

RESOLUTION 08-06-17

DIGEST

Limited Conservatorships: Immediate Appointment of Counsel

Amends Probate Code section 1471 to allow for the appointment of counsel upon the filing of the petition for limited conservatorship.

RESOLUTIONS COMMITTEE RECOMMENDATION

APPROVE IN PRINCIPLE

History:

No similar resolutions found.

Reasons:

This resolution amends Probate Code section 1471 to allow for the appointment of counsel upon the filing of the petition for limited conservatorship. This resolution should be approved in principle because it would save the court time by not wasting the initial hearing on the mandatory appointment of counsel.

In a limited conservatorship, the appointment of counsel for the proposed conservatee is mandatory. A majority of persons petitioning for a limited conservatorship are family members who are not represented by counsel themselves. At the time of filing the petition for the appointment of a limited conservator, most petitioners do not know that the appointment of counsel is mandatory and are unaware of the mandatory appointment until the initial hearing on the petition. Even though a petitioner can request that counsel be appointed for the proposed conservatee when they file the initial petition, such a request is never made. By requiring the courts to appoint counsel at the time the petition for a limited conservatorship is filed, it will save the court time as well as family member's time and dispense with the unnecessary initial hearing where counsel is usually appointed.

Even if the courts were required to appoint counsel at the time of the filing of the petition, this would not interfere with the proposed conservatee's right to obtain counsel. If the proposed conservatee obtained their own counsel, they could inform the court at the hearing on the petition for the appointment of a limited conservator.

TEXT OF RESOLUTION

RESOLVED that the Conference of California Bar Associations recommends that legislation be sponsored to amend Probate Code section 1471 to read as follows:

- 1 § 1471
- 2 (a) If a conservatee, proposed conservatee, or person alleged to lack legal capacity is
- 3 unable to retain legal counsel and requests the appointment of counsel to assist in the particular
- 4 matter, whether or not that person lacks or appears to lack legal capacity, the court shall, at or
- 5 before the time of the hearing, appoint the public defender or private counsel to represent the
- 6 interest of that person in the following proceedings under this division:

- 7 1. A proceeding to establish or transfer a conservatorship or to appoint a proposed
8 conservator.
9 2. A proceeding to terminate the conservatorship.
10 3. A proceeding to remove the conservator.
11 4. A proceeding for a court order affecting the legal capacity of the conservatee.
12 5. A proceeding to obtain an order authorizing removal of a temporary conservatee from
13 the temporary conservatee'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 that 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 that 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, at the time the petition is
23 filed ~~if the proposed limited conservatee has not retained legal counsel and does not plan to~~
24 ~~retain legal counsel~~, the court shall immediately appoint the public defender or private counsel to
25 represent the proposed limited conservatee. The proposed limited conservatee shall pay the cost
26 for that legal service if he or she is able. This subdivision applies irrespective of any medical or
27 psychological inability to attend the hearing on the part of the proposed limited conservatee as
28 allowed in Section 1825.

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

PROPONENT: Contra Costa County Bar Association

STATEMENT OF REASONS

The Problem: Limited Conservatorships are proceedings for developmentally disabled adults. The law currently provides for the “immediate” appointment of counsel for the proposed conservatee if counsel has not been retained. It is mandatory that counsel either be retained by the proposed conservatee or the court appoint counsel. The majority of proposed limited conservatees do not have the ability to retain independent counsel. If counsel is not retained by the proposed conservatee then the first hearing serves solely for the appointment of counsel which is a waste of the court’s and the family’s time. The families with children with developmental disabilities always appear to be willing to jump through any necessary hoop to ensure that their child is protected, but it does not make sense to increase the amount of time necessary in an already overly time consuming process. The courts always exercise the utmost care to ensure that the rights of proposed limited conservatees are honored, and are equally encumbered with this process--court time is completely wasted solely for a mandatory appointment of counsel.

The Solution: At the time the petition is filed the court immediately appoints counsel for the proposed conservatee. If the court were to appoint counsel for the proposed conservatee at the time of the filing of the petition these matters would potentially be completed sooner saving the court time and also saving the family multiple trips to the court.

IMPACT STATEMENT

The resolution does not affect any other law, statute or rule other than those expressly identified.

CURRENT OR PRIOR RELATED LEGISLATION

None known.

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COUNTERARGUMENTS AND STATE BAR SECTION COMMENTS

TEXCOM - DISAPPROVE

Many counties currently appoint counsel for proposed limited conservatees at filing. However, for those that do not, TEXCOM believes this resolution may obstruct an individual, for whom no determination of incapacity has been made, from retaining his or her own counsel. The delay from a continuance when counsel has to be appointed for an individual who has not retained one should be balanced against a proposal that could prevent or interfere with the limited conservatee's right to select counsel of his or her own choosing.

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

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