

## RESOLUTION 01-09-2014 (as amended)

### DIGEST

#### Guardianship: Appointment of Minor's Counsel in Guardianship Proceedings

Amends Probate Code sections 1471 and 1472 to provide for the appointment of counsel for minors in all probate guardianship proceedings.

### RESOLUTIONS COMMITTEE RECOMMENDATION DISAPPROVE

#### History:

No similar resolutions found.

#### Reasons:

This resolution amends Probate Code sections 1471 and 1472 to provide for the appointment of counsel for minors in all probate guardianship proceedings. This resolution should be disapproved because in many probate guardianships there is no need for minor's counsel and such appointments should be left to the trial court's discretion.

Probate guardianship cases are significantly different than dependency proceedings, in that they are not initiated by the state, are not regularly supervised by the court or a social service agency, and often are established with parental consent. (*In re Guardianship of Ann S.* (2009) 45 Cal.4th 1110, 1122.) These differences are due to the historical context of probate guardianships, which typically involved orphans rather than abused or neglected children. (*In re Guardianship of Christian G.* (2011) 195 Cal.App.4th 581, 599-600.)

Further, Probate Code section 1513, subdivision (c), requires the probate court to refer a guardianship case to Child Protective Services (CPS) - the agency that investigates child abuse and neglect - whenever it is alleged that a parent is unfit. If CPS concludes the child is at risk it can initiate a dependency proceeding, in which case the court will appoint counsel for the child. The proponent cites *In re Richard E.* (1978) 21 Cal.3d 249, as holding that it is generally error for a trial court to fail to appoint counsel for a minor in guardianship cases. However, that case involved a non-probate guardianship, and there the California Supreme Court held that such appointments are discretionary (although Welf. & Inst. Code, § 317 now requires the appointment of counsel for all children in dependency cases).

In addition, requiring the appointment of minor's counsel in all probate guardianship proceedings would create a burden for children and families with the means to pay for such counsel, and create a burden for the State in having to pay for counsel in cases where the families were not able to do so.

### TEXT OF RESOLUTION

RESOLVED, that the Conference of California Bar Associations recommends that legislation be sponsored to amend Section 1471 and add 1472 of Chapter 4 of Division 4 of the Probate Code to read as follows:

#### § 1471

- 1 (a) If a ward, proposed ward, conservatee, proposed conservatee, or person alleged to
- 2 lack legal capacity is unable to retain legal counsel and requests the appointment of counsel to
- 3 assist in the particular matter, whether or not such person lacks or appears to lack legal capacity,

4 the court shall, at or before the time of the hearing, appoint the public defender or private counsel  
5 to represent the interest of such person in the following proceedings under this division:

6 (1) A proceeding to establish a guardianship or conservatorship or to appoint a proposed  
7 guardian or conservator.

8 (2) A proceeding to terminate the guardianship or conservatorship.

9 (3) A proceeding to remove the guardian or conservator.

10 (4) A proceeding for a court order affecting the legal capacity of  
11 the conservatee.

12 (5) A proceeding to obtain an order authorizing removal of a temporary conservatee or  
13 ward in a temporary guardianship from the temporary conservatee's or ward's place of residence.

14 (b) If a conservatee or proposed conservatee does not plan to retain legal counsel and has  
15 not requested the court to appoint legal counsel, whether or not such person lacks or appears to  
16 lack legal capacity, the court shall, at or before the time of the hearing, appoint the public  
17 defender or private counsel to represent the interests of such person in any proceeding listed in  
18 subdivision (a) if, based on information contained in the court investigator's report or obtained  
19 from any other source, the court determines that the appointment would be helpful to the  
20 resolution of the matter or is necessary to protect the interests of the conservatee or proposed  
21 conservatee.

22 (c) In any proceeding to establish a limited conservatorship, if the proposed limited  
23 conservatee has not retained legal counsel and does not plan to retain legal counsel, the court  
24 shall immediately appoint the public defender or private counsel to represent the proposed  
25 limited conservatee. The proposed limited conservatee shall pay the cost for such legal service if  
26 he or she is able. This subdivision applies irrespective of any medical or psychological inability  
27 to attend the hearing on the part of the proposed limited conservatee as allowed in Section 1825.

28 (d) In a proceeding involving a ward or a proposed ward the court shall, at or before the  
29 time of the hearing, appoint the public defender or private counsel to represent the interests of a  
30 ward or proposed ward in any proceeding listed in subdivision (a) if any party to the  
31 guardianship proceeding objects to the requested action.

32  
33 § 1472

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

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

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

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

46 (4) If a conservator is not appointed for the person furnished legal counsel, the order for  
47 payment may be enforced in the same manner as a money judgment.

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

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

56 (d) If a ward or proposed ward is furnished legal counsel sources of payment for legal  
57 counsel shall be subject to Section 1470 subdivisions (c) and (d).

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

**PROPONENT:** San Bernardino County Bar Association

### **STATEMENT OF REASONS**

The Problem: Under existing law, in a probate guardianship proceeding, there is no equivalent to Probate Code Section 1471 (applicable to conservatorships) mandating the appointment of counsel for the minor in guardianship proceedings. Probate Code 1470(a) simply permits the court to appoint counsel for the minor if appointment would be “helpful to the resolution of the matter” or “is necessary to protect the person’s interests.” Notwithstanding the California Supreme Court’s decision in *In re Richard E*, (1978) 21 Cal.3d 249, 354, whereby the court concluded that it was generally error for a trial court to fail to appoint counsel for a minor, only a few jurisdictions require the appointment of counsel for minors in probate guardianship proceedings. As a result, important decisions that affect a minor’s life including the determination of the home where the minor will be raised are made without the benefit of counsel specifically representing the minor’s wishes and interests.

The Solution: The proposed resolution will require the court to appoint counsel for a minor in any guardianship proceeding that substantially affects the life of the minor. Under the proposed amendment, Probate Code Section 1471 would expand the requirement of court appointed counsel to not only include conservatees or proposed conservatees, but also wards or proposed wards. The resolution also amends Probate Code Section 1472 to provide for the payment of mandatory counsel based on a hearing determining the parent or parent’s ability to pay all or a portion of the cost of appointed counsel which is already required during discretionary appointments of counsel by the Court. The result of the resolution is that there will be uniformity throughout California regarding the requirement of appointed counsel in guardianship proceedings.

### **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 01-09-2014

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TRUST AND ESTATES SECTION OF THE STATE BAR OF CALIFORNIA

APPROVE

**Disclaimer:**

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