UPDATE FOR “A LAWYER IS A LAWYER IS A LAWYER”

1996 Legislative Rejection of a Proposal to Require an Appointed Attorney to Act as a Reporter

In 1996, the Legislature considered and rejected a proposal that would have required appointed attorneys to act as reporters to the court when they “believed” that a client lacked capacity but the client nevertheless objected to the establishment of the conservatorship or some other proposed action. The Legislature’s rejection of the proposal was based in part on a letter from the California Judges Association which argued that the proposal, “undermines the attorney’s role as an advocate for the client who deserves to have his best case put forward in opposition to the petition.”

Proposal Contained in AB 2751

In 1996, Assemblyman Kaloogian proposed AB 2751, an Omnibus Probate Bill that included a proposed revision to the Probate Code that would have required appointed attorneys who believed that their clients lacked capacity to perform certain functions to report that conclusion to the court, including the factual background for the attorney’s belief.

AB 2751 as introduced by member Kaloogian in 1996 included the following synopsis of the proposal:

> This bill would … require a court-appointed attorney who represents a person, as specified, to determine and inform the court whether that attorney believes the person lacks capacity….;
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> Specifically, Section 8 of AB 2751 proposed:
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> SEC. 8. Section 1471.1 is added to the Probate Code, to read: 1471.1. (a) If a petition requests that the court determine that a proposed ward, a conservatee, or a proposed conservatee lacks the capacity to perform a function, including, but not limited to, providing for his or her personal needs for physical health, food, clothing, or shelter, managing his or her financial affairs, contracting, making a conveyance, marrying, making medical decisions, voting, and the attorney appointed by the court to represent that person believes that that person clearly lacks that capacity, and a declaration of medical practitioner alleges that that person lacks that capacity, the court appointed attorney shall inform the court of all of the following: (1) What the facts the proposed ward, conservatee, or proposed conservatee contends are true and that the client wants. (2) That the attorney has concluded that the person lacks the capacity in question, and (3) That the attorney has identified one or more specific mental function deficits that the attorney believes prevent the person from having the capacity in question. (Emphasis added.)
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> (b) The court may hold an evidentiary hearing to determine the propriety of the attorney’s position, and no statement by the attorney in that hearing will be admissible in any other hearing or proceeding.
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> (c) If the court determines in that hearing that there is clear and convincing evidence that the client lacks that capacity in question, then the attorney shall act

to protect the proposed ward, conservatee, or proposed conservatee as a reasonable person in the same or similar circumstances would act. (Emphasis added; also what would this have meant?]

(d) If the court determines that there is not clear and convincing evidence that the client lacks the capacity in question, then the attorney shall zealously advocate the client's position, subject to all ethical and legal restrictions on the lawyer's conduct.

(e) Subject to all ethical and legal restrictions on the lawyer's conduct, the lawyer shall zealously advocate the client's position if the lawyer has not concluded that there is clear and convincing evidence proving that the client lacks the capacity in question.

A record of a hearing in the Judiciary Committee held on March 27, 1996 (Bill Morrow, Chair) recorded:

7) [Section 8] Establishes a procedure for a court appointed attorney for a proposed conservatee who appears to be incompetent, but who directs the lawyer to resist the conservatorship. The lawyer is to advise the court, and the judge will determine whether the person is in fact not competent. (Sec. 1471.1.)

Arguments in Support

7) Current law is unclear about how an attorney should respond when the client is obviously incompetent, but mutters words that signify opposition to the establishment of a conservatorship, even though it is in the client's best interest. This change relieves the lawyer from obeying the dictates of the obviously incompetent client, by establishing a process for the lawyer to present the problem to the judge, who can confirm that incompetence. The process will prevent perfunctory trials, which waste the time of court and counsel. (Emphasis added.) [This was the position of the Estate Planning, Trust and Probate Law Section]

Comments

Permitting an attorney to advise the court when an obviously incompetent client expresses resistance to conservatorship has generated a minority view, which is that a lawyer must follow the dictates of a client regardless how flagrantly obvious the incompetence of the client may be, and regardless of how injurious to the client it will be for the lawyer to follow an incompetent's direction.

A Background Information Request summarized the proposal as follows:

This is the annual Probate Omnibus Bill sponsored by the Estate Planning, Trust and Probate Law Section of the State Bar of California. The provisions of the bill include:

f) Role of court appointed attorney in conservatorship (Sec. 8) There is uncertainty as to the degree to which court appointed attorney must advocate the position taken by a proposed conservatee who is the attorney's client, but who

the attorney believes lacks capacity to make informed decisions. The proposal would permit the attorney to make representations as to his opinion, with the court to determine based on clear and convincing evidence whether or not the attorney is to zealously advocate the client's position.

California Judges Objected to the Proposal

On March 26, 1996 a letter from the California Judges Association letter dated March 26, 1996 (signed by Samuel T. Crump to Bill Morrow, chair of Assembly Judiciary Committee) objected to the proposal as follows:

> Section 8 of the bill would dramatically change the relationship of a court-appointed attorney for a proposed ward or conservatee who opposes the proposed guardianship or conservatorship. That section would require that if such an attorney concludes that the client lacks the capacity at issue in the proceeding, the attorney must reveal the attorney's opinion to the court. This undermines the attorney's role as an advocate for the client who deserves to have his best case put forward in opposition to the petition. There are other means available for the court to determine whether the client's wishes are misguided rather than through his own attorney. (Emphasis added.)

The legislature rejected the proposal to require/authorize the appointed attorney to give his or her opinion regarding incapacity to the judge.