

## **A Deeper Dive: Adapting to AB1194, And Anticipating its Challenges**

### **Woodland Hills Tax & Estate Planning Council**

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AB 1194 adds, repeals, or changes 23 different statutory sections. We are going to highlight a handful of those which are anticipated to have the biggest impact on your practice:

#### **A. Regulation of professional fiduciaries – two new sections added to BUSINESS & PROFESSIONS CODE.**

##### **1. B & P CODE § 6563**

- On or after January 1, 2023, a licensed fiduciary **with** a website shall post a schedule or range of their fees, including hourly rates.
- On or after January 1, 2023, a licensee **without** a website shall provide a prospective client with a schedule or range of their fees, including hourly rates, before executing any contract.
- Licensees must provide a client with a schedule or range of their fees, including hourly rates, upon request.
- If the prospective client or current client is a proposed or current conservatee, this information needs to be provided to all interested persons (Prob §1822(b)(2)) - all relatives named in the petition.

##### **2. B & P CODE §6580**

- Bureau **may** investigate on its own motion and **shall** investigate on receipt of a complaint from any person, public agency, or the Department of Consumer Affairs.
- Extends to investigations of professional fiduciaries whose license is retired, inactive, canceled, or suspended.
- Shall impose sanctions where there is a finding that the professional fiduciary:
  - o breached a legal or fiduciary duty and caused financial or physical harm or mental suffering to the client;
  - o abused an elder or dependent adult client; OR
  - o violated a statute or regulation related to this chapter.
- Includes a referral from the court that it has imposed a penalty on the professional fiduciary (Prob §1051(d)), removed the professional fiduciary as conservator or guardian for cause (Prob §2653(c)(3)), determined that the professional fiduciary has abused a conservatee (Prob §2112(a)).
- Sanctions include administrative citations and fines, license suspension, probation, or revocation – all sanctions shall be reported on the Professional Fiduciaries Bureau website
- License shall be revoked if there is a finding that the professional fiduciary knowingly, intentionally, or willfully breached a legal or fiduciary duty to an elder or dependent adult client that constitutes abuse OR caused serious physical or financial harm or mental suffering through gross negligence or gross incompetence.

**Analysis:** Unlike the State Bar, which has its own disciplinary tribunal and its own rules of procedure for its disciplinary proceedings, the PFB does not have its own tribunal for handling complaints, and the code has not given it that jurisdiction. We have not yet seen how the PFB intends to uphold due process rights of accused professionals in disciplinary proceedings. If complaints result in action against a licensee, they will have to enter the realm of administrative law that is beyond the scope of this presentation.

## **B. Numerous sections of the PROBATE CODE Updated.**

### **1. PROB. CODE §1471 – governing appointed counsel.**

- This Section is one of several important enactments governing appointed counsel.
- This section required appointment of counsel in certain situations, specifically, any time a conservatee, proposed conservatee, or person alleged to lack capacity, who is also unable to retain counsel, and requests counsel be appointed, while party to specified conservatorship proceedings (such as, but not limited to, appointment, or termination), the court must, at or before the hearing, appoint counsel for that person. Counsel can be either the public defender, or private counsel. That continues to be the case, but significant changes have been made.
- Now, instead of saying that the court shall appoint counsel to represent “the interests of a person”, it now simply says, “person”, changing the wording of both subdivisions (a) and (b).
- Adds new subdivisions (d) through (f) which clarify the role of court-appointed counsel.
- Subd. (d) states that “if a conservatee, proposed conservatee, or person alleged to lack legal capacity expresses a preference for a particular attorney to represent them, the court shall allow representation by the preferred attorney, even if the attorney is not on the court’s list of a court-appointed attorneys”
- Subd. (e) states: “The role of legal counsel of a conservatee, proposed conservatee, or a person alleged to lack legal capacity is that of a zealous, independent advocate representing the wishes of their client”.
- Subd. (f) extends these rights to proposed conservatees and conservatees in appellate proceedings.

**Analysis:** How big of a change this is will depend somewhat on where you practice, and what your practice emphasizes. In Los Angeles, conservatees having free choice is a big change from procedure which tended to emphasize a preference for court appointed counsel from a panel, who are appointed in all conservatorship cases. The codification of “zealous advocacy” is probably intended to disapprove the concept that court-appointed counsel are supposed to be “neutral” or represent “best interests”; but how will it square with case law such as *Conservatorship of Wendland* (2001) 26 Cal. 4th 519 and *Conservatorship of Drabick* (1988) 200 Cal. App. 3d 185, 212–214)? Will it be seen as overruling those cases, or coexisting with them? We will have to wait and see. It does appear to codify a statutory right that overrules cases like *Wilson v. Tedesco* (2019) Cal. App. Unpub. LEXIS 6244 that downplay the conservatee/proposed conservatee’s right to free choice of counsel, while incentivizing those who would serve in that role to obtain court appointment.

### **2. PROB. CODE §§1850, 1850.5 – Subsequent action by the Probate Investigator’s Office**

- Six months after initial appointment, court investigator shall visit conservatee, conduct an investigation as per Prob §1851(a) and report to the court regarding appropriateness of conservatorship and whether conservator is acting in the best interests of conservatee
- Best interest analysis as to placement, quality of care, and finances.
- In response to report, court may take action including ordering a hearing or ordering conservator to submit an accounting pursuant to Prob §2620(a).
- One year after initial appointment and annual thereafter, court investigator shall visit conservatee, conduct an investigation, and report findings to court.
- In response, court shall consider terminating the conservatorship and take any other appropriate action.

- This is not the only section concerning the Probate Investigator.
  - o Section 1826(a) subd (7)-(9) require investigator to advise and report re: Proposed Conservatee’s desire and ability to be represented by legal counsel, which works hand-in-hand with §§1470-1471.
  - o Section 1850 is updated to require the investigator to advise a Conservatee re: termination of the conservatorship.
  - o Section 1851.6 allows “any interested person” (referencing Section 48) with personal knowledge of a conservatee to petition the court to appoint an investigator to examine abuse (as defined in Welf. & Inst. Code §15610.07), subject to subd. (b) which requires a legislative appropriation.

**3. PROB. CODE §2112 – civil financial penalties.**

- New section provides for civil financial penalties that Courts may impose.
  - o In addition to other available remedies, if court finds a licensed professional fiduciary has abused a conservatee, conservator shall be liable for a civil penalty of up to \$10,000 for each separate act of abuse
  - o If fiduciary is nonlicensed, penalty is up to \$1,000 for each separate act of abuse
  - o If court finds professional fiduciary has abused a conservatee or if court imposes a penalty on professional fiduciary including surcharge, contempt, suspension, or removing for cause, the court shall report that finding or penalty to the Professional Fiduciaries Bureau

**4. PROB. CODE §2653 – new attorney fee-shifting provision.**

- New subd. (c) provides that (1) a petitioner who successfully seeks to remove a guardian or conservator for cause now must be awarded costs, including attorney fees; (2) the fiduciary is personally liable and may not deduct costs of opposing the petition from the estate, if unsuccessful; and (3) mandatory reporting by the Court to the PFB of any for-cause removal order.
- Things to think about (analysis):
  - o “For cause” is set forth in Section 2650, which has some specific breaches (such as failure to file inventory & appraisal §2650(b) or felony conviction (*Id.* at (d)); but also includes some very general categories such as “failure to use ordinary care” (*Id.* at (a)); “continued failure to perform...” (*Id.* at (c)), and “any other case” in the discretion-of-the-court (*Id.* at (j)).
  - o Previously, fee-shifting for a prevailing petitioner in this situation would have only been available under a *Private Attorney General* theory, which is discretionary, rather than directory.
  - o This is a one-sided fee-shifting statute, more like that contained in the Unruh Civil Rights Act, ADA, or Anti-SLAPP statutes, and not like contractual fee-shifting under Section 1717, which is always bilateral; fees cannot be awarded against an unsuccessful petitioner, except as judicial sanctions, which would require compliance with CCP §128.5 or §128.7.
  - o Will this put pressure on embattled conservators to resign rather than risk adverse adjudication? Or to seek vindication? Difficult to predict.

**5. PROB. CODE §§2640, 2641 – pruning compensation**

- In addition to 2653, Section 2640 and 2641 have been amended to prohibit a guardian or conservator from being compensated for fees or costs incurred in unsuccessful defense of petitions;
  - o including specifically, petitions concerning their own compensation, as well as other petitions, including opposition to petitions by the ward or conservatee;
  - o Unless the request or action was made in good faith, based upon the best interest of the ward/conservatee, and caused no harm;
  - o If all of the above are shown by clear-and-convincing evidence, the court may reduce rather than deny compensation.

**6. PROB. CODE §2401 – conflicts of interest.**

- New enactment expressly prohibits fiduciaries (other than trust companies (or employees thereof)) from hiring or referring any business to any entity in which he, she, or it has a financial interest, without leave of court.

**7. PROB. CODE §2623 – fiduciary’s bill of rights.**

- Conservator or guardian shall be allowed:
  - o reasonable expenses incurred in the performance of their duties
  - o compensation for services rendered as the court determines is just, reasonable, and in the best interest of the conservatee
  - o all reasonable expenses made before appointment
  - o all reasonable expenses made post termination but pre discharge – if terminated for any reason other than death of conservatee or ward
  - o All reasonable expenses incurred before discharge of conservator by court for custody and conservation of estate if terminated by reason of death of conservatee or ward – includes delivery to personal representative of estate or as otherwise disposed of as provided by law
  - o Conservator or guardian shall not be compensated for costs or fees incurred in successful defense of fee request petition, opposing a petition, or any other unsuccessful request or action made by on or behalf of ward or conservatee
  - o Court may reduce compensation awarded for fees or costs incurred as opposed to complete denial if court determines by clear and convincing evidence that defense, opposition, or other action was made in good faith, was based on the best interest of the ward or conservatee, and did not harm the ward or conservatee

**8. Other Sections changed by AB1194 not discussed above:**

In addition to the foregoing, PROBATE CODE §§ 1051, 1458, 1460, 1826, 1850.5, 1851, 1851.1, 1851.6, 1860, 1860.5, 1862, 1863, 2250, 2250.6, 2253, and 2620 are **all** affected by AB1194 in some way. And, AB1194 was not the only significant new trust & estate legislation in the 2021 session. We are attaching the full text of the session law which shows the changes (and redline) of each section. Also, if you want to get more information about how each of these sections are changed, we recommend that you review Cal. Trusts & Estates Quarterly, Vol. 28, Iss. 1 (2022), where Ryka Farotte, Esq. has written an excellent summary of all 2021 legislative activity affecting this area of law, including AB1194, and several other enactments.