

BEYOND THE BENCH 24 **UNITING FOR A BETTER FUTURE**

Probate Guardianships 101



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What is a Guardianship of the Person?

- Legal process whereby an individual other than the minor's biological parent is given the custody and care of a minor child.
- Parents' rights temporarily suspended.
 - Parent retains "right" to request visitation via the court
- Legal guardian responsible for care, custody, and control of minor.
- Parent remains responsible for financially supporting ward
 - Legal guardian may seek child support order.

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Alternatives to Guardianship

- Informal Caregiving
- Caregiver Affidavit
- Authorization for Medical Care
- Assignment of Educational Rights
- Adoption

- Powers of Attorney

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Informal Caregiving

Informal Custody vs. Legal Guardianship	
<ul style="list-style-type: none"> • Parents have full rights, including the right to reclaim the child at any time 	<ul style="list-style-type: none"> • Parents' rights suspended and transferred temporarily to legal guardian; parent must go to court to terminate the legal guardianship before reclaiming the child
<ul style="list-style-type: none"> • Child ineligible for caregiver's work insurance plans 	<ul style="list-style-type: none"> • Child eligible for caregiver's work insurance plans
<ul style="list-style-type: none"> • Caregiver can't consent if "parent or legal guardian consent required" 	<ul style="list-style-type: none"> • Legal guardian can give consent
<ul style="list-style-type: none"> • Parents have responsibility to financially support child 	<ul style="list-style-type: none"> • Parents have responsibility to financially support child

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Caregiver's Authorization Affidavit

Use of this affidavit is authorized by Part 1.5 (commencing with Section 6550) of Division 11 of the California Family Code.

Instructions: Completion of items 1-4 and the signing of the affidavit is sufficient to authorize enrollment of a minor in school and authorize school-related medical care. Completion of items 5-8 is additionally required to authorize any other medical care. Print clearly.

The minor named below lives in my home and I am 18 of age or older.

1. Name of minor: _____
2. Minor's birth date: _____
3. My name (adult giving authorization): _____
4. My home address: _____

5. I am a grandparent, aunt, uncle, or other qualified relative of the minor (see back of this form for a definition of "qualified relative").
6. Check one or both (for example, if one parent was advised and the other cannot be located):
 - I have advised the parent(s) or other person(s) having legal custody of the minor of my intent to authorize medical care and have received no objection.
 - I am unable to contact the parent(s) or other person(s) having legal custody of the minor at this time to notify them of my intended authorization.
7. My date of birth: _____
8. My California driver's license or identification card number: _____

Warning: Do not sign this form if any of the statements above are incorrect, or you will be committing a crime punishable by a fine, imprisonment, or both.

I declare under penalty of perjury under the laws of the State of California that the foregoing is true and correct.

Dated: _____ Signed: _____

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To Caregivers:

1. "Qualified relative," for purposes of item 5, means a spouse, parent, stepparent, brother, sister, stepbrother, stepsister, half-brother, half-sister, uncle, aunt, niece, nephew, first cousin, or any person denoted by the prefix "grand" or "great," or the spouse of any of the persons specified in this definition, even after the marriage has been terminated by death or dissolution.
2. The law may require you, if you are not a relative or currently licensed foster parent, to obtain a foster home license in order to care for a minor. If you have any questions, please contact your local department of social services.
3. If the minor stops living with you, you are required to notify any school, health care provider, or health care service plan to which you have given this affidavit.
4. If you do not have the information requested in item 8 (California driver's license or I.D.), provide another form of identification such as your social security number or Medi-Cal number.

To School Officials:

1. Section 48204 of the Education Code provides that this affidavit constitutes a sufficient basis for determination of residency of the minor, without the requirement of a guardianship or other custody order, unless the school district determines from actual facts that the minor is not living with the caregiver.
2. The school district may require additional reasonable evidence that the caregiver lives at the address provided in item 4.

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**AUTHORIZATION TO CONSENT
TO MEDICAL/DENTAL CARE OF MINOR**
California Family Code Section 6910

I authorize, _____, (an adult into whose care the minor has been entrusted) to consent to medical treatment of _____, a minor. For the purposes of this authorization, medical treatment is defined as:

1. X-ray examination, anesthetic, medical or surgical diagnosis or treatment, and hospital care under the general or special supervision and upon the advice of or to be rendered by a physician and surgeon licensed under the Medical Practice Act; and
2. X-ray examination, anesthetic, dental or surgical diagnosis or treatment, and hospital care by a dentist licensed under the Dental Practice Act.

This authorization is made pursuant to California Family Code Section 6910.

Signature: _____ **Date:** _____

Print Name: _____

Relationship to minor:

- Parent with legal custody**
 Guardian with legal custody
 Relative with Caregiver Affidavit (Family Code Section 6550)

A photocopy or facsimile of this document shall have the same effect as the original.

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**ASSIGNMENT OF EDUCATIONAL
DECISION-MAKING AUTHORITY**
California Government Code Section 7579.5(n)

I, _____, having never been determined to be incompetent for any purpose by a court of competent jurisdiction, and having all educational decision-making authority pursuant to California Education Code Section 56028, designate _____ to represent the interests of _____ (hereinafter "MINOR") for educational and related services and, as such, to make any and all decisions regarding MINOR'S entitlement to a Free Appropriate Public Education guaranteed by the Individuals with Disabilities Education Act (IDEA). Such authority shall include, but is not limited to:

1. Filing complaints with any public agency, such as the California Department of Education, the Office of Administrative Hearings, California, and U.S. Department of Education, Office for Civil Rights;
2. Initiating and pursuing special education due process proceedings pursuant to Cal. Education Code Sec. 56500, et seq. and any judicial appeals thereof;
3. Attending IEP meetings and due process mediations and signing IEP documents and mediation agreements with the same legal effect and authority as I would have absent this assignment;
4. Authorizing or refusing to authorize assessments, services, or placements;
5. Obtaining copies of any educational, psychological, medical, behavioral, or juvenile justice records, or any other materials and information related in any way to MINOR'S special education, related services, supplementary aids and services, or transition services;

A photocopy or facsimile of this document shall have the same effect as the original.

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6. Receiving information orally from any individual or agency (public or private) regarding MINOR'S special education rights or services;
7. Entering into agreements with any legal organization to assist me in pursuing and enforcing the educational rights of MINOR;
8. Exercising any other right or action on my behalf concerning MINOR'S education with the same authority as I would have absent this assignment.

Assigned Educational Rights Holder

Signature: _____ Date: _____

Print Name _____

This authorization is made pursuant to California Government Code § 7579.5(n).

Signature: _____ Date: _____

Print Name _____

Relationship to minor:

- Parent with legal custody
 Guardian with legal custody

A photocopy or facsimile of this document shall have the same effect as the original.

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Caution: Powers of Attorney

- In California, custody of a minor *cannot* be transferred from a parent to a nonparent without order of a judge.
- Documents called “Power of Attorney for Minor Child” or “Short-term Guardianship” *do not* transfer legal or physical custody.
- Notarization *does not* make such documents any more effective.

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Adoption

- Permanently terminates all parental rights, including
 - Care, custody & control
 - Medical & education
 - Visitation
- Permanently terminates all parental duties
 - Support & communication
- Severs legal parent-child relationship
 - Care, custody, control of child
 - Inheritance

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Rights and Duties of Guardians

- A legal guardian has the ability to act on the child's behalf and make all decisions regarding the child.
 - Parent's rights are suspended.
- Guardian is legally responsible upon appointment for the following:
 - Care, custody, control
 - Education, medical, dental, and psychological well-being
 - Judicial Council Form GC-248 provides a non-exhaustive list of guardian duties

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Legal Standards

- Guardianship granted if it appears necessary or convenient. (Prob. Code § 1514(a))
- Adjudication guided by the “best interests of the child”. (Fam. Code §§ 3020 and 3040 et seq.; Prob. Code § 1514, subd. (b).
- Burden of Proof: Preponderance of evidence (Evid. Code § 115)

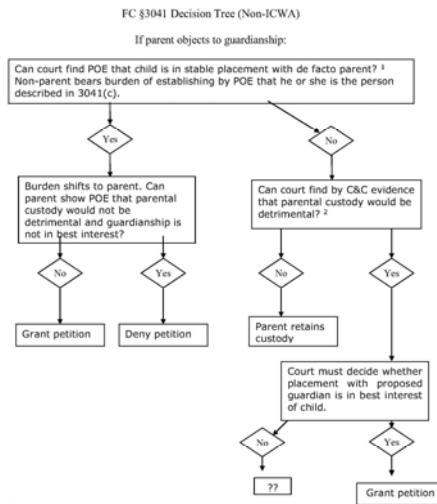
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Best Interest

- The “best interest of the child” is a relative standard
- Determination should be on the specific facts of the case. A court is charged with the task of determining whether “a particular set of circumstances relative to an alternative set of circumstances is in the best interest of the child.” Adoption of Michelle T., 44 Cal. App. 3d 699, 707 (Ct. App. 1975)

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Contested General Guardianship



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Temporary Guardianship

- Request for expedited guardianship hearing/orders based on immediate need.
 - See local rules for timeline (ex. LA Local Rule 4.12 subd. (c)(3))
- **Not a stand-alone process.** A Petition for Appointment of Temporary Guardian must be filed along with a Petition for Appointment of General Guardian. (Prob. Code § 2250, subd. (a)(1))

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Termination

- By operation of law a guardianship ends when:
 - Death of ward
 - Ward turns 18 years old
 - Ward is emancipated, married, joins armed forces
- A parent, legal guardian, and/or ward may petition to terminate a non-ICWA guardianship.
 - **Note:** This list does not include any other relatives or other persons. (Prob. Code § 1601)
 - The **best interest of the child** is the **sole** criterion for termination of a guardianship. (Id., Guardianship of L.V., 136 Cal. App. 4th 481, 489)

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Guardianships for children 18-20/SIJS

- Prob. Code § 1510.1
 - With consent of the youth, the court may appoint a guardian for unmarried youth ages 18-20 in connection with an SIJS petition
 - Can be filed by a relative, other person, or the proposed ward
 - With consent of the ward, the court may extend an existing guardianship of a youth up until 21 years of age.
 - Can be filed by a relative, other person, or the ward
- Guardianships continue to terminate when the ward turns 18, unless such an extension is requested. (Prob. Code § 1600(a))

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State-Wide Judicial Council Forms and Notice Requirements

Use the Forms Luke

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The Petition, why are there two?

- The General Petition for Guardianship uses GC-210 or GC-210(P)
 - GC-210 is generic and can be used for guardianship of the person and estate
 - GC-210(P) is only for guardianship of the person
- In addition you also need to include the following:
 - GC-210(CA)
 - GC-248
 - FL-105
 - GC-211
 - GC-212
 - Any local forms which are required
 - i.e. background check
 - Check your Local Rules

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Wait, it costs how much to file?

- As with almost all filings there are costs involved
 - Initial Filing Fee
 - Background Investigation Fee
- Fee Waivers
 - Guardianship fee waivers are different from standard fee waivers
 - FW-001-GC
 - It's based on the child's or the parent's situation, not necessarily the proposed guardian's
 - Most children who are living with non-parent caregivers will qualify for MAGI Medi-Cal or other public benefit
 - Thus they will qualify for a fee waiver

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Notice him? But I don't even like him?

- The Probate code lists the parties who need to be notified of the Guardianship.
 - All relatives within the second degree
 - Anyone with a valid visitation order
 - Any other interested party
 - Someone nominated in a will, Director of the Dept. of Social Services & Director of the Regional Center, if applicable
 - Subject to some interpretation
 - Parents, minors and guardians are entitled to personal service
 - Everyone else can be served by mail
 - The Hague Convention may apply

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ICWA

Who is this Zinke guy anyway?

- Every Guardianship has to comply with ICWA requirements
 - At a minimum an inquiry is required
- If the child has or may have Indian ancestry you need to notify more people
 - Complete ICWA-030
 - If you love ancestry.com you will love this form, if not...
 - Mailed by certified mail to:
 - Parents
 - Tribes
 - Bureau Chief of the Sacramento Bureau of Indian Affairs
 - United States Secretary of the Interior (Ryan Zinke)

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Why does this take so long?

- Cases which are continued are almost always continued due to notice defects.
 - Stay on top of them
 - Review the file, along with any probate examiner notes prior to your hearing
 - Don't wait on the background check it can take a long time depending on how busy the agency is

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Declaration of Diligent Search

- What can I do if I cannot locate a party for service? (CA Rule of Court 7.52)
- Allows court to waive notice or prescribe different manner of giving notice if person's address cannot be found
- You may use MC-030, pleading paper or a local county form
- Include last known address, internet search, search of property indexes, telephone directories, inquiry of relatives, friends, etc.

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Investigations

- An investigation is required to be completed according to, unless waived. PC § 1513(a)
 - Relatives: Court investigator
 - Non-Relatives: County agency that investigates potential dependency
- How do I initiate the investigation?
- Report is confidential, but can be viewed by persons who were served. PC § 1513(d)
 - ***Try to get a copy before the hearing!***

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Contents of Investigation

- **Social history of proposed guardian and proposed ward**, including any developmental, emotional, psychological, or educational needs.
- **Relationship of the proposed ward to the guardian**, including ward's attitude about the guardianship.
- **Anticipated duration of the guardianship** and the plans of the parents and proposed guardian for the stable and permanent home for the child.

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Contents of Investigation

- Person who prepares the report can be called as a witness and examined. PC § 1513(c)
- If child is a child described by WIC § 300, the court may refer case to the county agency designated to investigate potential dependencies. PC § 1513(b)
 - ***Inform the client that the client should pretend like the investigator is the Judge. The client should dress up for the investigation, must be honest, and must tell the investigator everything that is important to his or her case.***

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The Court Hearing

1. Check local practice & local rules
2. Observe court
3. Correct defects or deficiencies
4. Check tentative rulings
5. Prepare client



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The Court Hearing

6. Arrange for interpreter, if needed
7. Arrange for court reporter, if needed
8. Prepare proposed letters and orders
9. Review Investigation
10. File a points and authorities, if needed



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Uncontested Court Hearing

- Reminder of Law
 - Is it “necessary or convenient”? PC § 1514(a)
 - Health, safety, and welfare of children shall be the court's primary concern in determining the best interest of children. FC § 3020
 - Is child living in wholesome and stable environment? FC § 3040(a)(2)
 - If the child is sufficiently mature, the court should consider his/her wishes. PC § 1514(e); FC § 3042(a)
 - A parent's nomination of a proposed guardian will receive "due weight". Fam. Code § 3043

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Contested Hearing

Can you mediate or come to an agreement?



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Contested Court Hearing

- Questions to address at evidentiary hearing:
 - 1) Is the child in a stable placement?
 - 2) Has the caregiver assumed a de facto parent role for a substantial period of time?
 - 3) Is parental custody detrimental to the minor?
 - 4) Is the investigator's report accurate?
 - 5) Is there a history of physical abuse?
 - 6) Is there a history of alcohol or drug abuse?
 - 7) Is there a criminal history?

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Tips for Parents

1. Lease
2. Employment or source of income
3. Relationship with child
4. Letters regarding sobriety
5. Support system witnesses
6. **MOST IMPORTANTLY:**
Take physical custody of your child if they are living with someone else before the trial.



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After the Hearing

1. Obtain certified letters & orders
2. Ensure client knows duty to notify court of address
3. Ensure client knows rules re: moving outside CA
4. Clarify orders with client
5. Sub off your case



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RESOURCES

- PLI California Guardianship Law 2015
- Probate Examiners/Court Staff
- Observing Court
- CA Probate Code; Local Rules, and CA Rules of Court
- CEB California Guardianship Practice
- Ilrc.org (for issues involving SIJS)

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THANK YOU!!



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