentive for a person to apply for an unwarranted guardian appointment or to continue with an appointment longer than necessary.

b. Testing of Evidence

The available commentary states that in California the applicant (usually the proposed conservator) is almost always successful, suggesting that despite the protections offered by the civil procedure rules, the evidence is not sufficiently tested. Studies of California conservatorship files revealed that: "[t]he Court Investigator rarely disagreed with the petitioner; [and] the Investigator almost invariably felt that a conservatorship should be established."[208] Further, when the applicant was also a relative who proposed themselves as conservator (as in Ms. Spears' case), the investigator usually agreed.[209] Disability Voices United says of the California Probate Court that: "[t]he brief hearing in front of the judge usually ends with the court establishing a conservatorship."[210] There is widespread agreement that investigators in California lack sufficient training, are overloaded, and underfunded,[211] and in one study of conservatorships with professional fiduciaries, it was reported that "92% were granted *before* the court saw the investigator's report."[212] This is despite the fact that the "clear and convincing proof" standard applies and is theoretically higher than the balance of probabilities test applying in Queensland and Victoria.

c. Reviews and Terminations

There is also a general consensus that in California and the United States more widely, once conservatorship is ordered, it is difficult to achieve a termination and the court will hardly ever order termination on their own

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https://www.abc.net.au/news/2022-03-15/public-trustee-system-under-fire-over-fees-to-vulnerable-people/100908772; Amy Sheehan, *Family Wins Battle Against Public Trustee to Keep Brother's Financial Independence*, ABC SUNSHINE COAST (Oct. 21, 2021), https://aasgaa.org/wp-content/uploads/2022/03/2021-10-Family-Wins-battle-against-Public-Trustee.pdf.

[207] VWA (Guardianship) [2021] VCAT 193.

[208] Friedman & Starr, *supra* note 88, at 1519.

[209] Friedman & Savage, *supra* note 75, at 280.

[210] DISABILITY VOICES UNITED, *supra* note 178, at 4.

[211] COLEMAN, *supra* note 3, at 94; Heisz, *supra* note 189, at 38.

[212] Heisz, *supra* note 189, at 37 (emphasis added).

motion.[213] As one advocacy organization advises: "[t]he few cases where a court has ended a conservatorship—after likely many years of fees and fighting an uphill battle—have been seen as a huge victory."[214] Despite the mandate for reviews, "resources to police this responsibility are scarce or non-existent and the reality is that most guardianships go unmonitored after the initial court hearing concludes."[215]

While in Queensland and Victoria there is no data available on the length of appointments, there are some published reasons for decisions that illustrate reviews are more than tokenistic and can lead to revocation or amendment of an order. For example, in the Queensland case *KH* a guardian had been appointed to make decisions on services for KH who was suffering from vascular dementia.[216] On review, while it was determined that KH continued to have impaired capacity, the tribunal decided that a guardian was no longer needed because "[t]here is no evidence that the decision-making needs of KH in relation to personal matters will not be adequately met unless a guardian remains in place for her."[217] In Victoria, in *ZFN (Guardianship)*[218] the tribunal revoked an order for guardianship that gave decision-making powers on ZFN's social contacts on the basis that ZFN now had a trusted person in place to negotiate access between her and her adult sons. Also, in *NCX (Guardianship)* the tribunal removed two guardians on the express basis that they were failing to seek or make decisions in accordance with NCX's will and preference, and appointed a guardian chosen by the adult.[219]

In summary, there is general agreement in the commentary that the default position in California is that a conservatorship appointment is made for life, and that restoration of rights is exceptional; and in Ms. Spears' case her conservatorship lasted for an extremely long time–thirteen years–and was only revoked due to her ability to garner media attention. The above-published tribunal decisions, on the other hand, indicate ready access to review and revocation of appointments, together with a "least restrictive" approach to decision-making by the tribunals. I argue that, even if in Queensland or Victoria a guardian and administrator had been appointed for Ms. Spears in the first instance, they would never have continued in place past the first review period,

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[213] Zammiello, *supra* note 198, at 589; Stephens, *supra* note 33, at 231; Friedman & Savage, *supra* note 75, at 278; Wood, *supra* note 187, at 22; *but see* ERICA WOOD et al., *Restoration of Rights in Adult Guardianship: Research & Recommendations*, AM. BAR ASS'N (2017) (noting how restoration is increasingly being pursued by advocates).

[214] DISABILITY VOICES UNITED, *supra* note 178, at 6; *see also* Davis, *supra* note 178, at 55; Wood, *supra* note 187.

[215]Arsenault, *supra* note 17, at 29; *see* Karp & Wood, *supra* note 146, at 155.

[216] KH [2014] QCAT 585.

[217] *Id.* at ¶ 6 (noting the former guardian had been and could continue to make decisions as statutory health attorney); *see also* DJS [2012] QCAT 576 (deciding that before the 2019 amendments to the *Guardianship and Administration Act 2000*(Qld), a guardianship was revoked because the adult, although suffering ill-effects of an acquired brain injury, could make personal decisions with informal support of family and carers).

[218] ZFN (Guardianship) [2022] VCAT 262.

[219] NCX (Guardianship) [2021] VCAT 544.

and the order probably would have been revoked much, much earlier. In California, the more formal court system leads to additional expenses by way of payment for investigators and attorneys, the costs of which are often met from the conservatee's estate. The formal procedural protections are often waived, and ironically the ones that are not become burdensome and costly for the adult, limiting their ability to oppose the initial application or to instigate a further review or termination. Moreover, unlike the tribunals in Australia, there appears to be little if any attempt in California for the courts to apply a least restrictive approach to deciding whether a conservator is needed or not, despite the fact the Probate Code requires it.[220]

3. Reasons for Decisions

The third significant difference between the California and Australian jurisdictions is the relative transparency of the tribunal systems. In both cases the default rule is that the court or tribunal be open to the public, with the important ability to order closed hearings for the adult's benefit. In Ms. Spears' case there were obviously sound reasons why the court should have been closed, and yet it was only when Ms. Spears, buoyed by the support of her social media followers and the American Civil Liberties Union,[221] sought and was granted an open hearing that the tide began to turn in her favour. Soon after that hearing, a series of orders were made that led to the termination of the conservatorship only a few months later.[222] This illustrates the value of transparency not just in an individual case, but in conservatorship and guardianship procedures more systemically. Ms. Spears' much publicised public appearance and subsequent public announcement of the termination of her conservatorship have also been pivotal in leading to much welcomed amendments to the Guardianship-Conservatorship Law in California (described below). The practice in California of not providing written reasons on request and of not publishing any reasons for decisions conforms with outdated concepts of conservatorship law as a protective jurisdiction, rather than one framed by civil and human rights and underpinned by administrative accountability.

4. Summary and Conclusions

In recognition of the significant erosion of civil rights that can result from conservatorship, the California Probate Code is replete with due process protections. There are notice provisions, rights to attend hearings, information notices, investigators' interviews and reports, limited rights to counsel, and mandated periodic reviews. Friedman and Savage write that "[t]he history of conservatorship reflects, in part, an increased sensitivity to procedural rights; it

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[220] *See supra* Section III.B.1.

[221] Brief for American Civil Liberties Union Foundation of Southern California as Amici Curiae Supporting Conservatee Britney Spears, In re the Conservatorship of the Person and Estate of Britney Jean Spears, Case No. BP108870 (Cal. Super. Ct. L.A. Cnty., July 14, 2021).

[222] Farrow & Tolentino, *supra* note 26.

is an echo of the so-called due process revolution."[223] Somewhat ironically, it is the heavy process accompanying court proceedings which contributes ultimately to both encouraging wider, plenary orders in the first instance as a "just in case" strategy to save costs of a further application,[224] while also discouraging or thwarting attempts at review or termination of appointments. Because of the well documented pattern in California—exemplified by Ms Spears' case—of conservatorship appointments being plenary and extremely difficult to revoke, the frequent description of guardianship as automatically leading to "civil death" has significant cogency.[225]

Moreover, the case of Britney Spears is illustrative of how due process is often overridden or waived in practice due to chronic underfunding[226] and an implicit assumption that a conservatorship will continue for the life of a conservatee. Ironically, it is the complexity of the processes and the onerousness of the review and reporting requirements which actually mean that lawyers and conservators profit from their roles, to the extent that they have an incentive to keep a conservatorship continuing for as long as possible. The due process protections fail to uphold the conservatee's civil rights in practice.

By way of comparison, the informal and relatively inexpensive tribunal jurisdiction does allow for review and revocation orders to be made. The guardianship regimes in Queensland and Victoria illustrate that when substitute decision-making is used as a last resort and implemented in the least restrictive way, it does not automatically lead to wholesale and long-term deprivation of rights. The informal and relatively inexpensive tribunal systems in Queensland and Victoria play a significant role in ensuring that rights to decision-making and legal capacity are restricted as little as possible and are subject to regular review.

V. DISCUSSION - LEAST RESTRICTIVE ALTERNATIVES DISRUPT THE BINARY MODEL

A. *California – Court System and Power Imbalance*

Probate conservatorship in California effects a substantial denial of an adult's civil rights. The CRPD Committee prescribes that people with disability should have their legal capacity recognized on an equal basis with others, yet the threshold tests for conservatorship in California are extremely broad, giving the courts significant discretion with little accountability. Moreover, without any assessment of mental capacity expressly required, once a conservatorship of

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[223] Friedman & Savage, *supra* note 75, at 276 (noting that petitions for guardianship are often "overly broad"); Anderson, *supra* note 88, at 123 (stating "States have for decades revised and amended their guardianship statutes to meet due process requirements"); *see also* Johns, *supra* note 76, at 69.

[224] Applicants tend to instruct their attorneys to seek wide orders so there is no need to go through the work and cost of reapplying later, should narrower ones prove inadequate. *See* Quinn & Krooks, *supra* note 11, at 1630–31.

[225] Sell, *supra* note 67, at 215.

[226] In California, Judges have "too many cases on their dockets" and investigators are "over-worked." COLEMAN, *supra* note 3, at 44, 94; *see also* Dayton, *supra* note 12, at 235 (for the United States overall).

the estate is ordered, an adult is *deemed* not to have legal capacity.

There are some substantive protections. A capacity test is required for a conservator to have power over health care decision-making, and a least restrictive approach available in making appointments. Moreover, any conservatorship order should only be made after less restrictive options, including supported decision-making, have been considered and found inadequate.[227] Ms. Spears' case is illustrative of a conservatorship system that fails to adequately apply and uphold its own laws.[228] Or at the very least, the law is interpreted and practiced through an ableist ethos of patronage and protection. Whilst the text of the law nods to a civil rights approach in its prescription of "least restrictive" principles, "best interests" is used as a trump card in practice.

Because conservatorship in California can affect such a significant and fundamental denial of rights, reforms have focused on increasing due process protections to ensure accountability and transparency. However, in practice these protections are either waived, overlooked, or ineffective.[229] The heavy emphasis on court process serves to accentuate the power imbalance between conservator and conservatee. This is because the conservator has a right to counsel with legal fees potentially payable by the conservatee, and yet the conservatee may be unable to choose their own counsel, so is usually represented by an attorney who doesn't promote their will and preference. Further, the costly court processes mean that the conservatee's lawyer has a personal interest in continuing the conservatorship to keep being paid fees, in many cases from the conservatee's own estate. These factors interact with a legal and community culture which has failed to embrace a human rights approach to conservatorship but remains grounded in the protective and patronizing approaches of the *parens patriae* jurisdiction. The conservatorship system in California (in particular, courts and investigators) has also been chronically underfunded, leading to procedural steps being either waived or implemented according to an ethos of formal (not substantive) compliance.

B. *Recent Amendments in California*

The publicity around Ms. Spears' case has led to amendments being made to

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[227] *See* Morgan K. Whitlach & Rebekah Diller, *Supported Decision-Making: Potential and Challenges for Older Persons*, 72 SYRACUSE L. REV. 165, 175 (2022) ("The fact that court recognition of SDM need not necessarily be predicated by legislative change is supported by the A.B.A.").

[228] *See* Davis, *supra* note 178, at 58 ("[A]dvocates say judges aren't necessarily following the letter of the law.").

[229] Dayton writes of U.S. guardianship generally that "it must be noted that much anecdotal evidence suggests that the procedural protections in place for the purpose of assuring due process to the AIP are, to some extent, a chimera. In reality, the local legal 'culture' often dictates whether and to what extent individual judges actually require the parties to follow these rules. In some jurisdictions, or in some courtrooms within those jurisdictions, statutory or court-rule based procedural requirements are often abbreviated, circumvented, or ignored." Dayton, *supra* note 12, at 99; *see also* Johns, *supra* note 76.

the California Guardianship-Conservatorship Law.[230] Amendments include expressly mandating that the court consider termination of a conservatorship at nominated hearings and authorizing the court to modify conservatorships according to the least restrictive option.[231] It is hard to see how these amendments do anything more than restate the existing law. Some commentators have pointed out that the Guardianship-Conservatorship Law is already more progressive than its counterparts in some other states,[232] and others have praised it (prior to the amendments) as being:

> particularly strong in its provisions for independent fact gathering, both for the initial determination as to whether a conservator or guardian should be appointed and. . . whether there is a basis for continuing the conservatorship.[233]

Wood has commented that "real change on the ground is difficult" and that previous legislative reform has not led automatically to changes in guardianship practice.[234]

More promising in driving change are amendments that provide that courts must allow the conservatee's choice of attorney and that their attorney must zealously represent their client's wishes.[235] Changes have also been made to the cost rules so that a conservator cannot always be compensated from the conservatee's estate for the cost of unsuccessful applications.[236] The amendments also proactively promote supported decision-making and establish an office to review petitions for conservatorship with an emphasis on recommending less restrictive options, including supported decision-making.[237] The amendments place more emphasis on the conservator's and court's obligations to consider the conservatee's will and preferences when making decisions and to assess their ongoing needs in the context of available supports.[238]

All of these proposed changes are welcome, and if funded adequately may

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[230] *See* A.B. No. 1194, 2021–2022 Legis. Sess. (Cal. 2021); A.B. No. 1663, 2021–2022 Legis. Sess. (Cal. 2022), which became *The Probate Conservatorship Reform and Supported Decision-Making Act* of 2022.

[231] A.B. 1163, 2021–2022 Legis. Sess. (Cal. 2022) § 10; CAL. PROB. CODE § 1851 (2022).

[232] Bushko, *supra* note 11 (praising the provisions of the California Probate Code as being more progressive than the laws in Maryland); *see also* COLEMAN, *supra* note 3, at 54 ("The problem is not so much with the law as it is with the lack of uniform and effective implementation. What California needs are methods to ensure that statutory and constitutional requirements are enforced.").

[233] Andreasian et al., *supra* note 7, at 324.

[234] Wood, *supra* note 187, at 10.

[235] CAL. PROB. CODE §1471 (2023).

[236] CAL. PROB. CODE § 2623 (2022).

[237] A.B. 1663, 2021–2022 Legis. Sess. (Cal. 2022).

[238] CAL. PROB. CODE § 1800(e) (2023) (stating that on periodic review of the conservatorship, "the court investigator shall consider the best interests and expressed wishes of the conservatee; whether the conservatee has regained or could regain abilities and capacity with or without supports; and whether the conservatee continues to need a conservatorship.").

allow for many adults to avoid oppressive conservatorships of indefinite duration.[239] However, conservatorship will remain an institution in California, as it has in other states, and it is far from clear that these reforms will significantly impact the fundamental drivers that enable the abuse of conservatees. Investigators, attorneys, and conservators will still profit from perpetuating conservatorships for as long as possible, the best interests test is still given significant weight, and it is unlikely that the proposed ten-million-dollar, one-off injection of funds[240] will address the challenges posed by chronic underfunding.

C. *Australian Tribunal Systems – Levelling the Playing Field*

The purpose of having guardianship matters brought before administrative tribunals rather than courts is best described in the legislation establishing the Queensland tribunal: to "deal with matters in a way that is accessible, fair, just, economical, informal and quick,"[241] and to "ensure proceedings are conducted in an informal way that minimises costs to parties, and is as quick as is consistent with achieving justice."[242] In the guardianship regimes of Queensland and Victoria, attorneys are discouraged, costs are low, and procedures are informal and flexible. As in California, data is scant,[243] but the available information demonstrates that in many cases, application of the least restrictive principle is a reality, so that guardianship neither results in complete "civil death"[244] nor does it last "til death do we part." Systematic research on and evaluation of guardianship systems internationally has been lacking, and the jurisdictions of Queensland and Victoria are no exception; the tribunal decisions relied on in the review above are therefore illustrative only. Data showing an increase in guardianship appointments in both Queensland and Victoria are concerning, as is the practice in Queensland of having guardianship decisions made "on the papers."[245] Moreover, government fiscal pressures and demographic pressures due to the aging population continue to challenge the integrity of the system.[246]

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[239] Lanier, *supra* note 91, at 214 ("The gap between the promise contained in the language of guardianship statutes and the resulting loss of rights typical in guardianship orders may be a function of both practicality and resources.").

[240] A.B. 1663, 2021–2022 Legis. Sess. (Cal. 2022); *Hearing on A.B. 1663 Before the Assemb. Comm. on Appropriations*, 2021-2022 Legis. Sess. 1 (Cal. April 6, 2022) ("This bill appropriates $10 million in one-time funds to the JCC to implement the diversion program. . . .").

[241] *Queensland Civil and Administrative Tribunal Act 2009* (Qld) s 3(b).

[242] *Id.* s 4(c); *see also id.* s 4(e) ("[E]nsure the tribunal is accessible and responsive to the diverse needs of persons who use the tribunal.").

[243] Wood, *supra* note 187, at 12 ("[A]dult guardianship data is sparse and empirical research next to non-existent."); Kristin Booth Glen, *Introducing a New Human Right: Learning from Others, Bringing Legal Capacity Home*, 49 COLUM. HUM. RTS. L. REV. 1, 8 n.28 (2018) (explaining the lack of sufficient statistics about guardianships of persons with I/DD within the U.S); *see also* Davis, *supra* note 178.

[244] *See* Sell, *supra* note 67, at 215.

[245] *See* OFF. OF THE PUB. ADVOC. (QLD), AUSTRALIAN GUARDIANSHIP AND ADMINISTRATION COUNCIL: AUSTRALIAN ADULT GUARDIANSHIP ORDERS 2021/22 (2022) (showing 19,879 new guardianship orders in Australia from 2021–22).

[246] Carney, *supra* note 96, at 6.

Commentators have suggested that guardianship is still over-used as a blanket response to elder abuse or to mitigate risk for service providers.[247]

D. *Rejecting Binarism in Favour of a Continuum Model*

The CRPD Committee and others have promoted a binary framing of conservatorships or guardianships as always rights-denying and supported decision-making as always rights-affirming.[248] The dominance of this framing risks diverting attention away from the importance of developing an evidence-based supported decision-making practice that upholds human rights, both within and outside of guardianship.[249] It also risks shrouding the fact that structural socio-economic inequities (or as in Ms. Spears' case, mental illness and family power imbalances)—experienced disproportionately by people with disabilities—are all too often the real source of abuse.[250] Indeed, as Whitlach and Diller write, "guardianship is misused to meet the needs of social institutions when service systems that are supposed to assist older persons fall short," and that:

> The availability of SDM will not on its own solve the other personal and financial crises that prompt guardianship petitions to be filed.
>
> Some older adults become subject to guardianship not specifically because of decision-making impairments but because of poverty, threats of homelessness, and related economic and social challenges. Some of these individuals may not need SDM in order to make decisions but may need significant social safety net support.[251]

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[247] John Chesterman, *The Future of Adult Guardianship in Federal Australia*, 66 AUSTL. SOC. WORK 26, 31–32 (2013).

[248] *See, e.g.*, Sell, *supra* note 67; Anderson, *supra* note 88, at 129 ("Guardianship is the systematic stripping of rights from those with disabilities to provide them to someone else."); Kohn, *supra* note 13, at 318–19 ("supported decision-making is sometimes defined not merely as a process, but as a process that always reaches a successful outcome—at least from a procedural point of view").

[249] Nina A. Kohn, *Realizing Supported Decision-Making: What It Does—and Does Not—Require*, 21 AM. J. BIOETHICS 37, 38 (2021) (noting the emphasis in the United States on people entering into formal supported decision-making agreements, despite the lack of evidence that they are more effective than informal or undocumented relationships between adults and supporters); *see also* Nina A. Kohn & Jeremy A. Blumenthal, *A Critical Assessment of Supported Decision-Making for Persons Aging with Intellectual Disabilities*, 7 DISABILITY & HEALTH J. S40 (2014); Kohn, *supra* note 14, at 315; Cathy E. Costanzo et al., *Supported Decision-Making: Lessons from Pilot Projects*, 72 SYRACUSE L. REV. 99, 109–11, 135 (2022) (noting that there has been little emphasis in the United States on promoting supported decision-making within guardianship).

[250] Whitlach & Diller, *supra* note 226, at 167; Carney, *supra* note 96, at 6 ("[L]ower social capital of potential applicants (such as lack of any informal support networks) on the part of those living in lower socio-economic areas may account for their over-representation and higher [utilization] of guardianship."); Nina A. Kohn et al., *Supported Decision Making: A Viable Alternative to Guardianship?*, 117 PENN ST. L. REV. 1111, 1137 (2013) ("In. . . informal arrangements such as supported decision-making, which may occur in private and with less accountability [than formal procedures such as guardianship], the potential for financial or other abuse likely increases."); *see also* Kohn & Blumenthal, *supra* note 248, at S41.

[251] Whitlach & Diller, *supra* note 226, at 188.

It is important to disrupt the binary divide because despite widespread criticism of guardianship regimes, it is nevertheless a widely held view that the retention of substitute decision-making systems in some form is inevitable, including in cases of advanced aged dementia, for example.[252] Indeed, no Law Reform Commission in the English speaking world has to date recommended the total abolition of substitute decision-making.[253] The binary framing that positions substitute decision-making and guardianship as inevitably abusive, and supported decision-making as always rights affirming, fails to take account of the specific legal systems in which substitute decision-making is practiced. There is indeed a notable absence of any studies comparing and analysing guardianship legislation and practice between jurisdictions internationally,[254] leading to a pervasive misunderstanding and lack of particularity in much of the article 12 scholarship and related disability advocacy. Kohn writes that:

> The international interest in guardianship has unfortunately led to a great deal of advocacy-oriented writing that speaks of guardianship in general and does not distinguish jurisdictions that have reformed their guardianship systems to, for example, require the use of limited guardianships, require guardians to take individuals' preferences into account, or impose guardianship based solely on functional need and not disability status. Thus, guardianship law frequently is critiqued without a recognition of the modern law reform efforts. [255]

If Ms. Spears had lived in Queensland or Victoria it is unlikely that a guardian or administrator would ever have been appointed because she would have been given notice of the proceeding and would have been allowed to have her own legal representation. If an urgent hearing were held in the absence of Ms. Spears, there would still have been a genuine reconsideration at the main hearing of whether she needed the ongoing appointments. Her father, as prospective and ongoing conservator, would have been obliged to pay for his own attorneys and would only have been permitted to receive fees as her administrator, not as her guardian. Moreover, if the California amendments recognizing supported decision-making agreements had already been in place, it is not obvious that this would have avoided an oppressive conservatorship in her case. More significant would be the proposed amendment allowing for the

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[252] Anderson, *supra* note 88, at 137 ("In some cases, guardianship is necessary and will best sustain the person with a disability."); *see also* Davis, *supra* note 178; *see e.g.*, David M. English, *Amending the Uniform Guardianship and Protective Proceedings Act to Implement the Standards and Recommendations of the Third National Guardiansihp Summit*, 12 NAELA J. 33 (2016) (discussing ongoing development of guardianship law).

[253] Shih-Ning Then et al., *Supporting Decision-Making of Adults with Cognitive Disabilities: The Role of* Law Reform Agencies – *Recommendations, Rationales and Influence*, 61 INT'L J.L. & PSYCHIATRY 64 (2018).

[254] Two exceptions to this are: CARNEY & TAIT, *supra* note 134 (predating the adoption of the CRPD), and Dayton, *supra* note 11.

[255] Kohn, *supra* note 14, at 325.

conservatee's right to legal representation of their choice, given that Ms. Spears' considerable wealth would have enabled her to engage counsel.

Broad-brush references to and prescriptions for abolition of "guardianship" have the detrimental effect of painting all substitute decision-making regimes with the same tainted brush. It is detrimental because it results in confusion as to what is actually demanded by article 12, and also creates a risk that the abolition of the term "guardianship' and indeed of all substitute decision-making will in itself be rights-enabling no matter what informal or formal system of supported decision-making may result. The highly publicised case of Britney Spears has usefully brought the oppressive nature of the conservatorship system in California to the fore and led to some much-needed legislative action. However, it has also added to the inaccurate and now popular perception that *all* guardianships worldwide are *always* abusive, no matter how wide or restricted the guardian's powers, and no matter what systems surround the guardian to ensure accountability (or not).

VI. CONCLUSION

The purpose of this article has not been to hail guardianship systems in the Australian states as human rights paragons, because they are not. Nor does it claim that there is no room for significantly improved access to best practice supported decision-making both within and outside of guardianship. The need is pressing. However, as Mahomed et al. writes, to meet these needs in Australia and elsewhere it is essential to develop supported decision-making regimes that are "contextually relevant, recognizing the significance of local resource availability and cultural norms," and that further efforts are needed "towards innovation and development of contextually relevant models, rather than wholesale importation of existing approaches."[256] Focusing on abolition of substitute decision making as ensuring the fulfilment of human rights for adults with cognitive disability may merely lead to defunding of the existing accountability systems for decision-making, as indeed has happened in at least one U.S. state.[257] Article 12 implementation must focus on developing supported decision-making not just in law, but *in practice*, and on ensuring that governments invest in providing supports and in systems of supported decision-making that are effective, transparent and accountable.

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[256] Faraaz Mahomed et al., *Introduction - A "Paradigm Shift" in Mental Health Care*, *in* MENTAL HEALTH, LEGAL CAPACITY, & HUMAN RIGHTS 1, 11 (Michael A. Stein ed., Cambridge Univ. Press 2021).

[257] *See* Theodorou, *supra* note 19; Whitlach & Diller, *supra* note 226, at 193 ("So far, SDM has largely been presented as a potential resource-saving alternative to guardianship, a measure that can keep people with significant needs out of the courts. But in order to ensure that it is actually a viable option for older persons without an existing network, public funding will be necessary.").

APPENDIX A

	California	**Australia**	
		Queensland	**Victoria**
General Principles, Purposes	Purpose includes: • Protect adult's rights • Determine extent of conservatorship • Address health and psychosocial needs • Promotes independence in the "least restrictive setting possible" • Best interest • Basic needs met • Manage and protect property.[258]	General Principles include: • Give support to make decisions and enable participation[259] • Respect autonomy, independence and right to make choices[260] • Same human rights and fundamental freedoms.	General Principles include: • Provide appropriate support to participate in decisions, express will and preferences and develop capacity • Will and preferences should direct as far as practicable decisions made for the person.[261]
Tests for Appointment: Personal	Adult is "unable to provide properly for his or her personal needs for physical health, food, clothing or shelter."[262]	1. Capacity test: a. "understand the nature and effect of decision," b. can communicate decisions "in some way," and c. must be able to make decisions "freely and voluntarily."	1. Capacity test: a. "understand information "relevant to the decision" and its effects; and b. retain that information to the extent necessary to make the decision; and c. use or weigh that information…; and
Tests for Appointment: Health Matters	Lacks mental capacity,[267] i.e. whether she is "unable to respond knowingly and intelligently to queries about medical treatment or is unable to participate in a treatment decision by means of a rational		

[258] CAL. PROB. CODE § 1800 (2023).

[259] *Guardianship and Administration Act 2000* (Qld) s 11B(3) (General principle 8(2)).

[260] *Id.* s 11B(3) (General principles 2 "Same human rights and fundamental freedoms") and (3)(a); *id.* s 11C(3) (Health care principles 2 "Same human rights and fundamental freedoms") and 2(b); *see also id.* s 11B(3) (General principles 4 "Maintenance of adult's existing supportive relationships") and 4(3)("The role of families, carers and other significant persons in an adult's life to support the adult to make decisions should be acknowledged and respected.").

[261] *Guardianship and Administration Act 2019* (Vic) s 8.

[262] CAL. PROB. CODE § 1801(a) (1996).

[267] CAL. PROB. CODE § 1890(a) (2016); *see also* WITKIN ET AL., *supra* note 135, at § 17 ("The 1995 Legislature enacted a comprehensive statute governing legal capacity, encompassing the capacity to execute wills and trusts and the capacity to consent to medical treatment.").

[267] *Id.* §§ 812, 810(b)(c).

	California	**Australia**	
		Queensland	**Victoria**
	thought process."[268]	2. Must be likely that the adult would otherwise make a decision involving unreasonable risk to their "health, welfare or property," and that lack of appointment means their needs not "adequately" met or their "interests . . . not adequately protected."[263]	d. communicate the decision…in some way"[264]
Tests for Appointment: Financial	"[S]ubstantially unable to manage his or her own financial resources or resist fraud or undue influence."[269]		2. Must have a "disability" and be "in need of a guardian or administrator."[265] Requires considering adult's preferences and whether it would be more appropriate to have decisions made informally.[266]
Powers: Personal	Conservator "has the care, custody, and control of . . . the . . . conservatee," and can restrict "personal rights . . .including . . . the right to receive visitors, telephone calls, and personal mail"[270]	Depending on terms of appointment, authorised to do anything in relation to a personal matter that the adult could do if they had capacity.[271]	"[P]ower to make decisions" about personal matters as specified in the appointment.[272]
Powers: Personal—Specific to Health Care	Conservator has "the exclusive authority to make health care decisions."[273] When diagnosed with dementia,[274] can "authorize" psychotropic medications if prescribed.[275]		

[268] *Id.* § 1881(a).

[263] *Guardianship and Administration Act 2000* (Qld) s 12.

[264] *Guardianship and Administration Act 2019* (Vic) s 5(1) ("decision-making capacity").

[265] *Id.* ss 30(2)(b), 31.

[266] *Id.* ss 31(1)(a)–(b).

[269] CAL. PROB. CODE § 1801(b) (1996); *see* WITKIN ET AL., note 135, at § 994 (citing Katz v. Superior Court, 141 Cal. Rptr. 234, 238 (Cal. Ct. App. 1977)).

[270] CAL. PROB. CODE § 2351 (2016).

[271] *Guardianship and Administration Act 2000* (Qld) s 33.

[272] *Guardianship and Administration Act 2019* (Vic) s 46.

[273] CAL. PROB. CODE § 2355 (2000).

[274] *Id.* § 2356.5; AM. PSYCHIATRIC ASS'N, DIAGNOSTIC AND STATISTICAL MANUAL OF MENTAL DISORDERS Section II (5th ed. 2013).

[275] CAL. PROB. CODE § 2356.5 (2016).

	California	**Australia**	
		Queensland	**Victoria**
Powers: Financial	To make any financial transactions regarding the estate,[276] with minor exceptions;[277]	As for personal matters – see above.	Power to make decisions about financial matters as specified in the appointment.[278] Has powers of capacitous adult (with some exceptions) and can implement decisions.[279] Must apply "general principles."[280]
Decision-making Principles: Personal and Financial	Act in conservatee's best interests.[281] For financial only, has fiduciary,[282] must act in good faith, and must "use ordinary care and diligence."[283] Must accommodate conservatee's desires only if it would not burden estate.[284]	Act honestly and with diligence and apply General Principles.[285] Must apply "general principles" – see above.	
		"Structured decision-making" 1. "preserve, to the greatest extent practicable, the adult's right to make their own decision; 2.[i]f possible, support the adult to make a decision." 3.Take into account adult's views. 4.If views can't be ascertained, then use	Decision-making principles include: 1. Give effect to will and preferences ("WP").[287] 2. If can't ascertain WP, then decision must "as far as practicable" reflect what the adult's WP "are likely to be."[288] 3.Where "likely" WP can't be determined, then "promote[s] personal and social wellbeing,"[289] and

[276] *Id.* § 1872.

[277] *Id.* § 1873; *id.* § 1870 (clarifying that "transaction" includes a gift, contract, sale, transfer, conveyance, incurring a debt, encumbering property, delegating a power, and waiving a right); for a trustee's general duties, *see* KOVE ET AL., *supra* note 112, at § 541; CAL. PROB. CODE Div. 9; *id.* § 2421 (providing that the conservator can, with court authorization, pay to the conservatee "a reasonable allowance for the personal use of the . . . conservatee.").

[278] *Guardianship and Administrative Act 2019* (Vic) s 33.

[279] *Id.*

[280] *Id.* s 34.

[281] CAL. PROB. CODE § 1851(d) (2022).

[282] *Id.* § 2101.

[283] CAL. PROB. CODE § 2401; *see also* 113 *id.* §§ 1872, 541; CAL. R. CT. 7.1059 (2023).

[284] CAL. PROB. CODE § 2113 (2023).

[285] *Guardianship and Administration Act 2000* (Qld) ss 34–35; *Guardianship and Administration Act 2019* (Vic) s 41.

[287] *Guardianship and Administration Act 2019* (Vic) s 9(1)(a).

[288] *Id.* s 9(1)(b).

[289] *Id.* s 9(1)(c) ("the personal and social wellbeing of a person is promoted by—(a) recognizing the inherent dignity of the person; and (b) respecting the person's individuality; and (c) having regard

	California	**Australia**	
		Queensland	**Victoria**
		"substituted judgment". [286]	4. "only override WP if. . . . necessary. . . . to prevent serious harm."[290]
Decision-making Principles: Personal—Specific to Health Care	"[I]n accordance with the conservatee's individual health care instructions, if any, and other wishes to the extent known. . . . Otherwise. . . in accordance with. . . . best interest. In determining the conservatee's best interest, the conservator shall consider the conservatee's personal values to the extent known to the conservator."	As for "personal" above. Also, for healthcare, a decision may be made by a guardian against an adult's objection only in limited circumstances.[291] Must also apply "Health care principles"—include: "same human rights," "independence," and choice.[292]	As for "personal" above. See also "Principles" in *Medical Treatment Planning and Decisions Act 2016* (Vic), including respecting adult's "preferences, values and personal and social wellbeing" and providing support to make decisions.[293]

to the person's existing supportive relationships, religion, values and cultural and linguistic environment; and (d) respecting the confidentiality of confidential information relating to the person; and (e) recognizing the importance to the person of any companion animal the person has and having regard to the benefits that may be obtained from the person having any companion animal.") (emphasis removed); *id.* ss 61, 4. Decisions for health treatment are also governed by the *Medical Treatment Planning and Decisions Act,* which provides that the guardian must "make the medical treatment decision that [they] reasonably [believe] is the decision that the person would have made if the person had decision-making capacity," but if unable for some reason, they must make a decision that "promotes the personal and social wellbeing of the person." *Medical Treatment Planning and Decisions Act 2016* (Vic) ss 61(1), (3)(a).

[286] *Guardianship and Administration Act 2000* (Qld) s 10.

[290] *Guardianship and Administration Act 2019* (Vic) s 9(1)(e).

[291] *See Guardianship and Administration Act 2000* (Qld) s 67.

[292] *Id.* s 11C.

[293] *Medical Treatment Planning and Decisions Act 2016* (Vic) s 7.

APPENDIX B

		California	Australia	
			Queensland	**Victoria**
Appointments, Oversight and Review		Superior Court governed by general rules of civil procedure.	Administrative tribunals—designed to be just, accessible, informal, economical, and quick.[294]	
Notice	**General**	5 days before hearing with investigator's report—see below.	8 days after filing and 7 days before hearing.	7 days after filing,[295] and before hearing (no period specified).[296]
	Temporary, Interim, Urgent	5 days—waived "for good cause," i.e. "immediate and substantial harm."	May be without notice if immediate risk of harm to the adult's health, welfare or property.	
Length	**Temporary, Interim, Urgent**	Earlier of 30 days or substantive application heard, but can be extended.	Max 3 months (unless "exceptional circumstances" then + 3 months.	21 days + 21 days.
	General	Indefinite unless ordered otherwise.	Not prescribed in legislation.	
Evidence		Investigator: Before the hearing must review the application and evidence of mental incapacity for health care decisions[297] and make recommendation to court. Usual rules of evidence apply at hearing.	Conduct proceedings "with as little formality and technicality and determine each proceeding with as much speed . . . [as] a proper consideration of the matter[s]" permits.[298] Not bound by the rules of evidence, but have wide information gathering powers and must follow the rules of natural justice or procedural fairness. In Qld the tribunal has an express obligation to ensure that the parties understand the proceedings,[299] and hearings can also be conducted on the papers.[300]	

[294] *Civil and Administrative Tribunal Act 2009* (Qld) s 3(b).

[295] *Civil and Administrative Tribunal Rules 2018* (Vic) r 4.09.

[296] *Civil and Administrative Tribunal Act 1998* (Vic) s 99.

[297] *See* CAL. PROB. CODE § 811 (1999).

[298] *Civil and Administrative Tribunal Act 1998* (Vic) s 98; *see Civil and Administrative Tribunal Act 2009* (Qld) s 28.

[299] *Civil and Administrative Tribunal Act 2009* (Qld) s 29.

[300] *Id.* s 32.

	California	Australia	
		Queensland	**Victoria**
Adult's Attendance at Hearing	For general conservatorship, must be present unless medically unfit[301] or don't wish to attend and don't oppose the conservatorship or conservator.[302]	Natural justice provides the adult has a right to be heard.	
Standard of Proof	Clear and convincing evidence.	Legislation is silent, but balance of probabilities.[303]	
Representation	Applicant has right to representation. Court has discretion to appoint counsel for adult from panel. Adult can't choose their own counsel if considered not to have capacity to instruct.	No right to representation—except a person with impaired capacity has a right to representation by a lawyer or can be represented by "appropriate" other person.[304]	Neither party has right to representation (with limited exceptions), but discretion to allow a "professional advocate" (lawyer or other person).
		Registrars must assist the parties in whatever way is necessary.	
Costs	Conservatee may be ordered to pay the legal costs of both parties and cost of investigator.	Default rule is that each party bears their own costs.	
Reviews	Review required within six months, after 12 months, then every one or two years,[305] or on court instigation or on application by an interested person including adult.[306]	Review at least every five years,[307] or on application by others, including the adult or "interested person"[308]	Review optimally within 12 months, or otherwise within 3 years unless exceptional circumstances.

[301] CAL. PROB. CODE § 1825(b) (1990).

[302] *Id.* § 1825(a)(3).

[303] O'CONNOR ET AL., *supra* note 164, at 143.

[304] *Queensland Civil and Administrative Tribunal Act 2009* (Qld) ss 43(2)(b)(i), (4).

[305] CAL. PROB. CODE § 1850 (2023); *see also* JUD. COUNCIL OF CAL., HANDBOOK FOR CONSERVATORS CH. 7, § 4 (rev. ed. 2016).

[306] CAL. PROB. CODE § 1850(b) (2023) (regarding an investigator, if they have conducted an investigation and provided a report in the preceding six months (including for an application for temporary conservatorship) then another one is required. Except in the case of a temporary conservatorship, the investigator must make a second visit to the conservatee and the report must include information on the effect of the temporary conservatorship on the conservatee).

[307] *Guardianship and Administration Act 2000* (Qld) s 28.

[308] *Id.* s 29.

	California	**Australia**	
		Queensland	**Victoria**
Reasons for decision	None provided and the Investigator's report and court files are confidential (report can be released if in best interests).[309]	Reasons for decision provided on request[310] and selected de-identified reasons published..[311]	

[309] CAL. PROB. CODE § 1826(c) (2023).

[310] *Queensland Civil and Administrative Tribunal Act 2009* (Qld) s 122(2); *Victorian Civil and Administrative Tribunal Act 1998* (Vic) s 117(2).

[311] *Victorian Civil and Administrative Tribunal Act 1998* (Vic) s 147.