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Memorandum 90-16

Subject: Study L-700 - Retroactive Appointment of Counsel in
Conservatorship Proceedings

In a recent case, a conservator of the estate was appointed for Olivia Mull. About a year later, a law firm not involved in the original appointment proceeding petitioned on behalf of Mrs. Mull for removal of the conservator. After hearing, the probate commissioner made an order that the petitioning law firm represented Mrs. Mull "individually." Later, the matter was settled, with the law firm agreeing to Mrs. Mull's conservator remaining in office. Then the law firm petitioned for attorneys' fees of \$15,374. Most of the services for which the firm sought compensation were performed before the probate commissioner's order. Nonetheless, the probate commissioner granted attorneys' fees in the full amount requested of \$15,374.

The appellate court reversed and remanded, holding that the attorneys fees could not be enforced against the conservatorship estate on a theory of private contract, because the conservatee lacked legal capacity. Whether the firm was entitled to a "reasonable" fee under the Probate Code provisions for appointment of counsel (§§ 1470-1472) depended on whether the probate commissioner's order that the law firm represented Mrs. Mull "individually" could be construed as an appointment under those code sections. The appellate court remanded for the probate court to construe its own order, but held that if the appointment was determined to be an appointment under those code sections, the attorneys' fees could not cover services rendered before the appointment order. Young, Wooldridge, Paulden, Self, Farr & Griffin v. Thomas, 210 Cal. App. 3d 812, 258 Cal. Rptr. 574 (1989).

This result was criticized in the August 1989 issue of the Estate Planning & California Probate Reporter (Cal. Cont. Ed. Bar):

There does not seem to be any purpose in not letting the court make a retroactive order of appointment. The conservatee would be adequately protected by a rule which provided that an attorney who renders service without an appointment order does so at the risk that the court will not

later make the appointment. There is no reason to punish the attorney's oversight on these facts. Further, it is normally appropriate for an attorney to do client interviewing and an investigation of facts before applying for appointment. Under this rule, those services cannot be compensated because they occur before appointment.

The staff agrees, and recommends adding new Section 1473 to the Probate Code to read:

Probate Code § 1473 (added). Retroactive appointment of
legal counsel

1473. In appointing the public defender or private legal counsel under this chapter, the court may provide in the order that the order shall have retroactive effect.

Comment. Section 1473 is new, and gives the court authority to make a retroactive order appointing legal counsel. Thus, in an appropriate case, compensation will be allowable for services rendered before the date of appointment. This changes the rule of *Young, Wooldridge, Paulden, Self, Farr & Griffin v. Thomas*, 210 Cal. App. 3d 812, 258 Cal. Rptr. 574 (1989).

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

Respectfully submitted,

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