

RESOLUTION LF-02-2017

DIGEST

Guardianships: Process for Creation and Designation of Standby Guardian

Amends Probate Code section 2105 and Education Code section 48204 to create a process for a custodial parent to designate a standby guardian to care for their child when necessary.

RESOLUTIONS COMMITTEE ANALYSIS

History:

No similar resolutions found.

Reasons:

This resolution amends Probate Code section 2105 and Education Code section 48204 to create a process for a custodial parent to designate a standby guardian to care for their child when necessary. Courts want alternatives to guardianships and this codifies informal arrangements between the parent and a standby guardian. Intentionally designed to keep family out of court and allow for a short-term solution. Does not suspend the parent's rights and a parent can rescind the appointment of the standby guardian.

Probate Code section 2105, subdivision (f), provides that a custodial parent can nominate someone to act as a joint guardian if the custodial parent has a terminal illness. The Legislature stated the intended purpose of subdivision (f) was to allow a parent with a terminal illness to arrange for a smooth transition for someone to care for their child and avoid a temporary guardianship, or placing the minor child in foster care, pending the appointment of a guardian.

The proposed subdivision (g) seeks to expand the purpose of subdivision (f) a step further by allowing a custodial parent to "designate" someone to act as a "standby guardian" which would take effect immediately.

The CCBA Resolutions Committee recommended disapproval of the resolution. The full Conference voted to approve.

TEXT OF RESOLUTION

RESOLVED that the Conference of California Bar Association recommends that legislation be sponsored to amend Probate Code section 2105 and Education Code section 48204 to read as follows:

1 § 2105

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3 (a) The court, in its discretion, may appoint for a ward or conservatee:

4 (1) Two or more joint guardians or conservators of the person.

5 (2) Two or more joint guardians or conservators of the estate.

6 (3) Two or more joint guardians or conservators of the person and estate.

7 (b) When joint guardians or conservators are appointed, each shall qualify in the same
8 manner as a sole guardian or conservator.

9 (c) Subject to subdivisions (d) and (e):

10 (1) Where there are two guardians or conservators, both must concur to exercise a power.

11 (2) Where there are more than two guardians or conservators, a majority must concur to
12 exercise a power.

13 (d) If one of the joint guardians or conservators dies or is removed or resigns, the powers
14 and duties continue in the remaining joint guardians or conservators until further appointment is
15 made by the court.

16 (e) Where joint guardians or conservators have been appointed and one or more are (1)
17 absent from the state and unable to act, (2) otherwise unable to act, or (3) legally disqualified
18 from serving, the court may, by order made with or without notice, authorize the remaining joint
19 guardians or conservators to act as to all matters embraced within its order.

20 (f) If a custodial parent has been diagnosed as having a terminal condition, as evidenced
21 by a declaration executed by a licensed physician, the court, in its discretion, may appoint the
22 custodial parent and a person nominated by the custodial parent as joint guardians of the person
23 of the minor. However, this appointment shall not be made over the objection of a noncustodial
24 parent without a finding that the noncustodial parent's custody would be detrimental to the
25 minor, as provided in Section 3041 of the Family Code. It is the intent of the Legislature in
26 enacting the amendments to this subdivision adopted during the 1995–96 Regular Session for a
27 parent with a terminal condition to be able to make arrangements for the joint care, custody, and
28 control of his or her minor children so as to minimize the emotional stress of, and disruption for,
29 the minor children whenever the parent is incapacitated or upon the parent's death, and to avoid
30 the need to provide a temporary guardian or place the minor children in foster care, pending
31 appointment of a guardian, as might otherwise be required.

32 "Terminal condition," for purposes of this subdivision, means an incurable and
33 irreversible condition that, without the administration of life-sustaining treatment, will, within
34 reasonable medical judgment, result in death.

35 (g) A custodial parent or a person who has been awarded custody or guardianship of a
36 minor may designate a person to serve as standby guardian of the person, the estate, or person
37 and estate of the minor child and provide that such designation shall take effect whenever the
38 parent is absent, incapacitated, upon the parent's death, or upon the occurrence of a contingency
39 and under the terms specified under Section 1501 or 1502 of the Probate Code. The court in its
40 discretion may appoint the designated standby guardian to assume the care, custody, and control
41 of the minor child. This appointment shall not be made over the objection of a noncustodial
42 parent without a finding that the noncustodial parent's custody would be detrimental to the
43 minor, as provided in Section 3041 of the Family Code. Appointment of a standby guardian does
44 not supersede the parental rights of a parent.

45 (1) A statutory form standby guardian under this part is legally sufficient if all of the
46 following requirements are satisfied.

47 (2) The signatures of the custodial parent or guardian and the standby guardian shall be
48 acknowledged.

49 (3) The standby guardian's authorization affidavit shall be in substantially the following
50 form:

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Standby Guardian's Authorization Affidavit

Use of this affidavit is authorized by Section 2105(g) of the California Probate Code.

Instructions: Custodial parent(s) / guardian(s) complete this form to nominate a standby guardian to assume the care, custody, and control of a minor child when the custodial parent(s) / guardian(s) is absent, incapacitated, upon the parent's death, or in the event of another contingency. Print clearly.

1. Name of minor:

2. Minor's birth date:

3. Name of nominating custodial parent(s):

4. Home address of nominating custodial parent(s):

5. Name of nominated standby guardian:

6. Address of nominated standby guardian:

7. Nominated standby guardian date of birth:

8. Nominated standby guardian California driver's license, passport, social security, Medi-Cal, or government-issued identification card number:

9. Standby guardian is a grandparent, aunt, uncle, or other qualified relative of the minor (see back of this form for a definition of "qualified relative").

10. Check one or both (for example, if one parent was advised and the other cannot be located):

<input type="checkbox"/> <u>I have advised the parent(s) or other person(s) having legal custody of the minor of my intent to authorize medical care, and have received no objection.</u>	
<input type="checkbox"/> <u>I am unable to contact the parent(s) or other person(s) having legal custody of the minor at this time, to notify them of my intended authorization.</u>	
<u>Warning: Do not sign this form if any of the statements above are incorrect, or you will be committing a crime punishable by a fine, imprisonment, or both.</u>	
<u>Authorization by custodial parent / guardian signature I declare under penalty of perjury under the laws of the State of California that the foregoing is true and correct.</u>	
<u>Dated:</u>	<u>Signed:</u>
<u>Acceptance by standby guardian: I declare under penalty of perjury under the laws of the State of California that the foregoing is true and correct.</u>	
<u>Dated:</u>	<u>Signed:</u>

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NOTICES:

1. This declaration does not affect the rights of the minor's parents or legal guardian regarding the care, custody, and control of the minor.
2. This declaration confers temporary legal custody of the minor to the standby guardian during the pendency of the circumstance that requires the standby custodian to act.
3. A person who relies on this affidavit has no obligation to make any further inquiry or investigation.
4. "Qualified relative," for purposes of item 5, means a spouse, parent, stepparent, brother, sister, stepbrother, stepsister, half-brother, half-sister, uncle, aunt, niece, nephew, first cousin, or any person denoted by the prefix "grand" or "great," or the spouse of any of the persons specified in this definition, even after the marriage has been terminated by death or dissolution.
5. If the circumstance requiring the standby custodian to act ceases or if the standby guardian cease to act, the custodial parent or guardian shall notify any person, school, day care, health care provider, or health care service plan that relies upon this affidavit.

TO SCHOOL OFFICIALS:

1. Section 48204 of the Education Code provides that this affidavit constitutes a sufficient basis for a determination of residency of the minor, without the requirement of a guardianship or other custody order, unless the school district determines from actual facts that the minor is not living with the standby guardian.
2. The school district may require additional reasonable evidence that the standby guardian lives at the address provided.

TO HEALTH CARE PROVIDERS AND HEALTH CARE SERVICE PLANS:

79 1. No person who acts in good faith reliance upon a standby guardian's authorization affidavit to
80 provide medical or dental care, without actual knowledge of facts contrary to those stated on the
81 affidavit, is subject to criminal liability or to civil liability to any person, or is subject to
82 professional disciplinary action, for such reliance if the applicable portions of the form are
83 completed.

84
85 § 48204

86 (a) Notwithstanding Section 48200, a pupil complies with the residency requirements for
87 school attendance in a school district if he or she is any of the following:

88 (1) (A) A pupil placed within the boundaries of that school district in a regularly
89 established licensed children's institution or a licensed foster home as defined in Section
90 56155.5, or a family home pursuant to a commitment or placement under Chapter 2
91 (commencing with Section 200) of Part 1 of Division 2 of the Welfare and Institutions Code.

92 (B) An agency placing a pupil in a home or institution described in subparagraph (A)
93 shall provide evidence to the school that the placement or commitment is pursuant to law.

94 (2) A pupil who is a foster child who remains in his or her school of origin pursuant to
95 subdivisions (f) and (g) of Section 48853.5.

96 (3) A pupil for whom interdistrict attendance has been approved pursuant to Chapter 5
97 (commencing with Section 46600) of Part 26.

98 (4) A pupil whose residence is located within the boundaries of that school district and
99 whose parent or legal guardian is relieved of responsibility, control, and authority through
100 emancipation.

101 (5) A pupil who lives in the home of a caregiving adult or standby guardian that is
102 located within the boundaries of that school district. Execution of an affidavit under penalty of
103 perjury pursuant to Part 1.5 (commencing with Section 6550) of Division 11 of the Family Code
104 by the caregiving adult or pursuant to Probate Code section 2105(g) by the standby guardian is a
105 sufficient basis for a determination that the pupil lives in the home of the caregiver or standby
106 guardian, unless the school district determines from actual facts that the pupil is not living in the
107 home of the caregiver or standby guardian.

108 (6) A pupil residing in a state hospital located within the boundaries of that school
109 district.

110 (7) A pupil whose parent or legal guardian resides outside of the boundaries of that
111 school district but is employed and lives with the pupil at the place of his or her employment
112 within the boundaries of the school district for a minimum of three days during the school week.

113 (b) (1) A school district may deem a pupil to have complied with the residency
114 requirements for school attendance in the school district if at least one parent or the legal
115 guardian of the pupil is physically employed within the boundaries of that school district for a
116 minimum of 10 hours during the school week.

117 (2) This subdivision does not require the school district within which at least one parent
118 or the legal guardian of a pupil is employed to admit the pupil to its schools. A school district
119 shall not, however, refuse to admit a pupil under this subdivision on the basis, except as
120 expressly provided in this subdivision, of race, ethnicity, sex, parental income, scholastic
121 achievement, or any other arbitrary consideration.

122 (3) The school district in which the residency of either the parents or the legal guardian of
123 the pupil is established, or the school district to which the pupil is to be transferred under this
124 subdivision, may prohibit the transfer of the pupil under this subdivision if the governing board

125 of the school district determines that the transfer would negatively impact the court-ordered or
126 voluntary desegregation plan of the school district.

127 (4) The school district to which the pupil is to be transferred under this subdivision may
128 prohibit the transfer of the pupil if the school district determines that the additional cost of
129 educating the pupil would exceed the amount of additional state aid received as a result of the
130 transfer.

131 (5) The governing board of a school district that prohibits the transfer of a pupil pursuant
132 to paragraph (2), (3), or (4) is encouraged to identify, and communicate in writing to the parents
133 or the legal guardian of the pupil, the specific reasons for that determination and is encouraged to
134 ensure that the determination, and the specific reasons for the determination, are accurately
135 recorded in the minutes of the board meeting in which the determination was made.

136 (6) The average daily attendance for pupils admitted pursuant to this subdivision is
137 calculated pursuant to Section 46607.

138 (7) Unless approved by the sending school district, this subdivision does not authorize a
139 net transfer of pupils out of a school district, calculated as the difference between the number of
140 pupils exiting the school district and the number of pupils entering the school district, in a fiscal
141 year in excess of the following amounts:

142 (A) For a school district with an average daily attendance for that fiscal year of less than
143 501, 5 percent of the average daily attendance of the school district.

144 (B) For a school district with an average daily attendance for that fiscal year of 501 or
145 more, but less than 2,501, 3 percent of the average daily attendance of the school district or 25
146 pupils, whichever amount is greater.

147 (C) For a school district with an average daily attendance of 2,501 or more, 1 percent of
148 the average daily attendance of the school district or 75 pupils, whichever amount is greater.

149 (8) Once a pupil is deemed to have complied with the residency requirements for school
150 attendance pursuant to this subdivision and is enrolled in a school in a school district the
151 boundaries of which include the location where at least one parent or the legal guardian of a
152 pupil is physically employed, the pupil does not have to reapply in the next school year to attend
153 a school within that school district and the governing board of the school district shall allow the
154 pupil to attend school through grade 12 in that school district if the parent or legal guardian so
155 chooses and if at least one parent or the legal guardian of the pupil continues to be physically
156 employed by an employer situated within the attendance boundaries of the school district, subject
157 to paragraphs (2) to (7), inclusive.

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

PROPONENT: Bar Association of San Francisco.

STATEMENT OF REASONS:

The Problem:

California law currently fails to allow parents to plan for the seamless care of their children. A caregiver affidavit authorizes the caregiver to enroll children in school, but not to pick them up from school. Medical authorizations may or may not be recognized by a healthcare provider. But, a guardianship is too strong of a response as it suspends a parent's rights. Under Probate Code section 2105(f), a custodial parent can assure him or herself of the continuous care of a child only if the parent has a terminal illness. According to the Robert Wood Johnson

Foundation, thirty-two percent (32%) of children in California live in single parent households. (<http://www.countyhealthrankings.org/app/california/2015/measure/factors/82/description>) There are many reasons for a parent to plan for their children's ongoing stable care in the parent's absence. Given the changing face of immigration enforcement, many parents now urgently need to plan for their children's care in the event of separation. Where there is no backup, or even where there is, a concerned parent may wish to designate a standby guardian who could care for the child.

Standby guardianship laws provide parents a way to legally transfer custody of their child without the necessity of relinquishing their parental rights. Many States developed these laws specifically to address the needs of parents living with HIV/AIDS, other disabling conditions, or terminal illnesses who want to plan a legally secure future for their children. Approximately 28 States and the District of Columbia have made statutory provisions for standby guardianships. It is time for California to help parents plan for their children with as much confidence as they plan for their assets.

The Solution:

This resolution will create a legally recognized method for parents to create a parental rights succession plan.

CURRENT OR PRIOR RELATED LEGISLATION

None.

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