

Judicial Council of California

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INVITATION TO COMMENT

W18-09

Title	Action Requested
Probate Law: Appointment of Counsel	Review and submit comments by February 9, 2018
Proposed Rules, Forms, Standards, or Statutes	Proposed Effective Date
Approve form GC-005	September 1, 2018
Proposed by	Contact
Probate and Mental Health Advisory Committee	Corby Sturges, 415-865-4507
Hon. John H. Sugiyama, Chair	corby.sturges@jud.ca.gov

Executive Summary and Origin

The Probate and Mental Health Advisory Committee recommends approving a form for optional use to apply for and order the appointment of counsel for a ward, a proposed ward, a conservatee, or a proposed conservatee, including a limited conservatee, in a proceeding under division 4 (beginning with section 1400) of the Probate Code, which includes the Guardianship-Conservatorship Law. Probate courts and other stakeholders have indicated that appointment of counsel early in a proceeding would promote more efficient and informed case management and better protect the legal rights of persons subject to guardianship or conservatorship.

Background

The probate court holds the authority to appoint counsel for a ward, a proposed ward, a conservatee, or a proposed conservatee in any proceeding under division 4 of the Probate Code if the court determines that the person is not represented by 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, § 1470(a).)

In addition, the court is required to appoint counsel for a conservatee, a proposed conservatee, or a person alleged to lack capacity in specified proceedings—that is, those to establish, transfer, or terminate a conservatorship; to appoint or remove a conservator; for a determination and order affecting the legal capacity of the conservatee; or for an order authorizing removal of a temporary conservatee from that person's residence—in two sets of circumstances.

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 These proposals are circulated for comment purposes only.

First, the court must appoint counsel in those proceedings if the person is unable to retain counsel and has requested that the court appoint counsel. (Prob. Code, § 1471(a).) Second, the court must also appoint counsel in those same proceedings if the person has not retained counsel, does not plan to retain counsel, and has not requested that the court appoint counsel, if the court determines that the appointment would either be helpful to resolution of the matter or is necessary to protect the person's interests. (*Id.*, § 1471(b).)

In a proceeding to establish a limited conservatorship for a developmentally disabled adult, the court must immediately appoint counsel for the person unless the person has already retained, or plans to retain, counsel. (Prob. Code, § 1471(c).) Finally, the court must appoint counsel for a conservatee or person alleged to lack legal capacity in proceedings under other scattered sections of the Probate Code, some of which refer back to section 1471 and some of which do not. (See, e.g., *id.*, §§ 1852, 1954, 2357, 2684, 3140, 3205.) The court investigator is typically responsible for informing the conservatee of the circumstances in which the court is authorized or required to appoint counsel. (See *id.*, §§ 1826, 1851.1.)

The Proposal

The Probate and Mental Health Advisory Committee recommends that the Judicial Council, effective September 1, 2018, approve *Application and Order for Appointment of Counsel* (form GC-005) for optional use to request the appointment of counsel in guardianship and conservatorship proceedings as outlined above. The proposal is needed to ensure that counsel is appointed for wards, proposed wards, conservatees, and proposed conservatees when appropriate or required by statute. The need is particularly acute in limited conservatorship proceedings, in which the court is required to appoint counsel immediately if the proposed limited conservatee has not retained counsel and does not plan to retain counsel. (Prob. Code, § 1471(c).)

The first page of the form would serve as the application. It would solicit information about the person requesting appointment, the person to be represented, the type of proceeding, and the circumstances justifying or requiring the appointment of legal counsel under sections 1470 and 1471 of the Probate Code. The applicant could file the form with the petition or, if not the petitioner, at any point after the filing of the petition. Furthermore, nothing would preclude more than one applicant from requesting appointment of counsel. This flexibility would bring the need for appointment of counsel to the court's attention as early as possible in the proceeding.

The second page of the form would serve as the appointment order. The court would have the opportunity to make findings of the facts and circumstances justifying or requiring appointment of counsel, order the appointment, and, if appropriate, identify the attorney appointed. The form is proposed for optional use. It would not preclude the court from using other mechanisms to appoint counsel. If the form were used, copies of the order could be kept in the case file and given to the appointed attorney and the client for their reference.

Alternatives Considered

The committee considered not proposing a form for appointment of counsel, but concluded that the problem to be addressed was sufficiently serious and the costs of a new optional form sufficiently low to warrant a new form. The committee also considered proposing two forms—an application and an order—but decided to circulate a single form and request comment on the advantages and disadvantages of separate forms. Finally, the committee considered proposing amendments to rule 7.1101 of the California Rules of Court governing the qualifications and training of appointed counsel, but elected to defer that proposal pending further consultation with stakeholders.

Implementation Requirements, Costs, and Operational Impacts

The proposal would assist courts in implementing existing statutory requirements by simplifying the process for appointment of counsel. The courts might incur some short-term costs incorporating the new form into their procedures, but these costs should be insubstantial and offset by ongoing gains in efficiency.

Request for Specific Comments

In addition to comments on the proposal as a whole, the advisory committee is interested in comments on the following:

- Does the proposal appropriately address the stated purpose?
- Would two separate forms—one for the application and one for the order—promote more efficient case management?
- Are additional rule amendments or form revisions needed to address issues related to appointment of counsel in guardianship or conservatorship proceedings, including limited conservatorships? If so, please specify.

The advisory committee also seeks comments from *courts* on the following cost and implementation matters:

- Would the proposal provide cost savings? If so please quantify.
- What would the implementation requirements be for courts? For example, training staff (please identify position and expected hours of training), revising processes and procedures (please describe), changing docket codes in case management systems, or modifying case management systems.
- Would three months from Judicial Council approval of this proposal until its effective date provide sufficient time for implementation?
- How well would this proposal work in courts of different sizes?

Attachments and Links

1. Application and Order for Appointment of Counsel (form GC-005), at pages 4–5
2. Probate Code, §§ [1470](#) & [1471](#)

CASE NAME:	CASE NUMBER:
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ORDER

The court finds that:

6. The person named in 2 has not retained legal counsel, is not otherwise represented by counsel in this proceeding, and *(check all that apply)*:
- a. Is unable to retain counsel.
 - b. Does not plan to retain counsel.
 - c. Has requested the appointment of counsel.
 - d. Has not requested the appointment of counsel.
7. Appointment of counsel for the person named in 2 *(check all that apply)*:
- a. Would be helpful to the resolution of the matter.
 - b. Is necessary to protect that person's interests.
 - c. Is required because this proceeding is described in Probate Code section 1471(a)(1)–(5) and items 6(a) & (c), above, are both checked.
 - c. Is required because this proceeding is described in Probate Code section 1471(a)(1)–(5) and items 6(b), above, and 7(a) or (b) are checked.
 - d. Is required because this is a proceeding to establish a limited conservatorship, and item 6(b), above, is checked.

The court orders:

8. Appointment of counsel who meets the qualification and education requirements in rule 7.1101 of the California Rules of Court to represent the person named in 2 in this proceeding until relieved by the court on substitution of other qualified counsel or for cause.
9. *(Choose one)*:
- a. Appointment of the attorney identified below, who meets the eligibility requirements, is available for appointment, and has no known conflict of interest.
 Attorney *(name)*:
 Firm, agency, or office *(name)*:
(address):
(telephone number): *(e-mail)*:
(State Bar number):
 or
 - b. Appointment of a qualified attorney to be determined under the procedure established by local rule of court and confirmed by subsequent order of the court.

Date: _____  _____
(JUDICIAL OFFICER)