

A Bill to Promote Access to Justice and Effective Assistance of Counsel in Probate Conservatorship Proceedings

This bill protects the rights of people with disabilities to equal access to public services as guaranteed by Title II of the Americans with Disabilities Act, California Government Code Section 11135, Welfare and Institutions Code Section 4502, and Section 50510 of Title 17 of the California Code of Regulations. The objectives of this bill are supported by the [California Advocates for Nursing Home Reform](#), [The Arc of California](#), and the [Public Justice Center](#).

Section 1 – Findings

The Legislature finds and declares:

1. Tens of thousands of adults in California are living under an order of probate conservatorship. Thousands of new conservatorship petitions are filed each year. These cases involve seniors who may be experiencing cognitive decline, adults with developmental disabilities, or adults of any age who have cognitive or communication disabilities caused by medical illnesses or injuries.
2. Probate conservatorship proceedings are initiated to protect the health and welfare of adults with significant disabilities – conditions that may impact their ability to make major life decisions regarding residence, education, medical care, marriage, social and sexual contacts, and finances.
3. These proceedings implicate the liberty interests of such adults and may ultimately result in the loss of fundamental constitutional and statutory rights.
4. Probate Code Section 1471 mandates the appointment of counsel in all *limited* conservatorship proceedings. In *general* conservatorship proceedings, the appointment of counsel is required only if requested or if the court determines that counsel “is necessary to protect the interests of the conservatee or proposed conservatee.” Some petitioners file for a general conservatorship in order to avoid the requirement that an attorney be appointed for all respondents in limited conservatorship proceedings.
5. Individuals with cognitive disabilities may not request counsel because they do not have the ability to understand the role of or need for an attorney to protect their rights. When a request is not made, some judges allow the individual to represent themselves, without conducting an assessment of the person’s ability to have meaningful participation in the proceeding without legal representation.
6. Litigants with disabilities have an interest in receiving access to justice in probate conservatorship proceedings. Components of access to justice include effective communication and meaningful participation in such litigation. Unless an attorney has been or will be retained by a conservatee or proposed conservatee, courts should appoint counsel in order to protect these legal interests.
7. When a statutory right to counsel exists, due process entitles a person to effective assistance of counsel throughout the proceeding.
8. The right to effective assistance of counsel is enhanced when an attorney receives appropriate education and training and adheres to objective performance standards.
9. On Sept. 24, 2019, the Judicial Council adopted new training and education requirements for attorneys representing conservatees and proposed conservatees in probate court. A report issued by its Probate and Mental Health Advisory Committee indicates that the authority to adopt performance standards for such attorneys is vested in the California Legislature and The State Bar of California.

Section 2 – Appointment of Counsel

California Probate Code Section 1471 , subdivision (b) is hereby amended as follows:

(b) If a conservatee or proposed conservatee does not plan to retain legal counsel and has not requested the court to appoint legal counsel, whether or not that person lacks or appears to lack legal capacity, the court shall, at or before the time of the hearing, appoint the public defender or private counsel to represent the interests of that person in any proceeding listed in subdivision (a). ~~if, based on information contained in the court investigator's report or obtained from any other source, the court determines that the appointment would be helpful to the resolution of the matter or is necessary to protect the interests of the conservatee or proposed conservatee.~~

Section 3 – Performance Standards

California Probate Code Section 1471 is hereby amended to add the following subdivision:

(d) The role of counsel for a conservatee or proposed conservatee is that of a zealous advocate. The State Bar of California shall develop and periodically update performance standards for attorneys who represent conservatees and proposed conservatees in probate conservatorship proceedings.

Comments:

The Americans with Disabilities Act requires that courts provide an accommodation to litigants with *known* disabilities in order to enable them to have meaningful participation in a legal proceeding. A *request* is not necessary to trigger the court's duty to accommodate. Verified petitions, medical capacity declarations and other documents put judges on notice that litigants in conservatorship proceedings have cognitive and communication disabilities that affect their ability to understand, deliberate, and communicate. Appointment of counsel, therefore, may be a necessary accommodation to enable access to justice for many, if not most, conservatees and proposed conservatees.

One regional center has reported that judges in several counties are not appointing counsel to represent many litigants in probate conservatorship proceedings. An audit by the Spectrum Institute revealed that the Sacramento County Superior Court does not appoint counsel in a significant number of such cases.

California appellate courts have ruled that once a statutory right to counsel exists, due process entitles a litigant to receive effective assistance of counsel. However, no public entity in California has adopted performance standards for attorneys representing conservatees or proposed conservatees. A report from an advisory committee of the Judicial Council states that the State Bar and the Legislature have the authority to issue such standards. In formulating new standards, the State Bar can draw upon those adopted in Massachusetts and in Maryland. It can also refer to proposals included in a *White Paper* submitted to the U.S. Department of Justice and guidelines contained in a *Strategic Guide for Court Appointed Attorneys*. Both documents were produced and published by the Spectrum Institute.

Mandatory appointment of counsel in guardianship and conservatorship cases is supported by The Arc of the U.S., American Association for Intellectual and Developmental Disabilities, TASH, American Bar Association, National Council on Disability, National Coalition for a Civil Right to Counsel, Conference of State Court Administrators, and the California Advocates for Nursing Home Reform.

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