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# REPORT TO THE JUDICIAL COUNCIL

For business meeting on: October 26, 2012

Title
Probate Guardianships: Testimony and Alternatives to Testimony of Wards and Proposed Wards in Guardianship Cases

Rules, Forms, Standards, or Statutes Affected
Adopt Cal. Rules of Court, rule 7.1016

Recommended by
Probate and Mental Health Advisory Committee
Hon. Mitchell L. Beckloff, Chair

Agenda Item Type
Action Required

Effective Date
January 1, 2013

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August 29, 2012

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## Executive Summary

The Probate and Mental Health Advisory Committee recommends adopting new probate rule 7.1016 to extend to probate guardianship proceedings provisions of recently effective legislation and parts of a recently adopted rule of court concerning testimony and alternatives to testimony of children involved in custody and visitation litigation under the Family Code. The legislation that compelled the adoption of the new family law rule of court was placed in a Family Code section that also expressly applies to the appointment of a guardian of the person of a child. But a separate rule for guardianship proceedings, rather than the direct application of the family law rule to those proceedings, is recommended because of unique features of probate guardianship cases that distinguish them from family law custody matters.

## Recommendation

The Probate and Mental Health Advisory Committee recommends that the Judicial Council, effective January 1, 2013, adopt rule 7.1016 of the California Rules of Court, concerning

testimony and alternatives to testimony of wards or proposed wards in probate guardianship cases.
The text of the rule is attached at pages 9–16.

## Previous Council Action

On October 28, 2011, the Judicial Council adopted rule 5.250 of the California Rules of Court, concerning testimony and alternatives to testimony of children involved in family law custody and visitation litigation. The rule became effective on January 1, 2012. An electronic link to this rule follows this report.

## Rationale for Recommendation

Legislation enacted in 2010 that became effective on January 1, 2012 added subdivisions (c)–(i) to section 3042 of the Family Code.[1] The new provisions govern the court's receipt of information, by testimony or by other means, from children who are the subject of custody or visitation litigation under that code. Subdivision (h) of section 3042 required the Judicial Council to adopt a rule of court establishing procedures for the examination of a child witness, including guidelines on methods other than direct testimony for obtaining information or other input from the child concerning custody or visitation.

During the public comment period on rule 5.250, many probate judicial officers and court staff, and attorneys practicing in guardianship cases, concluded that the family law rule would fully apply to probate guardianships of the person of a minor because of Probate Code section 1514(b)(1), which makes chapter 1 and chapter 2 of part 2 of division 8 of the Family Code (sections 3020–3032 and 3040–3048, including section 3042) applicable to the appointment of a guardian of the person of a minor. But there are differences between family law custody and visitation matters and probate guardianship practice. Some of the investigators and other experts identified in rule 5.250 do not participate in guardianship cases while other professionals who are not mentioned in that rule are regularly involved in guardianships.

The Probate and Mental Health Advisory Committee concluded that the provisions of section 3042 concerning child testimony should apply, and were intended by the Legislature to apply, to the appointment of a guardian of the person of a child and related matters in a guardianship case that are analogous to custody and visitation litigation in family law departments of the court. Differences between probate guardianship cases and family law custody matters, however, support the adoption of a specific probate rule applying the principles of section 3042 to guardianships. For that reason, the committee requested the Family and Juvenile Law Advisory Committee to add an advisory committee comment to rule 5.250 stating that the rule does not apply to probate guardianships "except as and to the extent that the rule is incorporated or expressly made applicable by a rule of court in title 7 of the California Rules of Court." The requested comment was added to rule 5.250.

[1] Assem. Bill 1050 (Stats. 2010, ch. 187) § 1. See Family Code section 3042(i). An electronic link to Family Code sections 3040–3049, including section 3042, follows this report.

**Rule 7.1016**

Rule 7.1016 would apply to "proceedings" in guardianships of the person, a term defined in paragraph (a)(2) as any matter that concerns the appointment or removal of a guardian; visitation; determination of the ward's place of residence; or termination of the guardianship by court order, which means, in effect, return of custody to a minor ward's parents. These matters are the closest equivalents in guardianship practice to custody and visitation matters under the Family Code.

Rule 7.1016(b)(2) would also authorize, but not require, courts to apply all or any portion of the rule to any matter in a guardianship of the estate, and to any matter other than a "proceeding" in a guardianship of the person. These matters are collectively referred to in paragraph (b)(2) and throughout the rule thereafter as "other matter[s] subject to this rule."

The rule does not refer to rule 5.250 or expressly incorporate its provisions in a probate rule under title 7 of the California Rules of Court. The rule's only mention of the family law rule is to exclude its application to guardianships. (Rule 7.1016(b)(4).) But rule 7.1016 follows the organization of rule 5.250 and repeats many of its provisions, with the differences described below.

***Rule applies only to wards or proposed wards.*** Rule 7.1016 applies only to a ward (or a proposed ward, included within the meaning of the term "ward" throughout the rule by rule 7.1016(a)(1)), with most provisions applicable to wards who are not parties in the case—who have not filed petitions or opposition in "proceedings" or "other matter[s] subject to this rule," as these phrases are defined above.[2] The testimony of minors other than wards would be governed by the Evidence Code's general provisions concerning underage witnesses, sections 765(b) and 767(b).

***The right of a ward to address the court.*** Rule 5.250(c)(2) requires the court to permit a child who is at least 14 years of age to address the court unless it makes a finding that it would be in the child's best interest not to do so and states the reasons for the finding on the record. Rule 7.1016(d)(2) would lower the minimum age for this treatment to 12 years because minors that age are granted the rights to notice and to become parties in their own guardianship cases.
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The probate rule would also provide that a ward who is under the age of 14 but is at least 12 years old would have the same degree of protection under the rule as a child witness in a family law custody matter or in any other case; the unique right a 12-year-old ward is given under the

[2] A minor at least 12 years of age is entitled to notice of hearing separate from notice to his or her parents on a petition for the appointment of a guardian for that minor, and may petition for the appointment. (Prob. Code, §§ 1510(a), 1511(b)(1).) By implication, he or she may also file opposition to an appointment petition. See *California Guardianship Practice* (Cont.Ed.Bar, 2011 edition § 5.65. p. 269). The rule proceeds on the assumption that a 12-year-old ward could become a party as to any other issues to be decided in his or her guardianship by filing pleadings that take positions on those issues.

rule to address the court would not affect the ward's right to the court's special care when he or she does testify. To ensure that result the probate rule expressly cites the Evidence Code section concerning testimony of underage witnesses instead of restating the essence of its provisions in the rule. Compare rule 7.1016(e)(3) and 7.1016(h)(4) with rule 5.250(d)(4). The first two sentences of the latter paragraph are essentially a restatement of the special care provisions of Evidence Code section 765(b).

Rule 5.250(c)(3) lists factors the court should consider when determining whether it would be in a child's best interest to address the court. Rule 7.1016(d)(3) would apply these factors to nonparty wards. The first factor listed in rule 5.250(c)(3)(A) is whether the child is of sufficient age and capacity to "reason to form an intelligent preference as to custody or visitation (parenting time)." The equivalent factor is restated in rule 7.1016(d)(3)(A) as "whether the ward is of sufficient age and capacity to form an intelligent preference as to the matter to be decided."

Subparagraph (E) of rule 7.1016(d)(3) would add the appointment of counsel under Probate Code section 1470 or a guardian ad litem to the list of factors the court should consider, not only on the issue of whether the appointment would be helpful to the determination of whether it would be in the ward's best interest to address the court, but also to protect the ward's interests.

***Appointed counsel for the ward who does testify.*** Rule 5.250(d)(5) says that in any case where a child will be called to testify, the court *may* consider the appointment of counsel for the child. Counsel so appointed must satisfy the standards for appointed counsel under the Family Code and related rules of court in title 5 of the California Rules of Court. Rule 7.1016(e)(5) would provide that if a nonparty ward will be called to testify, the court *must* consider the appointment of counsel under Probate Code section 1470 and may consider the appointment of a guardian ad litem. Appointed counsel must satisfy the requirements of rule 7.1101.

***Alternative sources of input from a ward who does not testify.*** Alternative sources of information and input for the court from the nonparty ward who does not testify would include (1) court or county guardianship investigators participating in the case under Probate Code sections 1513 (appointment investigations) and 1513.2 (enforcement of guardian status report requirements); and (2) counsel or a guardian ad litem appointed for the ward. (See rule 7.1016(e)(6)(A)–(F), particularly subparagraphs (A) and (C), compared to rule 5.250(d)(1)(A)–(E).)

A court or county guardianship investigator and a guardian ad litem would also be added to the list of persons who must inform the court if they have information that a nonparty ward wishes to address the court (rule 7.1016(c)(1), compared to rule 5.250(b)(1)).

Alternatives for this information and input under rule 5.250(d)(1)(B) include custody evaluators or investigators appointed under Family Code section 3110. This alternative would be deleted from the equivalent list of alternatives in rule 7.1016(e)(6). Custody evaluators and investigators appointed under Evidence Code section 730 remain in both rules; custody evaluators

increasingly are also appointed in guardianship cases, particularly in courts that have unified their family law and guardianship departments, but their appointments are not made under section 3110 in guardianships.

Child custody recommending counselors under Family Code section 3183 are child custody mediators permitted to make recommendations to the family court concerning child custody, visitation, or other disposition of the custody proceeding. However, mediations similar to family court custody mediations do occur in guardianships. Particularly in unified courts, some of the mediators in these matters are also child custody recommending counselors under the Family Code child custody mediation provisions, sections 3160–3188. They are included as a source of information and a ward's input in rule 7.1016(e)(6)(E). (See also the opening sentences of rules 7.1016(f) and 5.250(e), concerning responsibilities of court-connected or appointed professionals.)

The material in rule 5.250(d)(4), concerning taking testimony from a child and the court's receipt of the child's input, would be broken out into two paragraphs, at rule 7.1016(e)(3) and (4). Paragraph (4) would state the ward's preference as referring to the matter to be decided, not merely to custody or visitation. The subject of the ward's preference would be restated in the same way in rule 7.1016(f)(2), concerning the duties of court-connected or appointed professionals.

***Providing information to parents and supporting children in their court experience.*** Rule 5.250(f) describes methods of providing information to parents and supporting children (the latter phrase meaning supporting children through their experience in the family court, not financial support). Rule 7.1016(g) would modify rule 5.250(f) to provide (the following references below are to paragraphs in this subdivision of the rule):

- Court or county guardianship investigators or experts appointed under Evidence Code section 730 are to meet with the parties (¶1).

- Provision of information to parties about the ward testifying is to be done before testimony so the parties may consider the effect on the ward of giving testimony before he or she does so. Having parties learn about the effect of testimony after it is given would not help them decide whether to withdraw requests for testimony or insist on testimony (¶3).

- An additional method of providing information and supporting a ward is to appoint counsel or a guardian ad litem for the ward (¶4).

- "Including information in child custody mediation orientation" in rule 5.250(f)(4) would be changed to (¶5):

> Including information in guardianship orientation presentations and publications about the options available to a ward who is not a party to the proceeding or other matter subject to this rule to participate or testify or not to do so, and the consequences of a ward's decision whether to become a party to the proceeding or other matter subject to this rule . . .

***Provisions for wards who are parties.*** The rule would contain special provisions for a ward or proposed ward who is a party that have no equivalent in the family law rule. A ward who is a party is subject to the law of discovery as applied to parties in civil actions and may be called as a witness by any other party, but the probate rule would permit the court to find that it would not be in the ward's best interest to provide information in response to discovery requests or to testify (rule 7.1016(h)(1)). The court would retain special authority to protect the ward in these activities in the same ways it can protect the ward when he or she testifies in court (rule 7.1016(h)(2) and (3)).

***Education and training of judicial officers and court staff.*** Rule 7.1016(i), education and training of judicial officers and court staff, would restate rule 5.250(g) as follows:

> Education and training content for court staff and judicial officers should include information on wards' participation in proceedings or other matters subject to this rule, methods other than direct testimony for receiving input from a ward, procedures for taking a ward's testimony, and differences in the application of this rule to wards who are and are not parties to the proceeding or other matter subject to this rule.

## Comments, Alternatives Considered, and Policy Implications

This proposal was circulated for comment as part of the spring 2012 comment cycle. Four comments were received, all of which approved the proposal. One comment, that of the Superior Court of Los Angeles County, recommended changes. A chart summarizing the comments received and the committee's responses is attached at pages 17–30.

The Los Angeles court's initial concern was that the rule is overbroad because it applies to more matters than hearings on appointment petitions in guardianships of the person, and the application of Family Code sections, including section 3042, in Probate Code section 1514(b)(1), is limited to those hearings. The committee's response notes that the family law rule applies to child custody and visitation matters in family law cases. The mandatory application of the probate rule would be to the hearings in guardianships that are the equivalent of custody and visitation hearings in family law cases. In addition to guardianship appointment and visitation hearings, these are hearings on removal of a guardian and termination of a guardianship by court order (during the ward's minority). Each of the latter matters involves a change of custody—back to the parents if the guardianship is terminated or to another guardian if the existing guardian is removed.

Another mandatory application would be to a hearing on a petition to determine the ward's place of residence out of state, which, unlike moves within the state, requires prior court permission (Prob. Code, § 2352(a), (c)). Such a move in many cases would also involve a change of guardian but even if it does not, the move involves a substantial change of the minor's life concerning which he or she should have an opportunity to address the court and may lead to a change of guardians if the court decides that the minor should not leave the state and the guardian intends to go. All other applications of the rule, including all hearings concerning a guardianship of the estate, would be within the discretion of the court.

The court was also concerned that the proposed rule is overly reliant on appointed counsel as aids to the goals of the rule, at a potentially large cost to counties, which are responsible for the public portion of the cost of appointed counsel. The committee supports the appointment of counsel for minors in guardianship cases generally, and particularly in the situations where this rule would apply, especially where they are mandatory. No representative of any county's government has commented negatively on this feature of the proposed rule.

The Los Angeles court also objected to the requirement of rule 7.1016(e)(7)(A), that information from a nontestifying ward provided by a professional or a nonparty must be in writing. (The same requirement is found in rule 5.250(d)(2)(A)). The court pointed out that this requirement could apply to counsel. If it were so applied, the ward's counsel would be required to express his or her client's desires in writing and then be subject to cross-examination, presenting cost and privilege issues. The committee decided to retain the general requirement of written submissions from professionals and nonparties but modified rule 7.1016(e)(7) to clarify that "professional" under the rule for this purpose does not include counsel for the ward or any party; the term was intended to refer to the investigators, evaluators, or other experts listed in the rule, not to counsel.

The court also objected to inclusion in the text of the rule examples of factors to be considered on the question of whether the ward should be permitted to testify in rule 7.1016(e)(2). These examples had been taken from a similar list in rule 5.250(d)(3). The committee agreed with the objection and eliminated the examples from the probate rule.

The Joint Rules Working Group of the Trial Court Presiding Judges and Court Executives Advisory Committees (JRWG) entirely approved the rule, agreed with the estimates of training time for judicial officers and implementation expenses contained in the invitation to comment (and rated by JRWG as low to medium impact), and did not request or recommend changes. Its comment, however, requested clarification or an explanation of certain provisions of the rule and the surrounding law. A detailed response to this inquiry is contained in the attached comment chart beginning at page 19 and will be provided separately to the working group as a whole and to its members who prepared the group's comment.

## Implementation Requirements, Costs, and Operational Impacts

The legislation that led the advisory committee to create this rule will require additional work by probate court staff, particularly guardianship investigators. Investigators would be required to

inform the court if they learn during their investigation that a nonparty ward wishes to address the court. (Rule 7.1016(c)(1)(B).) If the court decides that the ward should not testify, the court investigators would be alternative sources of input to the court from the ward. (Rule 7.1016(e)(6)(A).) Information investigators provide to the court about the ward's input must be reduced to writing and provided to the parties, and the investigator must be prepared to testify and be cross-examined about that input and the circumstances of its collection and reproduction. (Rule 7.1016(e)(7)(A).) Experts and counsel for the ward appointed by the court in like circumstances will have similar increased responsibilities.[3]

Judicial officers, court investigators, and court-appointed experts and counsel will also have additional responsibilities in providing information to parties about the testimony of the ward and the effect on the ward of giving testimony and appearing in court. See rule 7.1016(f), (g), and (h). If the court decides that the ward may testify, the court will be required to make the determinations described in rule 7.1016(e)(2). Discharge of all of these responsibilities will lead to longer court hearings and additional preparation time for these hearings.

Rule 7.1016(i) would require additional training for judicial officers and court staff in the requirements of the rule.

### Relevant Strategic Plan Goals and Operational Plan Objectives

The proposed rule supports the case management policies underlying strategic Goal III, Modernization of Management and Administration (Goal III.B, Trial and Appellate Case Management) and objective III.B.5 of the related operational plan (Develop and implement effective trial case management rules, procedures, techniques, and practices to promote the fair, timely, consistent, and efficient processing of all types of cases). The rule also supports Goal IV, Quality of Justice and Service to the Public, and objective IV.1 of the operational plan (Foster excellence in public service to ensure that all court users receive satisfactory services and outcomes) and desired outcome f (improved practices, procedures, and administration of probate guardianship cases).

### Attachments

1. Rule 7.1016, at pages 9–16; and
2. Chart of comments, at pages 17–30.

A link to rule 5.250 is:
http://www.courtinfo.ca.gov/cms/rules/index.cfm?title=five&linkid=rule5_250.
A link to Family Code sections 3040–3049, including section 3042, is:
http://www.leginfo.ca.gov/cgi-bin/displaycode?section=fam&group=03001-04000&file=3040-3049.

[3] But the cost of counsel appointed for the ward not payable by the ward's estate or his or her parents is payable by the county, not the court (Prob. Code, § 1470(c)(3)).

Rule 7.1016 of the California Rules of Court is adopted, effective January 1, 2013, to read as follows:

**Rule 7.1016. Participation and testimony of wards in guardianship proceedings**

**(a) Definitions**

As used in this rule, the following terms have the meanings specified:

(1) "Ward" includes "proposed ward."

(2) A "proceeding" is a matter before the court for decision in a probate guardianship of the person that concerns appointment or removal of a guardian, visitation, determination of the ward's place of residence, or termination of the guardianship by court order.

(3) "Party," as used in this rule to refer to the ward, means a ward who has filed a petition or opposition to a petition concerning a proceeding or other matter subject to this rule.

**(b) Purpose and scope of rule**

(1) This rule applies Family Code section 3042 to the participation and testimony of the ward in a proceeding in a probate guardianship of the person. The testimony of other minors in a guardianship case is governed by Evidence Code sections 765(b) and 767(b).

(2) The court in its discretion may apply this rule, in whole or in part, to the participation and testimony of a ward in a guardianship of the estate or in a matter before the court in a guardianship of the person that is not a proceeding within the meaning of this rule. The phrase "or other matter subject to this rule" following the term "proceeding" is a reference to the matters described in this paragraph.

(3) No statutory mandate, rule, or practice requires a ward who is not a party to the proceeding or other matter subject to this rule to participate in court or prohibits him or her from doing so. When a ward desires to participate but is not a party to the proceeding or other matter subject to this rule, the court must balance the protection of the ward, the statutory duty to consider the wishes of and input from the ward, and the probative value of the ward's input while ensuring all parties' due process rights to challenge evidence relied on by the court in making decisions affecting the ward in matters covered by the rule.

(4) This rule rather than rule 5.250, on children's participation and testimony in family court proceedings, applies in probate guardianship proceedings.

**(c) Determining whether the nonparty ward wishes to address the court**

(1) The following persons must inform the court if they have information indicating that a ward who is not a party wishes to address the court in a proceeding or other matter subject to this rule:

(A) The ward's counsel;

(B) A court or county guardianship investigator;

(C) A child custody recommending counselor who provides recommendations to the judicial officer under Family Code section 3183;

(D) An expert appointed by the court under Evidence Code section 730 to assist the court in the matter; or

(E) The ward's guardian ad litem.

(2) The following persons may inform the court if they have information indicating that a ward who is not a party wishes to address the court in a proceeding or other matter subject to this rule:

(A) A party in the guardianship case; and

(B) An attorney for a party in the guardianship case.

(3) In the absence of information indicating that a ward who is not a party wishes to address the court in a proceeding or other matter subject to this rule, the judicial officer may inquire whether the ward wishes to do so.

**(d) Guidelines for determining whether addressing the court is in the nonparty ward's best interest**

(1) When a ward who is not a party indicates that he or she wishes to address the court, the judicial officer must consider whether involving the ward in the proceeding or other matter subject to this rule is in the ward's best interest.

(2) If the ward is 12 years old or older, the judicial officer must hear from the ward unless the court makes a finding that addressing the court is not in the ward's best interest and states the reasons on the record.

(3) In determining whether addressing the court is in the ward's best interest, the judicial officer should consider the following:

(A) Whether the ward is of sufficient age and capacity to form an intelligent preference as to the matter to be decided;

(B) Whether the ward is of sufficient age and capacity to understand the nature of testimony;

(C) Whether information has been presented indicating that the ward may be at risk emotionally if he or she is permitted or denied the opportunity to address the court or that the ward may benefit from addressing the court;

(D) Whether the subject areas about which the ward is anticipated to address the court are relevant to the decision the court must make;

(E) Whether the appointment of counsel under Probate Code section 1470 or a guardian ad litem for the ward would be helpful to the determination or would be necessary to protect the ward's interests; and

(F) Whether any other factors weigh in favor of or against having the ward address the court, taking into consideration the ward's desire to do so.

**(e) Guidelines for receiving testimony and other input from the nonparty ward**

(1) No testimony of a ward may be received without such testimony being heard on the record or in the presence of the parties. This requirement may not be waived.

(2) On deciding to take the testimony of a ward who is not a party in a proceeding or other matter subject to this rule, the judicial officer should balance the necessity of taking the ward's testimony in the courtroom with parents, the guardian or proposed guardian, other parties, and attorneys present with the need to create an environment in which the ward can be open and honest. In each case in which a ward's testimony will be taken, the judicial officer should consider:

(A) Where the testimony will be taken;

(B) Who should be present when the testimony is taken;

(C) How the ward will be questioned; and

(D) Whether a court reporter is available in all instances, but especially when the ward's testimony may be taken outside the presence of the parties and their attorneys. If the court reporter will not be available, whether there are other means to collect, preserve, transcribe, and make the ward's testimony available to parties and their attorneys.

(3) In taking testimony from a ward who is not a party to the proceeding or other matter subject to this rule, the court must take the special care required by Evidence Code section 765(b). If the ward is not represented by an attorney, the court must inform the ward in an age-appropriate manner about the limitations on confidentiality of testimony and that the information provided to the court will be on the record and provided to the parties in the case.

(4) In the process of listening to and inviting the ward's input, the court must allow but not require the ward to state a preference regarding the matter to be decided in the proceeding or other matter subject to this rule and should provide information in an age-appropriate manner about the process by which the court will make a decision.

(5) In any case in which a ward who is not a party to the proceeding or other matter subject to this rule will be called to testify, the court must consider the appointment of counsel for the ward under Probate Code section 1470, and may consider the appointment of a guardian ad litem for the ward. In addition to satisfying the requirements for minor's counsel under rule 7.1101, minor's counsel must:

(A) Provide information to the ward in an age-appropriate manner about the limitations on the confidentiality of testimony and indicate to the ward the possibility that information provided to the court will be on the record and provided to the parties in the case;

(B) Allow but not require the ward to state a preference regarding the issues to be decided in the proceeding or other matter subject to this rule, and provide information in an age-appropriate manner about the process by which the court will make a decision;

(C) If appropriate, provide the ward with an orientation to the courtroom or other place where the ward will testify; and

(D) Inform the parties and the court about the ward's desire to provide input.

(6) If the court precludes the calling of a ward who is not a party as a witness in a proceeding or other matter subject to this rule, alternatives for the court to obtain information or other input from the ward may include:

(A) A court or county guardianship investigator participating in the case under Probate Code section 1513 or 1513.2;

(B) Appointment of a child custody evaluator or investigator under Evidence Code section 730;

(C) Appointment of counsel or a guardian ad litem for the ward;

(D) Admissible evidence provided by the ward's parents, parties, or witnesses in the proceeding or other matter subject to this rule;

(E) Information provided by a child custody recommending counselor authorized under Family Code section 3183 to make a recommendation to the court; and

(F) Information provided from a child interview center or professional to avoid unnecessary multiple interviews.

(7) If the court precludes the calling of a ward who is not a party as a witness in a proceeding or other matter subject to this rule and specifies one of the other alternatives, the court must require that the information or evidence obtained by alternative means and provided by a professional (other than counsel for the ward or counsel for any party) or a nonparty:

(A) Be in writing and fully document the ward's views on the matters on which he or she wished to express an opinion;

(B) Describe the ward's input in sufficient detail to assist the court in making its decision;

(C) Be provided to the court and to the parties by a person who will be available for testimony and cross-examination; and

(D) Be filed in the confidential portion of the case file.

**(f) Responsibilities of court-connected or appointed professionals—all wards**

A child custody evaluator, an expert witness appointed under Evidence Code section 730, an investigator, a child custody recommending counselor or other custody mediator appointed or assigned to meet with a ward must:

(1) Provide information to the ward in an age-appropriate manner about the limitations on confidentiality of testimony and the possibility that information provided to the professional may be shared with the court on the record and provided to the parties in the case;

(2) Allow but not require the ward to state a preference regarding the issues to be decided in the proceeding or other matter subject to this rule, and provide information in an age-appropriate manner about the process by which the court will make a decision; and

(3) Provide to the other parties in the case information about how best to support the interest of the ward during the court process.

**(g) Methods of providing information to parties and supporting nonparty wards**

Courts should provide information to the parties and the ward who is not a party to the proceeding or other matter subject to this rule when the ward wants to participate or testify. Methods of providing information may include:

(1) Having court or county guardianship investigators and experts appointed under Evidence Code section 730 meet jointly or separately with the parties and their attorneys to discuss alternatives to having the ward provide direct testimony;

(2) Providing an orientation for the ward about the court process and the role of the judicial officer in making decisions, how the courtroom or chambers will be set up, and what participating or testifying will entail;

(3) Providing information to parties before the ward participates or testifies so that they can consider the possible effect on the ward of participating or not participating in the proceeding or other matter subject to this rule;

(4) Appointing counsel under Probate Code section 1470 or a guardian ad litem for the ward to assist in the provision of information to the ward concerning his or her decision to participate in the proceeding or testify;

(5) Including information in guardianship orientation presentations and publications about the options available to a ward who is not a party to the proceeding or other matter subject to this rule to participate or testify or not to do so, and the consequences of a ward's decision whether to become a party to the proceeding or other matter subject to this rule; and

(6) Providing an interpreter for the ward.

**(h) If the ward is a party to the proceeding**

(1) A ward who is a party to the proceeding or other matter subject to this rule is subject to the law of discovery applied to parties in civil actions and may be called as a witness by any other party unless the court makes a finding that providing information in response to discovery requests or testifying as a witness is not in the ward's best interest and states the reasons on the record.

(2) The court must consider appointing counsel under Probate Code section 1470 or a guardian ad litem for a ward who is a party to the proceeding or other matter subject to this rule if the ward is not represented by counsel.

(3) In determining whether providing information in response to discovery requests or testifying as a witness is in the ward's best interest, the judicial officer should consider the following:

(A) Whether information has been presented indicating that the ward may be at risk emotionally if he or she is permitted or denied the opportunity to provide information in response to discovery requests or by testimony;

(B) Whether the subject areas about which the ward is anticipated to provide information in response to discovery requests or by testimony are relevant to the decision the court must make; and

(C) Whether any other factors weigh in favor of or against having the ward provide information in response to discovery requests or by testimony.

(4) In taking testimony from a ward who is a party to the proceeding or other matter subject to this rule, the court must take the special care required by Evidence Code section 765(b). If the ward is not represented by an attorney, the court must inform the ward in an age-appropriate manner about the limitations on confidentiality of testimony and that the information provided to the court will be on the record and provided to the parties in the case.

**(i) Education and training of judicial officers and court staff**

Education and training content for court staff and judicial officers should include information on wards' participation in proceedings or other matters subject to this rule, methods other than direct testimony for receiving input from a ward, procedures for taking a ward's testimony, and differences in the application of this rule to wards who are and are not parties to the proceeding or other matter subject to this rule.

## SPR12-23

**Probate Guardianships: Testimony of (Proposed) Wards and Other Children in Guardianship Cases**

(Adopt rule 7.1016 of the California Rules of Court)

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

| | Commentator | Position | Comment | Committee Response |
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| 1. | Joint Rules Working Group of the Trial Court Presiding Judges and Court Executives Advisory Committee (TCPJAC/CEAC)<br>San Francisco | A | **Agree** with proposed changes<br><br>**<u>TCPJAC/CEAC Joint Rules Working Group Comment:</u>**<br><br>The TCPJAC/CEAC Joint Rules Working Group agrees with the proposed changes.<br><br>**Potential Fiscal Impact**<br>The increased training costs described below will have a fiscal impact. Implementation of the rule will increase the length and cost of trials in guardianship cases that affect custody of the ward because of the special requirements imposed by the rule concerning communications to the court by the ward or proposed ward and advice to the ward and others required by the rule concerning the ward's right to provide information to the court by means other than testimony in open court. In addition, judicial officers in the Superior Court of Napa County, and perhaps others, are reluctant to have minors testify in open court or in chambers without a court reporter. For courts that do not normally provide court reporters in Family Law cases, the parallel Family Law requirements have necessitated providing court reporters when minors testify at additional cost to the court. The requirements of this Guardianship rule may increase costs in the same manner.<br><br>**Impact on Existing Automated Systems** | No response necessary.<br><br>The advisory committee acknowledges that there will be increased training costs. The committee appreciates that the working group agrees with the committee's summary of education that will be required in training, contained in the Invitation to comment on this proposal. |

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| | | | This proposal does not require any changes to the SUSTAIN Justice Edition CMS. There is no apparent impact to automated CCMS V3 for Civil, Small Claims, Probate, and Mental Health.<br><br>**Increased Training Needs Requiring the Commitment of Staff Time and Court Resources:**<br><br>**The working group agrees with the summary of the education that will be needed as stated in the Invitation to Comment,** especially with regards to judicial officer training in eliciting testimony from young children.<br><br>**Increase to Existing Court Staff Workload:**<br><br>**The working group agrees with the summary of the increases to existing court staff's workload as stated in the Invitation to Comment. It also has the following additional input:**<br><br>• **Court Investigators –** Court Investigators' current procedures, including any scripts that staff may use to conduct investigations, will need to be updated to incorporate these new provisions. Pursuant to Probate Code §1513, an investigation report must be filed with the court with recommendations as to the granting of the petition for guardianship. Under this provision | |

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| | | | the investigator would be required to ask the ward, if the child is of sufficient age[1] and capacity to reason, whether or not he/she would like to address the Court and include the wards response in the report. Based on the proposed rule, the court may see an increase in subpoenas on the investigators. If the increase is substantial, this *may* impact the turnaround time for an investigator to conduct interviews and produce reports to the court as they will be appearing in court more frequently. There is no way of predicting the actual impact at this time. **Medium Impact.**<br><br>[1] Clarification on what is the "sufficient age" is required. Family Code §3042(c) says, "If the child is **14 years of age or older** and wishes to address the court…the child may be permitted to do so…" Probate Code §1510(a) says, "A relative or other person on behalf of the minor, or the minor if **12 years of age or older**, may file a petition for the appointment of guardian of the minor." | Section 1513(a)(3) requires the guardianship investigator to include in his or her report a statement of the proposed ward's "attitude concerning the proposed guardianship unless the statement of the attitude would be affected by the proposed ward's developmental, physical, or emotional condition." The commentator's mention of "sufficient age and capacity to reason" appears to be a reference to section 1514(e)(2) or to its family law analogue, Family Code section 3042(a), both discussed immediately below in response to the commenter's footnote 1.<br><br>"Sufficient age" under Probate Code section 1514(e)(2) on the one hand, and the 14-year old and 12-year old provisions of rules 5.250(c)(2) and proposed rule 7.1016(d)(2) on the other hand, are different. Section 1514(e)(2) says that the proposed ward's preference for the person to be appointed as his or her guardian must be considered by the court if the child is of sufficient age to form an intelligent preference. (The analogue to section 1514(e)(2) in a family law custody and visitation proceeding is Family Code section 3042(a), which refers to a child of |

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| | | | | "sufficient age and capacity to reason to form an intelligent preference as to custody and visitation.")<br><br>The provisions of the rules concerning 14-year-old and 12-year-old children refer to the minimum age that a child must have reached to become entitled to the right to address the court (unless the court expressly finds that it would not be in his or her best interest to do so). The 14-year-old minimum age under rule 5.250(c)(2) is based on Family Code section 3042(c). The 12-year old minimum age under rule 7.1016(d)(2) is based on the fact that Probate Code section 1510(a) permits a minor of that age to petition for the appointment of a guardian. A child of sufficient age to be a petitioner is clearly of sufficient age to have the right to address the court (unless the court expressly determines otherwise).<br><br>Neither the 14-year nor the 12-year minimum ages provided in the two rules of court establish "sufficient age and capacity" under section 1514(e)(2) and, in the case of the guardianship rule, does not establish a minimum age to require a statement in the investigator's report of the proposed ward's attitude about the proposed guardianship under section 1513(a)(3). Absent unusual circumstances, one would expect a child of a younger age than 12 years to have capacity to express an intelligent preference between two or more candidates for appointment as his or her |

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| | | | • **Examiner—**A "canned note" would need to be made on the calendar notifying the judicial officer that a request has been made, or in the absence of the request, that the court may want to inquire if the minor would like to address the court. **Medium Impact.**<br><br>• **Probate Court Staff—**Upon updating written procedures, staff training will be required. Estimated time to update written procedures and train staff: approximately 2 weeks. ***Low Impact.***<br><br>• **Judicial Officer—**Upon review of examiner notes, the court would decide if it is in the best interest of the child to have him/her testify, or in the absence of such a request, the judge would make the inquiry. If ward testifies, hearing time would be increased. ***Medium Impact.***<br><br>**Positive Impact—**Access to justice for ward.<br><br>**Negative Impact—**Overall increased workload generating no additional revenue.<br><br>• **Additional Comments:** The implementation timeline of two months is feasible. Two months is adequate time to | guardian. Similarly, not all children of less than 12 years will be in such a developmental, physical, or emotional condition that an investigator should omit from his or her report a statement of the child's attitude about the guardianship. |

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| | | | update procedures and train staff. Orange County could be in compliance with the new rule effective January 01, 2013.<br><br>• In the event that the proposed guardian(s) is not a relative of the minor, pursuant to Probate Code §1513(a) the investigation and subsequent report must be done by the county agency (in Orange County's case this would be done by the Department of Social Services). The provisions are silent as to any requirements or impacts this rule would have on agency investigations and the subsequent reports.<br><br>**Request for Specific Comments**<br><br>• Does the proposal appropriately address the stated purpose? ***Yes***<br>• Will the proposal provide cost savings? ***No***<br>• What are the implementation requirements for courts?<br>Training Requirements:<br>**Judicial Officers—Two hours.**<br>Court Investigators and Examiners—Two hours<br>Changes and additions to standardized guardianship report formats and content:<br>**No changes to automated systems.**<br>• Would additional time from Judicial Council | |

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| | | | approval of this proposal until its effective date provide sufficient time for implementation? ***Yes***<br>• How well would this proposal work in courts of different sizes? **No difference.** | |
| 2. | Orange County Bar Association, by Dimetria Jackson, President<br>Newport Beach | A | No specific comment made. | No response necessary. |
| 3. | Superior Court of California, County of Los Angeles<br>Los Angeles | AM | I.<br>The rule is overbroad and exceeds the legislative directive of Probate Code section 1514(b)(1). Chapters 1 and 2 of Part 2 of Division 8 of the Family Code apply "[i]n appointing a guardian of the person" only. The proposed rule expands the application of the Family Code provisions well beyond "appointing a guardian of the person" to include actions concerning the removal of guardians, visitation controversies, determining the ward's principal place of residence, and termination of guardianships. | I.<br>Family Code section 3042(h) provides:<br><br>(h) The Judicial Council shall, no later than January 1, 2012, promulgate a rule of court establishing procedures for the examination of a child witness, and include guidelines on methods other than direct testimony for obtaining information or other input from the child regarding custody or visitation.<br><br>This provision led to the adoption of rule 5.250 effective January 1, 2012.<br><br>The proposed rule 7.1016 would apply the concepts of section 3042(h) and rule 5.250 to the unique circumstances of guardianships. Rule 5.250 applies to child custody and visitation matters in family law matters. The proposed mandatory application of rule 7.1016 would be to the hearings in guardianships that are the |

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| | | | | equivalent of custody and visitation hearings in family law cases. In addition to guardianship appointment and visitation hearings, these are hearings on removal of a guardian and termination of a guardianship by court order (during the ward's minority). Each of the latter matters involves a change of custody—back to the parents if the guardianship is terminated or to another guardian if the existing guardian is removed.<br><br>Another mandatory application would be to a hearing on a petition to determine the ward's place of residence out of state, which, unlike moves within the state, requires court permission. Such a move in many cases would also involve a change of guardian but even if it does not, the move involves a substantial change of the minor's life concerning which he or she should have an opportunity to address the court and may lead to a change of guardians if the court decides that the minor should not leave the state and the guardian intends to do so. |
| | | | Further, the proposed rule suggests that it could be applied in guardianships of the estate and other proceedings not specifically set forth in the rule's definition of "proceeding." As discussed below in IV, given the financial implications of the rule, the rule should be a narrow one. | Application of the rule to matters in a guardianship other than the custody analogues mentioned above and visitation matters is entirely discretionary with the court. |
| | | | Accordingly, if adopted, the proposed rule should apply as the Legislature has directed—to | The advisory committee concluded that the Legislature intended, in Family Code section |

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| | | | proceedings "appointing a guardian of the person." | 3042, that a rule of court on child testimony should apply to all custody and visitation issues, not merely to hearings on a petition for appointment of a guardian. Return of the ward to his or her parents upon termination of a guardianship, or a change in guardians after a hearing on a guardian's removal, are every bit as much of custody hearings as is an initial guardianship appointment hearing, or a hearing concerning parental visitation. |
| | | | II.<br>(b)(1) provides that the rule implements Family Code section 3042(c). That statement is under inclusive as the rule implements all of Family Code section 3042. *Compare* (e) with Family Code section 3042(e). | II.<br>This comment is well-taken. Rule 7.1016(b)(1) has been modified by deleting the reference to subdivision (c) of section 3042. |
| | | | The language of (b)(2) is confusing. The "or other matter subject to this rule" language is a bit unwieldy throughout the rule. Perhaps an additional subdivision could be similar to the first sentence of (b)(2) to express that the court in its discretion may apply the rule to matters before the court that are not a proceeding as defined in the rule. Such a revision would establish the court's discretion to apply the rule in any guardianship proceeding not otherwise defined as a proceeding without using the language "or other matter subject to this rule" throughout the rule.<br><br>(This comment is included even though this | The committee has decided against changing the way the rule refers to "proceedings"—the matters to which the rule must apply, and "other matters subject to this rule"—to which the application of the rule is discretionary. The explanation in paragraph 7.1016(b)(2) of the phrase "other matter subject to this rule" could have been placed in an introductory paragraph but it would not be any clearer if placed there as applied throughout the rest of the rule. The committee believes the phrase is best defined where it first appears in the rule. |

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| | | | aspect of the rule is overbroad and not in compliance with the Probate Code as noted in I above.) | |
| | | | III.<br>(c) uses "non-party ward" and "proposed ward." This seems redundant given the definition of "ward" in part (a). | III.<br>The reference to "proposed ward" in the heading of rule 7.1016(c) has been deleted. As the commentator notes, the term "ward" includes "proposed ward" (rule 7.1016(a)(1)). |
| | | | (c)(2) appears unnecessary. (c)(1) creates a mandatory obligation unlike (c)(2). Given (c)(2)'s permissive nature as well as the overall length of the proposed rule, it is unclear why (c)(2) should be included in the rule. As a practical matter, parties or the attorney for a party will likely advise the court of the minor's desire to testify. Where the parties are silent, (c)(3) allows the court to inquire. | Rule 7.1016(c)(2) is intended to inform the persons identified that they may inform the court. Six short lines of text do not seem excessive for this purpose. The court's inquiry under rule 7.1016(c)(3) would primarily be directed at the minor, not at the other participants in the case. |
| | | | IV.<br>(e)(7) is unnecessary and does not allow the court to determine with the parties how best to receive the minor's position from alternative sources. Nothing in Family Code section 3042 requires a written document related to the court's determination of a minor's preference where that minor has not been permitted to testify. It should be up to the court hearing the matter to determine how best to receive the alternative source information. | IV.<br>This provision, including the requirement of a writing from a professional or nonparty witness, is consistent with rule 5.250(d)(2), adopted by the Judicial Council effective January 1, 2012. |

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| | | | As a practical matter, the proposed rule promotes the appointment of minor's counsel (see also (e)(6), (g)(4), (h)(2)) and the resulting increased costs for such services to the County. (Parents involved in these guardianship proceedings are most often indigent.)<br><br>Given the scope of the proposed rule, the cost of minor's counsel is likely to increase substantially.<br><br>For example, in a case where a minor does not testify, in counties where an investigator's report is not prepared as such reports may be waived by the court under Probate Code section 1513, subdivision (a), the alternatives to determining the minor's preference are costly. Where an investigator's report has been waived, it is unlikely given the reduction in staffing required under recent budget cuts that an Evidence Code section 730 expert, child custody evaluator, child custody counselor, or child interview center will be available. (e)(1)(D)'s alternative (admissible testimony of others) provides evidentiary hurdles. The only real alternative for the court under this alternative is the appointment of minor's counsel with a shift of that expense to the County.<br><br>(e)(7)(A) would require minor's counsel (if that | The committee supports the appointment of counsel for minors in guardianships generally, and where a minor would be governed by this rule specifically. No counties have commented concerning this aspect of the proposed rule. (Rule 7.1016(e)(6) is moved to (e)(5).)<br><br>If a court believes that the alternatives to an investigation under section 1513 would be more expensive than the investigation in a case where the minor is likely not to testify, it can determine that the investigation should not be waived in such a case.<br><br>Rule 7.1016(e)(7) has been modified to exclude |

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| | | | alternative is used as an alternative to testimony) to put into writing and fully document the ward's views. It would also require minor's counsel to be available for testimony and cross-examination pursuant to (e)(7)(C). The writing and testimony requirements create privilege and cost issues. Even assuming that the court has a child custody counselor or child interview center available as a resource, requiring a writing from that counselor or interviewer is costly and creates delay. This is not to suggest that the counselor or interviewer should not be subject to cross-examination. Currently, child interviews and testimony from the interviewer can be conducted on the same day. If a "writing fully document[ing] the ward's views" is required, it is likely that the families will be required to make multiple trips to court in connection with the proceeding, i.e., child interview occurs, parties obtain written report and evidentiary hearing is set, and evidentiary hearing is conducted.<br><br>V.<br>(e)(2) should end as follows: "In each case in which a ward's testimony will be taken, the judicial officer should consider (A) where the testimony will be taken; (B) who should be present when the testimony is taken; (C) how the ward will be questioned; and (D) whether a court reporter is available." | counsel for the non-party ward or counsel for a party in the case from the term "professional." If the minor's attorney is the source of this information, the normal methods of obtaining an attorney's statement would apply. The term "professional" was intended to refer to the experts, custody evaluators, or court investigators mentioned in the rule, not to counsel for the ward or for a party to the case. That intended meaning is now express and clear.<br><br>The provisions of rule 7.1016(e)(7) concerning written statements from professional or nonparty witnesses are identical to the provisions of rule 5.250(d)(2), adopted by the Judicial Council effective on January 1, 2012.<br><br>The committee agrees with this recommendation and has deleted the options or examples following the introductory statements in subparagraphs (A)–(D) of rule 7.1016(e)(2). |

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| | | | Items (A), (B), (C), and (D) are sufficient to flag the issues for the court so the court can best determine consistent with due process how to proceed. Listing options (even with the language "may include") suggests that a selected option would comply with due process requirements when the option may not given the circumstances of a particular case.<br><br>Further, given the length of the rule, subparagraphs (A)–(D) of rule 7.1016((e)(3) are unnecessary details that can be explored in the context of the judicial education required by (i).<br><br>VI.<br>(f)(1) and (f)(2) create obligations on court-connected or appointed professionals that can easily be included during the evaluation/interview process.<br><br>(f)(3) imposes a requirement that is vague. What is required of the professional? If it is nothing more than a boilerplate approach, why not include the information on a Judicial Council form?<br><br>If (f)(3) requires something more than a boilerplate approach, the section creates practical problems. These professionals may not know "how best to support the interests of the ward" until they have concluded their investigation/evaluation. It requires a professional to spend additional time arranging | The committee does not believe the custody experts and investigators listed in subdivision (f) of the proposed rule require a Judicial Council form to complete their assignments under that subdivision. |

## SPR12-23

**Probate Guardianships: Testimony of (Proposed) Wards and Other Children in Guardianship Cases**

(Adopt rule 7.1016 of the California Rules of Court)

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

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| | | | and counseling parties. Thus, this additional obligation creates more cost to the investigation process and more cost to the court.<br><br>(g) raises similar cost issues for the court. Given the fiscal crisis in the courts, creating guardianship orientation programs, appointing counsel for the minor, providing information to parties to allow those parties to consider the effects of testimony, etc. will be a financial burden to courts. | The Joint Rules Working Group of the Trial Court Presiding Judges and Court Executives Advisory Committees supports the proposed rule. See Comment No. 1 above. Its estimates of the impact of the rule on court staff workload and training costs range from "low" to "medium." |
| 4. | Superior Court of California, County of San Diego, by Michael Roddy, Executive Officer | A | No specific comment made. | No response required. |

 Positions: A = Agree; AM = Agree if modified; N = Do not agree; NI = Not indicated.