

**GUARDIANSHIP
CROSSOVER ISSUES:
PROBATE AND
JUVENILE COURTS**

Hon. Dean Stout
Ms. Dana Crom
Mr. Jim Paulsen
Ms. Debra Zander-Willis

LEARNING OBJECTIVES

- Understand the history and holdings of *In Re Guardianship of Christian G.* and *In re Guardianship of H.C.*
- Understand the legal implications of the holdings in these two cases
- Understand the practice implications to the court, child welfare and probate investigation of these two cases.

**CHILD WELFARE PENDULUM:
A BRIEF HISTORY**



HISTORY

- Child welfare “swings” in response to changing beliefs and attitudes about the role of government, children, parents, marriage, and family
- Rights of states and communities vs. responsibility of federal government
- Parents’ Rights (family preservation) vs. Children’s Rights (child safety and well-being)

MODERN CHILD WELFARE = FAMILY PRESERVATION

- 1980 Adoption Assistance and Child Welfare Act - Keep families together or reunify (SB14 1982)
- 1987 California Senate Bill 242 - established preservation of family as the primary system goal

MODERN CHILD WELFARE = CHILD SAFETY AND CHILD’S BEST INTERESTS

- 1997 Adoption & Safe Families Act - time limited services and permanency planning
- W & I 309 - increasingly restrictive guidelines for relative foster care (particularly emergency care)

RELATIVE HOME “PLACEMENT”

- Multiple forms, supervisor/manager approvals, LifeScans, home visit needed for a relative/kin to temporarily care for a child
- Temporary Guardianships can (and are in some counties) granted without any contact between court investigator and parents or prospective guardians

**MODERN CHILD WELFARE =
FAMILY STRENGTHS & SELF
DETERMINATION**

- Family Finding, Engagement and Sustaining Connections
- Family-Centered Practice
- Team Decision Making, Family Group Conferencing

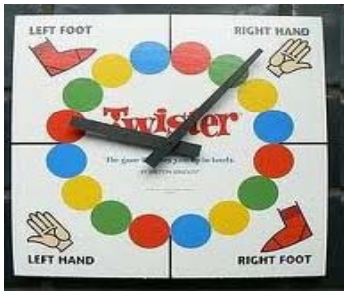
**MODERN CHILD WELFARE =
COMMUNITY PARTNERSHIP AND
PREVENTION**

- Differential Response
- “Assessment” instead of “Investigation”

MEDIA & PUBLIC PERCEPTION

- National, Regional and Local Press - Impact on legislation and foster care policy
- Last time you read "Probate Guardianship System Hurts Kids Again!"

CHILD WELFARE TWISTER



GUARDIANSHIP CASES HISTORICAL PERSPECTIVE

Probate Courts adjudicated guardianship as part of the disposition of a decedent's estate before juvenile dependency statutes were enacted.

HISTORY

- Probate guardianship cases historically involved orphans or children of absent parents
- Guardians were often appointed when both parents were deceased
- Cases did not generally involve parental unfitness
- As a result, guardianship law did not develop a focus on reunification of the child with the parent, nor procedural safeguards such as appointment of counsel for the parents

MODERN PROBATE GUARDIANSHIP

- Social Workers, Attorneys and Families often feel avoiding Juvenile Court and CPS supervision is a "Win Win"
- Probate Guardianship is a Permanent Plan

MODERN PROBATE GUARDIANSHIP

California case law and legislation increasingly supported utilization of probate guardianships to address parental "unfitness" and child's best interests prior to Christian G.

(e.g. Guardianship of Zachary H. (1999))

ASSEMBLY BILL 1938 (2002)

Initially included a requirement that the court to appoint counsel to represent a minor in specified guardianship proceedings if necessary to protect the minor's interests.

PC 1470 allows for appointment but does not require appointment

AB 1938

Removal of the child from a stable placement with a person who has acted as a parent for a substantial period is harmful.

So, custody with the parent(s) becomes detrimental to the child.

AB 1938

"Under existing law...a court may make an order terminating the guardianship if the court determines that it is no longer necessary...This bill would delete the determination that the guardianship is no longer necessary as grounds for an order terminating guardianship."

FC 3041(c) - ... "detriment to the child" includes the harm of removal from a stable placement of a child with a person who has assumed, on a day-to-day basis, the role of his or her parent, fulfilling both the child's physical needs and the child's psychological needs for care and affection, and who has assumed that role for a substantial period of time. A finding of detriment does not require any finding of unfitness of the parents.

PC 1601 - ...the court may make an order terminating the guardianship if the court determines that it is in the ward's best interest to terminate the guardianship...

"THE SOCIAL WORKER SAID I HAVE TO GET GUARDIANSHIP RIGHT AWAY, OR THE KIDS ARE ALL GOING TO FOSTER CARE."



THE MODERN DAY PROBATE GUARDIANSHIP CASE

- Grandparents or other relatives as petitioners alleging unfitness on the part of the parent(s)
- Substance Abuse (Methamphetamine)
- Frequently there is a related child custody dispute between the parents in a family law/paternity case

PROBATE CODE SECTION 1513(C)

If the [Probate] investigation finds that any party to the proposed guardianship alleges the minor's parent is unfit, as defined by Section 300 of the WIC, the case shall be referred to the county agency designated to investigate potential dependencies. Guardianship proceedings shall not be completed until the investigation required by Sections 328 and 329 of the WIC is completed and a report is provided to the court in which the guardianship proceeding is pending. (Emphasis added)

**GUARDIANSHIP OF CHRISTIAN G.
 (AS MODIFIED MAY 31, 2011)
 COURT OF APPEAL, FIRST DISTRICT, DIVISION 2
 195 CAL.APP.4TH 581, 124 CAL.RPTR.3D 642**

- Wake Up...Follow the Law...Probate Code Section 1513(c)
- Holding: Probate Court has a mandatory duty to refer to Child Protective Services (CPS) under 1513(c)
- Message: Probate Investigators, Probate Courts, CPS...take it seriously and do it right

CHRISTIAN G. HOLDING

- Failure to comply with Probate Code section 1513(c) renders Guardianship Order invalid. Trial Court's failure to refer to CPS was prejudicial error under any standard. Guardianship order reversed and case remanded for compliance with 1513(c)

CHRISTIAN G. HOLDING

- Parent (father) was deprived of certain procedural safeguards when the probate court failed to refer the case to CPS after it became apparent that Petitioner's allegations about father's parenting deficiencies amounted to a charge that he was an unfit parent.

PROBATE GUARDIANSHIP COMPARED TO JUVENILE DEPENDENCY

- Factors identified in *Guardianship of Christian G.* (2011) 195 Cal.App.4th 581
- Why subd. (c) of Probate Code section 1513 is important
- Differences in due process and procedural safeguards

**COMPARISON
PRIMARY FOCUS**

- Dependency - Primary focus is preservation or reunification of the family while protecting the emotional and physical well-being of the children.
- Guardianship - Permanent living arrangement when it is "necessary or convenient". Focus on proposed guardians qualifications and child's needs, without focus on parent's circumstances or any preference for maintaining the family unit.

**COMPARISON
INVESTIGATIONS**

- Dependency: Social worker must report to the court why the child has been removed from the parent's physical custody, the need, if any, for continued detention, and identify available services that could facilitate the return of the child to the parents
- Guardianships: Probate Investigation Report discretionary under Probate Code section 1513(a)

**COMPARISON
PRE-REMOVAL SERVICES**

- Dependency: Before the child can be detained in a dependency case, the Court must determine that continuance in the parent's home is contrary to the child's welfare, and make a finding whether reasonable efforts were made to prevent or eliminate the need for removal of the child from his or her home.
- Guardianship: No similar requirements.

COMPARISON - RIGHT TO COUNSEL

- Dependency Case: Indigent parents have a right to appointed counsel whenever the child has been placed in out-of-home care, or the agency is recommending the same.
- Guardianship: No right to appointed counsel (*Id.*, p. 600-601; *Guardianship of H.C.* (2011) 198 Cal.App.4th 1235)

COMPARISON - REUNIFICATION SERVICES

- Dependency Court...reunification services aimed at reuniting the family. The services must be tailor made for the needs of the individual family.
- Guardianship: Court *cannot* order reunification services (*Id.*, p. 601; *Kaylee J.* (1997) 55 Cal.App.4th 1425, 1432, 64 Cal.Rptr.2d 662)

**PROBATE CODE SECTION 1513(C)
KEY POINTS**

- Based on allegations (Petition and/or Probate Investigator's Report) No factual findings.
- Even if Counsel retained or appointed for parents (e.g., ICWA case and counsel appointed for parents per Probate Code section 1474) still must comply with 1513(c)
- Meaningful report to court mandatory
 - Don't rely on *Guardianship of H.C.* as a way out

**STATUS OF GUARDIANSHIP PENDING
CPS REFERRAL - RECOMMENDATIONS**

- Continue with Probate Investigator's Investigation and Report
- Guardianship can not be concluded until requirements of 1513(c) satisfied - CPS report to Court
- Temporary Guardianship Orders okay
 - *Guardianship of Christian G.* - On remand Appellate Court continued temporary guardianship pending compliance with 1513(c)

SIMILAR STATUTE

Family Code section 3027(b) provides....

If allegations of child abuse, including child sexual abuse, are made during a child custody proceeding, the court may request that the local child welfare services agency conduct an investigation of the allegations pursuant to Section 328 of the WIC. Upon completion of the investigation, the agency shall report its findings to the court.

PRACTICAL PROBLEM #1

- CPS Report says "NO" 300 filing & Parent or Child disagrees....
 - Remedy: WIC sections 329 & 331

PRACTICAL PROBLEM #2

◦ CPS Report says "NO" 300 filing & Court disagrees...

- Remedy: Court may order county child welfare agency to file a dependency petition. No violation of separation of powers. (*In re M.C.* (Sept. 29, 2011) 2011 WL 4495308 (Cal.App. 1 Dist.); WIC section 331)
- Agency/County Counsel can not dismiss petition

PRACTICAL PROBLEM # 3

◦ Same as # 1 or #2...Pr. 1513 referral and report of CPS says "NO" filing. Court ultimately orders petition filed.

◦ CPS files Petition but does not seek removal of the child

PRACTICAL PROBLEM #4

◦ CPS report says "NO" 300 petition as parent(s) have agreed to voluntary services....

- Deny guardianship? Voluntary services negate detriment? (Pr. Code 1514; FC section 3041)
- What if Petitioner in the Guardianship (Grandma) says I've been down this road of parental promises before, and grandchild isn't staying with me unless I have a guardianship order.
- Continue temporary guardianship...?

PRACTICAL PROBLEM #5

- While discussing the Petitioner’s desire to keep the child out of the dependency system and foster care, the Court in *Christian G.* observed that the involvement of CPS does not inevitably mean out-of-home placement with strangers. (pgs. 596-597)
 - Willing relative deemed “suitable” (WIC section 309(d)(1)). Same standards used to determine licensing foster family homes. Includes in-home inspection & criminal records check of the relative and others in the home

PRACTICAL PROBLEM #6

Guardianship order in effect from 2008 based on parental unfitness. Probate Code section 1513(c) was never complied with. Guardian now seeks to have child declared free from the custody and control of parents and adopt child under Probate Code section 1516.5.

PRACTICAL PROBLEM #7

- Grandma has had the child for years...now seeks guardianship. Parent(s) clearly unfit in past...now doing reasonably well and oppose guardianship.
- 1513(c) apply?
- Clear and convincing evidence required for CPS detention
- Probate Case...preponderance of the evidence under FC section 3041(d).

#7 - BURDEN OF PROOF CONTINUED

- The critical finding of detriment to the child does not necessarily turn on parental unfitness. It may be based on the prospect that a successful, established custodial arrangement would be disrupted.
 - *Guardianship of Ann S.* (2009) 45 Cal.4th 1110, 1123, 90 Cal.Rptr.3d 701; *Guardianship of H.C.* (2011) 198 Cal.App.4th 1235, 1245, 130 Cal.Rptr.3d 316; Family Code section 3041, subdivision (c)
 - Preponderance of the evidence per FC 3041(d)

PRACTICAL PROBLEM # 8

Who receives a copy of the CPS report to the Probate Court?

PRACTICAL PROBLEM # 9

- Pr. Code 1513(c) referral and CPS says "NO" 300 petition. Parent wants to convince Court to order the agency to file a petition under *In re M.C.* and WIC 331.
- Is the parent entitled to a hearing upon receipt of the 1513 report? Social Worker subject to cross-examination?

CHILD WELFARE PERSPECTIVE

- Impact
- Collaboration
- Challenges
- Risks
- Unintended Consequences
- Solutions

CURRENT IMPACT SAN DIEGO

- Volume of 329 Referrals
- Number of petitions filed
- Number of WIC 331 petitions filed
- Number County ordered to file

COLLABORATION COURTS AND CHILD WELFARE

- Brainstorming with the court to problem-solve
- New case flow developed together
- Proposed procedure will provide probate court more detailed information

RISKS

- Social Worker ordered to file petition
- Social Worker testimony
- Liability
- Referrals Pending over 30 days

**THROUGH THE EYES OF THE CHILD
UNINTENDED CONSEQUENCES**

- Trauma due to loss of family connections/current placement
- Pitfalls of entering the Child Welfare System

SOLUTIONS

- Communication with Dependency and Probate Court
- Utilize existing Policy Group Meeting
- Proposed Legal Contract - consultation to parents
