Disability and Guardianship Project
Disability and Abuse Project

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November 26, 2018

Lloyd G. Connelly
Court Executive Officer
Sacramento Superior Court
720 Ninth Street
Sacramento, CA 95814

Re: Reply to Letter of October 16, 2018

Dear Mr. Connelly:

I am writing in reply to your letter to Spectrum Institute dated October 16, 2018.

The letter states that "the Court is unable to lawfully adopt the policies that you suggest because they are contrary to the government statutes which invest discretion of such decisions with the responsible judicial officer, and command an expenditure of public funds in circumstances not authorized by the Legislature." That conclusion is not supported by fact or by law.

Trial courts possess inherent rulemaking authority. (Elkins v. Superior Court (2007) 41 Cal.4th 1337) Courts have fundamental inherent equity, supervisory, and administrative powers, as well as inherent authority to control pending litigation. That inherent power authorizes the superior court to exercise reasonable control over all proceedings connected with such litigation in order to insure the orderly administration of justice. (Rutherford v. Owens-Illinois, Inc. (1997) 16 Cal.4th 953, 967)

The Sacramento Superior Court recognizes its authority to adopt local rules of court. In fact, it has adopted an extensive set of rules governing a variety of court proceedings, including proceedings under the probate code. (https://www.saccourt.ca.gov/local-rules/docs/local-rules-2017.pdf) It has also exercised its rulemaking authority on a variety of subjects, including the adoption of local rules regarding the appointment of counsel. (Rule 8.09) Therefore, the court does have authority to adopt local rules regarding the appointment of counsel in probate conservatorship cases, so long as those rules are not inconsistent with state statutes.

The appointment of counsel pursuant to Probate Code Section 1470 or 1471 would not "command an expenditure of public funds in circumstances not authorized by the Legislature" as your letter suggests. First of all, some appointments of counsel would not involve the expenditure of public funds because counsel would be paid from the estate of the proposed conservatee, not from public funds. Second, even in those circumstances when public funds would be used to pay counsel, those expenditures are authorized when the court has determined that appointment of counsel "would be helpful to the resolution of the matter" or that such appointment "is necessary to protect the person's interests."

Your letter recognizes that proposed conservatees must have "meaningful access to the court system." When the court is aware that a litigant has serious cognitive and/or communication disabilities – so serious that a conservatorship proceeding has been initiated by a concerned party who has submitted evidence of incapacity to understand, reason, or make significant decisions – the court knows that meaningful access to justice is not likely without the appointment of counsel.

The Superior Court, therefore, can and should adopt a local rule directing judges who hear probate conservatorship cases to protect the due process rights of proposed conservatees – rights guaranteed by Title II of the ADA, Section 504 of the Rehabilitation Act, and Government Code Section 11135 – by taking one of two courses of action: (1) appoint counsel under Section 1470 or 1471 because it is necessary to protect the proposed conservatee's interests under these constitutional and statutory provisions; or (2) conduct an "individualized analysis" to determine whether the interests of the proposed conservatee under these provisions to have effective communication and meaningful participation in the case are protected even without the appointment of counsel.

Pending the adoption of such a court rule, the judicial officers who process such cases can, on their own motion, adopt a policy and practice of conducting such an analysis and making such a determination in all cases in which the court decides not to appoint counsel. Failure to appoint counsel is a judicial decision – a deliberate choice by such judicial officers – affecting the substantial rights of involuntary litigants who have significant cognitive and communication disabilities to have access to justice in proceedings that may adversely impact their fundamental rights.

I invite the court to consider the implications of the "access rights" specified in Section 50510 of Title 17 of the California Code of Regulations when it fails to appoint counsel for litigants with developmental disabilities. (See the enclosed commentary: "Access to the Courts for People with Developmental Disabilities.")

Probate Code Section 1471 requires the appointment of counsel when the court determines that such appointment "is necessary to protect the person's interests." When such a condition exists, appointment is not discretionary; it is mandatory. When, through a verified petition, confidential questionnaire, medical capacity declaration, or other means, the court becomes aware that a person has significant cognitive and communication disabilities that impair their ability to understand, reason, or communicate, it should be clear that appointment of counsel "is necessary to protect the person's interests." It should also be clear to any bench officer that such an individual will not be able to effectively represent himself or herself pro per.

Therefore, our complaint to the court is modified to request the adoption of a local court rule requiring an individualized evaluation and determination, when counsel is not appointed for a proposed conservatee, that the litigant has the ability to effectively represent himself or herself in the proceeding without counsel and that he or she will have effective communication and meaningful participation in the proceeding without counsel. Pending adoption of such a rule, any judicial officer who hears a probate conservatorship matter should voluntarily adopt such a policy and practice.

Yours truly,

Thomas F. Coleman
Legal Director

Enclosure