

# Judicial Council of California • Administrative Office of the Courts

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## INVITATION TO COMMENT

### SPR12-23

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Title	Action Requested
Probate Guardianships: Testimony of (Proposed) Wards and Other Children in Guardianship Cases	Review and Submit Comments by June 15, 2012
Proposed Rules, Forms, Standards, or Statutes	Proposed Effective Date
Adopt Cal. Rules of court, rule 7.1016	January 1, 2013
Proposed by	Contact
Probate and Mental Health Advisory Committee	Douglas C. Miller
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### Executive Summary and Origin

Proposed rule 7.1016 would extend to probate guardianship proceedings provisions of recently effective legislation and parts of a recently adopted rule of court pertaining to the testimony of children involved in custody and visitation litigation under the Family Code. The Probate and Mental Health Advisory Committee proposes a probate rule of court on this topic because the Family Code section that compelled the adoption of the new family law rule of court applies also to the appointment of a guardian of the person of a child. The advisory committee recommends the adoption of a separate rule concerning the receipt of information from (proposed) wards in guardianship proceedings rather than the direct application of the family law rule to those proceedings because of differences between the two types of cases.

### Background

New subdivisions (c)–(i) were added to section 3042 of the Family Code by legislation enacted in 2010 that became effective on January 1, 2012.<sup>1</sup> 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.

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<sup>1</sup> Assem. Bill 1050 (Stats. 2010, ch. 187) § 1. See section 3042(i). A copy of section 3042 follows this Invitation to Comment.

*The proposals have not been approved by the Judicial Council and are not intended to represent the views of the council, its Rules and Projects Committee, or its Policy Coordination and Liaison Committee. These proposals are circulated for comment purposes only.*

In response to the Legislature’s direction, the Judicial Council adopted Cal. Rules of Court, rule 5.250, also effective on January 1, 2012.<sup>2</sup> A comment to the rule made by its sponsor, the Family and Juvenile Law Advisory Committee, states 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 Proposal**

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. 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 court; but that the differences between probate guardianship cases and family law custody matters 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 its advisory committee comment to rule 5.250 and undertook to develop and propose such a specific rule.

### **Rule 7.1016**

Proposed 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 matters subject to this rule.”

The proposed rule would 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 proposed rule’s only mention of the family law rule is to exclude its application to guardianships. (Rule 7.1016(b)(4).) But rule

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<sup>2</sup> An electronic link to rule 5.250 is provided on the last page of this Invitation to Comment.

7.1016 would follow the organization of rule 5.250 and repeat many of its provisions, with the differences described below.

***Rule applies only to wards or proposed wards***

Though rule 5.250 applies to all children involved in family law custody or visitation matters, rule 7.1016 would apply 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 matters subject to this rule,” as these phrases are defined above.<sup>3</sup> 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 rule would also contain special provisions for a ward or proposed ward who is a party. He or she 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 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)).

***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 of the rights granted to minors of that age to notice and to become parties.

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 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 is the reason that 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)(4) and 7.1016(h)(4) with rule 5.250(d)(4). The first two sentences of the latter provision are essentially a restatement of the special care provisions of Evidence Code section 765(b).

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<sup>3</sup> 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* 269, § 5.65 (Cont. Ed. Bar, 2011 edition). 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 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)(1) would apply these factors to non-party 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)(6) would provide that if a non-party 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 non-party 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)(1)(A)–(G), particularly subparagraphs (B) and (D), 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 non-party 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)(D) include investigators appointed under Family Code section 3110 and "child custody recommending counselor(s) authorized to provide recommendations under Family Code section 3183(a)."

The reference to child custody evaluators and investigators appointed under Family Code section 3110 would be deleted from the equivalent provision of rule 7.1016, subparagraph (e)(1)(C). Custody evaluators and investigators appointed under Evidence Code section 730 remain in both rules.

Child custody recommending counselors under Family Code section 3183 are child custody mediators permitted to make recommendations concerning child custody, visitation, or other disposition of the custody proceeding to the family court. 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)(1)(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)(4) and (5). Paragraph (5) 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 (references below are to paragraphs in this subdivision of the rule):

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

(3) 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.

(4) An additional method of providing information and supporting a ward is to appoint counsel or a guardian ad litem for the ward (rule 7.1016(g)(4)).

(5) “Including information in child custody mediation orientation” in rule 5.250(f)(4) would be changed, in rule 7.1016(g)(5), to:

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;

### ***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 in guardianships 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.

### **Alternatives considered**

Proposed wards in guardianship cases—particularly those in guardianships of the person in which the appointment or continued authority of a guardian is opposed by one or both of the child's parents—face the same challenges that children in family law custody matters must meet. The policies behind the special protection of children provided by Family Code section 3042 and rule 5.250 in family law custody and visitation matters apply equally to custody and visitation issues in probate guardianships.

The committee considered limiting the proposed rule to guardianships of the person and to custody-related matters in those guardianships because the requirements of Family Code section 3042 and rule 5.250 are limited to those matters in the family law context. However, the committee decided to permit courts to apply some or all of the provisions of the rule to all guardianship cases and to matters in those cases other than custody or visitation. Young wards will play central roles in all matters coming before the court in their guardianships. The committee believes that courts should be permitted in appropriate cases to give these children the opportunity to be heard under the same conditions and with the same protections the law now requires when their custody and visitation issues are before the court.

The committee concluded that a rule of court concerning child testimony in guardianship cases rather than training, education, or other measures is required because the Legislature required the adoption of such a rule in a Family Code section that is made applicable to appointments of guardians of the person by Probate Code section 1514(b).

### **Implementation Requirements, Costs, and Operational Impacts**

The legislation that led the advisory committee to make this proposal would 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 non-party 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)(1)(B).) 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)(2).) Experts and counsel for the ward appointed by the court in like circumstances would have similar increased responsibilities.<sup>4</sup>

Judicial officers, court investigators, and court-appointed experts and counsel would 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 rules 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)(3). Discharge of all of these responsibilities would 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.

## Request for Specific Comments

In addition to comments on the proposal as a whole, the advisory committee is interested in comments on the following:

- Does the proposal appropriately address the stated purpose?

The advisory committee also seeks comments from *courts* on the following cost and implementation matters:

- Will the proposal provide cost savings? If so please quantify.
- What are the implementation requirements for courts? For example, training staff (please identify position and expected hours of training), revising processes and procedures (please describe), changing docket codes in case management system, or modifying case management system.
- Would additional time from Judicial Council approval of this proposal until its effective date provide sufficient time for implementation?
- How well would this proposal work in courts of different sizes?

### Attachments and Links

1. Rule 7.1016, at pages 8–15

2. Family Code section 3042, at page 16

3. The text of rule 5.250 may be accessed at:

[http://www.courtinfo.ca.gov/cms/rules/index.cfm?title=five&linkid=rule5\\_250](http://www.courtinfo.ca.gov/cms/rules/index.cfm?title=five&linkid=rule5_250).

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<sup>4</sup> 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 Proposal

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

1  
2 **Rule 7.1016. Participation and testimony of wards in guardianship proceedings**

3  
4 **(a) Definitions**

5  
6 As used in this rule, the following terms have the meanings specified:

- 7  
8 (1) “Ward” includes “proposed ward.”
- 9  
10 (2) A “proceeding” is a matter before the court for decision in a probate guardianship  
11 of the person that concerns appointment or removal of a guardian, visitation,  
12 determination of the ward’s place of residence, or termination of the guardianship  
13 by court order.
- 14  
15 (3) “Party” as used in this rule to refer to the ward, means a ward who has filed a  
16 petition or opposition to a petition concerning a proceeding or other matter subject  
17 to this rule.

18  
19 **(b) Purpose and scope of rule**

- 20  
21 (1) This rule implements Family Code section 3042(c) in probate guardianships of  
22 the person. The rule applies to the participation and testimony of the ward in a  
23 proceeding in such matters. The testimony of other minors in a guardianship case  
24 is governed by Evidence Code sections 765(b) and 767(b).
- 25  
26 (2) The court in its discretion may apply this rule, in whole or in part, to the  
27 participation and testimony of a ward in a guardianship of the estate or in a matter  
28 before the court in a guardianship of the person that is not a proceeding within the  
29 meaning of this rule. The phrase “or other matter subject to this rule” following  
30 the term “proceeding” is a reference to the matters described in this paragraph.
- 31  
32 (3) No statutory mandate, rule, or practice requires a ward who is not a party to the  
33 proceeding or other matter subject to this rule to participate in court or prohibits  
34 him or her from doing so. When a ward desires to participate but is not a party to  
35 the proceeding or other matter subject to this rule, the court must balance the  
36 protection of the ward, the statutory duty to consider the wishes of and input from  
37 the ward, and the probative value of the ward’s input while ensuring all parties’

1 due process rights to challenge evidence relied on by the court in making  
2 decisions affecting the ward in matters covered by the rule.

3  
4 (4) Rule 5.250 does not apply to probate guardianships. If there is a conflict between  
5 any provision of this rule and rule 5.250, the provisions of this rule control in  
6 probate guardianship proceedings.

7  
8 **(c) Determining if the non-party ward or proposed ward wishes to address the court**

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

13  
14 (A) The ward’s counsel;

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16 (B) A court or county guardianship investigator;

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

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

23  
24 (E) The ward’s guardian ad litem.

25  
26 (2) The following persons may inform the court if they have information indicating  
27 that a ward or proposed ward who is not a party wishes to address the court in a  
28 proceeding or other matter subject to this rule:

29  
30 (A) A party in the guardianship case; and

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

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

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38 **(d) Guidelines for determining whether addressing the court is in the non-party**  
39 **ward’s best interest**

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

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(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 non-party ward**

(1) 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 sections 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;

- 1           (D) Admissible evidence provided by the ward’s parents, parties, or witnesses in  
2           the proceeding or other matter subject to this rule;  
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- 4           (E) Information provided by a child custody recommending counselor authorized  
5           under Family Code section 3183 to make a recommendation to the court; and  
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- 7           (F) Information provided from a child interview center or professional so as to  
8           avoid unnecessary multiple interviews.  
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- 10          (2) If the court precludes the calling of a ward who is not a party as a witness in a  
11          proceeding or other matter subject to this rule and specifies one of the other  
12          alternatives, the court must require that the information or evidence obtained by  
13          alternative means and provided by a professional or nonparty:  
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- 15               (A) Be in writing and fully document the ward’s views on the matters on which  
16               he or she wished to express an opinion;  
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- 18               (B) Describe the ward’s input in sufficient detail to assist the court in making its  
19               decision;  
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- 21               (C) Be provided to the court and to the parties by a person who will be available  
22               for testimony and cross-examination; and  
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- 24               (D) Be filed in the confidential portion of the case file.  
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- 26          (3) On deciding to take the testimony of a ward who is not a party in a proceeding or  
27          other matter subject to this rule, the judicial officer should balance the necessity  
28          of taking the ward’s testimony in the courtroom with parents, the guardian or  
29          proposed guardian, other parties, and attorneys present with the need to create an  
30          environment in which the ward can be open and honest. In each case in which a  
31          ward’s testimony will be taken, the judicial officer should consider:  
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- 33               (A) Where the testimony will be taken: options may include the possibility of  
34               closing the courtroom to the public or hearing from the ward on the record in  
35               chambers;  
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- 37               (B) Who should be present when the testimony is taken: options may include one  
38               or both parents (whether or not they are parties in the case); the petitioner and  
39               (proposed) guardian and their attorneys; only the attorneys in a case in which  
40               all interested persons are represented; all parties and their attorneys; only the  
41               ward’s attorney or guardian ad litem; or only a court reporter with the  
42               judicial officer;  
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1           (C) How the ward will be questioned: options may include only by the judicial  
2           officer with questions the parties have submitted; by the petitioner or  
3           (proposed) guardian or his or her attorney; by a child advocate or expert in  
4           child development in the presence of the judicial officer and parties or a court  
5           reporter; attorneys or parties will be permitted to cross-examine the ward;  
6           attorneys or parties will not be permitted to cross-examine the ward; and  
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8           (D) Whether a court reporter is available in all instances, but especially when the  
9           ward’s testimony may be taken outside the presence of the parties and their  
10          attorneys. If the court reporter will not be available, whether there are other  
11          means to collect, preserve, transcribe, and make the ward’s testimony  
12          available to parties and their attorneys.  
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14         (4) In taking testimony from a ward who is not a party to the proceeding or other  
15         matter subject to this rule, the court must take the special care required by  
16         Evidence Code section 765(b). If the ward is not represented by an attorney, the  
17         court must inform the ward in an age-appropriate manner about the limitations on  
18         confidentiality of testimony and that the information provided to the court will be  
19         on the record and provided to the parties in the case.  
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21         (5) In the process of listening to and inviting the ward’s input, the court must allow  
22         but not require the child to state a preference regarding the matter to be decided in  
23         the proceeding or other matter subject to this rule and should provide information  
24         in an age appropriate manner about the process by which the court will make a  
25         decision.  
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27         (6) In any case in which a ward who is not a party to the proceeding or other matter  
28         subject to this rule will be called to testify, the court must consider the  
29         appointment of counsel for the ward under Probate Code section 1470, and may  
30         consider the appointment of a guardian ad litem for the ward. In addition to  
31         satisfying the requirements for minor's counsel under rule 7.1101, minor's counsel  
32         must:  
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34           (A) Provide information to the ward in an age-appropriate manner about the  
35           limitations on the confidentiality of testimony and indicate to the ward the  
36           possibility that information provided to the court will be on the record and  
37           provided to the parties in the case;  
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39           (B) Allow but not require the ward to state a preference regarding the issues to be  
40           decided in the proceeding or other matter subject to this rule, and provide  
41           information in an age-appropriate manner about the process by which the  
42           court will make a decision;  
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1           (C) If appropriate, provide the ward with an orientation to the courtroom or other  
2           place where the ward will testify; and

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

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

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

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12           A child custody evaluator, an expert witness appointed under Evidence Code section  
13           730, an investigator, a child custody recommending counselor or other custody  
14           mediator appointed or assigned to meet with a ward must:

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

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

25

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

28

29 **(g) Methods of providing information to parties and supporting non-party wards**

30

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

34

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

38

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

42

- 1 (3) Providing information to parties before the ward participates or testifies so that  
2 they can consider the possible effect on the ward of participating or not  
3 participating in the proceeding or other matter subject to this rule;  
4
- 5 (4) Appointing counsel under Probate Code section 1470 or a guardian ad litem for  
6 the ward to assist in the provision of information to the ward concerning his or her  
7 decision to participate in the proceeding or testify;  
8
- 9 (5) Including information in guardianship orientation presentations and publications  
10 about the options available to a ward who is not a party to the proceeding or other  
11 matter subject to this rule to participate or testify or not to do so, and the  
12 consequences of a ward's decision whether to become a party to the proceeding or  
13 other matter subject to this rule; and  
14
- 15 (6) Providing an interpreter for the ward.  
16

17 **(h) If the ward is a party to the proceeding**  
18

- 19 (1) A ward who is a party to the proceeding or other matter subject to this rule is  
20 subject to the law of discovery applied to parties in civil actions and may be  
21 called as a witness by any other party unless the court makes a finding that  
22 providing information in response to discovery requests or testifying as a witness  
23 is not in the ward's best interest and states the reasons on the record.  
24
- 25 (2) The court must consider appointing counsel under Probate Code section 1470 or a  
26 guardian ad litem for a ward who is a party to the proceeding or other matter  
27 subject to this rule if the ward is not represented by counsel.  
28
- 29 (3) In determining whether providing information in response to discovery requests  
30 or testifying as a witness is in the ward's best interest, the judicial officer should  
31 consider the following:  
32
  - 33 (A) Whether information has been presented indicating that the ward may be at  
34 risk emotionally if he or she is permitted or denied the opportunity to provide  
35 information in response to discovery requests or to testify;  
36
  - 37 (B) Whether the subject areas about which the ward is anticipated to provide  
38 information in response to discovery requests or testify are relevant to the  
39 decision the court must make; and  
40
  - 41 (C) Whether any other factors weigh in favor of or against having the ward  
42 provide information in response to discovery requests or testify.  
43

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

7  
8 **(i) Education and training of judicial officers and court staff**

9  
10 Education and training content for court staff and judicial officers should include  
11 information on wards' participation in proceedings or other matters in guardianships  
12 subject to this rule, methods other than direct testimony for receiving input from a  
13 ward, procedures for taking a ward's testimony, and differences in the application of  
14 this rule to wards who are and are not parties to the proceeding or other matter subject  
15 to this rule.

## Family Code section 3042

### 3042.

(a) If a child is of sufficient age and capacity to reason so as to form an intelligent preference as to custody or visitation, the court shall consider, and give due weight to, the wishes of the child in making an order granting or modifying custody or visitation.

(b) In addition to the requirements of subdivision (b) of Section 765 of the Evidence Code, the court shall control the examination of a child witness so as to protect the best interests of the child.

(c) If the child is 14 years of age or older and wishes to address the court regarding custody or visitation, the child shall be permitted to do so, unless the court determines that doing so is not in the child's best interests. In that case, the court shall state its reasons for that finding on the record.

(d) Nothing in this section shall be interpreted to prevent a child who is less than 14 years of age from addressing the court regarding custody or visitation, if the court determines that is appropriate pursuant to the child's best interests.

(e) If the court precludes the calling of any child as a witness, the court shall provide alternative means of obtaining input from the child and other information regarding the child's preferences.

(f) To assist the court in determining whether the child wishes to express his or her preference or to provide other input regarding custody or visitation to the court, a minor's counsel, an evaluator, an investigator, or a mediator who provides recommendations to the judge pursuant to Section 3183 shall indicate to the judge that the child wishes to address the court, or the judge may make that inquiry in the absence of that request. A party or a party's attorney may also indicate to the judge that the child wishes to address the court or judge.

(g) Nothing in this section shall be construed to require the child to express to the court his or her preference or to provide other input regarding custody or visitation.

(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.

(i) The changes made to subdivisions (a) to (g), inclusive, by the act adding this subdivision shall become operative on January 1, 2012.