



## TRUSTS & ESTATES SECTION

THE STATE BAR OF CALIFORNIA

### ***APPOINTMENT OF COUNSEL FOR A PROPOSED CONSERVATEE WHO MAY LACK THE CAPACITY TO HIRE COUNSEL***

#### **LEGISLATIVE PROPOSAL (T&E-2010-06)**

TO: Saul Bercovitch, Legislative Counsel  
State Bar Office of Governmental Affairs

FROM: Margaret G. Lodise

DATE: July 31, 2009

RE: Appointment of Counsel for a Proposed Conservatee Who May Lack the Capacity to Hire Counsel  
- Proposal to amend Section 1470 of the Probate Code  
- Proposal to adopt Rule 7.1102 of the California Rules of Court

#### **SECTION ACTION AND CONTACTS**

Date of Approval by Section Executive Committee: November 15, 2008  
Approval Vote: Unanimous

<b>Contact Information:</b>	<b>Section Legislative Co-Chairs:</b>
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## SUMMARY OF PROPOSAL

The existing statutory law concerning the appointment of an attorney by the court for a proposed conservatee who appears with a lawyer who contends that he or she is the proposed conservatee's lawyer is unclear. Probate Code Sections 1470 and 1471 provide clear statutory authorization for the court to appoint an attorney to represent a proposed conservatee when the conservatee lacks counsel to represent himself or herself, if the court determines that the appointment is necessary or would be helpful to the resolution of the matter. Neither code section specifically addresses a situation where a lawyer contends that he or she represents a proposed conservatee, but the court has serious doubts about whether the proposed conservatee has the capacity to hire the would-be attorney as the proposed conservatee's attorney in the pending proceeding or about the potential conflicts of interest of the attorney. Moreover, neither code section addresses how or when the court should make a determination regarding the capacity of the proposed conservatee to hire counsel.

The proposed amendment to Probate Code Section 1470 would clarify the court's ability to appoint counsel for a proposed conservatee even where an attorney appears and claims to be counsel for the conservatee. The proposed amendment would also provide a standard for the court to determine whether the proposed conservatee's apparent counsel, either new or long-term, should be retained/approved as counsel for the conservatee. The proposed statutory language tracks very closely legislation passed in 2008 to amend a similar Probate Code section designed to protect the interests of a potentially incapacitated spouse in his or her property rights where a spouse may not have the capacity to retain independent counsel.

## ISSUES AND PURPOSE

As more and more conservatorships are contested and in light of recent conservatorship reform to focus on the rights of the conservatee, the issue of whether the lawyer appearing for the conservatee really represents the conservatee's interests, or was hired by a competent conservatee, has become increasingly important. Typically, this situation arises when the conservatee is in court with an attorney, the court asks the conservatee if he or she has counsel, and the conservatee says "no," or professes not to know the person standing by his or her side, or identifies an individual (the *same person* who is accused of abuse, undue influence, etc.) as the person who found the attorney for the conservatee.

Current statutory law does not tell the court that it indeed does have the authority to appoint an attorney for a proposed conservatee whose capacity to hire a lawyer is in question. Although some courts currently believe they already have this authority, that belief is not uniform. Present statutory law also does not tell the court at what point to evaluate the capacity of the proposed conservatee to retain counsel. This proposal would provide statutory authorization for the appointment of a lawyer and provide a standard for the court to use in making its determination. This could mean either replacement counsel or duplicate counsel or approval of the already retained counsel if the court is satisfied.

In Conservatorship of David L., 164 Cal.App.4th 701 (2008), the court found that, where counsel was appointed, the conservatee was entitled to effective assistance of counsel and to

address the court as to conservatee's reasons for changing counsel. In so finding, the court addressed the due process rights of a conservatee to effective counsel. However, as pointed out in Conservatorship of Chilton, 8 Cal.App.3d 34 (1970) the mere fact that a lawyer appeared "for" the proposed conservatee, to oppose a conservatorship, did not guarantee that lawyer's neutrality as that lawyer could be acting *in reality* for the perpetrator *against* the best interests of the manipulated and incompetent proposed conservatee.

Moreover, Sullivan v. Dunn, 198 Cal. 183 (1926) clarifies that the mere fact that a lawyer shows up and alleges that he or she represents the proposed conservatee does not mean that the proposed conservatee has the capacity to hire the lawyer. Where the issue is whether the proposed conservatee is in need of a conservatorship, it is obvious that the proposed conservatee may not have the capacity to contract.

In 2008, the legislature addressed a similar defect in Probate Code Section 3140, a statute designed to protect the interests of a potentially incapacitated spouse in his or her property rights where a spouse may not have the capacity to retain independent counsel. To address a similar problem, the legislature amended the portion of the statute related to the appointment of counsel to read as follows: "If *the court determines that a spouse alleged to lack legal capacity is not otherwise represented has not competently retained independent counsel*, the court may in its discretion appoint the public guardian, public administrator, or a guardian ad litem to represent the interests of the spouse." The same protection that is now afforded a spouse whose property rights are at issue is even more important in the case where a proposed conservatee's liberty interests are at stake as is the case in situations to which Probate Code Section 1470 applies.

However, the importance of protecting a proposed conservatee from overreaching by an attorney not truly independent must be weighed against the potential invasion of the proposed conservatee's rights to privileged communications with counsel representing the conservatee. In some courts, court appointed counsel is treated as a guardian ad litem or an Evidence Code Section 730 expert. If the court is to have the absolute right to appoint counsel for the proposed conservatee, it is equally important that the appointed counsel be obligated to represent only the proposed conservatee and not any other interest.

The Judicial Council's Probate Conservatorship Task Force has recommended that an attorney be automatically appointed for a proposed conservatee in all cases.

This proposed legislation and accompanying rule of court offer the court the clear statutory authority to appoint counsel even where it appears that other counsel is already representing the conservatee. In so doing, it enables the court to protect a conservatee who might not have had the capacity to contract in hiring an attorney and to provide a neutral attorney to consider the wishes of the conservatee where undue influence or abuse may be present. The proposed legislation merely would allow the court to appoint an attorney for the proposed conservatee, despite the fact that another member of the bar shows up and says he or she is the proposed conservatee's lawyer and the proposed conservatee says that this is true.

The proposed legislation does **not** address what the court appointed lawyer's duties would be. However, the Executive Committee of the Trusts and Estates Section (TEXCOM)

recommends that the proposal be accompanied by a new rule of court to specifically state the duties of the court appointed counsel solely to the proposed conservatee. The proposed text of the rule of court, modified from an existing Los Angeles Superior Court Rule of Court, is set forth below the proposed legislative change.

## **HISTORY**

AB 1491 (Kaloogian) of 1999 was a TEXCOM-sponsored bill that originally contained a provision addressing the same subject matter as this proposal, but with different language. That provision was ultimately dropped in response to concerns raised by legislative staff, and the bill proceeded instead as an omnibus probate law bill with various other provisions. More recently, a provision in AB 1938 (Aroner) of 2002, which dealt with similar issues, was deleted from the bill over what appear to have been funding issues. The language of this proposal is modified from any prior proposals, and adopts a standard now found elsewhere in the Probate Code.

## **PENDING LITIGATION**

None known.

## **LIKELY SUPPORT/OPPOSITION**

TEXCOM anticipates support from groups and organizations advocating against elder abuse. TEXCOM anticipates that some mental health patient's-rights advocate groups might oppose this proposal, contending that, no matter how grievously mentally impaired a person is, he or she has the "right" to select an attorney, even if others question the choice of attorney.

## **FISCAL IMPACT**

The fiscal impact is unknown, but likely to be limited. Any counsel representing a conservatee or proposed conservatee is entitled to be paid out of the conservatee's estate. Only where the conservatee is without funds would the county need to pay a fee. In such cases, however, it is unlikely that the proposed conservatee would have otherwise retained counsel and current law would require an appointment in that circumstance. In some counties, public defenders are appointed. Even where funds are paid by the state or county to a private attorney, the fiscal impact may be limited. For instance, where a neutral attorney is able to persuade a proposed conservatee not to fight a conservatorship, trials might be eliminated.

## **GERMANENESS**

The subject matter is directly related to the practice of the members of the TEXCOM. The members of TEXCOM have the particular expertise pertaining to the management of the affairs of incompetent persons.

## TEXT OF PROPOSAL

### Proposed Legislation:

SECTION 1. Section 1470 of the Probate Code is amended to read:

1470. (a) The court may appoint private legal counsel for a ward, a proposed ward, a conservatee, or a proposed conservatee in any proceeding under this division if the court determines the person is not otherwise represented by legal counsel and that the appointment would be helpful to the resolution of the matter or such appointment is necessary to protect the person's interests.

*(b) Notwithstanding the fact that the ward, proposed ward, conservatee, or proposed conservatee may also be represented by other legal counsel, the court may appoint private legal counsel if the court determines that the ward, proposed ward, conservatee or proposed conservatee has not competently retained independent counsel for the proceeding.*

*(c) The court's determination under paragraph (b) shall not be admissible for any other purposes in a proceeding under this Division or in any other proceedings.*

~~(b)~~ (d) If a person is furnished legal counsel under this section, the court shall, upon conclusion of the matter, fix a reasonable sum for compensation and expenses of counsel. The sum may, in the discretion of the court, include compensation for services rendered, and expenses incurred, before the date of the order appointing counsel.

~~(e)~~ (e) The court shall order the sum fixed under subdivision ~~(b)~~ (d) to be paid:

(1) If the person for whom legal counsel is appointed is an adult, from the estate of that person.

(2) If the person for whom legal counsel is appointed is a minor, by a parent or the parents of the minor or from the minor's estate, or any combination thereof, in any proportions the court deems just.

(3) If a ward or proposed ward is furnished legal counsel for a guardianship proceeding, upon its own motion or that of a party, the court shall determine whether a parent or parents of the ward or proposed ward is financially unable to pay all or a portion of the cost of counsel appointed pursuant to this section. Any portion of the cost of that counsel that the court finds the parent or parents or the estate of the ward or proposed ward is unable to pay shall be paid by the county. The Judicial Council shall adopt guidelines to assist in determining financial eligibility for county payment of counsel appointed by the court pursuant to this chapter.

~~(d)~~ (f) The court may make an order under subdivision ~~(e)~~ (e) requiring payment by a parent or parents of the minor only after the parent or parents, as the case may be, have been given notice and the opportunity to be heard on whether the order would be just under the circumstances of the particular case.

Proposed Rule of Court:

New California Rule of Court, Rule 7.1102 is added, to read:

***Rule 7.1102. Guidelines for counsel appointed by the court under Probate Code Sections 1470 and 1471.***

*Counsel's primary duty shall be to represent the interest of his or her client in accordance with the laws and ethical standards which apply to the representation of clients in general.*