

# The Role of a Conservatee's Counsel and Changes to Probate Code §1471

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# Why are You Here? I am the Client's Attorney, Not You.

- Private attorney appears in the conservatorship case claiming to represent the proposed conservatee. The court has already appointed you as counsel (CAC).
- So, on occasion, CAC would be in a position where their client, being the proposed conservatee in pending case, already has an attorney, subsequently retains an attorney, or an attorney appears claiming to represent the proposed conservatee.

# What's the Big Deal? Why are We Concerned?

- **The potential concerns:** Is this private (non-court-appointed) counsel a bad actor, operating to aid and abet a fraud and/or to effectuate someone's undue influence? Are they a stranger acting to assist an abuser?
- **The potential benefits:** Is this private (non-court-appointed) counsel a long-term friend and advisor who can help and assist? Do they have the client's trust and confidence? Are they knowledgeable and have relevant information?

# View Purported Private Counsel with Skepticism

***Hence a policy to view proposed private counsel with skepticism.***

***The effect of this policy was, prior to recent change in the law...***

- If a non-court appointed attorney attempts to act on behalf of a proposed conservatee in a conservatorship proceeding, the motivations of the private (non-court appointed) attorney immediately become suspect.
  - *Especially alarming if the representation has only recently begun.*
- Unlike CAC, whom is court-appointed without any disqualifying connection to the proposed conservatee, **the policy has historically been to view the involvement of the purported private (non-court appointed) counsel with skepticism.**
  - *Why? Perhaps private counsel asserting the interests of other persons, perhaps undue influencers or other bad actors, and not acting solely in the best interest of the proposed conservatee.*

California Conservatorship Practice (CEB) §§7.30A-7.30B

# Long-Standing Relationships with Purported Private Counsel

**But what if the proposed conservatee has a long-standing relationship with private (non-court appointed) counsel?**

- Often such a person will have **valuable insight** into the proposed conservatee's history and current needs.
- Might helpful if the person is a **trusted** friend and/or advisor.
- May be **knowledgeable and have relevant information** pertaining to the disputed issues before the court.
- May simply be your advocate to **gain** the client's trust and confidence.
- Can you as CAC develop an **appropriate working relationship** with such a person?

California Conservatorship Practice (CEB) §§7.30A-7.30B.

# What is the historical role of private (non-court-appointed) counsel?

- The appropriate role for the private (non-court appointed) attorney, if any, would normally be determined based upon the court's view of the client's capacity.
  - If the client **undisputedly** lacked capacity, then the client would lack capacity to retain or direct the private counsel.
    - The conservatorship case would normally proceed with CAC as the sole attorney; the court could be requested to disqualify purported private (non-court appointed) counsel or to make any other necessary orders under the prevailing circumstances to effectuate CAC's role as counsel.
  - If the client **may or may not** lack capacity, historically the best practice for CAC would be to **promptly** request guidance from the Court supervising the conservatorship proceeding before taking any action that might prejudice or impair the client's rights.
    - The conservatorship case would then proceed with either the CAC, or private counsel, or both, depending on the court's view of the client's capacity and ability to select, retain, and direct counsel.

# What is the Relationship between an Attorney and Client?

- The relationship between an attorney and a client is controlled by the law of contract as well as the law of agency because the principles of agency underlie the attorney-client relationship.
- It is true that an attorney-client relationship may only be created by **contract**. *Koo v. Rubio's Restaurants, Inc.* (2003) 109 Cal.App.4th 719.
  - But this does not mean only an express written agreement, as contracts may be implied by fact or law.
  - Restatement, Third, The Law Governing Lawyers, §14(1): *A relationship of client and lawyer arises when [...] a person manifests to a lawyer the person's intent that the lawyer provide legal services for the person; and either (a) the lawyer manifests to the person consent to do so; or (b) the lawyer fails to manifest lack of consent to do so, and the lawyer knows or reasonably should know that the person reasonably relies on the lawyer to provide the services.*
- As a general proposition, the attorney-client relationship, insofar as it concerns the attorney's authority to bind the client by agreement or stipulation, is governed by **agency** principles. *Blanton v. Womancare, Inc.* (1985) 38 Cal.3d 396.

# Court's Role in Determining Effective Representation for Person Whose Capacity is Questioned in a Conservatorship Proceeding

- It is the intent of the Legislature in enacting California's Conservatorship Law **to protect the rights of persons who are placed under conservatorship**. Prob. Code §1800(a).
  - **Prob. Code §1470(a) (permissive)**: The court **may** appoint private legal counsel for a conservatee, or a proposed conservatee in any conservatorship proceeding if the court determines the person is not otherwise represented by legal counsel and that the appointment would be helpful to the resolution of the matter or is necessary to protect the person's interests.
  - **Prob. Code §1471 (mandatory)**: Further, if a conservatee, proposed conservatee, or person alleged to lack legal capacity is unable to retain legal counsel and requests the appointment of counsel to assist in the particular matter, 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 person in any proceeding to establish or terminate the conservatorship or any proceeding for an order affecting the legal capacity of the conservatee.
- **POLICY**:
  - The court has a responsibility to ensure that a conservatee or proposed conservatee is represented by an attorney who is competent and is not taking advantage of a vulnerable person.
    - California Conservatorship Practice (CEB) §7.30A

# Can the Client Select, Retain, and Direct an Attorney?

***POLICY:** The court has a responsibility to ensure that a conservatee or proposed conservatee is represented by an attorney who is competent and is not taking advantage of a vulnerable person.*

**Applying this POLICY to CAC versus proposed private attorney results in the following inquiry:**

**Does the client have the ability to select, retain, and direct an attorney?**

# Can the Client Select, Retain, and Direct an Attorney?

**POLICY:** *The court has a responsibility to ensure that a conservatee or proposed conservatee is represented by an attorney who is competent and is not taking advantage of a vulnerable person.*

## **GUIDELINES:**

- Civil Code §1556: All persons are capable of contracting except minors, persons of unsound mind, and persons deprived of civil rights.
- Civ. Code §38: A person entirely without understanding has no power to make a contract of any kind.
- Civ. Code §2296: An agency exists only if the principal and agent have the capacity to contract.
- Civil Code §2356(a)(3): An agency is terminated by "the incapacity of the principal to contract."

# Presumptions

***POLICY:*** *The court has a responsibility to ensure that a conservatee or proposed conservatee is represented by an attorney who is competent and is not taking advantage of a vulnerable person.*

## **PRESUMPTIONS:**

- Civ. Code §39(b): A rebuttable presumption of unsound mind exists if a person is substantially unable to manage his or her own financial resources or resist fraud or undue influence.
- Prob. Code §810: A rebuttable presumption exists that all persons are presumed to have the capacity to make their own decisions and be responsible for their actions, including the right to contract with an attorney.
  - However, this presumption simply affects the burden of proof. Prob. Code §810(a).

To overcome these presumptions, an interested person must prove by “**clear and convincing evidence**,” i.e. that it is “highly probable,” that the proposed conservatee is substantially unable to manage his or her own financial resources or resist fraud or undue influence, and therefore does not have the capacity to select, retain, and direct counsel. See Prob. Code §§810, 1801(a) & 1801(e).

# Determination of Ability to Select, Retain, and Direct Counsel

- **A person who lacks capacity also lacks the legal ability to ability to select, retain, and direct an attorney.**
- Prior to recent changes in the law, the appropriate role for the private (non-court appointed) attorney, if any, would normally be determined based upon the court's view of the client's capacity.
  - If the client **undisputedly** lacked capacity, then the client would lack capacity to retain or direct the private counsel.
    - The conservatorship case would normally proceed with CAC as sole counsel, and the court could be requested to disqualify purported private (non-court appointed) counsel or make other necessary orders.
  - If the client **may or may not** lack capacity, historically the best practice for CAC would be to promptly request guidance from the Court supervising the conservatorship proceeding before taking any action that might prejudice or impair the client's rights.
    - The conservatorship case would then proceed with either the CAC, or private counsel, or both, depending on the court's view of the client's capacity and ability to select, retain, and direct counsel.

# New Laws and Rules

- Amendments to Probate Code §1471
  - Changes to the Los Angeles Superior Court Local Rules governing CAC.
  - The changes to the Los Angeles Superior Court Local Rules are consistent with the revisions to Probate Code §1471.
- Three Areas of Discussion
  - When appointment of counsel is mandatory
  - The role of the client's preference of counsel
  - The role of conservatees' counsel

# Which Proceedings Do These Changes Impact?

## Probate Code §1470(a)

- The circumstances when the Court may appoint counsel in any conservatorship proceeding are *unchanged*.
  - The Court may appoint counsel for a conservatee, proposed conservatee, or person alleged to lack capacity who is not otherwise represented by legal counsel and
  - The Court determines that (1) the appointment would be helpful to the resolution of the matter or (2) is necessary to protect the person's interests.

# Which Proceedings Do These Changes Impact?

## Prob. Code §1471(a)

- The conservatorship proceedings where appointment of counsel is mandatory remain the same:
  - to establish or transfer a conservatorship;
  - to obtain a court order affecting the legal capacity of the conservatee;
  - to appoint a proposed conservator;
  - to remove the conservator;
  - to terminate the conservatorship; and
  - to obtain an order authorizing removal of a temporary conservatee from their place of residence.

# Probate Code §1471(b) – Broader Mandatory Appointment of Counsel

## *So what did change?*

- There are changes to Probate Code section 1471(b). Here's the revised language:

If a conservatee or proposed conservatee has not retained legal counsel and 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~~ person in any proceeding listed in subdivision (a).

## Probate Code §1471(b) – Broader Mandatory Appointment of Counsel

- Appointment of counsel for any conservatee or proposed conservatee is now mandatory (in any of the proceedings discussed earlier) **if**
  - the conservatee does not have counsel, **and**
  - does not plan to retain legal counsel
- By contrast, under **former** §1471(b), the Court also had to find first that appointing counsel:
  - would be helpful to the resolution of the matter, or
  - is necessary to protect the interests of the client
  - based on information in the Court investigator’s report or “any other source”

# Overview – Appointment of Counsel

- The Court has **discretion** to appoint counsel in any conservatorship proceeding where the person does not have counsel.
  - Prob. Code §1470.
- The Court **must** (shall) appoint counsel in proceedings covered by §1471(a), any time a:
  - Proposed conservatee or conservatee does not have counsel and does not plan to retain counsel. Prob. Code §1471(b).
  - For any other person alleged to lack capacity, if the person cannot retain counsel and requests counsel. Prob. Code §1471(a).

# The Role Of The Client's Preferred Counsel - Probate Code §1471(d)

**Prob. Code § 1471(d) is new. Here's the new language:**

If a conservatee, proposed conservatee, or person alleged to lack legal capacity expresses a preference for a particular attorney to represent them, the court shall allow representation by the preferred attorney, even if the attorney is not on the court's list of a court-appointed attorneys, and the attorney shall provide zealous representation as provided in subdivision (e). However, an attorney who cannot provide zealous advocacy or who has any conflict of interest with respect to the representation of the conservatee, proposed conservatee, or person alleged to lack legal capacity shall be disqualified.

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# The Role Of The Client's Preferred Counsel - Probate Code §1471(d)

- If the person “expresses a preference for a particular attorney to represent them,” then the Court “shall allow representation by the preferred attorney” under Prob. Code §1471(d).
  - **Expression** of preference
  - **Mandatory** (“shall allow representation”)
  - **Regardless** of whether the attorney is an approved CAC
  - Does **not** state that it depends on the conservatee’s capacity or ability to contract
- *Exceptions:* *(more on this a bit later)*
  - An attorney who **cannot provide zealous advocacy**
  - An attorney who has any **conflict of interest**

# The Role Of Counsel - Probate Code §1471(e)

- **Probate Code § 1471(e) is also new. Here's the new language:**

The role of legal counsel of a conservatee, proposed conservatee, or a person alleged to lack legal capacity is that of a zealous, independent advocate representing the wishes of their client, consistent with the duties in Business and Professions Code §6068 and the Rules of Professional Conduct.

# The Role Of Counsel - Probate Code §1471(e)

## *What does new Prob. Code §1471(e) provide?*

- A **zealous, independent** advocate for the wishes of the client.

*Revisions to Los Angeles Superior Court Local Rules 4.123 through 4.127 have changes consistent with the revised Probate Code provisions. More on that today...*

# The Role of Counsel - Probate Code §1471(b)

- Going back to Probate Code section 1471(b):

If a conservatee or proposed conservatee has not retained legal counsel and 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~~ person in any proceeding listed in subdivision (a).

# Issues Regarding The Client's Preferred Counsel

- ***When private counsel is permitted under revised §1471(d), the Court “shall allow representation” by the preferred attorney, even if the attorney is not on the court’s list of a court-appointed attorneys. **WHAT DOES THAT MEAN?*****
  - California Rule of Court 7.1101 is Unchanged
    - To qualify for any appointment under Probate Code section 1470 or 1471, an attorney must:
      - .... (4) Have met the applicable qualifications and annual education requirements in this chapter and have a current certification on file with the appointing court; and (5) Have satisfied any additional requirements established by local rule.
  - Probate Code §2647 is Unchanged
    - Attorneys’ fees may not be paid from a conservatorship estate without court approval.
  - Probate Code §1871 is Unchanged
    - Legal capacity/rights retained by conservatees; the right to retain and/or pay counsel not a right retained by a conservatee.

# Issues Regarding The Client's Preferred Counsel

- Under new Section 1471(d), the client's preferred counsel cannot represent the client if:
  - The attorney **cannot provide zealous advocacy**
  - The attorney has any **conflict of interest**

**What role do these exceptions play in protecting the policy against representation by undue influencers?**

*The court has a responsibility to ensure that a conservatee or proposed conservatee is represented by an attorney who is competent and is not taking advantage of a vulnerable person.*

# Issues Regarding the Role of Counsel

- ***Is there a meaningful change in practice due to the change in statutory language from “Person” versus “Interests of that Person”?***
  - **When appointment is mandatory**, the Court appoints counsel to represent the “person” instead of “the interest of that person.” Prob. Code §1471(a),(b).
  - An attorneys’ duties to the client include, among many others, maintaining the confidence of the client and preserving the client’s secrets. Bus. & Prof. Code §6068.
- ***Does new Prob. Code §1471(e) apply when appointment is not mandatory – that is, when a discretionary appointment as per §1470 is made?***

# Thank You!

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