

Invitation to Comment

Title	Probate Guardianship Venue: Proposed Legislation (amend Prob. Code, §§ 1514 and 2203, add Prob. Code, § 2204)
Summary	This proposal would specify the venue applicable in probate guardianship cases when a child custody proceeding under the Family Code concerning the minor was filed in another county before commencement of the guardianship matter. The legislation would abrogate a portion of a 1951 California Supreme Court decision affecting venue in these circumstances, and would establish a procedure under which courts in the two proceedings could communicate and determine the best forum for the guardianship proceeding.
Source	<p>Probate and Mental Health Advisory Committee Hon. Mitchell L. Beckloff, Chair</p> <p>Family and Juvenile Law Advisory Committee Hon. Jerilyn L. Borack, Co-Chair Hon. Susan D. Huguenor, Co-Chair</p>
Staff	<p>Douglas C. Miller, Senior Attorney, 818-558-4178, douglas.miller@jud.ca.gov</p> <p>Julia Weber, Supervising Attorney, 415-865-7693, julia.weber@jud.ca.gov</p>

Background

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 But current guardianship venue statutes do not cover the situation in which a petition for appointment of a guardian of the person of a minor is filed after a custody proceeding under the Family Code involving that minor has been filed in a different county. This proposal would address that situation, and in so doing would

¹ Unless otherwise stated, all code references are to the Probate Code.

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. Upon that determination, the proceeding goes forward in that county and the other proceeding is dismissed.

partially abrogate the California Supreme Court’s decision in *Greene v. Superior Court* (1951) 37 Cal.2d 307, which, as discussed below, dealt with the interaction of probate guardianship and divorce courts in child custody matters under the law in effect before the enactment of the Family Code.³

The California 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 divorce action between the minor’s parents is the county where the divorce action 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 between courts that might arise if they were free to make contradictory custody awards simultaneously. (See *Greene, supra*, 37 Cal.2d at 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 (37 Cal.2d at 311).

The *Greene* court then concluded that a custody award to a parent in a divorce action differs only in formal respects from a decree appointing a parent as the guardian of the child’s person. Therefore, the continuing jurisdiction of a divorce court over its custody awards should also be exclusive (*Id.*). The court then stated that if a change of residence within this state makes it desirable that the court of a different county 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 (37 Cal.2d at 312).

This Proposal

The proposal, recommended by the Probate and Mental Health and Family and Juvenile Law Advisory Committees, would modify the rule of the *Greene* court in most cases, but provide for its continued application in two respects.

The proposal would add a new subdivision (d) to Probate Code section 2203 that would apply if a petition is filed for the appointment of a guardian of the person of a minor in one county and “there was previously filed in another county a proceeding described in Family Code section 3021 that concerns custody or visitation of the same minor”⁴ (referred to elsewhere in the proposed

³ The Family Code was enacted in 1992, effective January 1, 1994 (Stats 1992, ch. 162). The child custody proceeding incident to a divorce action between the minor children’s parents in the *Greene* case would be governed today by the child custody provisions of the Family Code.

⁴ Section 3021 lists the proceedings to which Part 2 of Division 8 of the Family Code (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 Family Code section 3120, (5) proceedings under the Domestic Violence Prevention Act (Division 10 of the Family Code, commencing with 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 Family Code section 17404.

legislation and in this invitation as a Family Code custody proceeding). The new provision would modify the rule articulated by the majority opinion in the *Greene* case. 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 a period of at least six months before the proceeding was commenced (or since birth for a minor less than six months old). (A period of temporary absence from the county not longer than 30 days would not be considered an interruption of the six-month period. See section 2203(d)(1).) Despite this presumption, the guardianship court could determine that the minor’s best interests require the transfer of the guardianship proceeding to the court where the Family Code custody proceeding was filed.

The opposite presumption, in favor of venue in the county where the 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 section 2203(d)(2).) The guardianship court would be required to transfer the case to the court where the Family Code custody proceeding was filed unless it determined that the best interests of the minor require maintenance of the guardianship case in the court where it was filed.

The proposal would also require communications between the courts to help facilitate venue determinations in these cases. It is modeled after similar provisions affecting courts in different states under the Uniform Child Custody Jurisdiction and Enforcement Act (UCCJEA), Family Code section 3400 et seq. The communications required between courts are described in paragraph (3) of new section 2203(d) as follows:

1. The guardianship court must communicate with the court where the Family Code custody proceeding was filed before it makes the “best interests of the minor” determination described above; and
2. 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 where the Family Code custody proceeding was filed, and the latter court must file the order in its case file.

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 record⁵ of such communications. But section 3410(d) requires that a record be made of all other communications between the courts

⁵ A “record” under section 3410 is defined in section 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.

and that the parties be promptly informed of these other communications and granted access to the record.

The Judicial Council would be directed in this legislation to adopt rules of court to implement the inter-court communication provisions of section 2203(d)(3) (see section 2203(d)(3)(D)). Comments are requested concerning the contents of these rules.

Comments are also requested concerning the possible need this legislation might create for changes in the forms filed in probate guardianships to advise the court of prior child custody or visitation proceedings, the *Declaration Under Uniform Child Custody Jurisdiction and Enforcement Act (UCCJEA)* (form FL-105/GC-120), which currently inquires about prior custody proceedings in California as well as those in other states; and the *Guardianship Petition—Child Information Attachment* (form GC-210 (CA)).⁶

Greene involved a guardianship of the persons of two minor children sought by their mother, a participant in the earlier custody proceeding in her divorce action against the children’s father. In effect, she sought to modify the earlier custody award by reducing her former spouse’s permitted visitation.⁷ It is not clear from the Supreme Court’s decision why the petitioner sought a guardianship instead of a change in the custody order in her divorce case. 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.*⁸ (37 Cal.2d at 312, italics added.)

⁶ Probate Code section 1510(f) requires the petitioner to disclose in his or her petition for appointment of a guardian any pending adoption, juvenile court, marriage dissolution, domestic relations, custody, or “other similar proceeding affecting the proposed ward” of which the petitioner has knowledge. Section 1512 requires the petitioner to disclose, by amended petition within 10 days of its discovery, any proceeding affecting the custody of the proposed ward discovered after the guardianship petition was filed. The standard and “plain language” guardianship petitions, forms GC-210 and GC-210(P), do not inquire about these other proceedings, but instead refer to form FL-105/GC-120 and instruct its completion, and attachment to and filing with the petition if the appointment of a guardian of the person is requested. The information requested in the latter form is mandated by Family Code section 3429, part of the UCCJEA. The *Guardianship Petition—Child Information Attachment* (form GC-210(CA)), a separate copy of which must be attached to and filed with the guardianship petition concerning each child named in the petition, also asks if the child named in the attachment has been involved in an adoption, juvenile court, marriage dissolution, domestic relations, custody, or other similar court case, and asks for the type of matter, case number, and court where each case was filed.

⁷ See *Greene, supra*, 37 Cal.2d at 309.

⁸ Another possible reason the children’s mother sought guardianship rather than a modification of the custody decree in her divorce action appears in the case summary contained in the Supreme Court’s opinion. She also sought appointment as guardian of her two children’s estates. It is not clear from the opinion why an estate guardian was

This proposal would address the concerns expressed in the above quote by amending Probate Code section 1514(b) by adding a new paragraph (2). The new paragraph would bar a parent from appointment as the guardian of his or her child's person, except as permitted by section 2105.⁹ 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.

Probate Code section 2351 grants the guardian of a minor's person 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 fix the ward's residence within this state. 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. An order appointing the parent of a child as guardian of the child's person would be essentially the equivalent of an order granting the parent legal custody of the child; there is no reason why the parent would need both orders.

However, most petitioners for the appointment of guardians of the persons of minors, and certainly most proposed guardians under current law, are not parents of the proposed wards. Most petitioners and proposed guardians will not have been parties in previous Family Code custody proceedings involving their proposed wards, and most will not even have been given notice of those matters.¹⁰ Their choice to file guardianship petitions will not be exercises in forum-shopping to undo unfavorable custody rulings in the Family Code proceedings.¹¹ 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 behind this proposal, at 37 Cal.2d pages 314–315:

then necessary for these children, but their 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 37 Cal.2d at 310.)

⁹ Section 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 under some circumstances to facilitate the transition to successor sole guardianship of the child's person by the co-guardian upon the incapacitation or death of the parent. Section 2105(f) is 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.

¹⁰ See the discussion of the differences between a divorce custody proceeding and a guardianship case in the dissenting opinion of Justice Spence in *Greene*, supra, 37 Cal.2d at 313–314.

¹¹ A person other than a parent of a child involved in a Family Code custody proceeding may participate in the case and may be awarded custody of the child (Fam. Code, §§ 3040(a)(2) and (3), and 3041). However, the custody matter may be commenced only by a parent of the child, and one or both parents or the nonparent seeking custody must move the court for permission for the nonparent's entry into the case (see Cal. Rules of Court, rules 5.150–5.160). If a nonparent who was involved in the 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 section 2203(d), the court in the guardianship case could certainly consider the forum-shopping aspects of the case when making its "best interests" venue determination.

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.

Many petitioners for the appointment of a guardian of a minor's person 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.

The final provision of this proposal would codify another portion of the Supreme Court's decision 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 37 Cal.2d at 311, and *Browne v. Superior Court* (1940) 16 Cal.2d 593, 597–598.) A new section 2204 would be added to the Probate Code to codify this principle.¹²

The text of the proposed legislation follows this Invitation to Comment.

¹² The new section contains an exception for Welfare and Institutions Code section 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.

Legislative Proposal

Probate Code sections 1514 and 2203 would be amended and section 2204 would be added, to read as follows:

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) The court shall appoint a guardian nominated under Section 1500 insofar as
17 the nomination relates to the guardianship of the estate unless the court
18 determines that the nominee is unsuitable.

19

20 (d) The court shall appoint the person nominated under Section 1501 as guardian
21 of the property covered by the nomination unless the court determines that the
22 nominee is unsuitable. If the person so appointed is appointed only as
23 guardian of the property covered by the nomination, the letters of
24 guardianship shall so indicate.

25

26 (e) Subject to subdivisions (c) and (d), in appointing a guardian of the estate:

27

28 (1) The court is to be guided by what appears to be in the best interest of the
29 proposed ward, taking into account the proposed guardian's ability to
30 manage and to preserve the estate as well as the proposed guardian's
31 concern for and interest in the welfare of the proposed ward.

32 (2) If the proposed ward is of sufficient age to form an intelligent preference
33 as to the person to be appointed as guardian, the court shall give
34 consideration to that preference in determining the person to be so
35 appointed.

36

1 2203.

2
3 (a) If proceedings for the guardianship or conservatorship of the estate are
4 commenced in more than one county, the guardianship or conservatorship of
5 the estate first granted, including a temporary guardianship or conservatorship
6 of the estate, governs and extends to all the property of the ward or
7 conservatee within this state and the other proceeding shall be dismissed.

8
9 (b) If proceedings for the guardianship or conservatorship of the person are
10 commenced in more than one county, the guardianship or conservatorship of
11 the person first granted, including a temporary guardianship or
12 conservatorship of the person, governs and the other proceeding shall be
13 dismissed.

14
15 (c) If a proceeding for the guardianship or conservatorship of the person is
16 commenced in one county and a proceeding for the guardianship or
17 conservatorship of the estate is commenced in a different county, the court
18 first granting the guardianship or conservatorship, whether of the person or of
19 the estate, may find that it is in the best interests of the ward or conservatee
20 that the guardianship or conservatorship of both the person and the estate be
21 maintained in that county or in such other county as the court shall determine.
22 Thereupon, the guardianship or conservatorship proceeding in the court of the
23 county found by the court to be in the best interests of the ward or conservatee
24 shall govern and shall extend to all property of the ward or conservatee within
25 this state and the other proceeding shall be dismissed.

26
27 (d) If a proceeding for the guardianship of the person of a minor is filed in one
28 county and there was previously filed in another county a proceeding
29 described in Family Code section 3021 that concerns custody or visitation of
30 the same minor under Part 2 of Division 8 of that code (commencing with
31 Section 3020), the following shall apply:

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

1
2 (2) If the guardianship proceeding is filed in a county where the proposed
3 ward and the proposed guardian have resided for a period of less than six
4 consecutive months immediately preceding commencement of the
5 proceeding, or in the case of a minor less than six months of age a period
6 less than the minor's life, the court shall transfer the case to the court
7 where the proceeding under the Family Code was filed unless the court
8 determines the best interests of the minor require that the guardianship
9 proceeding be maintained in the court where it was filed.

10
11 (3) The following shall apply concerning communications between the
12 courts:

13
14 (A) The court where the guardianship proceeding is commenced shall
15 communicate with the court where the Family Code proceeding is
16 filed concerning the proceedings before the court in the
17 guardianship proceeding makes the determinations authorized in
18 paragraph (1) or (2) of this subdivision.

19
20 (B) If the court in the guardianship proceeding appoints a guardian of
21 the person of the minor, including a temporary guardian, the court
22 shall transmit a copy of the order appointing a guardian to the court
23 where the proceeding under the Family Code was filed, and the
24 latter court shall file the order in the case file for the Family Code
25 proceeding.

26
27 (C) The provisions of Family Code section 3410 subdivisions (b)–(e)
28 shall apply to communications between courts under this
29 paragraph.

30
31 (D) The Judicial Council shall adopt rules of court to implement the
32 provisions of this paragraph.

33
34 2204.

35
36 Except as provided in Section 304 of the Welfare and Institutions Code, upon the filing of
37 an order appointing a guardian of the person of a minor in a guardianship proceeding,
38 including an order appointing a temporary guardian of the person, the court in the
39 guardianship proceeding shall have exclusive jurisdiction to determine all issues of
40 custody or visitation of the minor until the guardianship proceeding is terminated.

Item LEG10-05 Response Form

Title: Probate Guardianship Venue: Proposed Legislation (amend Prob. Code, §§ 1514 and 2203, add Prob. Code, § 2204)

- Agree with proposed changes
- Agree with proposed changes **if modified**
- Do not agree** with proposed changes

Comments: _____

Name: _____ **Title:** _____

Organization: _____

- Commenting on behalf of an organization

Address: _____

City, State, Zip: _____

To Submit Comments

Comments may be submitted online, written on this form, or prepared in a letter format. If you are *not* commenting directly on this form, please include the information requested above and the proposal number for identification purposes. Please submit your comments online or email, mail, or fax comments. You are welcome to email your comments as an attachment.

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DEADLINE FOR COMMENT: 5:00 p.m., Friday, July 16, 2010

Circulation for comment does not imply endorsement by the Judicial Council or the Policy Coordination and Liaison Committee. All comments will become part of the public record of the council's action.