

Introduction to Guardianship Law

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What is a Guardianship?

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- Suspends parents' right to physical custody of child & places custody with another adult
- Not permanent termination of parental rights
 - Valid until minor turns 18, is married, emancipated, or adopted, or judge terminates
- Can be obtained through probate, family, or juvenile court (dependency and delinquency)

When Guardianship Is Necessary:

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- To provide long-term care
 - Parent(s) incarcerated, ill, deployed, unavailable
- To protect child
 - Abuse, abandonment, neglect
- To obtain private medical insurance
- To get consent to Special Education
- To obtain public benefits in certain circumstances

Rights & Duties

PC §§2351-2360

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- General duties (GC-248)
 - Care, custody, control of minor
- Fiduciary relationship governed by the laws of trusts (PC §2101)
- Responsible for education
- Must follow court orders regarding visitation
- May consent to driver's license
- May consent to enlistment in the armed services
- Court and guardian may consent to child's marriage

Rights & Duties cont.

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- May establish residence anywhere in CA
 - Can petition court to approve out of state move
- Pre and Post Move Notice (GC-079 & GC-080)
- Possible liability for willful misconduct of minor or negligent actions
- Two guardians?
 - Both must agree (PC §2105)

UCCJEA FC §§3400-3465

The Uniform Child Custody Jurisdiction and Enforcement Act

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- CA court will not have jurisdiction to grant a guardianship if:
 - There is a **valid custody order** issued in any other state, or ...
 - The minor has not lived in California for **at least 6 months** prior to the filing of the petition for guardianship.
- Exception for temporary guardianships.
 - Temporary emergency jurisdiction

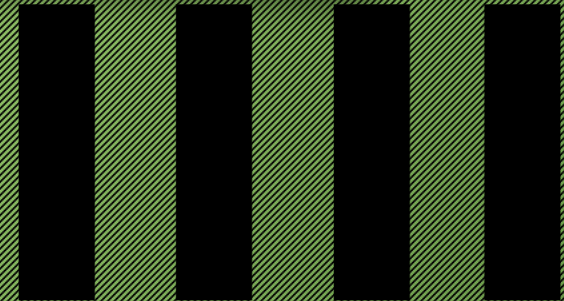
Public Benefits for Guardians and Caregivers

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- Related Guardians and informal caregivers: Non-Needy Caregiver (CalWorks) and Medi-Cal
- Unrelated Guardians: Foster Care AFDC-FC cash and Medi-Cal
- Other Benefits
 - Social Security Disability
 - Survivor's Benefits
 - Food Stamps
 - SSI
 - CAPI

GUARDIANSHIP CLINIC

- Probate legal guardianships are custody actions where a non-parent is seeking custody of a child, often due to a parent's death or absence, or allegations the parent is unfit.
 - Not Family Court - because the person seeking custody is a non-parent
 - Not Children's Court - because there is no official government action, although DCFS may be guiding behind the scenes
- Our clinic touches between 80 to 90% of all probate guardianships filed in LA County, and provides over 2,000 services each year.
 - We assist both litigants seeking guardianships and litigants opposing them.
 - We prepare many types of pleadings: petitions, notices, ICWA, objections, ex partes, etc.
 - Located in the Stanley Mosk Courthouse
 - Open for walk-ins on Monday through Thursday



Probate Court



Other proceedings

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- Family Court
- Delinquency
 - (children's court / juvenile crime)
- Adoption
- Dependency
 - (children's court / abuse, neglect)

Dependency vs. Probate

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- Petitioner files petition, not agency
- No appointment of counsel
- No goal of reunification or family maintenance services
- No reviews by agency
- Difference in payments

Overview of Process of a Guardianship Case

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- 1) Initial Meeting with Client
 - Attorney/client relationship?
 - Why is guardianship needed & overview of guardianship
 - Timeline (temporary v. permanent hearings etc.)
 - Jurisdiction issues
 - Benefits and risks of applying for guardianship
 - Fees involved, alternatives, & parties involved
- 2) Prepare Forms/Client Review/Signature
- 3) File the Forms at the appropriate Courthouse
- 4) Initiate Investigation at first opportunity

Overview of Process

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- 5) Complete Notice Requirements for Temporary Guardianship Hearing
- 6) Attend Temporary Guardianship Hearing
 - Draft Letters & Orders if necessary
- 7) Attend Guardianship Investigation
 - Probate v. DCFS
- 8) Complete Notice Requirements for General Guardianship Hearing
- 9) Attend General Guardianship Hearing
 - Draft Letters & Orders if necessary

GENERAL GUARDIANSHIP LEGAL STANDARD - UNCONTESTED

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- The court may appoint a guardian if it appears “necessary or convenient.”
 - PC §1514(a)
 - Generally, the minor should be living with the proposed guardian
 - UNLESS parent objects...
- Probate Court is also governed by parts of the Family Code.
 - PC §1514(b)

GENERAL GUARDIANSHIP LEGAL STANDARD - UNCONTESTED

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- Order of preference when granting custody:
 1. Parents or parent;
 2. Person whose home the child has been living in;
 3. Any other person.

FC §3040
- Guardianship should be in the child's "best interest."

FC §3040

 - Assuring health, safety, and welfare of children shall be the court's primary concern when determining best interest.

FC §3020(a)

GENERAL GUARDIANSHIP LEGAL STANDARD

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- A parent cannot be appointed a guardian. [PC §1514\(b\)\(2\)](#)
 - Except as in [PC §2105](#).
- The minor cannot be married or have had their marriage dissolved.
 - The minor could have a marriage adjudged a nullity.
 - [PC §1515](#)
- If a child is of sufficient age and capacity to reason the court shall consider the wishes of the child. [FC §3042\(a\)](#)
- Due weight to nomination of guardian. [FC §3043](#)

TEMPORARY GUARDIANSHIP

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- The “permanent” guardianship petition must already be on file or filed concurrently.
- The Court may appoint a temporary guardian to serve pending final determination of general guardianship.

PC §2250

- Standard: “for good cause”
- Medical, educational, or other emergency

NOTICE REQUIREMENTS

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Notice Requirements: General Guardianships

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- **What gets Served?**

- Notice of Hearing (GC-020) along with Copy of Petition for Appointment of Guardian of the Person (GC-210), Child Information Attachment (GC 210(CA)), with any attachments and any confidential declarations
- GC-207INFO Comparison of Guardians with Other Nonparent Caregivers. New Code requires it be included in notice
- Consent and Waiver of Notice (GC-211) (optional)

- **How and When?**

- **Personally:** By someone over 18, not a party to the case; At least 15 days before the hearing on the general guardianship
- **By mail:** By someone over 18, not a party to the case; At least 15 days before the hearing on the general guardianship

Notice Requirements: General Guardianships

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Who Gets Personal Service?

Probate Code § 1511 (b)

- Parents *or* any person with legal custody of minor
- Minor if over age 12
- Any person nominated as guardian

Notice Requirements: General Guardianships

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Who Gets Service by Mail?

Probate Code §§ 1511(c), 1516, 1542

- Grandparents
- Siblings over age 12
- Person having care of minor (if no legal custody)
- Emergency Response Services (County Social Services Office)
- Department of Family and Children's Services (if non-relative) i.e., county agency designated to investigate potential dependencies
- Cal. Department of Social Services (unrelated guardians only)

Notice Requirements: General Guardianship

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- Rule of Court 7.52 requires diligent search
- Due Diligence:
 - Must state last known address, when person was known to reside there, efforts to locate person, and facts to explain why person cannot be located.
 - Must talk to friends, relatives, employers, search internet, directory assistance, real property records
 - Court can then prescribe alternate form of service (in a manner “reasonably calculated” to give actual notice *or* dispense with notice (see PC § 1212 and CCP § 413.30)

Notice: ICWA

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- **Indian Child Welfare Act (ICWA)** 25 U.S.C. 1901, 1912(a): Tribe must be given notice of proceedings.
- Probate Code § 1460.2 and § 1511(i); Cal. Rule of Court 7.1015
- **Purpose:** Promote stability and security of Indian tribes and family.
- Duty to Inquire
- Complete **ICWA-030** and send to Sacramento Area Director, Bureau of Indian Affairs, or Department of the Interior

Declaration of Due Diligence

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- MUST include an internet search
 - If you can locate people via Facebook, send message with date, time, location, and purpose of hearing.
- MUST include last known address
- Don't let your client talk you out of efforts to locate relatives...

Fee Waivers

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- 2014 Legislation: **AB 2747**
- **Fee waivers based on the financial condition of the proposed ward, not the petitioner.**
- Financial condition of the proposed ward would include the financial condition of any person against whom he or she has a claim for support including the parents of a proposed ward.
- Assessments for investigations in guardianships are subject to the fee waiver provisions.

Guardianship Investigation

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- **Probate Code § 1513**

- Court *may* require an investigation and report by local services agency (non-relative) or court investigator (relative) before establishing a guardianship
- Non-related guardians are investigated by county agency designed to investigate potential dependency
- Look at local requirements as they vary by county: (some counties routinely waive, some never, etc.)

Contents of Guardianship Report

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- Report is confidential, but can be viewed by persons who were served (PC § 1513(d))
 - *Try to get a copy before the hearing!*
- Person who prepares the report can be called as a witness and examined (PC § 1513(c))
- Referral can be made to county agency designated to investigate potential dependencies in certain circumstances (PC § 1513 (a) and (b))

Contents of Guardianship Report

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- 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
 - The plans of the parents and proposed guardian for the stable and permanent home for the child.

SPECIAL IMMIGRANT JUVENILE STATUS

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- SIJS is a federal law that allows undocumented children who are in a juvenile court who are abused, neglected, or abandoned to obtain lawful permanent residency in the United States.
- In 1990, Congress created SIJS.
- Congress, through the **Trafficking Victims Protection and Reauthorization Act of 2008** (TVPRA), amended and expanded the definition of SIJS.
- California through **Code of Civ Pro §155** clarified Superior Court's authority to make findings to enable an undocumented child to apply for SIJS in 2014

FEDERAL SIJS ELIGIBILITY REQUIREMENTS - INA §101(a)(27)(J)

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For a youth to be eligible for SIJS, he/she must:

- 1) Be under 21 years of age;
- 2) Be unmarried;

The Probate Court must also find that:

- 3) The court has legally placed the youth under the custody of an individual appointed by a state or juvenile court.
- 4) Reunification with one or both parents is not viable due to abuse, neglect or abandonment, or a similar basis under state law; and
- 5) It is not in the young person's best interest to be returned to his or her country of nationality or last residence or his or her parents' country of nationality or last residence.

Cal. Code Civ. Proc. § 155

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- If a court order is requested to make SIJS findings in a superior court including (but not limited to) family court, probate court, or juvenile court AND
- There is evidence to support those findings,
- THE COURT SHALL ISSUE THE SIJS ORDER WHICH INCLUDES....

Cal. Code Civ. Proc. § 155(b)(1)(a)

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- (A) The child was either of the following:
 - (i) Declared a dependent of the court.
 - (ii) Legally committed to, or placed under the custody of, a state agency or department, or an individual or entity appointed by the court. The court shall indicate the date on which the dependency, commitment, or custody was ordered.
- (B) That reunification of the child with one or both of the child's parents was determined not to be viable because of abuse, neglect, abandonment, or a similar basis pursuant to California law. The court shall indicate the date on which reunification was determined not to be viable.
- (C) That it is not in the best interest of the child to be returned to the child's or his or her parents' previous country of nationality or country of last habitual residence.

JOINT GUARDIANSHIP

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- A minor's parent may not be appointed as a guardian of the person of the minor. *PC §1514(b)(2)*
 - **Exception:** If a custodial parent has been diagnosed as having a terminal condition the court may appoint the custodial parent and a person nominated by the parent as joint guardians. *PC §2105(f)*
 - Petitioner must provide a declaration executed by a licensed physician as evidence.

JOINT GUARDIANSHIP

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- "Terminal condition" means an incurable and irreversible condition that, without the administration of life-sustaining treatment, will, within reasonable medical judgment, result in death.
- If the noncustodial parent objects, the Court cannot appoint the joint guardians without a finding that the noncustodial parent's custody would be detrimental to the minor. *PC §2105(f)*
- Joint guardians - both must concur to exercise a power