

***Protocol for Guardianships in
The Juvenile, Family, Probate, and Domestic Violence Courts***
(Revised 2009)

The purpose of this Protocol is to clarify which division of the San Diego Superior Court should handle a legal guardianship involving a child and to indicate the circumstances that determine whether the Juvenile, Family, Probate, or Domestic Violence Division should hear a guardianship matter.

I. GENERAL POLICY

A. Juvenile Division. The juvenile dependency court (hereafter "Juvenile Court") is principally concerned with child protective issues, i.e., children who have suffered or are at risk of suffering from abuse or neglect. Juvenile Court orders supersede custody orders issued by the Family Division and the Probate Division. Upon receiving notice of a conflicting Juvenile Court order, the Family Court or Probate Court judge shall immediately suspend proceedings on the merits until resolution of the jurisdiction issue.

B. Family Division. The Family Court has jurisdiction over child custody disputes, including paternity and domestic violence. Family Court orders have priority over Probate Court orders unless the procedures set forth herein are followed.

C. Probate Division. A guardianship petition may be heard in the Probate Division if there are no child protection issues and no outstanding custody orders or pending custody issues in any other division of the Superior Court.

D. Jurisdiction Issues. When a court considering a custody issue receives information that a court of another division has an outstanding custody order or is considering issuing a new custody order, it has a duty to make contact with the other division and resolve the jurisdictional issue.

II. JUVENILE COURT PROCEEDINGS

A. The Juvenile Court may order a legal guardianship without adjudicating the child a dependent of the court. In such cases, the Court first determines a guardianship is in the

best interest of the child, the parent is not interested in reunification, and the parent and child, if able to give a meaningful response, agree to the guardianship. This guardianship is under Juvenile Court jurisdiction. (Welf. & Inst. Code [hereafter, "WIC"] § 360(a).)

Alternatively, the Juvenile Court may select a permanent plan for a dependent child of legal guardianship when efforts to reunify the family have failed. (WIC § 366.26(b)(2), (b)(4), (d).)

B. If the Juvenile Court assumes jurisdiction by declaring the child a dependent, the power to determine custody rights lies exclusively with the Juvenile Court, and orders from another division are void. (Fam. Code § 7808; WIC §§ 302, 304, 366.26(a) & (d); *In re William T.* (1985) 172 Cal. App. 3d 790, 797.)

C. Juvenile Court orders supersede Family Division custody orders and Probate Division orders appointing a guardian; no other court may enforce orders that conflict with orders of the Juvenile Court. (WIC § 302; *In re William T., supra*, 172 Cal. App. 3d at p. 800.) If a petition for adoption is filed, in San Diego County the Juvenile Court has exclusive jurisdiction to proceed. (San Diego Superior Court Local Rules, rule 6.2.1.)

D. Health & Human Services Agency Child Welfare Services (hereafter "HHS A CWS") may not undertake a program of voluntary supervision (WIC § 301) with parents while a Probate Division guardianship is in place for their child.

E. The Juvenile Court shall endeavor to avoid ordering the placement of a dependent child with an adult who has been appointed by the Probate Division to serve as the guardian of a sibling of the dependent child. The purpose of this policy is to avoid having two courts supervise an individual who has custody of siblings.

III. FAMILY COURT PROCEEDINGS

A. Assuming the Juvenile Court does not have jurisdiction and there are no child protection issues, if an action is pending in the Family Division (including family support and domestic violence cases) and that court makes a custody order pursuant to Family Code § 3022, the Family Court has exclusive jurisdiction over custody issues concerning children

who are subject to that action. The Probate Court does not have jurisdiction to appoint a guardian of the person of such children. (*Guardianship of Paduano* (1989) 215 Cal. App. 3d 346, 351.)

B. The Family Court may in its discretion defer custody issues to the Probate Court in any case where a nonparent petitions for appointment as guardian of a child in Probate Court and the noncustodial parent in the Family Court proceeding does not object to the guardianship.

C. If an application for a domestic violence protective order is pending in the Family Division or such an order has been issued and is in effect, there may or may not be a child custody order from the Domestic Violence court in that case (e.g., for the children of the restrained party, the protected party, or both parties). (See Fam. Code §§ 3041, 6346, 7604.)

In addition to its authority to include children as protected parties under a Domestic Violence protective order, the family court has authority to grant custody to either parent (Fam. Code §§ 6223, 6346) or to a nonparent (Fam. Code § 3041). If a nonparent seeks appointment as a guardian pursuant to Probate Code § 1510¹ (rather than a nonparent custody order pursuant to FC § 3041), he or she should be directed to file a petition for appointment as a guardian in the Probate Division. If such a petition is granted, the Probate Court shall provide the Family Court with a copy of any order appointing a guardian that is intended to supersede a Family Court custody order. (See Section IV.D.7, below.)

IV. PROBATE COURT PROCEEDINGS

A. In all cases when a petition is filed for appointment as guardian of a child, the Probate Court shall inquire whether there are any existing custody orders issued by the Juvenile Court or the Family Court.

¹ Note: Effective January 1, 2009, Probate Code § 1510(h) is amended to read as follows: "If the proposed ward is or becomes the subject of an adoption petition, the court shall order the guardianship petition consolidated with the adoption petition, and the consolidated case shall be heard and decided in the court in which the adoption is pending. (Stats. 2008, ch. 534.)

B. The Probate Court should not appoint a guardian of the person for a child if the Juvenile Court has assumed jurisdiction or the Family Court has made a custody order (see Prob. Code § 1510(f)), except under certain circumstances described below.

C. If a parent dies in a prejudgment action in the Family Division, the matter is dismissed, and prior custody orders have no effect unless a third party has been joined. The Probate Division may entertain a guardianship petition only upon dismissal of the Family Court matter.

D. The following procedures will be followed if a custody order remains in effect in the Family Division and a nonparent files a petition for guardianship in the Probate Division:

1. If, after notice to both parents, neither parent appears nor objects, the Probate Division may appoint the nonparent as temporary or permanent guardian. The Clerk of the Probate Court shall serve the Family Court with a copy of the Order Appointing Guardian.

2. Upon receipt of the Order Appointing Guardian, the Family Court will defer jurisdiction to the Probate Court pursuant to this Protocol.

3. If either parent appears at the guardianship hearing and objects to guardianship, the Probate Court will dismiss the proceeding without prejudice and direct the proposed guardian to file a petition to be joined as a party in the Family Division proceeding. If the motion for joinder is granted, the proposed guardian may petition thereafter for visitation or custody in the Family Court.

The Probate Court may issue an Order Appointing a Temporary Guardian pending resolution of the issue of jurisdiction with the Family Court. A subsequent order of the Family Court shall supersede the Probate Court order.

E. Special Considerations

1. If a parent requests custody of a child at a hearing subsequent to the first hearing in which the parent had notice and an opportunity to appear, the Probate Court has discretion to retain jurisdiction or refer the matter back to Family Court.

2. If a parent consents to a guardianship but objects to appointment of the petitioner, the Probate Court shall retain jurisdiction of the proceeding.

F. If a “protective issue” (for example, an allegation of abuse, abandonment, or neglect) comes to the attention of the Probate Court or the Family Court, the matter should be referred to Juvenile Court. This may be done by filing an Application to Commence Proceedings by Affidavit (Judicial Council Form JV-210) or an application in the form of an affidavit [1] alleging that there was or is within the county, or residing therein, a child who falls within the definition of a dependent child (WIC § 300) and [2] setting forth facts in support of that allegation. (See WIC § 329.) If the applicant is a judicial officer, the completed Form JV-210 or affidavit may be faxed to the County’s Child Abuse Hotline at (858) 694-5240 or 694-5241. The telephone numbers for the Hotline are (619) 560-2191 and (800) 344-6000. If the child resides in another county, the application must be directed to the child protective services agency of the county in which the child lives.

WIC § 329 requires a HHSA CWS social worker to investigate “immediately” upon receiving the application. Within three weeks after the application, the social worker must [1] decide whether to commence proceedings in Juvenile Court, [2] complete the declaration at the bottom of Form JV-210, and [3] notify the applicant of the social worker’s decision.

If HHSA CWS declines to file a dependency petition or fails to notify the applicant of its decision within three weeks, the applicant may, within one month of making the § 329 application, request that the Juvenile Court review the social worker’s decision pursuant to WIC § 331. To make this request, the applicant should complete an Application To Review Decision By Social Worker Not To Commence Proceedings (Judicial Council Form JV-215) and file it with the Presiding Judge of the Juvenile Court.

G. If no petition has been filed in Juvenile Court, HHSA CWS may refer a voluntary guardianship to the Probate Division when it has determined there is no protective issue, the appointment of a guardian would be in the child’s best interest, and placement with the

guardian is appropriate. "Voluntary" means that the parent and child (if the child can give meaningful consent) consent to the guardianship. HHSA CWS will attempt to obtain the consent in writing for presentation to the Probate Court by the nonparent seeking guardianship.

H. By calling HHSA CWS at (858) 694-5191, the Probate Division can ascertain whether HHSA CWS has become involved, whether the matter has been referred to Juvenile Court, and, sometimes, the facts of the case. To determine if the Juvenile Court has ordered guardianship as a permanent plan, the Probate Division may call Juvenile Court Adoptions, (858) 634-1671.

GUARDIANSHIP PROTOCOL v.7, rev. 7.28.09