

REPRESENTING MINORS IN GUARDIANSHIP PROCEEDINGS



REPRESENTING MINORS IN PROBATE GUARDIANSHIP CASES



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- ▶ Oliver Greenwood is the founder of the Pleasant Hill, California based law firm, Law Offices of Oliver Greenwood. He received his B.A. from the University of California, Berkeley and his J.D. from Golden Gate University in San Francisco. He is a former member of the Probate and Mental Health Advisory Committee. Mr. **Greenwood's areas of practice include conservatorships**, guardianships, wills, trusts, probate, and estate planning. Previously he worked as a magician, a dishwasher, and an enlisted infantryman in the US Marine Corps.
- ▶ Former Member of Judicial Council Probate & Mental Health Advisor Committee
- ▶ Contributing Author to The California Conservatorship Practice (Cal CEB), California Powers of Attorney and Health Care Directives (Cal CEB), and the California Guardianship Practice (Cal CEB)



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- ▶ Lara Heisler has been practicing law for over 20 years and specializes in conservatorships and guardianships. She grew up in Contra Costa County and is passionate about serving the community where she grew up and is raising her children. She lives in Walnut Creek with her husband, daughter, and son. Lara is not only active in the local legal community, but she is committed to involvement in **her children's schools.**
- ▶ Bar Admissions:
- ▶ California State Bar
- ▶ New York State Bar (Inactive)
- ▶ Heisler Rosenfeld LLP is a family-oriented boutique law firm located in Contra Costa County and serving the greater East Bay. Our specialty is estate planning, trust administration, and all aspects of probate and estate litigation, including conservatorships and guardianships.



AGENDA:

- ▶ Why Probate Court?
- ▶ Basic Guardianship Principles
- ▶ I am Appointed- What Now?
- ▶ How Do I Qualify for Court Appointment?
- ▶ What Does Probate Court Expect of Me?
- ▶ Why Did I Agree to This?



Why Probate Court?

Custody cases in
Probate Court?

Isn't Probate
Court for really
old or really
dead people....





It started
with the
orphans...

Long ago, when the Probate Court was deciding what to do with a deceased person's assets that same court naturally determined where an orphaned child should live.

As our legal systems evolved, and custody disputes became more complex, involving issues of parental abuse/neglect, or conflict between the parents, Dependency Court and Family Court created more robust resources for tackling custody matters.



DEPENDENCY COURT - CUSTODY ISSUES- FOSTER CARE and CPS

- ▶ As a rule of thumb, Family Court trumps Probate Court, and Juvenile Dependency Court (aka Dependency Court) trumps Family Court when it comes jurisdictional issues in child custody disputes. Probate Court is often the last chance for kids to settle in to a safe and stable home life.
- ▶ Dependency Court handles custody cases when Child Protective Services has substantiated allegations of child abuse or neglect. In Dependency Court, all parties (parents, children, social service agencies) are represented by attorneys.
- ▶ Moreover, in Dependency Court, services such as counseling, parenting classes, and drug testing are provided to the parties. Dependency Court has the authority to place children with relatives or non-relatives (ie foster care, group homes.)





Kramer vs. Kramer

FAMILY COURT - CUSTODY

Family Court handles cases when parents cannot agree on child custody, parentage, and parental/grandparental visitation. In Family Court, attorneys are often appointed to represent minors, and parents are usually represented by attorneys. Family Court often oversees complex financially support orders, parental custody and visitation orders that contemplate holidays, adoption cases and of course, divorce proceedings. Generally, there are Family Law Facilitators or Mediators available to the parties to help work through practical and legal obstacles that exist in difficult custody disputes.

PROBATE COURT - CUSTODY

- ▶ Probate Court handles custody cases when a relative or a friend is willing to assume legal responsibility for the child when parental custody is problematic.
- ▶ The person seeking guardianship must be able to provide the Court with evidence that parental custody would be harmful and that a guardianship would be **in the minor's** best interest.
- ▶ Pro Per
- ▶ Court Investigator
- ▶ Mediation





Basic Guardianship Principles



ISSUE SPOTTING

- ▶ In many guardianship proceedings there are allegations of illegal drug use (usually by the parents) or alcohol abuse.
- ▶ Domestic violence is a common issue as well. These are not in themselves determinants of whether the guardianship should be granted. But, of course, they are very important in deciding what detriment there would be for the child to reside in the households involved.
- ▶ Conflicts about visitation rights are also common.
- ▶ The minor may have suffered serious abuse or neglect, requiring the minor's needs to be balanced against the parents' constitutional rights.

WHEN DOES A MINOR NEED COURT APPOINTED COUNSEL- Family Law?



► Rule 5.240. Appointment of counsel to represent a child in family law proceedings

►(a) Appointment considerations

- In considering appointing counsel under Family Code section 3150, the court should take into account the following factors, including whether:
 - (1) The issues of child custody and visitation are **highly contested** or protracted;
 - (2) **The child is subjected to stress** as a result of the dispute that might be alleviated by the intervention of counsel representing the child;
 - (3) Counsel representing the child would be likely to **provide the court with relevant information** not otherwise readily available or likely to be presented;
 - (4) The dispute involves **allegations of** physical, emotional, or sexual **abuse** or neglect of the child.
 - (5) It appears that one or both **parents are incapable of providing a stable, safe, and secure environment**;
 - (6) Counsel is available for appointment who is knowledgeable about the issues being raised regarding the child in the proceeding;
 - (7) The **best interest** of the child appears to require independent representation; and
 - (8) If there are two or more children, any **child would require separate counsel to avoid a conflict of interest.**

Probate Code §1514(a)

- ▶ Probate Code §1514(a) provides that a guardianship of the person or estate may be granted if it is **necessary** or **convenient** for the minor's benefit.
- ▶ However, if a parent objects to a petition to appoint a nonparent as guardian of the person, the guardianship can be granted only if the court finds that **parental custody would be detrimental** to the minor and that granting the petition would be in the **minor's best interest**. Fam C §3041(a).



MATTERS TO BE CONSIDERED IN GRANTING CUSTODY: **FAM. CODE §3041.**



3041. (a) Before making an order granting custody to a person other than a parent, **over the objection of a parent**, the court shall make a finding that granting custody to a parent would be **detrimental to the child** and that granting custody to the nonparent is required to serve the **best interest of the child.**

Allegations that parental custody would be detrimental to the child, other than a statement of that ultimate fact, shall not appear in the pleadings. The court may, in its discretion, exclude the public from the hearing on this issue.

FAM. CODE 3041 Cont...

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

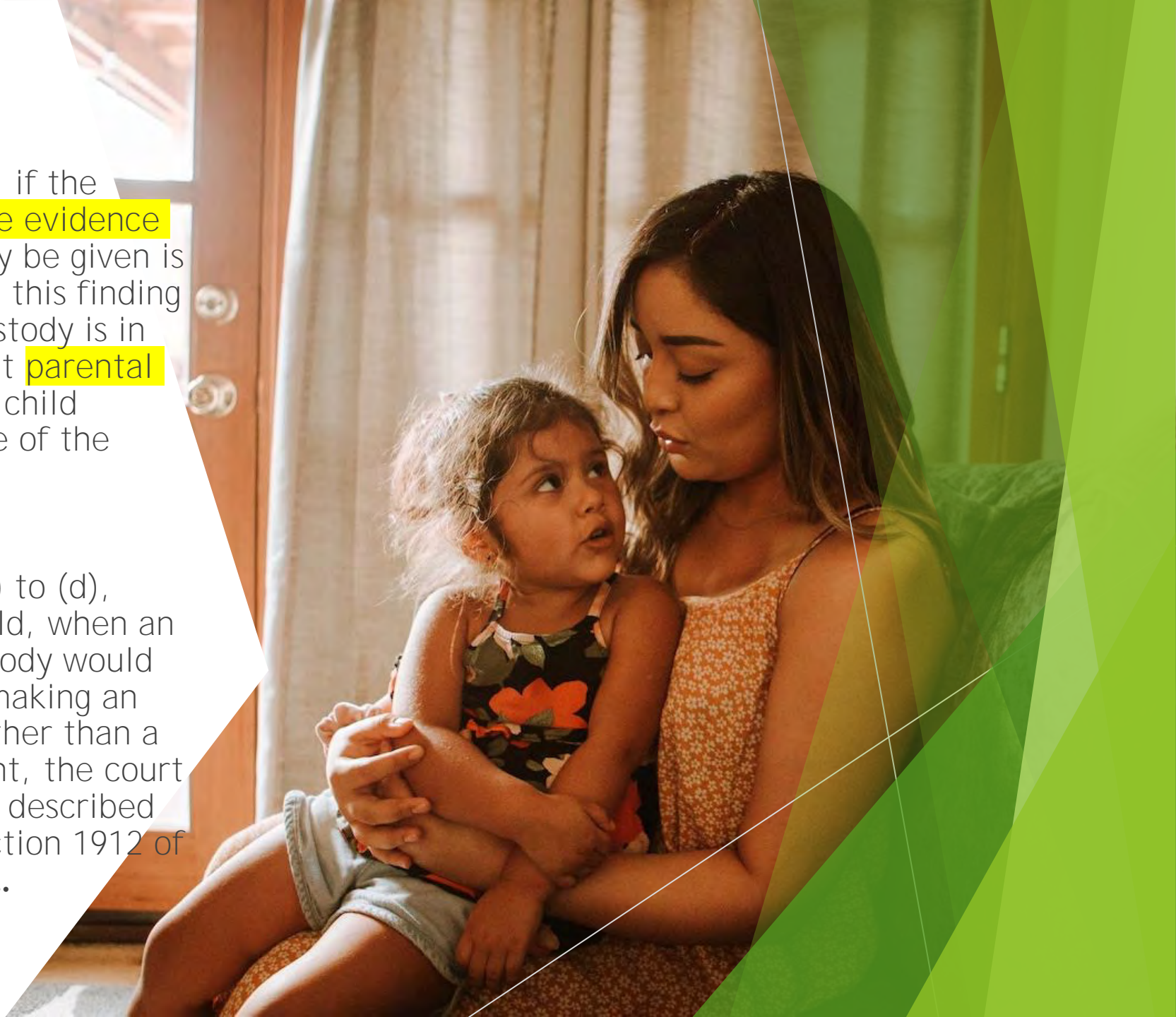
(c) As used in this section, “detriment to the child” includes the harm of removal from a stable placement of a child with a person who has assumed, on a day-to-day basis, the role of the child’s parent, fulfilling both the child’s physical needs and the child’s psychological needs for care and affection, 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.



►(d) 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.

►(e) Notwithstanding subdivisions (a) to (d), inclusive, if the child is an Indian child, when an allegation is made that parental custody would be detrimental to the child, before making an order granting custody to a person other than a parent, over the objection of a parent, the court shall apply the **evidentiary standards** described in subdivisions (d), (e), and (f) of Section 1912 of the **Indian Child Welfare Act (ICWA)**...

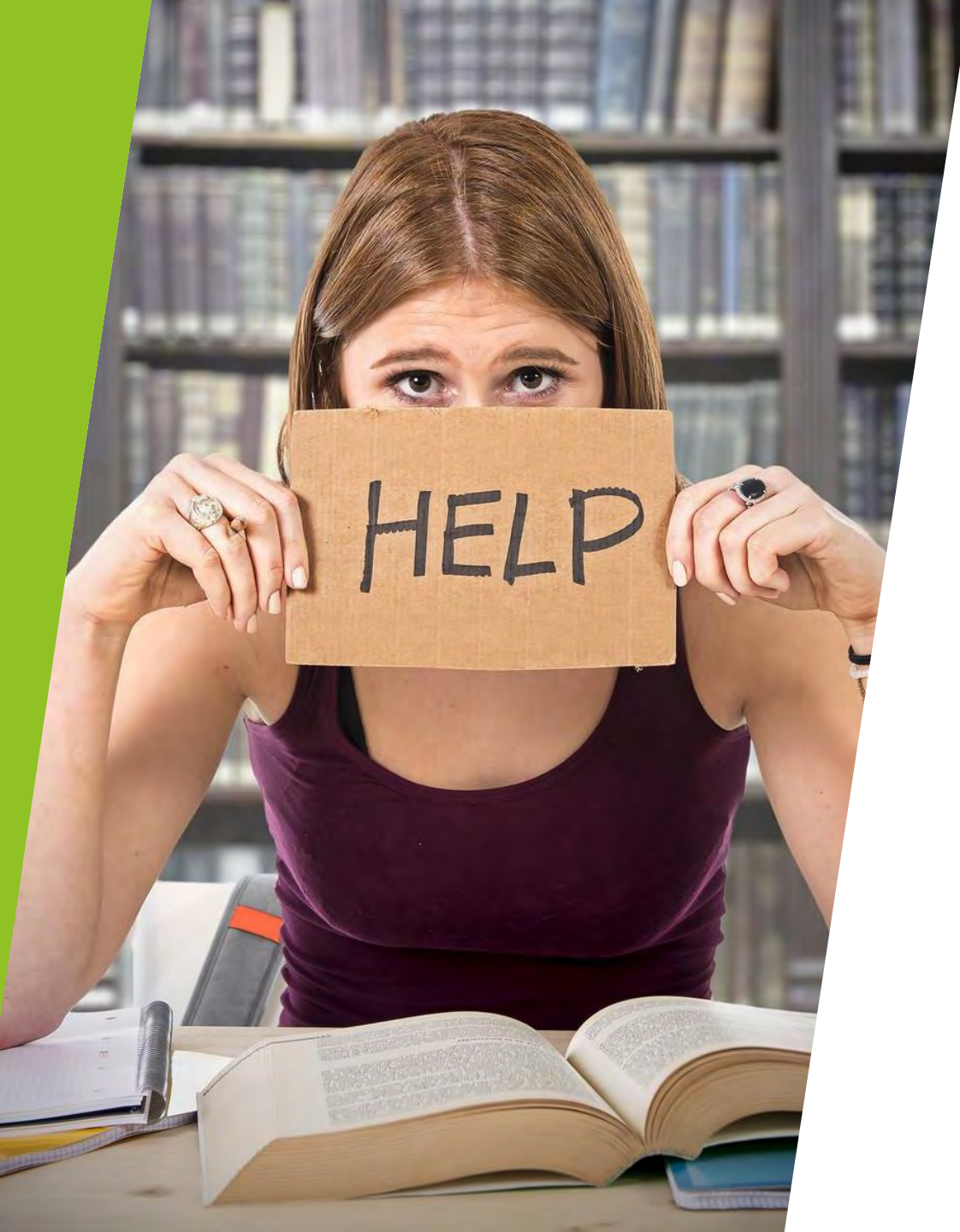


Cal. Fam. Code § 3042 WISHES OF CHILD CONSIDERED

► (a) If a child is of sufficient age and capacity to reason so as to form an intelligent preference as to custody or visitation, the court shall consider, and give due weight to, the wishes of the child in making an order granting or modifying custody or visitation.

► (b) In addition to the requirements of subdivision (b) of Section 765 of the Evidence Code, the court shall control the examination of a child witness so as to protect the best interest of the child.





Fam. Code § 3042 (cont.) WISHES OF CHILD CONSIDERED

- ▶(c) If the child is 14 years of age or older and wishes to address the court regarding custody or visitation, the child shall be permitted to do so, unless the court determines that doing so is not in the child's best interest, in which case, the court shall state its reasons for that finding on the record.
- ▶(d) This section does not prevent a child who is less than 14 years of age from addressing the court regarding custody or visitation, if the court determines that is appropriate pursuant to the child's best interest.
- ▶(e) If the court precludes the calling of a child as a witness, the court shall provide alternative means of obtaining input from the child and other information regarding the child's preferences.

Fam. Code § 3042 (cont.)

WISHES OF CHILD CONSIDERED

(f)(1) Except as provided in paragraph (2), the court shall not permit a child addressing the court regarding custody or visitation to do so in the presence of the parties. The court shall provide an alternative to having the child address the court in the presence of the parties in order to obtain input directly from the child.

2) Notwithstanding paragraph (1), the court may permit the child addressing the court regarding custody or visitation to do so in the presence of the parties if the court determines that doing so is in the child's best interest and states its reasons for that finding on the record. In determining the child's best interest under this paragraph, the court shall consider whether addressing the court regarding custody or visitation in the presence of the parties is likely to be detrimental to the child.





Fam. Code § 3042 (cont.)

►(g) To assist the court in determining whether the child wishes to express a preference or to provide other input regarding custody or visitation to the court, **a minor's counsel...** shall indicate to the judge that the child wishes to address the court, or the judge may make that inquiry in the absence of that request. A **party ... may also indicate to the judge** that the child wishes to address the court...

►(h) If a child informs the minor's counsel...that the child has changed their choice with respect to addressing the court, the **minor's counsel ... shall**, as soon as feasible, **indicate** to the judge, the **parties ... serving on the case** that the child has changed their preference.

►(i) This section **does not require the child to express to the court a preference** or to provide other input regarding custody or visitation.



How Do I Qualify For Court Appointment?



Attorney Qualifications

► All attorneys, including solo practitioners and employees of private law firms, legal services organizations, and public **defender's offices, must meet** certain minimum qualifications before appointment as counsel for a minor in a guardianship matter under Prob C §1470. Cal Rules of Ct 7.1101(a).

CONFLICTS PROGRAM



<https://www.conflictprogram.org/>

To be a member of the panel, attorneys must maintain offices in Contra Costa and conduct the majority of their business in the county, maintain professional liability insurance, and must be active members of the California State Bar.

Attorneys are paid based on the case difficulty, ranging from \$89 to \$130 per hour for out-of-court time, and \$99 to \$166 per hour for jury trials and contested hearings.

To apply to become a Conflict Program panel attorney, please visit: www.conflictprogram.org, email: admin@criminalconflict.org or call (925) 229-4410.



CONFLICTS PROGRAM

▶ <https://www.conflictprogram.org/>

▶ CONSERVATORSHIP
▶ (STANDARD-NO ESTATE, STANDARD WITH
▶ PUBLIC BENEFITS), PROBATE GUARDIANSHIP
CONSERVATORSHIP COMPLEX

▶ All services \$ 154.00/hour

▶ ATTORNEY TRAVEL RATE \$35.00/hour

▶




► Practitioners must complete and file a Certification of Attorney Concerning Qualifications for Court Appointment in Conservatorships or Guardianships (Judicial Council Form GC-010) before being appointed as counsel by the court.

► Appointed attorneys must file a completed Annual Certification of Court-Appointed Attorney (Judicial Council Form GC-011) each year before the end of March, reporting the completion of their continuing education requirements, the status of their insurance coverage, and any change in disciplinary history.



► Attorneys lacking the requisite experience-based qualifications may qualify for appointment by working closely with, or being supervised by, a mentoring attorney who has satisfied all of the experience requirements. Cal Rules of Ct. 7.1103(b).



Appointments to represent children in custody proceedings under the Family Code under Cal Rules of Ct 5.242, including the alternative experience requirements of Cal Rules of Ct 5.242(g) (Cal Rules of Ct 7.1102(a)(2)(A)).

- ▶ In addition, Cal Rules of Ct 7.1102(c)-(d) requires that counsel complete 3 hours of education each year covering one of the following subjects:
- ▶ Statutes, rules of court, and case law governing probate guardianship proceedings and the legal rights of parents and children;
- ▶ Child development, including techniques for communicating with a child client; and
- ▶ Risk factors for child abuse and neglect and family violence.

- ▶ Appointees must also meet the following specific experience requirements:
- ▶ Within the 5 years immediately before the date of first availability for appointment after January 1, 2020, he or she **must have represented at least three minors** or proposed minors in probate guardianships, three children in juvenile court dependency or delinquency proceedings, or three children in custody proceedings under the Family Code (Cal Rules of Ct 7.1102(a)(1));
- ▶ Or
- ▶ At the time of first availability for appointment, he or she must be working under the direction of an attorney qualified for appointments to represent children in **juvenile dependency proceedings under Cal Rules of Ct 5.660 and the court's local** rules governing court-appointed juvenile court dependency counsel (Cal Rules of Ct 7.1102(a)(2)(A));





► Panel of counsel eligible for appointment

- (1) Each court may create and maintain a list or panel of counsel meeting the minimum qualifications of this rule for appointment.
- (2) If a list or panel of counsel is maintained, a court may appoint counsel not on the list or panel in special circumstances, taking into consideration factors including language, culture, and the special needs of a child in the following areas:
 - (A) Child abuse;
 - (B) Domestic violence;
 - (C) Drug abuse of a parent or the child;
 - (D) Mental health issues of a parent or the child;
 - (E) Particular medical issues of the child; and
 - (F) Educational issues.
- (3) If the court maintains a panel of counsel eligible for appointment and the court appoints counsel who is not on the panel, the court must state the reason for not appointing a panel counsel in writing or on the record.
- (4) Any lists maintained from which the court might appoint counsel should be reviewed at least annually to ensure that those on the list meet the education and training requirements. Courts should ask counsel annually to update their information and to notify the court if any changes would make them unable to be appointed.

- Be an active member of the State Bar of California or a registered legal aid attorney qualified to practice law under [Rule 9.45](#). [Cal Rules of Ct 7.1101\(c\)\(1\)](#).
- Have no professional discipline imposed in the 12 months preceding the date of first availability for appointment. [Cal Rules of Ct 7.1101\(c\)\(2\)](#).
- Be covered by professional liability insurance or covered for professional liability through a self-insurance program with coverage limits of not less than \$100,000 per claim and \$300,000 per year. [Cal Rules of Ct 7.1101\(c\)\(3\)](#).
- Meet the applicable qualifications set out in [Cal Rules of Ct 7.1101–7.1105](#) and any additional requirements set by local rule. [Cal Rules of Ct 7.1101\(c\)\(4\)–\(5\)](#).





I'm
Appointed
- What
Now?



EXPLAINING YOUR ROLE TO THE MINOR

- ▶ “I am your court-appointed counsel. Part of my job is to find out from you what it is what you want, and what you think is best.
- ▶ Another part of my job, because you are not yet an adult, is to make up my own mind about what I believe is going to be best for you.
- ▶ It is my duty to tell the judge both things: What you say you want and what I think is best. Then **the judge will make a decision.**”
- ▶ **If the guardian’s attorney can help a guardian understand the role of minor’s counsel, it can** ease tensions between the parties and take some of the focus off of the minor, who may be subjected to pressure from parents or petitioners **to “tell your lawyer” various misleading statements.**
- ▶

ROLE OF MINOR'S COUNSEL



► For minors who are the subject of guardianship proceedings, every aspect of their lives will depend on the outcome—including their schooling, their health care, where they live, what they eat, how they will be treated every day, and what values will be instilled in them.

► There is considerable **pressure on you as minor's attorney**, not only from the parties, but also because a **child's entire future** depends on the result of the proceeding.

MEETING WITH THE CHILD

- ▶ **Minor's counsel should consider taking the minor out of the home** where the minor is residing to conduct initial conversations and establish trust.
- ▶ **Meeting minors at counsel's office, in a private area at a restaurant, driving around minor's neighborhood, or even at the minor's school** often yields great rewards in establishing rapport between minor and minor's counsel.
- ▶ **Of course, privileged communications about the minor's guardian preference or discussion of allegations of parental abuse or neglect must be conducted in private.** However, devoting an hour of time to meeting in a casual or relaxed atmosphere will establish long-term trust and rapport between minor and his or her attorney



WORKING WITH THE CHILD

- ▶ If the child is four years of age or older, counsel shall interview the child to determine the child's wishes and assess the child's well-being, and shall advise the court of the child's wishes.
- ▶ Counsel shall not advocate for the return of the child if, to the best of his or her knowledge, return of the child conflicts with the protection and safety of the child.



MINOR'S STATE OF MIND

► A common challenge for court appointed counsel for minors is developing a bond with the minor, who is often traumatized by the tragedy or conflict that led to filing of a guardianship petition.

► **Minor's counsel should consider taking** the minor out of the home where the minor is residing to conduct initial conversations and establish trust.



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Chrisoula Workman

RIOR COURT OF THE S.

FOR THE COUNTY OF LO.

Person and Estate of:) Case No.: BP 137032

AN.)

A minor.)

REPLY DECLARATION TO
RESPONSIVE DECLARATION OF
SHANELLE GRAY IN OPPOSIT
TO CHRISOULA WORKMAN'S
MOTION TO COMPEL PRODU
OF DOCUMENTS AT THE
DEPOSITION OF SHANELLE

Date: December 3, 2012 BY

Time: 10:00 a.m.

Dept: 11



Visits and Observations

- ▶ Visit the client during time with the guardian.

- ▶ Also visit the client during time with a parent, or other interested parties who may be a suitable alternative to either parent or proposed guardian.

- ▶ It is so important to respect the bonds that the child has developed with the various parties, and it can take some digging to figure out what the child wants or child needs.

- ▶ Attorneys often balk at this notion, noting that they are not social workers or therapists.

- ▶ **Our job as minor's counsel is to understand all** the dynamics at play, and to do right by our clients while also being aware of the generational impacts guardianships have within a family unit.

BONDING WITH MINOR

► **Serving as Minor's Counsel** requires a difficult balancing of interests. When your client is a child, you are often straddling the line between acting as an advocate for what the child claims to want while also acting as a guardian ad litem, **acting as an advocate for the child's best interests.**

► Certainly, the minor's wishes must be considered, along with the minor's level of maturity. To fulfil your role as minor's counsel, you must be able to put yourself in the child's shoes, even if those shoes are baby booties.

► While you can't ask a toddler to articulate a preference, you can - and must- observe the child in competing contexts.



REPORT OF MINOR'S COUNSEL

- Preparing a written report of minor's counsel makes the Court happy. Minor's counsel reports can also be helpful to the parties, the court investigator, and attorneys.
- The downside is these reports are public record, and submitting a report can impact your ability to work cooperatively with the parties. Be careful what you put in writing! Some suggested headings:
- Factual Background
- Report and Recommendations,
- Home Visits/Contacts/Meetings
- Analysis and
- Recommendations

6	Attorneys for Minor Marcus Johnson	
7	SUPERIOR COURT OF THE STATE OF CALIFORNIA	
8	FOR THE COUNTY OF CONTRA COSTA	
9		
10		
11	In the Matter of the Guardianship of the	Case #: MSP14-00913
12	Person of:	REPORT AND RECOMMENDATIONS
13	MARCUS JOHNSON	OF MINOR'S COUNSEL
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15		Date: January 24, 2020
16		Time: 9:30 A.M.
17		Dept: 30
18		Judge: Honorable Virginia George
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18	FACTUAL BACKGROUND
19	The Minor, MARCUS JOHNSON ("Marcus") is a sweet, bright 6 year old boy
20	whose who has been living with his guardian, Jeti Hanna, since he was approximately
21	6 months old.
22	Soon after Marcus' birth, his young mother, Elisa Johnson ("Mother"), stayed
23	with Jeti, who was a family friend/child care provider for Marcus. According to Court
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4	Marcus told me he felt "funny" seeing his mom and Jeti together. He was glad to see Mother and wanted to spend more time with her.
5	When Marcus and I returned to the table, Mother and Jeti were talking about what should happen next. Jeti and Mother were talking about what should happen next. We all brainstormed options for what should occur in a neutral place. We all brainstormed options for what should occur in a neutral place. We all brainstormed options for what should occur in a neutral place.
6	at a Barnes and Noble, and that Mother would attend some of the parties. All parties seemed happy with this plan, with Jeti needed to take baby steps moving forward.
7	C. Analysis
8	Considering the bond Marcus has developed with his grandchildren, retaining his stable home environment with their relationship is of paramount importance. If Mother is of regaining custody, Marcus will need a gradual transition of regaining custody. Marcus will need a gradual transition of regaining custody. Marcus will need a gradual transition of regaining custody.
9	Whether de facto parenthood exists is not based on biological parent or the manner in which the de facto parent it is based on the quality of the relationship between the child and the parent. (Vaughn, supra, 207 Cal. App. 4th at p. 1072.)
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CHILD TESTIMONY - Part One



► The issue of whether to have the minor testify is often a difficult one. Certainly, the minor's attitudes, perceptions, and observations are relevant to the proceedings. See [Fam C §3042](#); [Prob C §1514\(e\)\(2\)](#).

► The minor's age and level of maturity are obviously factors in this decision; calling a 3-year-old child to the stand would be silly, but if the guardianship involves a 17-year-old minor, it would be unusual for the minor not to be a witness.

► The minor's thoughts and wishes are typically presented to the court as part of the other evidence introduced, such as the court investigator's report, minor's counsel's report, the parties' testimony, and other evidence such as the report of an [Evid C §730](#) expert.

► Children are highly suggestible, so the statements they make in court about the parents and others while in their presence should not be given special credibility. See Ceci & Bruck, *Suggestibility of the Child Witness: A Historical Review and Synthesis*, 113 Psychological Bull 403 (1993).

► Some judges do want minors present, or at least available in the hallway, to be able to question the minors directly.

► In contested proceedings for guardianship of the person, being present in the courtroom, listening to the testimony that is often vitriolic and highly emotional regarding the parents and others on whom the minor is totally dependent, can add significantly to the emotional trauma commonly experienced by minors during guardianship proceedings.

► Minors often feel guilty about the unhappiness of the adults involved, concluding that this is somehow their fault. Testifying about their preferences can increase this sense of guilt.

CHILD TESTIMONY - Part Two



CHILD TESTIMONY - Part Three



► Having counsel for the minor can be particularly valuable when considering child testimony.

► **Minor's counsel's job is to protect** the minor from unnecessarily difficult situations, and to help the minor understand that the court is considering the minor's wishes but that the decision is the court's responsibility, not the minor's.

► Another variable to consider is how the court will perceive the decision to call a minor to testify.

► The judge may conclude that the party who puts an emotionally fragile minor on the witness stand is more interested in beating the opposing party than in caring for the minor.

De Facto Parent/Shifting Burden of Proof

- ▶ If the court finds by a preponderance of the evidence that, for a substantial period of time, the proposed guardian has been providing a stable placement of the minor and has assumed, on a day-to-day basis, the role of parent, fulfilling both the child's physical needs and psychological needs for care and affection, then *it is presumed that removing the minor from the proposed guardian's care would be detrimental*.
- ▶ The burden of proof is to then show that the contrary is preponderance of the evidence.
- ▶ Fam C §3041(c)–(d).
- ▶ It is immaterial whether this relationship with the proposed guardian is the result of a temporary guardianship in the proceeding. *Guardianship of Vaughan* (2012) 207 CA4th 1055.



DE FACTO PARENTS/DETRIMENT

- ▶ Absent a finding that the proposed guardian has a quasi-parental relationship with the minor, the guardianship can be granted *only if* the detriment to the child in remaining in the parent's custody is proven by *clear and convincing evidence*, the same as the burden of proof in juvenile dependency proceedings.
- ▶ See Fam C §3041(b). See also *Guardianship of Jenna G.* (1998) 63 CA4th 387; *Guardianship of Stephen G.* (1995) 40 CA4th 1418. Once detriment has been proven, it constitutes a finding as to whether the guardianship would be in the best interest of the minor. Fam C §3041(d).



Dependency Guidelines for Minor's Counsel

Welf. & Inst. §317

- ▶ Attorneys charged with the duty of representing foster children in the juvenile court system have a tremendous responsibility. It is important for all child advocates to be familiar with Welfare and Institutions Code Section 317(e), which lays out the roles and responsibilities of attorneys charged with the representation of a child in foster care:
- ▶ "317 (e)(1) Counsel shall be charged in general with the **representation of the child's interests.**
- ▶ To that end, counsel shall ...[make/cause] investigations that he or she deems in good faith to be reasonably necessary to **ascertain the facts**, including the **interviewing of witnesses**, and shall **examine and cross-examine** witnesses in both the adjudicatory and dispositional **hearings.**



Dependency Guidelines W & I §317 (Cont.)

- ▶ Counsel may introduce and examine his or her own witnesses, **make recommendations** to the court concerning the child's welfare, and participate further in the proceedings to the degree necessary to adequately represent the child.
- ▶ When counsel is appointed to represent a nonminor dependent, counsel is charged with representing the wishes of the nonminor dependent except when advocating for those wishes conflicts with the **protection or safety** of the nonminor dependent.
- ▶ If the court finds that a nonminor dependent is not competent to direct counsel, the court shall appoint a **guardian ad litem** for the nonminor dependent.



MINOR'S WISHES

► Certainly, the minor's wishes must be considered, along with the minor's level of maturity.

► (Contrary to common belief, the **minor's wishes do not suddenly** become relevant when the minor reaches a particular age.) See Fam C §3042.

► However, it is ultimately for the court to determine whether the **minor's wishes are in the minor's** best interest.



"The witness will confine his 'Knock knock' answers to 'Who's there?'"

Warning to Estate Planners: Nomination of Guardian is Not All That



► In contested proceedings for the appointment of a guardian of the person when both parents are deceased, one or both parties often seek to present evidence about whom the parents would favor as guardian if they were alive.

► This problem arises when the parents did not nominate a guardian or when the nominee cannot serve. Because deceased parents obviously cannot be present in court, the question arises whether a third person can testify about statements made by them during lifetime expressing their wishes. Such statements are obviously hearsay and can be introduced only if they come within an exception to the hearsay rule.

► Because the statements are offered to prove the parents' state of mind, Evid C §§1250–1252 seem to permit the evidence. See California Trial Objections §19.24 (Cal CEB).

► Although the parents' statements may be admissible, the weight the trier of fact should give them depends on the circumstances under which they were made.

► The attorney opposing the evidence, if it is admitted, should emphasize countervailing considerations, *e.g.*, the fact that the statements were made when the child was an infant (if the child is now much older), the fact that the person mentioned has, *e.g.*, been divorced, moved from the area, or had some other significant change in his or her personal situation.



► In some situations, it may be an abuse of discretion for the court not to appoint counsel for the minor in proceedings for guardianship of the person.

► When a conflict exists that will determine the home in which the minor **will be raised, the minor's interest is so** fundamental that it merits substantive due process protection. *Guardianship of Zachary H.* (1999) 73 CA4th 51.

What does the Probate Court Expect of Me?



► Discretionary Appointment of Counsel

► There is no guardianship equivalent to Prob C §1471 (applicable to conservatorships) mandating the appointment of counsel for the minor in guardianship appointment proceedings.

► Probate Code §1470(a) permits the court to appoint counsel for the minor if **appointment would “be helpful to the resolution of the matter” or “is necessary to protect the person’s interests.”**

► Similarly, the court has discretion under Fam C §3150 to appoint counsel to **represent the child’s interest. The court must consider appointment of counsel** for a nonparty minor if the minor will be called to testify. Cal Rules of Ct 7.1016(e)(5).



What the Court Expects

- ▶ Attorneys or their agents are **expected to meet regularly with clients**, including clients who are children, **regardless of the age** of the child or the child's ability to communicate verbally, **to ... professionals associated with the ... case, to work with other counsel and the court to resolve disputed aspects of a case without contested hearing**, and to adhere to **...timelines**.
- ▶ The attorney for the child must have **sufficient contact ...to establish and maintain an adequate ... attorney-client relationship**.
- ▶ *The attorney for the child is not required to assume the responsibilities of a social worker and is not expected to perform services for the child that are unrelated to the child's legal representation.*
California Rule of Court 5.660(d)(4)
(EASIER SAID THAN DONE)



Working with the Investigator

Minor's counsel should think of court investigators the way that criminal defense attorneys think of private investigators – a secret weapon of sorts. Court investigators are a huge resource for information and advice.

It is always a good idea to **reach out to the investigator** assigned to the matter and speak directly so that you can compare notes, ask questions, and troubleshoot your concerns as a team.

While you may not always agree with the investigator's recommendations, speaking directly with the investigator helps you develop your theory of the case.

Do not underestimate the value of the input of the investigator. If you and the investigator are flummoxed by a case, you can tag team strategies such as conducting unannounced visits.



Why Advocate?

"Unless someone like you cares
a whole awful lot,
Nothing is going to get better.
It's not."



Dr. Seuss,

The Lorax

ADVOCACY

- ▶ After determining which position to advocate **for the minor, the attorney's role becomes** somewhat more traditional.
- ▶ Formal discovery may be involved, or the appointment of experts for comprehensive evaluations pursuant to Evid C §730.
- ▶ Eventually the matter may be set for trial under the usual rules (including the Evidence Code).
- ▶ Most petitioners in guardianships are relatively unsophisticated and of limited means, appearing in pro per.
- ▶ **A key service of minor's counsel is to prepare** the case for trial so that the relevant evidence is properly presented to the court, *e.g.*, ensuring witnesses are available and important testimony is elicited.

►(b) Request for appointment of counsel

- The court may appoint counsel to represent the best interest of a child in a family law proceeding on the court's own motion or if requested to do so by:
 - (1) A party;
 - (2) The attorney for a party;
 - (3) The child, or any relative of the child;
 - (4) A mediator under Family Code section 3184;
 - (5) A professional person making a custody recommendation under Family Code sections 3111 and 3118, Evidence Code section 730, or Code of Civil Procedure section 2032.010 et seq.;
 - (6) A county counsel, district attorney, city attorney, or city prosecutor authorized to prosecute child abuse and neglect or child abduction cases under state law; or
 - (7) A court-appointed guardian ad litem or special advocate;
 - (8) Any other person who the court deems appropriate.



Minor's Counsel or GAL?

► *(California Code of Civil Procedure § 372)*

- A) When a minor, a person who lacks legal capacity to make decisions, or a person for whom a conservator has been appointed is a party, that person shall appear either by a guardian or conservator of the estate or by a guardian ad litem appointed by the court in which the action or proceeding is pending, or by a judge thereof, in each case.
- B) A guardian ad litem may be appointed in any case when it is deemed by the court in which the action or proceeding is prosecuted, or by a judge thereof, expedient to appoint a guardian ad litem to represent the minor, person who lacks legal capacity to make decisions, or person for whom a conservator has been appointed, notwithstanding that the person may have a guardian or conservator of the estate and may have appeared by the guardian or conservator of the estate.
- (1) Notwithstanding subdivision (a), a minor 12 years of age or older may appear in court without a guardian, counsel, or guardian ad litem, for the purpose of requesting or opposing a request for any of the following: a TRO or Injunction, a Protective Order... or any ... proceedings concerning child custody.





When does it end...?

►(f) Termination of appointment

- On entering an appearance on behalf of a child, counsel must continue to represent that child until:
 - (1) The conclusion of the proceeding for which counsel was appointed;
 - (2) Relieved by the court;
 - (3) Substituted by the court with other counsel;
 - (4) Removed on the court's own motion or request of counsel or parties for good cause shown; or
 - (5) The child reaches the age of majority or is emancipated.

Complaints - Everyone's Mad at Minor's Counsel. Always.

- ▶ Reporting a Problem with a Minor's Attorney
- ▶ In some California counties, a complaint concerning the performance of an attorney appointed to represent a minor may be lodged on the child's behalf by a caretaker, relative, or a foster parent. See our [Local Rules of Court web page](#) to find the rules in your county regarding complaint procedures.



BALANCING INTERESTS



► The role of counsel for the minor generally requires a difficult balancing of interests.

► Although there is no Probate Code equivalent of Fam C §3151, requiring the attorney to advocate for **the minor's best interests**, the same consideration must apply in guardianships.

DEALING WITH PRO PERS



► Guardianships have become ubiquitous because the social welfare departments are understaffed and underfunded. Consequently, when there are no hospital or police records to support concerns of child abuse or neglect, CPS may encourage family members to petition for guardianship.

► CFS workers will hand guardianship paperwork to friends and relatives who are willing to take custody of a child who is alleged to be unsafe with their parents.

► This leads the self-represented potential guardians to believe that because CFS suggested they apply, **they will “win” guardianship.** This misconception is very frustrating to potential guardians, who learn quickly that the guardianship process is lengthy and difficult.

SELL YOUR RECOMMENDATIONS TO THE PARTIES

If you believe parental custody is detrimental for your client, getting the parent to buy in to your point of view changes the dynamic of the case. It is helpful to explain to the parents that a guardianship is not a termination of parental rights but is merely a custody order that can be modified and can encompass parental visitation orders.

Parents and guardians have many misconceptions about what a guardianship is, but most people are familiar with divorce custody disputes. If you can contextualize a guardianship as a custody order focused on the child's best interests, it is easier for the parents to accept a guardianship as a solution to family problems.

Make it clear to the parties that guardianship custody orders may be modified just like divorce custody orders. It can mean the difference between a parent vigorously objecting to or gracefully accepting a proposed guardianship.



Why Did I Agree to This?



COMPASSION IS KEY



► It is important for minor's counsel to consider how much of time, money, and emotional capital that a potential guardian is investing in the child, and it is always a good idea to let the guardian know that you appreciate all that they are doing to **try to improve the child's life.**

► Of course, a positive attitude toward the guardian must be balanced against a widespread, philosophical belief that children belong with their parents.

The Parent Child Relationship is Sacrosanct

- ▶ The law tends to be deferential to parents, and for many good reasons.
- ▶ Never forget that removing a child from the custody of even an objectively unstable parent can result in lifelong trauma to the child.






The Minor's Voice

► As minor's counsel, you are often the lone voice advocating for the best interests of the child.

► And even though trying to **figure out “best interests”** is always challenging and **emotionally taxing for minor's** counsel, it is also the most soul satisfying work you can do as an attorney.



► As minor's counsel, you can experience, in real time, how your work can make a huge difference in a child's life.

► Nothing feels better than being able to help a child obtain a safe, loving and happy home - either with parents or guardians.



CONFLICTS PROGRAM



<https://www.conflictprogram.org/>

To be a member of the panel, attorneys must maintain offices in Contra Costa and conduct the majority of their business in the county, maintain professional liability insurance, and must be active members of the California State Bar.

Attorneys are paid based on the case difficulty, ranging from \$89 to \$130 per hour for out-of-court time, and \$99 to \$166 per hour for jury trials and contested hearings.

To apply to become a Conflict Program panel attorney, please visit: www.conflictprogram.org, email: admin@criminalconflict.org or call (925) 229-4410.