

Guardianship Handbook



The Alliance *for* Children's Rights
protecting the future of all children

A NOTE ON THIS HANDBOOK

The laws and regulations governing guardianships differ and are subject to change at any time. Individual children, circumstances, and cases vary greatly as well. This handbook provides only general information. For individual assistance and legal accuracy, please check the local statutes and laws in your state and community.

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Introduction

In the United States today, there are 5.4 million children living under the daily care and supervision of grandparents or other relative caregivers.¹ Many of these children were simply dropped off at their grandparents’ homes or at the home of another relative because their parents were unable or unwilling to continue caring for them. There are numerous reasons why so many children

are being cared for by grandparents and other relative caregivers. Some of these reasons are: death of parents, substance abuse by parents, unemployment of parents, incarceration of parents, HIV/AIDS, family violence, teen pregnancy, poverty, or mental illness of parents.² Nationally, there was a dramatic 44% increase from 1980 to 1990 in the number of children living with relative caretakers. In Los Angeles County alone, 327,228 children lived in homes maintained by grandparents, other relatives and non-relative caregivers.³

Over 2 million children are being raised solely by their grandparents or other relatives with no parents present.⁴ Many grandparents find themselves raising young children all over again during what should be their golden years. For some grandparents, their caregiver role is a temporary commitment lasting no longer than six months. For the majority of grandparents, however, their role as primary caregiver is a much more long-term and labor-intensive commitment. Many grandparents care for young children under age five, and on average, the children remain with their grandparents for three years or longer.⁵

Grandparents raising grandchildren require legal authority in order to make decisions on behalf of their grandchildren. Grandparents need legal authority to consent to medical care for their grandchildren, enroll their grandchildren in school, and receive public government benefits and other public assistance.⁶

Court-appointed legal guardianship provides the relative or non-relative caregiver with the legal authority to make all the child’s necessary life decisions, including education, health care, and benefits. For example, a caregiver without guardianship may not be able to consent to mental health services for the child, apply for government subsidized housing with the child, or include the child in the grandparents’ private health insurance.

Legal guardianship also protects the child and caregiver against future custody challenges and creates stability for the caretaker-child relationship. Without a court-appointed guardianship, a child is at risk of being removed from the grandparents’ home by an unfit parent or placed in foster care by the county. For many children living under the care of non-parent caregivers, their current home is the only true and stable home they have ever lived in.

Legal Guardianship

A legal guardian is an adult appointed by the court to care for a child’s person and/or property. A guardian has the authority and obligation to make decisions affecting the care, education, medical treatment, and supervision of the child. When a legal guardian is appointed over a child, the parents’ rights to care, supervision and custody of the child are suspended and given to the legal guardian. The parents’ rights are not permanently





terminated by a guardianship. The guardian does not become the legal parent.

A court may appoint a guardian if all parental rights have been suspended or terminated by circumstances or by prior court order; or if the parents are unable or unwilling to exercise their parental rights; or if the parents voluntarily consent to the guardianship. A court will generally appoint a guardian for a child if the court finds the guardianship to be in the child's best interest.⁷

Guardianship Differs From Adoption

An adoption substitutes one parent or set of parents for another. When an adoption occurs, the parents voluntarily give up their parental rights or a court terminates all rights and duties of the parents to the child.

An adoption differs from a guardianship. Guardianship suspends the rights and obligations of the parents and does not affect the child's relationship with other relatives. Guardianship may be a preferable option when a parent is likely to regain custody of the child, a child's relationship with other relatives is important to keep intact, or inheritance rights must be preserved.

Caregiver's Affidavit

Some states have documents designed specifically for the purpose of allowing a non-parent caregiver to enroll a child in school and consent to some medical treatments and procedures. These types of "caregiver documents" do not generally require a court proceeding to be valid, but the strength of these documents is severely limited by the parents' right to overrule any decisions made by the caregiver.

In California, a Caregiver's Affidavit is a legal document stating that someone other than the parent is currently caring for the child.⁸ The caregiver need not be related to the child and no court proceeding is necessary for a Caregiver's Affidavit to be valid. A Caregiver's Affidavit does not establish a legal guardianship.

A Caregiver's Affidavit grants a caregiver related to the child the power to enroll the child in school, consent to medical care and apply for public government benefits on behalf of the child. The parents, however, may at any time, take the child back into their custody or override any decisions made by the caregiver. A Caregiver's Affidavit gives less authority to an unrelated caregiver. A caregiver not related to the child may only enroll the child in school and consent to school-related medical care.

Other states may have documents similar to California's Caregiver's Affidavit. Please check with your local court.

Best Interest of the Child

The court has broad discretion in deciding whom to appoint as a child's legal guardian. As a general rule, when selecting a guardian for a child, courts will decide the case using the "best interest of the child" standard.

Parents have custodial priority over other caregivers. A court will not appoint a guardian for a child if a parent seeks custody of his or her child and the parent is found fit and proper. The court will, however, appoint a guardian if the parent's rights to the child were suspended or terminated by a court, the parent has abandoned the child, or the parent voluntarily consents to the guardianship.⁹ Generally, a parent's right to custody of his or her child is a fundamental right and will not be disregarded unless the parent is unfit or the interests and welfare of the child requires appointment of a non-parent guardian. Similarly, the wishes of a parent are considered in appointing a guardian, but these wishes are not necessarily controlling and do not outweigh what the court considers to be in the best interests of the child.

Where both parents are deceased or ineligible to have custody of their children, many states have a statutory preference for blood relatives when appointing a guardian. However, even this statutory preference may be put aside if the best interest of the child requires appointment of a different person as guardian.¹⁰

Determining Fitness of a Guardian

As a general rule, any interested person may act as a guardian unless he or she is disqualified by factors such as mental incapacity, criminal history, or physical disability, which prevents the person from completing the duties of a guardian.¹¹

LEGAL RESIDENCY STATUS OF PROPOSED GUARDIAN

Some states do not consider a person's residency status in the United States when determining if a proposed guardian is fit and competent for appointment. In California, the legal residency status of the proposed guardian alone does not determine whether a court will appoint the proposed guardian.

Other states, however, consider a proposed guardian incompetent based solely on the proposed guardian's legal residency status.

ALTERNATIVE LIFESTYLE OF PROPOSED GUARDIAN

As a general rule, alternative lifestyles or sexual orientation of a person is not determinative and can only be considered if shown to be detrimental to the child's well being.

Determining Fitness of a Parent

Evidence of neglect by a parent or their inability to properly care for his or her children may demonstrate the parent's unfitness. Generally, a parent's dishonesty, divorce, or having once been guilty of misconduct may not be enough to show incompetence or unfitness.¹²

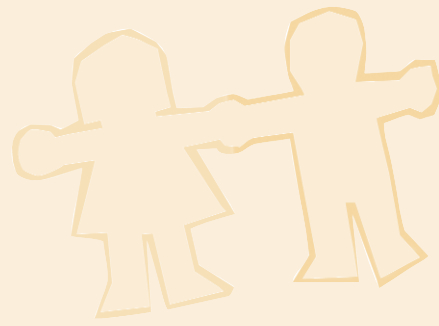
FAILURE TO PAY CHILD SUPPORT

As a general rule, a parent who fails to provide financial support for his or her children may not be enough to justify depriving a parent of custody.

UNDERAGE PARENTS

A parent who is not of adult age is not considered incompetent based solely on the age of the parent. In some states, however, the minor age of a parent is a factor in determining the appointment of a guardian.¹³





Nomination by Parents

As a general rule, a child's parent(s) may nominate a specific person to be appointed the child's legal guardian. Courts do not generally require parental nomination for a guardianship, but courts will give a parent's nomination due consideration.

TESTAMENTARY GUARDIANSHIP

A testamentary guardian is a guardian nominated by a parent through his or her last will and testament.¹⁴ In most states, the welfare of the child controls the appointment of a guardian. Courts are not required to appoint the guardian named in the parent's will. Courts will look to the welfare and best interest of the child in determining if the testamentary guardian should be appointed.¹⁵

NOTARIZED LETTERS OR VERBAL TRANSFERS OF CUSTODY OF A CHILD

As a general rule, a verbal or written statement by a parent transferring custody of a child to another person is not legally valid. There are, however, some states which uphold such transfers in custody.¹⁶

California does not legally recognize notarized letters or other written or verbal transfers of custody from parents to other caregivers. Notarized letters may be persuasive evidence of a parent's consent to have someone else care for their child, but notarized letters do not establish legal guardianship. A court proceeding is the only means to establish a legal guardianship in California.

A Child's Right to Nominate His or Her Guardian

Most states recognize a child's right to nominate a specific person to act as his or her guardian, provided the child is a certain age.¹⁷ Different states have different age requirements. When a child exercises his or her right to nominate a guardian, the courts will not automatically appoint that nominee without an investigation of the nominee's competence and suitability. For a child who does not meet the age requirement for nominating his or her own guardian, the court may still consider the child's request provided the child is able to make an intelligent choice.¹⁸

In California, a child who is twelve years old or older may petition the court for appointment of a particular guardian.¹⁹ The child's nomination is not the determining factor, but the court will seriously consider the child's preference in appointing a guardian.

Process for Becoming a Legal Guardian

To be appointed a child's legal guardian, a person must file legal documents (a petition or complaint) with a court. Generally, a petition for guardianship may be filed by any person interested in the welfare of the child, provided the child is not in the physical custody of a parent.²⁰

FILING PROCESS

As a general rule, requests for appointment of a legal guardian are heard in probate courts.²¹ Depending on the laws in your state, you may be able to file for guardianship in any county court, district court, juvenile court, or superior court.²² However, the request for guardianship must usually be filed in the district where the child lives.²³ In California, a petition for guardianship may be filed in any Superior Court in the county where the child resides.²⁴

The cost for filing a request for guardianship varies. In Los Angeles County, filing fees for a guardianship cost \$600-700. The court may waive the filing fees in whole or in part if the petitioner qualifies for a fee waiver. To qualify for a fee waiver, a petitioner must be receiving public government assistance or have very low financial resources.

Once a petition for the appointment of a guardian is filed with the court, the court must set a date for the hearing.²⁵ In Los Angeles County, the court usually schedules a permanent guardianship hearing date within two months from the filing date.

NOTICE OF GUARDIANSHIP PROCEEDINGS

In general, there are mandatory notice requirements that require the giving of notice that a guardianship is sought over a child.²⁶ There must be strict compliance with notice requirements, but the court may exercise reasonable discretion as to who gets notice and how.²⁷

Most notice requirements are specific as to the form and contents, the mode of service, the persons to be served with notice, and the time of notice.²⁸ A petitioner usually must give certain persons notice of the time and place of the hearing within a specific number of days before the hearing. Proof of such notice must also be filed with the court.

As a general rule, a child's parents are entitled to receive notice that a guardianship is sought over their child. Where the natural parents of a child are deceased, the child's closest next of kin must also be given notice of the guardianship application.²⁹ In California, parents, maternal and paternal grandparents, and adult siblings of the child are entitled to receive notice of guardianship proceedings.³⁰

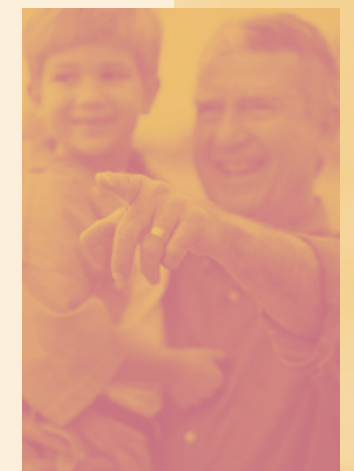
Many courts have waiver procedures allowing persons to waive their right to receive notice of guardianship proceedings.³¹ In California, parents or other persons entitled to receive notice may waive their right to notice by signing a Consent and Waiver form.

INVESTIGATION/HOME STUDY

As a general rule, after a petition for the appointment of a guardian is filed with a court, the court appoints an investigator to interview and investigate the petitioner and proposed guardian. The investigator files a written report with the court discussing the findings of the investigation/interview.³²

In California, if the proposed guardian is related to the child, a probate court investigator contacts the proposed guardian to schedule an investigation or "home study." If the proposed guardian is unrelated to the child, the county agency designated to investigate potential dependency (the Department of Children and Family Services in Los Angeles County) contacts the proposed guardian to schedule an investigation or "home study."³³

The investigator visits the proposed guardian's home and interviews the proposed guardian, the child, and any other residents of the home. Based on the home visit and interviews, the investigator submits a written report to the court. The court considers the investigator's report in granting or denying a petition for guardianship.



THE COURT HEARING

Typically, the prospective guardian and child must appear in court on the hearing date. The court will often allow the introduction of competent and relevant evidence at the hearing to determine what would be in the best interest of the child. The court will consider the written report of the court-appointed investigator as well as any professional evaluations by a physician, psychologist, or other qualified individual. The court will seek to bring out all the facts in determining the fitness of a prospective guardian and what is for the best interest of the child.³⁴

Temporary Guardianship (California Only)

A court in California will establish a temporary guardianship where there is good cause.³⁵ The court considers good cause to be emergency circumstances that require a legal relationship. For example, the child needs immediate medical attention and the prospective guardian's health insurance will not cover the child without a legal guardianship. If a request for a temporary guardianship hearing is granted, the court will usually schedule a temporary hearing date within five (5) business days of filing the court papers.

A temporary guardian has only the powers and duties of a guardian necessary to provide for the immediate care of the child. The court will not issue a temporary guardianship unless a permanent guardianship is also being sought. A temporary guardianship is only valid until the date of the permanent guardianship hearing.

Other states may also have a proceeding similar to California's Temporary Guardianship. Please check with your local court.

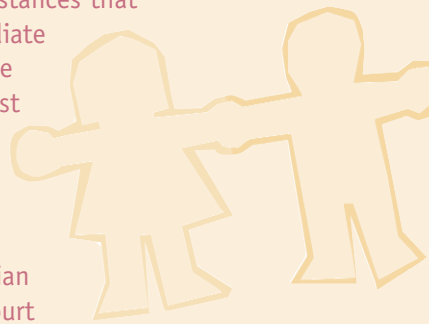
Continuing Jurisdiction of the Court

In general, when a court appoints a guardian for a child, the appointing court retains jurisdiction for all purposes in connection with the guardianship until the guardianship is terminated.³⁶ The appointed guardian is an agent of the court and subject to orders of the court, but the court usually will not override the judgment of the guardian as to what is in the best interests of the child.³⁷ The court will not intervene unless the circumstances require court intervention.

Parents' Right to Visitation and Duty to Support

Parents still retain their legal obligations to their children even after a guardian is appointed by a court.³⁸ In some circumstances, a parent may retain their right to visit his or her child or to dictate the child's religion even after a

guardianship is established. These parental rights, however, may be subject to the court's discretion and intervention if court involvement is necessary for the best interest of the child.



As to child support by parents, some states do not require parents to support children who are under a guardianship.³⁹ Other states, like California, still hold parents legally responsible for the financial support of their children even if the children are under the custody and supervision of a guardian. Under California law, the guardian may take action to obtain child support.⁴⁰

Termination of Guardianship

A guardianship terminates when a child reaches the age of majority.⁴¹ The age of majority differs from state to state. In California, the age of majority is eighteen and a guardianship automatically terminates when a child turns eighteen years old.

As a general rule, a guardianship also terminates at the death, adoption, marriage, or emancipation of a child.⁴² It is also possible for a parent or any other interested party to seek termination of a guardianship by filing a petition to terminate guardianship with the court that originally appointed the guardian.

Resignation or Removal of Guardian

Some states allow for the resignation of a guardian.⁴³ The same court that appointed the guardian has the power to remove the guardian for any good and sufficient cause.⁴⁴ The laws and statutes of each state differ, but some grounds for removal may be: the guardian leaving the state, a felony conviction, failure to follow court orders, a conflict of interest, or the guardian is unfit to have custody and supervise the child's education.⁴⁵ Some courts may remove a guardian where removal is in the best interests of the child.⁴⁶

Legal Assistance

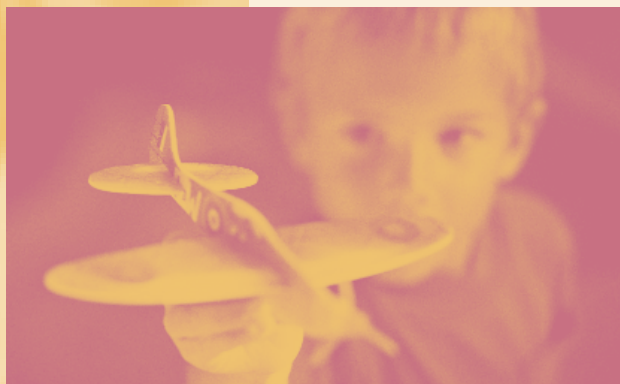
Prospective guardians do not need an attorney to file a guardianship petition and may file "in pro per." A person filing "in pro per" is not represented by an attorney. The prospective guardian may, however, wish to consult with an attorney to avoid mistakes in paperwork or if a parent or other individual might object to the guardianship.

In some states, the court may appoint an attorney for the child if the court determines the interests of the child are not adequately represented. Similarly, some courts may appoint an attorney for a parent contesting the guardianship if the parent is indigent and receiving public assistance.⁴⁷

Rights and Duties of a Guardian

The powers and duties of guardians vary from state to state.⁴⁸ As a general rule, a guardian is responsible for the supervision, care and well being of the child.⁴⁹ A guardian has the legal authority to make decisions about the child's education, support, and health care. In many states, a guardian may be eligible to receive public government benefits in support of the child.⁵⁰

In California, a guardian is responsible for the child's daily care, custody, and control. This includes responsibility for providing food, clothing, shelter, education, and all medical and dental needs of the child. The guardian must also provide for the safety, protection, and physical and emotional growth of the child. A guardian may decide where the child lives within the State of California but must provide notice to the court of any change of address.





A guardian may also provide consent for a child to:

- Enlist in the armed services;
- Get a driver's license;
- Receive medical procedures or treatments; and
- Marry, provided the court also consents.

In California, a guardian may apply for public government benefits on behalf of the child. A related guardian may be eligible to receive CalWORKS on behalf of the child, without regard to the guardian's own income level. An unrelated guardian may be eligible for financial assistance through the Department of Children and Family Services under their nonfederal foster care funding program. An unrelated guardian need not be a licensed foster care provider to receive financial assistance.

Liabilities of the Child and Guardian

As a general rule, lawsuits resulting from the actions of a child are brought against the child even though the guardian may be named as a party defendant.⁵¹ A guardian has the right and duty to defend any action against the child to the extent necessary to protect the child's person or property.⁵² A guardian also has the right and duty to prosecute any litigation that is reasonable and necessary to protect the child. For example, some states allow a guardian to sue and recover from a wrongdoer for injuries personally sustained by the child or for the false imprisonment of the child.⁵³

In California, a guardian, like a parent, is liable for the harm and damages caused by the willful misconduct of the child.

Joint Guardianships

If two or more persons are appointed guardians, the guardians must exercise their rights and duties together. If one of the guardians dies, resigns, or refuses to act, all the rights and powers of the guardianship go to the remaining guardian(s).⁵⁴ If one of the guardians is dissatisfied with the actions of the other guardian(s), the dissatisfied guardian can only seek relief from the court that originally appointed the joint guardians.⁵⁵

In California, joint guardianships are available when a custodial parent is diagnosed with an incurable or irreversible medical condition that is terminal.⁵⁶ A joint guardianship permits terminally ill parents to include another person of their choice in the care of their children without completely relinquishing their own parental and custodial rights. A joint guardianship provides a transition from parent to guardian before the parent dies or becomes too ill to care for the children.

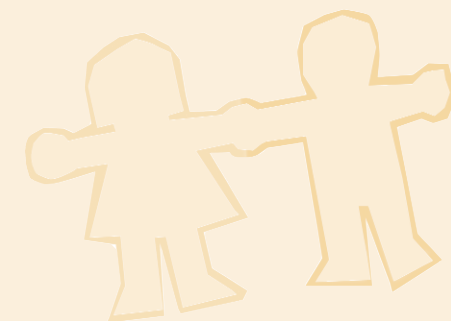
Conclusion

A court-ordered guardianship may be appropriate and necessary for a child who is living with a non-parent caregiver. Guardianships stabilize a caretaker/child relationship and every caretaker who concludes a guardianship has, for the first time, legal recognition of their relationship with the child for whom they have often already cared for for years. Once a caretaker becomes a court-ordered guardian, the caretaker has parental authority and children living without their parents have a permanent home. To learn more about guardianships and how to obtain a guardianship in your state, contact your local court or legal aid society.

The Alliance for Children's Rights is a non-profit legal services organization helping children who have been abused and neglected or who are living in poverty. The Alliance's efforts are focused on direct legal representation, community training, and advocacy. If you live in California and would like more information about guardianships or services provided by The Alliance for Children's Rights, please contact us at (213) 368-6010.

Notes

- 1 U.S. Census Bureau
- 2 US Department of Health and Human Services, Administration on Aging, 2000. 'Grandparents raising grandchildren'
- 3 United Way of Greater Los Angeles, 1998-1999 State of the County Report
- 4 U.S. Census Bureau
- 5 Fuller-Thomson, Minkler, and Driver, 1997. 'A profile of grandparents raising grandchildren in the United States.' *The Gerontologist*
- 6 US Department of Health and Human Services, Administration on Aging, 2000. 'Grandparents raising grandchildren'
- 7 American Jurisprudence, 2nd Edition, § 98
- 8 California Family Code §§ 6550-6552
- 9 American Jurisprudence, 2nd Edition, § 22
- 10 American Jurisprudence, 2nd Edition, §§ 41-42
- 11 American Jurisprudence, 2nd Edition, §§ 48, 50
- 12 American Jurisprudence, 2nd Edition, § 49
- 13 American Jurisprudence, 2nd Edition, § 48
- 14 American Jurisprudence, 2nd Edition, § 11
- 15 American Jurisprudence, 2nd Edition, § 15
- 16 American Jurisprudence, 2nd Edition, § 10
- 17 American Jurisprudence, 2nd Edition, § 45
- 18 American Jurisprudence, 2nd Edition, § 46
- 19 California Family Code § 1510
- 20 American Jurisprudence, 2nd Edition, § 65
- 21 American Jurisprudence, 2nd Edition, § 35
- 22 American Jurisprudence, 2nd Edition, § 34
- 23 American Jurisprudence, 2nd Edition, § 37
- 24 California Probate Code §§ 2201, 2202
- 25 American Jurisprudence, 2nd Edition, § 69
- 26 American Jurisprudence, 2nd Edition, § 54
- 27 American Jurisprudence, 2nd Edition, § 55
- 28 American Jurisprudence, 2nd Edition, § 55
- 29 American Jurisprudence, 2nd Edition, § 57
- 30 California Family Code § 1511
- 31 American Jurisprudence, 2nd Edition, § 59
- 32 American Jurisprudence, 2nd Edition, § 67
- 33 California Probate Code § 1513
- 34 American Jurisprudence, 2nd Edition, § 70
- 35 California Probate Code §2250
- 36 American Jurisprudence, 2nd Edition, § 36
- 37 American Jurisprudence, 2nd Edition, §§ 76, 94
- 38 American Jurisprudence, 2nd Edition, § 77
- 39 American Jurisprudence, 2nd Edition, § 77
- 40 California Family Code §§ 3951, 4002
- 41 American Jurisprudence, 2nd Edition, § 81
- 42 American Jurisprudence, 2nd Edition, §§ 80, 82
- 43 American Jurisprudence, 2nd Edition, §§ 85, 86
- 44 American Jurisprudence, 2nd Edition, § 87
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- 47 American Jurisprudence, 2nd Edition, § 68
- 48 American Jurisprudence, 2nd Edition, § 93
- 49 American Jurisprudence, 2nd Edition, § 97
- 50 American Jurisprudence, 2nd Edition, §§ 100-101
- 51 American Jurisprudence, 2nd Edition, § 193
- 52 American Jurisprudence, 2nd Edition, § 194
- 53 American Jurisprudence, 2nd Edition, § 186
- 54 American Jurisprudence, 2nd Edition, § 256
- 55 American Jurisprudence, 2nd Edition, § 257
- 56 California Probate Code § 2105





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