

**RESOLUTION 06-05-2016**

**DIGEST**

Guardianship: Burden of Proof Necessary for the Appointment of a Guardian

Amends Probate Code section 1514 to remove the shifting of the burden of proof necessary for appointment of a guardian in cases where the minor is living with a temporary guardian.

**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:

§1514

- 1           (a) Upon hearing of the petition, if it appears necessary or convenient, the court may  
2 appoint a guardian of the person or estate of the proposed ward or both.
- 3           (b) (1) In appointing a guardian of the person, the court is governed by Chapter 1  
4 (commencing with Section 3020) and Chapter 2 (commencing with Section 3040) of Part 2 of  
5 Division 8 of the Family Code, relating to custody of a minor.
- 6           (2) Except as provided in Section 2105, a minor's parent may not be appointed as a  
7 guardian of the person of the minor.
- 8           (c) The court shall appoint a guardian nominated under Section 1500 insofar as the  
9 nomination relates to the guardianship of the estate unless the court determines that the nominee  
10 is unsuitable. If the nominee is a relative, the nominee's immigration status alone shall not  
11 constitute unsuitability.
- 12           (d) The court shall appoint the person nominated under Section 1501 as guardian of the  
13 property covered by the nomination unless the court determines that the nominee is unsuitable. If  
14 the person so appointed is appointed only as guardian of the property covered by the nomination,  
15 the letters of guardianship shall so indicate.
- 16           (e) Subject to subdivisions (c) and (d), in appointing a guardian of the estate:  
17           (1) The court is to be guided by what appears to be in the best interest of the proposed  
18 ward, taking into account the proposed guardian's ability to manage and to preserve the estate as  
19 well as the proposed guardian's concern for and interest in the welfare of the proposed ward.  
20           (2) If the proposed ward is of sufficient age to form an intelligent preference as to the  
21 person to be appointed as guardian, the court shall give consideration to that preference in  
22 determining the person to be so appointed.
- 23           (f) The granting of a temporary guardianship does not affect the burden of the petitioner  
24 for the guardianship to prove that the guardianship is necessary or convenient, even if the  
25 granting of the temporary guardianship places the ward in the custody and care of the proposed  
26 guardian for a substantial period of time pursuant to subdivision (d) of Section 3041 of the  
27 Family Code. The burden shifting provision of subdivision (d) of Section 3041 of the Family  
28 Code §3041, will take effect if the proposed guardian had custody and control of the minor for a  
29 substantial period of time before the temporary guardianship was granted.

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

**PROPONENT:** San Bernardino County Bar Association

## STATEMENT OF REASONS

The Problem: Under Probate Code section 1514, a petitioner must show by clear and convincing evidence that a guardianship is necessary and convenient for the care of the minor. Family Code section 3041(d) provides for the burden of proof to be shifted from the petitioner to the objecting party, generally the biological parent, when the petitioner has been the main care provider for the minor for a “substantial period of time.”

Once a temporary guardianship is in place, the now temporary guardian has custody and control of the minor and assumes the role of full time care provider for the minor. This has the effect of “starting the clock” in considering the burden shifting provisions of Family Code section 3041(d).

In many cases, the first real opportunity an objecting parent has to present his or her own evidence challenging petitioner’s evidence of the necessity of the guardianship can be 12-18 months *after* the time they first lost custody of their child. It is then more likely the court will rule that the minor has been in the custody and care of the petitioner for a “substantial period of time” and, thus, the burden of proof has shifted to the objecting parent.

The Solution: This resolution removes the burden shifting effects of Family Code section 3041, subdivision (d) from the situations in which a temporary guardianship has been granted and the petitioner is seeking to be appointed the general guardian over the objection of a parent. This would protect the parents’ right to raise their child and will keep the burden of proof on the petitioner, where it belongs, unless petitioner has had custody and control for a substantial period of time outside of the established temporary guardianship. The proposed changes would not have any effect on the budgets of counties regarding petitions for guardianship.

## IMPACT STATEMENT

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

## CURRENT OR PRIOR RELATED LEGISLATION

Not known.

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**RESPONSIBLE FLOOR DELIGATE:** Mark H. McGuire

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**RESOLUTIONS COMMITTEE RECOMMENDATION**  
APPROVE IN PRINCIPLE

History:

No similar resolutions found.

Reasons:

This resolution amends Probate Code section 1514 to remove the shifting of the burden of proof necessary for appointment of a guardian in cases where the minor is living with a temporary guardian. This resolution should be approved in principle because the standards for the appointment of a temporary guardian are relatively low, and the appointment of a temporary guardian may otherwise create a fait accompli.

The appointment of a temporary guardian means that the child will live with that temporary guardian pending further hearing. The temporary guardian may, under current law, then use the time elapsed between the temporary appointment and the hearing to address a parent's objection to this appointment to establish de facto parent status, which then causes the burden of proof to be shifted to the party who wishes to change the child's living arrangements, often the displaced parent. The net result of the current law is that some courts are hesitant to appoint temporary guardians, even when appropriate, because the parent then has the burden to show why it is in the child's best interests to be with them. This is a large hurdle to overcome when that parent has not had custody of the minor for an extended period of time because of the length of time it takes to return to court to address this issue.

## **COUNTERARGUMENTS**

### **TEXCOM**

#### **SUPPORT IN PRINCIPLE**

##### **RATIONALE**

The proponents propose to add subdivision (f) to Probate Code section 1514 to provide that the burden shifting effect of subdivision (d) of Probate Code section 1514 will take effect only if the proposed guardian had custody and control of the minor for a substantial period of time before the temporary guardianship was granted.

TEXCOM generally agrees with the arguments set forth by the proponents of the resolution. This proposed change to the statute will remove the burden shifting effects of Family Code section 3041, subdivision (d), in situations in which a temporary guardianship has been granted and the petitioner is seeking to be appointed the general guardian over the objection of a parent. This would protect the parents' right to raise their child and will keep the burden of proof on the petitioner, where it belongs, unless petitioner has had custody and control for a substantial period of time prior to the establishment of the temporary guardianship. TEXCOM believes that some gamesmanship may be taking place by seeking temporary appointment and possibly delaying an evidentiary hearing. Removing the burden shift will eliminate this tactic.

TEXCOM has some suggested amendments to the proposal. First, "§3041" in the last sentence appears to be a typographical error as the sentence also refers to "Section 3041." Second, we suggest amending the term "will take effect" to "applies only" in that same sentence.

It is also unnecessary to include the first sentence of proposed subdivision (f). Subdivision (a) of Probate Code section 1514 states:

“Upon hearing of the petition, if it appears necessary or convenient, the court may appoint a guardian of the person or estate of the proposed ward or both.”

The sentence is an affirmation of what is required under subdivision (a) of Probate Code section 1514 and it would not be necessary to state that the burden to prove that the guardianship is necessary or convenient is not affected if a temporary guardianship is granted.

**DISCLAIMER:**

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