

Memorandum 83-84

Subject: Study L-700 - Use of Court Investigators in Conservatorship Proceedings

Senator Barry Keene, the Senate Member of the Commission, has forwarded to the Commission a letter he received from a lawyer-constituent, Harold A. Irish, expressing concern about the high cost of using court investigators in conservatorship proceedings. Attached as Exhibit 1 is a copy of Mr. Irish's letter and Senator Keene's letter.

The California Guardianship-Conservatorship Law (enacted in 1979 upon recommendation of the Law Revision Commission) requires the court investigator to visit the proposed conservatee, to make certain inquiries, and to make a written report to the court, if the proposed conservatee is either unwilling or medically unable to attend the hearing on the petition for conservatorship. Prob. Code § 1826. In addition, the court investigator must visit the conservatee one year after the appointment of the conservator and every two years thereafter. Prob. Code §§ 1850, 1851.

Although this system is undeniably costly, the Legislature enacted the Lanterman bill creating this system in 1977 to correct abuses in the conservatorship system and to provide more adequate protection for the individual rights of conservatees. See the letter from Dean Alexander (attached as Exhibit 2). This policy was reexamined at the time of the Commission's recommended legislation in 1979, and the Commission decided not to make any substantial change in the role of the court investigator.

The staff recommends that the Commission not recommend any change in the existing law. Dean Alexander (Exhibit 2) makes a strong case for retaining existing law. In addition, the 1977 Lanterman legislation creating the court investigator system was strongly supported by senior citizens' groups and other groups. Any attempt to curtail the role of the court investigator will be vigorously resisted by those groups. The staff believes it is extremely unlikely that legislation designed to reduce the court investigator's role would be enacted. For these reasons, we recommend that staff and Commission resources be spent on proposals more likely to obtain legislative approval.

Two issues raised by Mr. Irish's letter deserve specific comment:

(1) He wonders whether lawyers are needed as court investigators. Probate Code Section 1454 certainly does not require the use of attorneys as court investigators. In fact, the language of former Section 1754 requiring the court investigator to be a person "trained in law" was softened in the revision recommended by the Commission to require that the court investigator have "demonstrated sufficient knowledge of the law" See Prob. Code § 1454(b)(2). In addition, Mendocino County appears to be the only county that appoints private attorneys on a rotating basis. See W. Johnstone, G. Zillgitt & S. House, California Conservatorships § 10.2, at 599 (2d ed. 1983). Within the limits established by Section 1454, the matter of who should be appointed as court investigator is appropriate to leave to local determination.

(2) Mr. Irish also expresses concern about the cost of the court investigator to the county general fund. Section 1851.5 has recently been added to the Probate Code to provide for the recovery of the costs of court investigators from conservatorship estates.

Respectfully submitted,

John H. DeMouly
Executive Secretary



THE UNIVERSITY OF SANTA CLARA

SCHOOL OF LAW
OFFICE OF THE DEAN

September 2, 1983

John H. DeMouly, Esq.
Executive Secretary
California Law Revision Commission
4000 Middlefield Road, Room D-2
Palo Alto, CA 94306

Dear John:

Thank you for soliciting my views regarding the necessity for automatic periodic review of conservatorships by a court investigator as provided by the recently revised California Probate Code.

The addition of this provision was part of a major overhaul of the guardianship and conservatorship laws designed to prevent substantial deprivations of due process which regularly occurred under the prior law. Although the prior law contained procedural safeguards to protect the alleged incompetent including provision for his presence at the hearing, representation by counsel to controvert the petition, and a judicial determination of incompetence, these protections were largely illusory. According to a study conducted by the National Senior Citizens Center examining 1010 cases filed under former Cal. Prob. Code Sections 1460-1470 and Sections 1701-2207 in the Los Angeles County central district, 93 percent of the respondents were not in court when their cases were tried, and 97 percent were not represented by counsel at their hearings. Due to the broadly drawn standards of incompetence and the ease with which the procedural safeguards were circumvented under prior law, the potential for abuse was great and shocking inequity was a common result.

The new law properly focuses the question of competence on the ward's ability to function and provides considerably tighter regulation of procedures to ensure that the alleged incompetent is adequately informed of his rights and given a meaningful opportunity to be heard. It introduces the court investigator at the time of initial conservatorship determination for those potential wards who are unable to appear for themselves. At that stage court investigators guard against many of the aforementioned abuses. The provision for automatic periodic review

John H. DeMouilly, Esq.
September 2, 1983
Page Two


by a court investigator is also an essential part of this procedure.

Ongoing judicial supervision guarantees that the need to continue the conservatorship or guardianship will be regularly evaluated. Periodic re-evaluation is imperative because the appointment of a guardian or conservator is necessarily made based upon a prediction of future behavior - the court is instructed to determine whether or not the potential ward will be able properly to provide for his own personal needs and manage his own financial resources in the future. Although the ward's prior conduct is considered, the courts often rely heavily on the expert testimony of physicians (especially psychiatrists) and psychologists predicting the ward's future ability to provide for his needs and manage his affairs. Unfortunately, the accuracy of such predictions is subject to grave doubt. Empirical studies demonstrate substantial prediction failures and clearly indicate a level of reliability insufficient to support a permanent judicial decree. As a result, periodic review is necessary to protect against inaccurate diagnosis and prediction.

Review by a court investigator guarantees that determination of the need (or lack thereof) to continue the guardianship or conservatorship will be made based on a report by an unbiased and otherwise disinterested party. The law does not require that the court investigator be an attorney, and the use of attorneys does not seem necessary to me. It is, however, important that the investigator be neutral. If the determination is based on a report or declaration by the conservator, nursing home director, state hospital staff or other potentially interested party, there is substantial risk that conflicts of interest will influence the judgment.

I hope this brief summary of my views will be helpful. If I can be of further assistance, please let me know.

Sincerely,


George J. Alexander
Dean*

GJA:jab

* For identification only and not as an indication of institutional endorsement.

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HAROLD A. IRISH
ATTORNEY AT LAW

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May 25, 1983

Senator Barry Keene
State Capitol
Sacramento, CA

Dear Barry:

As a lawyer, you're probably aware of the relatively new change in the law regarding Conservatorships which requires a referral to a Court Investigator to determine if there is a need for continuance of the proceeding and to advise the conservatee of his rights.

All this is laudable, but the cost must be enormous. In Mendocino County the practice is to appoint attorneys to do this. I found that I was on a list, the existence of which I didn't know about. The catch in the whole thing is that the court-ordered payment for these investigations comes out of the County general fund. The costs are not inconsiderable. I had to ask for \$94.00 on the last one (and I sincerely hope it is) because it required a two page report, and two other papers, as well as a trip to Fort Bragg. I saw another attorney's papers. He asked and received \$264.00. All of taxpayer's money.

Couldn't this be handled more expediently? For example, a declaration from the person in charge of the nursing home. My conservatee is 89 years old and quite oblivious to the whole proceeding. This is the second time I saw her and she obviously is going to need conservatorship for the rest of her life.

If attorneys need to be in the picture (which I doubt) there should not only be a cap on the fee to be charged, but the fee should be payable out of the Conservatorship estate, rather than by the County general fund.

I had intended to write this letter a couple years ago, but you know how those things go. I trust you and your family are well and enjoying life.

Sincerely,

Hae
Harold A. Irish

*Probate § 1826
Code from § 154*



Exhibit 1
(continued)

California State Senate

BARRY KEENE
SENATOR, 2ND DISTRICT

DEL NORTE, HUMBOLDT, MENDOCINO,
SOLANO AND SONOMA COUNTIES

CHAIRMAN, SENATE JUDICIARY COMMITTEE

Study L-700

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FOREST LANDS ISSUES

July 21, 1983

Harold A. Irish
Attorney at Law
Post Office Box 726
Mendocino, California 95460

Dear Hal:

Thank you for your letter regarding the use of court investigators in conservatorship proceedings. Please excuse the delay in replying.

A member of my staff has been in contact with John DeMouilly of the California Law Revision Commission. The Commission is currently studying changes in the conservatorship proceedings. Mr. DeMouilly requested that a copy of your letter be sent to him so he can better understand your concerns. The Commission will keep you informed on the progress of their study.

I appreciate your bringing this matter to my attention. If I may be of further assistance to you, please don't hesitate to contact me.

Thanks for the good wishes.

Best regards,


BARRY KEENE

BK:lbo
cc: John DeMouilly
CA Law Revision Commission
Stanford Law School
Stanford, CA 94305