

RESOLUTION 08-09-2017 (REVISED AS AMENDED)

DIGEST

Guardian ad Litem: Discretionary Appointment by Court

Amends Probate Code section 1003 to allow the court discretion in appointing a guardian ad litem without a finding that the person is incapacitated.

RESOLUTIONS COMMITTEE COMMENT

History:

No similar resolutions found.

Reasons:

This resolution amends Probate Code section 1003 to allow the court discretion in appointing a guardian ad litem without having to find the person incapacitated. The amendment taken on the Conference Floor provides additional safeguards through the requirement that a GAL is only contemplated when counsel has been appointed or the proposed conservatee already has counsel.

In determining whether a guardian ad litem should be appointed based on incapacity, the courts often rely on the standards set forth in Probate Code section 1801 subdivision (b) which governs the appointment of a Probate Conservator whereby a showing is required that someone is "substantially unable to manage his or her own financial resources or resist fraud or undue influence." Other courts may rely on Code of Civil Procedure section 372 which provides for the appointment of a guardian ad litem for someone "lacking legal capacity to make decisions."

The Resolutions Committee initially recommended disapproval of this resolution. The full Conference voted to approve the resolution after it had been amended to apply only after counsel had been appointed for the person whose capacity is at issue.

TEXT OF RESOLUTION

RESOLVED that the Conference of California Bar Associations recommends that legislation be sponsored to amend Probate Code section 1003 to read as follows:

- 1 § 1003
- 2 (a) The court may, on its own motion or on request of a personal representative, guardian,
- 3 conservator, trustee, or other interested person, appoint a guardian ad litem at any stage of a
- 4 proceeding under this code to represent the interest of any of the following persons, if the court
- 5 determines that representation of the interest otherwise would be inadequate:
- 6 (1) A minor.
- 7 (2) An incapacitated person.
- 8 (3) An unborn person.
- 9 (4) An unascertained person.
- 10 (5) A person whose identity or address is unknown.
- 11 (6) A designated class of persons who are not ascertained or are not in being.

12 (7) A person whose capacity is at issue, for whom counsel has been appointed by the
13 court or is otherwise represented by counsel, and for whom, in the discretion of the court such
14 appointment would be helpful to the resolution of the matter, or and for whom the appointment
15 of a guardian ad litem is necessary to protect the person's interests. The appointment of a
16 guardian ad litem pursuant to this subdivision does not constitute a finding of incapacity.

17 (b) If not precluded by a conflict of interest, a guardian ad litem, including compensation
18 and attorney's fees, shall be determined by the court and paid as the court orders, either out of
19 the property of the estate involved or by the petitioner or from such other source as the court
20 orders.

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

PROPONENT: Probate Attorneys of San Diego

STATEMENT OF REASONS

The Problem: Existing law requires a court to adjudicate a person incapacitated prior to appointment of a guardian ad litem unless one of the enumerated exceptions applies. Currently a court can appoint legal counsel to individuals where such individual is not otherwise represented by legal counsel and the appointment would be helpful to the resolution of the matter or necessary to protect the person's interests. Probate Code §1470. Frequently, persons for whom a court appoints legal counsel are unable to meaningfully participate in the legal proceedings and are unable to direct or assist their court appointed counsel and therefore their interests may not be adequately protected.

The Solution: Will enable a court to use discretion in appointing a guardian ad litem for a person for whom counsel has been appointed without first needing to adjudicate the person incompetent.

IMPACT STATEMENT

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

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COUNTERARGUMENTS AND STATE BAR SECTION COMMENTS

TEXCOM - DISAPPROVE

While perhaps understandable, this resolution is inconsistent with the rights of those who are accused of lacking capacity. It would be unfair to give courts the discretion to appoint a guardian ad litem for someone regardless of whether that person is incapacitated or not. If an

interested person wants to have a guardian ad litem appointed for someone, the interested person does not need to obtain a prior conservatorship and, instead, can request appointment of a guardian ad litem by ex parte application. (*Sarracino v. Superior Court* (1974) 13 Cal.3d 1, 12-13.)

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.