

RESOLUTION 3-07-03

DIGEST

Conservators: Statutory Fee Schedule

Amends Probate Code section 2623 to add a statutory fee schedule for initial and subsequent conservator services.

RESOLUTIONS COMMITTEE RECOMMENDATION

DISAPPROVE

History:

None known.

Reasons:

This resolution amends Probate Code section 2623 to add a statutory fee schedule for initial and subsequent conservator services. This resolution should be disapproved because it removes the discretion of the court to determine a “just and reasonable” fee for the services of a conservator, leading to fees which are too high in some cases and too low in others.

Section 2623 currently provides that the court may order conservator compensation “as the court determines just and reasonable.” Under this standard, a conservator petitions the court for payment of fees at appropriate intervals, including termination of the conservatorship. The conservator submits a description of the time spent and the court reviews that description, the proposed hourly rate, the complexity of the tasks and other relevant factors, such as the size of the conservatorship estate, to arrive at a reasonable fee. This process is similar to the analysis used by the probate court to determine reasonable attorney and trustee fees and has been the process for many years.

Although the proponent correctly identifies a problem in connection with fee awards to conservators as a result of variances in approach by different judges and counties, this proposed resolution will not solve the problem. A statutory fee schedule works well in connection with probate estates where the tasks to be handled are relatively well identified and tend to vary in complexity according to the value of the estate. In a conservatorship, the tasks to be accomplished vary tremendously depending upon the individual conservatorship and may not be related in any way to the size of the estate. For instance, a conservatorship in which the conservatee has mental health problems or a large and bickering family may require much more time than a conservatorship where the conservatee is placed in a facility and the only task is to pay a monthly bill. While the proposed language supposedly allows a court to depart from the statutory fee schedule, it is likely that the existence of a schedule will cause courts to award the statutory fee and not more unless there is an extraordinary showing. As a result, fees based solely on the size of the conservatorship estate may often cause the conservator to be over- or under-compensated.

This resolution may also create an incentive for conservators to improperly classify tasks as being for the conservatorship of the person (not subject to the statutory fee) rather than the conservatorship of the estate.

SECTION/COMITTEE REPORT

TRUSTS AND ESTATES SECTION EXECUTIVE COMMITTEE

Recommendation: **DISAPPROVE**

Reasons:

Bbasing first-year fees for a conservator of the estate on the statutory probate fee schedule would provide too large a fee in some case and too small a fee in others, particularly in small estates.

TEXT OF RESOLUTION

RESOLVED, that the Conference of Delegates of California Bar Associations recommends that legislation be sponsored to amend Probate Code section 2623 to read as follows:

- 1 §2623
- 2 The guardian or conservator shall be allowed all of the following:
- 3 (a) For ordinary services rendered during the first year of a conservatorship, a conservator of
- 4 the estate shall receive compensation based upon the value of the estate accounted for by the
- 5 conservator, as follows:
- 6 (1) Four percent (4%) on the first one hundred thousand (\$100,000) dollars
- 7 (2) Three percent (3%) on the next one hundred thousand (\$100,000) dollars
- 8 (3) Two percent (2%) on the next eight hundred thousand (\$800,000) dollars
- 9 (4) One percent (1%) on the next nine million (\$9,000,000) dollars
- 10 (5) For all amounts above ten million (\$10,000,000) dollars a reasonable amount to be
- 11 determined by the court.
- 12 For the purposes of this section, the value of the estate accounted for by the conservator is
- 13 the total amount of the appraisal of property in the inventory, plus gains over the appraisal value on
- 14 sales, plus receipts, less losses from the appraisal value on sales, without reference to encumbrances
- 15 or other obligations on estate property.
- 16 (b) For ordinary services rendered in all subsequent years, the conservator of the estate shall
- 17 receive compensation annually, based on the fair market value of the assets valued annually as
- 18 reflected in the annual or biennial account approved by the court as follows:
- 19 **(1) Two (2%) percent of the first two hundred thousand (\$200,000) dollars**
- 20 (2) One (1%) percent of the next nine million (\$9,000,000) dollars
- 21 (3) For amounts above nine million two hundred thousand (\$9,200,000) dollars a reasonable
- 22 amount as determined by the court.
- 23 (c) In addition to the compensation provided for in sub-paragraphs (a) & (b), the court shall
- 24 allow additional compensation for services rendered by the conservator of the person, and for
- 25 extraordinary services rendered by the conservator of the estate as the court determines to be just and
- 26 reasonable.
- 27 (d) The amount of the reasonable expenses incurred in the exercise of the powers and the
- 28 performance of the duties of the guardian or conservator (including, but not limited to, the cost of
- 29 any surety bond furnished, reasonable attorney's fees, and such compensation for services rendered
- 30 by the guardian or conservator of the person as the court determines is just and reasonable).
- 31 ~~Such compensation for services rendered by the guardian or conservator as the court~~
- 32 ~~determines is just and reasonable.~~
- 33 (e) All reasonable disbursements made before appointment as guardian or conservator.
- 34 (f) In the case of termination other than by the death of the ward or conservatee, all
- 35 reasonable disbursements made after the termination of the guardianship or conservatorship but prior
- 36 to the discharge of the guardian or conservator by the court.
- 37 (g) In the case of termination by the death of the ward or conservatee, all reasonable
- 38 expenses incurred prior to the discharge of the guardian or conservator by the court for the custody
- 39 and conservation of the estate and its delivery to the personal representative of the estate of the
- 40 deceased ward or conservatee or in making other disposition of the estate as provided for by law.

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

PROPONENT: Los Angeles County Bar Association

STATEMENT OF REASONS

Existing Law: Provides that the conservators, both of person and estate, are entitled to just and reasonable fees as determined by the court.

This Resolution: Adds a statutory fee schedule for conservators of the estate for ordinary services.

The Problem: The fees awarded to conservators by the courts vary substantially from county to county. The local rules of various courts provide a variety of guidelines to assist the court in determining the reasonableness of conservator's fees (i.e., reasonable value of services, percentages, hourly rates (\$35-\$100), consideration of use of subcontractors, etc.). Complaints are common about the inconsistency of fees awarded by the courts and how they justify those awards. Some courts feel that hours expended multiplied by rate(s) is not a good indication of value services. As a result of the local court policies in many counties corporate fiduciaries and professional conservators will not take appointments as conservators of the estate because the policy of the court in awarding fees does not reflect market realities.

Because of the aging population, society is now giving greater and greater attention to the issues of the elderly. The increased requirements on conservators of the estate imposed by the Legislature over the past few years places conservators of the estate in a more burdensome administrative role than that of an executor or administrator. Compensation should be commensurate.

Additionally, by utilizing the current probate fee schedule (as modified), a substantial portion of the court's and conservator's time can be saved by not having to deal with valuation of ordinary duties performed, thus leaving extraordinary estate services (sales, litigation, operation of businesses, taxes, etc.) and services as conservator of the person to be determined by the court. The fee structure forces conservators to be cost efficient in ordinary estate administration issues and does not necessarily discourage the use of professional or corporate conservators of the estate where the size is acceptable to the fiduciary. The provision for fees for years after the first allows professional and corporate fiduciaries to remain in the market (to the benefit of conservatee).

IMPACT STATEMENT

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

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COUNTERARGUMENTS

BEVERLY HILLS BAR ASSOCIATION

This resolution seeks to amend Probate Code Section 2623 to provide for statutory fees for conservators. While the unification of procedures involving decedent's estates and conservatorships are generally advantageous the enactment of a statutory fee schedule for conservatorships is inappropriate.

Statutory fees for decedent's estates cover defined tasks including marshalling assets, handling creditor's claims against the estate, and distribution to beneficiaries. The tasks for a conservatorship are not so well defined and may go on for many years. Generally probates involve just one fee period, which is the length of the probate. The tasks required by a conservator may be difficult or light. A statutory fee scheme would under compensate a conservator involved in difficult proceedings where the conservatee's estate is modest and over compensate a conservator should his tasks be mundane and the estate large. While this outcome may be acceptable in the probate of an estate where only one fee period exists, it becomes oppressive and unacceptable where there are repetitive accounting periods. This is made more even more awkward where fees are to be determined on annual basis and the conservator accounts to the court on a bi-annual basis.

While the current system of compensating the conservator for the work actually accomplished for the conservatee's estate, as determined by the court, in many instances results in inadequate fees, this is not the appropriate solution.

SAN DIEGO COUNTY BAR ASSOCIATION

The statutory schedule is an inflexible template. Conservator fees must take in a wider variety of factors than typically encountered in decedent's estates. Such circumstances could include a conservatorship that lasted only a matter of weeks, or a conservatorship comprised of assets that would have been eligible for summary administration as a probate estate.