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INVITATION TO COMMENT

SPR11-57

Title	Action Requested
Court Fee Waivers in Probate Proceedings	Review and submit comments by June 20, 2011
Proposed Rules, Forms, Standards, or Statutes	Proposed Effective Date
Amend Cal. Rules of Court, rule 3.50; adopt rule 7.5	January 1, 2012
Proposed by	Contact
Probate and Mental Health Advisory Committee	Douglas C. Miller, 818-558-4178 douglas.miller@jud.ca.gov
Hon. Mitchell L. Beckloff, Chair	

Summary

The proposed rule of court would apply, in decedent estate, probate conservatorship, and probate guardianship proceedings, civil action court fee waiver practice and procedure required by law, including changes in the law made by recent legislation and new and revised rules of court.

Discussion

Background

Effective July 1, 2009, Judicial Council-sponsored legislation was enacted concerning waivers of court fees for indigent litigants in civil actions.¹ The legislation replaced the former law on this topic, Government Code section 68511.3 and rules 3.50–3.63 of the California Rules of Court. In addition to establishing new procedures for seeking fee waivers, the legislation clarifies steps courts may take to collect previously waived fees from a party who is ultimately successful in the litigation or whose financial condition improves during the progress of the case.

¹ Assem. Bill 2448; Stats 2008, ch. 462. The legislation repealed Government Code section 68511.3 and added article 6 to chapter 2 of title 8 of the Government Code (sections 68630–68641).

The proposals have not been approved by the Judicial Council and are not intended to represent the views of the council, its Rules and Projects Committee, or its Policy Coordination and Liaison Committee. These proposals are circulated for comment purposes only.

Effective on the same date as the legislation, the Judicial Council substantially repealed, restated, and amended the existing rules of court applicable to fee waivers. The council also revised existing Judicial Council fee waiver forms and adopted new forms, effective July 1, 2009 or January 1, 2010. All of the new or revised trial court forms are mandatory forms.²

The legislation, the new rules of court, and the Judicial Council forms neither expressly provide for nor exclude fee waivers in decedent estates, conservatorships, and guardianships. The new Government Code provisions clearly apply to civil rather than criminal cases, but they are not expressly limited to particular subsets of civil matters and no classes of civil matters are excluded.

Rule 3.50 limits rules 3.50–3.58 to fee waivers in the trial court but does not otherwise restrict their application to any particular class of civil action or proceeding. But rule 3.10 provides that the rules in title 3 of the rules of court apply to all civil cases in the superior courts, including probate cases, unless otherwise provided in a statute or a rule of court. There is no provision otherwise that excludes probate matters from the new fee waiver law and rules of court.³

Decedents' estates, conservatorships, and guardianships share the common characteristic of an amount of money or property that is properly a source of payment for the court costs subject to waiver coming under court supervision shortly after the case is commenced. The closest analogue to this characteristic in ordinary civil actions under the revised fee waiver law and rules of court is an improvement in the successful waiver applicant's financial condition during the progress of the case or as the result of a successful outcome of the case.

During the public comment phase on the proposal for adoption or revision of the rules of court and Judicial Council fee waiver forms to conform to the new legislation, which had by then been enacted but was not yet in effect, the proposal received the following comment from the manager of a court's probate and mental health department, the only comment received concerning probate matters:

[Neither] [t]he rule[s] nor the forms appear to address probate needs. Recommend adding language to the instructions and/or the rule that addresses the issue that if . . . [the matter] is a probate case (guardianship, conservatorship, decedent's estate, trust) the estate may be

² The new and restated rules concerning fee waivers are rules 3.50–3.58. The trial court mandatory forms are designated as forms FW-001, FW-001-INFO, FW-002, FW-003, FW-005, FW-006, FW-007, FW-008, FW-010, FW-011, and FW-012. Three new family law trial court fee waiver forms, designated as FL-336, FL-337, and FL-338, were also adopted.

³ But see footnote 4, concerning assessments of the cost of investigations in guardianships and conservatorships.

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ordered to pay court fees and costs at a date well after the filing date—often at distribution. The fees should be able to be ordered waived or deferred as needed. . . .⁴

This comment received the following response from the advisory committees that had recommended the new fee waiver rules and forms:

This comment addresses a matter outside the scope of the current proposal, which is intended to implement the rules and forms mandated by the new statute by the July 1, 2009, operative date. The fee waiver statute is generally applicable to probate fee waiver matters, and a petitioner in such matter[s] may request a waiver.

As resources permit, in the future the [advisory] committees will consider whether additional rules or statutory provisions are needed to address recovery of waived fees in probate matters, beyond the generally applicable recovery provisions in Government Code sections 68636 and 68637.

Perhaps in response to the 2009 legislation and the changes in the fee waiver forms and rules of court, there has been a considerable amount of interest from courts and elsewhere concerning fee waivers in probate matters involving the estates of decedents, conservatees, and wards. Some court representatives believe that only the estate’s financial condition determines qualification for a waiver, thereby making virtually all petitioners for person-only appointments in guardianships and conservatorships eligible for fee waivers. Others look primarily or exclusively to the financial condition of the petitioner prior to the appointment of a fiduciary.

Still other courts have developed hybrid approaches, in which an initial fee waiver before the appointment of a fiduciary is adjusted or terminated after the appointment or after the new fiduciary has successfully marshaled assets of the estate, or the decision on the waiver application is deferred until after the fiduciary has been appointed. The procedures employed in these hybrid situations may not conform to the requirements of the new Government Code provisions, which are based on motion practice in ordinary civil or family law actions, feature very short time periods, and create defaults in favor of waivers if the time limits are not met.

⁴ This comment also requested that the cost of investigations by court or county investigators in guardianships and court investigators in conservatorships be subject to waiver (and recovery) under the Government Code fee waiver provisions. These investigations are not mentioned in the Government Code sections or the fee waiver rules of court. But Probate Code sections 1513.1 and 1851.5 provide explicit authority for courts to assess the cost of these investigations and to waive the assessments, in whole or in part, on the ground of hardship, under a specific procedure that is separate and distinct from the more general fee waiver procedure outlined in the new legislation. Therefore, the proposed rule of court does not address investigator assessments.

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Rule 7.5

This proposal would specifically apply the recent legislation and the new and amended rules of court and Judicial Council forms to decedent estates, probate guardianships, and probate conservatorships. Proposed rule 7.5 includes the following elements:

1. An initial fee waiver⁵ requested by a petitioner for the appointment of a conservator or a guardian (of the person, the estate, or both) must be based on the petitioner's financial condition.
2. An initial fee waiver requested by a petitioner for the appointment of a personal representative of a decedent's estate must be based on the petitioner's financial condition.
3. The appointment of a fiduciary may be a change of financial condition for fee waiver purposes under Government Code section 68636.
4. If the successful petitioner is appointed as a fiduciary, his or her continued eligibility for a fee waiver must be based on the combined financial condition of the petitioner and the decedent estate, conservatee, or ward.
 - Upon collecting assets of the estate, the fiduciary must notify the court of a change of financial condition under Government Code section 68636(a) that may affect his or her ability to pay all or a portion of fees waived.
 - The court may make a preliminary determination under Government Code section 68636(b) that the petitioner's appointment as fiduciary is a change of financial condition that makes the petitioner no longer eligible for a fee waiver based, in whole or in part, on the estimates of estate value and income contained in the petitioner's appointment petition.

If a preliminary determination is made, the court must give notice and conduct the hearing required by section 68636(b), a noticed hearing with at least 10 days' notice, with specific reasons given as to why the fee waiver may be reconsidered. The court may require the petitioner to provide reasonably available evidence to support his or her continued eligibility for the waiver.
5. If the successful petitioner is not an appointed fiduciary:
 - A fee waiver for the petitioner in his or her individual capacity continues in effect according to its terms.

⁵ The term "initial fee waiver" comes from Government Code section 68631 and rule 3.50(b). An initial fee waiver may be a full waiver of all eligible fees and costs that may be applied for at any stage of a case. The waiver is called "initial" only because the court may later end or modify it or recover previously waived costs and fees if the court determines that the applicant is not, or is no longer, eligible for the waiver. See rule 3.50(a).

- The appointed fiduciary may apply for a fee waiver. The application must be based on the combined financial condition of the fiduciary and the decedent estate, conservatee, or ward.
6. The “financial condition of the decedent estate, conservatee, or ward”⁶ may include:
- The financial condition of any person against whom the conservatee or ward has a claim for support, including a spouse, registered domestic partner, or parent. But such claims are subject to the provisions of Government Code section 68637(e), concerning likelihood of payment.⁷
 - The conservatee’s interest in community property that is outside the conservatorship estate under the management and control of the conservatee’s spouse or domestic partner.
 - The right to receive support, income, or other distributions from a trust or under a contract.
 - In the court’s discretion, the estate’s liquidity; whether estate property or income is necessary for support of a person entitled to a family allowance, the conservatee or a person entitled to support from the conservatee, or the ward; or whether property in a decedent’s estate is specifically devised. But if property of the estate is eliminated from consideration for fee waiver purposes for one or more of these reasons, the court may determine that the fee waiver applicant and the estate can pay a portion of fees, can pay them over time, or can pay them at a later time, under an “equitable arrangement” under Government Code section 68632(c). This arrangement may include establishment of a lien against property distributable from a decedent’s estate or payable to a ward or conservatee or any successor in interest at the termination of a guardianship or conservatorship.
7. If the financial condition of the estate of a decedent, conservatee, or ward is a change of financial condition that results in withdrawal of a previously granted initial waiver of fees in favor of a petitioner for the appointment of a fiduciary under this rule, the estate must pay to the court as an allowable expense of administration fees and costs waived before the court’s order withdrawing the initial fee waiver.

⁶ The financial condition of the conservatee or ward is not limited to consideration of the size of his or her estate or even on its existence because the definition of his or her financial condition includes claims that the conservatee or ward has on support from others or an interest in property that is not part of the estate. Therefore, even in cases where there is no estate conservator or guardian, the financial condition of the conservatee or ward may be included in the determination of the fiduciary’s eligibility or continued eligibility for a fee waiver.

⁷ Section 68637(e) applies to family law cases. A provision in that section addresses the effect of a spousal or child support order in favor of a party who has been granted an initial fee waiver. The support order may be considered a change of circumstances affecting the fee waiver only if the court has evaluated the likelihood that the support obligor will make the payments ordered by the court.

8. Applicants for fee waivers under this rule who are represented by counsel must complete the items in the waiver request forms (items 3a and 3b of form FW-001 and items 2a and 2b of FW-002) that inquire about agreements on cost advances by counsel.

The advisory committee decided not to include provisions in rule 7.5 addressing fee waivers in proceedings governed by the Probate Code other than decedents' estates, conservatorships, and guardianships, including trust litigation. This decision was made, at least in part, because many of those proceedings are more like regular civil litigation than the three types of matters covered in the rule.

Rule 3.50(c)

An amendment of rule 3.50 is proposed, the addition of a new subdivision (c) advising that certain fee waivers in decedent estate, conservatorship, and guardianship proceedings under the Probate Code are governed by the proposed new rule 7.5. This change would alert persons unfamiliar with the probate rules that a specific rule governing fee waivers in the specified matters has been adopted.

Specific Comments Requested

The advisory committee desires comments concerning the need or desirability of including in the proposed rule any proceedings governed by the Probate Code other than decedents' estates, conservatorships, and guardianships.

Attachment

1. Cal. Rules of Court, rules 3.50 and 7.5, at pages 7–10.

Rule 3.50 of the California Rules of Court would be amended and rule 7.5 would be adopted, effective January 1, 2012, to read:

1 3.50. Application of rules

2
3 (a) * * *

4
5 (b) * * *

6
7 (c) Probate fee waivers

8
9 Certain initial fee waivers in decedent's estate, probate conservatorship, and
10 probate guardianship proceedings are governed by rule 7.5.

11
12 | Rule 7.5. Waivers of court fees in decedents' estates, conservatorships, and
13 guardianships

14
15 (a) Scope of rule

16
17 This rule governs initial fee waivers, as defined in rule 3.50(b), that are
18 requested by petitioners for the appointment of fiduciaries, or by fiduciaries
19 after their appointment, in decedents' estates, conservatorships, and
20 guardianships under the Probate Code.

21
22 (b) Court fee waivers requested by petitioners for the appointment of
23 conservators and guardians of the person

24
25 A petitioner for the appointment of a conservator or guardian of the person
26 must base an application for an initial fee waiver on his or her personal
27 financial condition.

28
29 (c) Court fee waivers requested by petitioners for the appointment of
30 personal representatives of decedents' estates, conservators of estates,
31 and guardians of estates

32
33 A petitioner for the appointment of a personal representative of a decedent's
34 estate, a conservator of the estate, or a guardian of the estate, must base an
35 application for an initial fee waiver on his or her personal financial
36 condition.

1 (d) Effect of the appointment of a fiduciary on a court fee waiver in
2 decedent estate, conservatorship, and guardianship proceedings

3
4 The appointment of a personal representative of a decedent's estate, a
5 conservator, or a guardian may be a change of financial circumstances for fee
6 waiver purposes under Government Code section 68636 in accordance with
7 the following:

8
9 (1) If the successful petitioner is an appointed fiduciary:

10
11 (A) The petitioner's continued eligibility for an initial fee waiver must
12 be based on the combined financial condition of the fiduciary and
13 the decedent's estate, conservatee, or ward.

14
15 (C) Upon marshaling or collecting assets of the decedent's,
16 conservatee's, or ward's estate following the petitioner's
17 appointment and qualification as fiduciary, the petitioner must
18 notify the court of a change in financial circumstances under
19 Government Code section 68636(a) that may affect his or her
20 ability to pay all or a portion of the waived court fees and costs.

21
22 (D) The court may make a preliminary determination under
23 Government Code section 68636(b) that the petitioner's
24 appointment as fiduciary is a change of financial condition that
25 makes the petitioner no longer eligible for an initial fee waiver
26 based, in whole or in part, on the estimates of estate value and
27 income contained in the petitioner's appointment petition. In that
28 event, the court must give notice and conduct the hearing required
29 by section 68636(b).

30
31 (2) If the successful petitioner is not an appointed fiduciary:

32
33 (A) An initial fee waiver for that petitioner continues in effect
34 according to its terms for subsequent fees incurred by that
35 petitioner in the proceeding solely in his or her individual
36 capacity.

37
38 (B) The appointed fiduciary may apply for an initial fee waiver. The
39 application must be based on the combined financial condition of
40 the fiduciary and the decedent estate, conservatee, or ward.

1 (3) The financial condition of the conservatee or ward for purposes of this
2 subdivision may include:

3
4 (A) The financial condition of any person against whom the
5 conservatee or ward has a claim for support, including a spouse,
6 registered domestic partner, or parent. Such claims are subject to
7 the provisions of Government Code section 68637(e) concerning
8 likelihood of payment.

9
10 (B) A conservatee's interest in community property that is outside the
11 conservatorship estate and under the management or control of
12 the conservatee's spouse or domestic partner.

13
14 (C) The right to receive support, income, or other distributions from a
15 trust or under a contract.

16
17 (4) The financial condition of the decedent's, conservatee's, or ward's
18 estate for purposes of this subdivision may, in the court's discretion,
19 include consideration of:

20
21 (A) The estate's liquidity;

22
23 (B) Whether estate property or income is necessary for the support of
24 a person entitled to a family allowance from the estate of a
25 decedent, the conservatee or a person entitled to support from the
26 conservatee, or the ward; or

27
28 (C) Whether property in a decedent's estate is specifically devised.

29
30 (5) If property of the estate is eliminated from consideration for initial
31 court fee waiver purposes because of one or more of the factors listed
32 in (4), the court may determine that the applicant and the estate can pay
33 a portion of court fees, can pay court fees over time, or can pay court
34 fees at a later time, under an equitable arrangement within the meaning
35 of Government Code section 68632(c). An equitable arrangement under
36 this paragraph may include establishment of a lien for initially waived
37 court fees against property distributable from a decedent's estate or
38 payable to the conservatee or ward or other successor in interest at the
39 termination of a conservatorship or guardianship.

1 (e) Payment of previously waived court fees by the estates of decedents,
2 conservatees, and wards

3
4 If the financial condition of the estate of a decedent, conservatee, or ward is a
5 change of financial condition that results in withdrawal of a previously
6 granted initial waiver of fees in favor of a petitioner for the appointment of a
7 fiduciary under this rule, the estate must pay to the court as an allowable
8 expense of administration fees and costs waived before the court's order
9 withdrawing the initial fee waiver.

10
11 (f) Advances of court fees and costs by legal counsel

12
13 (1) Government Code section 68633(g), concerning agreements between
14 applicants for initial court fee waivers and their legal counsel for
15 counsel to advance court fees and costs and court hearings to determine
16 the effect of the presence or absence of such agreements on the
17 applications, applies to proceedings described in this rule.

18
19 (2) Applicants for initial fee waivers under this rule represented by legal
20 counsel, and their counsel, must complete the *Request to Waive Court*
21 *Fees* (form FW-001), including items 3a and 3b; and, if a request to
22 waive additional court fees is made, the *Request to Waive Additional*
23 *Court Fees* (form FW-002), including items 2a and 2b. The reference to
24 "legal-aid type services" in these forms refers to legal services provided
25 to an applicant by counsel for or affiliated with a qualified legal
26 services project defined in Business and Professions Code section
27 6213.

28
29 (g) Expiration of initial court fee waivers in proceedings under this rule

30
31 "Final disposition of the case" for purposes of determining the expiration of
32 fee waivers under Government Code section 68639 occurs on the later of the
33 following events:

34
35 (1) Termination of the proceedings by order of court or under operation of
36 law in conservatorships and guardianships of the person; or

37
38 (2) Discharge of personal representatives of decedent estates and discharge
39 of conservators or guardians of estates.

Item SPR11-57 Response Form

Title: Court Fee Waivers in Probate Proceedings (adopt rule 7.5 of the Cal. Rules of Court)

- Agree with proposed changes
- Agree with proposed changes **if modified**
- Do not agree** with proposed changes

Comments: _____

Name: _____ Title: _____

Organization: _____

- Commenting on behalf of an organization

Address: _____

City, State, Zip: _____

To Submit Comments

Comments may be submitted online, written on this form, or prepared in a letter format. If you are *not* commenting directly on this form, please include the information requested above and the proposal number for identification purposes. Please submit your comments online or email, mail, or fax comments. You are welcome to email your comments as an attachment.

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DEADLINE FOR COMMENT: 5:00 p.m., Monday, June 20, 2011

Circulation for comment does not imply endorsement by the Judicial Council or the Rules and Projects Committee. All comments will become part of the public record of the council's action.