

RESOLUTION 02-01-2019

DIGEST

Accountings: Failure to File

Amends Probate Code section 2620.2 to authorize a party or interested person to file an ex parte petition and request the court to order an accounting be filed when the accounting is past due.

RESOLUTIONS COMMITTEE RECOMMENDATION DISAPPROVE

History:

No similar resolutions found.

Reasons:

This resolution amends Probate Code section 2620.2 to authorize a party or interested person to file an ex parte petition and request the court to order an accounting be filed when the accounting is past due. This resolution should be disapproved because courts are already required to provide written notice to the conservator or guardian when an accounting has not been filed and additional laws should not be enacted because some courts fail to follow the law.

Probate Code section 2620 requires that a conservator or guardian shall file an accounting at the expiration of one year after their appointment and thereafter every two years unless ordered otherwise by the court. Probate Code section 2620.2, subdivision (a), requires that a court shall give written notice to the conservator or guardian and the attorney of record directing them to file an accounting and have it set for hearing within 30 days of the notice when an accounting has not been filed as required under section 2620. The court can grant an additional 30 days to file the accounting upon a showing of good cause.

At the hearing on the appointment of a conservator or guardian, some courts will set an accounting review date by which time a conservator or guardian should file their accounting. Other courts will set an internal review date. If the accounting is not filed by the internal review date, then the court will send to the conservator or guardian and their counsel an Order to Show Cause (OSC) as to why the conservator or guardian should not be suspended for failure to file the accounting, which is more consistent with section 2620.2, subdivision (a).

Whether the court sets an accounting review date or an internal review date and later issues an OSC, if the conservator or guardian has failed to file an accounting prior to the hearing date, they or their counsel, if represented, must appear at the hearing and explain why the accounting has not been filed. They can request the court to grant them an additional 30 days to file the accounting. Since the court has the discretion to grant additional time, the court usually grants the request and continues the hearing. If the accounting is not filed in a timely manner thereafter, the court can take additional action at the subsequent hearing as set forth in Probate Code section 2620.2, subdivision (c), such as suspending or removing the conservator. This procedure also applies to subsequent annual accountings that must be filed by the conservator or guardian.

Further, under Probate Code section 2651, a ward or conservatee, the spouse or registered domestic partner of the ward or conservatee, a relative, friend or interested person of the ward or conservatee can file a petition for removal of the conservator for failure to file an accounting. Under Probate Code section 2654, if a petition for removal has been filed, the court, on its own motion or on a petition, can suspend the guardian or conservator for failure to file the accounting and compel the conservator to surrender the estate to a custodian appointed by the court.

The proposed resolution appears to be addressing more of a local issue rather than a statewide issue and would unnecessarily cause additional work for court staff statewide. A simpler fix would be for the court to either set an accounting review date or an internal review date to ensure that an accounting is filed by the conservator or guardian. Also, the proposed resolution could be used by family members or friends, who are already unhappy that they have been cut-off from their gravy train, to unduly harass the conservator.

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 upon
50 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.

AUTHOR AND/OR PERMANENT CONTACT: Susan C. Hill, Hill Law Offices, PC, 700 University Avenue, Suite 130, Sacramento, CA 95825; (916) 568-0212; SusanHill@HLO-PC.com

RESPONSIBLE FLOOR DELEGATE: Susan C. Hill

COUNTERARGUMENTS BY BAR ASSOCIATIONS AND CLA SECTIONS

TEXCOM

DISAPPROVE

There already are statutes in place that require courts to track accounting deadlines, and this proposes a statewide fix to a problem not experienced statewide. In counties where counsel or private parties can simply call the court to ask that an OSC be set, this statute may create an impediment to informally alerting courts who are failing to track accounting deadlines. Further, TEXCOM understands that the Judicial Council's Probate and Mental Health Advisory Committee is looking into the issue addressed by this Resolution.

RESOLUTION 02-02-2019

DIGEST

Guardianships: Appointment of Guardian for Minor

Amends Probate Code section 1514 to limit the circumstances under which the probate court may appoint a guardian for a minor.

RESOLUTIONS COMMITTEE RECOMMENDATION

APPROVE IN PRINCIPLE

History:

No similar resolutions found.

Reasons:

This resolution amends Probate Code section 1514 to limit the circumstances under which the probate court may appoint a guardian for a minor. This resolution should be approved in principle because it would ensure that the dependency court's resources are available to support the parent-child relationship, if appropriate.

The probate court currently has the discretion to appoint a probate guardian if doing so is in the best interests of the minor, whether the minor resides with the parents or with someone else. (Prob. Code, § 1514, subd. (e)(1).) This resolution adds specific language to Probate Code section 1514 to require the probate court to automatically refer any cases involving children currently living with their parents to dependency court, instead of attempting to remediate the issues through a guardianship action.

There are currently several important differences between proceedings in dependency court and guardianship proceedings in probate court. If the dependency court removes a child from a parent's custody, it must, with some exceptions, order social welfare services for the child and parent including counseling or other treatment services to facilitate reunification of the family. (Welf. & Inst. Code, § 361.5.) The probate court lacks both the ability and the resources to provide such services for the parent and child in the context of a probate guardianship, and is therefore incapable of addressing the longer-term ability to nurture and support the parent-child relationship, even assuming it believed such efforts might result in providing a suitable home for the child.

This resolution would also prohibit the probate court from appointing a guardian for a minor who is temporarily living with another person with the parent's authority and consent. This resolution would ensure that individuals to whom a parent has temporarily given authority to have custody of a minor child, such as when a parent is deployed or temporarily incapacitated, cannot take advantage of the absent parent by seeking a guardianship when the parent's intention was to allow someone to care for a child temporarily. This would encourage parents to seek appropriate help caring for children during temporary absences such as military deployment, housing or employment instability, or extended medical treatment without worrying that by transferring temporary custody they are risking that a formal guardianship could be granted due to the parent's absence.

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: The resolution 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.

AUTHOR AND/OR PERMANENT CONTACT: Jack B. Osborn, Brown White & Osborn LLP, 300 E. State Street, Suite 300, Redlands, CA 92373. Tel: (909) 798-6179. Email: josborn@brownwhitelaw.com

RESPONSIBLE FLOOR DELEGATE: Jack B. Osborn

COUNTERARGUMENTS BY BAR ASSOCIATIONS AND CLA SECTIONS

BANSDC

Although the proposed language would allow for CPS/CWS services to be provided to the parents and children, it prevents family members, who have knowledge and evidence of abuse, from bringing a guardianship case when the parent is unable or unwilling to provide appropriate care for the minor child. The proposed language would cause the child to be less protected just because the child lives with a parent. Additionally, oftentimes CPS/CWS does not have the resources or inclination to conduct an analysis of the children’s living situation the way a concerned relative would/could. Probate Court should not be limited to appointing appropriate guardians just because an unfit or unwilling parent continues to reside in the same home as the child.

TEXCOM

DISAPPROVE

While TEXCOM supports the concept of providing reunification services for parents and children, the Resolution takes discretion away from the probate court when a child's best interests are in jeopardy. The exclusion of situations where a minor is with a substitute caregiver is particularly problematic. This proposed change does not provide redress for situations where the substitute caregiver is not acting in the best interest of the minor, despite having parental authorization.

RESOLUTION 02-03-2019

DIGEST

Notice: Parental Rights

Amends Probate Code section 1514 to require a guardian to provide parents with a notice of their parental rights upon the granting of a guardianship petition.

RESOLUTIONS COMMITTEE RECOMMENDATION

APPROVE IN PRINCIPLE

History:

Similar to Resolution 01-01-2011, which was disapproved.

Reasons:

This resolution amends Probate Code section 1514 to require a guardian to provide parents with a notice of their parental rights upon the granting of a guardianship petition. This resolution should be approved in principle because parents should be made aware of what their parental rights are when a guardianship is established for their child since those rights can be drastically affected upon the appointment of a guardian.

A parent's rights may be affected in several ways when a guardianship is established for a child. When a guardianship is established, a parent's rights are suspended and not terminated; a parent can no longer make decisions for the child; the court may require the guardian to allow the parent to visit, but may place restrictions on those visits (i.e., supervised visits, specified day(s) and time of the visit(s)); and a parent may still have a financial obligation to support the child.

Also, when a petitioner files a petition for guardianship, Probate Code section 1510, subdivision (h), requires petitioner to disclose if they intend to adopt the minor child by checking box 5 on the Petition for Appointment of Guardian and box 6c on the Guardianship Petition – Child Information Attachment, which could put the parent on notice that there is an intent by petitioner to adopt the child. At the time a guardianship petition is filed, the proposed guardian may not have an intent to adopt the child and those boxes may not be checked. Therefore, a parent would not be put on notice that a guardian intends to adopt their child.

Further, Probate Code section 1516.5 allows a guardian to terminate parental rights if a guardianship has been established for more than two years, and sets forth certain factors for the court to look at to determine if it would be in the child's best interests to terminate parental rights and allow the guardian to adopt the child. If the guardian decides to initiate proceedings under section 1516.5, such proceedings must be brought in accordance with the procedures specified in Family Code section 7800 et. seq., which protects parental rights in proceedings brought to terminate their rights as a parent. However, the parent may not fully understand that a guardian can petition to terminate their parental rights and adopt the child after a guardianship has been established for more than two years, and notice should be given to the parents that a guardian can do so.

A parent may also believe that a guardianship is only temporary and is unaware that it remains in place until the child turns 18-years of age or a petition for termination is filed. Under Probate Code section 1601, a parent can petition to terminate a guardianship. In determining whether or not to terminate the guardianship, the court will look at what would be in the child's best interests, whether or not a parent is involved in the child's life and can show they are able to provide a stable and suitable environment for the child. Because a guardianship is permanent until the child is 18 years old or a petition to terminate is filed, which can be filed by a parent, parents should be provided notice of this as well.

When a conservatorship is established, a conservator is required to serve on the conservatee, and those who were entitled to notice of the petition for conservatorship, a "Notice of Conservatee's Rights" along with a copy of the order appointing the conservator. This form was created by the Judicial Council.

Because parental rights can be drastically affected when a guardian is appointed for their child, it seems that they should be provided with a notice of their rights. Since the order appointing a guardian does not provide such information as discussed above, it seems a form would need to be created, either by the Judicial Council or at a local level, similar to a "Notice of Conservatee's Right" so there is uniformity in providing parents with a notice of their parental rights.

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) (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 (c) The court shall appoint a guardian nominated under Section 1500 insofar as the
10 nomination relates to the guardianship of the estate unless the court determines that the nominee
11 is unsuitable. If the nominee is a relative, the nominee's immigration status alone shall not
12 constitute unsuitability.

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

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

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

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

24 (f) An information notice of the rights of parents of the minor shall be attached to the
25 order. The guardian shall mail the order and the attached information notice to the minor's
26 parents and minor's relatives, as set forth in subdivision (c) of Section 1510, within 30 days of
27 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.

AUTHOR AND/OR PERMANENT CONTACT: Oliver A. Greenwood, 367 Civic Drive, Suite 2, Pleasant Hill, CA 94523, voice 925-957-1030, fax 925-266-3446, email oliver@oaglaw.com.

RESPONSIBLE FLOOR DELEGATE: Oliver A. Greenwood

COUNTERARGUMENTS BY BAR ASSOCIATIONS AND CLA SECTIONS

TEXCOM

APPROVE IN PRINCIPLE

In concept, this notice is well intended. However, TEXCOM suggests that (1) the terms or content of the notice should be set forth in this legislation, and (2) the notice should be provided to the parents at the time the guardianship petition is initially filed, not after it is ordered. Providing this notice after the guardianship petition is already granted deprives a parent of knowledge of the consequence of a guardianship when it is too late to consider other alternatives.

RESOLUTION 02-04-2019

DIGEST

Guardianship: Allows Delegation of Parental or Guardian Authority

Adds Probate Code section 1505 to allow a parent to delegate temporary parental rights to another or appoint a temporary guardian.

RESOLUTIONS COMMITTEE RECOMMENDATION

APPROVE IN PRINCIPLE

History:

No similar resolutions found.

Reasons:

This resolution adds Probate Code section 1505 to allow a parent to delegate temporary parental rights to another or appoint a temporary guardian. This resolution should be approved in principle because it adds a mechanism for parents to provide for the care of their children during temporary absences without incurring the expense and loss of control dictated by a guardianship proceeding.

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. This often forces a parent to seek a guardianship to provide appropriate legal support for their children during temporary absences such as a military deployment, housing or employment instability, or extended medical treatment. This process is lengthy, complicated, and expensive.

This resolution would permit a parent to temporarily delegate the power to provide for the care, custody, or property of a minor to another individual of the parent's choice, thus dispensing with the need for a probate guardianship. Many other states, including Arkansas (Ann. Code §§ 28-65-221(a); 28-65-204(b)(1)-(2)), New York (Surrogate's Crt. Proc. Act, § 1726), and Texas (Pen. Code, § 25.081), 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 proposed amendment is limited in scope and empowers the parent or guardian to decide who should care for their children without requiring them to go through the uncertainty, expense and unnecessary scrutiny of the probate court.

This resolution is similar to Assembly Bill No. 1378 (2019-2020 Reg. Sess.), which would allow a person to serve as a "standby guardian," who would have temporary legal custody of a child in certain involuntary situations such as incarceration, deportation or military service when a parent executes a standby guardian authorization affidavit. This resolution would expand this concept by allowing parents and guardians to delegate authority voluntarily whenever the parent or guardian deems it necessary.

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 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 (c) 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 (d) 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 (e) 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.

AUTHOR AND/OR PERMANENT CONTACT: Mark J. Andrew Flory, Special Counsel at Brown White & Osborn, 300 E. State Street, Suite 300, Redlands, California 92373, 909-798-6179, mflory@brownwhitelaw.com.

RESPONSIBLE FLOOR DELEGATE: Mark Flory

COUNTERARGUMENTS BY BAR ASSOCIATIONS AND CLA SECTIONS

FLEXCOM

FLEXCOM Disapproves this resolution.

FLEXCOM is concerned that the proposed statute has the potential for abuse by one parent who transfers custody to a non-parent without the consent of the other parent. The proposed statute is vague as to what "visitation rights" means. Many parents do not have court orders for visitation (e.g., in an intact marriage), so it is not clear if this would apply to them or not. Also, there is no procedure for a parent to object to the delegation, i.e. notice may be required but it appears the other parent would be bound by the delegation. Also, it would appear improper to have a court-appointed guardian be able to circumvent judicial supervision by delegating custodial powers to a non-court appointed person.

TEXCOM

DISAPPROVE

Existing law under Family Code §§ 6550-6552 sets forth a Caregiver Authorization Affidavit. This existing statute provides an informal alternative to a guardianship and provides an adequate short-term non-judicial solution as sought by proponents. If there is a need for authority beyond that granted under these Family Code statutes, the protections of court supervision and oversight under temporary guardianship are in the best interests of the child.

TEXCOM also voiced concern that the proposed process could be abused if both parents are not given notice of the delegation.

BAR ASSOCIATION OF NORTHERN SAN DIEGO COUNTY

Probate Code Section 1514 allows one parent alone, with only 10 days' notice to the other parent, to give/delegate all care, custody and property of the minor child to a non-parent. Ten days' notice is insufficient notice to allow a parent to research, locate, meet with and hire an attorney to oppose a unilateral delegation of the other parent's parental rights and responsibilities.

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 during which a minor is under a temporary guardianship of the person.

RESOLUTIONS COMMITTEE RECOMMENDATION

DISAPPROVE

History:

No similar resolutions found.

Reasons:

This resolution amends Family Code section 3041 to clarify that the term “substantial period of time” shall not include the time during which a minor is under a temporary guardianship of the person. This resolution should be disapproved because any time spent with the proposed guardian in a stable placement should be considered in determining the best interests of the minor.

In determining whether a guardianship should be granted over the objection of a parent, current law recognizes the importance of continuity and stability in a child’s living arrangement. (Fam. Code, § 3041.) If the proposed guardian has been providing stable placement and has assumed the role of a parent on a day-to-day basis, thereby fulfilling the child’s psychological needs for care and affection for a substantial period of time, then under Family Code section 3041 there is a presumption that removal of the child would be detrimental. (*In re Guardianship of L.V.* (2006) 136 Cal.App.4th 481, 490-491.) The parents then have the burden of proving by a preponderance of evidence that it would not be detrimental to remove the child from the stable placement. (*In re Guardianship of Vaughan* (2012) 207 Cal.App.4th 1055, 1070.)

Under Probate Code section 2250 subdivision (b), any appointment of a temporary guardian must be based on a judicial determination of good cause and the minor’s best interests. While there is no statutory provision to specify what constitutes a “substantial period of time,” courts can include the period that a child is under a temporary guardianship as a factor in determining whether there has been a stable placement over time. (*Id.* at 1072.) Since it is not unusual for more than a year to pass before trial on the issue of appointment of a guardian when a temporary guardianship is in place, under existing law it can be difficult for parents to prove that it would not be detrimental to remove the minor from the temporary guardian.

While a probate guardianship proceeding must balance parental rights, “courts recognized that the right of the parent [to custody] must give way, its preservation being of less importance than the health safety, morals, and general welfare of the child.” (*In re Guardianship of Imperatrice* (1920) 182 Cal. 355, 358.) Family Code section 3020, subdivision (a), provides that “it is the public policy of this state to ensure that the health, safety, and welfare of children shall be the court’s primary concern in determining the best interests of children when making any orders regarding the physical or legal custody or visitation of children.” Accordingly, this resolution

should be disapproved because the public policy of California dictates that the courts should have discretion to look at all factors, including the time a minor has been under a temporary guardianship, to determine whether the child has been under a stable placement and whether removal would be detrimental to the minor. (*Id.*)

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 section 2250. A finding of detriment does not require any
16 finding 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 from 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.

AUTHOR AND/OR PERMANENT CONTACT: Oliver A. Greenwood, 367 Civic Drive, Suite 2, Pleasant Hill, CA 94523, voice 925-957-1030, fax 925-266-3446, email oliver@oaglaw.com.

RESPONSIBLE FLOOR DELEGATE: Oliver A. Greenwood

COUNTERARGUMENTS BY BAR ASSOCIATIONS AND CLA SECTIONS

BANSDC

By excluding the time a minor is subject to temporary guardianship, the proposed change better protects the parents reduces the protections for the minor children. Section 3041 (c) addresses the real problem of flip flopping children in and out of an established and stable placement. It is widely accepted that it is generally detrimental to continually move children in and out of a stable home. Removing the time a minor is under guardianship as one of the protective factors to consider under the “substantial period of time” test and removing that consideration limits the court’s authority to protect children, which is not the purpose of the statute. Instead of limiting the court’s ability to consider the length of time the children are in a stable placement, the statute should remain as is so the Court will be able to utilize its discretion.

FLEXCOM

FLEXCOM Disapproves this resolution.

A child may emotionally bond with a temporary guardian while in that guardian's care. That child's best interests might be served by remaining in that guardian's care. This proposed amendment would have that period of care ignored for purposes of determining a child's best interest because a parent might be delayed in pursuing their parenting rights. This proposed amendment appears focused on a parent's needs, and not those of a child. If a child spends substantial time with a guardian, a statute suggesting that such time is not real development, attachment and bonding time will not have a real-world impact on the child. A child will bond irrespective of whether a statute says it is not bonding time, and the proposed amendment would not protect or advance the interests of the child.