

**CERTIFIED FOR PARTIAL PUBLICATION\***

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FIFTH APPELLATE DISTRICT

Conservatorship of the Person and Estate of  
EDITH KEY.

RON DICKEN, as Conservator, etc.,

Petitioner and Respondent,

v.

FERN McDONALD,

Objector and Appellant.

F047092

(Super. Ct. No. 02P-0042)

**OPINION**

APPEAL from an order of the Superior Court of Kings County. Peter M. Schultz,  
Judge.

Neil A. Holding for Objector and Appellant.

Peter D. Mook, County Counsel, and Jeanette Cauble, Deputy County Counsel,  
for Petitioner and Respondent.

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\* Pursuant to California Rules of Court, rule 976.1, this opinion is certified for  
publication with the exceptions of parts 2 through 6.

This appeal arises from the order approving the final account and report of the Kings County Public Guardian (Public Guardian) with respect to the conservatorship of Edith Key. Appellant, the executor of the conservatee's estate, objects to the manner in which the Public Guardian allocates interest earned on the pooled conservatorship estates to each individual estate. However, appellant's challenge does not focus on the subject final account. Rather, appellant's primary goals are to have the relevant code section, Probate Code section 7642, declared unconstitutional and to have a referee appointed to examine all conservatorships that have been handled by the Public Guardian during the last 13 years. Further, appellant's attorney, Neil A. Holding, wants to be declared an "interested person" with respect to those other conservatorships and seeks attorney fees under Code of Civil Procedure section 1021.5.

As discussed in the published portion of this opinion, Probate Code section 7642 violates neither the takings clause of the Fifth Amendment nor due process. In the nonpublished portion, we hold that the issues raised concerning other conservatorships are outside the scope of this appeal. Moreover, with respect to Holding, he does not qualify as an "interested person" and he did not file the required post judgment motion for attorney fees. Accordingly, the order will be affirmed.

## **BACKGROUND**

In May 2002, the Public Guardian was appointed the conservator of the person and estate of Edith Key. Although Holding was present at the hearing on the conservatorship petition as an "interested party," the court appointed Jennifer Giuliani as Key's attorney.

The Public Guardian filed a current account covering the first year of the conservatorship in May 2003. In April 2003, Key inherited approximately \$224,000. Before that time, she was dependent on social security for her support.

Key died in November 2003.

In March 2004, the Public Guardian filed a final accounting and report for the Key conservatorship. Shortly thereafter, Holding, as appellant's attorney and as an "interested person," filed the first of several sets of objections to the final accounting. In response to Holding's concerns, the Public Guardian revealed that Key's estate was located in the Public Guardian's trust account, a pooled account, at the Bank of Sierra. The Public Guardian also explained that he calculates the interest to be applied to each estate by averaging the interest rates from three financial institutions at the end of each quarter.

Holding objected to the Public Guardian's practice of interest averaging. According to Holding, the Public Guardian was obligated to apply the highest rate available.

Following a review of the applicable law, the Public Guardian filed a supplemental response to Holding's objections. The Public Guardian concluded that the interest averaging practice was not appropriate under Probate Code section 7642. Therefore, the Public Guardian revised the final accounting for the Key estate. The Public Guardian calculated interest by using the highest amount that Key could have earned at the Bank of Sierra if her estate had been separately invested. The Public Guardian also informed the court that all conservatorship estates would be credited with the highest interest rate that each would have earned if separately invested in the financial institution.

On July 1, 2004, through a stipulation entered into by the Public Guardian and Holding, the court ordered the Public Guardian to distribute the conservatorship estate to appellant less approximately \$5,000 for fees that had been requested by the Public Guardian and counsel. This retained sum was to be held by the Public Guardian pending further agreement or court order. The stipulation did not settle, allow or approve the final account.

Thereafter, the Public Guardian filed an amended final account. Holding again filed objections. Among other things, Holding argued that he should be allowed to act as

an interested person on behalf of other conservatorships, that he was entitled to attorney fees under Code of Civil Procedure section 1021.5, that the Public Guardian should be surcharged, and that Probate Code section 7642 is unconstitutional.

Following a hearing, the trial court approved the final account. The court ruled that Probate Code section 7642 was not unconstitutional and that the phrase “highest rate of interest,” as used in that section, referred to the highest rate in the institution where the funds are actually invested. The court further concluded that, although the Public Guardian made an error in interest calculations, that error was made in good faith and thus the Public Guardian should not be surcharged. The court expressed no opinion on Holding’s request for attorney fees since a motion had not been brought. Additionally, the court denied Holding’s requests to appoint a referee to pursue a general investigation of the Public Guardian and to be found an “interested person” in other estates.

## **DISCUSSION**

### ***1. Probate Code section 7642 violates neither the takings clause of the Fifth Amendment nor due process.***

Probate Code section 7642 provides:

“(a) The public administrator shall credit each estate with the highest rate of interest or dividends that the estate would have received if the funds available for deposit had been individually and separately deposited.

“(b) Interest or dividends credited to the account of the public administrator in excess of the amount credited to the estates pursuant to subdivision (a) shall be deposited in the county general fund.”

Appellant contends that subdivision (b) violates substantive and procedural due process because it results in a “confiscation” of property without notice or an opportunity to be heard.

Substantive due process “protects individual liberty against ‘certain government actions regardless of the fairness of the procedures used to implement them.’” (*Collins v. Harker Heights* (1992) 503 U.S. 115, 125.) The law must not be unreasonable, arbitrary

or capricious but must have a real and substantial relation to the object sought to be attained. (*Salmon Trollers Marketing Assn. v. Fullerton* (1981) 124 Cal.App.3d 291, 304.) In other words, “[s]o-called ‘substantive due process’ prevents the government from engaging in conduct that ‘shocks the conscience’ [citation], or interferes with rights ‘implicit in the concept of ordered liberty,’ [citation].” (*Cook v. City of Buena Park* (2005) 126 Cal.App.4th 1, 5.)

However, when analogous statutes relating to interest income generated by lawyer trust accounts have been challenged, courts have determined constitutionality based on the Takings Clause of the Fifth Amendment. (Cf. *Phillips v. Washington Legal Foundation* (1998) 524 U.S. 156; *Carroll v. State Bar* (1985) 166 Cal.App.3d 1193.) This analysis is consistent with the court’s reluctance to expand the substantive due process concept. (*Collins v. Harker Heights, supra*, 503 U.S. at p. 125.) As the court noted in *Collins v. Harker Heights, supra*, guideposts for responsible decision making in the uncharted area of substantive due process are scarce and open-ended. (503 U.S. at p. 125.) Similarly here, the determinative issue is whether the “excess” interest is private property subject to Fifth Amendment protection, not whether the statute is unreasonable, arbitrary or capricious.

“The Fifth Amendment provides that private property shall not be taken for public use without just compensation.” (*United States v. Reynolds* (1970) 397 U.S. 14, 15-16.) “Just compensation” means the full monetary equivalent of the taken property. (*Id.* at p. 16.)

Interest income is the “‘private property’ of the owner of the principal.” (*Phillips v. Washington Legal Foundation, supra*, 524 U.S. at p. 172.) However, the Fifth Amendment is satisfied so long as the owner is paid for what is taken, i.e., put in the same position monetarily as he or she would have occupied if the property had not been taken. (*United States v. Reynolds, supra*, 397 U.S. at p. 16.) “That the ‘taker’ may reap a profit above and beyond the value of the property interest taken does not entitle the

person from whom the property is taken to share in those profits.” (*Carroll v. State Bar, supra*, 166 Cal.App.3d at p. 1204.) Any such additional value does not represent an actual loss and therefore payment for it is not justified. It is a “loss” suffered by no one in fact. (*United States v. Chandler-Dunbar Co.* (1913) 229 U.S. 53, 76.) In other words, the award cannot be enhanced by any gain to the taker. (*Carroll v. State Bar, supra*, 166 Cal.App.3d at pp. 1204-1205.)

Within this framework, it must be concluded that Probate Code section 7642 does not involve a taking of property prohibited by the Fifth Amendment. That section requires that each estate be credited with an amount representing the highest rate of interest the estate would have earned if the funds had been individually and separately invested. Thus, each estate receives what it would have received had the funds not been invested in a pooled trust account. Accordingly, the estates are in the same position they would have been in monetarily if the Public Guardian were not administering them. No estate is stripped of its individual earnings potential. Thus, the estates suffer no “loss” when the “excess interest,” if any, is deposited in the county general fund.

Procedural due process principles require reasonable notice and an opportunity to be heard before governmental deprivation of a significant property interest. (*van't Rood v. County of Santa Clara* (2003) 113 Cal.App.4th 549, 569.) However, a “significant property interest” requires more than a unilateral expectation. The person claiming a property interest subject to constitutional protection must have a legitimate claim of entitlement to it. (*Schultz v. Regents of University of California* (1984) 160 Cal.App.3d 768, 775.)

As noted above, the conservatorship estates have no property interest in the “excess interest” either under the Takings Clause of the Fifth Amendment or by statute. Pursuant to Probate Code section 7642, those estates are in the same position they would be if the Public Guardian were individually investing each estate’s assets. Accordingly,

due process does not require that the estates receive notice and an opportunity to be heard before the interest earned on the pooled trust account is allocated.

**2. *The trial court correctly refused to appoint a referee.*\***

Helding requested the trial court to appoint a referee to review the “entire stewardship of the Public Guardian for at least 13 years.” The trial court denied this request on the ground that the subject estate was not an appropriate forum in which to determine the propriety of actions concerning other estates and funds. Helding argues that, because a conservator is subject to the regulation and control of the court in the performance of the duties of the office (Prob. Code, § 2102), a reference would assist the court in discharging this statutory duty. According to Helding, Code of Civil Procedure section 639 authorizes this proposed referee appointment.

A reference by the trial court involves the sending of a *pending* action or proceeding to a referee for hearing, determination and report back to the court. (*Jovine v. FHP, Inc.* (1998) 64 Cal.App.4th 1506, 1521.) Code of Civil Procedure section 639 authorizes the court to appoint a referee without the parties’ consent, i.e., a “special” reference, but only in certain specified circumstances. (*Id.* at p. 1522.) The circumstances under which the court has such authority are: when the trial of an issue of fact requires the examination of a long account; when the taking of an account is necessary for the information of the court before judgment; when a question of fact, other than on the pleadings, arises upon motion in any stage of the action; when it is necessary for the information of the court in a special proceeding; and when the court determines in any pending action that it is necessary to appoint a referee to hear and determine discovery disputes. (Code Civ. Proc., § 639, subd. (a).)

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\* See footnote on page 1, *ante*.

None of the above circumstances are present in the instant case. Moreover, a pending action must be the subject of the reference. Here, Holding requested that a referee be appointed to investigate other conservatorships that were not the subject of the action before the court. Accordingly, the trial court correctly concluded that it did not have the authority to order the requested reference. The Key conservatorship is simply not a proper vehicle for investigating all conservatorships that are administered by the Public Guardian.

**3. *The trial court correctly refused to declare that Holding was an “interested person” with respect to other estates.***

Probate Code section 48 defines “interested person” as an “heir, devisee, child, spouse, creditor, beneficiary, and any other person having a property right in or claim against a trust estate or the estate of a decedent which may be affected by the proceeding.” Interested person also includes “any person having priority for appointment as personal representative” and a “fiduciary representing an interested person.” (Prob. Code, § 48, subd. (a).) Thus, the broad category of persons whose rights or claims might be affected is encompassed within the definition of “interested person.”

However, Probate Code section 48, subdivision (b), permits the court to determine the sufficiency of the party’s interest for the purposes of each proceeding conducted. (*Estate of Maniscalco* (1992) 9 Cal.App.4th 520, 523-524.) This subdivision recognizes that the meaning of “interested person” as it relates to particular persons may vary from time to time and must be determined according to the particular purposes of, and matter involved in, the specific proceeding. A party may qualify as an interested person for purposes of one proceeding but not for another. (*Estate of Maniscalco, supra*, 9 Cal.App.4th at p. 524.)

Holding requested the trial court to declare that he was an “interested person” with respect to other conservatorships administered by the Public Guardian. However, as noted above, the determination of a party as an “interested person” is specific to the



particular proceeding. Thus, the court's authority in this respect was limited to the Key estate. The court correctly recognized that it could not rule on the issue of Holding's status as an "interested person" in other cases.

**4. *Whether the Public Guardian is required to place the estate assets in a federally insured account is moot.***

Over the course of the proceedings below, Holding questioned whether the Key estate funds were in an adequately insured account. Under the Probate Code, the Public Guardian is required to deposit all estate money in an insured account in a financial institution. (Prob. Code, §§ 2940, 7640.) "Insured account in a financial institution" is defined as "an account in a bank, an account in an insured credit union, and an account in an insured savings and loan association, to the extent that the account is insured." (Prob. Code, § 46.) Holding is requesting this court to determine what is meant by "insured account." He posits that a logical construction of "insured" is federally insured.

However, in June 2004, the Public Guardian transferred the Key estate funds to appellant. Thus, whether the Public Guardian deposited those funds in an insured account within the meaning of the Probate Code is no longer in controversy.

It is the duty of an appellate court to decide actual controversies by a judgment that can be carried into effect. It is not the province of the court to give opinions on moot questions or abstract propositions, or to declare principles or rules of law that cannot affect the case before it. (*Paul v. Milk Depots, Inc.* (1964) 62 Cal.2d 129, 132.)

An interpretation of the term "insured account" would have no effect on the outcome of this case. Rather, the issue of the Public Guardian's investment of the Key estate funds is moot. Further, it would be inappropriate to attempt to rule on the investment of other conservatees' estates. Those estates are not currently before this court.

**5. *The trial court did not abuse its discretion when it declined to surcharge the Public Guardian.***

The trial court concluded that the Public Guardian's past practice of interest averaging was "a clear error and clearly contrary to statute." However, the court also found that the error was made in good faith and was not intended to benefit the Public Guardian or the county. Accordingly, the court ruled there was no basis for surcharging the Public Guardian.

Appellant contends the Public Guardian should be denied his fees because he neglected his duty when he failed to initially apply the appropriate interest rate and to deposit the funds in an insured account. Appellant characterizes the fees as a "reward" for the Public Guardian's mismanagement.

Under Probate Code section 2401.3, the Public Guardian could be chargeable with any loss or depreciation in value of the estate, any profit made by the Public Guardian, or any loss of profit to the estate that resulted from the Public Guardian's breach of fiduciary duty. However, the court may excuse the Public Guardian in whole or in part from such liability if the Public Guardian acted reasonably and in good faith under the circumstances known to him at the time.

As noted above, the court found that the Public Guardian acted in good faith. Appellant has not demonstrated that this ruling was an abuse of discretion. Nevertheless, even if the court had not so found, there would be no basis for charging the Public Guardian. There was no evidence of any loss to the estate. The interest rate error was corrected and the estate was credited with the additional amount. Therefore, the trial court's ruling will not be disturbed.

**6. *Appellant is not entitled to attorney fees.***

Code of Civil Procedure section 1021.5 authorizes an award of attorney fees when the successful party's action "has resulted in the enforcement of an important right affecting the public interest." Holding requested guidance from the trial court as to

whether he should file a motion for attorney fees under this section before the court ruled on the final account. At the hearing, Holding acknowledged that this fee request was premature and that he had not fully briefed the issue. Thereafter, the trial court declined to express an opinion as to “how I would rule on such a motion, were one brought.”

Holding never filed a post-judgment motion for attorney fees in the trial court. Nevertheless, he is requesting this court to authorize the granting of attorney fees upon motion. However, by failing to file a motion below, Holding has waived this issue on appeal. (*Telles Transport, Inc. v. Workers' Comp. Appeals Bd.* (2001) 92 Cal.App.4th 1159, 1167.)

**DISPOSITION**

The order is affirmed. Costs on appeal are awarded to respondent.

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Levy, Acting P.J.

WE CONCUR:

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Cornell, J.

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Dawson, J.