

Memorandum 90-33

Subject: Study L-3035 - Information for Fiduciaries Concerning Duties

A 1988 law requires the Judicial Council to prepare a pamphlet explaining the nature of guardianship of a minor under child dependency provisions of the Welfare and Institutions Code, and explaining the rights, duties, and obligations of the guardian. Gov't Code § 68511.1. A copy of this pamphlet is attached as Exhibit 1.

At the March 1988 meeting, the Commission asked the staff to consider whether the Judicial Council should be required to prepare a pamphlet explaining duties of other fiduciaries, such as conservators, personal representatives, and trustees. At the November-December 1989 meeting, the Commission asked for a status report.

Personal Representatives

The Judicial Council has approved a statement of duties and liabilities of a personal representative as authorized by Probate Code Section 8404. A copy of the Judicial Council form (DE-147) is attached as Exhibit 2.

Trustees

A trustee has the powers conferred by the trust instrument and, except as limited by the trust instrument, the powers conferred by statute. Prob. Code § 16200. The court may relieve the trustee from restrictions in the trust instrument. *Id.* § 16201. The trustee may deviate from trust restrictions as necessary in unforeseen circumstances. Comment to Section 16201.

Because of variations in trust instruments and the power of the trustee to deviate from restrictions in unforeseen circumstances, no satisfactory general statement of a trustee's powers seems possible. A statement of statutory powers is possible, but would have limited value because the statute is not the only source of powers.

Probate Code Guardianships and Conservatorships

A 1988 law requires counties to provide private conservators with written information explaining:

(1) The rights, duties, limitations, and responsibilities of a conservator.

- (2) The rights of a conservatee.
 - (3) How to assess the needs of a conservatee.
 - (4) How to use community-based services to meet the needs of the conservatee.
 - (5) How to ensure that the conservatee is provided with the least restrictive possible environment.
 - (6) Court procedures relevant to conservatorships.
 - (7) Procedures for inventory, appraisalment, and filing accountings.
- Prob. Code § 1835.

The information is to be developed by the Judicial Council in consultation with the State Bar, the California State Association of Public Administrators, Public Guardians, and Public Conservators, and others. It must be updated periodically to reflect changes in the law. Counties may charge up to \$10 for the information package. Ben McClinton of the Judicial Council staff says the Judicial Council is working on this. They hope have it ready by July.

Information on powers and duties of a conservator of the estate (other than a limited conservator) could usually apply to guardians of the estate as well, because powers and duties are prescribed in provisions applicable both to guardians and conservators. See Prob. Code §§ 2400-2595. So we could add a parallel section to require the Judicial Council to develop the same information for guardians. Ben McClinton thinks this is a good idea. This could be accomplished by the following section:

Probate Code § 1517 (added). Information for private guardians

1517. (a) Every county, either through the appropriate court or the office of the public guardian, shall provide all private guardians with written information concerning a guardian's rights, duties, limitations, and responsibilities under this division.

(b) The information shall be developed by the Judicial Council, after consultation with the following organizations or individuals:

(1) The California State Association of Public Administrators, Public Guardians, and Public Conservators, or other comparable organizations.

(2) The State Bar.

(c) The failure of any court, public guardian, public officer, or public agency, or any employee or agent thereof, to provide information to a guardian as required by this section does not:

(1) Relieve the guardian of any of his or her duties as required by this division.

(2) Make the court, public guardian, public officer, or public agency, or the employee or agent thereof, liable, in either a personal or official capacity, for damages to a ward, guardian, the guardianship of a person or an estate, or any other person or entity.

(d) The information shall be made available to individual counties. The Judicial Council shall periodically update the information when changes in the law warrant revision. The revisions shall be provided to individual counties.

(e) To cover the costs of printing and mailing, a county may charge each private guardian a fee for providing the written information required by this section, not to exceed ten dollars (\$10).

Comment. Section 1517 is added to require the Judicial Council to develop information for guardians similar to that required for conservators. See Section 1835 [as revised by AB 759].

Respectfully submitted,

Robert J. Murphy III
Staff Counsel

GUARDIANSHIP PAMPHLET

(FOR GUARDIANSHIPS OF DEPENDENT CHILDREN
OF THE JUVENILE COURT UNDER WELFARE AND
INSTITUTIONS CODE SECTIONS 366.25 AND 366.26)

This pamphlet gives basic information to individuals thinking about becoming a legal guardian of a child who has been declared a dependent of the juvenile court. This pamphlet explains how to become a guardian of these children and discusses the basic rights, duties, and obligations of a legal guardian of a dependent child. This pamphlet is for general information only. If you want additional information or have specific questions, you may want to consult with an attorney.

Form Adopted by the
Judicial Council of California
JV-350 (New July 1, 1989)

Rose Printing Co. Catalog #JV-350

WHAT IS A LEGAL GUARDIAN?

A legal guardian is a person who is given the legal authority and responsibility to care for a child. A guardian may be related or unrelated to the child.

HOW TO BECOME A LEGAL GUARDIAN OF A CHILD WHO HAS BEEN DECLARED A DEPENDENT OF THE JUVENILE COURT

The juvenile court hears all matters related to a child who is a dependent of the juvenile court. In some cases, the juvenile court decides that children who have been declared dependents by the court cannot be returned safely to their parents. This decision can occur six, twelve, or eighteen months after children are removed from their parents. The child welfare agency will prepare and give to the court a report recommending a permanent plan. At this time, the court is required to make an alternate permanent plan for each child. If the court decides that the child cannot go home, the court will order adoption, guardianship, or long-term foster care as the best plan for the child.

You as a relative, foster parent, or interested party may be considered as a potential legal guardian. Foster parents have the right to attend all hearings or to provide any information they feel is important for the court to know. The appointment is made only after a court hearing and only after you have given your consent. There are various legal forms you will have to complete. The child welfare agency will study and write a report on your home situation before you are appointed. You will receive notice of the court hearing and, of course, have a right to be present at the hearing and to talk to the judge. The child's parents or other interested parties will have an opportunity to give their opinion on your appointment as guardian.

LEGAL PROCESS

Guardians are appointed after a court hearing. These hearings may or may not be contested by parents or other interested parties. If the court decides that the proposed guardianship is reasonable and necessary, an order of guardianship will be made.

DIFFERENCE BETWEEN GUARDIANSHIP AND ADOPTION

Guardianship *suspends* the rights and responsibilities of the birth parents. A child may still inherit from the parents if a guardianship exists. The court may order visitation with the parents or other relatives as a part of its decision. While a guardian has the same responsibility as a parent to care for and control a child, a guardian can be removed or the guardianship itself can be terminated by court order. A guardianship usually ends when the child becomes an adult at 18 years, but you always remain the parent of your adopted child.

Adoption ends all rights and responsibilities between the birth parents and the child, including inheritance and visitation rights. The legal relationship with all other relatives will also end. When you adopt a child, your legal relationship with that child is the same as with a child born to you. An adopted child becomes your own child in all respects.

Since adoption is the most permanent plan for a child, it is often the preferred plan. There are government programs (adoption assistance) that can provide financial help and services for children with special needs who are adopted. You may want to discuss this option with your social worker or attorney.

DIFFERENCE BETWEEN GUARDIANSHIP AND LONG-TERM FOSTER CARE

The legal responsibilities of a guardian are much greater than those of a foster parent. Guardianship can add long-term stability to the child's life. It is a formal commitment made between the child and the guardian. Guardianship may affect the amount of government assistance a child living with a relative guardian receives.

A foster parent's main duties are to furnish food, housing, and nurturing to a child under the foster parent's care. The foster parent is always under the supervision of the child welfare agency. Long-term foster care means the continued involvement of the child welfare agency and the court.

The court may dismiss the dependency when guardianship is granted. In these cases the court will no longer be involved.

RIGHTS AND RESPONSIBILITIES OF LEGAL GUARDIANS

Guardians in general must provide for the care, custody, control, and education of the child. There are some specific rights and responsibilities. These include the following:

RIGHTS

■ Child's Residence

You have the right to decide in what community the child will live. If the child moves to a different community in California all you have to do is notify the court in writing. However, there is a limit to this right. If you plan to move the child outside of California, the court must give approval before the child leaves the state. Different states have different rules regarding guardianship. If you plan to move out of state you should seek additional information.

■ Medical Care

The guardian can give consent to medical treatment for the child. However, for any surgery that is not an emergency, when a child 14 or older objects, the guardian must first get court approval. The law also allows older and more mature children to obtain some medical treatment based only upon the child's consent. This is true whether parent or guardian has custody of the child. Some of these situations include outpatient mental health treatment, medical care for the prevention or treatment relating to pregnancy or a sexually transmitted disease, and drug and alcohol treatment.

■ Education

The guardian can choose the child's school and educational program just as a parent can. In special situations the court may also be involved in this decision. A legal guardian can request special services from schools, regional centers, or any other service providers.

■ Marriage

Both the court and the guardian must give consent to a child's marriage.

■ Armed Services

A guardian may consent to the child's enlisting in the armed services.

■ Driver's License

A guardian may consent to the child's obtaining a driver's license. (See responsibilities listed below.)

RESPONSIBILITIES

Along with the above rights, the guardian has several responsibilities for the child. While this list of responsibilities may seem great, it is important to keep in mind that parents have the same responsibilities for their child.

■ Child's Driving

In order for a child to get a driver's license, the guardian must give written consent. When signing the Department of Motor Vehicles (DMV) application, the guardian agrees to be responsible for any civil damages that result from the child's driving. The guardian is responsible for both the child's negligent and willful acts when driving.

However, the law limits the amount of damages for which a parent or guardian can be liable. The law requires anyone signing the DMV application to get insurance to cover the child driver. The guardian, just like any parent, can withdraw consent at any time. This is done by filing a form with the DMV asking that the child's license be cancelled.

■ Child's Misconduct

A guardian, like a parent, is generally liable only for harm resulting from a child's willful misconduct. The law often limits the amount of a guardian's liability for a child's willful misconduct. In some situations a guardian may also be liable for a child's negligent misconduct. A legal guardian should check with an attorney if concerned about possible liability.

■ Support of Child

Although parents remain legally responsible for the child's support, often the guardian voluntarily accepts this responsibility. Guardians may be able to receive government benefits.

■ Additional Responsibilities

In addition to these responsibilities, the judge may ask the guardian to agree to other special conditions concerning the child's welfare. For example, the judge may ask the guardian to follow specific visitation orders between the child and the child's parents.

FINANCIAL ASSISTANCE AND RESOURCES

Legal guardians may be able to get public assistance. How much assistance depends on the child's own eligibility and the child's relationship to the guardian.

WHEN GUARDIAN IS RELATED _____

A relative who wishes to become a legal guardian may be able to get financial help. If the relative is already receiving aid for the child, guardianship may reduce the amount of aid.

Before becoming a legal guardian, it is important to discuss the availability of government assistance with your attorney, if you have one, or the social worker.

Aid To Families With Dependent Children Foster Care (AFDC-FC) Payments

Although state and federal AFDC Foster Care payments may be available to a foster child living with a relative, they are *not* available to a child living with a related legal guardian. If the relative foster parent had been receiving AFDC Foster Care payments for that child before becoming the legal guardian, those payments will stop when the guardianship is granted. Any other aid or services that were available because of participation in the foster care program may also end.

Aid To Families With Dependent Children Family Group (AFDC-FG) Benefits

A child living with a relative legal guardian may be eligible to receive AFDC Family Group Benefits. These benefits generally are much less than the monthly AFDC Foster Care payments. If a relative foster parent receives AFDC Family Group benefits for the relative's family, these payments may increase slightly if the relative becomes the legal guardian of the child.

WHEN GUARDIAN IS NOT RELATED _____

In California if the child is not related to you, you can receive the same benefits whether you are the child's foster parent or legal guardian. If the child moves to another state, California will stop making payments. In addition, the other state may not offer the same assistance.

Aid To Families With Dependent Children Foster Care (AFDC-FC) Payments

A legal guardian who is not related to the child may get AFDC Foster Care payments and other foster care services. If an unrelated foster parent of a child has been receiving AFDC Foster Care payments, the same payments will continue after becoming the child's legal guardian. The child's eligibility for this program will be evaluated every six months.

Other Available Financial Assistance

There may be additional benefits available that do not depend on whether the child is related to the legal guardian.

Medi-Cal benefits are available for any child eligible for AFDC. A child who has other sources of income may also qualify for Medi-Cal benefits.

In the event that AFDC benefits are not allowed, the child may be eligible for Social Security benefits, Supplemental Income (SSI), or other government assistance.

HOW A LEGAL GUARDIAN MAY BE REMOVED

Any person with an interest in the child's welfare may ask the court to have the guardian changed. A child who is 14 years or older has the right to ask to have the guardian changed. The judge will look to see if the guardian's duties have been performed properly. The judge will consider what is in the best interest of the child. A guardian can ask the court for permission to resign.

TERMINATION OF A LEGAL GUARDIANSHIP

Unless terminated by court order, a guardianship ends when the child turns 18, is adopted, marries, or legally becomes emancipated.

ADDITIONAL INFORMATION

You can get more information about these programs from your child's social worker or your local child welfare agency. The following is a list of local helpful telephone numbers:

TO COURT CLERK: This form is CONFIDENTIAL if local rule requires the Acknowledgment of Receipt to have a Social Security or driver's license number.

ATTORNEY OR PARTY WITHOUT ATTORNEY (Name and Address):	TELEPHONE NO.:	FOR COURT USE ONLY
ATTORNEY FOR (Name): SUPERIOR COURT OF CALIFORNIA, COUNTY OF STREET ADDRESS: MAILING ADDRESS: CITY AND ZIP CODE: BRANCH NAME:		
ESTATE OF (NAME): DECEDENT		
DUTIES AND LIABILITIES OF PERSONAL REPRESENTATIVE and Acknowledgment of Receipt		

DUTIES AND LIABILITIES OF PERSONAL REPRESENTATIVE

When you have been appointed by the court as personal representative of an estate, you become an officer of the court and assume certain duties and obligations. An attorney is best qualified to advise you about these matters. You should clearly understand the following:

1. MANAGING THE ESTATE'S ASSETS

a. Prudent investments

You must manage the estate assets with the care of a prudent person dealing with someone else's property. This means you must be cautious and you may not make any speculative investments.

b. Keep estate assets separate

You must keep the money and property in this estate separate from anyone else's, including your own. When you open a bank account for the estate, the account name must indicate that it is an estate account and not your personal account. Never deposit estate funds in your personal account or otherwise commingle them with anyone else's property. Securities in the estate must also be held in a name that shows they are estate property and not your personal property.

c. Interest-bearing accounts and other investments

Except for checking accounts intended for ordinary administration expenses, estate accounts must earn interest. You may deposit estate funds in insured accounts in financial institutions, but you should consult with an attorney before making other investments.

d. Other restrictions

There are many other restrictions on your authority to deal with estate property. You should not spend any of the estate's money unless you have received permission from the court or have been advised to do so by an attorney. You may reimburse yourself for official court costs paid by you to the county clerk and for the premium on your bond. Without prior order of the court, you may not pay fees to yourself or to your attorney, if you have one. If you do not obtain the court's permission when it is required, you may be removed as personal representative or you may be required to reimburse the estate from your own personal funds, or both. You should consult with an attorney concerning the legal requirements affecting sales, leases, mortgages, and investments of estate property.

2. INVENTORY OF ESTATE PROPERTY

a. Locate the estate's property

You must attempt to locate and take possession of all the decedent's property to be administered in the estate.

b. Determine the value of the property

You must arrange to have a court-appointed referee determine the value of the property unless the appointment is waived by the court. (You, rather than the referee, must determine the value of certain "cash items." An attorney can advise you about how to do this.)

c. File an inventory and appraisal

Within four months after your appointment as personal representative, you must file with the court an inventory and appraisal of all the assets in the estate.

(Continued on reverse)

ESTATE OF (NAME): _____	CASE NUMBER: _____
DECEDENT	

d. File a change of ownership

At the time you file the inventory and appraisal, you must also file a change of ownership statement with the county recorder or assessor in each county where the decedent owned real property at the time of death, as provided in section 480 of the California Revenue and Taxation Code.

3. NOTICE TO CREDITORS

You must mail a notice of administration to each known creditor of the decedent within four months after your appointment as personal representative. If the decedent received Medi-Cal assistance you must notify the State Director of Health Services within 90 days after appointment.

4. INSURANCE

You should determine that there is appropriate and adequate insurance covering the assets and risks of the estate. Maintain the insurance in force during the entire period of the administration.

5. RECORD KEEPING

a. Keep accounts

You must keep complete and accurate records of each financial transaction affecting the estate. You will have to prepare an account of all money and property you have received, what you have spent, and the date of each transaction. You must describe in detail what you have left after the payment of expenses.

b. Court review

Your account will be reviewed by the court. Save your receipts because the court may ask to review them. If you do not file your accounts as required, the court will order you to do so. You may be removed as personal representative if you fail to comply.

6. CONSULTING AN ATTORNEY

If you have an attorney, you should cooperate with the attorney at all times. You and your attorney are responsible for completing the estate administration as promptly as possible. When in doubt, contact your attorney.

NOTICE: This statement of duties and liabilities is a summary and is not a complete statement of the law. Your conduct as a personal representative is governed by the law itself and not by this summary.

ACKNOWLEDGMENT OF RECEIPT

1. I have petitioned the court to be appointed as a personal representative of the estate of *(specify)*:
2. I acknowledge that I have received a copy of this statement of the duties and liabilities of the office of personal representative.

Date: _____
(TYPE OR PRINT NAME)

▶ _____
(SIGNATURE OF PETITIONER)

*Social Security No.: _____ *Driver's License No.: _____

Date: _____
(TYPE OR PRINT NAME)

▶ _____
(SIGNATURE OF PETITIONER)

*Social Security No.: _____ *Driver's License No.: _____

Date: _____
(TYPE OR PRINT NAME)

▶ _____
(SIGNATURE OF PETITIONER)

*Social Security No.: _____ *Driver's License No.: _____

*Supply these numbers only if required to do so by local court rule. The law requires the court to keep this information CONFIDENTIAL. (Probate Code, § 8404(a).)