

AMENDED IN ASSEMBLY MAY 23, 2002

AMENDED IN ASSEMBLY APRIL 17, 2002

CALIFORNIA LEGISLATURE—2001–02 REGULAR SESSION

ASSEMBLY BILL

No. 1938

Introduced by Assembly Member Aroner

February 14, 2002

An act to amend Sections 391 and 391.7 of the Code of Civil Procedure, to amend Sections 210, 3041, and 8804 of the Family Code, and to amend Sections 1000, 1470, 1513, and 1601 of, and to add Chapter 3 (commencing with Section 1610) to Part 2 of Division 4 of, the Probate Code, relating to guardianship, conservatorship, and custody.

LEGISLATIVE COUNSEL'S DIGEST

AB 1938, as amended, Aroner. Guardianship: conservatorships: custody.

(1) Existing law authorizes a defendant in any litigation pending in any court of this state, at any time until final judgement is entered, to move for a court order requiring the plaintiff to furnish security as a vexatious litigant, as defined. The litigation must be dismissed as to the defendant for whose benefit the security was ordered, if it is not furnished.

This bill would clarify that these provisions apply to proceedings under the Family Code or Probate Code, and specifically extend these provisions to any petition, application, or motion other than a discovery motion, in a proceeding under the Family Code or Probate Code, for any order from which an appeal may be taken.

(2) Under existing law, before making an order granting custody to a person or persons other than a parent, without the consent of the parents, a court is required to make a finding that granting custody to a parent would be detrimental to the child and that granting custody to a nonparent is required to serve the best interest of the child.

This bill would, instead, provide that such a finding be made over the objection of a parent. The bill would define detriment to a child, and require a finding that parental custody is detrimental to the child to be supported by clear and convincing evidence unless the court finds by a preponderance of the evidence that custody would be granted to a person who has assumed the role of a parent for a substantial period, and would make related changes. This finding would constitute a finding that parental custody would be detrimental to the child, absent a showing by clear and convincing evidence to the contrary, as specified. A finding of detriment to the child would not require any finding of unfitness of the parents for these purposes.

(3) Under the Guardianship-Conservatorship Law, a court may appoint private legal counsel for a ward, a proposed ward, a conservatee, or a proposed conservatee, if the court determines the person is not otherwise represented by legal counsel and that the appointment would be helpful to the resolution of the matter or is necessary to protect the person's interests.

~~This bill would further require the court to appoint legal counsel for a minor who is the subject of a guardianship proceeding, if the court finds the appointment is necessary to represent the substantial interests of a minor in specified proceedings~~ *specify that this authorization applies to proceedings to establish or terminate a guardianship, to appoint a proposed guardian, or to remove a guardian for a minor.*

(4) Under existing law, unless waived by the court, a court investigator, probation officer, or domestic relations investigator may make an investigation and file with the court a report and recommendation concerning each proposed guardianship of the person or guardianship of the estate.

This bill would make this investigation, and report and recommendation, mandatory.

(5) Under existing law, upon the petition of the guardian, a parent, or the ward, a court may make an order terminating the guardianship if the court determines that it is no longer necessary that the ward have a guardian or that it is in the ward's best interest to terminate the guardianship.



This bill would delete the determination that the guardianship is no longer necessary as grounds for an order terminating guardianship. The bill would make various legislative findings.

(6) The bill would impose a state-mandated local program by requiring new duties of local officers.

(7) The California Constitution requires the state to reimburse local agencies and school districts for certain costs mandated by the state. Statutory provisions establish procedures for making that reimbursement, including the creation of a State Mandates Claims Fund to pay the costs of mandates that do not exceed \$1,000,000 statewide and other procedures for claims whose statewide costs exceed \$1,000,000.

This bill would provide that, if the Commission on State Mandates determines that the bill contains costs mandated by the state, reimbursement for those costs shall be made pursuant to these statutory provisions.

Vote: majority. Appropriation: no. Fiscal committee: yes. State-mandated local program: yes.

The people of the State of California do enact as follows:

1 SECTION 1. Section 391 of the Code of Civil Procedure is
2 amended to read:

3 391. As used in this title, the following terms have the
4 following meanings:

5 (a) "Litigation" means any civil action or proceeding,
6 including, but not limited to, a proceeding under the Family Code
7 or Probate Code, commenced, maintained or pending in any state
8 or federal court.

9 (b) "Vexatious litigant" means a person who does any of the
10 following:

11 (1) In the immediately preceding seven-year period has
12 commenced, prosecuted, or maintained in propria persona at least
13 five litigations other than in a small claims court that have been (i)
14 finally determined adversely to the person or (ii) unjustifiably
15 permitted to remain pending at least two years without having been
16 brought to trial or hearing.

17 (2) After a litigation has been finally determined against the
18 person, repeatedly relitigates or attempts to relitigate, in propria
19 persona, either (i) the validity of the determination against the



1 same defendant or defendants as to whom the litigation was finally
2 determined or (ii) the cause of action, claim, controversy, or any
3 of the issues of fact or law, determined or concluded by the final
4 determination against the same defendant or defendants as to
5 whom the litigation was finally determined.

6 (3) In any litigation while acting in propria persona, repeatedly
7 files unmeritorious motions, pleadings, or other papers, conducts
8 unnecessary discovery, or engages in other tactics that are
9 frivolous or solely intended to cause unnecessary delay.

10 (4) Has previously been declared to be a vexatious litigant by
11 any state or federal court of record in any action or proceeding
12 based upon the same or substantially similar facts, transaction, or
13 occurrence.

14 (c) “Security” means an undertaking to assure payment, to the
15 party for whose benefit the undertaking is required to be furnished,
16 of the party’s reasonable expenses, including attorney’s fees and
17 not limited to taxable costs, incurred in or in connection with a
18 litigation instituted, caused to be instituted, or maintained or
19 caused to be maintained by a vexatious litigant.

20 (d) “Plaintiff” means the person who commences, institutes or
21 maintains a litigation or causes it to be commenced, instituted or
22 maintained, including an attorney at law acting in propria persona.

23 (e) “Defendant” means a person (including corporation,
24 association, partnership and firm or governmental entity) against
25 whom a litigation is brought or maintained or sought to be brought
26 or maintained.

27 SEC. 2. Section 391.7 of the Code of Civil Procedure is
28 amended to read:

29 391.7. (a) In addition to any other relief provided in this title,
30 the court may, on its own motion or the motion of any party, enter
31 a prefiling order which prohibits a vexatious litigant from filing
32 any new litigation in the courts of this state in propria persona
33 without first obtaining leave of the presiding judge of the court
34 where the litigation is proposed to be filed. Disobedience of ~~such~~
35 ~~an~~ the order by a vexatious litigant may be punished as a contempt
36 of court.

37 (b) The presiding judge shall permit the filing of ~~such~~ that
38 litigation only if it appears that the litigation has merit and has not
39 been filed for the purposes of harassment or delay. The presiding
40 judge may condition the filing of the litigation upon the furnishing



1 of security for the benefit of the defendants as provided in Section
2 391.3.

3 (c) The clerk may not file any litigation presented by a
4 vexatious litigant subject to a prefiling order unless the vexatious
5 litigant first obtains an order from the presiding judge permitting
6 the filing. If the clerk mistakenly files the litigation without ~~such~~
7 ~~an~~ *the* order, any party may file with the clerk and serve on the
8 plaintiff and other parties a notice stating that the plaintiff is a
9 vexatious litigant subject to a prefiling order as set forth in
10 subdivision (a). The filing of the notice shall automatically stay the
11 litigation. The litigation shall be automatically dismissed unless
12 the plaintiff within 10 days of the filing of ~~such~~ *that* notice obtains
13 an order from the presiding judge permitting the filing of the
14 litigation as set forth in subdivision (b). If the presiding judge
15 issues an order permitting the filing, the stay of the litigation shall
16 remain in effect, and the defendants need not plead, until 10 days
17 after the defendants are served with a copy of ~~any such~~ *the* order.

18 (d) For purposes of this section, “litigation” includes any
19 petition, application, or motion other than a discovery motion, in
20 a proceeding under the Family Code or Probate Code, for any
21 order from which an appeal may be taken.

22 (e) The clerk of the court shall provide the Judicial Council a
23 copy of any prefiling orders issued pursuant to subdivision (a). The
24 Judicial Council shall maintain a record of vexatious litigants
25 subject to ~~such~~ *those* prefiling orders and shall annually
26 disseminate a list of ~~such~~ *those* persons to the clerks of the courts
27 of this state.

28 SEC. 3. Section 210 of the Family Code is amended to read:
29 210. Except to the extent that any other statute or rules
30 adopted by the Judicial Council provide applicable rules, the rules
31 of practice and procedure applicable to civil actions generally,
32 including the provisions of Title 3a (commencing with Section
33 391) of Part 2 of the Code of Civil Procedure, apply to, and
34 constitute the rules of practice and procedure in, proceedings
35 under this code.

36 SEC. 4. Section 3041 of the Family Code is amended to read:
37 3041. (a) Before making an order granting custody to a
38 person or persons other than a parent, over the objection of a
39 parent, the court shall make a finding that granting custody to a
40 parent would be detrimental to the child and that granting custody



1 to the nonparent is required to serve the best interest of the child.
2 Allegations that parental custody would be detrimental to the
3 child, other than a statement of that ultimate fact, shall not appear
4 in the pleadings. The court may, in its discretion, exclude the
5 public from the hearing on this issue.

6 (b) Subject to subdivision (d), a finding that parental custody
7 would be detrimental to the child shall be supported by clear and
8 convincing evidence.

9 (c) As used in this section, “detriment to the child” includes the
10 harm of removal from a stable placement of a child with a person
11 who has assumed, on a day-to-day basis, the role of his or her
12 parent, fulfilling both the child’s physical needs and the child’s
13 psychological needs for care and affection, and who has assumed
14 that role for a substantial period of time. A finding of detriment
15 does not require any finding of unfitness of the parents.

16 (d) Notwithstanding subdivision (b), if the court finds by a
17 preponderance of the evidence that the person to whom custody
18 may be given is a person described in subdivision (c), this finding
19 shall constitute a finding that parental custody would be
20 detrimental to the child absent a showing by clear and convincing
21 evidence to the contrary.

22 SEC. 5. Section 8804 of the Family Code is amended to read:

23 8804. (a) Whenever the petitioners move to withdraw the
24 petition for the adoption or to dismiss the proceeding, the clerk of
25 the court in which the proceeding is pending shall immediately
26 notify the department at Sacramento of the action. The department
27 or the delegated county adoption agency shall file a full report with
28 the court recommending a suitable plan for the child in every case
29 where the petitioners move to withdraw the petition for the
30 adoption or where the department or delegated county adoption
31 agency recommends that the petition for adoption be denied and
32 shall appear before the court for the purpose of representing the
33 child.

34 (b) Notwithstanding the withdrawal or dismissal of the
35 petition, the court may retain jurisdiction over the child for the
36 purposes of making any order for the child’s custody that the court
37 deems to be in the child’s best interest.

38 (c) If a birth parent who did not place a child for adoption as
39 specified in Section 8801.3 has refused to give the required
40 consent, or a birth parent revokes consent as specified in Section



1 8814.5, the court shall order the child restored to the care and
2 custody of the birth parent or parents subject to the provisions of
3 Section 3041.

4 SEC. 6. Section 1000 of the Probate Code is amended to read:

5 1000. Except to the extent that this code provides applicable
6 rules, the rules of practice applicable to civil actions, including
7 discovery proceedings and proceedings under Title 3a
8 (commencing with Section 391) Part 2 of the Code of Civil
9 Procedure, apply to, and constitute the rules of practice in,
10 proceedings under this code. All issues of fact joined in probate
11 proceedings shall be tried in conformity with the rules of practice
12 in civil actions.

13 SEC. 7. Section 1470 of the Probate Code is amended to read:

14 1470. (a) ~~(1)~~—The court may appoint private legal counsel for
15 a ward, a proposed ward, a conservatee, or a proposed conservatee
16 in any proceeding under this division, *including a guardianship*
17 *proceeding*, if the court determines the person is not otherwise
18 represented by legal counsel and that the appointment would be
19 helpful to the resolution of the matter or is necessary to protect the
20 person’s interests. *This section applies to proceedings to establish*
21 *or terminate a guardianship, to appoint a proposed guardian, or*
22 *to remove a guardian for a minor.*

23 ~~(2) The court shall, at or before the time of the hearing, appoint~~
24 ~~counsel to represent the interest of a minor who is the subject of~~
25 ~~a guardianship proceeding and not already represented by an~~
26 ~~attorney, if necessary to protect substantial interests of the minor~~
27 ~~in any of the following proceedings under this division regarding~~
28 ~~the minor:~~

29 ~~(A) A proceeding to establish a guardianship or to appoint a~~
30 ~~proposed guardian.~~

31 ~~(B) A proceeding to terminate the guardianship.~~

32 ~~(C) A proceeding to remove the guardian.~~

33 (b) If a person is furnished legal counsel under this section, the
34 court shall, upon conclusion of the matter, fix a reasonable sum for
35 compensation and expenses of counsel. The sum may, in the
36 discretion of the court, include compensation for services
37 rendered, and expenses incurred, before the date of the order
38 appointing counsel.

39 (c) The court shall order the sum fixed under subdivision (b) to
40 be paid:



1 (1) If the person for whom legal counsel is appointed is an
2 adult, from the estate of that person.
3 (2) If the person for whom legal counsel is appointed is a minor,
4 by a parent or the parents of the minor or from the minor's estate,
5 or any combination thereof, in any proportions the court deems
6 just.
7 (d) The court may make an order under subdivision (c)
8 requiring payment by a parent or parents of the minor only after
9 the parent or parents, as the case may be, have been given notice
10 and the opportunity to be heard on whether the order would be just
11 under the circumstances of the particular case.
12 SEC. 8. Section 1513 of the Probate Code is amended to read:
13 1513. (a) Unless waived by the court, a court investigator,
14 probation officer, or domestic relations investigator shall make an
15 investigation and file with the court a report and recommendation
16 concerning each proposed guardianship of the person or
17 guardianship of the estate. Investigations where the proposed
18 guardian is a relative shall be made by a court investigator.
19 Investigations where the proposed guardian is a nonrelative shall
20 be made by the county agency designated to investigate potential
21 dependency. The report for the guardianship of the person shall
22 include, but need not be limited to, an investigation and discussion
23 of all of the following:
24 (1) A social history of the guardian.
25 (2) A social history of the proposed ward, including, to the
26 extent feasible, an assessment of any identified developmental,
27 emotional, psychological, or educational needs of the proposed
28 ward and the capability of the petitioner to meet those needs.
29 (3) The relationship of the proposed ward to the guardian,
30 including the duration and character of the relationship, where
31 applicable, the circumstances whereby physical custody of the
32 proposed ward was acquired by the guardian, and a statement of
33 the proposed ward's attitude concerning the proposed
34 guardianship, unless the statement of the attitude is affected by the
35 proposed ward's developmental, physical, or emotional condition.
36 (4) The anticipated duration of the guardianship and the plans
37 of both natural parents and the proposed guardian for the stable and
38 permanent home for the child. The court may waive this
39 requirement for cases involving relative guardians.



1 (b) The report shall be read and considered by the court prior
2 to ruling on the petition for guardianship, and shall be reflected in
3 the minutes of the court. The person preparing the report may be
4 called and examined by any party to the proceeding.

5 (c) If the investigation finds that any party to the proposed
6 guardianship alleges the minor's parent is unfit, as defined by
7 Section 300 of the Welfare and Institutions Code, the case shall be
8 referred to the county agency designated to investigate potential
9 dependencies. Guardianship proceedings shall not be completed
10 until the investigation required by Sections 328 and 329 of the
11 Welfare and Institutions Code is completed and a report is
12 provided to the court in which the guardianship proceeding is
13 pending.

14 (d) The report authorized by this section is confidential and
15 shall only be made available to persons who have been served in
16 the proceedings or their attorneys. The county clerk shall make
17 provisions for the limitation of the report exclusively to persons
18 entitled to its receipt.

19 (e) For the purpose of writing the report authorized by this
20 section, the person making the investigation and report shall have
21 access to the proposed ward's school records, probation records,
22 and public and private social services records, and to an oral or
23 written summary of the proposed ward's medical records and
24 psychological records prepared by any physician, psychologist, or
25 psychiatrist who made or who is maintaining those records. The
26 physician, psychologist, or psychiatrist shall be available to clarify
27 information regarding these records pursuant to the investigator's
28 responsibility to gather and provide information for the court.

29 (f) This section does not apply to guardianships resulting from
30 a permanency plan for a dependent child pursuant to Section
31 366.25 of the Welfare and Institutions Code.

32 (g) For purposes of this section, a "relative" means a person
33 who is a spouse, parent, stepparent, brother, sister, stepbrother,
34 stepsister, half-brother, half-sister, uncle, aunt, niece, nephew, first
35 cousin, or any person denoted by the prefix "grand" or "great,"
36 or the spouse of any of these persons, even after the marriage has
37 been terminated by death or dissolution.

38 SEC. 9. Section 1601 of the Probate Code is amended to read:

39 1601. Upon petition of the guardian, a parent, or the ward, the
40 court may make an order terminating the guardianship if the court



1 determines that it is in the ward’s best interest to terminate the
2 guardianship. Notice of the hearing on the petition shall be given
3 for the period and in the manner provided in Chapter 3
4 (commencing with Section 1460) of Part 1.

5 SEC. 10. Chapter 3 (commencing with Section 1610) is added
6 to Part 2 of Division 4 of the Probate Code, to read:

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9

CHAPTER 3. PERMANENT AND STABLE HOME

10 1610. (a) The Legislature finds and declares that it in the best
11 interest of children to be raised in a permanent, safe, stable, and
12 loving environment.

13 (b) Unwarranted petitions, applications, or motions other than
14 discovery motions after the guardianship has been established
15 create an environment that can be harmful to children and are
16 inconsistent with the goals of permanency, safety, and stability.

17 SEC. 11. Notwithstanding Section 17610 of the Government
18 Code, if the Commission on State Mandates determines that this
19 act contains costs mandated by the state, reimbursement to local
20 agencies and school districts for those costs shall be made pursuant
21 to Part 7 (commencing with Section 17500) of Division 4 of Title
22 2 of the Government Code. If the statewide cost of the claim for
23 reimbursement does not exceed one million dollars (\$1,000,000),
24 reimbursement shall be made from the State Mandates Claims
25 Fund.

