

RESOLUTION 13-01-2019

DIGEST

Damages: Consistency with Damage Awards

Amends Probate Code section 859 to allow double damages in addition to damages awarded by the court.

TEXT OF RESOLUTION

RESOLVED that the Conference of California Bar Associations recommends that legislation be sponsored to amend Probate Code section 859 to read as follows:

1 § 859

2 If a court finds that a person has in bad faith wrongfully taken, concealed, or disposed of

3 property belonging to a conservatee, a minor, an elder, a dependent adult, a trust, or the estate of

4 a decedent, or has taken, concealed, or disposed of the property by the use of undue influence in

5 bad faith or through the commission of elder or dependent adult financial abuse, as defined in

6 Section 15610.30 of the Welfare and Institutions Code, the person shall be liable for twice the

7 value of the property in addition to the property recovered by an action under this part. In

8 addition, except as otherwise required by law, including Section 15657.5 of the Welfare and

9 Institutions Code, the person may, in the court’s discretion, be liable for reasonable attorney’s

10 fees and costs. The remedies provided in this section shall be in addition to any other remedies

11 available in law to a person authorized to bring an action pursuant to this part.

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

PROPONENT: Los Angeles County Bar Association

STATEMENT OF REASONS

The Problem: For many years the Court had the power to award double damages for wrongful taking in Trust, Estate, Guardianship and Conservatorship matters. There has been confusion by the Courts whether the double damages are to be added to the damage award or is the damage award only to be doubled. The Appellate Courts in published and unpublished decision have disagreed as to how Section 859 is to be applied. The most recent case is *Conservatorship of Ribal (Rogers v. Nguyen)* (January 18, 2019) 2018 DJDAR 561 the Court held that the damage award was to be doubled and not have double damages added to the damage award.

The Solution: The past application of Section 859 was treated in its application as if it was similar to an award of punitive damages. In cases involving punitive damages, punitive damages are added to the award of actual damages. Similar penalties (such as triple damages) in civil litigation are also added to the actual damage award. The *Ribal* case is the first published case that interprets a penalty provision to not be added to an actual damage award. This would reduce the protection as to the elderly and minors from those that attempt to wrongfully exploit them.

The proposed amendment is to ensure that the purpose of the statute would be maintained and protect this vulnerable population.

IMPACT STATEMENT

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

CURRENT OR PRIOR RELATED LEGISLATION

None

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RESOLUTION 13-02-2019

DIGEST

Probate Code: Verified Electronic Bank Statements

Amends Probate Code section 2620 to allow verified electronic bank statements to be submitted in support of accountings.

TEXT OF RESOLUTION

RESOLVED that the Conference of California Bar Associations recommends that legislation be sponsored to amend Probate Code section 2620, to read as follows:

- 1 § 2620
2 (a) At the expiration of one year from the time of appointment and thereafter not less
3 frequently than biennially, unless otherwise ordered by the court to be more frequent, the
4 guardian or conservator shall present the accounting of the assets of the estate of the ward or
5 conservatee to the court for settlement and allowance in the manner provided in Chapter 4
6 (commencing with Section 1060) of Part 1 of Division 3. By January 1, 2008, the Judicial
7 Council, in consultation with the California Judges Association, the California Association of
8 Superior Court Investigators, the California State Association of Public Administrators, Public
9 Guardians, and Public Conservators, the State Bar of California, and the California Society of
10 Certified Public Accountants, shall develop a standard accounting form, a simplified accounting
11 form, and rules for when the simplified accounting form may be used. After January 1, 2008, all
12 accountings submitted pursuant to this section shall be submitted on the Judicial Council form.
- 13 (b) The final court accounting of the guardian or conservator following the death of the
14 ward or conservatee shall include a court accounting for the period that ended on the date of
15 death and a separate accounting for the period subsequent to the date of death.
- 16 (c) Along with each court accounting, the guardian or conservator shall file supporting
17 documents, as provided in this section.
- 18 (1) For purposes of this subdivision, the term “account statement” shall include any
19 original account statement, or verified electronic statement, from any institution, as defined in
20 Section 2890, or any financial institution, as defined in Section 2892, in which money or other
21 assets of the estate are held or deposited. A verification shall be executed pursuant to California
22 Code of Civil Procedure section 2015.5.
- 23 (2) The filing shall include all account statements showing the account balance as of the
24 closing date of the accounting period of the court accounting. If the court accounting is the first
25 court accounting of the guardianship or conservatorship, the guardian or conservator shall
26 provide to the court all account statements showing the account balance immediately preceding
27 the date the conservator or guardian was appointed and all account statements showing the
28 account balance as of the closing date of the first court accounting.
- 29 (3) If the guardian or conservator is a private professional or licensed guardian or
30 conservator, the guardian or conservator shall also file all original account statements, as
31 described above, or verified electronic statements showing the balance as of all periods covered
32 by the accounting.
- 33 (4) The filing shall include the original closing escrow statement received showing the
34 charges and credits for any sale of real property of the estate.

35 (5) If the ward or conservatee is in a residential care facility or a long-term care facility, the
36 filing shall include the original bill statements for the facility.

37 (6) This subdivision shall not apply to the public guardian if the money belonging to the
38 estate is pooled with money belonging to other estates pursuant to Section 2940 and Article 3
39 (commencing with Section 7640) of Chapter 4 of Part 1 of Division 7. Nothing in this section
40 shall affect any other duty or responsibility of the public guardian with regard to managing
41 money belonging to the estate or filing accountings with the court.

42 (7) If any document to be filed or lodged with the court under this section contains the
43 ward's or conservatee's social security number or any other personal information regarding the
44 ward or conservatee that would not ordinarily be disclosed in a court accounting, an inventory
45 and appraisal, or other nonconfidential pleadings filed in the action, the account statement or
46 other document shall be attached to a separate affidavit describing the character of the document,
47 captioned "CONFIDENTIAL FINANCIAL STATEMENT" in capital letters. Except as
48 otherwise ordered by the court, the clerk of the court shall keep the document confidential except
49 to the court and subject to disclosure only upon an order from the court. The guardian or
50 conservator may redact the ward's or conservatee's social security number from any document
51 lodged with the court under this section.

52 (8) Courts may provide by local rule that the court shall retain all documents lodged with it
53 under this subdivision until the court's determination of the guardian's or conservator's account
54 has become final, at which time the supporting documents shall be returned to the depositing
55 guardian or conservator or delivered to any successor appointed by the court.

56 (d) Each accounting is subject to random or discretionary, full or partial review by the
57 court. The review may include consideration of any information necessary to determine the
58 accuracy of the accounting. If the accounting has any material error, the court shall make an
59 express finding as to the severity of the error and what further action is appropriate in response to
60 the error, if any. Among the actions available to the court is immediate suspension of the
61 guardian or conservator without further notice or proceedings and appointment of a temporary
62 guardian or conservator or removal of the guardian or conservator pursuant to Section 2650 and
63 appointment of a temporary guardian or conservator.

64 (e) The guardian or conservator shall make available for inspection and copying, upon
65 reasonable notice, to any person designated by the court to verify the accuracy of the accounting,
66 all books and records, including receipts for any expenditures, of the guardianship or
67 conservatorship.

68 (f) A superior court shall not be required to perform any duties imposed pursuant to the
69 amendments to this section enacted by Chapter 493 of the Statutes 2006 until the Legislature
70 makes an appropriation identified for this purpose.

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

PROPONENT: Probate Attorneys of San Diego

STATEMENT OF REASONS

The Problem: The current requirement to provide original bank statements is onerous and outdated. Electronic statements are now more common than paper statements. Requiring

original statements can cause unnecessary expense and delay in guardianship and conservatorship administrations.

The Solution: Allowing the use of electronic statements and requiring the party submitting the electronic statements to verify authenticity of the same will reduce cost and increase efficiency in the administration of guardianship and conservatorship administrations. At least one county has addressed this issue with a local rule enabling a declaration of due diligence to be submitted by a party if a financial institution will not produce original records. (See, Super. Ct. County of San Diego Local Rules, rule 4.15.2.)

IMPACT STATEMENT

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

CURRENT OR PRIOR RELATED LEGISLATION

None known.

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RESOLUTION 13-03-2019

DIGEST

Conservatorships: Requires Investigations by Adult Protective Services

Adds Probate Code section 1826.5 to require Adult Protective Services to investigate and file a report for all petitions for conservatorship.

TEXT OF RESOLUTION

RESOLVED that the Conference of California Bar Associations recommends that legislation be sponsored to add Probate Code section 1826.5 to read as follows:

- 1 § 1826.5
- 2 Adult protective services; delivery of notice of hearing and copy of petition; screening of
- 3 conservators and proposed conservatees.
- 4 (a) In each case involving a petition for conservatorship of the person, the petitioner
- 5 shall deliver pursuant to Section 1215 a notice of the hearing and a copy of the petition, at least
- 6 15 days before the hearing, to the local agency designated by the board of supervisors to
- 7 investigate conservatorships for the court. The local social services agency providing adult
- 8 protection services shall screen the name of the proposed conservator and the proposed
- 9 conservatee for prior referrals of neglect or abuse of adults and shall file a report with the court
- 10 containing the results of the screening prior to the hearing on the petition. The report shall be
- 11 served on all parties in accordance with Section 1215.

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

PROPONENT: San Bernardino County Bar Association

STATEMENT OF REASONS

The Problem: Currently the probate code does not provide for an agency responsible for protecting the elderly or a developmentally disabled adult to provide an opinion when a petition for conservatorship is filed. The Probate Code provides for such a report to be submitted by DPSS in guardianships, but there is not a similar requirement of a report in conservatorships. A person petitioning to become a conservator of a developmentally disabled adult or an elderly adult, may have a history with APS or a similar agency for allegations of abuse or neglect on the dependent adult that is the subject of the conservatorship. The petitioner may also have a history with APS for allegations regarding a different dependent adult that the Probate Court needs to be aware of when considering a petition for conservatorship.

The Solution: Adds Probate Code section 1826.5 to require that a petitioner for appointment as conservator provide notice to the local adult protective services agency, and would require APS to report to the court whether the proposed conservator or the proposed conservatee has any reported history with APS.

IMPACT STATEMENT

This 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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RESOLUTION 13-04-2019

DIGEST

Conservatorships: Notice of Hearing to Persons Nominated to Act as Conservator

Amends Probate Code section 1822 to provide notice of a conservatorship action on the proposed conservatee’s nominated preference.

TEXT OF RESOLUTION

RESOLVED that the Conference of California Bar Associations recommends that legislation be sponsored to amend Probate Code section 1822 to read as follows:

- 1 §1822
- 2 (a) At least 15 days before the hearing on the petition for appointment of a conservator,
- 3 notice of the time and place of the hearing shall be given as provided in this section. The notice
- 4 shall be accompanied by a copy of the petition. The court shall not shorten the time for giving
- 5 the notice of hearing under this section.
- 6 (b) Notice shall be delivered pursuant to Section 1215 to the following persons:
- 7 (1) The spouse, if any, or registered domestic partner, if any, of the proposed conservatee
- 8 at the address stated in the petition.
- 9 (2) The relatives named in the petition at their addresses stated in the petition.
- 10 (3) The persons nominated to act by the proposed conservatee in a writing signed before
- 11 the petition is filed.
- 12 (c) If notice is required by Section 1461 to be given to the Director of State Hospitals or
- 13 the Director of Developmental Services, notice shall be delivered pursuant to Section 1215 as
- 14 required.
- 15 (d) If the petition states that the proposed conservatee is receiving or is entitled to receive
- 16 benefits from the Veterans Administration, notice shall be mailed to the Office of the Veterans
- 17 Administration referred to in Section 1461.5.
- 18 (e) If the proposed conservatee is a person with developmental disabilities, at least 30
- 19 days before the day of the hearing on the petition, the petitioner shall deliver pursuant to Section
- 20 1215 a notice of the hearing and a copy of the petition to the regional center identified in Section
- 21 1827.5.
- 22 (f) If the petition states that the petitioner and the proposed conservator have no prior
- 23 relationship with the proposed conservatee and are not nominated by a family member, friend, or
- 24 other person with a relationship to the proposed conservatee, notice shall be delivered pursuant
- 25 to Section 1215 to the public guardian of the county in which the petition is filed.

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

PROPONENT: Bar Association of Northern San Diego County.

STATEMENT OF REASONS

The Problem: Under current law, only spouses, domestic partners and relatives named in a conservatorship petition are to be provided notice of a pending conservatorship hearing.

However, pursuant to Probate Code section 1810, the person nominated by the proposed conservatee shall be appointed unless the court finds that the nominee is not in the best interest of the proposed conservatee. In the event that the nominated proposed conservator is not a spouse, domestic partner or relative named in a conservatorship petition, the nominated party is not provided notice of the action to advocate for the proposed conservatee or an opportunity to seek appointment.

The Solution: This resolution provides that if a person nominates a proposed conservator pursuant to Probate Code section 1810, then the nominated person will have notice of the petition for conservatorship to advocate for the proposed conservatee and/or for an opportunity to seek appointment.

IMPACT STATEMENT

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

CURRENT OR RELATED LEGISLATION

None Known.

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RESOLUTION 13-05-2019

DIGEST

Conservatorships: Sanctions for Bad Faith Filings

Amends **or adds?** Probate Code section 1832 to provide a deterrent to a party for filing a bad faith petition for conservatorship.

TEXT OF RESOLUTION

RESOLVED that the Conference of California Bar Associations recommends that legislation be sponsored to add Probate Code section 1832 to read as follows:

- 1 § 1832
2 If a petition for conservatorship is denied and the court determines that the petition was made
3 without reasonable cause and in bad faith, the court may award the proposed conservatee and any
4 other objector to the petition costs of the objection(s) and other expenses and costs of litigation,
5 including attorney's fees, incurred to object to the petition.

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

PROPONENT: Bar Association of Northern San Diego County.

STATEMENT OF REASONS

The Problem: A conservatorship strips a person of their Constitutional rights and should be used sparingly. Unfortunately, they are being utilized in greater frequency as threats to force seniors to act or refrain from acting against their children or other family members' wishes. Additionally, the conservatorship process puts the confidential medical and financial information of the proposed conservatee in a public forum and requires great effort and financial resources to defend. The only person who is harmed by a failed conservatorship filing is the proposed conservatee.

The Solution: This Resolution provides a deterrent to the filing of meritless conservatorship actions. It mirrors Probate Code section 17211 which provides for costs of litigation, including attorney's fee, for the bad faith filing of a contest of a trust accounting or opposition to a contest of a trust accounting. It will not deter any unsuccessful good faith filings as it requires the court to make a finding that it was brought without reasonable cause and in bad faith.

IMPACT STATEMENT

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

CURRENT OR RELATED LEGISLATION

None Known

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RESOLUTION 13-06-2019

DIGEST

Probate: Adds Conservator of the Estate and Nominated Executor to Small Estate Affidavits
Amends Probate Code section 13051 to allow conservators and nominated executors to sign a small estate affidavit.

TEXT OF RESOLUTION

RESOLVED that the Conference of California Bar Associations recommends that legislation be sponsored to amend Probate Code section 13051 to read as follows:

- 1 § 13051
- 2 Guardian or conservator; trustee; custodian; sister state personal representative; durable power of
- 3 attorney; nominated executor
- 4 For the purposes of this part:
- 5 (a) The guardian or conservator of the estate of a person entitled to any of the decedent’s
- 6 property may act on behalf of the person without authorization or approval of the court in which
- 7 the guardianship or conservatorship proceeding is pending.
- 8 (b) The trustee of a trust may act on behalf of the trust. In the case of a trust that is subject
- 9 to continuing jurisdiction of the court pursuant to Chapter 4 (commencing with Section 17300)
- 10 of Part 5 of Division 9, the trustee may act on behalf of the trust without the need to obtain
- 11 approval of the court.
- 12 (c) If the decedent’s will authorizes a custodian under the Uniform Gifts to Minors Act or
- 13 the Uniform Transfers to Minors Act of any state to receive a devise to a beneficiary, the
- 14 custodian may act on behalf of the beneficiary until such time as the custodianship terminates.
- 15 (d) A sister state personal representative may act on behalf of the beneficiaries as
- 16 provided in Chapter 3 (commencing with Section 12570) of Part 13 of Division 7.
- 17 (e) The attorney in fact authorized under a durable power of attorney may act on behalf of
- 18 the beneficiary giving the power of attorney.
- 19 (f) The person nominated in decedent’s will to act as executor may act on behalf of the
- 20 beneficiary or all of the beneficiaries as provided by the terms of decedent’s will.
- 21 (g) The conservator of the estate of the decedent may act on behalf of sole person or all of
- 22 the persons who succeeded to the particular item of property of the decedent under Sections 6401
- 23 and 6402 or, if the law of a sister state or foreign nation governs succession to the particular item
- 24 of property, under the law of the sister state or foreign nation.

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

PROPONENT: Bar Association of Northern San Diego County.

STATEMENT OF REASONS

The Problem: When a person dies with less than \$150,000, the Probate Code provides for collection of assets without administration. However, to collect the decedent’s assets, a small estate affidavit must be executed by all of the beneficiaries entitled to receive the property. In

situations where a beneficiary refuses to execute the small estate affidavit, a probate must be initiated to collect the small sum. As the sum is small, attorneys are unlikely to accept the representation since their fee is limited to a percentage of the estate and the asset is likely dissipated through bank fees before the asset can be collected.

The Solution: This Resolution provides for alternatives to requiring the beneficiaries of an estate to cooperate if there was a conservator of the estate appointed during decedent's life or if the decedent nominated an executor in a will. The small estate affidavit will still require the name(s) of the decedent's beneficiaries to ensure accurate distribution of decedent's estate but would not require each one of the beneficiaries to execute the affidavit. In situations where there is conservator of the estate, the small estate affidavit could be utilized to distribute the assets as part of the final accounting without the need for the beneficiaries to execute the small estate affidavit to avoid a probate. Additionally, if there were assets held outside of the conservatorship estate which were discovered after decedent's death, this addition would allow the conservator to marshal it and distribute it as part of the final accounting to the court.

IMPACT STATEMENT

This resolution affects Probate Code section 13101 as it expands who can execute the small estate affidavit.

CURRENT OR RELATED LEGISLATION

None Known

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RESOLUTION 13-07-2019

DIGEST

Elder or Dependent Adult Abuse: Release of Information to Counsel

Amends Welfare and Institutions Code section 15633.5 to provide that counsel for the subject of an elder abuse report or dependent adult abuse report may obtain information contained in the report without the need to obtain a court order.

TEXT OF RESOLUTION

RESOLVED that the Conference of California Bar Associations recommends that legislation be sponsored to amend Welfare and Institutions Code section 15633.5, to read as follows:

- 1 § 15633.5
2 (a) Information relevant to the incident of elder or dependent adult abuse may be given to
3 an investigator from an adult protective services agency, a local law enforcement agency, the
4 office of the district attorney, the office of the public guardian, the probate court, the bureau, or
5 an investigator of the Department of Consumer Affairs, Division of Investigation who is
6 investigating a known or suspected case of elder or dependent adult abuse-, or to counsel
7 representing the elder or dependent adult who is the subject of the reported information.
8 (b) The identity of any person who reports under this chapter shall be confidential and
9 disclosed only among the following agencies or persons representing an agency:
10 (1) An adult protective services agency.
11 (2) A long-term care ombudsperson program.
12 (3) A licensing agency.
13 (4) A local law enforcement agency.
14 (5) The office of the district attorney.
15 (6) The office of the public guardian.
16 (7) The probate court.
17 (8) The bureau.
18 (9) The Department of Consumer Affairs, Division of Investigation.
19 (10) Counsel representing an adult protective services agency.
20 (c) The identity of a person who reports under this chapter may also be disclosed under
21 the following circumstances:
22 (1) To the district attorney in a criminal prosecution.
23 (2) When a person reporting waives confidentiality.
24 (3) By court order.
25 (d) Notwithstanding subdivisions (a), (b), and (c), any person reporting pursuant to
26 Section 15631 shall not be required to include his or her name in the report.

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

PROPONENT: Probate Attorneys of San Diego

STATEMENT OF REASONS

The Problem (including Existing Law): Currently, when allegations of elder abuse or dependent adult abuse are made to Adult Protective Services, the subject of the allegations – the elder or dependent adult – has no ability to simply request a copy of the documentation related to the allegations, investigation and findings. This is a problem when a conservatorship or other protective action is pending before the court and the proposed conservatee objects to the imposition of a conservatorship. Evidence that the allegations are unfounded and/or made in bad faith is critical in opposing the petition for conservatorship. The process for obtaining the information requires counsel for the proposed conservatee to first serve a subpoena duces tecum and/or a subpoena for the deposition of the investigator. The agency will then refuse to comply, citing the restrictions contained in Welfare and Institutions Code 15633.5. The next step is to file a motion to compel, which the agency won't oppose because their goal is to obtain the court order required by the code. Ultimately, when the court issues an order to the agency, they will comply with the discovery requests. This procedure is wasteful of the financial resources of the proposed conservatee as well as court resources.

The Solution: This resolution provides for the lawful release of the information without the need for unnecessary expense and without the court's intervention by including counsel for the subject of the allegations as an authorized recipient. This resolution does not require the agency to release the identity of the reporting party, thus preserving their right to privacy and promoting the confidentiality that encourages reporting of elder or dependent adult abuse. A court order would still be required to obtain the reporting party's identity.

IMPACT STATEMENT

The impact of this resolution is uncertain. Implementation of this resolution may affect the internal procedures followed by agencies charged with investigating allegations of elder or dependent adult abuse.

CURRENT OR PRIOR RELATED LEGISLATION

None known.

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RESPONSIBLE FLOOR DELEGATE: Merrienne E. Dean

RESOLUTION 13-08-2019

DIGEST

Probate Code: Clarify Persons Entitled to Compensation/Reimbursement for Conservatorship Petition
Amends Probate Code section 2640.1 to clarify who can seek compensation/ reimbursement for successful petition

TEXT OF RESOLUTION

RESOLVED that the Conference of California Bar Associations recommends that legislation be sponsored to amend Probate Code section 2640.1, to read as follows:

- 1 §2640.1. Person who has petitioned for appointment of conservator but was not
2 appointed ; petition for compensation and reimbursement; notice of hearing; order for
3 compensation and costs; retroactive effect
- 4 (a) If a person has petitioned for the appointment of a particular conservator
5 who is not the petitioner and the conservator is appointed, but not before the expiration of
6 90 days from the issuance of letters, the person who petitioned for the appointment of the
7 conservator and that person’s attorney may petition the court for an order fixing and
8 allowing compensation and reimbursement of costs.
- 9 ~~(a)~~(b) If a person has petitioned for the appointment of a particular conservator
10 and another conservator was appointed while the petition was pending, but not before the
11 expiration of 90 days from the issuance of letters, the person who petitioned for the
12 appointment of the conservator but was not appointed and that person’s attorney may
13 petition the court for an order fixing and allowing compensation and reimbursement of
14 costs, provided that the court determines that the petition was filed in the interests of the
15 conservatee.
- 16 ~~(b)~~(c) Notice of the hearing shall be given for the period and in the manner
17 provided in Chapter 3 (commencing with Section 1460) of Part 1.
- 18 ~~(c)~~(d) Upon the hearing, the court shall make an order to allow both of the
19 following:
- 20 (1) Any compensation or costs requested in the petition the court determines
21 is just and reasonable to the person who either petitioned for the appointment of a
22 particular conservator who was not the petitioner and the conservator was appointed, or
23 who petitioned for the appointment of a conservator but was not appointed, for his or her
24 services rendered in connection with and to facilitate the appointment of the conservator,
25 and costs incurred in connection therewith.
- 26 (2) Any compensation or costs requested in the petition the court determines
27 is just and reasonable to the attorney for the person, for his or her services rendered in
28 connection with and to facilitate the appointment of a conservator, and costs incurred in
29 connection therewith.
- 30 Any compensation and costs allowed shall be charged to the estate of the
31 conservatee. If a conservator of the estate is not appointed, but a conservator of the
32 person is appointed, the compensation and costs allowed shall be ordered by the court to
33 be paid from property belonging to the conservatee, whether held outright, in trust, or
34 otherwise.

35 ~~(d)~~(e) It is the intent of the Legislature for this section to have retroactive effect.

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

PROPONENT: Probate Attorneys of San Diego

STATEMENT OF REASONS

The Problem: Probate Code sections 2640 and 2641 provide authority for a conservator of the estate or a conservator of the person to seek an award of fees to an appointed conservator and his or her attorney, including for services rendered before the date of appointment (e.g., in relation to the petition). And Probate Code § 2640.1 provides that if a person petitions for appointment of a particular conservator and that person is ultimately not appointed and another conservator is ultimately appointed by the court, the person can still seek compensation for fees, provided that the court concludes that the petition was filed in the conservatee’s best interest.

But neither of these provisions apply to the situation where a petitioner seeks the appointment of a conservator who is not the petitioner, and the proposed conservator is indeed appointed—even though it is obvious and equitable that such petitioner should also be able to seek compensation and reimbursement for fees and costs incurred in connection with that successful effort to have the conservator appointed.

The Solution: Despite the void of statutory authority, the court in *Estate of Moore* ((1968) 258 Cal.App.2nd 460, resolved the issue of whether a court has equitable authority to award attorney’s fees for a party who successfully petitions for appointment of a conservator who is not the petitioner. In *Moore*, the court awarded fees to the person who successfully petitioned for the appointment of Bank of America as conservator. The court stated: “[o]ur question then becomes whether in the absence of statutory authorization, one who in good faith initiates caretaker proceedings in which a guardian or conservator other than the initiator is appointed may be awarded his costs and counsel fees. We think he may.” The *Moore* court focused on whether the services benefitted the conservatee and concluded that “[c]learly, it was as a consequence of [petitioner’s] initiative that a conservator was appointed for the person and the estate of Mrs. Moore.” The court further noted that if compensation were not available, parties might be discouraged from initiating effective action and becoming parties to conservatorship proceedings for the benefit of other persons. Thus, *Moore* provides direct support for an award of fees/reimbursement to a petitioner who successfully seeks appointment of a third-party conservator. Moreover, the lack of a statutory basis for a fee award under such circumstances appears to be an anomaly, as there is no reason why fees could be awarded to an unsuccessful petitioner (Prob. Code, § 2640.1, subd. (a)) and also to a person who successfully petitions for their own appointment (*Id.* at §§ 2640, 2641)—but not to a petitioner who successfully seeks the appointment of a third party. Thus, this Resolution simply amends Probate Code section 2640.1 to clarify that where a person successfully petitions for the appointment of a third-party conservator, that person may seek compensation and reimbursement---effectively codifying the holding in *Moore*.

IMPACT STATEMENT

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

CURRENT OR PRIOR RELATED LEGISLATION

None known.

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RESOLUTION 13-09-2019

DIGEST

Attorneys: Confidential Information of Diminished Capacity Clients

Amends Business and Professions Code section 6068 to allow an attorney to reveal an incapacitated client's confidential information if substantial harm is a risk.

TEXT OF RESOLUTION

RESOLVED that the Conference of California Bar Associations recommends that legislation be sponsored to amend Business and Professions Code section 6068 to read as follows:

- 1 § 6068
2 It is the duty of an attorney to do all of the following:
3 (a) To support the Constitution and laws of the United States and of this state.
4 (b) To maintain the respect due to the courts of justice and judicial officers.
5 (c) To counsel or maintain those actions, proceedings, or defenses only as appear to
6 him or her legal or just, except the defense of a person charged with a public offense.
7 (d) To employ, for the purpose of maintaining the causes confided to him or her those
8 means only as are consistent with truth, and never to seek to mislead the judge or any judicial
9 officer by an artifice or false statement of fact or law.
10 (e) (1) To maintain inviolate the confidence, and at every peril to himself or herself to
11 preserve the secrets, of his or her client.
12 (2) Notwithstanding paragraph (1), an attorney may, but is not required to, reveal
13 confidential information relating to the representation of a client to the extent that the
14 attorney reasonably believes the disclosure is necessary to prevent a criminal act that the
15 attorney reasonably believes is likely to result in death of, or substantial bodily harm to, an
16 individual.
17 (3) Notwithstanding paragraph (1), except where the attorney represents a minor, a
18 client in a criminal matter, or a client who is the subject of a conservatorship proceeding or
19 who has a guardian ad litem, an attorney may, but is not required to, take protective action,
20 provided the attorney reasonably believes that: (i) there is a significant risk that the client will
21 suffer substantial physical, psychological, or financial harm unless protective action is taken,
22 and (ii) the client has significantly diminished capacity, in accordance with the factors in
23 Probate Code §§ 811 and 812, such that the client is unable to understand and make
24 adequately considered decisions regarding the potential harm, and (iii) the client cannot
25 adequately act in the client's own interest. In taking protective action, the attorney must act in
26 the client's best interest and disclose no more information than is reasonably necessary to
27 protect the client from substantial physical, psychological or financial harm. For purposes of
28 this section, protective action means to take action to protect the client's interests by
29 notifying an individual or organization that has the ability to take action to protect the client
30 or seeking to have a conservator or guardian ad litem appointed.
31 (f) To advance no fact prejudicial to the honor or reputation of a party or witness,
32 unless required by the justice of the cause with which he or she is charged.
33 (g) Not to encourage either the commencement or the continuance of an action or
34 proceeding from any corrupt motive of passion or interest.
35 (h) Never to reject, for any consideration personal to himself or herself, the cause of
36 the defenseless or the oppressed.
37 (i) To cooperate and participate in any disciplinary investigation or other regulatory or
38 disciplinary proceeding pending against himself or herself. However, this subdivision shall

39 not be construed to deprive an attorney of any privilege guaranteed by the Fifth Amendment
40 to the Constitution of the United States, or any other constitutional or statutory privileges.
41 This subdivision shall not be construed to require an attorney to cooperate with a request that
42 requires him or her to waive any constitutional or statutory privilege or to comply with a
43 request for information or other matters within an unreasonable period of time in light of the
44 time constraints of the attorney's practice. Any exercise by an attorney of any constitutional
45 or statutory privilege shall not be used against the attorney in a regulatory or disciplinary
46 proceeding against him or her.

47 (j) To comply with the requirements of Section 6002.1.

48 (k) To comply with all conditions attached to any disciplinary probation, including a
49 probation imposed with the concurrence of the attorney.

50 (l) To keep all agreements made in lieu of disciplinary prosecution with the State Bar.

51 (m) To respond promptly to reasonable status inquiries of clients and to keep clients
52 reasonably informed of significant developments in matters with regard to which the attorney
53 has agreed to provide legal services.

54 (n) To provide copies to the client of certain documents under time limits and as
55 prescribed in a rule of professional conduct which the board shall adopt.

56 (o) To report to the State Bar, in writing, within 30 days of the time the attorney has
57 knowledge of any of the following:

58 (1) The filing of three or more lawsuits in a 12-month period against the attorney for
59 malpractice or other wrongful conduct committed in a professional capacity.

60 (2) The entry of judgment against the attorney in a civil action for fraud,
61 misrepresentation, breach of fiduciary duty, or gross negligence committed in a professional
62 capacity.

63 (3) The imposition of judicial sanctions against the attorney, except for sanctions for
64 failure to make discovery or monetary sanctions of less than one thousand dollars (\$1,000).

65 (4) The bringing of an indictment or information charging a felony against the
66 attorney.

67 (5) The conviction of the attorney, including any verdict of guilty, or plea of guilty or
68 no contest, of a felony, or a misdemeanor committed in the course of the practice of law, or in
69 a manner in which a client of the attorney was the victim, or a necessary element of which, as
70 determined by the statutory or common law definition of the misdemeanor, involves
71 improper conduct of an attorney, including dishonesty or other moral turpitude, or an attempt
72 or a conspiracy or solicitation of another to commit a felony or a misdemeanor of that type.

73 (6) The imposition of discipline against the attorney by a professional or occupational
74 disciplinary agency or licensing board, whether in California or elsewhere.

75 (7) Reversal of judgment in a proceeding based in whole or in part upon misconduct,
76 grossly incompetent representation, or willful misrepresentation by an attorney.

77 (8) As used in this subdivision, "against the attorney" includes claims and proceedings
78 against any firm of attorneys for the practice of law in which the attorney was a partner at the
79 time of the conduct complained of and any law corporation in which the attorney was a
80 shareholder at the time of the conduct complained of unless the matter has to the attorney's
81 knowledge already been reported by the law firm or corporation.

82 (9) The State Bar may develop a prescribed form for the making of reports required
83 by this section, usage of which it may require by rule or regulation.

84 (10) This subdivision is only intended to provide that the failure to report as required
85 herein may serve as a basis of discipline.

86

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

PROPONENT: Bar Association of San Francisco

STATEMENT OF REASONS

The Problem: As California’s elderly population continues to grow, with it projected to double from the 2000 figure by 2025 (<https://oag.ca.gov/bmfea/elder>), more elderly individuals will be in vulnerable positions and at risk for abuse. According to the National Center on Elder Abuse, approximately 1 in 10 Americans experience some form of elder abuse, such as physical, psychological, verbal or sexual abuse, financial exploitation, and neglect. (<https://ncea.acl.gov/whatwedo/research/statistics.html#14>). Through representation of elderly clients and clients who otherwise have diminished capacity, an attorney is in a position to witness the capacities of his or her clients disintegrate and note signs of abuse. However, because of the strict attorney-client confidentiality requirements under Business and Professions Code § 6068(e), in most circumstances attorneys are powerless to stop any abuse they suspect without violating the duty of confidentiality. Under the current law, if the abuse does not rise to the level of causing death or substantial bodily harm due to a criminal act, attorneys are unable to contact Adult Protective Services or other entities that might be able to provide the elder or incapacitated person with necessary protection and assistance.

The Solution: This resolution amends Business and Professions Code § 6068(e) to allow attorneys to disclose a client’s confidential information in the limited instance where the client has significantly diminished capacity, the client is at risk of substantial harm and the client is powerless to stop that harm. To ensure that attorney-client confidentiality is not eroded more than necessary, the attorney may divulge only the confidential information that is reasonably necessary to protect the client from harm. The resolution does not require attorneys to disclose the confidential information of a client with diminished capacity and instead makes such disclosure permissive. This exemption gives attorneys an avenue to stop or prevent abuse when they suspect it might be happening and by so doing, protect their elderly and otherwise incapacitated clients.

The language in this resolution is modeled after the language proposed by the California Commission for the Revision of the Rules of Professional Conduct in 2017 and ABA Model Rule 1.14. Almost all of the language in this resolution, except for a few key phrases, is exactly the same as the applicable language in the Commission’s proposed rule. The proposed rule was not adopted by the California Supreme Court, without an explanation, despite the Commission undertaking an extensive review process that included collecting and considering public comment. The Commission’s proposed rule and related report may be found at https://www.calbar.ca.gov/portals/0/documents/rules/rrc2014/final_rules/rrc2-1.14-all.pdf.

IMPACT STATEMENT

This resolution affects California Rule of Professional Conduct 1.6 by requiring an additional exemption.

CURRENT OR PRIOR RELATED LEGISLATION

None known.

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