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REPORT TO THE JUDICIAL COUNCIL

For business meeting on: December 14, 2010

Title	Agenda Item Type
Judicial Council-sponsored Legislation (Probate): Guardianship Venue Considerations When Previously Filed Family Code Custody Proceedings Exist	Action Required
	Effective Date
	December 14, 2010
Rules, Forms, Standards, or Statutes Affected	Date of Report
Amend Prob. Code, §§ 1514 and 2203; add § 2204	November 1, 2010
Recommended by	Contact
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Probate and Mental Health Advisory Committee	
Hon. Mitchell L. Beckloff, Chair	
Family and Juvenile Law Advisory Committee	
Hon. Jerilyn L. Borack, Cochair	
Hon. Susan D. Huguenor, Cochair	

Executive Summary

The Policy Coordination and Liaison Committee (PCLC), Probate and Mental Health Advisory Committee, and Family and Juvenile Law Advisory Committee recommend that the Judicial Council sponsor legislation to amend provisions of the Probate Code that govern venue in probate guardianship proceedings. The legislation would address situations in which a guardianship matter is filed in one county and one or more child custody proceedings under the

Family Code concerning the proposed ward previously have been filed in one or more other counties. The legislation would abrogate a portion of a 1951 California Supreme Court decision affecting venue in these circumstances and establish a procedure under which courts in the guardianship and Family Code custody proceedings would communicate with each other before the court where the guardianship is filed determines the appropriate forum for that proceeding.

Recommendation

The PCLC, Probate and Mental Health Advisory Committee, and Family and Juvenile Law Advisory Committee recommend that the Judicial Council sponsor legislation to amend the Probate Code to (1) establish a consultative procedure between courts for determining the appropriate venue of a probate guardianship of the person of a child (versus the estate of the child) when one or more custody proceedings under the Family Code involving the proposed ward are on file in one or more other counties, (2) discourage forum shopping by parents disappointed in previous child custody litigation, and (3) codify decisional law establishing exclusive jurisdiction in the guardianship court to determine custody or visitation concerning the ward on the appointment of a guardian of his or her person.

The text of the proposed legislation is attached at pages 12–14.

Previous Council Action

There is no previous Judicial Council action to report.

Rationale for Recommendation

Existing law

Probate Code section 2201 establishes the general rule of venue for a guardianship proceeding for a resident of this state as either the county where the proposed ward resides or such other county as may be in his or her best interests.¹ Section 2203 sets venue priorities when multiple guardianship proceedings have been filed in different counties.² Sections 2211 and 2212 authorize the persons listed in section 2212 to petition the court where a guardianship proceeding is pending for an order transferring the matter to a different county—in effect, the equivalent of a motion for change of venue for probate guardianship proceedings. The court must order the

¹ Unless otherwise stated, all code references are to the Probate Code. The sections of that code identified in this paragraph govern venue in both probate conservatorship and probate guardianship proceedings. However, because this proposal concerns only guardianships, no further references to conservatorships will be made.

² Section 2203 provides that if two proceedings for the appointment of a guardian of a minor's person or of his or her estate are filed in different counties, proper venue is in the first court to appoint either a temporary or general guardian. If a petition for the appointment of a guardian of the person of a minor is filed in one county and a petition for the appointment of a guardian of the minor's estate is filed in a different county, the court first appointing a guardian (of either the person or the estate, and either a temporary or general guardian) may find that it is in the child's best interest that the guardianship of the person and estate be maintained in that county or in such other county as the court determines. On that determination, the proceeding goes forward in that county, and the other proceeding is dismissed.

transfer if it finds that the transfer would be in the best interests of the ward (Prob. Code, § 2215(b)(1)).

Current guardianship venue statutes do not provide for the situation in which a petition for appointment of a guardian of the person of a minor is filed after one or more custody proceedings under the Family Code involving that minor are on file in different counties. This proposal would address that situation and in so doing would partially abrogate the California Supreme Court's decision in *Greene v. Superior Court* (1951) 37 Cal.2d 307.

The Supreme Court in *Greene* held that the proper venue for a guardianship proceeding involving a minor who had been the subject of an earlier custody proceeding in a dissolution action between the minor's parents is the county where the dissolution was filed, not the county where the minor and the petitioner and proposed guardian resided when the guardianship action was filed. The majority opinion in *Greene* applied the general rule that when two courts have concurrent jurisdiction, the first court to assume jurisdiction retains it to the exclusion of all others. The court concluded that this rule is particularly appropriate to prevent conflict that might arise between courts if they were free to make contradictory custody awards. (See *Greene, supra*, 37 Cal.2d at pp. 310–311.) The opinion went on to note that the court's jurisdiction in guardianship matters is ongoing and exclusive: no other court may interfere with that court's control over a guardian it has appointed. (*Id.* at p. 311.)

The *Greene* court concluded that a custody award to a parent in a marriage dissolution action differs only in formal respects from a decree appointing a parent as the child's guardian. Therefore, the continuing jurisdiction of a divorce court over its custody awards should also be exclusive. (*Greene, supra*, 37 Cal.2d at p. 311.) The court then stated that if a change of residence within the state makes it desirable for the court of a different county to have jurisdiction to modify the custody decree, this objective can be attained by moving for a change of venue, after first bringing a proceeding in the court with jurisdiction over the original decree. (*Id.* at p. 312.)

This proposal

The proposed legislation would modify the rule of the *Greene* court in most cases, but provide for its continued application in two respects.

Residence presumptions. A new subdivision (d) would be added to Probate Code section 2203 and would apply if a petition is filed for the appointment of a guardian of the person of a minor when “there was previously filed in one or more other counties a proceeding described in Family Code section 3021 that concerns custody or visitation of the same minor” (referred to in the proposed legislation and in this report as a Family Code custody proceeding).³ The new

³ Fam. Code, § 3021 lists the proceedings to which Part 2 of Division 8 (commencing with section 3020) applies when child custody or visitation issues are involved. The proceedings are (1) marriage dissolutions, (2) marriage nullity proceedings, (3) proceedings for legal separation, (4) actions for exclusive custody under Fam. Code, § 3120, (5) proceedings under the Domestic Violence Prevention Act (Division 10 of the Family Code, commencing with

provision would modify the rule articulated by the majority opinion in *Greene*. It would create a presumption in favor of venue in the county where the guardianship is filed if the minor and the proposed guardian have lived in that county continuously for at least six months before the proceeding commenced (or since birth, for a minor less than six months old).⁴ Despite this presumption, the guardianship court could determine that the minor's best interests require the transfer of the guardianship proceeding to a court where a Family Code custody proceeding is on file.⁵

The opposite presumption, in favor of venue in a county where a Family Code custody proceeding was filed, would apply if the minor and the proposed guardian were not residents of the guardianship county for the six-month period before the guardianship case was filed (or since the minor's birth, if he or she is less than six months old on that date). (See proposed Prob. Code, § 2203(d)(2).) The guardianship court would be required to transfer the case to a court where a Family Code custody proceeding is on file unless it determines that the best interests of the minor require maintenance of the guardianship case in the court where it was filed.

These presumptions would also apply to the court's determination of the best interests of the minor if a petitioner or respondent files a petition for transfer before a guardian is appointed concerning the same minor in a Family Code custody proceeding⁶

Communications between courts. The proposed legislation would require communications between the courts where the guardianship and the Family Code custody proceedings are on file to facilitate the determination of appropriate guardianship venue. This requirement is modeled after similar provisions in the Uniform Child Custody Jurisdiction and Enforcement Act (UCCJEA) applicable to courts in different states, enacted in California as Family Code section

section 6200), (6) Uniform Parentage Act proceedings under Part 3 of Division 12 of the Family Code (commencing with section 7600), and (7) child support enforcement actions brought by a local child support agency under Fam. Code, § 17404.

⁴ Under proposed Prob. Code, § 2203(d)(1), a period of temporary absence from the county of not longer than 30 days would not be considered an interruption of the six-month period.

⁵ The phrase "is on file" rather than "filed" or "was filed" is used throughout the proposed legislation concerning the situs of Family Code custody proceedings to reach proceedings filed in one county but transferred to another county before the guardianship is filed. (See the discussion under Alternatives considered.)

⁶ See proposed Prob. Code, § 2203(d)(3), existing §§ 2210–2217, and the discussion under Alternatives considered. The petition for transfer is analogous to a motion for change of venue applicable to guardianships and conservatorships. A parent of the proposed ward is an authorized petitioner (Prob. Code, § 2212(d)) and would also be an authorized petitioner or respondent in a Family Code custody proceeding concerning his or her child. The standard for transferring a guardianship to another county on a petition for transfer is identical to the standard for the determination under proposed section 2203(d): the best interests of the ward or proposed ward (Prob. Code, § 2215(b)(1)).

Although a petition for transfer may be filed after as well as before the appointment of a guardian, the advisory committees concluded that the residency presumptions of Prob. Code, § 2203(d)(1) & (2) should apply only if the petition is filed very early in the guardianship case, at about the same time as the court would be called on by § 2203(d)(1) or (2) to make the identical determination of the best interests of the minor concerning guardianship venue in the absence of such a petition. Moreover, after the appointment of a guardian, the court's determination of the ward's best interests concerning a transfer of the guardianship to a different county would likely require consideration of additional factors, making residence presumptions in favor of or against a transfer less significant.

3400 et seq. The communications required between courts are described in paragraph (4) of proposed section 2203(d). They are summarized as follows:

1. The guardianship court must communicate with the court or courts where the Family Code custody proceedings are on file before it makes the “best interests of the minor” determination described above in the following circumstances:
 - a. When Family Code custody proceedings involving the proposed ward are disclosed in the *Petition for Appointment of Guardian of Minor* form or papers in support filed with the petition; and
 - b. In the guardianship proceeding, when a parent of the proposed ward files—before the appointment of a guardian of the person, including a temporary guardian—a petition for an order transferring the proceeding to the court in another county where a Family Code custody proceeding concerning the proposed ward was filed.⁷
2. When, after the appointment of a guardian of the person, a parent of the ward files a petition for an order transferring the proceeding to the court in another county where a Family Code custody proceeding concerning the ward is on file, the court in the guardianship proceeding may communicate with courts where Family Code custody proceedings concerning the ward are on file before determining the transfer petition.
3. If the guardianship court appoints a guardian of the minor’s person, including a temporary guardian, the court must transmit a copy of the order appointing the guardian to the court or courts where the Family Code custody proceedings are on file, and each of the latter courts must file the order in its case file.

Proposed Probate Code section 2203(d) applies Family Code sections 3410(b)–(e) to the communications between courts described above. Section 3410(b) authorizes the court to permit the parties to participate in the communication, but if they are unable to do so, they must be given an opportunity to present facts and legal arguments before a decision is made—in this context, the “best interests of the minor” venue decision, not the decision on jurisdiction under the UCCJEA mentioned in the section. Section 3410(c) permits courts to communicate on schedules, calendars, court records, and similar matters without informing the parties and without making a record of such communications.⁸ But section 3410(d) requires that a record be made of all other communications between the courts and that the parties be promptly informed of these other communications and granted access to the record.

The proposed legislation would also require the Judicial Council to adopt rules of court to implement the intercourt communication provisions of Probate Code section 2203(d)(3) (see section 2203(d)(4)(E)).

⁷ See fn. 6 above, Prob. Code, §§ 2210–2217, and proposed Prob. Code, § 2203(d)(3).

⁸ A “record” is defined in Fam. Code, § 3410(e) as information that is inscribed on a tangible medium or is stored in an electronic or other medium and is retrievable in a perceivable form.

Forum shopping by child custody litigants. *Greene* involved guardianship of two minor children sought by their mother, a participant in the earlier custody proceeding in her dissolution action against the children's father. In effect, she sought through her appointment as the guardian of her children to reduce their father's permitted visitation under her earlier custody award.⁹ It is unclear from the Supreme Court's opinion why the petitioner sought a guardianship instead of a change in the custody order in her dissolution. The majority opinion emphasized one possible reason, however, supporting its ultimate holding that the first court to determine custody matters should have precedence:

Similarly, the avoidance of such [continuing custody] litigation is facilitated by holding that only one court within this state may provide for the custody of minors in divorce or guardianship proceedings. *Otherwise a parent having the immediate control of a minor might move from county to county, instituting guardianship proceedings, in search of a court that will alter the custody provisions of a divorce decree.*¹⁰ (*Greene, supra*, 37 Cal.2d at p. 312; italics added.)

This proposal addresses the concerns expressed in the above quotation by adding a paragraph to Probate Code section 1514(b). The new provision would bar a parent from appointment as the guardian of his or her child, except in the limited circumstances permitted by Probate Code section 2105.¹¹ This change would require a parent in the same situation as the petitioner in the *Greene* case to seek to modify the prior order in the Family Code custody proceeding instead of petitioning for appointment as guardian of the persons of his or her minor children.

An order appointing a parent of minor children as guardian of the children's persons is essentially the equivalent of an order in a Family Code custody proceeding granting the parent legal custody of the children. There is no reason why the parent would need both orders if the unique circumstances described in Probate Code section 2105(f) are not present.¹²

Most petitioners for the appointment of a guardian of the person of a minor, and certainly most proposed guardians, are not parents of the minor. Most petitioners and proposed guardians will not have been parties in previous Family Code custody proceedings involving their proposed

⁹ See *Greene, supra*, 37 Cal.2d at p. 309.

¹⁰ Another possible reason the children's mother sought guardianship rather than modification of the custody decree in her dissolution appears in the case summary in the Supreme Court's opinion. She also sought appointment as guardian of her two children's estates. The opinion does not give a reason why their mother believed these children needed estate guardians, but the children's father did not contest the estate appointments; the court's decision concerned only their mother's request for appointment as guardian of their persons. (See *Greene, supra*, 37 Cal.2d at p. 310.)

¹¹ Prob. Code, § 2105 concerns the appointment of joint or co-guardians. Section 2105(f) permits the court, in its discretion, to appoint a custodial parent with a terminal medical condition as a co-guardian of his or her child's person with another individual nominated by the parent to facilitate the co-guardian's transition to successor sole guardianship on the incapacitation or death of the parent. Section 2105(f) provides the only express reference in the current Probate Code to the appointment of a parent as a guardian of his or her child's person.

¹² See Prob. Code, §§ 2351–2353. Section 2353(a) grants the guardian of the person of a minor the same right as a parent with legal custody to give consent to medical treatment of his or her child. Section 2351 grants the guardian of a minor authority over the minor's care, custody, and control and places the guardian in charge of the minor's education. Section 2352(a) permits the guardian of the person of a minor to determine where the ward will reside.

wards, and most will not even have been given notice of those matters.¹³ Their choice to file guardianship petitions will not be exercises in forum shopping to undo unfavorable custody rulings in the Family Code proceedings.¹⁴ For these petitioners, particularly after the Family Code custody matters are settled, a guardianship proceeding is the only available remedy.

The dissenting opinion in the *Greene* case highlights a critical issue raised by the majority opinion that led to this proposal:

Thus, if a divorce decree awarding custody of a minor had been granted to one of the minor's parents in the superior court of Del Norte County, and thereafter all interested persons had established their domicile in San Diego County and had lived there for many years preceding the final abandonment of the minor by his parents in the latter county, then neither the superior court in San Diego County, nor any other court of this state other than the superior court of Del Norte County, would have jurisdiction to entertain a guardianship proceeding which might be instituted by the minor or some other person during the lifetime of the parents. (37 Cal.2d, pages 314–315)

Many petitioners for the appointment of a guardian of a minor are not represented by counsel. Many are without substantial financial resources. Requiring these petitioners to travel possibly hundreds of miles to file their guardianship petitions or to seek a change of venue in remote counties where Family Code custody proceedings concerning the proposed ward were filed, perhaps many years before under greatly different circumstances, might well deprive many of them of effective access to the courts in circumstances where prompt and effective access may be necessary to protect a child.

Exclusive jurisdiction over custody and visitation. The final provision of this proposal would codify another portion of the Supreme Court's opinion in *Greene*. The majority opinion affirmed its support of the principle that when a court has appointed a guardian of the person of a child, no other court may interfere with the guardian's custody so long as the guardianship appointment is in effect. (See *Greene, supra*, 37 Cal.2d 311, and *Browne v. Superior Court* (1940) 16 Cal.2d

¹³ See the discussion of the differences between a custody proceeding in a dissolution action and a guardianship in the dissenting opinion of Justice Spence in *Greene, supra*, 37 Cal.2d at pp. 313–314.

¹⁴ Although a person other than a parent of a child involved in a Family Code custody proceeding may participate in the proceeding and may be awarded custody of the child, the proceeding must be commenced by a parent, and one or both parents or the nonparent seeking custody must move the court for permission for the nonparent's entry into the case. The nonparent's joinder as a party is not mandatory unless he or she has physical custody of the child or claims custody as a matter of right. (See Fam. Code, § 3040(a)(2) & (3), § 3041; and Cal. Rules of Court, rules 5.150–5.160.)

If a nonparent who was joined as a party in a Family Code custody proceeding later files a guardianship petition in another county to modify an unfavorable ruling in the Family Code matter—a less likely event if the child and the petitioner satisfy the six-month residency requirement of proposed new section 2203(d)(1)—the court in the guardianship case could certainly consider the forum-shopping aspects of the case when making its “best interests” venue determination.

593, 597–598.) A new section, 2204, would be added to the Probate Code to codify this principle.¹⁵

Comments, Alternatives Considered, and Policy Implications

Comments received

This proposal was circulated for comment in a special comment cycle that closed on August 25, 2010.¹⁶ Nine comments were received. Five commentators approved the proposal without recommending changes.

Four commentators approved the proposal if modified. The most detailed recommendations for changes were made by the Executive Committee of the State Bar of California, Family Law Section. The section's recommendations were to modify the proposal to (1) address the situation in which there is more than one previously filed Family Code custody proceeding in multiple counties; (2) refer to the current venue of each of those matters instead of the places where they were filed, to cover proceedings that had been transferred from one county to another before the guardianship was filed; and (3) provide for a consultation between courts in response to a petition to transfer the guardianship under Probate Code sections 2210–2217 filed by a parent of the proposed ward in favor of a county where a Family Code custody proceeding is on file. For the reasons discussed under the Alternatives considered section, the third recommendation was accepted by the advisory committees and is reflected in the revised proposal.

Judge Tari L. Cody of the Superior Court of Ventura County recommended that the proposal include an amendment of Probate Code section 2105¹⁷ to permit a joint guardianship between a custodial parent in the military and another person, when the parent is to be deployed, to prevent the ward's return to the custody of the noncustodial parent upon deployment of the custodial parent. The advisory committees acknowledged that the proposal may have merit but believe that it should be given further study.

Judge Cody also inquired about the effect of the termination of a guardianship during the ward's minority on prior Family Code custody orders concerning the ward. The question concerns proposed new Probate Code section 2204, which would provide that, with the appointment of a guardian of the person of a ward until termination of the guardianship, the guardianship court has exclusive jurisdiction over all issues of the ward's custody or visitation.

The advisory committees concluded, however, that the effect of termination of the guardianship in this situation would be the same as it is under current law because section 2204 is

¹⁵ The new section contains an exception for Welf. & Inst. Code § 304, to preserve the existing primacy of juvenile court dependency jurisdiction over the jurisdiction of all other departments or divisions of the superior court concerning custody of minor children, including probate departments in guardianships.

¹⁶ A chart providing the full text of the comments received and the advisory committees' responses is attached at pages 16–25.

¹⁷ Section 2105 is cited in the proposal's amended Prob. Code § 1514(b)(2) but is not changed by the proposal.

codification of settled decisional law, not a change in the law.¹⁸ The committees also noted that a court considering termination of the guardianship during the ward's minority because it is no longer necessary, presumably because one or both of the ward's parents will be able to resume responsibility for the child, would weigh the effect of the termination on the ward's future custody arrangements, including its effect on prior custody orders between the child's parents.

The Superior Court of Sacramento County expressed concern that the proposal would unduly burden the guardianship court to determine proper venue and transfer the case if it is in the ward's best interests. The court recommended that this responsibility should be limited to cases in which the court appoints a temporary guardian. When it does not, the court should be permitted to dismiss the proceeding and direct the petitioner to refile in the other county.

The advisory committees disagree with this recommendation, noting that the court in the guardianship case would learn through the allegations of the petition and supporting papers about the existence of the Family Code custody matter in the other county.¹⁹ That court, after consultation with the court where the custody case is on file, should be able to arrive at an appropriate determination of whether to retain or transfer the guardianship case to the latter court, whether or not a temporary guardian is proposed. If a temporary guardian is appropriate, the court that ultimately will be responsible for supervision of the fiduciary should make that decision whenever possible. A direct transfer rather than dismissal is fairer to the guardianship petitioner, is not unfair to any participants who support venue in the transferee county, and provides greater assurance that the proposed ward will be protected at all stages of the guardianship proceeding.

Alternatives considered

The proposal circulated for public comment contemplated that two matters would be involved: a newly filed guardianship proceeding in one county where the proposed ward currently resides and a single previously filed Family Code custody matter involving that child in another county. The proposal also contemplated that the best-interests venue determination would be made by the guardianship court in every case, whether any person interested in the matter moved for a change of venue.

The comment received from the State Bar of California, Family Law Section, led to discussions between representatives of the section and, in support of the proposal, representatives of the State Bar of California, Trusts and Estates Section, and members and staff of the Probate and Mental Health Advisory Committee. During these discussions, Family Law Section representatives

¹⁸ See *Browne v. Superior Court* (1940) 16 Cal.2d 593, 598, and *Milani v. Superior Court* (1943) 61 Cal.App.2d 463, 467.

¹⁹ The petition for the appointment of a guardian of the person must disclose, so far as known by the petitioner, any pending adoption, juvenile court, marriage dissolution, domestic relations, custody, or "other similar proceeding" affecting the proposed ward. If the petitioner discovers this information after the petition has been filed, he or she must amend the petition to provide the information within 10 days after making the discovery (Prob. Code, §§ 1510(f), 1512). In current practice, the disclosure is not made in the petition. It is instead made in a separate document that must be filed with the petition and may also be filed separately thereafter, the *Declaration Under Uniform Child Custody Jurisdiction and Enforcement Act (UCCJEA)* (form FL-105/GC-120). See item 4 of that form, item 12 of the *Petition for Appointment of Guardian of Minor* (form GC-210), item 8 of the *Petition for Appointment of Guardian of the Person* (form GC-210(P)), and Cal. Rules of Court, rule 7.101(c).

pointed out that in their practice experience, parents involved in custody disputes often move to different counties after an order is made in an initial custody matter. Such relocation may lead to Family Code custody or visitation matters filed in more than one county concerning the same child, or even a change of venue. Moreover, a guardianship petitioner may be unaware of all of the custody matters that have been filed, or their current venues, when he or she files the guardianship petition. A procedure should be available to a parent of a proposed ward living in a county where a custody proceeding is on file to bring that proceeding to the attention of the court in the guardianship proceeding, and gain the benefit of consultation between the guardianship court and all courts where custody matters involving the child are on file, including the court in the parent's county of current residence.

The advisory committees accepted the Family Law Section's concerns, and revisions were made in response to those concerns. A parent of a proposed ward may bring a custody proceeding to the attention of the guardianship court by filing a petition for transfer under sections 2210–2217. Because the standard for a transfer under section 2215(b)(1) is “the best interests” of the minor—identical to the standard for the venue determination in this proposal—the existing transfer petition fits well with that determination.

No entirely new procedure is necessary, but two modifications have been made in the revised proposal concerning a petition for transfer. Such a petition may be filed at any time during a guardianship or conservatorship proceeding, before or after the appointment of a fiduciary. But the venue determination provided in this proposal is intended to be made very early in the guardianship case, before the appointment of a general guardian and often before the appointment of a temporary guardian, if any. Therefore, this proposal would apply the residence presumptions of sections 2203(d)(1) and (2) only to qualified petitions for transfer filed before the appointment of a guardian. Consultation between courts under section 2203(d)(3) would also be mandatory before that event, but would be authorized after it, with the discretion of the court.

The redrafted proposal was sent to representatives of the State Bar of California's Family Law and Trust and Estates sections. At a meeting on September 25, 2010, the Executive Committee of the Family Law Section approved the changes.²⁰ The Trusts and Estates Section also submitted written comments in support of the revised proposal.

²⁰ At that meeting, one member of the Family Law Section's executive committee expressed concerns about the effect of proposed new Prob. Code, § 2204 on adoptions, concerns not mentioned in the section's written comment. The advisory committees have not received a written statement of these concerns. However, the committees believe that section 2204 would have no effect on adoption proceedings. An adoption terminates a guardianship as a matter of law (Prob. Code, § 1600(b)), thereby also terminating the guardianship's exclusivity in custody issues codified in section 2204. Prior appointment of a guardian does not currently bar the filing of an adoption petition, and section 2204, declaratory of existing decisional law, would not change that fact. Moreover, if an adoption proceeding is filed concerning a proposed ward before the commencement of a guardianship or the appointment of a guardian, the guardianship matter must be consolidated with the adoption proceeding, and the consolidated case must be heard and decided in the court where the adoption is pending (Prob. Code, § 1510(h), Fam. Code, § 8714.5). If this proposal is approved by the council, the advisory committees will continue to work with the Family Law Section and the State Bar of California's legislative staff to address these concerns in an effort to secure the section's full support of the legislation.

Implementation Requirements, Costs, and Operational Impacts

This proposal would require courts to establish procedures for consultations between judicial officers of different courts in this state. Additional costs would be associated with this process. However, the overall effect of this proposal should be a reduction of costs incurred by the courts in affected guardianship matters. Prompt determinations of appropriate venue after consultation between courts in the early stages of these cases, often without the need for hearings or other formal court proceedings, would cost less than such proceedings. The costs incurred by petitioners in these cases would be significantly less because the petitioners would not have to travel to possibly very remote counties to file their cases and petition for their transfer to the county where they and the proposed wards reside.

The consultation process should result in prompt and appropriate guardianship venue decisions, after taking into account the concerns of all involved parties and affected courts, including those responsible for prior custody litigation affecting the proposed wards.

Relevant Strategic Plan Goals and Operational Plan Objectives

This proposal represents an innovative and effective practice to foster the fair, timely, and efficient resolution of guardianship cases (Strategic Plan, Goal III.B.1). Many petitioners for guardianship are unrepresented and without financial resources. This proposal would permit these petitioners to file their cases where they and their proposed wards reside without having to go to other counties to do so and then later attempt to transfer the cases back to their home counties. Even though the courts may ultimately transfer some of these cases to other counties, they would do so only if they determine that the transfers are in the best interests of the wards. Unrepresented petitioners would be able to participate in that determination in their home counties, and the proposed wards would be under the courts' protection throughout the transfer process. This procedure should remove or reduce a barrier to effective access to the courts by unrepresented guardianship petitioners and the children for whose benefit they act. (See Strategic Plan, Goal I.1; Operational Plan, Goal I, Objective 2.b. See also Operational Plan, Goal IV, Objective 1.f.)

Attachments

1. Probate code sections 1514, 2203, and 2204, at pages 12–14
2. Chart of comments, at pages 15–24

Sections 1514 and 2203 of the California Probate Code would be amended and section 2204 would be added to read:

1 **1514.**

2
3 (a) Upon hearing of the petition, if it appears necessary or convenient, the court
4 may appoint a guardian of the person or estate of the proposed ward or both.

5
6 (b)

7
8 (1) In appointing a guardian of the person, the court is governed by Chapter
9 1 (commencing with Section 3020) and Chapter 2 (commencing with
10 Section 3040) of Part 2 of Division 8 of the Family Code, relating to
11 custody of a minor.

12
13 (2) Except as provided in Section 2105, a minor's parent may not be
14 appointed as a guardian of the person of the minor.

15
16 (c)–(e) ***

17
18 **2203.**

19
20 (a)–(c) ***

21
22 (d) If a proceeding for the guardianship of the person of a minor is filed in one
23 county and there was previously filed in one or more other counties a
24 proceeding described in Family Code section 3021 that concerns custody or
25 visitation of the same minor under Part 2 of Division 8 of that code
26 (commencing with Section 3020), the following shall apply:

27
28 (1) If the guardianship proceeding is filed in a county where the proposed
29 ward and the proposed guardian have resided for six or more
30 consecutive months immediately preceding commencement of the
31 proceeding—or in the case of a minor less than six months of age, since
32 the minor's birth—the court in that county is the proper court to hear and
33 determine the guardianship proceeding, unless that court determines that
34 the best interests of the minor require that the proceeding be transferred
35 to one of the courts where a proceeding under the Family Code
36 described in (d) is on file. A period of temporary absence not longer than
37 30 days from the county of the minor or the proposed guardian is not an
38 interruption of the six-month period.

39
40 (2) If the guardianship proceeding is filed in a county where the proposed
41 ward and the proposed guardian have resided for less than six
42 consecutive months immediately preceding commencement of the
43 proceeding—or in the case of a minor less than six months of age, a

1 period less than the minor's life—the court shall transfer the case to one
2 of the courts where a proceeding under the Family Code described in (d)
3 is on file, unless the court determines that the best interests of the minor
4 require that the guardianship proceeding be maintained in the court
5 where it was filed.
6

7 (3) If a petitioner or respondent in a Family Code custody or visitation
8 proceeding described in (d) who is an authorized petitioner under section
9 2212 petitions the court where the guardianship proceeding is filed for
10 transfer of the guardianship to the court where the Family Code
11 proceeding is on file at any time before the appointment of a guardian,
12 including a temporary guardian, the provisions of paragraphs (1) and (2)
13 of this subdivision shall apply to the court's determination of the petition
14 for transfer. Except as provided in this paragraph, the petition for
15 transfer shall be determined as provided in sections 2210–2217.
16

17 (4) The following shall apply concerning communications between the
18 courts:
19

20 (A) The court where the guardianship proceeding is commenced shall
21 communicate concerning the proceedings with each court where a
22 Family Code proceeding described in (d) is on file before the court
23 in the guardianship proceeding makes the determinations
24 authorized in paragraph (1) or (2) of this subdivision, including
25 determinations in transfer proceedings described in paragraph (3).
26

27 (B) If a person described in paragraph (3) petitions the court where the
28 guardianship proceeding is filed for transfer of the guardianship
29 after the appointment of a guardian, including a temporary
30 guardian, the court in the guardianship proceeding may
31 communicate with each court where a Family Code proceeding
32 described in (d) is on file before determining the petition for
33 transfer.
34

35 (C) If the court in the guardianship proceeding appoints a guardian of
36 the person of the minor, including a temporary guardian, the court
37 shall transmit a copy of the order appointing a guardian to each
38 court where a proceeding under the Family Code described in (d)
39 is on file, and each of the latter courts shall file the order in the
40 case file for its Family Code proceeding.
41

42 (D) The provisions of Family Code section 3410 subdivisions (b)–(e)
43 shall apply to communications between courts under this
44 paragraph.
45

LEG10-05**Venue Considerations When Previously Filed Family Code Custody Proceedings Exist** (amend Probate Code sections 1514 and 2203; add Probate Code section 2204)

All comments are verbatim unless indicated by an asterisk (*).

	Commentator	Position	Comment	Committee Response
1.	Hon. Tari L. Cody Judge of the Superior Court, County of Ventura	AM	1. PARENT AS GUARDIAN: A parent who obtains sole or primary custody in a family law case who is in the military should be able to request co-guardianship orders when they are to be deployed so that the non-custodial parent (who lost custody for good reason) cannot then get custody of the child when the custodial parent is deployed. Your proposed legislation only allows one narrow exception to a parent being appointed guardian. I think that is a mistake.	<p>1. PARENT AS GUARDIAN. Judge Cody’s recommendation would add a second ground for the appointment of a parent as co-guardian of the person of his or her child to Probate Code section 2105. (The existing ground is a custodial parent’s terminal illness and his or her nomination of the proposed co-guardian.) The committee believes that the recommendation—to permit a military custodial parent about to deploy overseas to petition for appointment of him- or herself and another person as co-guardians—may have merit, but the committee would prefer to consider the recommendation further without holding up the current proposal, which makes no changes in section 2105.</p> <p>One concern about Judge Cody’s recommendation is how to handle the division of responsibilities between co-guardians when one is a member of the military deployed overseas. Co-guardians generally must concur to exercise a power (Prob. Code, § 2105(c)(1)). Section 2105(e) permits a single co-guardian to petition for authority to take specified actions alone if the other co-guardian is out of state and unable to act (or simply unable to act). A co-guardian deployed overseas may or may not be unable to act, given the increased access</p>

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All comments are verbatim unless indicated by an asterisk (*).

	Commentator	Position	Comment	Committee Response
			<p>2. TWO-COUNTY JURISDICTION: Under your proposed legislation, what happens if there is a family law custody order made in County A, later a guardianship order is entered in County B and later still County B orders the guardianship terminated? Does the family law custody order spring back to life? What if that family law custody order is no longer appropriate under the current circumstances? (E.g., mom who had sole legal/physical custody under the family law order is now using drugs but dad is a good parent.) Will the parties have to go back to County A and get the family law order modified?</p>	<p>of members of the military to e-mail and other forms of instant communication. On the other hand, where an inability to act exists, the burden on the co-guardian possibly to be forced to repeatedly petition for authority to act alone could negatively impact his or her ability to make critical decisions about the minor’s care and supervision. The committee believes that further consideration of this and other issues should be made before proposing a change in section 2105.</p> <p>2. TWO-COUNTY JURISDICTION: The answer to this question—whether the family law custody order in County A springs back to life automatically upon termination of the guardianship in County B—would be the same as it is under current law if the guardianship that is terminated were filed in the family law county (County A) or if venue had been changed to County B on application to the court in County A. Under <i>Browne v. Superior Court</i> (1940) 16 Cal.2d 593, 598, and <i>Milani v. Superior Court</i> (1943) 61 Cal.App.2d 463, 467, the primacy of the guardianship court over custody issues lasts only so long as the guardianship is in effect. (This concept is made explicit in proposed new Probate Code section 2204.)</p> <p>If the guardianship is terminated because the</p>

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	Commentator	Position	Comment	Committee Response
			<p>3. FILING TERMINATION ORDERS: Your legislation only proposes that the guardianship order be filed in County A if County B orders a guardianship. You should consider also requiring that an order terminating the guardianship by County B be filed in County A (depending on how you propose to address #2 above).</p> <p>4. WHAT IS “TRANSFER?” What does it mean for a court to "transfer" the case — I assume it means to order a change of venue, in which case the statutes and court rules that address how to accomplish a change of venue would govern. Wouldn't it be better to call it a "change of venue" instead of "transfer" so that it is not confusing?</p>	<p>court determines that it is no longer necessary, presumably the court has also determined that the minor’s custody will be appropriate with one of his or her parents. The court would be less likely to make that determination if in doubt as to the effect of the family law order in County A on that parent’s right to custody.</p> <p>3. FILING TERMINATION ORDERS: The committee believes that a guardianship termination order in County B should ordinarily be filed in the family law case in County A, and the court in County B may certainly do so, but does not believe a mandatory requirement in the statute is necessary.</p> <p>4. WHAT IS “TRANSFER?” Probate Code sections 2211–2217 refer to a transfer of guardianship and conservatorship proceedings, and the pleading that is filed to seek such relief is referred to as a petition for transfer.</p> <p>The term “transfer” rather than “change of venue” appears to be particularly appropriate in this context. The procedure created by the proposed amended statute is not a motion for change of venue in the ordinary sense, in</p>

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	Commentator	Position	Comment	Committee Response
				<p>which the motion is made in the original county (County A in the above example). In this situation, the court in the second county (County B) decides whether to keep the guardianship case filed with it or to transfer the matter to County A. No one is required to ask the court in County B for a change of venue to County A—although a party given notice of the petition for appointment of a guardian in County B who is in favor of such a move has an opportunity to seek it in response to the court’s Order to Show Cause or other inquiry. The issue is whether the court will permit the guardianship case filed in County B to remain there despite the earlier family law filing in County A.</p>
2.	<p>Tom Johnson Supervising Probate Attorney Superior Court of Riverside County</p>	AM	<p>I am concerned that the reference to "the court where the proceeding under the Family Code was filed" could cause procedural problems the way this legislation is presently drafted. It appears this phrase is intended to mean the department of the superior court that hears matters under the probate code in the same County as the County in which the proceeding under the family code was filed. However, due to the use of the phrase later in the statute, I am concerned that this will be interpreted to require family law departments to hear probate guardianships when the six-month period</p>	<p>The committee does not think the quoted reference can fairly be interpreted as suggested or that a construction to that effect is compelled. The language refers to the superior court as a whole where the family law case was filed, as the proposal addresses venue choices between courts in two counties, not particular departments within either court. (Note that the language refers to the court where the family law case was <i>filed</i>. The family law case was not filed in a particular department of the court. The case was assigned to a department for trial or other disposition after it was filed.) If the guardianship case is transferred to the court</p>

LEG10-05**Probate Guardianship Venue: Proposed Legislation** (amend Probate Code sections 1514 and 2203; add Probate Code section 2204)

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	Commentator	Position	Comment	Committee Response
			<p>has not yet expired. For some courts who hear probate guardianship petitions in family law departments, this would not cause a problem. However, for other courts where guardianship petitions are heard in a probate department, requiring a probate guardianship to be heard before a family law judicial officer could cause unnecessary problems. I recommend that this issue be clarified in the proposed legislation.</p>	<p>where the family law case was filed, the transferee court would be free to handle it as it does any other guardianship case.</p> <p>Obviously, however, communications between courts under section 2203(d)(3) would be between the judicial officers actually responsible for the two cases. The purpose of the communication is to inform the judicial officer in the guardianship county of what, if anything, is occurring in the family law case so he or she can make an intelligent, fully-informed venue decision in the guardianship case. No useful purpose would be served by a communication between the judge presiding in the court where the guardianship was filed and the judge who hears guardianships in the family law county, who has nothing before him or her.</p>
3.	<p>Hon. Mary Fingal Schulte Supervising Judge, Probate Superior Court, County of Orange</p>	A	<p>Great idea to have the courts communicate re: jurisdiction and “BC”.</p>	<p>No response necessary.</p>
4.	<p>Superior Court of Sacramento County Robert Turner Administrative Analyst</p>	AM	<p>The proposed amendment to Probate Code 1514 (e)(2)(d)(2) places the burden entirely upon the court to determine the appropriate venue and to transfer the case. This requirement should only be imposed</p>	<p>The committee respectfully disagrees with this recommendation. The court in the guardianship case will learn through the allegations of the petition and supporting papers about the existence of the family law</p>

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	Commentator	Position	Comment	Committee Response
			<p>in those cases where the court sees fit to order a temporary guardianship. Otherwise, the court should be permitted to dismiss the case and order the parties to file in the appropriate county when the court has determined that a temporary guardianship is not necessary and venue is more appropriate in another county. This flexibility will allow the court to take appropriate action to discourage forum shopping.</p>	<p>case in the other county. The guardianship court, after consultation with the family law court, should be able to arrive at an appropriate determination of whether to retain or transfer the guardianship case to the family court, whether or not a temporary guardian is proposed. If a temporary guardian is appropriate, the court that is ultimately to hear the case should make that decision whenever possible. A direct transfer rather than dismissal is more fair to the guardianship petitioner, is not unfair to any participants who support venue in the family law county, and provides greater assurance that the proposed ward will be protected at all stages of the guardianship proceeding.</p>
5.	<p>Superior Court of San Diego County Michael M. Roddy, Executive Officer San Diego</p>	A	No additional comment.	No response necessary.
6.	<p>The Executive Committee of the Family Law Section of the State Bar of California (FLEXCOM) Dianne M. Fetzer</p>	AM	<p><u>BASIS FOR POSITION:</u> FLEXCOM supports the proposal to have guardianship venue in the county where the minor has resided for the last six months, as</p>	

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	Commentator	Position	Comment	Committee Response
	Law Offices of Dianne M. Fetzer Sacramento		<p>long as the court will also speak with the family law judge if one of the parties continues to reside in the county where the family law matter is venued. FLEXCOM’s proposed changes will clarify the proposal and ensure that the rights of the parents are protected, as well as taking into consideration concerns about the stability of the minor child. FLEXCOM believes these proposed changes are consistent with the intent of this proposal, while continuing to protect the rights of a party to a family law action, as well as the rights of the minor children.</p> <p><u>Amendment to Section 2203(d)(1):</u> If the guardianship proceeding is filed in a county where the proposed ward and the proposed guardian have resided for a period of six or more consecutive months immediately preceding commencement of the proceeding, or in the case of a minor less than six months of age since the minor’s birth, the court in that county is the proper court to hear and determine the guardianship proceeding unless that court determines that the best interests of the minor require that the proceeding be transferred to the court where the proceeding under the Family Code was filed <u>is currently venued or the court where a party in the proceeding under the Family</u></p>	<p><u>Amendments to Section 2203(d)(1)–(3):</u> The changes in the text of section 2203(d) made by the advisory committees partially in response to this commentator’s concerns, described in detail in the Alternatives Considered section of the Judicial Council report, were approved by FLEXCOM at a meeting held on September 25, 2010. The recommendations made by FLEXCOM were to (1) provide for situations involving more than one previously-filed Family Code proceeding in multiple counties; (2) refer to the current venue of the Family Code proceeding(s) instead of the place where it or they were filed, to cover proceedings that were transferred from one county to another before the guardianship is filed; and (3)</p>

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			<p><u>Code resides when it appears that all parties in the proceeding under the Family Code have moved from the county where the Family Code proceeding is venued.</u> A period of temporary absence not longer than 30 days from the county of the minor or <u>and</u> the proposed guardian is not an interruption of the six-month period.</p> <p><u>Amendment to Section 2203(d)(2):</u> If the guardianship proceeding is filed in a county where the proposed ward and the proposed guardian have resided for a period of less than six consecutive months immediately preceding commencement of the proceeding, or in the case of a minor less than six months of age a period less than the minor’s life, the court shall transfer the case to the court where the proceeding under the Family Code was filed <u>is venued if any party continues to reside in said county</u>, unless the court determines the best interest of the minor requires that the guardianship proceeding be maintained in the court where it was filed.</p> <p><u>Amendment to Section 2203(d)(3)(A)</u> [Section 2203(d)(4)(A) of revised proposal]: The court where the guardianship proceeding is commenced shall communicate with the court where the Family Code proceeding is filed <u>venued, if</u></p>	<p>provide for consultation between courts in response to a petition to transfer the guardianship under Probate Code section 2210–2217 filed by a parent of the proposed ward in favor of a county where a Family Code custody proceeding is on file. All of these recommendations have been adopted, but with different language than that proposed in the comment.</p>

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			<p>any party continues to reside in said county, concerning the proceedings before the court in <u>if</u> the guardianship proceeding makes the determinations authorized in paragraph (1) or (2) of this subdivision.</p> <p><u>Amendment to Section 2203(d)(3)(B):</u> [Section 2203(d)(4)(B) of revised proposal]: If the court in the guardianship proceeding appoints a guardian of the person of the minor, including a temporary guardian, the court shall transmit a copy of the order appointing a guardian to the court where the proceeding under the Family Code was filed <u>is venued</u>, and the latter court shall file the order in the case file for the Family Code proceeding.</p>	
7.	<p>The Executive Committee of the Trusts & Estates Section of the State Bar of California (TEXCOM)</p> <p>Saul Bercovitch The State Bar of California San Francisco</p>	A	<p>The Executive Committee of the Trusts & Estates Section of the State Bar (TEXCOM) has reviewed proposed changes to LEG10-05, agrees with the proposed changes, and supports LEG10-05, as modified.</p>	<p>The proposed changes referred to in this comment are described in detail in the Alternatives Considered portion of the Judicial Council report of which this chart is a part. The changes were made in the course of discussions with FLEXCOM (see comment 6 above), conducted by representatives of TEXCOM and members of the Probate and Mental Health Advisory Committee.</p>

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	Commentator	Position	Comment	Committee Response
8.	Orange County Bar Association, Lei Lei Wang Ekvall, President Newport Beach	A	No additional comment.	No response necessary.
9.	Dean Silliman Judicial Staff Counsel III Probate Attorneys and Examiners Superior Court of San Bernardino County	A	No additional comment.	No response necessary.