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# ADULT CONSERVATORSHIP IN THE UNITED STATES: FLAWS AND PROPOSED SOLUTIONS TO THE LEGAL SYSTEM

*Margaret Sheffield<sup>1</sup> & Alex Stevens<sup>2</sup>*

In 2013, April Parks, the owner of a professional guardianship company—“A Private Professional Guardian, LLC”—knocked on Rennie and Rudy North’s home in Las Vegas.<sup>3</sup> Although Parks had never previously been in contact with the Norths, she informed them that she was there to remove the Norths from their home and transport them to an assisted living facility. Unbeknownst to the Norths, April had obtained legal guardianship over the couple.<sup>4</sup> The Norths were not summoned to court nor had a lawyer to defend their rights. Working closely with a physician’s assistant, Parks obtained a vague medical certification of incapacity. With this documentation, she successfully convinced the court to grant her guardianship of the Norths. Due to Parks’ guardianship, the Norths were unable to intervene as their property was taken from them and sold.<sup>5</sup> Although Parks’ scheme

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3 Kathie B. Roberts and Allison Barger, *Guardianships in the Media, Can Utah Statutes Protect Against Abuse?*, 34, UTAH BAR J. 43, 43-45 (2021) (case of the North family and April Parks).

4 *Id.*

5 *Id.*

was ultimately discovered and she was sentenced to up to forty years in prison, the damage done to the Norths was irreparable.

One study shows that as many as 550,000 persons over the age of 60 in the United States experienced neglect or abuse in some form in the year 2000.<sup>6</sup> Financial exploitation is described as the misuse of an individual's assets for the abuser's personal gain through means of dishonesty or manipulation.<sup>7</sup> However, although 12% of the elder population experienced financial abuse, less than 21% of those cases were reported to Adult Protective Services.<sup>8</sup>

Due to the dramatic problem of elder abuse, it is paramount a solution be accessible and streamlined in order to protect the estate of the elder. Additionally, the elderly are not the only demographic targeted for financial abuse: many physically and mentally disabled adults are taken advantage of through the conservatorship system. We refer to 'incapacitated adults' as both elders and adults with physical or mental limitations who are unable to manage their own estate. In this paper we argue that limited conservatorships must be standardized by creating an efficient national conservatorship system to protect incapacitated adults from financial abuse. Although the terms 'guardianship' and 'conservatorship' differ among various states, this paper utilizes the term 'conservatorship' to discuss a capable adult managing the estate of an incapacitated adult.

## I. BACKGROUND

In general, courts grant conservatorships for an incapacitated adult who lacks functional ability. The conservatee relinquishes certain rights to a conservator who is better equipped to understand and manage their affairs. Ideally, the conservator does what is best—legally, financially, socially, mentally, etc.—for the incapacitated

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6 Michael J. Tueth, *Exposing Financial Exploitation of Impaired Elderly Persons*, AM J GERIAT PSYCHIAT. 104, 106 (2000) (statistics and definition of elder abuse).

7 *Id.*

8 *Id.*

adult for whom they are caring. However, in many cases conservatorship leads to neglect and abuse.

The number of conservatorships in the United States has greatly increased in the past 50 years. In 2016, there were an estimated 1.3 million adult conservatorships.<sup>9</sup> Many factors contribute to the increase such as advancements in medical treatments which increase life expectancy and a higher percentage of elderly generations in comparison to other adults and adolescents.

Although the specific process of obtaining a conservatorship varies between states, some general procedures remain constant across the United States.<sup>10</sup> First, the person seeking to become a conservator—often a family relation—petitions the court in the jurisdiction where the incapacitated adult currently resides.<sup>11</sup> This petition typically includes affidavits from doctors stating that the incapacitated adult lacks functional ability to perform necessary tasks. After the petition has been processed, the court will appoint a guardian ad litem to represent the incapacitated adult's best interest. The guardian ad litem then completes an evaluation of the allegedly incapacitated adult, informs them of their legal rights, discusses possibilities, and reports back to the court regarding the individual's physical, emotional, and mental state as well as their wishes and opinions.<sup>12</sup> The alleged incapacitated adult may also hire a lawyer to represent them or the court may be required to do so.<sup>13</sup> Depending on the state, the guardian ad litem may also meet with family members, doctors, and other caregivers to gain a better understanding of the situation that the potential conservatee is in. The court may also require a doctor's personal assessment.<sup>14</sup> As the process continues, the incapacitated

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9 Brenda Uekert, *Financial Exploitation in the Context of Guardianships and Other Legal Arrangements*, 12 (2017) <https://www.justice.gov/file/1064496/download>

10 Erica Wood, *Guardianship Systems*, 363-373 (XinQi Dong eds., 2017).

11 *Id.* at 364

12 *Id.* at 369

13 *Id.* at 370

14 *Id.* at 371

adult may respond in several ways: consent, disputed proceedings, and inability to respond.<sup>15</sup> If the incapacitated adult consents, the court will appoint a conservatorship. If the alleged incapacitated adult or their family objects, the petition may go to trial in probate court. In this case, sufficient evidence must show the alleged incapacitated adult is unable to care for themselves, make decisions, or use proper judgment.

## II. PROOF OF CLAIM

### *A. Conservatorships Are Not Always Necessary*

One conservatorship case highlights the dangers of full conservatorship. Mr. S, an 88-year-old man desired to leave his property to friends rather than family when he passed away.<sup>16</sup> Upon hearing this, the son of Mr. S. filed a petition to the court for conservatorship with the argument that family members should receive transferred property, even when the aging family member does not desire to bequeath their property to their own posterity. The guardian ad litem who represented Mr. S. expressed that, although he had a good sense of awareness, Mr. S. suffered from an absence of judgment. Upon conversing with the guardian ad litem and making his desires known, Mr. S waived his own presence at the hearing. The court, however, ruled that Mr. S was incapable of managing his finances and granted full guardianship to his son. In this case, Mr. S. became powerless and has been stripped of his personal autonomy. He cannot write a check, choose where he lives, choose where he travels, and many other basic freedoms.<sup>17</sup> Other atrocious cases reported in Southern California regarding the financial abuse of incapacitated adults through means of conservatorship highlight the unacceptable shortcomings of the system. Reports include paying taxes and

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15 *Id.*

16 Sally B. Hurme, *Limited Guardianship: Its Implementation Is Long Overdue*, 28 CLEARINGHOUSE REV. 660, (1995) (case study of Mr. S).

17 *Id.*

investing using the conservatee's savings.<sup>18</sup> Others include the conservatee's home being sold to the conservator at a significantly lower price than market value.<sup>19</sup>

Full conservatorships may cause as many problems as they resolve. Those who are put under full conservatorships lose independence and have no power over the actions of the conservator. This can be increasingly problematic with respect to preserving the conservatee's basic rights. In the examples listed above, both the North family and Mr. S were helpless in stopping the encroachment of their personal property and both parties suffered dire consequences. Lack of personal autonomy causes financial exploitation of these individuals even easier and defeats the original purpose of a conservatorship. As a result, full conservatorships should be a last resort in order to protect an incapacitated adult's estate.

### *B. Power of Attorney*

Rather than conservatorships, individuals should instead prepare a power of attorney in the case of cognitive decline or an inability to make life decisions. A power of attorney is a written authorization that gives an individual the power to act on behalf of another's private, financial, and legal affairs. Unfortunately, less than 18% of adults in the United States have a power of attorney prepared.<sup>20</sup> If a larger percentage of adults were to have a power of attorney, the need for conservatorship would be drastically reduced.

One example showcasing the importance of having a power of attorney prepared is the case of Mr. Andrews.<sup>21</sup> Mr. Andrews was a retired veteran who lived with his wife. Upon her sudden death, he

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18 Kenneth Heisz, *Beware of the Con in Conservatorships: A Perfect Storm for Financial Elder Abuse in California*, 17 NAELA Q. 1, 5-6 (2021).

19 *Id.*

20 Merrill A Bank of America Company, *Leaving a legacy: A lasting gift to loved ones*, 3, 2021.

21 Kyle S. Page, *Swimming against the Tide: A Case Study on the Removal of Conservatorship and Guardianship*, 40 CLIN. GERNOTOL. 35, 35-41 (2017) (Case study of Mr. Andrews).

began struggling with the management of his home and self. Soon after, Mr. Andrews suffered a stroke and was consequently diagnosed with Alzheimer's.<sup>22</sup> With this diagnosis alone, the physician who diagnosed Mr. Andrews wrote to the court recognizing a need for a conservatorship. Although Mr. Andrews strongly opposed any form of conservatorship, his lawyer went against his wishes and filed an official petition to the court for a joint conservatorship. The only evidence contained in the petition was an unclean house and a diagnosis of Alzheimer's. With this evidence alone, one of Mr. Andrews' cousins was appointed conservator over all of his assets and decision making. The guardian then proceeded to sell Mr. Andrews' house and possessions— all done without the consent of the conservatee. This specific case would have taken a completely different direction had Mr. Andrews prepared a power of attorney beforehand. If he had planned in advance who would manage his estate once his ability to make decisions had deteriorated, there would have been no need for a petition for conservatorship. It was apparent that Mr. Andrews did not want his cousin to be his conservator, but because the petition was granted, the cousin was able to have free reign over Mr. Andrews' assets. If Mr. Andrews would have prepared a power of attorney before, then the cousin would not have been able to take control. To prevent the misuse of conservatorship, it is necessary that individuals prepare a power of attorney to avoid the pitfalls of the conservatorship system.

### *C. Limited Conservatorships are Preferred*

Despite the possibilities of harm due to conservatorships, they are often necessary in various cases as a form of protection: disabilities, elderly, injury, etc. However, due to the serious nature of the disadvantages of conservatism, it is crucial that conservatism be limited when possible. As fundamental rights are taken away from an individual while they are placed in a conservatorship, the power of the conservator should be as limited as possible. Courts across the nation should approve petitions for full conservatorship only after all other

options, such as a limited conservatorship, have been thoroughly examined. While a complete conservatorship allows the conservator power over nearly every aspect of the incapacitated person's life – residence, finances, personal matters, etc.— limited conservatorship restricts the power given to the conservator. The restrictions of a limited conservatorship can be scaled back to include only finances, residence, real estate, investments, medical, etc.<sup>23</sup> Ideally, incapacitated adults would maintain as many of their rights as possible while still being protected from fraud by family and the court. Thus, a limited conservatorship is useful to allow a conservator access to only what the incapacitated adult actually needs help and support in successfully accomplishing.

The United State's courts have recently moved to favor limited conservatorship and many state laws reflect this. In the State of California, the term conservatorship refers primarily to the overall wellbeing and life of the person rather than the finances.<sup>24</sup> The state law declares that a limited conservatorship may ask for any of the following powers<sup>25</sup>:

1. Fix the conservatee's residence or dwelling
2. Access the conservatee's confidential records or paper
3. Consent or withhold consent to marriage on behalf of the conservatee
4. Enter into contracts on behalf of the conservatee
5. Give or withhold medical consent on behalf of the conservatee
6. Select the conservatee's social and sexual contacts and relationships
7. Make decisions to educate the conservatee

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23 Tani G. Cantil-Sakauye & Martine Hoshino, Handbook for Conservators, 1.1-3.3 (Karen Germand eds., 2016).

24 *Id.* at 1.1

25 *Id.* at 3.3

Thus, the conservator is able to have direct power to control what is necessary in order to protect the conservatee. However, it also allows the conservator to have limited power in case of neglect or misuse. For example, if an elder is unable to have functional ability to control their medical needs, a child would be able to step in and decide what medical procedures would be most beneficial for the elder. However, this would not limit the elder's power to decide where to live.<sup>26</sup>

Although the idea of a limited conservatorship is beneficial, directly stating different types of limited conservatorship limits the courts in their ability to follow an incapacitated adult's specific need. Proposed bill to modify Utah Code 75-5-304 in the 2020 session states: "The court may modify the powers of the guardian to the specific needs of the incapacitated person subject to the guardianship upon clear and convincing evidence that modification is necessary to address the needs of the incapacitated person."<sup>27</sup>

This proposed bill emphasizes the personal nature that ought to be displayed by the court when determining the powers of a limited conservatorship. Therefore, we propose that it is not ethical for courts of any state to directly outline what is included in a limited conservatorship. It can easily undermine the true purpose of a limited conservatorship whose primary goal is to create a conservatorship over only what the incapacitated adult cannot maintain with true functional ability. Wisconsin law 54.18(1) states: "Ward retains all rights not assigned to guardian"<sup>28</sup>

Thus, the incapacitated adult will maintain all rights not specifically granted to the conservator by the court. This provides the court the ability to grant the conservator power only what the incapacitated person is legitimately unable to accomplish and allows the incapacitated person to maintain as many rights possible. This process is frequently done with conservatorship and guardianship towards those with disabilities. It has been the desire of courts in the past several years to allow for the highest degree of independence possible for adults with disabilities. Thus, if a disabled individual is

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26 *Id.*

27 Utah Code Ann. § 75-5-304 (LexisNexis 2017).

28 Wis. Stat. § 54.18 (2015).

able to have control over a credit card, they should have the power to do so as increased independence often creates increased sense of purpose and confidence.

The desire for independence among disabled individuals has led to the creation of companies such as TrueLink. TrueLink is a pre-paid visa credit card that is given to incapacitated adults whether it be for disability, physical limitations, or their advanced age. While the incapacitated adult is still able to have their own debit card and have the independence to purchase their own things, a responsible adult—presumably a child or family member—controls how much money is available for spending. Thus, the incapacitated adult may decide how they spend their money, but a conservator may control how much money is spent. This is precisely what we propose: controlling what must be controlled for the safety and security of the incapacitated adult while still allowing the incapacitated adult as much personal independence as possible.

#### *E. Removal of Conservatorship*

Generally speaking, a conservatorship ends upon the death of the conservatee.<sup>29</sup> However, there are cases when a conservatee regains their mental or physical capacities and desires a removal of their conservatorship. Removing a conservatorship can be challenging for the conservatee for several reasons. Primarily, it may be difficult for the conservatee to obtain and hire a lawyer to terminate the conservatorship because they do not have direct access to their finances.<sup>30</sup> Furthermore, some conservatorships prevent the conservatee from having the ability to legally contract a lawyer or other professionals. In many cases it is the conservator who approves the request for a lawyer when the conservatee petitions for a termination of conservatorship.<sup>31</sup> If the conservator is exploiting the conservatee, they would not approve any attempts to end the conservatorship, effectively

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29 Wood, *supra* note 8 at 371.

30 *Id.* at 372.

31 *Id.*

trapping the conservatee in their state of helplessness and restriction of autonomy.

Removal of a conservatorship is possible; however, it remains both difficult and expensive to terminate a conservatorship. A conservatee or someone supporting the conservatee is required to file a petition to the court, a process often lasting several months.<sup>32</sup> It should, however, be easier to remove a conservatorship than to put one into practice, further protecting the incapacitated adult. If an error is made, it ought to be on the side of rights given to the conservatee. The ability to restore one's individual liberties should be significantly quicker and easier than the ability to remove one's individual liberties. Additionally, those who are under a conservatorship should be informed that they can petition to end the conservatorship with sufficient cause. Ensuring the ability to escape a conservatorship—should the need arise—is essential for the protection of the rights of the incapacitated adult.

It is paramount that a conservatorship be eliminated if or when the incapacitated adult regains functional abilities. Conservatorships ought to encourage the incapacitated adult to make decisions on their own behalf and regain the ability to manage their own affairs. For example, Colorado law 15-14-418(2) states: "A conservator shall ...encourage the person to...develop or regain the ability to manage the person's estate and business affairs".<sup>33</sup> This law is more likely to affect those with disabilities, encouraging them to be able to regain and grow their own independence. While it is true that the functional ability of many elders will not increase, increased independence ought to be encouraged. Conservatorship of the injured may also lead to an individual gaining more abilities despite originally lacking fundamental capacity. Thus, it is helpful to attempt to increase an individual's independence despite their age and situation. As with countless other aspects of the conservatorship system within the United States, the process for ending a conservatorship is poorly laid out at the state and national level. Essentially, current laws fail to contain competent or universal system for such an important practice.

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32 Wood, *supra* note 8 at 372.

33 Colo. Rev. Stat. § 15-14-418 (2015).

### *F. Rushed Conservatorships*

The process of obtaining a guardianship functions to protect the incapacitated adult. As shown in the background, the future conservator must file a petition to the court. This petition includes affidavits from doctors which state that the incapacitated adult lacks functional ability. The court then completes an evaluation of the alleged incapacitated person. The court may also be required to meet with family members and other caregivers or require a doctor's personal assessment. However, in emergency cases, this procedure is often overlooked leading to possible fraudulent activity against the incapacitated individual.

It is crucial, therefore, that the petition for conservatorship requires a mandated doctor's assessment of the alleged incapacitated individual prior to the court's granting of a conservatorship. Additionally, it ought to be federally mandated to interview close family members and inform them of the possible conservatorship. Even in emergency and rushed cases, these procedures must be followed to protect the incapacitated individual's rights. Emergency conservatorships may occur due to multiple different reasons such as a medical emergency, death of a spouse, or sudden fraud.<sup>34</sup> Although emergency conservatorships may provide a quick resolution of abusive situations, they can be misused when there is not an actual emergency present as we have seen in previous examples. In most states, a conservator can receive a limited conservatorship in only a few days.<sup>35</sup>

### *G. Flaws in Accountability of Conservators*

Many laws are designed to protect incapacitated individuals, however, in actuality, many are not implemented as they should. Additionally, some laws are designed for the convenience of the court rather than the protection of the conservatee. For example, Utah Code 75-5-303 states: "Counsel for the person alleged to be incapacitated..."

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34 Wood, *supra* note 8 at 370.

35 *Id.*

is not required if...no attorney from the state court's list of attorneys who have volunteered to represent respondents in guardianship proceedings is able to provide counsel to the person within 60 days of the date of the appointment."<sup>36</sup> The reality that an incapacitated adult may be denied counsel to protect their rights simply because an attorney is unavailable within 60 days illustrates the gaps in the legal system. Therefore, it becomes even more crucial that a standard, federal system be developed to protect adults in the conservatorship system. See additional information on our proposed federal office below.

In November 2005, the Los Angeles Times published a series of articles displaying its findings on conservatorship cases in Southern California.<sup>37</sup> The study examined more than 2,400 professional conservators between 1997 and 2003. A professional conservator, also known as a professional fiduciary, is a conservator who is not a family member of the incapacitated adult and takes a paycheck from the adult's finances— should they be able to afford it— to pay for their services. This study found that more than half of the cases involving professional conservators were granted on an emergency basis which led to mandated procedures to be ignored; 56% of cases were granted without notice to the proposed conservatee or the incapacitated adult's family; 64% were granted before an attorney was appointed, and 92% were granted before the court was given the court investigator's report.<sup>38</sup>

Additionally, the study found that the court's supervision was inadequate. Probate courts "are supposed to monitor [the conservator's] conduct, scrutinize their financial reports and fine or remove those who misuse their authority."<sup>39</sup> Yet the courts have "failed dismally in this vital role" and "frequently overlooked incompetence,

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36 Utah Code Ann. § 75-5-303 (LexisNexis <2017>)

37 Kenneth Heisz, *Beware of the Con in Conservatorships: A Perfect Storm for Financial Elder Abuse in California*, 17 NAELA Q. 1, 5-6 (2021).

38 *Id.*

39 *Id.*

neglect and outright theft.<sup>40</sup> The lack of accountability is partly due to the low number of court investigators: despite a 38% increase in conservator cases from 1995 to 2005, the number of court investigators remained the same.<sup>41</sup> Therefore, the court investigators' caseload was too large they were unable to properly examine each conservator's actions.

#### *H. Office of Adult Conservatorship and Guardianship Enforcement*

Perhaps the most glaring flaw of the current system of conservatorship in the United States is the lack of supervision and accountability of the conservator once the petition for conservatorship has been granted. It is apparent that the courts alone cannot enforce granted conservatorships. The individual state laws regarding the oversight of conservators vary widely. The actual enforcement of oversight and monitoring amongst the states is inconsistent. Oftentimes conservators are only required to file an annual report and accounting information of the conservatee's finances.<sup>42</sup> Many judges and those in the court systems view a conservatorship case "closed" as soon as the conservatorship has been approved, effectively shutting the door for any enforcement infrequent oversight of the conservators can lead to the mismanagement of the conservatee's finances. There are many cases that involve the conservator using the conservatee's finances for their own personal means.<sup>43</sup> Being a conservator can be a large undertaking, and without proper and consistent accountability, there is often nothing but integrity preventing the individual from pilfering the finances of the conservatee. These actions could stem from an entitlement of the conservatee's assets with the mentality of being compensated for their efforts. This mindset can easily grow into large amounts of finances being greatly misused.

For conservatorships to function as they were originally intended it is paramount that greater attention be placed on conservators once

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40 *Id.*

41 *Id.*

42 Wood, *supra* note 8

43 Heisz, *supra* note 36

the conservatorship has been granted. Enforcement on conservatorship should be thoroughly and consistently executed and implemented. A solution to the lack of oversight of conservators would be to nationalize the inconsistent and unreliable system of conservatorship that exists at the state level and institute a federal agency dedicated to establishing more accountability in the conservatorship system.

The proposed federal office would be established as the Office of Adult Conservatorship and Guardianship Enforcement (OACE) under the United States Department of Health and Human Services<sup>44</sup>. One of the primary functions of this office would be to ensure that conservators, if appointed, are kept in check and are operating within the bounds that the conservatorship has placed upon them. Upon petitioning for a conservatorship, many states will have the petitioning conservator file a general plan or outline of their plan for managing the estate of the conservatee. The court will then review an annual report completed by the conservator each year after the original granted request. With a lack of manpower, it becomes difficult for the local courts to review reports if they were to be submitted with more frequency than annually. The current conservatorship system fails to address the great power a conservator has over the individual and that this power needs to be put in check. How can a court give someone complete control of a conservatee's life to an individual and not certify that they are doing what they have been appointed to do? As the system stands, what is to stop the conservator from abusing their power? The proposed federal office would take the weight off of the local courts and be dedicated to reviewing and auditing these reports. With this change, each conservator would be required to file reports quarterly rather than only reporting annually. Quadrupling the number of reports would substantially increase the responsibility placed on conservators.

The staffing and resources of a United States office focused on the preservation of the conservatee's rights would undoubtedly improve the safety and efficiency of conservatorship. In terms of enforcement, the OACE will ensure that each conservator knows

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44 We'd like to especially thank Allison Barger for her invaluable comments and insights on this topic.

the repercussions for mishandling the finances of a conservatee. With the ability to process more reports regarding the finances of the conservatee, the OACE will better be able to oversee the execution of the conservatorship.

With the increased monitoring of conservatorships, the courts will have a better knowledge of any finances that have been pilfered or inappropriately used. While it is now easy for conservators succeed with financial mismanagement, with additional oversight, the conservators would have greater accountability. The OACE would be present in states and counties throughout the nation and would have the jurisdiction to handle disputes and reported cases of abuse or neglect. The office would receive these reports and have the resources to enforce the conservatorship how it was originally meant to be. In addition to thoroughly reviewing submitted annual reports from the conservator, the office would have the ability to interview conservators regarding the conservatorship and how the finances are being managed. Keeping an up-to-date record of the conservatees' assets will be valuable in making sure that the liberties of the conservatee are being adequately maintained.

### III. CONCLUSION

Due to the increasing number of cases regarding the financial exploitation of the incapacitated adults, conservatorship initially appears to be a prime solution for preventing these incidents. However, a full conservatorship actually has the ability to make the incapacitated adult individual even more prone to exploitation. There exist countless cases of those who abuse the power of a full conservatorship. As a result, states across the nation have instituted limited conservatorships to strike a balance between personal autonomy and protection of the incapacitated adult's estate. The Office of Adult Conservatorship and Guardianship Enforcement would streamline the process of obtaining and auditing a limited conservatorship. As a result, the elderly and other incapacitated adults will be more protected from potential financial abuse and exploitation while at the same time maintaining their personal freedoms.

