

RESOLUTION 02-12-2014

DIGEST

Conservatorships: Compensation of Petitioners and Their Attorneys

Adds Probate Code section 2640.2 to provide for allowance of compensation and costs of a successful petitioner for appointment of a third party to serve as conservator.

RESOLUTIONS COMMITTEE RECOMMENDATION

APPROVE IN PRINCIPLE

History:

No similar resolutions found.

Reasons:

This resolution adds Probate Code section 2640.2 to provide for allowance of compensation and costs of a successful petitioner for appointment of a third party to serve as conservator. This resolution should be approved in principle because a person who successfully petitions for the appointment of a third person to serve as a conservator should be as entitled to an award of expenses and attorney's fees as a person who petitioned for his or her own appointment.

Probate Code section 2640 authorizes allowance from the relevant estate of the compensation, costs and attorney's fees of a successful petitioner, on his or her own behalf, for appointment as the estate fiduciary. Section 2640.1 authorizes allowance of such compensation, costs and fees to an unsuccessful petitioner for appointment as conservator, where the court appointed another conservator while that petition was pending and where the court determines that the petition was "filed in the best interests of the conservatee." But there is no provision allowing for compensation, costs and fees to a successful petitioner for appointment of a third person, such as a neutral third party or a professional fiduciary. This resolution would eliminate this gap in the law.

In practice, many if not most probate courts will allow the compensation, costs and fees of a successful petitioner who obtains the appointment of a third party as conservator, on the basis that it benefits the conservatee and/or the conservatorship estate. But courts have also been known to randomly refuse to do so, on the basis that there is no statutory authorization for such an allowance. There can be no justification for this. We should be encouraging people to seek appointment of independent third parties to serve as conservators, in order to minimize contentious intra-family disputes over the control of the conservatee's affairs. This resolution would eliminate any supposed basis for the denial of the expenses and fees of a successful petitioner.

The resolution makes the proposed changes "retroactive." Although including pending proceedings appears fair, it should be noted that there may be unintended consequences. If interpreted literally, the resolution authorizes the award of compensation, costs and fees to petitioners to whom they were denied in ancient, now-terminated proceedings. However, because the retroactivity language tracks that of the related statute, section 2640.1, the benefit of including the retroactive language outweighs the risk of those unintended consequences.

TEXT OF RESOLUTION

RESOLVED, that the Conference of California Bar Associations recommends that legislation be sponsored to add Probate Code section 2640.2 to read as follows:

§ 2640.2

Compensation to person who petitioned for appointment of conservator

(a) When a conservator is appointed by the court, the person who has petitioned for the appointment of that conservator and that person's attorney may petition the court for an order fixing and allowing compensation and reimbursement of costs.

(b) Notice of the time and place of the hearing shall be given at least 15 days before the day of the hearing in the manner provided in Chapter 3 (commencing with Section 1460) of Part 1.

(c) At the hearing, the court shall make an order to allow both of the following:

(1) Any compensation or costs requested in the petition the court determines is just and reasonable to the person who petitioned for the appointment of a conservator for the person's services rendered in connection with and to facilitate the appointment of the conservator, and costs incurred in connection therewith.

(2) Any compensation or costs requested in the petition the court determines is just and reasonable to the attorney for that person, rendered in connection with and to facilitate the appointment of the conservator, and costs incurred in connection therewith.

(3) Any compensation and costs allowed shall be charged to the estate of the conservatee. If a conservator of the estate is not appointed, but a conservator of the person is appointed, the compensation and costs allowed shall be ordered by the court to be paid from property belonging to the conservatee, whether held outright, in trust, or otherwise.

(d) This section is to have retroactive effect.

(Proposed new language underlined; language to be deleted stricken.)

PROPONENT: Santa Barbara County Bar Association

STATEMENT OF REASONS

The Problem: There is a gap in the statutes for the payment of the expenses of a petitioner who requests the appointment of a different conservator than the one set forth in the original Petition for Conservatorship.

For example, in an original Petition for Conservatorship filed by the wife of the proposed conservatee, it is proposed that the wife be appointed to be conservator. Another interested person, such as the son of the proposed conservatee, may agree that a conservator is necessary but may disagree that the wife is the appropriate person to serve in that capacity. The son then files a Petition for Conservatorship requesting the appointment of a professional fiduciary. The Court agrees that the professional fiduciary should be appointed. The professional fiduciary is represented by other counsel. Even though the son was successful in having an appropriate fiduciary appointed as conservator, there is no statute which allows him to recover the cost of the petition for the appointment of the conservator which was appointed by the court.

Probate Code section 2640(c) allows compensation to the attorney for the conservator.

Probate Code section 2640.1 allows compensation to a person who petitions for appointment of a conservator (and their attorney) for services rendered and costs incurred in connection with the petition if the petition is not granted but the court appoints another person to act as conservator, provided that the court determines the original petition was filed in the best interests of the conservatee.

There is no Probate Code section which allows compensation to the person (and their attorney) who petitions for the appointment of a conservator either for services rendered or costs incurred in connection with a successful petition for appointment of a conservator.

The Solution: This resolution would allow interested parties who successfully petition for appointment of another, more appropriate person as conservator to recover compensation and their attorneys' fees and costs incurred in connection with that petition. Without this authority, family members and other interested parties may be discouraged, because of their own limited means, from petitioning to have a suitable conservator appointed.

LEGISLATIVE HISTORY

Not known.

IMPACT STATEMENT

The proposed resolution does not affect any other law, statute or rule.

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SECTION COMMENTS TO RESOLUTION 02-12-2014

TRUST AND ESTATE SECTION OF THE STATE BAR OF CALIFORNIA

APPROVE.

Disclaimer:

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