



Judicial Council of California · Administrative Office of the Courts

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REPORT TO THE JUDICIAL COUNCIL

For business meeting on: October 26, 2012

Title	Agenda Item Type
Probate Conservatorship and Guardianship: Financial Eligibility for County Payment for Counsel Appointed by the Court in Proceedings Under the Guardianship- Conservatorship Law	Action Required
Rules, Forms, Standards, or Statutes Affected	Effective Date
Amend rule 1.4 and adopt Appendix E, Cal. Rules of Court	January 1, 2013
Recommended by	Date of Report
Probate and Mental Health Advisory Committee	August 29, 2012
Hon. Mitchell L. Beckloff, Chair	Contact Douglas C. Miller 818-558-4178 douglas.c.miller@jud.ca.gov

Executive Summary

In response to a direction from the Legislature, the Probate and Mental Health Advisory Committee recommends adopting guidelines for determining the financial eligibility for payment by the county of all or a portion of the cost of counsel appointed for (proposed) conservatees and wards and for certain other persons, in proceedings under the Guardianship-Conservatorship Law. The advisory committee also proposes amending rule 1.4(d) of the California Rules of Court to specify that the guidelines will be included in the rules as Appendix E.

Recommendation

The Probate and Mental Health Advisory Committee recommends that the Judicial Council, effective January 1, 2013:

1. Amend rule 1.4(d) of the California Rules of Court to add a new paragraph (5) that identifies a new Appendix E to the rules; and
2. Adopt Appendix E of the California Rules of Court, Guidelines for Determining Financial Eligibility for County Payment of the Cost of Counsel Appointed by the Court in Proceedings Under the Guardianship-Conservatorship Law.

The text of the proposed amended rule 1.4 and the new Appendix E is attached at pages 12–16.¹

Previous Council Action

On January 1, 2008, the Judicial Council adopted rule 7.1101 of the California Rules of Court, which establishes qualifications and continuing education requirements for counsel appointed under the provisions of Probate Code sections 1470 and 1471. The council thereafter amended this rule twice. The amendments became effective on January 1, 2009, and January 1, 2011.

The Judicial Council also adopted two new Judicial Council forms for counsel to use to show their qualifications for appointment under rule 7.1101 and their completion of continuing education required by the rule. The forms are, respectively, the *Certification of Attorney Concerning Qualifications for Court Appointment in Conservatorships or Guardianships* (form GC-010), adopted effective January 1, 2008 and revised effective January 1, 2009; and the *Annual Certification of Court-Appointed Attorney* (form GC-011), adopted effective January 1, 2009.

Rationale for Recommendation

Background

Probate Code section 1470. Section 1470 of the Probate Code authorizes the court to appoint private counsel for a ward, proposed ward, conservatee, or proposed conservatee if the court determines that the person is not otherwise represented by counsel and the appointment would be helpful to resolution of the matter before the court or is necessary to protect the person's interests. Section 1470(b) requires the court to fix a reasonable sum for appointed counsel's compensation and expenses.

Before 2008, section 1470(c) directed the court to order the sums fixed by the court to be paid by the estate of the conservatee or, if the appointment was for a minor in a guardianship, from the ward's or proposed ward's estate, the ward's parents, or both in any combination, in proportions deemed just by the court; no provision was made for public payment of all or any portion of counsel's compensation or expenses fixed by the court. But in *Conservatorship of Berry* (1989)

¹ The attached amended rule 1.4(d) includes a new paragraph (6), which would identify a new Appendix F to the rules, Guidelines for the Juvenile Dependency Counsel Collections Program. This reference is to a separate proposal of the Family and Juvenile Law Advisory Committee, which will be presented for consideration by the Judicial Council at the same meeting at which this proposal will be presented. It is noted here in the amended rule text to ensure that, if both proposals are adopted, the amendment to rule 1.4(d) would reflect both adopted proposals.

210 Cal.App.3d 706, at pages 722–723, the Court of Appeal determined that the court has discretion to appoint a county public defender to represent an indigent probate conservatee under section 1470 and Government Code section 27706(d).² The *Berry* case was a conservatorship; the court discussed only those proceedings. However, because both sections 1470 and 27706(d) refer to wards in guardianships as well as to conservatees, the court’s conclusion on this point necessarily also applies to wards and proposed wards.

The court also concluded that Government Code section 27712 authorizes the court to award to the county the costs of providing the public defender to a conservatee under section 1470 from the conservatee’s estate, to the extent of his or her ability to pay. This conclusion necessarily also applies to a ward’s estate and the ward’s parents in a guardianship.³

Section 1470 was amended effective January 1, 2008.⁴ The amendment added a new paragraph (3) to section 1470(c), as follows:

(3) If a ward or proposed ward is furnished legal counsel for a guardianship proceeding, upon its own motion or that of a party, the court shall determine whether a parent or parents of the ward or proposed ward or the estate of the ward or proposed ward is financially unable to pay all or a portion of the cost of counsel appointed pursuant to this section. Any portion of the cost of that counsel that the court finds the parent or parents or the estate of the ward or proposed ward is unable to pay shall be paid by the county. *The Judicial Council shall adopt guidelines to assist in determining financial eligibility for county payment of counsel appointed by the court pursuant to this chapter.* (Italics added.)

It thus appears that under amended section 1470, the court may:

1. Appoint private counsel for a ward or conservatee (or proposed ward or conservatee) in a matter covered by the section without regard to the client’s ability to pay the cost of representation;
2. Fix a reasonable sum for appointed counsel’s compensation and expenses at the conclusion of the matter;

² Section 27706(d) provides: “Upon request, or upon the order of the court, the public defender shall represent any person who is not financially able to employ counsel in proceedings under Division 4 (commencing with Section 1400) of the Probate Code” See footnote 5 below.

³ See 210 Cal.App.3d at pp. 724–725. Section 27712 permits the court to (1) determine the ability of *any party* who was provided legal services by the public defender or private counsel appointed by the court to pay all or any part of the cost, and (2) order the party to reimburse the county for the sum so determined.

Although section 27712 refers to authority to order reimbursement for the cost of private counsel paid by the county, the court in *Berry* determined that the text of section 1470 and legislative history behind it do not permit county payment for the cost of private counsel appointed under that section (210 Cal.App.3d at p. 725). Until the 2008 amendment of section 1470, discussed below, this determination applied equally to payment of the cost of private counsel appointed under section 1470 for wards or proposed wards in guardianships.

⁴ Sen. Bill 241; Stats. 2007, ch. 719, § 1.

3. Order the amount fixed to be paid by the conservatee or the conservatee's estate, or, in a guardianship, from the ward's estate or the ward's parents in any combination and proportions deemed just;
4. Despite section 1470's express reference to private counsel, appoint the county's public defender to represent a ward or proposed ward in a guardianship or a conservatee or proposed conservatee in a conservatorship the court first determines is indigent (financially unable to employ private counsel) and award to the county any portion of the cost of representation by the public defender the court determines that the ward's estate, the ward's parents, or both, or the conservatee or the conservatee's estate, can afford to pay;⁵ and
5. For appointments of counsel (private or county public defenders) for minors in guardianships, determine the portion of the amount of costs fixed by the court, if any, that the minor's estate, the minor's parents, or both, cannot afford, for payment by the county.

The phrase "this chapter" in section 1470(c)(3) refers to chapter 4 of part 1 of division 4 of the Probate Code, sections 1470–1474.⁶ Thus, although the direction to the council is contained in a paragraph that concerns only public payment of the cost of representation by appointed counsel for minors in guardianships under section 1470, the direction requires guidelines for county payment of the cost of representation by appointed counsel for conservatees and proposed conservatees and wards and proposed wards under section 1470, and also for conservatees, proposed conservatees, and certain other persons under sections 1471 and 1472.

⁵ The proposed guidelines address the eligibility of a client, the client's estate, or the parents or estate of a minor client, for county payment of all or some of the cost of representation by appointed counsel in an amount and on terms the court fixes after completion of legal services under section 1470, not the client's legal indigence. The latter is financial inability to employ private counsel on terms that counsel would be likely to accept in the actual local market for legal services. See, e.g., Government Code section 27706(d), quoted in footnote 2 above; *People v. Ferry* (1965) 237 Cal.App.2d 880, 887–888; and *Williams v. Superior Court* (1964) 226 Cal.App.2d 666, 672–673. Thus a legally indigent client (or a minor client's estate or parents) may still be able to pay all or some portion of the cost of appointed counsel's services and expenses fixed by the court after the performance of those services, in an amount and on payment terms that do not necessarily correspond to legal market amounts and payment terms for similar services. The *Berry* court's conclusion that the superior court may appoint the public defender for an indigent conservatee under section 1470 and Government Code section 27706(d) refers to legal indigence. See also Government Code section 27712, which emphasizes the difference between a determination of legal indigence before appointment of the public defender or private counsel and the post-services determination of the legally indigent client's ability to pay for all or some of the cost. Despite the conclusion of the *Berry* court on this point, most superior courts do not appoint public defenders under section 1470 for conservatees or wards on the basis of a determination of legal indigence before the performance of services.

⁶ Section 1474 refers to federal law concerning the appointment of counsel for an indigent biological parent or "Indian custodian" of a ward or proposed ward in a guardianship that is subject to the Indian Child Welfare Act (25 U.S.C. § 1901 et seq.) because the ward or proposed ward is or may be an Indian child within the meaning of the act. (See § 1903(6) for the definition of "Indian custodian.") Federal law establishes the right of an Indian child's parents or Indian custodian to court-appointed counsel in any "removal" or "placement" proceeding, which includes a proceeding for the appointment of a temporary or general guardian of the child's person. (See 25 U.S.C. § 1903(1).) The act and regulations under it provide a procedure to apply for payment of the cost of appointed counsel by the Bureau of Indian Affairs in the United States Department of the Interior when—as here for the appointment of counsel for a ward's parents or Indian custodian in a guardianship proceeding—state law does not provide for the appointment of counsel (25 U.S.C. § 1912(b), 25 C.F.R. § 23.13 (2001)). The proposed guidelines do not address appointments of counsel under section 1474 because there is no provision in California law for county payment of any part of the cost of appointments under that section.

Probate Code sections 1471–1472. Section 1471 requires the courts to appoint the public defender or private counsel to represent conservatee and proposed conservatee in connection with five specific proceedings listed in section 1471(a).⁷ Appointed counsel under section 1471 for conservatee in certain other matters and for certain other persons who may not necessarily be conservatee is also authorized or required by cross-references in other provisions of the Guardianship-Conservatorship Law.⁸ Appointment of counsel under section 1471 for a conservatee or proposed conservatee or for a person alleged to lack legal capacity must be made in two situations. First, if he or she is unable to retain an attorney and requests the appointment of counsel, the court must appoint an attorney at or before the hearing of one of the authorized matters (Prob. Code, § 1471(a)). Second, in a conservatorship, in the absence of a request by the conservatee or proposed conservatee for the appointment of counsel for one of the authorized matters, the court must appoint counsel if the court determines that the appointment would be helpful to resolution of the matter or necessary to protect the interests of the conservatee or proposed conservatee (Prob. Code, § 1471(b)).

⁷ Proceedings (1) to establish a conservatorship or appoint a conservator, (2) to terminate a conservatorship, (3) to remove the conservator, (4) for an order affecting the conservatee's legal capacity, or (5) for authority to remove a temporary conservatee from his or her residence.

⁸ The Guardianship-Conservatorship Law is parts 1–4 of division 4 of the Probate Code, sections 1400–2893. See section 1400. The other matters are proceedings (1) to restore a conservatee's right to vote (§ 1852); (2) to give the conservator of the person exclusive authority to consent to specific medical treatment for the conservatee when the conservatee has not been adjudicated to lack the capacity to consent to medical treatment (§ 2357); (3) to authorize a particular transaction involving community property of a conservatee or other person alleged to lack legal capacity (§§ 3100–3154 and 3140(d)(1)); (4) to determine the capacity of a health care patient without a conservator to make a health care decision and for authority to make the decision for the patient if he or she does not have capacity (§§ 3200–3212 and 3205); and (5) to determine whether the conservator of the person should be granted or continue to have "dementia powers" (§ 2356.5).

Dementia powers are powers of a conservator of the person to consent to the administration to the conservatee of psychotropic medicines suitable for treatment of dementia or to place the conservatee in a restricted-egress living facility designed for dementia patients. Appointment of counsel must be made on the initial petition for such powers and also when the court must consider whether a previous order granting these powers should be modified because the conservatee objects to the powers when interviewed by the court investigator or the investigator recommends modification of the order on a review investigation. (See §§ 2356.5(f)(1) (petition) and 2356.5(g) (review investigation).)

The authority to appoint counsel under section 2356.5 is "pursuant to Chapter 4 (commencing with Section 1470)," without specifying whether the authority is under section 1470 or section 1471, but the appointment is mandatory, not discretionary. Despite the ambiguity of section 2356.5's provisions on appointment of counsel, those provisions appear more consistent with authority under section 1471 than under section 1470. All appointments of counsel for conservatees under section 1470 are discretionary, and all such appointments under section 1471 are mandatory. No other Probate Code counsel appointment cross-reference is made "pursuant to Chapter 4," and none are made pursuant to section 1470. See 1 California Conservatorship Practice (Cont.Ed.Bar, CD-ROM 2011 Update) Duties and Powers of Conservator of the Person, §§ 13.62 (petition for dementia powers) and 13.68 (review of previous grant of dementia powers). The author asserts, without discussion, that the appointment is made under section 1471 (§13.62) and is made under sections 1470–1471 (§ 13.68).

There is another important reason to conclude that the grant of authority for the appointment of counsel under section 2356.5 is derived from section 1471, not section 1470. As noted above in footnote 3, private counsel appointed for a conservatee under section 1470 may be paid or reimbursed only from the conservatee's estate. An appointment order under section 2356.5 should recite that the appointment is made under that section and section 1471 if county payment of any portion of the cost of appointed counsel is contemplated.

For the appointment of counsel for a person alleged to lack legal capacity in a proceeding for a particular transaction in community property on the second ground noted above—helpful to resolution of the matter or necessary to protect the client’s interests—the proposed property transaction must call for substantial assets to be transferred to the other spouse. Even if the spouse alleged to lack legal capacity appears to have independent legal counsel, the court may inquire into counsel’s retention. If the court determines that counsel has not been competently retained, the court has discretion to appoint counsel for the person alleged to lack legal capacity (Prob. Code, § 3140(d)(2)).

In the case of a proceeding to determine the capacity of a health care patient without a conservator to make a health care decision, the court must determine the identity of counsel the patient has retained or plans to retain. If the patient has not retained counsel and has no plans to do so, the court must appoint counsel for him or her under section 1471 (Prob. Code, § 3205).

At the conclusion of the matters described above, section 1472 requires the court to fix the reasonable amount of compensation and expenses, determine the client’s ability to pay all or a portion of the sum fixed, and order payment by the client or the client’s estate (directly to private counsel or to the county for reimbursement of its prior payments of private counsel’s compensation or expenses or the costs of representation by the public defender) in installments or other reasonable terms compatible with the client’s financial ability. If the court determines that the client cannot pay all or a portion of the sum fixed, the county must pay that amount to private counsel or bear the cost of public defender representation without reimbursement.

The Guidelines

The guidelines are proposed as a new appendix (Appendix E) to the California Rules of Court, accompanied by an amendment of rule 1.4(d) of those rules to identify the new appendix. The advisory committee did not consider, in the words of section 1470(c)(3), “guidelines to assist in determining financial eligibility” to require a rule of court. The committee proposes placing the guidelines in the rules as an appendix, however, to ensure a prominent, permanent, and public place for them and an assured wide distribution to judicial officers and court staff responsible for the disposition of matters under the Guardianship-Conservatorship Law, as well as to county governments and officials responsible for payment of the public portion of the cost of appointed counsel in matters under that law.

Responsible person. The guidelines would identify, in paragraph 2, those persons who are responsible for payment of the cost of appointed counsel under Probate Code sections 1470–1472, collectively referred to in the guidelines as the “responsible person.” These are the persons whose financial condition would be reviewed to determine their eligibility for county payment of all or some of their obligations. In addition to the estates of wards or proposed wards and conservatee and proposed conservatee and their estates, responsible persons include the parent or parents of a ward or proposed ward under section 1470, the person alleged to lack legal capacity under section 3100 et seq. (if payment of the cost is not ordered from the proceeds of

the property transaction), and the patient whose capacity to make a health care decision is at issue in a proceeding under section 3200 et seq.

Cost of appointed counsel. The term “cost of appointed counsel,” as used throughout the guidelines, would be defined in paragraph 3 to mean the reasonable sum fixed by the court after the performance of services by appointed counsel for his or her compensation and expenses, in accordance with the procedure required by sections 1470 and 1472.

Presumption of eligibility for county payment. Paragraph 4 of the guidelines would list three ways for a responsible person (singular or plural) to be presumed to be eligible for payment by the county of the cost of appointed counsel: (1) eligibility for listed public benefit programs; (2) income 125 percent of current federal poverty guidelines or less; or (3) the court’s individual determination that the responsible person cannot pay the cost of appointed counsel without using funds that would normally be used to pay for the “common necessities of life” for the responsible person and his or her family.

This three-part test is patterned after the standard for an initial court fee waiver under Government Code section 68632. The test is framed as a presumption, however, for reasons discussed below. In this regard it is consistent with a proposed standard for the eligibility of persons responsible for the cost of appointed counsel for minors and parents in juvenile dependency proceedings for payment of that cost by the court. The juvenile court proposal was circulated for public comment at the same time as this proposal and will be presented for consideration by the Judicial Council at the same meeting as will this proposal.

Determination of amount of cost that responsible person can pay. The guidelines would describe, in paragraph 5, the determination the court could make that a responsible person can pay all or a portion of the cost of appointed counsel in installments or in some other equitable manner set by the court without being required to resort to funds normally used for the common necessities of life for the person and his or her family. This paragraph clarifies that the presumption of eligibility under paragraph 4 refers to the responsible person’s ability to pay the whole sum fixed by the court for the cost of appointed counsel. The court retains authority to determine that even a person described in paragraph 4—a person presumed to be eligible for county payment of the cost of appointed counsel—may be able to afford a partial payment, payments over time, or other payment arrangements determined by the court to be fair and reasonable without having to use funds normally used for the common necessities of life.

Paragraph 5 would also provide that the court may determine that the responsible person’s payments are to be made directly to appointed counsel, made to the county as reimbursement for payments it has made to appointed counsel, or a combination of payments. This provision is declarative of existing law in sections 1470 and 1472.

Apportionment of responsibility for payment in guardianships. Paragraph 6 of the guidelines would restate the provisions of Probate Code section 1470(c)(2) concerning apportionment of responsibility for payment of the cost of appointed counsel for minors in guardianships under section 1470 between the ward's estate and his or her parent or parents.

No public payment of the cost of private counsel for conservatee under section 1470.

Paragraph 7 of the guidelines restates the conclusion of the Court of Appeal in *Conservatorship of Berry, supra*, 210 Cal.App.3d at page 725, that section 1470 does not permit payment by the county of any portion of the cost of private counsel appointed under section 1470 for a conservatee or proposed conservatee. See footnote 3 above.

The amount of the cost of counsel payable by the county. The guidelines conclude with Paragraph 8, which would define the amount the county must pay as the amount of the cost of counsel the court determines under paragraph 5 that the responsible person (or persons) cannot pay. This paragraph clarifies that the county's ultimate obligation is for the portion of the total cost that the responsible person or, if more than one, all of them collectively, cannot afford to pay even with partial payments or extended periods of time or other equitable terms fixed by the court and described in paragraph 5.

Advisory Committee Comment

Appendix E to the rules of court would close with an advisory committee comment referring to the phrase "common necessities of life." The comment describes the intended use of that phrase in subparagraph 4C and paragraph 5 of the guidelines. The phrase would be used in those places as it is used in Government Code section 68632(c), concerning court fee waivers: to be interpreted as the phrase was used in Code of Civil Procedure section 706.051(c)(1) before the section was amended to delete the phrase, effective January 1, 2012.

The phrase has two purposes in the guidelines. The first is to establish a ground of a responsible person's eligibility for county payment of the cost of appointed counsel if the person would be required to use funds that would be normally used to pay for the common necessities of life for the person and his or her family to pay the entire cost of counsel. The phrase has a similar purpose in section 68632. (Guidelines, ¶ 4C.) The second purpose is to establish a baseline for the court's determination that a responsible person, including one eligible for a presumption under paragraph 4, can still afford to pay a portion of the cost of counsel, or make payments over time or under some other equitable arrangement, without having to resort to funds that would be otherwise expended for the common necessities of life. (Guidelines, ¶ 5.)

The purpose of the advisory committee comment is to explain the original application of the phrase, describe its deletion from the Code of Civil Procedure, and provide a list of appellate decisions that interpreted the phrase as it was used in that code section and its predecessors. Citing these cases and briefly describing their interpretation of "common necessities of life" are intended to preserve in a readily accessible form the courts' construction and interpretation of the phrase as a guide to judicial officers who will be required to determine its application to the

guidelines and also to court fee waivers under Government Code section 68632. Over time, following deletion of the phrase from section 706.051 of the Code of Civil Procedure, research to find this history by ordinary means will be increasingly difficult.

Comments, Alternatives Considered, and Policy Implications

This proposal was circulated in a special comment cycle that concluded on June 30, 2012. Four comments were received. All commentators approved the proposal, but some commentators requested minor changes. A chart of comments with the advisory committee's responses follows this report at pages 17–20.

In response to a request for comments on whether the guidelines should be proposed as a rule of court, two comments were received. The Orange County Bar Association supported the guidelines as an appendix to the rules of court. The Standing Committee on the Delivery of Legal Services of the Office of Legal Services, State Bar of California, requested their adoption as a rule of court “[t]o ensure consistent application of the financial eligibility guidelines throughout the state, especially in light of the budget challenges facing the courts” The committee's response to this comment is as follows:

The committee respectfully disagrees with this recommendation. The Legislature required guidelines only, and did not specify that they may or must be expressed in a rule of court. In many other contexts, the Legislature expressly calls for a rule of court. Such a rule would have the force of law within its proper sphere of authority. These are merely guidelines. The public cost of counsel in the cases subject to the guidelines is borne by the counties, not by the courts. Flexibility in the application of the guidelines based on differences between the counties and comity between the courts and the counties is appropriate.

The Orange County Bar Association also recommended adoption of *Income and Expense Declaration* (form FL-150), used in child or spousal support litigation and, in Orange County probate matters by local rule, to show that a ward should be supported from his or her estate because the support available from the ward's parents is insufficient. The committee responded by stating a preference for the use of another existing form used in criminal cases to determine whether a defendant is eligible for appointed counsel, *Defendant's Financial Statement on Eligibility for Appointment of Counsel and Reimbursement and Record on Appeal at Public Expense* (form MC-210), suitably modified to eliminate all references to the responsible person as a defendant and to the criminal law and to add references to the new guidelines. The advantage of this form is that all counties are familiar with it in connection with the appointment of counsel at county expense in criminal cases, and those counties with financial evaluation officers use it extensively. It is a very thorough and complete form that makes full inquiry about assets, income, expenses, and support obligations of persons responsible for payment of the cost of counsel. The committee will make recommendations on forms for use in connection with the guidelines in 2013.

The guidelines as originally developed and presented for preliminary review and approval by the Trial Court Presiding Judges and Court Executives Advisory Committees' Joint Working Group on Rules (JRWG) simply provided for the standards of eligibility now contained in paragraph 4 of the guidelines, the three-part test based on the court fee waiver provisions of Government Code section 68632. Advisory committee staff learned at that presentation, in April 2012, that the similar subject of eligibility for court payment of the cost of appointed counsel in juvenile dependency proceedings was also being considered by JRWG. Members of the working group expressed concern that the probate and juvenile dependency guidelines were to some extent inconsistent and should be harmonized as much as possible, although the authorizing statutes in the two situations are very different.

Subsequent communication with Administrative Office of the Courts staff working on the juvenile guidelines disclosed that the primary difference between the two sets of guidelines was that the juvenile guidelines created a presumption of eligibility if the three-part test of section 68632 were met, but permitted the courts to seek recovery of some costs of counsel on equitable terms. Subsequent modifications of both proposals were made to bring them closer together, including the adoption of the same presumption in paragraph 4 of these guidelines coupled with the authority to collect all or a portion of the cost on equitable terms under paragraph 5. These changes led eventually to approval of the probate guidelines presented here by the working group responsible for the juvenile dependency guidelines.

Implementation Requirements, Costs, and Operational Impacts

The advisory committee does not expect that implementation requirements will be significant, although there will be some staff training costs. Courts and counties already have systems in place to determine a county's share of payment of the cost of appointed counsel under Probate Code section 1472 for appointments made under section 1471; the 2008 legislation extended county payment for the services of appointed counsel only to wards in guardianship cases under section 1470. Most appointments of counsel for conservatees, all appointments of counsel for proposed conservatees in conservatorship appointment proceedings, and all appointments of counsel for adults without conservators who are eligible for appointed counsel are made under section 1471. Courts and counties that use county financial evaluation officers to make initial determinations of responsible persons' eligibility for county payment under section 1472 will be able to continue that practice and extend it for appointments of counsel for minors under section 1470, if they have not already done so.

As noted above, the advisory committee will consider whether additional financial statement forms or probate variants of existing forms, or new rules of court, are necessary or advisable to fully implement the guidelines, but the committee expects that courts and counties will be able to work within their existing systems and with their existing forms over the short term.

Relevant Strategic Plan Goals and Operational Plan Objectives

The proposed guidelines support the case management underlying strategic Goal III, Modernization of Management and Administration (Goal III.A), and objective III.A.4 of the related operational plan because the guidelines will improve the collection of fees for appointed counsel statewide. They also support Goal IV, Quality of Justice and Service to the Public, and objective IV.1 (desired outcome f) of the operational plan in that they will foster excellence in public service to ensure that all court users receive satisfactory services and outcomes by improved practices, procedures, and administration of probate conservatorship and guardianship cases.

Attachments

1. Cal. Rules of Court, rule 1.4 and Appendix E, at pages 12–16
2. Chart of comments, at pages 17–20

Rule 1.4 of the California Rules of Court is amended and Appendix E is adopted, effective January 1, 2013, to read:

1 **Rule 1.4. Contents of the rules**

2 **(a)–(c)** * * *

5 **(d) The appendixes**

7 The California Rules of Court includes the following appendixes:

9 **(1)–(4)** * * *

11 **(5) Appendix E. Guidelines for Determining Financial Eligibility for County**
12 Payment of the Cost of Counsel Appointed by the Court in Proceedings
13 Under the Guardianship-Conservatorship Law.

15 **(6) Appendix F. Guidelines for the Juvenile Dependency Counsel Collections**
16 Program.

18 **Appendix E**

20 **Guidelines for Determining Financial Eligibility for County**
21 **Payment of the Cost of Counsel Appointed by the Court in Proceedings**
22 **Under the Guardianship-Conservatorship Law**

24 **1. Purpose**

26 These guidelines are adopted to implement Probate Code section 1470(c)(3), which
27 provides that the Judicial Council shall adopt guidelines to assist in determining
28 financial eligibility for county payment of all or part of the reasonable sum fixed by
29 the court for compensation and expenses of counsel appointed by the court under
30 chapter 4 of part 1 of division 4 of the Probate Code.

32 **2. Persons responsible for payment of the cost of appointed counsel**

34 Except to the extent that they are determined to be unable to pay for all or any
35 portion of the cost of appointed counsel under paragraph 5 of these guidelines, the
36 following persons or estates of persons (referred to collectively as the “responsible
37 person”) are responsible for the payment of that cost:

- 1 A. The estate of the ward or proposed ward in a guardianship proceeding under
2 section 1470;
- 3 B. The parent or parents of the ward or proposed ward in a guardianship
4 proceeding under section 1470;
- 5 C. The estate of a conservatee or proposed conservatee in a conservatorship
6 proceeding under sections 1470–1472;
- 7 D. The conservatee or proposed conservatee, if he or she has no estate, in a
8 conservatorship proceeding under sections 1471–1472;
- 9 E. The person alleged to lack legal capacity in a proceeding to authorize a
10 particular transaction in community property under sections 1471–1472, to
11 the extent the court does not order the cost paid from the proceeds of the
12 transaction under section 1472(a)(3); and
- 13 F. The health care patient in a proceeding to determine his or her capacity to
14 make a health care decision under sections 1471–1472.

21 **3. Cost of appointed counsel**

22
23 The cost of appointed counsel is the reasonable sum fixed by the court after the
24 performance of legal services under Probate Code section 1470 or section 1472 for
25 the compensation and expenses of appointed counsel.

26 **4. Presumed eligibility for county payment**

27
28 Except as provided in paragraph 7, the person responsible for payment of the cost
29 of appointed counsel is presumed to be eligible for payment by the county of that
30 cost if the person satisfies one or more of the following three conditions:

31 A. The responsible person is eligible for:

- 32 (1) Supplemental Security Income (SSI) and State Supplementary
33 Payment (SSP);
- 34 (2) Medi-Cal;
- 35 (3) General Assistance or General Relief (GA/GR) Program (county
36 general relief);

- 1 (4) Cash Assistance Program for [aged, blind, and disabled legal]
2 Immigrants (CAPI);
- 3
- 4 (5) CalWORKs (California Work Opportunity and Responsibility to Kids)
5 or Tribal (Native American) TANF (Temporary Assistance for Needy
6 Families) grant program;
- 7
- 8 (6) CalFresh (Supplemental Nutrition Assistance Program (SNAP)) or
9 California Food Assistance Program (CFAP), a California program for
10 immigrants not eligible for federal SNAP; or
- 11
- 12 (7) In-Home Supportive Services (IHSS);
- 13
- 14 B. The responsible person's income is 125 percent or less of current federal
15 poverty guidelines, updated periodically in the Federal Register by the United
16 States Department of Health and Human Services; or
- 17
- 18 C. The responsible person, as individually determined by the court, cannot pay
19 the cost of appointed counsel without using funds that would be normally
20 used to pay for the common necessities of life for the responsible person and
21 his or her family.
- 22

23 **5. Determination of responsible person's obligation for the cost of appointed**
24 **counsel**

25

26 If the court finds that the responsible person, including a responsible person
27 described in paragraph 4, can pay all or a portion of the cost of appointed counsel,
28 can pay those costs in installments, or can pay those costs under some other
29 equitable arrangement without using money that normally would pay for the
30 common necessities of life for the responsible person and the responsible person's
31 family, the court may order the responsible person to pay appointed counsel
32 directly, reimburse the county for the costs of appointed counsel paid by the
33 county, or both, in part or on such other terms as the court determines are fair and
34 reasonable under the circumstances.

35

36 **6. Apportionment**

37

38 If the responsible person is the estate of a ward or proposed ward and one or both
39 of his or her parents, the court may allocate the amount determined to be payable
40 by the responsible person under paragraph 5 among them in any proportions the
41 court deems just.

1 **7. Private appointed counsel for conservatee under section 1470**

2
3 A conservatee or proposed conservatee for whom private counsel is appointed
4 under Probate Code section 1470 is ineligible for payment by the county of any
5 portion of the cost of appointed counsel.

6
7 **8. Amount payable by the county**

8
9 Except as provided in paragraph 7, the amount payable by the county for the cost of
10 appointed counsel is all or any part of the cost that the court determines that the
11 responsible person cannot pay under paragraph 5.

12
13 **Advisory Committee Comment**

14
15 The guidelines placed in Appendix E to the California Rules of Court are not rules of court. They
16 are based in part on the conditions for granting an initial court fee waiver under Government
17 Code section 68632(a)-(c). For the purposes of these guidelines as well as of that Government
18 Code section, the term “common necessities of life” has the same meaning it had in Code of
19 Civil Procedure section 706.051(c)(1) before the amendment of that section effective on January
20 1, 2012. (Assem. Bill 1388; Stats. 2011, ch. 694, § 1.)

21
22 The 2012 amendment of section 706.051(c)(1) completely eliminated “common necessities of
23 life” from that code section. The deleted phrase referred to an exception to the exemption
24 provided in the section from an earnings withholding order for amounts the debtor can prove are
25 necessary to support himself or herself and his or her family, often referred to as the support
26 exemption. In other words, under former section 706.051(c)(1), the support exemption of section
27 706.051(b) would not apply to shield the debtor from an earnings withholding order to collect a
28 debt incurred to purchase the “common necessities of life.”

29
30 The following appellate cases discussed the meaning of “common necessities of life” as that
31 phrase was used in section 706.051(c)(1) and predecessor code sections that used the phrase for
32 the same purpose:

- 33
34 • A debt for hospital services to defendant or his family was based on the common
35 necessaries of life. (*J. J. MacIntyre Co. v. Duren* (1981) 118 Cal.App.3d Supp. 16.)
- 36
37 • The performance of legal services and the advancement of costs of litigation giving rise
38 to award to an attorney in marriage dissolution action qualified as “common necessities
39 of life” for the benefit of the debtor’s indigent wife, thereby permitting the attorney to
40 enforce the award by writ of execution on the husband’s earnings against his claim of the
41 support exemption. (*In re Marriage of Pallesi* (1977) 73 Cal.App.3d 424.)
- 42
43 • “Common necessities of life,” in former section 690.11 (repealed) exempting debts
44 incurred for common necessities of life from a statute protecting all of a judgment

1 debtor's earnings from execution or attachment if earnings were necessary for the support
2 of the debtor's family, did not refer to "necessaries" in the broad sense, but meant things
3 that are ordinarily required for everyone's sustenance. (*Ratzlaff v. Portillo* (1971) 14
4 Cal.App.3d 1013.)

- 5
- 6 • Attorney's fees former wife incurred in obtaining divorce were not common "necessaries
7 of life" within the meaning of former section 690.11 (repealed). (*Lentfoehr v. Lentfoehr*
8 (1955) 134 Cal.App.2d Supp. 905.)
 - 9
 - 10 • "Common necessities of life," as used in former section 690.11 (repealed), exempting all
11 of the earnings of a debtor if necessary for the use or support of debtor's family residing
12 within the state, except as against the collection of debts incurred by debtor, his wife, or
13 family for common necessities of life—meant those things that are commonly required
14 by persons for their sustenance regardless of their employment or status. (*Los Angeles*
15 *Finance Co. v. Flores* (1952) 110 Cal.App.2d Supp. 850.)
 - 16
 - 17 • In proceedings supplemental to execution, the debtor was required to pay one-half of a
18 check for \$47.50, which was in her possession, and which had been received as salary
19 from the Works Progress Administration, in partial satisfaction of a judgment based on a
20 necessary of life, although money may have been needed by debtor for the support of
21 herself and her family. (*Medical Finance Association v. Short* (1939)
22 36 Cal.App.2d Supp. 745.)

SP12-04

Probate Conservatorships and Guardianships: Guidelines to Assist in Determining Financial Eligibility for County Payment of the Cost of Appointed Counsel

All comments are verbatim unless indicated by an asterisk (*).

	Commentator	Position	Comment	Committee Response to Comment
1.	Orange County Bar Association, by Dimetria Jackson, President Newport Beach	AM	<p>Please consider editing the first paragraph in Section 2 of the proposed guidelines, as the current wording suggests that if one is unable to pay even a part of the cost of appointed counsel, then she is not a “responsible person” (which is not so, because one who can pay a part or all of the cost is a “responsible person”).</p> <p>Perhaps the following or a variant of it would work, to more closely mirror Probate Code §1470(c)(3): “Except as to any portion he, she, or it is determined to be unable to pay for the cost of appointed counsel under paragraph 6 of these guidelines (which could be the entire portion), those responsible for the payment of that cost (referred to individually and collectively as the “responsible person”) are: . . .”</p> <p>Additionally, please consider revising Paragraph 4(C) of the proposed guidelines to reflect that the responsible person may be eligible for payment by the county (i.e., found financially unable to pay) whether the reason is that she is using the funds (that would otherwise pay counsel) to pay for common necessities of life for her, her family, or both. By way of specific example, if Paragraph 4(C) of the proposed guidelines was to be revised to address this issue, it could state:</p> <p>C. The responsible person, as individually determined by the court, cannot pay the cost of appointed counsel without using funds that would be normally used to pay for the common necessities of life for the responsible person <u>and</u> his or her family, <u>or both</u>.” (Text to be deleted is stricken; text to be added is underlined.)</p> <p>[Former Code of Civil Procedure §706.051(c), from where</p>	<p>The intended use of the term “responsible person” is merely to designate the class of persons who are liable under Probate Code sections 1470 and 1472 for the cost of appointed counsel unless relieved of that responsibility because of financial inability in accordance with the guidelines. The committee will revise the introductory paragraph of section 2 to read:</p> <p>“Except to the extent that they are determined to be unable to pay for all or any portion of the cost of appointed counsel under paragraph 6 of these guidelines, the following persons or estates of persons (referred to collectively as the “responsible person”) are responsible for the payment of that cost: . . .”</p> <p>The committee does not support this proposed revision. The guidelines should be consistent with the language of current Government Code section 68632(c), concerning the application of the “common necessities of life” test to court fee waivers. As noted by the commentator, section 68632 says “common necessities of life for the [fee waiver] applicant <i>and</i> the applicant’s family.”</p> <p>The reference to the former Code of Civil Procedure section that mentions “common necessities of life” in the Advisory Committee Comment to the guidelines is made to provide a definition of such necessities, not to determine the persons whose necessities are to be considered.</p> <p>As a practical matter, the committee does not believe that the use of “and” rather than “or” in this context impairs any responsible person’s claim to an exemption, whether or not he or she has a family with a claim for his or her financial</p>

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Commentator	Position	Comment	Committee Response to Comment
		<p>the phrase “common necessities of life” was derived, used the word “or” (not “and”) when making the support exemption from judgment enforcement against earnings unavailable in the event of common necessities of life furnished to the judgment debtor “or” his or her family. It seems a responsible person should not have to prove she used funds for her and her family; she is validly financially unable to pay, thus justifying payment by the county, whether she pays for commons necessities of life for herself, her family, or both herself and her family]. Government Code 68632 does use the word “and,” but also says “common necessities of life” should be interpreted consistently with how it was used in former CCP 706.051(c)(1). See also <i>Cruz v. Superior Court</i> (2004) 120 Cal.App.4th 175 (court used the word “or” in context of determining eligibility for a fee waiver/proceeding in forma pauperis—analyzing whether litigant would be using money which is necessary for the use of the litigant “or” her family to provide for the common necessities of life, citing former Government Code 68511.3, which was repealed effective 1/1/2009 and effectively replaced by Government Code 68632 and other sections relating to fee waivers).</p> <p>As to the Request for Specific Comments:</p> <p>(1) Yes, the proposal appropriately addresses the stated purpose (especially if the above modifications are considered).</p> <p>(2) No, the proposed guidelines should not be a rule of court (mandatory) or a standard of judicial administration, but are appropriately included as an Appendix to the Rules of Court.</p>	<p>support. If there is such a family, both the person and the family are covered. If there is not such a family, the person him- or herself is covered.</p>

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Commentator	Position	Comment	Committee Response to Comment
		<p>(3) As to whether new or revised financial statement forms are necessary or would be helpful, we suggest the Judicial Council issue an Income & Expense Declaration for Probate matters. Currently, the local rules for the Superior Court, County of Orange mandate, in at least one area pertaining to guardianship matters (Rule 610.11), that the Judicial Council's Income and Expense Declaration be used to support a parent's claim of financial inability to support a child ward, but that JC form is designed for a Family Law dispute rather than a probate/guardianship matter and justice would be served by implementing a form designed for guardianship.</p>	<p>of Court, they are in fact not rules of court. See the committee's response to Comment No. 2 below.</p> <p>(3) The existing Judicial Council form for demonstrating financial eligibility for appointed counsel, <i>Defendant's Financial Statement on Eligibility for Appointment of Counsel and Reimbursement and Record on Appeal at Public Expense</i> (form MC-210), requests information concerning income and expenses (including employment and other income and expenses of the potential client and his or her spouse), and also property or assets held by both, plus disclosure of the names, ages, and relationships of dependents. The committee will consider the development of a variant of this form that does not refer to the affected person as a "defendant" or contain any other reference to the criminal law, but this form is one with which all courts and all county financial evaluation officers and others in county government with responsibility for determining a party's eligibility for appointed counsel at county expense are familiar.</p>
2. Standing Committee on the Delivery of Legal Services of the Office of Legal Services, State Bar of California, by Catherine Bennett, Chair, San Francisco	AM	To ensure consistent application of the financial eligibility guidelines throughout the state, especially in light of the budget challenges facing the courts, the guidelines should be proposed as a rule of court.	The committee respectfully disagrees with this recommendation. The Legislature required guidelines only, and did not specify that they may or must be expressed in a rule of court. In many other contexts, the Legislature expressly calls for a rule of court. Such a rule would have the force of law within its proper sphere of authority. These are merely guidelines. The public cost of counsel in the cases subject to the guidelines is borne by the counties, not by the courts. Flexibility in the application of the guidelines based on differences between the counties and comity between the courts and the counties is appropriate.

SP12-04**Probate Conservatorships and Guardianships: Guidelines to Assist in Determining Financial Eligibility for County Payment of the Cost of Appointed Counsel** All comments are verbatim unless indicated by an asterisk (*).

	Commentator	Position	Comment	Committee Response to Comment
3.	Superior Court of California, County of Los Angeles Los Angeles	AM	Paragraph 4, before subdivision a: It is difficult to follow; the Committee may want to consider clarifying that paragraph.	The introductory material in item 4 has been modified to read as follows: Except as provided in paragraph 7, the person responsible for payment of the cost of appointed counsel is presumed to be eligible for payment by the county of that cost if the person satisfies one or more of the following three conditions:
4.	Superior Court of California, County of San Diego, by Michael Roddy, Executive Officer San Diego	A	No specific comments made.	No response necessary.