

## Memorandum 90-94

Subject: Study L-700 - Compensation of Counsel in Guardianship and Conservatorship Proceedings (Comments on TR)

Attached is the Commission's *Tentative Recommendation relating to Compensation of Counsel in Guardianship and Conservatorship Proceeding*. We have received 19 letters, all in support. Fifteen of these express unqualified support. Four suggest revisions. We have also received two sets of comments handwritten on the face of the TR, one in support with suggested revisions and the other ambiguous. The letters are attached as Exhibits 1 through 19:

- Exhibit 1: William S. Johnstone, Jr.
- Exhibit 2: Alvin G. Buchignani
- Exhibit 3: Paul Gordon Hoffman
- Exhibit 4: James V. Simoni
- Exhibit 5: Irwin D. Goldring
- Exhibit 6: Michael J. Anderson
- Exhibit 7: Frank M. Swirles
- Exhibit 8: Henry Angerbauer
- Exhibit 9: John G. Lyons
- Exhibit 10: Alan D. Bonapart
- Exhibit 11: Wilbur L. Coats
- Exhibit 12: Paul H. Roskoph
- Exhibit 13: Thomas R. Thurmond
- Exhibit 14: Joseph E. Tinney
- Exhibit 15: Jeffrey A. Dennis-Strathmeyer
- Exhibit 16: Harry P. Drabkin
- Exhibit 17: Howard Serbin
- Exhibit 18: Ruth A. Phelps
- Exhibit 19: Ruth E. Ratzlaff

## SUGGESTED REVISIONS RECOMMENDED BY STAFF

Execution to Enforce Payment of Attorneys' Fee

If a proposed conservatee or person alleged to lack legal capacity is unable to retain legal counsel and requests the court to appoint counsel, the court must do so and shall fix a reasonable fee for the services. Prob. Code § 1470. If a conservator is ultimately not appointed, execution may be issued to enforce payment. *Id.* § 1472.

William Johnstone (Exhibit 1), one of California's leading authorities on conservatorship law, points out that there is no comparable authority for execution to enforce a fee order for a discretionary appointment under Section 1470. He would add such

authority to Section 1470. The staff agrees, and recommends adding new subdivision (e) to Section 1470 to read:

(e) If a guardian or 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.

#### Compensation of Conservator

The TR deals with compensation of counsel. A commentator who sent handwritten notes (Margaret Roisman, not attached) suggested it be broadened to deal with compensation of conservators as well: "[S]ome to-be-appointed conservators must expend considerable time and effort in seeing that the conservatee is protected and cared for before the appointment proceedings are complete."

The question is alluded to in W. Johnstone, G. Zillgitt, & S. House, California Conservatorships § 12.10, at 704, § 12.14, at 707 (2d ed., Cal. Cont. Ed. Bar 1983). Concerning a conservator of the estate, the authors say:

The conservator's fee for the first accounting period is often based on the value of the inventory. The conservator is frequently allowed a greater fee for services during the first accounting period than in subsequent periods. Courts in several of the larger counties sometimes allow a fee for the first period in an amount equal to one half of the statutory probate fee provided by Prob C §901. The fee must be justified by the amount of work in marshalling the assets and in the performance of other necessary duties.

Concerning a conservator of the person, the authors say:

The compensation to the conservator of the person for services rendered is limited to what the court considers just and reasonable under the circumstances. . . . There is no minimum fee as there is in some counties for the conservator of the estate. Compensation depends on the time the conservator is required to spend with the conservatee and the nature of the services performed.

The staff recommends making clear that the court may, in its discretion, award compensation to a guardian or conservator for services rendered before the order of appointment. This may be accomplished by adding the following to the TR:

#### Probate Code § 2640 (amended). Petition by guardian or conservator of estate

2640. (a) At any time after the filing of the inventory and appraisal, but not before the expiration of 90 days

from the issuance of letters, the guardian or conservator of the estate may petition the court for an order fixing and allowing compensation to any one or more of the following:

(1) The guardian or conservator of the estate for services rendered in that capacity to that time.

(2) The guardian or conservator of the person for services rendered in that capacity to that time.

(3) The attorney for services rendered to that time by the attorney to the guardian or conservator of the person or estate or both.

(b) Notice of the hearing shall be given for the period and in the manner provided in Chapter 3 (commencing with Section 1460) of Part 1.

(c) Upon the hearing, the court shall make an order allowing (1) the compensation requested in the petition as the court determines is just and reasonable to the guardian or conservator of the estate for services rendered in that capacity or to the guardian or conservator of the person for services rendered in that capacity, or to both, and (2) the compensation requested in the petition as the court determines is reasonable to the attorney for services rendered to the guardian or conservator of the person or estate or both. The compensation so allowed shall thereupon be charged to the estate. The compensation allowed to the guardian or conservator of the person and the guardian or conservator of the estate may, in the discretion of the court, include compensation for services rendered before the order of appointment. Legal services for which the attorney may ~~apply to the court for compensation~~ be compensated include those services rendered by any paralegal performing the legal services under the direction and supervision of an attorney. The petition or application for compensation shall set forth the hours spent and services performed by the paralegal.

Comment. Subdivision (c) of Section 2640 is amended to make clear the court has discretion to award compensation for services rendered before the date of appointment. Under Section 2623, the guardian or conservator may be allowed all reasonable disbursements made before appointment as guardian or conservator. See also Sections 1470 (compensation of counsel), 1472 (compensation of counsel), 2641 (compensation of guardian or conservator).

Subdivision (c) is also amended to delete the former reference to compensation for which the attorney may "apply to the court." Under Section 2640, the application to the court for the attorney's compensation is made by the guardian or conservator of the estate, not by the attorney.

Probate Code § 2641 (amended). Petition by guardian or conservator of person

2641. (a) At any time permitted by Section 2640 and upon the notice therein prescribed, the guardian or

conservator of the person may petition the court for an order fixing and allowing compensation for services rendered to that time in such capacity.

(b) Upon the hearing, the court shall make an order allowing such compensation as the court determines just and reasonable to the guardian or conservator of the person for services rendered. The compensation allowed shall thereupon be charged against the estate. The compensation allowed to the guardian or conservator of the person may, in the discretion of the court, include compensation for services rendered before the order of appointment.

Comment. Section 2641 is amended to make clear the court has discretion to award compensation for services rendered before the date of appointment. Under Section 2623, the guardian or conservator may be allowed all reasonable disbursements made before appointment as guardian or conservator. See also Sections 1470 (compensation of counsel), 1472 (compensation of counsel), 2640 (compensation of guardian or conservator).

If the Commission approves these additions to the TR, it should be retitled as *Compensation in Guardianship and Conservatorship Proceedings*.

Fees Awarded "Upon Conclusion of the Matter"

James Simoni (Exhibit 4) has a problem with existing language of Section 1472 requiring the court to fix the fee "upon conclusion of the matter." He says, "Many conservatorships do not have a conclusion, but continue from year to year." But "the matter" in this context does not refer to the conservatorship proceeding as a whole. Rather Section 1472 refers to a matter for which a person is furnished counsel under Section 1471. Section 1471 permits the court to appoint counsel "to assist in the particular matter." Thus the "matter" which must be concluded is the particular matter for which counsel was appointed. This is also the view of W. Johnstone, G. Zillgitt, & S. House, *supra*, § 4.57, at 197-98 (2d ed., Cal. Cont. Ed. Bar 1983): "[i]t is clear from the code itself that court-appointed counsel does not have to wait until an inventory has been filed to request fees."

The staff recommends addressing Mr. Simoni's problem by adding the following to the Comment to Section 1472:

Although Section 1472 requires the court to fix compensation of counsel "upon conclusion of the matter," this does not prevent the court from making an award of compensation during the pendency of the guardianship or conservatorship proceeding. See W. Johnstone, G. Zillgitt, &

S. House, California Conservatorships § 4.57, at 197-98 (2d ed., Cal. Cont. Ed. Bar 1983). The "matter" to which Section 1472 refers is the particular matter for which counsel was appointed. See Section 1471.

#### Narrative Portion of Tentative Recommendation

The narrative portion of the TR says 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." Paul Hoffman (Exhibit 3) objects to the reference to "overaggressive counsel." He is concerned this may discourage sincere and meritorious advocacy. The staff has no objection to deleting the words "against overaggressive counsel" from the quoted sentence.

#### SUGGESTED REVISIONS NOT RECOMMENDED BY STAFF

#### Compensation for Pre-Appointment Services; Discretionary or Mandatory?

Section 1472 requires the court to fix a reasonable attorneys' fee when mandatory appointment of counsel is made under Section 1471. The amendment proposed in the TR would add discretionary authority for the court to include compensation for pre-appointment services. Alvin Buchignani (Exhibit 2) would revise this to make the allowance of compensation mandatory, whether the services were rendered before or after appointment. To make this more palatable, he suggests the statute could require compensation for services "reasonably rendered" before and after appointment.

The staff is opposed to Mr. Buchignani's suggestion. If his suggestion were adopted, the qualification that the compensation must be for services "reasonably rendered" would be essential. But, with this qualification, he is merely suggesting a discretionary award in other language. His suggestion is therefore a change of taste. The staff thinks the present draft is better.

#### Ethical Responsibilities of Attorney

Paul Hoffman (Exhibit 3) asks what the ethical duty of the attorney is where the proposed conservatee objects to conservatorship, but the attorney thinks conservatorship is in the person's best interest. In W. Johnstone, G. Zillgitt, & S. House, *supra*, § 1.60, at 38-40 (2d ed., Cal. Cont. Ed. Bar 1983), the authors say:

There is an inherent conflict of interest problem in the attorney filing the proceedings unless the conservatee is the petitioner, and the proposed conservator seeks other legal counsel in handling the conservatorship. . . . When the dilemma does arise, there is no clear solution that will be both practical in the eyes of the parties, and strictly ethical.

The authors conclude that, if the proposed conservator is already a client of the attorney, the best approach may be not to represent either the proposed conservator or proposed conservatee in connection with the conservatorship proceedings.

Respectfully submitted,

Robert J. Murphy III  
Staff Counsel

MAY 29 1990

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May 24, 1990

\* PROFESSIONAL CORPORATION

California Law Revision Commission
4000 Middlefield Road, Suite D-2
Palo Alto, CA 94303-4739

Re: Comment on Tentative Recommendation Relating
to Compensation of Counsel in Guardianship and
Conservatorship Proceedings

Gentlemen:

While I support the recommendation of the Law
Revision Commission in concept, I believe that there should
be one further amendment to Prob. Code §1470. The suggested
amendment is provoked by the fact that the section contem-
plates discretionary appointment of private counsel for a
proposed ward or conservatee, and authorizes the fixing of
reasonable compensation and expenses of counsel including
services rendered and expenses incurred before the order of
appointment. In providing for source of payment in Section
(c), there is no provision for source of payment in the event
that an order of appointment is not made - i.e., denied or
withdrawn. While it is difficult to envision circumstances
prompting discretionary appointment of private legal counsel
for a proposed ward or conservatee (as considered in light of
the mandatory appointment of legal counsel provisions set
forth in Prob. Code §1471), I believe a provision similar to
Prob. Code §1472(4) should be added to §1470.

Very truly yours,

William S. Johnstone, Jr.
of HAHN & HAHN

WSJ:g

MAY 10 1990

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ATTORNEY AT LAW

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May 9, 1990

California Law Revision Commission  
4000 Middlefield Road, Suite D-2  
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Re: Tentative Recommendation - Compensation of Counsel  
in Guardianship and Conservatorship proceedings

Ladies & Gentlemen,

I agree with the proposed recommendation, with the following additional suggestion:

I see no reason that, if services rendered before the Order of Appointment are reasonable, they should not be given the same status as services rendered after the Order of Appointment. Therefore, there is no reason that the proposed subsection should not read as follows:

"(1) The Court shall, upon conclusion of the matter, fix a reasonable sum for compensation and expenses of counsel for services rendered before and after the Order of Appointment, and shall make a determination of the person's ability to pay all or a portion of such sum."

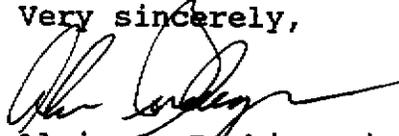
The rest of the statute already considers the ability to pay. Instead of making the provision more liberal, the proposal may actually tend to make the law more restrictive. I see no reason that the Court's discretion should not be limited to the issues of reasonableness and ability to pay. The proposed wording, however, creates a separate category of services which may or may not be compensated, with no guidance whatever for the exercise of the Court's discretion.

For those who feel some additional protection is necessary, the statute could read:

"... a reasonable sum for compensation and expenses of counsel reasonably rendered, both before and after the order of Appointment.."

May 9, 1990  
Page 2

Very sincerely,

A handwritten signature in black ink, appearing to read 'Alvin G. Bachignani', with a long horizontal flourish extending to the right.

Alvin G. Bachignani

AGB/pzg

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SABBAN &  
BRUCKER

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May 8, 1990

California Law Revision Commission  
4000 Middlefield Road  
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Palo Alto, CA 94303-4739

Re: Tentative Recommendation Relating to  
Compensation of Counsel in Guardianship and  
Conservatorship Proceedings

Ladies and Gentlemen:

I agree that appointed counsel in a guardianship or conservatorship proceeding should be entitled to compensation for services rendered prior to the order of appointment. However, I suggest that you reconsider the wording of the last sentence in the recommendation portion of the tentative recommendation. The comments regarding "overaggressive counsel" can only create confusion as to the intent of the change. After all, there may be counsel who are overaggressive when acting pursuant to an order of appointment! It would be preferable to utilize more neutral language such as that contained in the comment to the proposed statutes.

On a related matter, you might wish to consider the role of such appointed counsel. Is it the duty of such counsel to carry out the wishes of the client, or is such counsel serving as an advisor to the court in determining the best interests of the conservatee or proposed conservatee? For example, if a proposed conservatee does not wish to have a conservator appointed, but the appointed attorney determines that the proposed conservatee is substantially unable to manage his or her own affairs, and therefore is in need of a conservatorship, should the attorney assume the role of an advocate, leaving it to the court to determine the appropriateness of establishing a conservatorship, or should the attorney simply make a neutral finding of the facts and make a recommendation to the court based on the attorney's independent investigation? Until there is a clear rule establishing the ethical obligations of counsel in such



California Law Revision Commission  
May 8, 1990  
Page 2.

situations, attorneys who choose to view their role as that of an advocate are likely to be branded as "overaggressive."

Very truly yours,

Paul Gordon Hoffman

PGH/mem/P12/2

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May 22, 1990

California Law Revision Commission  
4000 Middlefield Road, Suite D-2  
Palo Alto, CA 94303-4739

Dear Gentlemen:

Having looked at your proposed legislation for fees, I would suggest a further modification in that Paragraph 1 be worded to say:

"The court shall upon application of any interested party, fix a reasonable sum."

Many conservatorships do not have a conclusion, but continue from year to year.

Sincerely yours,

*James V. Simoni*  
James V. Simoni

JVS:per

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MAY 23 1990  
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May 18, 1990

California Law Revision Commission  
4000 Middlefield Road, Suite D-2  
Palo Alto, California 94303-4739

Re: Tentative Recommendation: Compensation of  
Counsel in Guardianship and Conservatorship  
Proceedings

Gentlemen:

I have read and considered the above tentative recommendation and concur with it.

When teaching a CEB course on recent developments in estate planning, etc., last January, I was struck by the anomaly of the Young, Woolridge case as compared to the Conservatorship of Barry (1989) 210 CA 3d 706. This recommendation would still give the court in these circumstances some leeway but would certainly cure what the Young, Woolridge case pointed out as a glaring deficiency.

Very truly yours,

IRWIN D. GOLDRING

IDG:hs

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Michael J. Anderson

CA LAW REV. COMM'N

MAY 15 1990

R E C E I V E D

May 11, 1990

California Law Revision Commission  
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To whom it may concern:

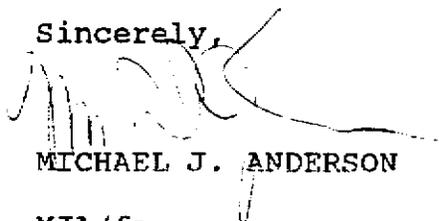
I have no comment regarding the Compensation of Counsel in Guardianship and Conservatorship Proceedings. I would be in favor of it.

In respect to recognition of Trustees' Powers, I am in favor of it. I think it is an extremely good provision to have. I would also recommend broadening the expansion of this concept into the area of Durable Power of Attorney. Banks many times refuse to honor such documents.

I have no comment on the Disposition of Small Estate Without Probate. I am in favor of the suggested changes.

Thank you very much.

Sincerely,



MICHAEL J. ANDERSON

MJA/fa

FRANK M. SWIRLES  
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May 17, 1990

California Law Revision Commission  
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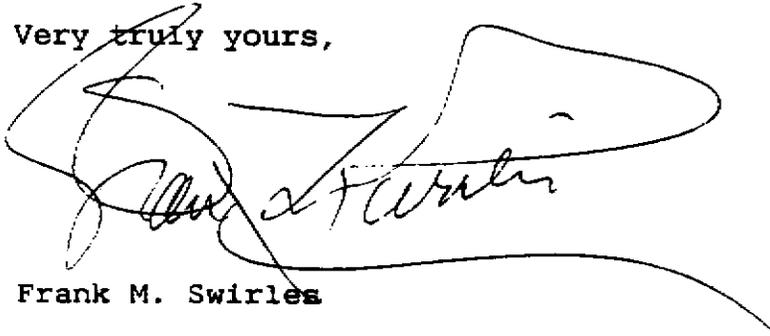
Re: Tentative Recommendations on

Disposition of Small Estates without Probate  
Recognition of Trustees' Powers  
and  
Compensation of Counsel in Guardianship and  
Conservatorship Proceedings

Gentlemen:

This is to advise that I have reviewed the subject and find them to be satisfactory. I am particularly pleased with the Recognition of Trustees' Powers recommendations.

Very truly yours,



Frank M. Swirles

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MAY 22 1990  
Study L-700  
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HENRY ANGERBAUER, CPA  
4401 WILLOW GLEN CT.  
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5/19/90

California Law Revision Commission:

Re Compensation of Counsel in Guardianship  
and Conservatorship Proceedings:

I agree with your tentative recommendation  
and conclusion and suggest you propose that  
recommendation to the legislature to be  
implemented into law. Thank you for letting  
me make my views known on this subject

Best Personal Regards

Sincerely  
HA

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May 14, 1990

California Law Revision Commission  
 4000 Middlefield Road, Suite D-2  
 Palo Alto, CA 94303-4739

Re: Tentative Recommendation  
 relating to compensation of  
 Counsel in Guardianship and  
 Conservatorship Proceedings

Gentlemen:

I approve of this Recommendation. It will fill  
 a real need. Preliminary legal work must be done  
 before the order appointing counsel is received.

Very truly yours,

*John G. Lyons*  
 John G. Lyons

JGL:car



Memo 90-94

EXHIBIT 10

STUDY L-700  
CALIF. LAW REV. COMM'N

MAY 10 1990

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May 8, 1990

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4000 Middlefield Road, Suite D-2  
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Tentative Recommendations:  
Disposition of Small Estate Without Probate;  
Compensation of Counsel in Guardianship and  
Conservatorship Proceedings;  
Recognition of Trustees' Powers

I support all three of the Tentative Recommendations, dated March 1990.

The following comments refer only to the proposed addition of Probate Code Section 18105 (Recognition of Trustees' Powers):

1. You have invited comment on the question of whether or not "in the experience of those commenting on this tentative recommendation, this problem is a significant one that merits a legislative solution."
2. In my practice I almost never rely upon statutory powers. Hence, it is my experience, the legislative solution would not have been useful in the past.
3. The legislative proposal could encourage me and other drafters of documents to make greater use of the statutory powers in order to take advantage of the enforcement mechanism provided for in proposed Section 18105.
4. There is an analogy, I believe, to your recently proposed measure for adoption of the Uniform Statutory Power of Attorney Act. In that Act there is somewhat of an enforcement mechanism (one that is easily avoided by knowledgeable financial institutions). My current thinking is that I will revise my forms of durable power of attorney to use the statutory form, with

May 8, 1990  
Page 2

additions, in order to provide my clients with  
the opportunity to use the enforcement mechanism.  
Adoption of proposed Section 18105 might cause  
some of us to do the same with trust instruments.

Thank you.

Sincerely yours,

A handwritten signature in cursive script, appearing to read "Alan D. Bonapart", with a stylized arrow-like flourish at the end.

Alan D. Bonapart

ADB:ah

**WILBUR L. COATS**  
ATTORNEY AND COUNSELOR AT LAW

TELEPHONE (619) 748-6512

May 8, 1990

California Law Revision Commission  
4000 Middlefield Road, Suite D-2  
Palo Alto, California 94303-4739

In re: Tentative Recommendations relating to:

- Recognition of Trustees' Power
- Disposition of Small Estate Without Probate
- Compensation of Counsel in Guardianship Conservator Proceedings

Dear Administrator:

I concur in the tentative recommendations of the Commission concerning the three areas set forth above.

I do not have any experience with third parties unwillingness to rely on automatic statutory powers under the revised Trust Law. However, I believe specific reference to liability for refusal to accept the trustee's powers as defined in the statutes will be helpful to a trustee.

As to Disposition of Small Estate Without Probate. I had a situation where a probate was commenced only to find that the only need for the probate was to obtain property that could have been transferred by the Affidavit procedure if probate had not been initiated. Therefore, I believe the tentative recommendation as set forth by the Commission will provide for greater flexibility in dealing with small estate distribution without probate. Often the person designated as Personal Representative in a small estate is not knowledgeable concerning the decedent's property. It is only after Letters are issued and the property inventoried that it is determined the Affidavit procedure is applicable in lieu of probate.

Respectfully submitted,

  
Wilbur L. Coats

MAY 09 1990

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May 8, 1990

California Law Revision Commission  
4000 Middlefield Road, Suite D2  
Palo Alto, CA 94303

Re: Probate Code Revision Proposals

Gentlemen:

Thank you for forwarding your tentative recommendations relating to:

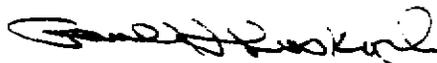
- (1) Recognition of trustees' powers;
- (2) Disposition of small estate without probate; and
- (3) Compensation of counsel in guardianship and conservatorship proceedings.

It is a great frustration to have entities within and outside California fail to acknowledge a clear statement of California law with respect to trustees powers and procedures to transfer assets. Your proposal should assist to enforce the existing law. Obviously, when dealing with title companies, they still have the right to say "shop elsewhere" if their internal procedures are not satisfied.

The proposal regarding compensation of counsel seems appropriate, although I do not personally get involved in those proceedings.

Disposition of small estate without probate will appropriately enhance the ability to deal with estates and insurance policies where probate is otherwise not required or where these procedures can accelerate action. A continuing practical problem remains where property, outside probate jurisdiction, is required to adequately cover debts, taxes or expenses associated with the probate. Nevertheless, I believe this procedure is an improvement to the current authority for non-probate administration. I hope these matters will all be submitted to the legislature and implemented.

Very truly yours,



Paul H. Roskoph

EXHIBIT 13  
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CALIF. LAW REV. COMMISSION  
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Thomas R. Thurmond  
Truman H. Vance

May 7, 1990

California Law Review Commission  
4000 Middlefield Road, Ste. D-2  
Palo Alto, CA 94303-4739

Re: Tentative Recommendations

Recognition of trustees' powers

I have encountered very few problems involving the recognition of trustees' powers by third parties. The only area of occasional difficulty that I have seen involves some securities transfer agents, mainly on the east coast. Even in those cases I have been able to secure cooperation by advising the transfer agent's legal counsel of the appropriate California statutes. Therefore I am not at all convinced that additional legislation is needed in this area. However, if the consensus of practitioners is that such legislation is desirable, the tentative recommendations appear to be acceptable.

Compensation of counsel in guardianship and conservatorship proceedings

This recommendation clarifies an area that sometimes can cause confusion for clients and/or courts. I believe the recommended changes are helpful in clarifying the law.

Disposition of small estate without probate

I endorse these recommendations which continue the enactment of legislation designed to help dispose of small estate with minimal legal cost to the heirs and beneficiaries.

Thank you for allowing me to comment on these recommendations.

Yours very truly,



Thomas R. Thurmond  
Attorney at Law

TT/mat

EXHIBIT 14  
**LAW OFFICES**  
**JOSEPH E. TINNEY.**  
114 SANSOME STREET  
SUITE 1205  
SAN FRANCISCO, CALIFORNIA 94104  
TEL 781-5010 FAX 956-3635

CA LAW REV. COMMISSION

MAY 08 1990

R E C E I V E D

May 7, 1990

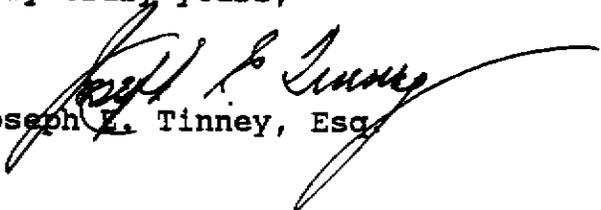
California Law Review Commission  
4000 Middlefield Road, Suite D2  
Palo Alto, CA 94303-4739

To the Commission,

The undersigned respectfully recommends approval of your tentative recommendation of:

- (1) Disposition of Small Estate without Probate (March 1990).
- (2) Recognition of Trustee's Power.
- (3) Compensation of Counsel in Guardianship and Conservatorship Proceedings.

Very truly yours,

  
Joseph E. Tinney, Esq.

JET/fo

**JEFFREY A. DENNIS-STRATHMEYER**  
ATTORNEY AT LAW

**MAY 04 1990**

**R E C E I V E D**

POST OFFICE BOX 533 - BERKELEY, CALIFORNIA 94701  
(415) 642-8317

May 3, 1990

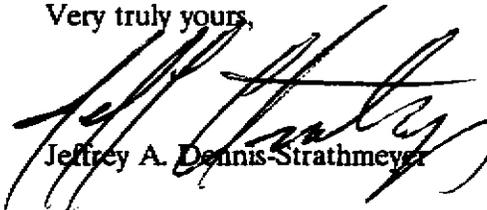
California Law Revision Commission  
4000 Middlefield Road, Suite D-2  
Palo Alto, CA 94303-4739

Re: Tentative Recommendation relating to:  
Compensation of Counsel in Guardianship and Conservatorship Proceedings

Sirs:

I strongly support the recommendation. Current law is unsettled and there is no reason to have artificial and capricious limitations imposed on the ability of judges and commissioners to award reasonable compensation to attorney for minors and conservatees.

Very truly yours,



Jeffrey A. Dennis-Strathmeyer



OFFICE OF COUNTY COUNSEL  
**STANISLAUS COUNTY**

COUNTY ADMINISTRATION BUILDING  
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PHONE (209) 525-8376  
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**MICHAEL H. KRAUSNICK**  
COUNTY COUNSEL  
**E. VERNON SEELEY**  
ASSISTANT COUNTY COUNSEL  
DEPUTIES  
Harry P. Drabkin  
Andrew N. Eshoo  
Linda S. Macy  
Teresa Vig Rein  
Wm. Dean Wright

CA LAW REV. COMM'N

MAY 07 1990

RECEIVED

May 4, 1990

California Law Revision Commission  
4000 Middlefield Road, Suite D-2  
Palo Alto, CA 94303-4739

Dear Sirs and Madam:

IN RE: TENTATIVE RECOMMENDATION RELATING TO COMPENSATION OF  
COUNSEL IN GUARDIANSHIP AND CONSERVATORSHIP  
PROCEEDINGS

I have reviewed the tentative recommendation relating to compensation of counsel in guardianship and conservatorship proceedings. I agree that it is necessary to clarify the statute to make it clear that compensation should be paid as set forth in the recommendation, and I think that the recommendation does so properly.

Very truly yours,

MICHAEL H. KRAUSNICK  
County Counsel

By *Harry P. Drabkin*  
Harry P. Drabkin  
Deputy County Counsel

HPD/sjp

JUN 15 1990

RECEIVED

Post Office Box 1379  
Santa Ana, California 92702

June 13, 1990

California Law Revision Commission  
4000 Middlefield Road, Suite D-2  
Palo Alto, California 94303-4739

Ladies and Gentlemen:

Thank you for sending me your tentative recommendations relating to disposition of small estates without probate and to compensation of counsel in guardianships and conservatorships.

Although I am a Deputy County Counsel for the County of Orange, as before, the opinions expressed here are my individual views, and I do not write as a representative of the County of Orange, the Orange County Counsel, or the Orange County Public Administrator/Public Guardian.

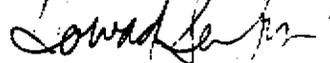
I believe the tentative recommendations relating to disposition of small estates without probate in the main are very well taken. I remain a little concerned about the interplay of the 13101 affidavit procedure and Section 2631, regarding the powers of a guardian or conservator after the death of the ward or conservatee. In a small insolvent estate, the guardian or conservator can obtain an order under 2631(b) authorizing him to withdraw money of the decedent in an account in a financial institution and to collect a debt, claim or insurance proceeds owed to the decedent or the decedent's estate. These funds can then be used to pay unpaid expenses of the guardianship or conservatorship. However, the increasing authority of a 13101 affiant makes it more possible that such affiant will collect the proceeds first, making them not readily available to pay those expenses.

I do not know if this has caused a problem in the past; perhaps the 40-days-from-death wait before the affidavit can be used generally prevents problems from arising. But there are times when a conservator may not be able within 40 days to both determine if 2631(b) authority is needed and then to obtain such. If you perceive a problem, perhaps the affidavit should include an averment that the decedent either did not have a guardian or conservator of his estate, or that such guardian or conservator has consented in writing to the transfer. Or perhaps some other amendment, such as narrowing the definition of the "successor of the decedent", would be helpful.

California Law Revision Commission  
June 13, 1990  
Page Two

I believe the tentative recommendation relating to compensation of counsel is very well taken, and I support it wholeheartedly.

Very truly yours,



Howard Serbin  
Deputy County Counsel

HS:mmm

cc: William A. Baker, Orange County Public Administrator/  
Public Guardian Guardian  
Carol Gandy, Assistant Public Administrator/  
Public Guardian  
Dwight Tipping, Supervising Deputy Public Administrator

**JUL 16 1990**

**R E C E I V E D**

(818) 795-8844

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Edward M. Phelps  
Deborah Ballins Schwarz  
Ruth A. Phelps  
Of Counsel  
Barbara E. Dunn

**Phelps, Schwarz & Phelps**  
Attorneys at Law  
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July 13, 1990

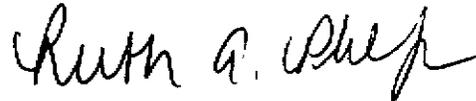
California Law Revision Commission  
4000 Middlefield Road, Suite B-2  
Palo Alto, California 94303-4739

Re: Tentative Recommendation Relating to Compensation of  
Counsel in Guardianship and Conservatorship Proceedings

Dear Sir/Madam:

I apologize for the delay in getting my comments to you on this section. I agree with the section and approve of it. I think it clarifies existing law and makes the judge's job easier.

Very truly yours,



Ruth A. Phelps  
PHELPS, SCHWARZ & PHELPS

RAP:svt

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

STATE OF CALIFORNIA

GEORGE DEUKMEJIAN, Governor

**CALIFORNIA LAW REVISION COMMISSION**

4000 MIDDLEFIELD ROAD, SUITE D-2  
PALO ALTO, CA 94303-4739  
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ARTHUR K. MARSHALL  
FORREST A. PLANT  
ANN E. STODDEN

**Letter of Transmittal**

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.

**COMPENSATION OF COUNSEL**

## RECOMMENDATION

Under existing law, the court in a guardianship or conservatorship proceeding may appoint counsel for a ward or conservatee.<sup>1</sup> 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.<sup>2</sup> There is some question whether the attorney may be compensated for legal services provided before the order of appointment.<sup>3</sup>

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.<sup>4</sup> 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.

## PROPOSED 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.

1. Prob. Code § 1470. See also Prob. Code §§ 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 Est. Plan. & Cal. Prob. Rep. 21 (Cal. Cont. Ed. Bar, Aug. 1989).

*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 or 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.