"The size of the estate is a legitimate concern when an award of full compensation may deprive the conservatee of funds needed for his or her support."

2nd Civil No. B 140538

COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

In re the Conservatorship of JOEL M. LEVITT Conservatee.	)	2nd Civil No. B 140538 LASC No. BP 045890

Appeal from an Order of the Superior Court of
Los Angeles County, Hon. Gary Klausner, Judge presiding

APPELLANT'S OPENING BRIEF

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1.
INTRODUCTION

Almost two decades ago, our Legislature recognized that abuse of the vulnerable elderly was a grave societal problem and that the State bears responsibility for seeing to the provision of resources and legal remedies sufficient to protect these disadvantaged members of the population against custodial abuse and neglect. After several additional years of experience under statutes intended to protect the elderly, the Legislature concluded that public agencies were failing in their responsibility to dependent adults, and that no legislative remedy was likely to be successful unless private civil attorneys were given incentives to take up the cause of abused elderly persons and prosecute cases that were frequently contentious, unremunerative, and otherwise unattractive.

Nine years after the Legislature articulated the necessity for adequate incentives for private counsel to undertake elder abuse cases, the legislative purpose remains unrealized. The policies of the lower courts treat abuse cases as a disfavored form of litigation and award compensation to attorneys on the basis of the size of the estate, without regard to the value of the litigation in preserving life and health of the elderly, or the detrimental impact that routine fee reductions have on the willingness of counsel to take such cases. Attorneys correctly perceive that probate courts dislike having these cases on their dockets, that they involve contentious opponents with every incentive to prolong litigation, and that trial courts routinely treat such litigation as little more than unduly protracted estate administration, with the attorney's ultimate compensation being based almost entirely upon the size of an estate depleted after long delay by the rapacity of the defendant and the expenses of care.

This case is typical of many. Joel Levitt was financially and emotionally exploited by a woman brought into his home to provide care after a debilitating seizure. She induced Levitt to marry her and to make the her sole beneficiary of his will. Even after a Conservatorship was established, she continued to manipulate and endanger him. Appellant Marc Hankin - among the most accomplished elder abuse specialists - undertook two and a half years of litigation to preserve Levitt's safety and a substantial estate, at the conclusion

of which the trial court cut his compensation to a rate which effectively guarantees that Appellant and other experienced attorneys will not undertake such cases.

The reality is that elder abuse cases are not being prosecuted because trial courts are not applying the criteria necessary to assure that there are adequate incentives to attract competent counsel. The typical elder abuse cases, involving seniors with modest assets under the influence of an individual predator, are not prosecuted, and such cases are virtually unknown on appeal, no doubt because of the lack of incentive to litigate them to the point where appellate law can be made. This case presents the Court with an opportunity to redress lower court practice and to establish a judicial policy consistent with the design of the Legislature to encourage prosecution of these actions.

2.
STATEMENT OF THE CASE

In April, 1997, Joel Levitt was 77 years of age, legally blind, and suffering from the effects of both stroke and alcohol induced seizures which led to hospitalization in 1993 and 1995. (App. 21:4-22:3) He had a history of alcohol abuse; following the death of his wife around 1983, he had become depressed and his memory began to fail. (App. 20:12-21:23) Levitt required Dilantin (which was dangerous when combined with alcohol) to control seizures. (App. 22:19-22)

A. **Levitt Falls Under the Influence of Barbara Gold**.

In December or January, 1996, Levitt suffered seizures which required hospitalization. Upon release, it was recommended he have 24-hour care. (App. 79, 25) On March 3, 1997, a private placement agency sent a nurse-helper, Barbara Gold, to provide live-in care for Levitt because of his mental and physical frailty. Gold was a 46 year old widow. Gold was African-American, a fact initially causing Levitt to demand her removal: Levitt held life-long racial biases. (App. 22:28-23:4, 25:9-27:24, 79)

Gold soon overcame Levitt's resistance and began exploiting him. On March 3,

1997, her first day of work, Gold obtained a check from Levitt for her home phone bill. (App. 182:2-3, 355) Within a few days, Levitt asked for the return of a valuable coin collection from a nephew who had been asked to safeguard it. (App. 81:9-13) Gold made efforts to have Levitt put $250,000 in certificates of deposit in her name, obtained his car, and managed to withdraw thousands from his accounts. (App. 358, 364, 564)

Levitt confided to his physician, Dr. Feit, that he planned to marry Gold. When Dr. Feit questioned whether Gold was really interested in his money, Levitt said that Gold didn't need his money because was wealthy. (App. 501-503)

On April 11, 1997, six weeks after her arrival in his home, Levitt and Gold were married in Las Vegas. (App. 79:16-17) The best man was Gold's room-mate, Michael Sherre. (App. 262) When Levitt told his niece of the marriage, he confusedly claimed that he had known Gold "for two or three years," and then realized it had only been a few weeks. (App. 27:7-28:1)

On April 15, 1997, Levitt went to City National Bank with Gold, where they attempted to put Gold's name on several of Levitt's certificates of deposit. The manager refused to do so after consulting law enforcement. (App. 81:2-7)

On May 1, Levitt appeared at a branch of the Bank of America with a younger man who appeared to be a relative of Barbara Gold asking for a $4,000 advance on Levitt's credit card. (App. 80:1-17) They were redirected to a bank manager who knew Levitt and who thought he was disoriented and seemed to be guided by the younger man. The manager refused to advance the money after consulting with the bank's legal department. The two men left in a car with a black woman identified as Levitt's wife. (App. 80:14-28)

While LAPD detectives were able to prevent Gold from accessing the accounts, the banks could not indefinitely freeze Levitt's accounts without a court order. (App. 357, 363, 724:18-23)

On April 24 and April 30, 1997, Levitt executed wills giving his entire estate to Gold and naming her roommate, Michael Sherre, as executor without bond. (App. 565:13-21)

B. **Petition for Conservatorship**.

Levitt's niece, Jane Solofra, became increasingly concerned by Levitt's deteriorating mental and physical condition, malnutrition, and his confused state of mind regarding his relationship with Gold (App. 25-28), eventually leading the matter to a public protective agency.

On April 25, 1997, Appellant Marc B. Hankin, as attorney for professional conservator Frumeh Labow filed a Petition for Conservatorship of Levitt's person and estate. (App. 1-28) Because of the immediate threat to Levitt's property, Labow was appointed temporary Conservator of the Estate on *ex parte* application despite opposition from Levitt and his attorney. (App. 32)

Opposition to permanent and temporary Conservatorships was filed by Culver Van Buren, ostensibly on behalf of Levitt, asserting that Levitt was not incapable of caring for himself, that the proposed Conservator had no standing, and raising technical defects. (App. 35-40) Van Buren demanded an immediate jury trial, with no continuances. (App. 39:11-18)

The Temporary Letters were extended on June 3, 1997. (App. 41)

C. **Levitt's Mental Condition.**

Levitt presented himself in most circumstances as coherent, and was functional in controlled settings. (App. 725:2-13) Van Buren hired a neuro-psychologist who reported that Levitt was competent and scored well on some tests. (App. 725:10-13) Hankin had the burden of piercing this appearance by demonstrating that dementia affected Levitt's abstract reasoning and ability to plan for himself in a manner that was not usually obvious and not reflected in those test results. He did this with the aid of a psychologist and forensic psychiatrist (demonstrating that the tests presented by the conservatee's expert failed to conform to standard protocols) and by interviewing Levitt's physician and family. (App. 725:10-727:22)

Stephen E. Webber was appointed as Probate Volunteer Panel (PVP) attorney for the Conservatee. On June 4, 1997, Webber petitioned *ex parte* for an order appointing an independent medical examiner to report on Levitt's mental condition and susceptibility to

undue influence. (App. 43-48) The Court granted the Petition, appointing Bonnie Wolkenstein, Ph.D. (App. 49-50)

Dr. Wolkenstein's report submitted for the June 25, 1997 hearing concluded that deficits in Levitt's memory, attention, abstract reasoning rendered him substantially unable to manage his finances or make medical decisions for himself, and that cognitive impairment, depression, dependence and isolation from other family members rendered him susceptible to undue influence at the time of his marriage to Barbara Gold. (App. 51-62) She also found Levitt's physical presentation reflected poor care. (App. 475-496)

PVP Attorney Webber reported that Levitt's estate included certificates of deposit totaling from $250,000 to $500,000 (App. 78) Webber recounted Gold's efforts to gain control of Levitt's financial assets and the use of levitt's money to pay Gold's personal expenses. He also reported that Gold had isolated and alienated from family and friends who had previously provided him with housekeeping and companionship. Gold had been indifferent to the fact (not understood by Levitt) that his remarriage would result in loss of Levitt's medical insurance coverage. (App. 79-86)

D. **Discovery and Trial re Conservatorship Petition.**

Because Mr. Van Buren had demanded am early trial, the conservatorship issues were set for jury trial on August 7, 1997. Hankin obtained an *ex parte* citation to make Gold appear and produce documents (App. 66-77)

Gold was deposed on July 22 and Levitt on July 30 pursuant to Court order. Gold testified at deposition that she was living permanently with Levitt, but that he was paying for an apartment she kept to receive mail. (App. 89:13-28) Hankin moved *ex parte* for issuance of subpoenas for production at trial of records regarding Gold's prior employment and her apartment. (App. 88-96, 97-98)

The Petition for Conservatorship came on for trial on August 7, 1997 before the Honorable Gary Klausner. After the considerable trial preparation, however, Levitt consented to the conservatorship. (App. 725:2-728:6) The Court found Levitt substantially unable to care for his person or finances, unable to resist fraud or undue influence, and

incapable of consenting to medical care, and appointed Frumeh Labow conservator. (App. 105-108) A claim for annulment of Levitt's marriage to Gold and request to separate her from the conservatee were dismissed without prejudice pursuant to stipulation. (App. 107:21-24)

E. **Van Buren's Petition for Fees**.

Culver Van Buren filed a Petition for payment for his services and costs incurred in opposing the conservatorship, seeking a total award of $30,975 at the rate of $200 an hour for attorney time, plus costs. (App. 109-113) Van Buren claimed over 235 hours in attorney and paralegal time had been expended in defending the Conservatorship Petition. (App. 113:3-10)

PVP counsel Webber's objection to Van Buren's fee request contained an analysis of the time expended which concluded that $13,897.50 represented a reasonable sum for professional fees incurred. (App. 127-132) The PVP attorney and Van Buren thereafter agreed on a fees of $17,875.00 plus costs (App. 134-135), which the Court confirmed by order of October 27, 1997. (App. 140-141)

F. **Hankin's Effort to Obtain Accounting and Discovery from Gold**.

The Conservator's initial Inventory of December 5, 1997 showed an estate of $470,702, including $220,704 in bank deposits and his home appraised at $249,000. (App. 143)

On December 5, 1997, Hankin filed a Petition to Compel Barbara Gold to File an Accounting, based on evidence that the conservatee had made gifts to her, paid her rent, and paid a $450 phone bill for Gold. Levitt was unable to remember the amounts involved. (App. 147-161) The Citation issued (App. 163) and on March 17, 1998 Gold, though attorney Ollie Manago, filed a First Account which also sought payment to her of $6,320 in salary for July, August and half of September, 1997 (after the purported marriage). (App.

165-175) Her account listed some cash and credit card expenditures by Levitt on her behalf in the amount of $7,405, and $18,000 in funds paid or allegedly owed to her from march to December, 1997. (App. 171-173)

Hankin prepared objections by the Conservator to Gold's accounting as lacking itemizations, containing conflicting amounts and expenses for a car allegedly sold by Levitt to Gold, and claiming salary for personal services rendered while Gold was allegedly married to Levitt. It also noted that she had interfered with provision of services by care-givers hired by the conservator, had wrecked Levitt's automobile and then abandoned him, after which he had been required hospitalization. The Conservator requested a continuance to do discovery into these matters prior to hearing. (App. 176-178)

The PVP attorney similarly objected to Gold's accounting, observing that she had improperly received over $11,000 which should be returned to the estate, that she had made demonstrably false statements regarding the care rendered to him, and that the conservatee was easily influenced and did not confirm Gold's account of their relationship. (App. 181-188)

Hankin noticed Gold's deposition and served interrogatories in September, 1998, directed at discovering financial records and identifying patterns in Gold's treatment of patients. (App. 246-250, 277-278)

Hankin deposed Gold on October 7, 1998, at which time she failed to produce requested documents. (App. 253-254) Her attorney promised to provide the documents later. (App. 217:20-23, 224:6-15, 274)

Levitt's deposition was noticed by Gold's attorney, Ollie Manago, for October 12, 1998. Levitt did not appear because Gold persuaded him (against the advice of his care-giver) that he did not have to attend.[1/] (App. 310-315) Ms. Manago, after repeatedly promising that responsive documents would be produced, moved to withdraw on the grounds that Gold had failed to cooperate in preparing responses to the conservator's interrogatories and requests for production, and that Gold was "not being quite candid with"

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1. When a phone call was made to Levitt's home the morning of the deposition, both Hankin and nurse Wendy Doering heard Gold screaming at Levitt that he was not to go. (App. 311)

her counsel. (App. 206-215) Manago asked Hankin and PVP attorney Webber to refrain from filing motions on the pending discovery issues until she was relieved of her representation of Gold. (App. 224-225, 228, 305)

Ms. Manago later withdrew her motion to withdraw (without notice to the other parties). (App. 218-219) Hankin, for the conservator, filed a motion to compel Gold to answer the interrogatories and deposition questions, and to produce documents. (App. 230-301) He also moved to impose sanction against Gold for failing to proceed with a deposition of Levitt noticed by her attorney and obstructing Levitt's attendance. (App. 302-318) The PVP Attorney joined in both motions, noting that they were "critical to the proper representation of the Conservatee's interests." (App. 319-320)

Gold opposed the motions, asserting that she had provided all the information in her possession subsequent to filing of the motion to compel, and that there was "no credible evidence" that Gold was responsible for Levitt's failure to appear at deposition - although she did not actually deny having persuaded Levitt not to attend. (App. 321-328, 329-334) Hankin's Replies again recounted Gold's screaming at Levitt not to attend the deposition and her continued failure to produce financial, employment and other information needed for trial. (App. 335-346) They also noted that the conservator's attorney had to spend three full days in efforts to obtain requested discovery because of Gold's resistance, and urged that this expense should be fully assessed against Gold rather than the Conservatee's estate. (App. 336:25-337:15)

On December 17, 1998, the Court granted the Motion to Compel, ordered additional answers to all questions at issue without exception, and granted the motion for sanctions based on Gold's obstruction of Levitt's deposition. (App. 442-446) The court denied the motion to compel production based on Gold's representation in court that she did not have the requested records.[2] (App. 730:5-8) Despite many hours incurred by the Conservator's attorney in obtaining further discovery, the Court awarded only $1,000 in sanctions against Gold for the motion to compel, $1,000 for obstructing Levitt's deposition, and $3,000 on the motion for sanctions forcing the Estate or Hankin to

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2. Later, at deposition, Gold said that she did have the documents.

shoulder the bulk of the expense resulting from Gold's intransigence. (App. 443, 446, 448-449)

Shortly thereafter, Gold signed a Substitution of Attorney relieving Manago and placing herself in *propria persona*. (App. 351)

Gold's deposition resumed on December 28, 1998. On arrival at Hankin's office, she asked if her attorney had arrived; after waiting for two hours, Hankin finally learned Gold had no attorney and that Gabor Szabo, who later substituted in as her attorney, did not plan to have counsel present for Gold. (App. 380-381) When the deposition finally began, she complained that she was unable to read documents presented to her because of a diabetic condition requiring emergency medical treatment. When Hankin and Webber agreed to continue the deposition to the next day, Gold began to make baseless claims that Webber was threatening her, threw a cup of coffee at him, and attacked him and Hankin. She would not leave when asked, but called a cab when no one was looking, left in the cab and returned a hour and a half later to pick up her own car. (App. 380-381, 408-409)

Gold also refused to cooperate in preparation of a Joint Trial Statement, as required by local rule. (App. 382)

Hankin moved for monetary sanctions based on Gold's refusal to cooperate at deposition or in preparation of the Joint Statement. (App. 385-410) He also filed an *in limine* motion for terminating, issue and/or monetary sanctions to be heard at trial scheduled for January 6, 1999. (App. 372-384)

Gold opposed by the motion for monetary sanctions through her new counsel, Mr. Szabo, on the grounds that the entire action was due to a “greedy nephew,” that Gold had previously been deposed and her second deposition had been noticed for four days prior to trial, and that the lack of cooperation was due to Gold's prior attorney, Ms. Manago. (App. 418-433) The Court took testimony and granted the Conservator's motion on February 16, 1999, awarding $3000.00 in sanctions against Gold. (App. 448-449)

Gold substituted herself *in pro per* in place of Szabo on March 8, 1999. (App. 452)

G. **Aborted Trial on Accounting and Undue Influence**.

At trial on January 7, 1999, before Judge Henry Shatford, the Conservator and PVP contended that Gold's accounting should be disapproved, the marriage voided, that transfers to Gold from Levitt were voidable as the product of fraud and undue influence, and that Gold's mistreatment had resulted in physically injury and deterioration of Levitt's health. (App. 354-371) Although testimony was taken concerning Levitt's capacity to assent to Gold's acts, the trial was aborted when presiding Judge Klausner instructed Judge Shatford that Gold was to be given 60 days to file an amended Accounting, essentially wasting the whole proceeding. (App. 436-440; 731:1-732:14; 542-549)

The Court ordered Gold to file by March 8 a detailed Amended Accounting tracing all funds and property received by Gold from Levitt from the date she first began proving services to him, and providing full documentation of their use and provenance. (App. 438) The Amended Accounting was set be heard on April 6, 1999, and 14 subpoenaed witnesses were ordered to return. (App. 437) The Amended Accounting was never produced, and the matter was continued multiple times by the court. (App. 732:12-19)

H. **Petition to Annul Marriage**.

As the Conservator, Hankin and the PVP attorney monitored the situation, they learned from care-givers that Gold berated and mistreated Levitt, and complained that her attorney had told her that she should spend several nights a week with Levitt. (App. 728:7-729:7)

With the concurrence of the PVP attorney, the Conservator filed a Petition to annul Levitt's marriage to Barbara Gold on the grounds of incompetence. The Petition remained in abeyance while competence and undue influence issues were litigated in the probate proceedings already set for hearing. (App. 728:24-729:14)

I. **Civil Suit for Damages**.

On January 25, 1999, the Conservator, acting by Hankin, filed a Complaint against Gold for conversion, breach of fiduciary duty and elder abuse, and for money had and

received. (App. 459-464)

Gold was served with the Summons and Compliant on February 5, 1999 by service on her then attorney, Gabor Szabo, who had stipulated to accept service on Gold before the Court at the January 7 hearing. (App. 538) Gold was personally served in the courthouse on April 6, 1999. (App. 555) Gold did not answer or otherwise respond. On May 4, 1999, Hankin filed a motion for an order directing the clerk of the court to enter Gold's default (App. 537-562), with a Supplement filed on May 27, 1999. (App. 612-620)

On June 1, 1999, the Court directed the Clerk to enter Gold's default, and also ordered Gold to vacate the conservatee's home in Burbank. (App. 629-630) Gold's default was entered in October, 1999. (App. 813)

J. **Petition for Substituted Judgment**.

Levitt's survival faced continuing threats during the duration of the purported marriage to Gold. Levitt required daily administration of Dilantin to control seizures; immediately after the temporary Conservator was appointed, he stopped seeing his doctor. Gold failed to give him the Dilantin, and he lost approximately 20% of his body weight during the first five months of marriage. Levitt was found abandoned by Gold and wandering on Ventura Boulevard; he was hospitalized and the Conservator hired new attendants to provide 24-hour care. In addition to recurring dementia, Levitt suffered from prostate cancer, his blood pressure became elevated, and his dilantin levels had dropped to virtually zero, a potentially deadly situation. (App. 728:13-729:7)

Thousands of dollars given to Gold were unaccounted for (App. 593-594), and Gold's efforts to loot the conservatee's estate had not abated. Even after the Court established a temporary conservatorship and prohibited transfer of his assets in April, 1997, Gold attempted to withdraw funds through Levitt's credit card. (App. 80:1-28) Gold had also had Levitt execute wills dated April 24 and April 30, 1997 naming her Levitt's sole beneficiary and designating Gold's roommate, Michael Sherre, to serve as executor without bond. (App. 565:13-21)

In May, 1999, the Conservator filed a Petition for Substituted Judgment seeking

authorization pursuant to Probate Code §2580 *et seq.* for the Conservator to execute a will so as to avoid the conservatee's estate going to Gold in the event of his death prior to annulment of the marriage. (App. 459-464) The Conservator also moved to strike any objection to the Petition that might be filed by Gold on the ground that she was in contempt of court in failing to obey the Order of February 16, 1999 compelling further responses to interrogatories. (App. 523)

The PVP Attorney joined in support of the Petition for Substituted Judgment, observing that Gold had single-mindedly attempted to loot the conservatee's estate, and that the wills executed by Levitt in April, 1997 were without doubt the result of Golds' pernicious influence. (App. 563-577; 621-623)

At a hearing of May 19, 1999, Judge Klausner expressed reluctance to alter the Conservatee's estate plan or to make a determination of his capacity to make a will prior to death, and questioned whether the court could grant the requested relief prior to a decree annulling the marriage. (App. 592-594) The matter was continued to June 1, 1999, and a Supplement to the Petition for Substituted Judgment filed recounting the evidence of incapacity, undue influence, the deterioration of the conservatee's condition, and exploitation by Gold of Levitt's assets for which the conservator had by then been seeking relief for two years.[3/]

(App. 592-620) It also noted that absent a substituted will, Gold might take as a pretermitted spouse even were the April, 1999 wills invalidated, and that the delay in resolution of the various civil proceedings (and possible criminal charges against Gold then under investigation) threatened to allow Gold to inherit in view of Levitt's precarious health. (App. 601:15-602:16)

At a hearing of June 1, 1999 before Judge Klausner, the Court granted the Petition for Substituted Judgment and authorized the Conservator to execute the proposed will on behalf of the conservatee. (App. 626-627)

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3. During a March, 1999 hearing in the similar action, In re Peggy Page, Judge Klausner told Mr. Hankin that the Court only rarely and reluctantly made findings of contempt and urged him to take a pending contempt based on Gold's refusal to object the order compelling answers to interrogatories off calendar. In response, Hankin filed a declaration addressing the importance of contempt relief to elder abuse and conservatorship proceedings. (App. 453-457)

K. **Sale of Levitt's Home**.

Levitt's condition worsened to the point the Conservator had to place him permanently in a nursing home. In October, 1999, the Conservator petitioned for authority to list and sale his home. (App. 816-818) The PVP Attorney concurred in light of Levitt's advancing memory loss, physical deterioration and occasional bizarre behavior, and the continued interference of Barbara Gold. (App. 841-844)
The Court authorized sale of the house by Order of January 31, 2000. (App. 847)

L. **Account, Report and Fee Requests**.

On October 7, 1999, the Conservator filed her first Account and Report, together with a request for fees for Conservator's and Attorney's services. (App. 631-811) The inventory and receipts totalled $487,639; after disbursements, the estate had assets of $370,517 as of August 31, 1999.[4/] (App. 632-634, 639; RT 3:14-21) Levitt was then in a skilled nursing home, and would be eligible for full coverage under Medi-Cal in the event his assets were depleted. (RT 4:11-22, 8:24-9:7, 13:13-25; App. 739:19-22)

The Conservator requested fees in the amount of $29,027 for 393 hours spent in caring for the conservatee. (App. 634:8-12) Hankin sought fees for 324 hours at $225.00 per hour for most of the work and $250.00 for the most recent hours, for a total of $76,594.50, less the sum of $4,250 advanced by Levitt's niece and nephew (to be reimbursed by the estate), plus expenses of $1,044.89. (App. 634:24-635:8, 799) Attorney George Glasco sought legal fees of $17,550. (App. 634:9-10)

Hankin's fee request represented efforts over a period of almost two and a half years in establishing both the temporary and permanent conservatorships, in sequestering assets taken by Gold, removing her access to Levitt and his property, prosecuting discovery to locate assets and identify misappropriated property, prosecuting the substituted judgment action and numerous motions. It was supported by an extensive description of the course

4. That sum includes an estimated value of $249,000 for Levitt's home, which was sold in February, 2000 for $235,000. (App. 632:18-19, 855-857)

of the case, Hankin's efforts, and the benefits to the Conservatee. (App. 722-806)

PVP Attorney Webber concurred in the Accounting and scrutinized Hankin's fee request. (App. 834-840) He observed that Hankin had actually **under-billed** by excluding some hearings from his fees, and that his "billings for activities where the PVP was also involved, whether telephone calls, depositions or court appearances, compared favorably with times recorded by the PVP." (App. 837-838) He stated:

> This PVP has observed Gold's behavior at numerous court hearings, one abbreviated trial, at least two depositions, and on several other occasions. Her antics are numerous and varied. They range from fabricating testimony, feigning illness, switching attorneys immediately before trial, and to simply disregarding court orders. The initial impression is that the bills submitted by attorneys Hankin and Glasco are quite high. However, after careful review and in consideration of Gold's obstructive behavior, it is apparent to this PVP that hours not billed for far exceed any hours that could be questioned.
>
> The difficulties and complexity of this case, which are well documented in the Court's file, definitely justify the number of hours billed by Mr. Hankin and Mr. Glasco in this matter.
> . . . .
>
> Mr. Hankin is held in high esteem by his colleagues and the courts of this state for his efforts on behalf of the elderly and disabled. H[is] expertise in the field of conservatorships justifies his hourly rate of $225 to $250 in this geographic area.
> [App. 837:24-838:12]

Mr. Webber also filed a Petition for fees, reporting that he had expended 161.8 hours and requesting fees at the rate of $225.00 per hour for a total of $36,405. (App. 821-831) The Court granted the PVP Attorney $32,000.00 in fees by Order of February 8, 2000. (App. 854)

M. **Ruling on the Petition for Fees**.

The fees requests were heard on January 3, 2000 before Judge Klausner. (App. 847)

Judge Klausner used the value of the estate as the benchmark for the fees award, explaining that "the Court has a problem in making any distribution that is over one-third of what the estate is," and on that basis reduced the fees, though counsel for the conservatee and the PVP attorney alike advised him of the difficulty in obtaining counsel for elder abuse cases and of the adverse impact of such routine fee reductions on the availability of representation. (RT 3:25-16:5) The Court replied:

> . . . I am not upset about anybody's hours. I am not even upset about the pay rate other than the fact that I have to consider the size of the estate when I am looking at the pay rate.
>
> To say that no one would take these accounts - and I have heard you mention that before counsel - but I have got to tell you, I heard that for ten years over in criminal where they said, if you want good attorneys to take death penalty cases, you have got to pay them the extraordinary rate on it, that's not true. There are people who will work for a little bit less and they will still do an outstanding job and not throw people out on the streets.
>
> I know this is going to be uncomfortable for you and for everybody here, but I am going to cut the rates down on all this. And I am doing it not because I don't think the work justifies it. I think the time spent does justify it. I think don't [*sic*] the estate justifies it . . .
> [RT 10:11-12:3]

Indeed, Judge Klausner conceded that the reduction meant that attorneys were not being compensated in such cases at the market rate, but that the size of the estate dictated that result:

> I have no problem with the time that you have spent, the effort that you have spent. Are you getting as much as you would on the outside or that you deserve on the outside? No. There is no question about it [at] all.
> [RT 15:24-28]

By order of February 3, 2000, the court approved and settled the First and Final Account, authorized fees to the Conservator of $29,027, and authorized the payment to

Hankin of $64,000 in fees for the period April 22, 1997 to August 31, 1999. (App. 849, 851:5-7)

As Judge Klausner was advised, payment of the full fee request would not jeopardize Levitt's future care: he was in a comfortable residential care facility and Medi-Cal coverage assured him full medical care and support.

On March 31, 2000, Hankin filed his Notice of Appeal from the Attorney's Fee portion of the Order of February 3, 2000. (App. 858)

3.
APPEALABILITY OF ORDER

An attorney seeking fees from a conservatorship estate is an interested party and may appeal from an adverse ruling on his or her fees petition. Estate of Trynin (1989) 49 Cal.3d 868, 873, 264 Cal.Rptr. 93; Estate of Lagerson (1962) 210 Cal.App.2d 788, 791, 26 Cal.Rptr. 783.

4.
SUMMARY OF ARGUMENT

Those who routinely handle elder abuse cases are aware of the apparent dilemma often presented by cases of abused seniors. Vulnerable and frequently ill, they are dependent for support upon resources already plundered, and ill-positioned to finance litigation necessary to restore those assets. They are frequently victimized by individuals whose litigiousness is directly proportional to their lack of scruple, who may be judgment-proof, and whose sole economic concern is to protract proceedings so as to hang on to stolen assets or continue pilfering from the victim.

In this and many cases, however, the conflict between the expense of litigation necessary to preserve or restore the estate and the resources needed to care for the elder or conservatee is more apparent than real. Full compensation for legal services is essential to the statutory scheme for protecting the elderly, rather than adverse to their interests. The

reality is that, absent intervention of a conservator and an experienced attorney willing to diligently prosecute such matters, not only will the conservatee's entire estate be lost, but the conservatee's personal survival is threatened, as the present cases illustrate. Financial predation is most often accompanied by physical abuse and lack of proper nutrition or medication, hastening the death of an already debilitated conservatee. If the lives of elderly victims are to be protected, there is realistically no alternative to fee awards which will attract and reward capable counsel.

While this reality is recognized by statutes and case authority, in practice the trial courts have implemented practices which reduce elder abuse cases to second-class status, which analogizes the abuse case to a mere property dispute when fees are awarded, discouraging experienced attorneys from undertaking such cases and virtually guaranteeing under-compensation even in cases where full compensation at market rates would not compromise the conservatee's care.

Even where misappropriated assets might otherwise be recoverable, the unreliability of fee awards and the fact that counsel themselves having to finance the litigation often compels settlement at a fraction of the claim's real value. Financial pressure forces counsel and conservator to agree to ephemeral protection for the senior, to the ultimate detriment of the estate and victim. Perpetrators know this and use it to their advantage - as the instant case demonstrates.

This situation calls for an appellate decision which applies to elder abuse and conservatorship cases the principles for assessing attorney fee awards which have been recognized in other areas of law, such as private attorney general awards and fee-shifting statutes. Because the attorney's sole compensation in abuse and conservatorship cases will, as a rule, be a court award, it is critical to the availability of representation that these fee awards be predictable and carefully reasoned according to well articulated legal standards. This is especially crucial where the victims have small estates - as in the present case - and the attorney accordingly faces doubtful prospects of recovering his fees even at the outset. Appellant hopes to assist the Court by this Brief in developing those standards.

5.

PUBLIC POLICY RECOGNIZES THAT DETERRENCE OF ELDER ABUSE REQUIRES FULL COMPENSATION FOR LEGAL SERVICES

A. The Legislature Has Mandated Adequate Attorney Compensation to Fulfill the Public Responsibility to Protect Seniors.

Though responsibility for protection of vulnerable seniors rests with the state (Welfare and Institutions Code §15600), the authorities concede that public agencies have proven incapable of intervening in the vast majority of abuse cases, and that only suitable incentives to encourage action by private attorneys in cases of small estates will secure protective and remedial action.

The history of the Elder Abuse and Dependent Adult Civil Protection Act ("EADACPA"), Welfare and Institutions Code §15600 *et. seq.*, bears out the difficulty of obtaining representation in elder abuse cases.[5/] As summarized by Delaney v. Baker (1999) 20 Cal.4th 23, 33, 82 Cal.Rptr.2d 610:

> The purpose of [EADACPA] is essentially to protect a particularly vulnerable portion of the population from gross mistreatment in the form of abuse and custodial neglect. As the Court of Appeal, in ARA Living Centers-Pacific, Inc. v. Superior Court (1993) 18 Cal.App.4th 1556, 1559, 23 Cal.Rptr.2d 224 (ARA Living Centers), has stated regarding the genesis and development of the Elder Abuse Act: "In 1982, the Legislature recognized 'that dependent adults may be subjected to abuse, neglect, or abandonment and that this state has a responsibility to protect such persons.' (Former 15600, added by Stats. 1982, ch. 1184, 3, p. 4223.)" It adopted measures designed to encourage the reporting of such abuse and neglect. (§15601 et seq.) Subsequent amendment refined the 1982 enactment, but the focus remained on reporting abuse and using

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5. Appellant is the author of EADACPA and other legislation intended to protect the elderly.

> law enforcement to combat it (see ARA Living Centers, supra, 18 Cal.App.4th at p. 1560). Also, Penal Code §368 was enacted, making it a felony or misdemeanor (depending on the circumstances), for, among other things, a custodian of an elder or dependent adult to willfully cause or permit various types of injury. (Stats. 1986, ch. 769, 1.2, p. 2531.)
>
> In the 1991 amendments at issue here, the focus shifted to private, civil enforcement of laws against elder abuse and neglect. "[T]he Legislature declared that 'infirm elderly persons and dependent adults are a disadvantaged class, that **cases of abuse of these persons are seldom prosecuted as criminal matters**, and **few civil cases are brought in connection with this abuse due to problems of proof, court delays, and the lack of incentives to prosecute these suits**.' (§15600, subd. (h), added by Stats. 1991, ch. 774, 2.) It stated the **legislative intent to 'enable interested persons to engage attorneys to take up the cause of abused elderly persons and dependent adults**.' (Id., subd. (j))" (ARA Living Centers, supra, 18 Cal.App.4th at p. 1560.) As was stated in the Senate Rules Committee's analysis of Senate Bill No. 679, "in practice, **the death of the victim and the difficulty in finding an attorney to handle an abuse case where attorneys fees may not be awarded, impedes many victims from suing successfully**. [] This bill would address the problem by: ... authorizing the court to award attorney's fees in specified cases; [and by] allowing pain and suffering damages to be awarded when a verdict of intentional and reckless abuse was handed down after the abused elder dies." (Sen. Rules Com., Analysis of Sen. Bill No. 679 (1991-1992 Reg. Sess.) as amended May 8, 1991, p. 3.) [20 Cal.4th 33, emphasis added.]

In undertaking "to provide heightened remedies for . . . 'acts of egregious abuse' against elder and dependent adults. . ." (Delaney, *supra*, 20 Cal.4th 35), the Legislature thus established two fundamental principles: (1) there is a **public** responsibility to protect the **persons** of vulnerable elderly from custodial abuse[6]; (2) existing civil and criminal

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6. Note the definition of "neglect" in former §15610.57 of the Welfare and InstitutionsCode as "the negligent failure of any person having the care or custody of an elder or a dependent adult to exercise that degree of care which a reasonable person in a like position would exercise. Neglect includes, but is not limited to, all of the following: (a) Failure to assist in personal hygiene, or in the provision of food, clothing or shelter. (b) Failure to provide medical care for physical and mental health

remedies having proven ineffective, it is essential to assure adequate **"incentives to prosecute these suits**" by private counsel.[7]

B. **Because of Judicial Practice in Compensating Counsel in Elder Abuse and Conservatorship Cases, EADACPA Has Failed to Protect the Most Vulnerable Seniors.**

The legislative policy of encouraging attorneys to undertake such litigation has gone tragically amiss, especially in the most numerous cases where assets are minimal and economic incentives for counsel most crucial. One measure of the ineffectiveness of EADACPA under present practice is the paucity of published decisions construing it since its enactment in 1991. Of seven cases citing it, one (People v. Heitzman (1994) 9 Cal.4th 189, 37 Cal.Rptr.2d 236) was a criminal prosecution. Another was a declaratory relief action brought by long term health care facilities regarding administrative citations (California Association of Health Facilities v. Department of Health Services (1997) 16 Cal.4th 284, 65 Cal.Rptr.2d 872) and the remaining four cases were, in effect, institutional malpractice actions brought against substantial corporate defendants. ARA Living Centers-Pacific, Inc. v. Superior Court (1993) 18 Cal.App.4th 1556, 1559, 23 Cal.Rptr.2d 224 Community Care and Rehabilitation Center v. Superior Court (2000) 79 Cal.App.4th 789, 94 Cal.Rptr.2d 343; Akers v. Miller (1998) 68 Cal.App.4th 1143, 80 Cal.Rptr.2d 857;

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needs. . . . (c) Failure to protect from health and safety hazards. (d) Failure to prevent malnutrition." See Delaney, *supra*, 20 Cal.4th 34.

> "Abuse" includes "physical abuse, neglect, fiduciary abuse, abandonment, isolation, abduction, or other treatment with resulting physical harm or pain or mental suffering, or the deprivation by a care custodian of goods or services necessary to avoid physical harm or mental suffering." Welfare and Institutions Code §15610.07.

7. Among the incentives was Welfare and Institutions Code §16657 (drafted by Appellant), which allows for an award of attorneys fees and costs against a defendant upon a showing of abuse by clear and convincing evidence.

Delaney v. Baker, *supra*, 20 Cal.4th 23.[8] There is not one case involving abuse by an individual outside of the context of institutional liability. In other words, **the typical elder abuse case in which an individual preys upon an isolated, uninstitutionalized senior - such as Page and Levitt - has never reached the stage of published appellate review**, though there must be thousands of such cases that would have merited legal action. The reason is evident: they are not getting to the trial courts.

Defense strategy in elder financial abuse cases is typically to aggressively litigate and prolonging the litigation until plaintiff's resources are exhausted or until the elder dies. Heirs, anxious to receive their inheritance, are willing to settle for terms more favorable to defendants than the elder who was victimized, and heirs do not make a sympathetic plaintiff. Judges simply do not take either the attorneys fees or punitive damages provisions of EADACPA seriously, and elderly victims of financial abuse rarely achieve even a "make whole" settlement or full relief even after an expensive and time consuming trial. (RT 13:26-14:26)

An informal survey by Appellant of attorneys involved in probate and trust work suggest that few, if any, would take a case involving theft of $80,000 from an incompetent person - even if assets could be found and recovered - where the perpetrator had arranged for a lawyer to represent the proposed conservatee in resisting a petition for conservatorship and the perpetrator was highly litigious. (App. 742:3-22) The Bar simply does not have the confidence that they will be awarded fees sufficient to justify the time that such a case would take. In all likelihood, most elder abuse cases are never filed for the simple reason that lawyers are unwilling to take them. (App. 742:23-743:5; RT 13:26-14:21)

The failure of EADACPA in practice was recognized by a Resolution of the Los Angeles County Board of Supervisors on September 12, 2000, which urged additional measures to improve access to legal services for elderly persons with modest estates who

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8. One other depublished decision, in which the Supreme Court granted and then dismissed review, was an action by a terminated employee against a nursing home. Maxwell v. Beverly Enterprises California, Inc. (1998) 75 Cal.Rptr.2d 222.

are subject to exploitation and abuse.[9]

6.

TRIAL COURTS MUST APPLY AN ANALYSIS WHICH ASSURES THAT FEE AWARDS IN ABUSE CASES ARE SUFFICIENT TO ENSURE AVAILABILITY OF COUNSEL

A "gut feeling" approach to fees, or a rule of thumb based on the value of the estate, fails the essential purpose of the fees award in elder abuse cases: to assure that lawyers will be ready and willing to act in such cases to protect the life and health of the senior **regardless** of his or her wealth. Courts require criteria which intelligibly relate fee awards to this objective.

The factors traditionally considered in assessing fee requests in probate are: time spent, value of the estate, skills exercised, amount in dispute, and results obtained. Estate of Beach (1976) 15 Cal.3d 623, 645, 125 Cal.Rptr. 570. As discussed below, elder abuse cases involve additional non-economic considerations and hardships on the attorney which are reflected in the more comprehensive array of factors considered in a "lodestar" analysis.

Under the "lodestar" or "multiplier" method of calculating attorneys' fees approved in Serrano v. Priest (1977) 20 Cal.3d 25, 141 Cal.Rptr. 315, the reasonable hourly fee for the attorney is the starting point. Additional factors then considered to enhance or diminish the straight hourly calculation include:

1. The time and labor required;
2. The novelty and difficulty of the issues;
3. The skill requisite to perform the legal services properly;
4. The preclusion of other employment;
5. The customary fee in the community for similar work;
6. The fixed or contingent nature of the fee;

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9. Appellant will file a separate request that the Court take judicial notice of this Resolution.

7. The time limitation imposed by the client or the circumstances;
8. The amount involved and the results obtained;
9. The experience, reputation and ability of the attorney;
10. The undesirability of the case;
11. The nature and length of the professional relationship with the client; and
12. Awards in similar cases.

[Maria P. v. Riles (1987) 43 Cal.3d 1281, 1294, 240 Cal.Rptr. 872; Calif. Attorneys' Fees Awards Practice (Calif. CEB 1982) Chapter 5]

An additional and fundamental factor in conservatorship or elder abuse cases is the necessity of the litigation for protection of the conservatee and the impact on the conservatee's quality of life.

As noted in Meister v. Regents of the University of California (1998) 67 Cal.App.4th 437, 448, 78 Cal.Rptr.2d 913, the adoption of the loadstar principle in Serrano was not based upon a statutory entitlement to fees but rather "on the premise that anchoring the analysis to the loadstar figure is the only way of approaching the problem that can claim objectivity, a claim which is obviously vital to the prestige of the bar and the courts. Thus its pronouncements cannot be read as necessarily limited only to fees awarded under [C.C.P.] section 1021.5." See also Flannery v. California Highway Patrol (1998) 61 Cal.App.4th 629, 646, 71 Cal.Rptr.2d 632, noting that the Legislature appears to have endorsed the Serrano criteria, and that exercise of judicial discretion in setting legal fees must be based on proper utilization of the adjustment method. (61 Cal.App.4th 647)

The risk of non-payment, combined with often lengthy delays in payment of fees and the advancement of costs are the factors most frequently cited by courts for award fee enhancement or multipliers. Without enhancements, experienced, skillful attorneys cannot reasonably be expected to undertake cases in which compensation does not reflect the market rate for the inherent risk of either delayed payment or no payment at all. To arrive at a reasonable attorneys' fee, the court must incorporate a premium for the risk of non-

recovery, for the delay in payment and for the economic risks associated with the fee arrangement. Serrano v. Priest, *supra*, 20 Cal.3d at 49; Downey Cares v. Downey Community Development Comm. (1987) 196 Cal.App.3d 983, 242 Cal.Rptr. 272.

The factors peculiar to the representation of abused elderly or conservatees weigh heavily in favor of **enhancement** of fees, not routine reduction as practiced by the probate courts.

A. **The Elder Abuse Attorney is at Risk of Non-Payment**.

The attorney undertaking an elder abuse case faces both delay and uncertainty in being paid comparable to those faced by contingency fee attorneys. In effect, the lawyer finances the case for the client and gambles on results in the suit and the ultimate availability of funds sufficient to pay his fees. Cazares v. Saenz (1989) 208 Cal.App.3d 279, 288, 256 Cal.Rptr. 209. The prospects for payment - and the incentives to take the case - are far grimmer in a conservatorship with a modest estate and insolvent victimizer. The prospect of recovering assets from defendants who have been living on the conservatee's assets is precarious, and the conservatee's daily maintenance, medical care and other financial demands are also consuming the estate.

These uncertainties normally call for a higher rate of compensation, as they involve "economic considerations separate and apart from the attorneys' work on the case." Cazares v. Saenz, *supra*, 208 Cal.App.3d 287-288.[10/]

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10. As the Court put it in Cazares, *supra*, 208 Cal.App.3d at 288:

> Thus, in theory, a contingent fee in a case with a 50% chance of success should be twice the amount of a non-contingent fee for the same case. . .
>
> . . . the lawyer, under such an arrangement, agrees to delay receiving his fee until the conclusion of the case, which is often years in the future. The lawyer, in effect, finances the case for the client during the pendency of the lawsuit.

B. **Elder Abuse Cases Are Highly Litigious**.

Elder abuse cases impose special burdens on counsel, particularly because the elder's life may hang in the balance. Unscrupulous litigants like Ms. Gold know how to manipulate court procedures and use disruptive tactics to their advantage. Victimizers are often relentless in efforts to recapture the conservatee and the estate, and in resisting efforts to remove them from the gravy train, as Page and Levitt demonstrate. Obstreperous conduct by opposing parties favors enhancement of fees. Serrano v. Unruh (1982) 32 Cal.3d 621, 634 fn. 18, 638, 186 Cal.Rptr. 754; Chalmers v. City of Los Angeles 676 F.Supp. 1515, 1524-25 (C.D.Cal. 1987), *aff'd*, 796 F.2d 1205 (9th Cir. 1986).

C. **Elder Abuse Cases Demand Special Expertise**.

These cases are often contests over the mind of the senior, requiring expertise in demonstrating incapacity and undue influence, and knowledge of how to use medical experts. The conservatee may present an appearance of rationality and retain feelings of dependence upon the defendant, requiring the specialized skills of an attorney who knows how to pierce these appearances and establish a pattern of undue influence. (App. 725:2-727:2)

D. **Attorney Compensation is Regularly Delayed**.

Unlike the typical hourly fee case, where the client is billed monthly so the attorney is not *de facto* financier of the litigation, recovery of fees in conservatorship and elder abuse cases is delayed, often for years, while a struggle proceeds for control of assets.[11/] Payment of $200 per hour is reduced to a present value of $162 when delayed three years.

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11. Of course, extended delay is also common in other cases under fee award statutes. In Serrano v. Unruh, *supra*, the challenge to the financing of public schools was filed in 1968, the fee award was made in 1975, and the Supreme Court's decision that counsel was entitled to compensation for time incurred in seeking fees was rendered in 1975.

It is by now a truism that delay in compensation effects a reduction. Cazares v. Saenz, *supra*, 208 Cal.App.3d at 288. As the United States Supreme Court stated in Missouri v. Jenkins (1989) 491 U.S. 274, 283, 109 S.Ct. 2463, 2469 (decided under 28 U.S.C. §1988):

> Clearly, compensation received several years after the services were rendered - as it frequently is in complex civil rights litigation - is not equivalent to the same dollar amount received reasonably promptly as the legal services are performed, as would normally be the case with private billing. We agree, therefore, that an appropriate adjustment for delay in payment - whether by application of current relevant historic hourly rates or otherwise - is within contemplation of the statute.

In Federal courts, delay in recovery of attorneys' fees is compensated by either: (1) applying the attorneys' current rate to all hours billed during the course of the litigation, increasing the rate for the earlier work, or (2) using the attorneys' historic rates and adding a prime rate enhancement. In Re Washington Public Power Supply Systems Securities Litigation (9th Cir. 1994) 19 F.3d 1291, 1305; Skelton v. General Motors Corp. (7th Cir. 1988) 860 F.2d 250, 255 fn 5.

The trial court here not only failed to compensate for delay, uncertainty, litigiousness and special demands of the litigations, but reduced the hourly rate below even the normal rate.

E. **Unpredictability of Fee Awards Discourages Representation in Elder Abuse Cases**.

As in fee shifting cases, public policy supports an increase in the predictability of awards and a reduction in randomness. Ramos v. Countrywide Home Loans, Inc. (2000) 82 Cal.App.4th 615, 626, 98 Cal.Rptr.2d 388, citing Burlington v. Dague (1992) 505 U.S. 557, 566, 122 S.Ct. 2638. See Estate of Trynin (1989) 49 Cal.3d 868, 879, 264 Cal.Rptr. 93, noting that if attorneys "have no reasonable expectation of full and fair compensation, they will be reluctant to undertake extraordinary services on behalf of decedent's estates."

The inability of counsel to enter into a contract with conservatee providing for definite hourly rates, the uncertain condition of the estate after years of litigation, and the vagaries of judges in awarding fees all render the prospects of future compensation exceedingly speculative, absent well defined legal standards preventing random departures from the rule of full compensation.

F. **Elder Abuse Cases Impose Severe Demands on the Attorney's Practice**.

Elder abuse cases impose time constraints in several respects that favor fee enhancement of the fee award: they preclude other employment, and they demand immediate action to alleviate imminent dangers to the conservatee and the conservatee's estate. Maria P. v. Riles, *supra*, 43 Cal.3d 1281, 1294 fn. 8 (lodestar calculation should consider "the extent to which the nature of the litigation precluded other employment by the attorney.")

As in the instant case, the conservator must act quickly and often *ex parte* to remove the senior from the defendant's control, and to sequester and protect the remaining assets. Hankin had to act immediately to preserve Levitt from the rapacity of Gold, to block interference by Gold with the Conservator's efforts to see that Levitt got proper care. The demands required him to put aside other matters and act with dispatch regardless of what other work he may have had. These incessant interruptions have a devastating impact on a lawyer's ability to maintain a normal practice or give appropriate attention to other cases.

G. **Elder Abuse Cases Are Undesirable.**

Another factor favoring enhancement of the fee award is the "undesirability of the case." Flannery v. California Highway Patrol, *supra*, 61 Cal.App.4th 629, 642; Allen v. Shalala (9th Cir. 1995) 48 F.3d 456, 458 fn. 3. Few if any lawyers would consider an elder abuse case involving a feeble conservatee, an estate modest in light of the senior's anticipated longevity and costs of care, and a litigious and financially impecunious defendant to be a desirable undertaking. The legislative history described in Delaney and

the dearth of such cases in the legal literature bears witness to the unattractive nature of these cases, though there is surely a vast number of vulnerable elders needing legal representation. The bulk of these cases never reach the courthouse door; those that do usually settle with some transient protection for the victim that allows the lawyer and professional conservator to cut their losses and extract themselves from what they come to recognize as a quagmire. The court is spared endless acrimonious interruptions, and the conservatee allowed to die outside the concerned oversight of the court.

H. Preservation of the Conservatee's Life and Health Justifies Enhanced Compensation.

As the record here shows, in valuing the attorney's services, trial courts tend to look upon these cases as not very important property disputes. They accordingly reduce fee requests based on what is ostensibly "the amount involved." This reasoning is fallacious. The value involved is the conservatee's life and health, and the "results obtained" is the conservatee's survival and freedom from abuse and oppression. The objective of such suits, as Delaney puts it, is to "protect a particularly vulnerable portion of the population from gross mistreatment in the form of abuse and custodial neglect." (20 Cal.4th 33) To base fees on monetary recovery or size of the estate is to discount the value of the representation in protecting life and health and to discourage attorneys from undertaking to protect any except the wealthiest seniors.

7.
TRIAL COURT POLICIES WHICH ROUTINELY CUT ATTORNEY FEES IN ELDER ABUSE CASES UNDERMINE PUBLIC POLICY

The trial court followed a rule of thumb which reduced attorney fees based solely on the size of the estate, expressing the view that fees should not exceed one-third of the conservator estate as of the time the fees petition is heard. This approach is unsound in the

circumstances of this case where the conservatee had $370,000 in assets, no financial concerns, and was permanently situated in a good residential care facility which would be paid for by MediCal even if his assets ran out. The trial court's rule is manifestly counter-productive in terms of affording protection to conservatees and other elderly, and unfair to their attorneys.

Attorneys undertaking representation of seniors with modest estates are assured that they will not only **never** be rewarded for any of the loadstar factors, but will not even receive normal hourly rates reflecting the actual market value of their services: they will **always** be under-compensated. It is an abuse of discretion when the court, instead of exercising independent review of the facts of the case, fixes compensation by a predetermined formula or rate. Halpin v. Superior Court (1966) 240 Cal.App.2d 701, 706, 49 Cal.Rptr. 857. It is an even more serious abuse when courts set fees in a manner that undermines the legislative policy of protecting disadvantaged persons from exploitation and physical mistreatment.

Insofar as the court determined the "value of services" solely by reference to the size of the estate, it was clear error. **The primary value to the conservatee is protection against predation and neglect of his or her person**. Delaney, *supra*, 20 Cal.4th at 33. The victims of such torts are hostages, and the first duty of the conservator and attorney is to wrest them from control of the predator and place them in a safe situation where they receive appropriate care. The value of this cannot be measured by the size of the estate; to do so would value the lives of poor seniors at less than the lives of the wealthy.[12/]

The effect of the court's reduction of fees is in many instances to reward the attorney prosecuting the matter at a rate **lower** than the PVP attorney whose payment is

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12. Even in the case of decedents' estates where physical and psychological welfare is not at stake and the interests protected by the attorney are entirely economic, it is error to fix compensation solely by reference to the financial benefit accruing to estate. "Services that do not directly benefit the estate in the sense of increasing, protecting, or preserving it are nonetheless compensable if the estate's attorneys or representatives in performing the services were 'acting in consonance with the fiduciary duties imposed upon them.'" Estate of Trynin, *supra*, 49 Cal.3d at 874, citing Ludwig v. Superior Court (1933) 217 Cal. 499, 500, 19 P.2d 984.

virtually certain, and who accepts a PVP assignment in part as a public service. Yet the conservator's attorney who has been engaged privately does not enjoy the deferential treatment from the court that many PVP attorneys receive, is subjected to vast uncertainties over the rate and timing of payment, and undergoes vastly greater stress and obligations in pursuing the litigation. Specialists in elder abuse, in particular, cannot be expected to operate as a charitable or partially charitable enterprise, or there will be no specialists. Unlike the PVP attorney, the demands on the conservatee's attorney precludes him or her from taking other remunerative work.

The trial court's practice values the services of attorneys combatting elder abuse at less than those of attorneys for normal probate estates, who have the prospect of occasional enhanced fees since large estates will afford both the statutory fee based on the size of the estate for ordinary services, and the prospect of contingent fees or an increased hourly rate for extraordinary services where such would be recoverable in non-probate cases. (Probate Code §910; Estate of Trynin, 49 Cal.3d 877-879) The attorney representing the ordinary victims of elder abuse has no prospect of breaking even, much less earning a fee in excess of his normal hourly rate for work at a more leisurely pace.

A. **Public Policy Demands Compensation for All Hours Reasonably Spent**.

When the law seeks vindication of strong public interests by awarding legal fees so as to encourage attorneys to undertake given litigation, full compensation is required. Where the private attorney general theory supports an award, "absent circumstances rendering an award unjust, the fee should ordinarily include compensation for **all hours reasonably spent**, including those related solely to the fee." Serrano v. Unruh (1982) 32 Cal.3d 621, 624, 633, 186 Cal.Rptr. 754.

Since the trial court took no issue with the hourly rate charged by Hankin, the fee reduction imposed by the court is, in effect, the denial of compensation for part of the time incurred by Hankin, irrespective of the fact the court found that the efforts undertaken were reasonable and well merited.

Estate of Trynin (1989) 49 Cal.3d 868, 871, 264 Cal.Rptr. 93, held that even the

denial of attorneys fees for time reasonably spent seeking fees for extraordinary services to a probate estate "would ultimately be deleterious to decedent's estates and heirs because attorneys would be reluctant to perform services necessary to the proper administration of decedent's estates if the compensation awarded for such services could be effectively diluted or dissipated by the expense of defending against unjustified objections to their fee claims."

The notion that fair compensation means compensation for all hours reasonably spent is shared by the federal cases. "In computing the fee, counsel for prevailing party should be paid, as is traditional with attorneys compensated by a fee paying client, for all time reasonably expended on a matter". Hensley v. Eckerhart (1983) 461 U.S. 424, 430 fn. 1, 103 S.Ct, 1933.

Judicial instance on full compensation is far more critical in elder abuse and conservatorship cases than in those involving "fee-shifting" statutes intended to encourage certain types of litigation such as race discrimination under the FEHA (Government Code §12965(b)), private attorney general suits (C.C.P. §1021) or other statutes. Under fee-shifting statutes, the attorney often has alternate sources of compensation pursuant to agreement with the client. In discrimination cases, for example, the attorney will have a contingent fee agreement earning fees well above a normal hourly rate, or will be able to charge the client an hourly rate pursuant to retainer agreement, placing the risk of an adverse outcome on the client. By contrast, the conservatorship attorney case cannot make such arrangements and has no guarantee as to the rate of compensation at the outset of the litigation; his right to compensation is founded on statute, and fee agreements are generally unenforceable. Estate of Trynin, *supra*, 49 Cal.3d at 873.

B. Delay in Compensation Renders the Trial Court's Approach Arbitrary.

The fees award becomes a vanishing act when the court applies a one-third rule of thumb to an estate which has been opened for two or three years, during which it may have been diminished by extraordinary expenses in addition to the normal costs of the conservatee's care and upkeep. The under-compensation that results from a delay in

payment without an offsetting enhancement adds insult to injury. The lawyer who undertakes representation when there is a substantial opening inventory should not be expected to subsidize other expenses of the estate occurring during the course of a lengthy conservatorship proceeding by a reduced fee at the conclusion of the proceeding, or attorneys will not take such cases in the first place, to the detriment of conservatees' survival and finances.

A percentage formula discriminates against the attorney who delays seeking periodic or interim fee payments, since incremental payments will always be a much smaller portion of the estate than the total fee at the end of a complex case. The success of the attorney's efforts is one factor the court is required to consider in awarding fees. Hence, the largest portion of the award must be granted only after success has been achieved. An attorney who benefits the estate by delaying his fee petition should not suffer by the delay. Treating the fees request in an abuse case or in a conservatorship where the estate is constantly declining in the same manner as the attorney fees in a decedent's estate thus conflicts with the EADACPA objectives by systematically disfavoring the elder abuse attorney who protects a life along with the conservatee's estate.

C. The Trial Court's Approach is Arbitrary Where an Award of Requested Fees Would not Imperil the Elder's Care.

The size of the estate is a legitimate concern when an award of full compensation may deprive the conservatee of funds needed for his or her support. It should not be an excuse for reducing otherwise reasonable fee requests where a full award would in no manner endanger an elder's care, as when the conservatee has died or when available public social and medical services will maintain the senior in good stead.

Levitt was not dependent on his estate for his future medical care or for his maintenance in a residential care facility, so the size of the estate should have been only a marginal consideration in assessing Hankin's fees, and not a ground for reducing attorney fees which the court conceded were based on a reasonable rate and appropriate services.

If a conservatee has large medical expenses or nursing home costs, the estate may be exhausted well before the litigation is concluded. But if there is enough left to pay the attorney's fees **and** there are resources (*e.g.* through Medi-Cal or other insurance) to assure that the conservatee is maintained in the future with appropriate care, then the court has given misplaced priority to the expectancies of heirs over the interests of the elderly.

Nor is the public policy of paying attorneys at fair market rates in conflict with Medi-Cal or other public services. A growing pattern of elder abuse involves the theft of the victim's estate, with the victim being dumped in a nursing home where Medi-Cal picks up the tab. This pattern will become more frequent unless the judicial response, by increasing private enforcement, decreases the likelihood of perpetrators "getting away with it."

The public policy of encouraging the conservator and attorney to protect the conservatee, and the need to deter abusive conduct by assuring the availability of counsel, outweighs any expectation of a deceased conservatee's heirs in an inheritance - a legacy which would be altogether non-existent but for the attorney's efforts. It is an especially inappropriate consideration when the conservatee's life has been saved because of early and vigorous intervention of counsel. The rule applied by the court sacrifices the physical safety of the conservatee for the prospective interests of heirs.

D. The Reasonable Value of Legal Services Should be Assessed as of the Outset of the Representation.

Courts must look to the broader purposes contemplated by the Elder Abuse Act and to the broader consequences of inadequate compensation. The focus should be not on what seems to be in the financial interest of the conservatee or heirs at the **time of the fee petition**, but on the availability of legal assistance **at the time the abuse and exploitation is in progress**.

It is implicit in the legislative policy behind EADACPA that courts should judge fee payments according to the effect on availability of counsel at the time the senior is still under the influence or control of the perpetrator. The value of the attorney's services are

most appropriately measured at the point he or she intervenes to preserve the conservatee's health and safety. The paramount question is whether fees are sufficient to induce attorneys to undertake these cases in the first instance to protect the elder's **non-pecuniary** interests. This focus is reflected in EADACPA's 1991 amendment stating "the legislative intent to 'enable interested persons to engage attorneys to take up the cause of abused elderly persons and dependent adults.'" Delaney v. Baker, *supra*, 20 Cal.4th 33.

8. THE TRIAL COURT ABUSED ITS DISCRETION BY FAILING TO CONSIDER ALL FACTORS OR TO GIVE A REASONED BASIS FOR THE AWARD, AND BY ARBITRARILY REDUCING HANKIN'S FEE REQUEST

The trial court made no determination as to what the value of the legal services were, but rather took a reasonable hourly rate and then decided that as a rule of thumb the estate should bear only a portion of those fees irrespective of all other considerations. The court had no criticism of hourly rates, and discounted none of the work performed as unnecessary. It applied a one-factor analysis.

In California, "any fee-setting inquiry begins with the 'lodestar': the number of hours reasonably expended multiplied by a reasonable rate." Margolin v. Regional Planning Commission (1982) 134 Cal.App.3d 999, 1004, 185 Cal.Rptr. 145.

> "California courts have consistently held that a computation of time spent on a case and the reasonable value of that time is fundamental to its determination of the appropriate attorneys' fee award." . . . The reasonable hourly rate is that prevailing in the community for similar work. . . The lodestar figure may then be adjusted, based on factors specific to the case, in order to fix the fee at the fair market value for the legal services provided. . . Such an approach anchors the trial court's analysis to an objective determination of the value of the attorney services, insuring that the amount awarded is not arbitrary. [PLCM Group, Inc. v. Drexler (2000) 22 Cal.4th 1084, 1095, 95 Cal.Rptr.2d 198]

So far as can be determined, the trial court made no such analysis in the instant case. While it found that Hankin's services were reasonable and appropriate, the court articulated no analysis of how it arrived at the reduction of the fee request, how enhancing factors applied, or why an hourly rate different from that claimed by Mr. Hankin would be more reasonable or consonant with rates "prevailing in the community for similar work," other than citing the size of the estate. The court's award thus stands as an arbitrary and unreviewable figure.

A fee award which is founded on incorrect application of legal standards will be reversed (Flannery v. California Highway Patrol (1998) 61 Cal.App.4th 629, 647, 71 Cal.Rptr.2d 632), as will an award which fails to apply the lodestar analysis in a careful manner. "[S]ince determination of the lodestar figure is so fundamental to calculating the amount of the award, the exercise of that discretion must be based on the lodestar adjustment method." Press v. Lucky Stores, Inc. (1983) 34 Cal.3d 311, 322, 193 Cal.Rptr. 900.

The award is an abuse of discretion in failing to reflect any consideration except the size of the estate. Ramos v. Countrywide Home Loans, Inc., *supra*, 82 Cal.App.4th 615, observed that "the fees award must be scrutinized for its compliance with all applicable standards," and that where the ruling gave no explanation for the basis of the award or the effect of enhancement factors, the reviewing court would not be justified in presuming that the trial court considered only appropriate factors. The Court of Appeal accordingly remanded for the trial to make a ruling articulating the grounds for enhancing the award. See also Lealao v. Beneficial California Inc. (2000) 82 Cal.App.4th 19, 97 Cal.Rptr.2d 797, remanding because of the lower court's failure to consider lodestar factors.

The elements peculiar to elder abuse cases which favor enhancement rather than reduction of fees are discussed above. Additional factors and evidence, unrebutted, also favor award of the entire amount requested:

A. **Skill and Experience of Counsel.**

Mr. Hankin is a preeminent specialist in elder abuse law. He was principal drafter of

EADACPA, of legislation to protect families from catastrophic health care costs (Welfare & Institutions Code §14006.2), and of the Due Process in Competence Determinations Act enacted in 1995. He is an active part of the Los Angeles City and County Fiduciary Abuse Specialist Team and many other organizations, former member of the Executive Committee of the State Bar Estate Planning, Trust and Probate Section, and past Chair of the Section's Elder Law Committee, a frequent lecturer and author of a chapter in the CEB volume on Elder Law.

Mr. Hankin's high competence in the field, and the value of his efforts in this case, were also attested to by the PVP Attorney. (App. 838:5-12)

B. **Reasonable Hourly Rate**.

Mr. Hankin's requested hourly rate was justified by his skills, experience, and by legal service rates in Los Angeles, as PVP counsel stated. (App. 838:10-12) The rate is modest: see Lealao v. Beneficial California Inc., *supra*, 82 Cal.App.4th 19 (hourly fees normally charged from $225.00 to $350.00 in class actions for lending violations) and Bihun v. AT&T Information Systems, Inc. (1993) 13 Cal.App.4th 976, 16 Cal.Rptr.2d 787 (sexual harassment/retaliation; fees at $450 an hour held reasonable considering lead counsel's knowledge, skill and experience, the contingent nature of his fees).

Hankin's rate was not excessive; to the contrary, there is no question but that in the Los Angeles legal community, the private market pays a premium to attorneys who undertake cases involving risk of non-payment and delay in compensation. Judge Klausner acknowledged that Hankin's requested rate was less than he can command in the market place. (RT 15:24-28) The predictable consequences of the court's decision in that Hankin - a leading specialist in elder abuse law - has decided to eschew cases such as Levitt and Page for the foreseeable future. (RT 5:6-16)

9.

CONCLUSION

Aside from death penalty cases, in no other type of litigation does the payment of fair attorney fees so closely entail life and death. In recognition of this, EADACPA was intended to place elder abuse litigation on an economically sound basis by assuring full compensation at rates comparable to those set by the market. Yet judicial practice has relegated abuse cases - already an unattractive area of practice - to an economically disfavored status.

The lower courts' practice systematically disfavors litigation on behalf of elderly plaintiffs with small estates, and assures that the more effort attorneys put into such cases, the more they will be underpaid. The judicial attitude towards legal fees is the critical factor in the willingness of counsel to undertake such work. The unpredictable reduction of fees below what would be acceptable to the attorney at the outset of the litigation, and below that charged for comparable work in the marketplace, is an inherent disincentive to taking these cases.

Neither the court in the instant case nor probate judges generally analyze fee requests in a manner that serves the legislative objectives or permits effective appellate review, and they will continue to do so until the appellate courts articulate the standards discussed herein. Elder abuse litigation will have a sound economic basis only when the lower courts are required to award fees through a lodestar-type analysis which recognizes that the physical and mental safety of the elderly victim is the primary benefit secured by this litigation. This Court should correct the mistaken emphasis on the value of the estate, and affirm that it is a factor that should have overriding significance only when an award of the full value of legal services would jeopardize the elder's future care.

Appellant submits that this Court should reverse the attorneys fee award and remand to the Superior Court, and that this Court should take this opportunity to remind the trial courts and the legal community that fee awards in elder abuse cases must rest on a sound appreciation of the public policy of providing sufficient financial incentives to encourage private attorneys to undertake these arduous but important cases.

Respectfully Submitted,

DATED: December 11, 2000

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