

# GUARDIANSHIP BOOTCAMP

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Presented By

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# INTRODUCTION

A guardianship petition is filed and lands on your desk, now what? This workshop explains the what. This workshop will provide you with the following:

An understanding of guardianship and where it stands in context with other proceedings affecting custody,

An overview of the guardianship process, and

An overview of the court investigation process.

## I. PROCEEDINGS AFFECTING CUSTODY OF A MINOR

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Although this workshop is about probate guardianships, it is important to be aware of other proceedings in which custody of minors is affected. Legal custody of a child means the right and responsibility to make almost all decisions affecting the care and supervision of that child. This includes the right to determine the child's domicile, the rights to provide consent for the child's medical care, the right to guide the child's education and religious development, and the right to make decisions that may control the child's conduct.

## I. PROCEEDINGS AFFECTING CUSTODY OF A MINOR **LEGAL GUARDIANSHIP**

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Legal guardianship of the person of the child suspends the parents' right to custody of their child and places custody with another adult. It does **not** permanently terminate parental rights, parents retain the right to petition the court for visits or to terminate the guardianship at any time. Technically, parents also remain financially responsible for their child. A guardianship of the estate of a child is usually for the purpose of managing property and/or substantial assets that are in the child's name. Legal guardians can be appointed by the Probate Court and Juvenile Court.

## I. PROCEEDINGS AFFECTING CUSTODY OF A MINOR **DISSOLUTION**

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Legal custody is initially vested **equally** in the child's natural parents (Family Code §3010) whether they are married. Several ways exist to change legal custody. If the parents are married, custody is usually determined in a dissolution action. The Court can consider the child's preference and the reasons for it, if the child is sufficiently mature. Any custody order can be modified based on a change of circumstances.

## I. PROCEEDINGS AFFECTING CUSTODY OF A MINOR **DOMESTIC VIOLENCE PREVENTION ACT**

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In situations involving domestic violence, custody of children can be temporarily determined under the Domestic Violence Prevention Act (Family Code §6200 et seq.). A temporary restraining order may award custody of a child to one parent, subject to visitation rights of the other upon determination of the Court. The abusive parent may also be required to make support payments. One parent may obtain temporary care and control of her/his child through a restraining order when the parties have not been married, or when no petition for separation, nullity of marriage, or dissolution of marriage has been filed.

## I. PROCEEDINGS AFFECTING CUSTODY OF A MINOR

# JUVENILE COURT

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Custody may also be changed through three Juvenile Court jurisdictional sections: Welfare & Institutions Code §300 (dependency), §601.2 (status offense), and §602 (delinquency). If the child falls within the descriptions of § 300, § 601, or § 602, the Juvenile Court may remove custody of the child from the parent or other legal custodian by declaring the child a **dependent** (Welfare & Institutions Code §300) or a **ward** (Welfare & Institutions Code §601, 602) of the Court. The Court may place custody with relatives or friends of the child with addition of ongoing supervision by the Probation Department or Human Services Agency (HSA). The Court may also transfer placement to HSA or the Probation Department, which generally results in an “out of home” placement of the child such a foster home or group home setting. In some cases, the child will remain in the physical custody of the parents, under the supervision of HSA or of the Probation Department. The Juvenile Court can also appoint a legal guardian in both dependency and delinquency proceedings.

## I. PROCEEDINGS AFFECTING CUSTODY OF A MINOR **ADOPTION**

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An adoption is a complete substitution of one parent or a set of parents for another. (Family Code §8500-9340). In an adoption, the natural parent(s) (and the parents' other relatives) lose all their rights and obligations regarding their children, including custody, visitation, and support. The new adoptive parent(s) are placed in the same legal position in relation to the child as a natural parent including custody, support, and inheritance rights. In a stepparent adoption, only one parent is substituted for another. If the parent to be substituted is living, an adoption requires that the natural parent's rights be terminated. (Family Code §8604-8606)

An adoption is different from a guardianship in that the guardianship temporarily suspends the parents' rights to custody (not their right to visitation or obligation to support), while adoption permanently substitutes one parent, or set of parents, for another.



## I. PROCEEDINGS AFFECTING CUSTODY OF A MINOR **CONSERVATORSHIP**

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Custody of a child can also be placed with a conservator. A conservatorship allows the involuntary placement of a child found to be gravely disabled in a treatment facility. The procedures for conserving a child for mental health treatment may be found at the Welfare & Institutions Code §5350 et seq.

## I. PROCEEDINGS AFFECTING CUSTODY OF A MINOR **EMANCIPATION**

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A child can become his/her own legal custodian before attaining majority (i.e. turning 18) if s/he is declared emancipated (Family Code §7000-7135). A child can be emancipated in three ways:

- By joining the United States Armed Services with parental consent;
- By getting married- requiring consent of one parent and the Court through a court order (Family Code §302, 7002); **or**
- By obtaining a Declaration of Emancipation form the Court (Family Code §7002, 7122).

## II. PROBATE GUARDIANSHIP: AN OVERVIEW

### PURPOSE OF PROBATE GUARDIANSHIPS

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“[P]rotect and promote the best interest of the child.”  
(Suleman v. Superior Court (2010) 180 Cal.App.4th 1287,  
1299)

Provide “an alternative placement for children who  
cannot safely remain with their parents.” (Guardianship of  
Ann S. (2009) 45 Cal.4th 1110, 1122)

## II. PROBATE GUARDIANSHIP: AN OVERVIEW

### **GUARDIANSHIP OF THE PERSON**

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Guardianship of the person is set up because a child is living with an adult who is not a parent, and the adult needs the legal authority to make decisions on behalf of the child. In a probate guardianship of the person, the guardian has full legal and physical custody of the child.

## II. PROBATE GUARDIANSHIP: AN OVERVIEW **GUARDIANSHIP OF THE PERSON- CONTINUED**

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What does a guardian of the person do? The guardian generally has the same responsibilities as a parent. That means the guardian is responsible for the child's care, including the child's:

- Food, clothing and shelter,
- Safety and protection,
- Physical and emotional growth,
- Medical and dental care, and
- Education and any special needs.

## II. PROBATE GUARDIANSHIP: AN OVERVIEW **GUARDIANSHIP OF THE PERSON (SIJS)**

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### **Guardianships for children 18-20/SIJS (Probate Code §1510.1)**

- With consent of the youth, the court may appoint a guardian for unmarried youth ages 18-20 in connection with a SIJS petition. Can be filed by a relative, other person, or the proposed ward.
- Guardianships continue to terminate when the ward turns 18, unless such an extension is requested. (Probate Code §1600(a))
  - With consent of the ward, the court may extend an existing guardianship of a youth up until 21 years of age. Can be filed by a relative, other person, or the ward.

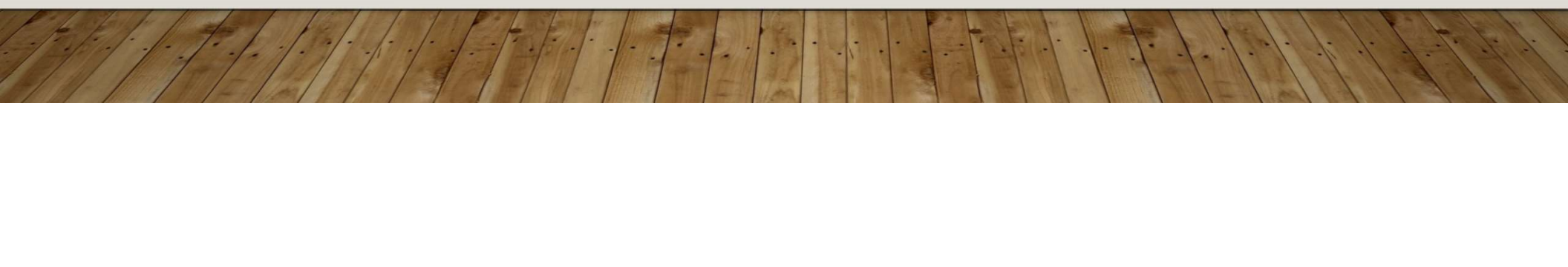
## II. PROBATE GUARDIANSHIP: AN OVERVIEW

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### **Guardianship of the Estate**

What does a guardian of the estate do? A guardian of the estate manages a child's income, money, or other property until the child turns 18 (note: unlike a guardianship of the person, a guardianship of the estate can only be extended by the child).

A child may need a guardian of the estate if s/he inherits money or assets. If the only assets the child is entitled to are Social Security benefits, then a guardian of the estate is not necessary.

- In most cases, the Court appoints the surviving parent to be the guardian of the child's estate.
  - In some cases the same person can be the guardian of the person and of the estate.
  - In other cases, the Court will appoint two different people.
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## II. PROBATE GUARDIANSHIP: AN OVERVIEW

### LEGAL REQUIREMENTS TO GRANT GUARDIANSHIP

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1. Must be “necessary and convenient”. (Probate Code §1514(a))
2. Family Code §3020 et seq. and 3040 et seq. apply. (Probate Code §1514(b))
3. If custody is ordered to the nonparent (over the parent’s objection), the Court must find by clear and convincing evidence that custody to the parent is detrimental and custody to nonparent is in child’s best interest. (Family Code §3041(a))



## II. PROBATE GUARDIANSHIP: AN OVERVIEW

### **WHO?**

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#### **WHO HAS STANDING TO FILE?**

- **ANYONE!**  
(Probate Code §1510(a))

#### **WHO CAN BECOME A GUARDIAN?**

- Any adult
- Even someone with a criminal and child welfare history
- No minimum requirements for the home

## II. PROBATE GUARDIANSHIP: AN OVERVIEW – ACTIVITY

**Please answer Yes or No to the following:**

1. Emily a 17-year-old is joining the Army with her grandmother's consent. Can she file for emancipation?
2. Sandra has lived next to Patricia and Dave for 5 years and has often babysat for their 10-year-old daughter (Lisa) when they fight and Lisa gets scared. Patricia and Dave have recently separated and Patricia has left the family home. Sandra often sees Lisa looking dirty- wearing the same clothes and dishelved hair. Lisa is coming to Sandra's home more often saying she's hungry. Can Sandra file for guardianship?
3. 15-year-old Sam receives Social Security Death Benefits because his mother passed away 8 months ago. His aunt is petitioning for guardianship. Does she need to petition for guardianship of his estate? What if it is later disclosed that he is the beneficiary of a \$10,000 life insurance policy held by his mother through her employer?

## II. PROBATE GUARDIANSHIP: AN OVERVIEW

### **DETRIMENT & EVIDENCE OF DETRIMENT REQUIRED**

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#### **DETRIMENT = REMOVAL FROM DE FACTO PARENT**

“Detriment to the child” includes: “the harm of removal from a stable placement of a child with a person who has assumed, on a day-to-day basis, the role of the child's parent, fulfilling both the child's physical needs and the child's psychological needs for care and affection, and who has assumed that role for a substantial period of time. A finding of detriment does not require a finding of unfitness of the parents.” (Family Code §3041(c))

#### **CLEAR AND CONVINCING EVIDENCE OF DETRIMENT**

Subject to subdivision (d), a finding that parental custody would be detrimental to the child shall be supported by clear and convincing evidence. (Family Code §3041)

## II. PROBATE GUARDIANSHIP: AN OVERVIEW

### REBUTTABLE PRESUMPTION

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REBUTTABLE  
PRESUMPTION OF  
PARENTAL CUSTODY  
WOULD BE DETRIMENTAL  
AND GUARDIANSHIP IS IN  
CHILD'S BEST INTEREST



Notwithstanding subdivision (b), if the court finds by a preponderance of the evidence that the person to whom custody may be given is a person described in subdivision (c), this finding shall constitute a finding that the custody is in the best interest of the child and that parental custody would be detrimental to the child absent a showing by a preponderance of the evidence to the contrary. (Family Code §3041 (d))



Places the burden on the parent to rebut presumption that guardianship should be granted

## II. PROBATE GUARDIANSHIP: AN OVERVIEW

### **DUE PROCESS PROTECTIONS**

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DUE PROCESS PROTECTIONS IN GUARDIANSHIPS

NOTICE AND THE OPPORTUNITY TO BE HEARD

NO RIGHT TO APPOINTED COUNSEL (ONLY CHILD IS APPOINTED COUNSEL)

NO REUNIFICATION SERVICES (FAMILY CODE §3026;  
GUARDIANSHIP OF ANN S. (2009) 45 CAL.4TH 1110, 1124)

## II. PROBATE GUARDIANSHIP: AN OVERVIEW

### **TIMELINES OR REVIEWS**

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ANY SET TIMELINES  
OR REVIEWS?

No

Court can require  
annual reports but  
only if resources  
allow (Pr. C. 1513.2)

## II. PROBATE GUARDIANSHIP: AN OVERVIEW PARENTS' RIGHTS IF GUARDIANSHIP IS GRANTED

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1. To request visitation.
2. To file to terminate guardianship.
3. “When the court appoints a guardian, the authority of the parent “ceases.” (Family Code §7505(a)) The Court has discretion to grant visitation but otherwise parental rights are completely suspended for the duration of a probate guardianship. The guardian assumes the care, custody, and control of the child.” (Guardianship of Ann S. (2009) 45 Cal.4th 1110, 1123–1124)

## II. PROBATE GUARDIANSHIP: AN OVERVIEW **CAN A GUARDIAN ADOPT THE CHILD?**

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Yes. After two years in the guardianship and if it is in the best interest of the child. (Probate Code §1516.5)

“Although the finding required by §1516.5, subdivision (a)(3) is simply that “the child would benefit from being adopted by his or her guardian,” there is no doubt that this requires a determination of the child's best interest.” (Guardianship of Ann S. (2009) 45 Cal.4th 1110, 1128)



## II. PROBATE GUARDIANSHIP: AN OVERVIEW INTERSECTION OF DEPENDENCY CASES & PROBATE GUARDIANSHIPS

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1. Informal voluntary child welfare safety plan may result in a probate guardianship
2. Petition for guardianship may trigger a child welfare investigation and the filing of a petition (Probate Code 1513(b))

## II. PROBATE GUARDIANSHIP: AN OVERVIEW

### **PROBATE CODE §1513(B)**

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- If the proposed ward is or may be described by Welfare & Institutions Code §300, the court **may** refer the matter to the local child welfare services agency to initiate an investigation of the referral pursuant to Welfare & Institutions Code §328 and 329 and to report the findings of that investigation to the court.
- Pending completion of the investigation, the court may take any reasonable steps it deems appropriate to protect the child' s safety, including, but not limited to, appointment of a temporary guardian or issuance of a temporary restraining order.
- If dependency proceedings are initiated, the guardianship proceedings shall be stayed in accordance with Welfare & Institutions Code §304 of the Welfare & Institutions Code. ...
- If a dependency proceeding is not initiated, the probate court shall retain jurisdiction to hear the guardianship matter.

## II. PROBATE GUARDIANSHIP: AN OVERVIEW ACTIVITY

Answer Yes or No to indicate whether a referral per Probate Code §1513(b) should be made:

1. Kate has filed for guardianship of her 16-year-old niece (Sally) who has run away home. Sally has come to temporarily live with Kate. Kate's sister (Joy), who is Sally's mother, is in agreement. Sally and Joy fought because Sally would not allow Joy to date an 18-year-old boy. Is a referral needed?
2. Tricia's nephew tested positive for drugs. Child welfare was contacted by the hospital and a social worker told Tricia to file for guardianship or the baby would be placed in foster care. Tricia's sister (Ellen) initially agreed to the petition but is now objecting. Is a referral needed?
3. Robert has custody of his 9-year-old son (Max) through family court. Robert has placed Max with his sister (Mary) and has asked her to get guardianship of Max. Max's mother (Sherry), who lives in another state and has court ordered visits, objects. Is a referral needed?
4. Molly filed for guardianship of her 1-year-old granddaughter (baby) who has been put up for adoption by her daughter (Cheryl). Molly claims Cheryl abandoned the baby. Is a referral needed?

## II. PROBATE GUARDIANSHIP: AN OVERVIEW A LITTLE BIT OF HISTORY

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**Before 2012-** Probate Code §1513(c) created a mandatory referral from the Probate Court to child welfare if any party to the proposed guardianship alleges the child's parent is unfit, as defined by Welfare & Institutions Code §300. *Guardianship of Christian G.* (2011) 195 Cal.App.4th 581 found that the failure to make the Probate Code §1513(c) referral was deemed reversible error, where father was objecting to the guardianship (Cf. *Adoption of Myah M.* (2011) 201 Cal.App.4th 1518 [no referral required when parents consented to guardianship]).

**AFTER 2012-** At the behest of the Academy of California Adoption Lawyers, the law was changed to make referral to child welfare discretionary (the word “may” replaced the word “shall”— claiming *Christian G.* “lead to an already overburdened child welfare system to be deluged with cases for investigation investigated” Now the referral authorization can be found under Probate Code §1513(b).


## II. PROBATE GUARDIANSHIP: AN OVERVIEW – **WELFARE & INSTITUTIONS CODE §329 & 331**

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- Welfare & Institutions Code §329: A person can apply to a local child welfare agency requesting that a Welfare & Institutions Code § 300 petition be filed. (Essentially a written hotline referral.) If the social worker does not file the petition within 3 weeks they must tell the applicant why. (JV-210)
- Welfare & Institutions Code §331: A Welfare & Institutions Code §329 applicant can request the Juvenile Court to order the social worker to file a Welfare & Institutions Code §300 petition. (JV-212)

## II. PROBATE GUARDIANSHIP: AN OVERVIEW – ALTERNATIVES TO GUARDIANSHIP

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- **Informal Caregiving:** Parents retain full rights, child ineligible for caregiver's work insurance, caregiver cannot consent when parent or legal guardian consent required, and parents have responsibility to financially support child.
  - **Caregiver Affidavit** (Family Code §6550)
  - **Authorization for Medical Care** (Family Code §69.10)
  - **Assignment of Educational Rights** (Government Code § 7579.5 (n))
  - **Indian Custodian:** If the child has Native American Ancestry under the Federal Indian Welfare Act (ICWA), custody can be given to an Indian Custodian under tribal law.
  - **Powers of Attorney:** In California, custody of a minor cannot be transferred from a parent to a nonparent without order of a judge. Documents called "Power of Attorney for Minor Child" or "Short-term Guardianship" do not transfer legal or physical custody. Notarization does not make such documents any more effective.
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## II. PROBATE GUARDIANSHIP: AN OVERVIEW

### ACTIVITY- CASE SCENARIO I

Jane has been caring for her 1-year-old grandson (John) consistently since his birth. John's mother (Samantha), who is Jane's daughter, also lives in the home. Samantha comes and goes from the house. Samantha sleeps most of the day but will watch John, feed him, and change his diaper a few hours before she goes out each day. She does not have a steady job but she collects WIC for John and gives it to Jane. John is covered under Medi-Cal. He is current on his vaccinations because Jane makes the appointments and takes Samantha and John to the appointments. Samantha does not Samantha started dating a man named Frank. Jane does not know Frank but has heard from the neighbors that Frank is a drug dealer and pimp. Samantha has talked about moving in with Frank. Jane is worried.

- Can Jane file for guardianship? Can Jane get a temporary guardianship to prevent Samantha from taking John away from her home? What if John is developmentally behind and Samantha will not allow him to be assessed or receive services?
- What are Jane's options? What other information is needed for your investigation?

## II. PROBATE GUARDIANSHIP: AN OVERVIEW

### ACTIVITY- CASE SCENARIO 2

Jeff has a 15-year-old son (Peter) and a 3-year-old daughter (Clarissa) and they live in Contra Costa County. Jeff's wife (Sharon), who is also Peter's mother, died a year ago. Jeff does not have any family nearby to help him. Peter has started smoking pot and skipping school. Jeff is overwhelmed and has asked his sister (Karen), who is Peter's paternal aunt and lives in Kern County, to help him and care for Peter.

- Can Jeff file for guardianship? Can Karen file for guardianship? If so, where should the petition be filed?
- Is temporary guardianship needed in this case?
- What other options are available to Jeff and/or Karen?
- Are there any concerns with Clarissa remaining in Jeff's care and custody?



## II. PROBATE GUARDIANSHIP: AN OVERVIEW **TERMINATION**

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### **By operation of law a guardianship ends when:**

- Death of ward, ward turns 18 years old or ward is emancipated, married, or joins armed forces
- A parent, legal guardian, and/or ward (if 12 years or older) may petition to terminate a non-ICWA guardianship.
  - \*Note: This list does not include any other relatives or other persons. (Probate Code § 1601)
- The sole criterion for termination of a guardianship is “best interest”. (Id., Guardianship of L.V., 136 Cal.App. 4th 481, 489)

\*Note: Probate Code § 1601 does not mandate a court investigation.

### III. COURT INVESTIGATIONS

## **ACTIVITY- LET'S BEGIN (CHECKLIST)**

You get a guardianship case assigned to you, what next?

### III. COURT INVESTIGATIONS

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Regardless of whether the child or proposed guardian are related, there is a court investigation completed per Probate Code §1513.

**NON-RELATIVE:** If the child and the proposed guardian are **not related**, the local county social services will perform the investigation and provide the court with a report.

**RELATIVE:** In guardianship between relatives, the court investigator will conduct the investigation and provide the court with a report.

### III. COURT INVESTIGATIONS ACTIVITY- CASE SCENARIO

Heidi was 16-year-old Jolene's mother. Heidi had Jolene when she was a minor and chose to have her parental rights terminated. Heidi's grandfather (Roy) adopted Jolene. Roy lost his home about 7 months ago. He was living in the Alameda County with Jolene and in the same county as Heidi. However, since losing his home, Roy has been living with Jolene out of his car and motels; they have "living" in Mendocino County for the last 6 months. Roy was hospitalized last week. Jolene called Heidi and asked to come live with her. Roy is still in the hospital.

- Can Heidi file for guardianship? Where should Heidi file her petition?
- Is temporary guardianship needed in this case?
- Is this an investigation per Probate Code §1513(a)?

### III. COURT INVESTIGATIONS PROBATE CODE §1513

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(a) Unless waived by the court for good cause, a court investigator, probation officer, or domestic relations investigator shall make an investigation and file with the court a report and recommendation concerning each proposed guardianship of the person or guardianship of the estate. Investigations where the proposed guardian is a relative shall be made by a court investigator. Investigations where the proposed guardian is a nonrelative shall be made by the county agency designated to investigate potential dependency. The report of the investigation for a guardianship of the person shall include, but need not be limited to, a discussion of all of the following:

### III. COURT INVESTIGATIONS

## **PROBATE CODE §1513- CONTINUED**

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(1) A social history of the proposed guardian.

(2) A social history of the proposed ward, including, to the extent feasible, an assessment of any identified developmental, emotional, psychological, or educational needs of the proposed ward and the capability of the proposed guardian to meet those needs.

(3) The relationship of the proposed ward to the proposed guardian, including the duration and character of the relationship, the circumstances under which the proposed guardian took physical custody of the proposed ward, and a statement of the proposed ward's wishes concerning the proposed guardianship, unless the proposed ward's developmental, physical, or emotional condition prevents the proposed ward from forming or stating their wishes concerning the proposed guardianship.

(4) The duration of the guardianship anticipated by the parents and the proposed guardian and the plans of each parent and the proposed guardian to provide a stable and permanent home for the child. The court may waive this requirement when no parent is available.

### III. COURT INVESTIGATIONS

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**Review File:** Determine proper venue (is there guardianship in another county or custody order issued?), confirm petitioner is a relative, determine if the case is contested (i.e. signed consent form, parental absence), and determine if referral per Probate Code §1513(b) is needed.

**Conduct Background Checks:** Criminal History, DMV, Domestic Violence and Department of Justice Child Abuse Index.

**Records:** Children and Family Services, school, medical and police reports.

**Conduct Interviews:** Proposed Guardian, parents, child, siblings, and other (family members, teachers, doctors, therapists and neighbors)

**Write & Submit Report:** The reports shall be made available to all parties entitled to receipt no less than three court days before the hearing on the guardianship petition. (Probate Code §1513 (d))

### **ADDITIONAL RESOURCES:**

Judicial Council form GC-205– Information on Probate Guardianship of the Person

Judicial Council form GC-207– Comparison of Guardians with Other Nonparent Caregivers

### **QUESTIONS?**

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