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Memorandum 90-67

Subject: Study L-700 - Compensation of Counsel in Guardianship and
Conservatorship Proceeding

At the last meeting, the Commission approved a draft section to change the rule of a recent unpublished Court of Appeal opinion that counsel appointed in a conservatorship proceeding could not be compensated for services rendered before the date of appointment. The draft section gave the court discretion to make a retroactive appointment order.

Attached is a staff draft of a *Tentative Recommendation relating to Compensation of Counsel in Guardianship and Conservatorship Proceedings*. The attached TR carries out the policy decision made by the Commission, but takes a slightly different approach than the section approved at the last meeting. Rather than proposing a new section to permit a retroactive order of appointment, the attached TR permits the court to award compensation for all services, whether rendered before or after the appointment order. This has the same substantive effect as the previous draft, but it seems like a clearer, more direct way to deal with the problem.

Respectfully submitted,

Robert J. Murphy III
Staff Counsel

STATE OF CALIFORNIA

CALIFORNIA LAW REVISION COMMISSION

TENTATIVE RECOMMENDATION

relating to

Compensation of Counsel in Guardianship and Conservatorship Proceedings

April 1990

This tentative recommendation is being distributed so interested persons will be advised of the Commission's tentative conclusions and can make their views known to the Commission. Comments sent to the Commission are a public record, and will be considered at a public meeting of the Commission. It is just as important to advise the Commission that you approve the tentative recommendation as it is to advise the Commission that you believe it should be revised.

COMMENTS ON THIS TENTATIVE RECOMMENDATION SHOULD BE RECEIVED BY THE COMMISSION NOT LATER THAN JUNE 15, 1990.

The Commission often substantially revises tentative recommendations as a result of the comments it receives. Hence, this tentative recommendation is not necessarily the recommendation the Commission will submit to the Legislature.

CALIFORNIA LAW REVISION COMMISSION
4000 Middlefield Road, Suite D-2
Palo Alto, California 94303-4739

CALIFORNIA LAW REVISION COMMISSION

4000 MIDDLEFIELD ROAD, SUITE D-2
PALO ALTO, CA 94303-4739
(415) 494-1335



This tentative recommendation makes clear that the court has discretion in fixing compensation for counsel under the guardianship-conservatorship law to include all services rendered in the proceeding, not merely those services rendered after the effective date of the order appointing counsel.

This recommendation is made pursuant to Resolution Chapter 37 of the Statutes of 1980.

TENTATIVE RECOMMENDATION

Under existing law, the court in a guardianship or conservatorship proceeding may appoint counsel for a ward or conservatee.¹ On conclusion of the matter, the court fixes a reasonable sum for compensation and expenses of counsel, payable out of the estate of the ward or conservatee.² There is some question whether the attorney may be compensated for legal services provided before the order of appointment.³

The Commission recommends that it be made clear that the court in a guardianship or conservatorship proceeding may award compensation for legal services provided before, as well as after, the appointment order. Preliminary legal work may be necessary before the court's order of appointment is made. For example, the attorney may need to interview the ward or conservatee and investigate the facts before applying for appointment.⁴ The ward or conservatee would be protected against overaggressive counsel by the court's discretion not to make the appointment, or not to award compensation for services rendered before the appointment.

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1. Prob. Code § 1470. See also *id.* §§ 1471, 1472.
 2. Prob. Code § 1470. If the person for whom counsel is appointed is a minor, the court may order compensation to be paid by the parent or parents of the minor, or out of the minor's estate, or by any combination thereof. *Id.*
 3. A recent case held the court in a conservatorship proceeding could not award attorneys' fees for services rendered before the appointment order. *Young, Wooldridge, Paulden, Self, Farr & Griffin v. Thomas*, 210 Cal. App. 3d 812, 258 Cal. Rptr. 574 (1989). The California Supreme Court has ordered that this opinion not be published in the official reports.
 4. 11 Estate Planning & California Probate Reporter 21 (Cal. Cont. Ed. Bar, Aug. 1989).

RECOMMENDED LEGISLATION

The Commission's recommendation would be effectuated by enactment of the following measure:

An act to amend Sections 1470 and 1472 of the Probate Code, relating to guardianship and conservatorship proceedings.

The people of the State of California do enact as follows:

Probate Code § 1470 (amended). Discretionary appointment of legal counsel

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 such person is not otherwise represented by legal counsel and that the appointment would be helpful to the resolution of the matter or is necessary to protect the person's interests.

(b) 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. Such sum may, in the discretion of the court, include compensation for services rendered, and expenses incurred, before the order of appointment.

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

(1) If the person for whom legal counsel is appointed is an adult, from the estate of such 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 such proportions as the court deems just.

(d) The court may make an order under subdivision (c) 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.

Comment. Subdivision (b) of Section 1470 is amended to add the second sentence. The second sentence gives the court discretion to award compensation for legal services rendered before the date of appointment, and to award expenses incurred before the date of appointment.

An attorney who provides legal services without an appointment order does so at the risk that the court will not later make the

appointment or will not authorize compensation for services rendered before the date of appointment.

Probate Code § 1472 (amended). Compensation of mandatory court-
appointed counsel

SEC. 2. Section 1472 of the Probate Code is amended to read:

1472. (a) If a person is furnished legal counsel under Section 1471:

(1) The court shall, upon conclusion of the matter, fix a reasonable sum for compensation and expenses of counsel and shall make a determination of the person's ability to pay all or a portion of such sum. Such sum may, in the discretion of the court, include compensation for services rendered, and expenses incurred, before the order of appointment.

(2) If the court determines that the person has the ability to pay all or a portion of such sum, the court shall order the conservator of the estate or, if none, the person to pay in such installments and in such manner as the court determines to be reasonable and compatible with the person's financial ability.

(3) In a proceeding under Chapter 3 (commencing with Section 3100) of Part 6 for court authorization of a proposed transaction involving community ~~ex~~-homestead property, the court may order payment out of the proceeds of the transaction.

(4) If a conservator is not appointed for the person furnished legal counsel, execution may be issued on the order in the same manner as on a judgment in a civil action.

(b) If the court determines that a person furnished private counsel under Section 1471 lacks the ability to pay all or a portion of the sum determined under paragraph (1) of subdivision (a), the county shall pay such sum to the private counsel to the extent the court determines the person is unable to pay.

(c) The payment ordered by the court under subdivision (a) shall be made to the county if the public defender has been appointed or if private counsel has been appointed to perform the duties of the public defender and the county has compensated such counsel. In the case of other court-appointed counsel, the payment shall be made to such counsel.

Comment. Paragraph (1) of subdivision (a) of Section 1472 is amended to add the second sentence. The second sentence gives the court discretion to award compensation for legal services rendered before the date of appointment, and to award expenses incurred before the date of appointment.

An attorney who provides legal services without an appointment order does so at the risk that the court will not later make the appointment or will not authorize compensation for services rendered before the date of appointment.

Paragraph (3) of subdivision (a) is amended to delete the former reference to a transaction involving homestead property under Chapter 3 (commencing with Section 3100) of Part 6. Those provisions were revised in 1982 to delete the references to homestead property to reflect the elimination of the collateral effects of a homestead declaration.