

RESOLUTION 02-01-2019

DIGEST

Accountings: Failure to File

Amends Probate Code section 2620.2 to authorize persons entitled to an accounting to request that the court order that an accounting be filed when the accounting is past due.

TEXT OF RESOLUTION

RESOLVED that the Conference of California Bar Associations recommends that legislation be sponsored to amend Probate Code section 2620.2, to read as follows:

- 1 §2620.2
2 (a) Whenever the conservator or guardian has failed to file an accounting as required by
3 Section 2620, the court shall require that written notice be given to the conservator or guardian
4 and the attorney of record for the conservatorship or guardianship directing the conservator or
5 guardian to file an accounting and to set the accounting for hearing before the court within 30
6 days of the date of the notice or, if the conservator or guardian is a public agency, within 45 days
7 of the date of the notice. The court may, upon cause shown, grant an additional 30 days to file
8 the accounting.
9 (1) If a person entitled to an accounting from the conservator or guardian has not
10 received service of a filed accounting within 90 days of the end of the account period, as
11 described in Section 2620, the party or interested person may file an ex parte motion requesting
12 the court order an accounting be filed pursuant to section 2620.2(a). The petitioning party must
13 attach to the ex parte motion a copy of a letter requesting the accounting due, served on the
14 conservator or guardian, showing a reasonable attempt to acquire the accounting from the
15 conservator or guardian prior to filing the ex parte motion.
16 (2) The Judicial Council shall develop or update forms or rules of court that are
17 necessary to implement this section.
18 (b) Failure to file the accounting within the time specified under subdivision (a), or
19 within 45 days of actual receipt of the notice, whichever is later, shall constitute a contempt of
20 the authority of the court as described in Section 1209 of the Code of Civil Procedure.
21 (c) If the conservator or guardian does not file an accounting with all appropriate
22 supporting documentation and set the accounting for hearing as required by Section 2620 , the
23 court shall do one or more of the following and shall report that action to the bureau established
24 pursuant to Section 6510 of the Business and Professions Code :
25 (1) Remove the conservator or guardian as provided under Article 1 (commencing with
26 Section 2650) of Chapter 9 of Part 4 of Division 4.
27 (2) Issue and serve a citation requiring a guardian or conservator who does not file a
28 required accounting to appear and show cause why the guardian or conservator should not be
29 punished for contempt. If the guardian or conservator purposely evades personal service of the
30 citation, the guardian or conservator shall be immediately removed from office.
31 (3) Suspend the powers of the conservator or guardian and appoint a temporary
32 conservator or guardian, who shall take possession of the assets of the conservatorship or
33 guardianship, investigate the actions of the conservator or guardian, and petition for surcharge if
34 this is in the best interests of the ward or conservatee. Compensation for the temporary

35 conservator or guardian, and counsel for the temporary conservator or guardian, shall be treated
36 as a surcharge against the conservator or guardian, and if unpaid shall be considered a breach of
37 condition of the bond.

38 (4)(A) Appoint legal counsel to represent the ward or conservatee if the court has not
39 suspended the powers of the conservator or guardian and appoint a temporary conservator or
40 guardian pursuant to paragraph (3). Compensation for the counsel appointed for the ward or
41 conservatee shall be treated as a surcharge against the conservator or guardian, and if unpaid
42 shall be considered a breach of a condition on the bond, unless for good cause shown the court
43 finds that counsel for the ward or conservatee shall be compensated according to Section 1470 .
44 The court shall order the legal counsel to do one or more of the following:

45 (i) Investigate the actions of the conservator or guardian, and petition for surcharge if
46 this is in the best interests of the ward or conservatee.

47 (ii) Recommend to the court whether the conservator or guardian should be removed.

48 (iii) Recommend to the court whether money or other property in the estate should be
49 deposited pursuant to Section 2453 , 2453.5 , 2454 , or 2455 , to be subject to withdrawal only
50 upon authorization of the court.

51 (B) After resolution of the matters for which legal counsel was appointed in
52 subparagraph (A), the court shall terminate the appointment of legal counsel, unless the court
53 determines that continued representation of the ward or conservatee and the estate is necessary
54 and reasonable.

55 (5) If the conservator or guardian is exempt from the licensure requirements of Chapter 6
56 (commencing with Section 6500) of Division 3 of the Business and Professions Code, upon ex
57 parte application or any notice as the court may require, extend the time to file the accounting,
58 not to exceed an additional 30 days after the expiration of the deadline described in subdivision
59 (a), where the court finds there is good cause and that the estate is adequately bonded. After
60 expiration of any extensions, if the accounting has not been filed, the court shall take action as
61 described in paragraphs (1) to (3), inclusive.

62 (d) Subdivision (c) does not preclude the court from additionally taking any other
63 appropriate action in response to a failure to file a proper accounting in a timely manner.

(Proposed new language underlined; language to be deleted stricken)

PROPONENT: Sacramento County Bar Association

STATEMENT OF REASONS

The Problem: Conservators and guardians frequently fail to file accountings timely. The code related to timely filing is Probate Code Section 2620, and the failure to file timely is under Section 2620.2. Addressing the failure to timely file requires the court to discover the failure to file on their own and issue a written notice to the party to file within 30 days of their discovery. It is a useful code to enforce the filing of the accounting, but the problem is that the court rarely discovers the failure to file on their own, mostly because they do not have the staff to follow up on every single matter. The task then falls to interested persons/parties who must then somehow alert the court and request that the court order the accounting, perhaps through a Motion to Compel, which is fairly costly with full filing fee + drafting fees + court appearance, etc.

The Solution: The amendment would add a subsection allowing an interested person/party who discovers an accounting is overdue to file an application requesting the court to order the responsible party to account. The method for making that application to the court should be a simple ex parte request with a minimal filing fee, that can be dropped for court review, thereby reducing the costs to the petitioner significantly. In order to give fair notice and to reduce unnecessary court filings, the amendment proposes a requirement that a written request for the conservator or guardian to comply must be served on the conservator or guardian before the petitioner would be allowed to file this application.

IMPACT STATEMENT

This resolution does not affect any other law, statute, or rule.

CURRENT OR PRIOR RELATED LEGISLATION

None known.

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RESOLUTION 02-02-2019

DIGEST

Guardianship: Appointments of Guardian When Minor Lives With Person Other Than Parent
Amends Probate Code Section 1514 to limit appointment of a guardian to only when child is not living with a custodial parent.

TEXT OF RESOLUTION

RESOLVED that the Conference of California Bar Associations recommends that legislation be sponsored to amend the Probate Code section 1514:

1 § 1514

2 (a) Upon hearing of the petition, if it appears necessary or convenient, the court may
3 appoint a guardian of the person or estate of the proposed ward or both.

4 (b) (1) In appointing a guardian of the person, the court is governed by Chapter 1
5 (commencing with Section 3020) and Chapter 2 (commencing with Section 3040) of Part 2 of
6 Division 8 of the Family Code, relating to custody of a minor.

7 (2) Except as provided in Section 2105, a minor s parent may not be appointed as a
8 guardian of the person of the minor.

9 (3) In appointing a guardian of the person, the court may only appoint a guardian when a
10 parent has permitted a minor to live with another person and does not provide legal authority for
11 the minor’s care and maintenance, or when the minor is not residing with the parent or parents
12 when the petition is filed.

13 (c) The court shall appoint a guardian nominated under Section 1500 insofar as the
14 nomination relates to the guardianship of the estate unless the court determines that the nominee
15 is unsuitable.

16 (d) The court shall appoint the person nominated under Section 1501 as guardian of the
17 property covered by the nomination unless the court determines that the nominee is unsuitable. If
18 the person so appointed is appointed only as guardian of the property covered by the nomination,
19 the letters of guardianship shall so indicate.

20 (e) Subject to subdivisions (c) and (d), in appointing a guardian of the estate:

21 (1) The court is to be guided by what appears to be in the best interest of the proposed
22 ward, taking into account the proposed guardian s ability to manage and to preserve the estate as
23 well as the proposed guardian s concern for and interest in the welfare of the proposed ward.

24 (2) If the proposed ward is of sufficient age to form an intelligent preference as to the
25 person to be appointed as guardian, the court shall give consideration to that preference in
26 determining the person to be so appointed.

(Proposed new language underlined; language to be deleted stricken)

PROPONENT: San Bernardino County Bar Association

STATEMENT OF REASONS

The Problem: Under current law, when there is evidence of parental unfitness, a probate guardianship can be used to remove a child who is physically in the custody of a parent without

referral to Child Protective Services (CPS). In 2013 the legislature amended Probate Code section 1513(b) to remove the requirement mandating referral to Child Protective Services in cases alleging parental unfitness leaving discretion to the Court to make the referral. Accordingly, custodial parents in Probate proceedings who see their children removed from the home can be deprived of reunification services afforded in dependency matters in accordance with Welfare & Institutions Code section 16507.

Traditionally Probate guardianships have addressed the needs of orphans or children already living with a non-family member without legal authority granted by the parents. Frequently the children are living with a non-family member because the parents are unable or unwilling to provide care for their children. Alternatively, under Welfare and Institutions Code 300, Dependency Courts have jurisdiction over minors living with a custodial parent when the child has suffered, or there is substantial risk that the child will suffer, harm or neglect. Once the Dependency Court takes jurisdiction, the minor is protected and the parents are afforded the services necessary to help reunify with the children, if appropriate. These services to parents are not available in a Probate Court guardianship.

The Solution: Adds specific language to Probate Code Section 1514 to limit the authority of the Probate Court to appoint a guardian only when a child is not living with a custodial parent when the petition is filed. This would ensure that allegations of neglect or parental unfitness of a custodial parent would be handled by CPS and the Dependency Court which will both protect the minor and afford parents services toward reunification, if appropriate.

IMPACT STATEMENT

The resolution does not affect any other law, statute or rule other than those expressly identified.

CURRENT OR PRIOR LEGISLATION

No current legislation known. However, in 2013, the legislature amended Probate Code section 1513 to provide that the Probate Court “may” refer an allegation of parental unfitness to CPS, but that pending completion of the investigation, the court may take any appropriate steps to protect the child’s safety including appointing a temporary guardian.

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RESOLUTION 02-03-2019

DIGEST

Guardianships: Notice of Parental Rights in Probate

Amends Probate Code section 1514 to provide that parents shall receive a notice of their parental rights upon the granting a guardianship petition.

TEXT OF RESOLUTION

RESOLVED that the Conference of California Bar Associations recommends that legislation be sponsored to amend Probate Code section 1514, to read as follows:

- 1 §1514
- 2 (a) Upon hearing of the petition, if it appears necessary or convenient, the court may
- 3 appoint a guardian of the person or estate of the proposed ward or both.
- 4 (b)
- 5 (1) In appointing a guardian of the person, the court is governed by Chapter 1
- 6 (commencing with Section 3020) and Chapter 2 (commencing with Section 3040) of Part 2 of
- 7 Division 8 of the Family Code, relating to custody of a minor.
- 8 (2) Except as provided in Section 2105, a minor’s parent may not be appointed as a
- 9 guardian of the person of the minor.
- 10 (c) The court shall appoint a guardian nominated under Section 1500 insofar as the
- 11 nomination relates to the guardianship of the estate unless the court determines that the nominee
- 12 is unsuitable. If the nominee is a relative, the nominee’s immigration status alone shall not
- 13 constitute unsuitability.
- 14 (d) The court shall appoint the person nominated under Section 1501 as guardian of the
- 15 property covered by the nomination unless the court determines that the nominee is unsuitable. If
- 16 the person so appointed is appointed only as guardian of the property covered by the nomination,
- 17 the letters of guardianship shall so indicate.
- 18 (e) Subject to subdivisions (c) and (d), in appointing a guardian of the estate:
- 19 (1) The court is to be guided by what appears to be in the best interest of the proposed
- 20 ward, taking into account the proposed guardian’s ability to manage and to preserve the estate as
- 21 well as the proposed guardian’s concern for and interest in the welfare of the proposed ward.
- 22 (2) If the proposed ward is of sufficient age to form an intelligent preference as to the
- 23 person to be appointed as guardian, the court shall give consideration to that preference in
- 24 determining the person to be so appointed.
- 25 (f) An information notice of the rights of parents of the minor shall be attached to the
- 26 order. The guardian shall mail the order and the attached information notice to the minor’s
- 27 parents and minor’s relatives, as set forth in subdivision (c) of Section 1510, within 30 days of
- 28 the issuance of the order.

(Proposed new language underlined; language to be deleted stricken)

PROPONENT: Contra Costa County Bar Association

STATEMENT OF REASONS

The Problem: The rights of the parents after the granting of a probate guardianship are not clearly defined. The majority of parents with children subject to a guardianship are unaware that their child may be adopted by the guardians in a probate guardianship. Or that it may be very difficult to terminate the guardianship. Most parents believe that guardianships are temporary custodial orders and they are faced with a surprise when the guardians chose to petition to adopt the minor or the court later refuses to terminate the guardianship because the minor is in a safe and stable placement.

The Solution: Provide information defining the parent's rights. This would include a description of the rights they retain, that their parental rights may be terminated if the guardianship remains in place and the guardian petitions to adopt their child and the standard needed for the termination of the guardianship.

IMPACT STATEMENT

This resolution does not affect any other law, statute, or rule.

CURRENT OR PRIOR RELATED LEGISLATION

None known.

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RESOLUTION 02-04-2019

DIGEST

Power of Attorney: Allows Delegation of Parental or Guardian Authority

Adds Probate Code section 1505 to allow power of attorney for delegation of parental or guardian authority.

TEXT OF RESOLUTION

RESOLVED that the Conference of California Bar Associations recommends that legislation be sponsored to add Probate Code section 1505 to read as follows:

1 §1505

2 Delegation of powers by parent or guardian

3 (a) By a properly executed power of attorney, a parent, legal custodian or guardian of a
4 minor may delegate to another person, for a period not exceeding 180 days, any of the parent’s
5 or guardian’s powers regarding care, custody, or property of the minor child or ward, except the
6 power to consent to marriage or adoption of a minor ward or to release of a minor ward for
7 adoption.

8 (b) A parent who executes a delegation of powers under this section must mail or give a
9 copy of the document to any other parent within 10 days of its execution unless

10 (1) The other parent does not have visitation rights or has supervised visitation rights: or

11 (2) There is an existing domestic violence restraining order, or a similar law of another
12 state, in effect against the other parent to protect the parent, legal custodian, or guardian
13 executing the delegation of powers or the child.

14 (b) A power of attorney executed pursuant to (a) of this section shall be revocable by the
15 person who executed the power of attorney.

16 (c) If a parent or guardian is serving in the armed forces of the United States and is
17 deployed to a foreign nation, and if the power of attorney so provides, a delegation under this
18 section is effective until the thirty-first day after the end of the deployment.

19 (d) If a guardian for a minor delegates any power under this section, the guardian shall
20 notify the court within 7 days after execution of the power of attorney and provide the court the
21 name, address, and telephone number of the attorney-in-fact.

(Proposed new language underlined; language to be deleted stricken)

PROPONENT: San Bernardino County Bar Association

STATEMENT OF REASONS

The Problem: California law currently does not provide a mechanism for a parent or a guardian to temporarily delegate the power to provide for care, custody or property of a minor to someone without the formality of a guardianship. Parents and guardians often file petitions for guardianship when a parent’s absence is intended and planned to be temporary. The parties are then subjected to unnecessary and invasive investigations and subsequently, if a guardianship is established by the court, then they are subjected to further scrutiny and the uncertainty of

whether the court will agree to terminate the guardianship. This process is lengthy, complicated and expensive. Many other states already have similar provisions allowing a parent or guardian to temporarily delegate powers regarding care, custody, or property of a minor to another person.

The Solution: This resolution will add Probate Code section 1505 to authorize a parent or guardian to delegate powers regarding care, custody, or property to another person. The authorization is fully revocable and is subject to a 180-day duration (unless the signer is in the military). The statute would be limited in scope, leaving decisions about who should care for children in the hands of responsible parents, without requiring them to go through the uncertainty, expense and unnecessary scrutiny of the probate court. Responsible parents and guardians should have the option to provide for their children's temporary care without the necessity of a formal guardianship proceeding in probate court.

IMPACT STATEMENT

This resolution does not affect any other law, statute or rule other than those expressly identified.

CURRENT OR PRIOR RELATED LEGISLATION

None known.

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RESOLUTION 02-05-2019

DIGEST

Family Law: Scope of “Substantial Period of Time”

Amends Family Code section 3041 to clarify that the term “substantial period of time” shall not include the time a minor is under a guardianship of the person.

TEXT OF RESOLUTION

RESOLVED that the Conference of California Bar Associations recommends that legislation be sponsored to amend Family Code section 3041, to read as follows:

1 §3041

2 (a) Before making an order granting custody to a person or persons other than a parent,
3 over the objection of a parent, the court shall make a finding that granting custody to a parent
4 would be detrimental to the child and that granting custody to the nonparent is required to serve
5 the best interest of the child. Allegations that parental custody would be detrimental to the child,
6 other than a statement of that ultimate fact, shall not appear in the pleadings. The court may, in
7 its discretion, exclude the public from the hearing on this issue.

8 (b) Subject to subdivision (d), a finding that parental custody would be detrimental to the
9 child shall be supported by clear and convincing evidence.

10 (c) As used in this section, “detriment to the child” includes the harm of removal from a
11 stable placement of a child with a person who has assumed, on a day-to-day basis, the role of his
12 or her parent, fulfilling both the child’s physical needs and the child’s psychological needs for
13 care and affection, and who has assumed that role for a substantial period of time. A “substantial
14 period of time” shall not include the time that a minor is subject to a temporary guardianship of
15 the person pursuant to Probate Code §2250. A finding of detriment does not require any finding
16 of unfitness of the parents.

17 (d) Notwithstanding subdivision (b), if the court finds by a preponderance of the evidence
18 that the person to whom custody may be given is a person described in subdivision (c), this
19 finding shall constitute a finding that the custody is in the best interest of the child and that
20 parental custody would be detrimental to the child absent a showing by a preponderance of the
21 evidence to the contrary.

22 (e) Notwithstanding subdivisions (a) to (d), inclusive, if the child is an Indian child, when
23 an allegation is made that parental custody would be detrimental to the child, before making an
24 order granting custody to a person or persons other than a parent, over the objection of a parent,
25 the court shall apply the evidentiary standards described in subdivisions (d), (e), and (f) of
26 Section 1912 of the Indian Child Welfare Act (25 U.S.C. Sec. 1901 et seq.) and Sections 224.6
27 and 361.7 of the Welfare and Institutions Code and the placement preferences and standards set
28 out in Section 361.31 of the Welfare and Institutions Code and Section 1922 of the Indian Child
29 Welfare Act (25 U.S.C. Sec. 1901 et seq.)

(Proposed new language underlined; language to be deleted stricken)

PROPONENT: Contra Costa County Bar Association

STATEMENT OF REASONS

The Problem: Under the current law the initial burden of proof is a clear and convincing evidence that parental custody would be detrimental. However, if the court finds by a preponderance of the evidence that it would be detrimental to remove the minor from a safe and stable placement (the temporary guardian) then the burden shifts to the parents to prove by a preponderance of the evidence that it would not be detrimental to remove the minor from the temporary guardian.

This greatly prejudices the parents who through no fault of their own are not able to secure a timely trial date after the granting of a temporary guardianship. Since securing a trial date can take up to a year or more (a substantial period of time) from the initial granting of a temporary guardianship it becomes impossible for the parent to prove that it would not be detrimental to remove the minor for the temporary guardian.

The Solution: Include language which does not permit the time during a temporary guardianship to be considered as part of the “substantial period of time” referred to in this section.

IMPACT STATEMENT

This resolution does not affect any other law, statute, or rule.

CURRENT OR PRIOR RELATED LEGISLATION

This section was created under the Prior legislation: AB 1938 and no other proposals have sought to address the same problem.

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