

Memorandum 91-41

Subject: Study L-700 - Compensation in Guardianship and Conservatorship Proceedings

Exhibit 1 is the Commission's *Recommendation Relating to Compensation in Guardianship and Conservatorship Proceedings (September 1990)*. We had planned to include it in the Commission's general probate bill, SB 271. But Legislative Counsel thought it was not germane to the subject of SB 271. So we sent it to Senator Henry Mello because of his interest in guardianship and conservatorship law. The recommendation was reviewed by Paul Minicucci on Senator Mello's staff. He had two drafting problems with it:

(1) He thought it should be made clearer in the statute that "order of appointment" in Sections 1470 and 1472 means appointment of the attorney, and that the same language in Sections 2640 and 2641 means appointment of the guardian or conservator. The staff has revised the statutory language as set out in Exhibit 2 to do this.

(2) He was concerned that an express provision allowing fees for pre-appointment services of a court-appointed attorney might imply that there is no right to fees where the attorney is privately retained. Fees for services of privately retained attorneys have been allowed, even though some other petitioner was appointed or other counsel was retained by the successful petitioner, as discussed below. We have addressed this problem by adding a paragraph to the Comments to Sections 1470 and 1472 in Exhibit 2.

Is This Legislation Unnecessary?

Mr. Minicucci asked whether this legislation might be unnecessary, since the 1989 case which prompted it is unpublished. In that case, an appellate court held that the trial court in a conservatorship proceeding could not award attorneys' fees for pre-appointment services. The case appears to have been wrongly decided.

There are cases suggesting that the court does have authority to order payment for pre-appointment services. In *Estate of Moore*, 258 Cal. App. 2d 458, 65 Cal. Rptr. 831 (1968), the physician of a proposed adult ward petitioned for appointment as guardian. He hired an attorney (not court-appointed), but the court appointed someone else as

guardian. The court ordered payment of the attorneys' fees of the unsuccessful petitioner. The court said that attorneys' fees should be denied where the petitioner is unsuccessful only if no guardian is appointed. In such a case, the court has found that no guardian is needed, and "a volunteer earns no right to reimbursement for rendering services which have proved unnecessary." But where some other guardian is appointed, the court has found that a guardianship is necessary, and the unsuccessful applicant should not be denied reimbursement. Although the attorney in the *Moore* case was not court-appointed, the reasoning of the case suggests that the rendering of services by a court-appointed attorney before the order of appointment should not preclude recovery of attorneys' fees, since the eventually-appointed attorney is more than a mere volunteer.

In re Guardianship of Bundy, 44 Cal. App. 466, 186 P. 811 (1919), held the trial court properly allowed compensation to the attorneys for the petitioner seeking appointment of a guardian for an adult, even though the proposed ward retained someone else as his attorney. The reasoning of this case also suggests a court-appointed attorney should not be denied compensation merely because the services were rendered before the order of appointment.

These two cases suggest that the 1989 case which prompted the proposed legislation is an anomaly not likely to be repeated, especially since the opinion is unpublished and therefore has no weight as authority. On the other hand, the recommendation was unanimously supported by the 19 people who gave us written comments. The staff thinks the problem addressed in the recommendation is not pressing, and we are concerned about the risk of causing unintended constructional problems like those raised by Mr. Minicucci.

If the Commission wants to renew this recommendation, it will have to wait until the 1992 session. If this is the Commission's desire, the staff recommends substituting the draft in Exhibit 2 for the previous recommendation in Exhibit 1.

Respectfully submitted,

Robert J. Murphy III
Staff Counsel

GUARDIANSHIP-CONSERVATORSHIP

2837

STATE OF CALIFORNIA

CALIFORNIA LAW REVISION COMMISSION

RECOMMENDATION

relating to

**Compensation in Guardianship and
Conservatorship Proceedings**

September 1990

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

NOTE

This recommendation includes an explanatory Comment to each section of the recommended legislation. The Comments are written as if the legislation were enacted since their primary purpose is to explain the law as it would exist (if enacted) to those who will have occasion to use it after it is in effect.

Cite this recommendation as *Recommendation Relating to Compensation in Guardianship and Conservatorship Proceedings*, 20 Cal. L. Revision Comm'n Reports 2837 (1990).

STATE OF CALIFORNIA

GEORGE DEUKMEJIAN, Governor

CALIFORNIA LAW REVISION COMMISSION

4000 MIDDLEFIELD ROAD, SUITE D-2
PALO ALTO, CA 94303-4739
(415) 494-1935

ROGER ARNEBERGH
CHAIRPERSON
EDWIN K. MARZEC
VICE CHAIRPERSON
BION M. GREGORY
ASSEMBLYMAN ELIHU M. HARRIS
BRAD R. HILL
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FORREST A. PLANT
SANFORD M. SKAGGS
ANN E. STODDEN

September 13, 1990

To: **The Honorable George Deukmejian**
 Governor of California, and
 The Legislature of California

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

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

Respectfully submitted,

Roger Arnebergh
Chairperson

RECOMMENDATION

Compensation of Counsel

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 by the court's discretion not to make the appointment, or not to award compensation for services rendered before the appointment.

Compensation of Guardian or Conservator

Similarly, there is some question whether a guardian or conservator may be compensated for services provided before the order of appointment. For a conservator of the estate,

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).

some courts allow a larger fee for services rendered during the first accounting period.⁵

The Commission recommends that it be made clear the court in a guardianship or conservatorship proceeding may award compensation for services provided by a guardian or conservator of the person, estate, or both, before the order of appointment.

5. See W. Johnstone, G. Zillgitt, & S. House, *California Conservatorships* § 12.10, at 704 (Cal. Cont. Ed. Bar, 2d ed. 1983). For a conservator of the person, there is no minimum fee as there is in some counties for a conservator of the estate; compensation depends on the time the conservator is required to spend with the conservatee and on the nature of the services performed. *Id.* § 12.14, at 707.

PROPOSED LEGISLATION

The Commission's recommendation would be effectuated by enactment of the following amendments.

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

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.

(e) *If a guardian or conservator is not appointed for the person furnished legal counsel, the order for payment may be enforced in the same manner as a money judgment.*

Comment. Section 1470 is amended to add the second sentence to subdivision (b), and to add a new subdivision (e). The second sentence of subdivision (b) 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.

Subdivision (e) is drawn from paragraph (4) of subdivision (a) of Section 1472.

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

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 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, the order for payment may be enforced in the same manner as a money judgment.

(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.

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 (Cal. Cont. Ed. Bar, 2d ed. 1983). The "matter" to which Section 1472 refers is the particular matter for which counsel was appointed. See Section 1471.

Prob. 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) such 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) such 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.

Prob. 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).

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

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, whether the services were rendered and the expenses incurred before or after the date of the order appointing counsel.

(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 make clear that, when legal counsel is appointed under this section, the court is not precluded from awarding compensation for legal services rendered, and expenses incurred, before the date of appointment.

Subdivision (b) deals with compensation when counsel has been appointed. Section 1470 does not affect the right to compensation in cases not covered by the section. See, e.g., Estate of Moore, 258 Cal. App. 2d 458, 65 Cal. Rptr. 831 (1968) (payment of attorneys' fees of unsuccessful petitioner); *In re Guardianship of Bundy*, 44 Cal. App. 466, 186 P. 811 (1919) (compensation of attorneys for petitioner for adult guardianship, even though proposed ward retained someone else as attorney).

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

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, whether the services were rendered and the expenses incurred before or after the date of the order appointing counsel, and shall make a determination of the person's ability to pay all or a portion of such sum.

(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 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, the order for payment may be enforced in the same manner as a money judgment.

(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 make clear that, when legal counsel is appointed under Section 1471, the court is not precluded from awarding compensation for legal services rendered, and expenses incurred, before the date of appointment.

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.

Section 1472 deals with compensation when counsel has been appointed. The section does not affect the right to compensation in cases not covered by the section. See, e.g., Estate of Moore, 258 Cal. App. 2d 458, 65 Cal. Rptr. 831 (1968) (payment of attorneys' fees of unsuccessful petitioner); *In re Guardianship of Bundy*, 44 Cal. App. 466, 186 P. 811 (1919) (compensation of attorneys for petitioner for adult guardianship, even though proposed ward retained someone else as attorney).

Prob. 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) such 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) such 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, whether the services were rendered before or after the date of the order appointing the guardian or conservator. The compensation so allowed shall thereupon be charged to the estate. 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 is not precluded from awarding compensation for services rendered before the date of appointment. See also Sections 1470 (compensation of counsel), 1472 (compensation of counsel), 2623(c) (guardian or conservator allowed all reasonable disbursements made before appointment as guardian or conservator), 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.

Prob. 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, whether the services were rendered before or after the date of the order appointing the guardian or conservator.

(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.

Comment. Section 2641 is amended to make clear the court is not precluded from awarding compensation for services rendered before the date of appointment. See also Sections 1470 (compensation of counsel), 1472 (compensation of counsel), 2623(c) (guardian or conservator allowed all reasonable disbursements made before appointment as guardian or conservator), 2640 (compensation of guardian or conservator).