

## RESOLUTION 10-06-2015

### DIGEST

#### Conservatorships: Right to a Trial by Jury and Jury Fees

Amends Probate Code section 1827 to specify that a proposed conservatee may demand a jury trial at any time before trial commences and when the jury fees may be assessed.

### TEXT OF RESOLUTION

**RESOLVED**, that the Conference of California Bar Associations recommends that legislation be sponsored to amend Probate Code section 1827 to read as follows:

#### §1827

1           The court shall hear and determine the matter of the establishment of the conservatorship  
2 according to the law and procedure relating to the trial of civil actions, including trial by jury if  
3 demanded by the proposed conservatee.

4           (a) The proposed conservatee may demand a trial by jury at any time in the proceedings,  
5 up to and including the date of trial.

6           (b) No jury fees shall be required to be posted, regarding a petition for a conservatorship  
7 of the person.

8           (c) The court may charge jury fees and have the conservator of the estate pay those fees  
9 from estate funds if, (1) the petition for the conservatorship of the estate is granted, and (2) the  
10 court makes a finding that the conservatee's estate has the ability to pay jury fees pursuant to  
11 Probate Code section 2623.

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

**PROPONENT:** San Bernardino County Bar Association

### STATEMENT OF REASONS

The Problem: The Probate Code is silent as to when the demand for a jury trial regarding a petition for conservatorship must be made as well as when and how jury fees, if any are to be paid. Probate Code § 1000 states where there is no specific rule in the Probate Code governing a procedure, the California Code of Civil Procedure, is to be followed. Thus, a strict reading of the codes means that a proposed conservatee must exercise his or her right to a trial by jury upon the objection to the petition for conservatorship and submit that in writing to the court and pay jury fees prior to the first case management conference; which are not scheduled in probate cases. Forcing a proposed conservatee to exercise his or her right to a trial by jury at the initial stages of the proceedings will drastically increase the number of jury trials schedule for already overburden courts.

The Solution: This resolution amends Probate Code section 1827 regarding the time and means of a proposed conservatee to exercise their right to have the issue of the petition for conservatorship decided by a jury of their peers and when jury fees, if any, are due and must be paid and by whom. Currently the probate code grants a proposed conservatee, whose liberty

interest is at issue regarding a petition for conservatorship, the right to trial by jury. However, the code is silent as to when that demand for a jury trial must be made. Practitioners in this field have seen different rulings from judicial officers regarding when the demand for a jury trial must be made and if jury fees must be posted by the proposed conservatee. In some cases a demand for a jury trial, given the quasi-criminal nature of the proceedings, is honored by a judicial officer when made the day trial is set to start. In other instances the judicial officer has sighted the code of California Code of Civil Procedure, § 631, which states that jury fees must be paid prior to the first case management conference. Probate cases do not schedule case management conferences. This has created an ambiguity in the code which needs to be addressed.

In addition to this, it is in the best interests of judicial economy for the proposed conservatee to put off for as long as is possible the demand for a right to a trial by jury, in order to not bog down the courts and to facilitate cooperation between the parties, who are most often family members and possible settlement of the matter. Once the demand for a jury is made the parties will dig in their heels and the court system will grind to a halt.

The right of a proposed conservatee to a trial by jury is also established in Welfare and Institutions Code §5350. The proposed resolution would not affect procedures under this code section. Proceedings under this code section are governed by specific detailed procedures and practitioners in this area of the law have not seen the kind of procedural problem as noted above in strictly probate conservatorship matters.

#### **IMPACT STATEMENT**

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

#### **CURRENT OR PRIOR RELATED LEGISLATION**

Not known.

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#### **RESOLUTIONS COMMITTEE RECOMMENDATION**

APPROVE IN PRINCIPLE

#### History:

No similar prior resolutions found.

#### Reasons:

This resolution amends Probate Code section 1827 to specify that a proposed conservatee may demand a jury trial at any time before trial commences and when the jury fees may be assessed. This resolution should be approved in principle because a proposed conservatee should enjoy the same liberal right to demand a jury up to the day of trial, and jury fees should only be assessed if the conservatorship is imposed and the estate has the ability to pay them.

Probate Code section 1827 enshrines a proposed conservatee's right to a jury trial if demanded, but does not specify when demand must be made, or whether jury fees must be paid by the proposed conservatee. This resolution clarifies that a proposed conservatee may elect a jury trial up to and including the first day of trial, as may a criminal defendant. A conservatorship is a drastic proceeding that can result in the curtailment of a person's liberties, and is thus somewhat akin to a criminal proceeding. Thus it is appropriate that a proposed conservatee should be allowed the same leeway in electing to demand a jury.

This resolution would also clarify that jury fees would not be due unless and until a conservatorship is imposed *and* the court has determined that the estate has the ability to pay the fees. It is only fair that since a proposed conservatee does not initiate proceedings to conserve him or herself, jury fees should not be assessed unless the conservatorship is actually created. In that regard the resolution also tracks other fee assessment provisions of the code, such as section 1851.5, which pertains to the assessment on the conservatee's estate of the court investigator's fee.

Note: This resolution is similar, and in the alternative to, Resolution 10-05-2015, which also addresses the time by which a conservatee must demand a jury trial but requires that such a demand be made at the outset of the proceedings.

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## **SECTION TO COMMENTS TO RESOLUTION 10-06-2015**

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### **TRUSTS AND ESTATES SECTION OF THE STATE BAR OF CALIFORNIA**

#### **SUPPORT**

The problem with the current statute, as stated by the author, is the Probate Code grants a proposed conservatee the right to demand a jury trial regarding a petition for conservatorship but the code is silent as to when the demand for a jury trial must be made, and when and how jury fees, if any, are to be paid. Probate Code section 1000 states where there is no specific rule in the Probate Code governing a procedure, the Code of Civil Procedure is to be followed. A strict reading of the code means that a proposed conservatee must exercise his or her right to a jury trial upon the objection to the petition for conservatorship and submit it in writing to the court and pay jury fees prior to the first case management conference but none are scheduled in probate cases.

This omission in the Probate Code has resulted in inconsistent results. In some cases a demand for a jury trial is allowed when made on the date of trial because of the quasi-criminal nature of the proceedings. In other cases, judges have relied on CCP section 631, which states jury fees must be paid prior to the first case management conference, to preclude jury trials.

Subdivision (a) clearly establishes when a proposed conservatee must elect his or her right to a jury trial, and clarity in probate proceedings is preferred to ambiguity. Additionally,

since the liberty interest of the proposed conservatee is at issue, it is appropriate that he or she not be forced to demand a jury trial at the initial stages of the proceeding before the issues have been fleshed out in order to avoid forfeiting the right to have a jury trial. Moreover, as investigation and discovery proceed after the proposed conservatee objects to the petition for conservatorship, the proposed conservatee may change his or her mind concerning a court or jury trial. The proposal allows the proposed conservatee to benefit from new information gathered after he or she objects to the petition for probate.

Subdivision (b) states that no jury fees shall be required to be posted, regarding a petition for conservatorship of the person. This is reasonable because it does not add an additional financial burden or hurdle to an individual seeking to protect his or her liberty interest. There is, however, the potential for waste of scarce judicial resources because proposed conservatees can demand a jury trial without incurring any costs, even if they have the resources to pay jury fees.

Subdivision (c) provides a framework for determining when jury fees must be paid regarding a petition for conservatorship of the estate. It eliminates a financial barrier to the proposed conservatee's exercise of his or her right to a jury trial but also allows, under certain circumstances, the courts to recover some of the costs incurred by jury trials.

**DISCLAIMER:**

**This position is only that of the TRUSTS & ESTATES SECTION of the State Bar of California. This position has not been adopted by either the State Bar's Board of Trustees or overall membership, and is not to be construed as representing the position of the State Bar of California.**

**Membership in the TRUSTS & ESTATES SECTION is voluntary and funding for section activities, including all legislative activities, is obtained entirely from voluntary sources.**

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**COUNTERARGUMENTS TO RESOLUTION 10-06-2015**

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**ORANGE COUNTY BAR ASSOCIATION**

The Conservatee's right to trial by jury is an important constitutional right that should be preserved. There is need for clarity in law as to when the conservatee must request his right to trial by jury. The proposed resolution creates an unfair burden upon the petitioner and opens the gates to unfair gamesmanship. For these reasons, the conservatee should not be able to request jury trial on the day of trial, but should be required to make that request at upon making his objection.

It would not be efficient to allow a conservatee to request a jury trial on the day of trial. A petitioner would be at a disadvantage to prepare for the possibility that the contested conservatorship trial could be before a jury. The conservatorship is the only proceeding under the probate code that allows for a jury trial. Most probate practitioners would not be competent to act

as trial counsel in a jury trial, and would likely require co-counsel with experience in jury trials. Furthermore, even where the probate attorney is competent to handle a jury trial, in each contested conservatorship trial, the petitioner and ultimately the conservatee's estate must bear the extra expense of counsel's preparation for voir dire, etc., in the event that the conservatee requests a jury trial on the day of trial, or run the risk of going to trial unprepared. Even where the probate court finds that the election of a jury trial is basis for a continuance, there will be unnecessary delay and extra costs generated by the continuance. Furthermore, it is not unimaginable that the last minute request for a jury trial could be used as tool of gamesmanship by uncivilized litigators who represent conservatees.

Proposed resolution 10-05-2015 on the other hand, requires the conservatee to make the request for a jury trial at time that he makes his objection. This would not be a terrible burden upon the conservatee so long as the conservatee is advised of his rights and has counsel appointed to him to ensure that he makes an informed choice. If the conservatee makes the request for a jury trial when he makes his objection, then the court should allow him the opportunity to change his mind at a later date. In this way, the conservatee's rights are preserved and the petitioner has an opportunity to adequately prepare for trial without unnecessary waste, expense, and uncertainty.

#### **BAR ASSOCIATION OF NORTHERN SAN DIEGO COUNTY**

This proposed resolution could create an unfair advantage to a party by allowing a party to demand a jury trial up to the date of trial because an attorney prepares differently for a trial by jury than a bench trial. Notice of a jury trial earlier in the proceedings will alter how one party conducts and prepares his case. Requiring the demand to be thirty or sixty days before trial would be more practical.