FAMILY LAW

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APPENDICES

PART ONE: CUSTODY, VISITATION AND HIV

By Andrea Palash[1]

I. INTRODUCTION

A parent with HIV has numerous special decisions to make when considering the future care of a minor child. The first two parts of this chapter deal with issues that are likely to arise when the parent is going through or has gone through a divorce with the child's other parent. Andrea Palash's article presents an excellent orientation to issues arising during and after the separation.

The section on Guardianship is a thorough guide to the process of providing additional adult caretaking for a child when the parent or parents face incapacity or death. Staff of several local agencies that assist parents through this process helped put this section together, including the HOPE Project, Legal Services for Children, Berkeley Community Law Center, National Center for Youth Law, and BASF's Volunteer Legal Services Program. We made the section as detailed as possible because we receive numerous calls seeking help from people who want to ensure that their children will be cared for. In trying to help them, we discovered that there was no cohesive guide available explaining what guardianship is or how to set it up. Individual attorneys who wanted to assist were often baffled by complex procedures and conflicting local rules.

This chapter does not directly address the special needs of minor children with HIV, except in the section on Guardianship, where it discusses how children with HIV qualify for Social Security benefits. Attorneys seeking more information for minor clients with HIV should contact Legal Services for Children, which can provide more complete information to assist children.

II. In the Child's Best Interest

Custody and visitation are likely to be at issue in any marriage dissolution where the couple has children. Even in the most amicable dissolutions the parties have to make special provisions for the care of their children: who visits them, what doctors treat them or which schools teach them. During one of the most emotionally charged and disruptive periods of their lives, both parties must struggle together to craft fair and thoughtful arrangements in the best interests of their children.

In the "best case" scenario the parties work through their personal hostility and hurt to agree on a basic course of action. In many cases, however, no matter how hard the parties try, there is friction. Unfortunately, the children invariably end up in the middle.

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The 2004 version of this chapter was updated by Nancy Marmol, Esq.

How the parties view each other as parents may prevent an agreement on custody and/or visitation. But it is equally possible that other underlying problems are standing in the way of a resolution. When the parties themselves cannot resolve custody or visitation issues the attorney may suggest that they seek private mediation, for example, from a therapist or counselor. If the parties cannot afford a counselor, some county courts have voluntary mediation for parties who have filed actions for dissolution. Other counties, like San Francisco, without court-assisted voluntary mediation counseling, will only see parties whose pleadings indicate that custody is at issue.

If the parties reach an agreement they should reduce that agreement to writing. If an action for dissolution is pending the parties may turn that writing into a Stipulation and Order. If neither party has yet filed an action, the written agreement can serve as a Parenting Agreement. Such an agreement may be the basis for any Stipulations, Orders and/or Settlement Agreements in a subsequent action for dissolution.

III. General Issues in Custody Litigation

The parties first present custody and visitation issues at the litigation level in an Order to Show Cause (OSC) or first Motion. In California all counties require mandatory mediation prior to a court hearing on the OSC. In San Francisco, if an initial pleading indicates either a custody or visitation issue, the parties are required to attend the Pre-Mediation Orientation Program and mediation prior to the date of the court hearing. Where a non-moving party does not cooperate in attending orientation and mediation, the case will not be dropped from the court's calendar. Until a party complies, the court will issue necessary orders for the safety of the parties and interim orders on custody and visitation. Where a *moving* party does not cooperate in attending orientation and mediation, the court will order the matter off calendar unless good cause is shown.

Pre-Mediation Orientation. The orientation session is offered weekly by the Office of Family Court Services (FCS) , which provides confidential mediation of custody and visitation disputes, and conducts or coordinates court-ordered evaluations. Failure of a party to attend orientation will result in the court continuing the matter to a later date unless the Court determines that it is in the best interests of the child to proceed. Sanctions may be issued against a party or the party's attorney for the noncompliance with the requirement to attend orientation.

Extended Mediation. If the parties desire subsequent sessions with the mediator and the mediator agrees, the parties may be seen again in extended mediation. The mediator does not seen court determination on child custody and visitation issues in cases that are open in extended mediation. Upon the termination of mediation, the attorneys of record will be given written notice of the disposition.

Evaluation. An evaluation is an assessment of the child, his or her needs, and the ability of each parent to meet these needs. An evaluator gathers relevant information and prepares a report for the court. Pending the results of the evaluation, the court will grant temporary custody/visitation orders.

Resolution and/or Settlement Conference. If the parties are unable to settle the dispute on the basis of the evaluator's report and with the assistance of counsel, a meeting may be

scheduled by FCS to further facilitate resolution. If issues remain in dispute, FCS will schedule a Settlement Conference with the court. Only after an unsuccessful Settlement Conference may a hearing date for trial on contested custody and/or visitation issues be set.

Definition Used in Mediation. When the parties meet with the mediator, or simply when they discuss various custody arrangements with counsel, they will hear daunting phrases like "legal custody," "physical custody," "joint" and "sole" custody. California Family Code §§ 3002-3007 sets out the following definitions:

Physical Custody: where the child actually resides and which parent (or parents) is responsible for the child's day-to-day supervision;

Legal Custody: which parent (or parents) holds major decision-making authority over the child's health, education, religious training and other areas;

Sole Physical Custody: when the child resides with only one parent and that parent is the child's primary caretaker, subject to the other parent's visitation rights (a court rarely grants physical custody without visitation unless the other parent poses a serious threat to the child's well-being);

Sole Legal Custody: when only one parent has the right to make important decisions for the child;

Joint Legal Custody: when both parents share the responsibility for making decisions for the child; and

Joint Physical Custody: when both parents have significant periods of physical custody (not necessarily equal time).

The court uses physical and legal custody options in various combinations, and to say that one parent has sole physical custody does not, for example, necessarily preclude the parties from sharing joint *legal* custody of the child.

The court has wide discretion in child custody cases. The court, in applying a basic "best interest of the child" standard, will consider the child's health, safety and welfare before it allocates custody. In California, the court works within a statutory preference for the child's continued contact with both parents and for joint custody arrangements. *See* California Family Code § 3020 and § 3040. In effect, the court strives for stability and continuity for the child.

IV. Specific Issues in Custody

A. Preference of child

The court occasionally explores which parent the child prefers. If the child is of significant age and capacity to reason so as to form an intelligent preference as to custody, the court shall consider and give due weight to the wishes of the child in making an order granting or modifying custody. Family Code § 3042(a). In practice, the judge will not speak to the child directly, nor will the child be permitted to testify in court. A mediator from Family Court Services may interview the child, or, in an appropriate case, the judge may appoint an attorney for the child. *See* California Family Code § 3042(a).

B. Gender

Courts may not use gender to prefer one parent over the other. *See* California Family Code § 3040(2)(1); *In re Marriage of Carney* (1979) 24 Cal. App. 3d 725.

C. Sexuality

Sexual orientation is a potential issue in many custody cases involving persons with HIV infection. The U.S. Supreme Court broadly held that a court may not make custody or visitation awards based on the court's own "private biases" (*Palmore v. Sidoti* (1984) 466 U.S. 429). More specifically, California case law holds that the simple fact that a parent is gay will not preclude that parent from obtaining custody of the child. *See Marriage of Wellman* (1980) 104 Cal. App. 3d 992; *Nadler v. Superior Court* (1967) 255 Cal. App.2d 523. Only if a party offers specific evidence of a negative effect on the child's best interest will a court deny custody or visitation on the basis of sexual orientation.

D. HIV

1. Custody

Two cases provide an effective argument by analogy when one party requests denial of custody or visitation rights because of the other parent's AIDS diagnosis. *In re Marriage of Carney* (1979) 24 Cal. App. 3d 725 and *In re Marriage of Levin* (1980) 102 Cal. App. 3d 981 hold that a court may not use a parent's physical handicap in denying custody without a specific showing of harm to the child. Therefore, unless the opposing party can demonstrate that frequent and continuing contact with the sick parent will harm the child, a court should not deny the parent's custody and visitation rights.

Two lower courts have already accepted this logic in awarding custody to a parent with AIDS. On June 24, 1988, a California Superior Court granted primary physical custody of a nine-year-old son to a gay father with AIDS (*Julia W. v. Artie W.* (1988) San Bernardino Superior Court, Civ. Act. No. VFL 13212). Similarly, a Maryland Circuit Court restored joint physical custody to a gay father with AIDS (*Jane Doe v. John Doe* (1988) Montgomery County Circuit Court, Civ. Act. No. 28094.)

2. Visitation

If the parent with AIDS is seeking only visitation, the court must award "reasonable" visitation unless it specifically finds such visitation is harmful to the child. Although there is no real standard for "reasonable" visitation, an appellate court will reverse a lower court's decision on visitation only if it is clearly "unreasonable." *See Camacho v. Camacho* (1985) 173 Cal. App. 3d 214. In addition, the court in *Birdsall v. Birdsall* (1988) 197 Cal. App. 3d 1024, stated flatly that a homosexual parent's unrestricted visitation is not presumably detrimental to the child. At least one lower court, and appellate courts in Indiana and New York, have issued rulings making it clear that a diagnosis of AIDS alone may not preclude a parent's exercise of reasonable visitation rights. *See Tubb v. Tubb* (1990) Tenn. Chanc. Ct., Wilson County, Act. No. 3306; *Stewart v. Stewart*, (1988) 521 N.E.2d 956; and *"Jane" W. v. "John" W.* (1987) 519 N.Y.S. 2d 603 (Sup. 1987).

Courts are also beginning to articulate their positions on HIV testing as a condition precedent to requests for custody and visitation, denying such requests in the absence of a showing of "compelling needs." An Illinois court upheld a request for reasonable visitation by a gay father. In *Susan Doe v. John Doe* (1986) Cook County Circuit Court, Domestic Relations Div. No. 78 D 5040, a mother sought to require that her husband take an HIV test before he visited their child. The court refused to order the test. The Supreme Court of New York County, New York, in an extremely comprehensive and thoughtful opinion, denied a request that a custodial father submit to an HIV antibody test and further held that even if the father tested positive, that factor alone would not justify removal of the children from his custody. *Doe v. Roe* (1988) 525 N.Y.S. 2d 718 (Sup. 1988).

V. Modification of Custody/Visitation

Any time until the child is 18 either party may petition the court for a modification of a custody or visitation award. To justify a modification the moving party must demonstrate a "change" in circumstances. In other words, the situation that existed at the time of the original custody order has changed to such an extent as to warrant a change in the custody and visitation arrangement. The moving party must also demonstrate that such a change is in the best interests of the child. The process for a modification is the same as that described above in Section II regarding initial custody. After the motion is made the parties confer with a mediator, who may recommend an evaluation if there are unresolved issues. An evaluation will be presented at the hearing, where the judge can resolve any final issues.

VI. Child Support

A court bases child support on the relative incomes and needs of the two parents. California has uniform guidelines for establishing the amount of child support. These factor the custodial parent's income, the non-custodial parent's income, and the amount of time the child spends with each parent into an algebraic equation.

Under statutory guidelines for awarding child support, a court only takes into account amounts for a child's basic food, shelter and clothing needs. A court may, in its discretion, award child support over the guideline amounts to cover additional expenses such as uninsured medical expenses, travel expenses and child care costs. In practice, child care costs are almost always shared equally by the parents.

If there is an existing child support order, and if a party experiences a change in circumstances, then that party can move for a modification of child support. For example, if a parent with AIDS incurs considerable medical expenses, loses his or her job, and survives on a state disability or Social Security check, that parent may ask the court to modify the child support award. Unfortunately, any delay in a motion to modify a child support award can have catastrophic results.

A court will not retroactively order a decrease in any amount owed before the filing date of the motion. Without a new order, the client with AIDS who cannot pay the old amount of child support will incur an arrearage. The old support amount will simply mount in addition to the ongoing support obligation. Then the district attorney may attach the person with AIDS' wages, attach portions of his or her government entitlements, or intercept tax returns. At a time when

the client's greatest need is to reduce stress, the person with AIDS finds him- or herself sinking deeper and deeper into debt.

PART TWO: GUARDIANSHIP OF MINORS

By Marina T. Sarmiento, Esq.[2]

I. INTRODUCTION

When a parent has HIV, the disease affects not only her[3] health, but the well-being of the entire family. Yet many HIV-positive parents, afraid of acknowledging death, put off planning for their children until it is too late. Once a parent dies, the child may be placed in foster care or with a relative a parent might not have wanted.

The purpose of this chapter is to provide attorneys with a basic guide to legal guardianships for parents with HIV. Recent changes to the law provide an important new option for parents with HIV disease. Under former California probate law the establishment of a guardianship while a parent was alive required a parent to change custodial rights from a parent to a non-parent. Many terminally ill parents did not want to "lose their rights" to their child, despite the benefits of early planning, since the emotional trauma of "letting go" of their child was too much to bear.

Now, with the passage of the "joint guardianship" law for terminally ill parents, an HIV positive parent can establish a guardianship for her child without losing all of her rights. Probate Code § 2105(f). Joint guardianship allows a terminally ill custodial parent and a person nominated by the custodial parent to share custody of a child or children. Upon the incapacity or death of a parent the guardianship continues in the joint guardian, easing the transition of custody for the child. Most parents with HIV prefer joint guardianship arrangements. *See* Section III.E. for more information. With this new guardianship law, ALRP expects an increased demand for pro bono guardianship legal services.

This manual focuses primarily on San Francisco Superior Court procedures. Each county may differ in its procedures and we suggest you contact the county clerk for local rules and procedures.

II. Overview

A. Guardianship

Generally, except for the joint guardianship mentioned above, guardianship of a minor is a formal legal arrangement where an adult other than a child's parent (guardian) is appointed to take care of a minor child (ward). The guardian will have legal custody of the ward and will

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[2] This section is an extract of a larger manual produced by the ALRP called *Guardianship for Parents with HIV: An Advocates Guide*. That manual includes additional sections of the code, sample cases and letters, and guardianship forms. I f you would like a copy, please contact the ALRP. Numerous people collaborated on preparing this information, including the staff of the HOPE Project, Jeff Selbin of the Berkeley Community Law Center, Ora Prochovnik, Janet Seldon, Mary Cedarblade, Jody Joseph, Esther La, Irwin Keller, Philip Kuttner, Kristin Chambers and volunteer law clerk Rob A. Kahn. Thanks also to Legal Services for Children, the National Center for Youth Law, and the Volunteer Legal Services Program for research materials on guardianship law.

The 2004 version of this section was updated by Abigail Trillin Esq. of Legal Services for Children.

[3] Throughout the text, we use the feminine since most ALRP guardianship clients are women. However, the law is the same for both sexes.

assume parental rights and responsibilities over the ward. There are two types of guardians: A "guardian of the person" takes care of the child's well-being, including education, religious upbringing, medical care and day-to-day decisions, and a "guardian of the estate" manages the child's property and assets. A guardianship suspends a parent's custodial rights instead of permanently terminating parental rights as in an adoption. A guardianship can be terminated by court order upon petition by a party such as the parent, ward or guardian if the guardianship is no longer necessary or no longer in the best interest of the child.

B. Comparison of guardianship to other custodial arrangements

Although this manual focuses on guardianships, it is important to be aware of other legal proceedings affecting the custody of a child in order to determine the right custodial arrangement for your client. In proceedings affecting the custody of a minor child, when parents are in disagreement, custody must be awarded according to the "best interest of the child." *Guardianship of Marino* (1973) 30 Cal. App. 3d 952, 106 Cal. Rptr. 655; Fam. Code § 3040(a). California declared public policy also favors attempting to "assure minor children of continuing and frequent contact with both parents" except where that contact would "not be in the best interest of the child." Fam. Code § 3020.

1. Dissolution/divorce

Dissolution or judicial termination of a marriage will affect the custody of a child. Prior to divorce both parents equally share legal and physical custody of a child. Fam. Code § 3010. The court has broad power to make child custody, visitation or other orders affecting the welfare of a child.

2. Uniform Parentage Act

If a child's parents have never been married to each other, child custody issues will usually be adjudicated through a paternity action, pursuant to the Uniform Parentage Act. Fam. Code § 7600. Once the legal father of the child is established, custody of the child is resolved as in a dissolution.

3. Domestic Violence Prevention Act

In situations involving domestic violence, temporary custody of a child can be determined under the Domestic Violence Prevention Act (DVPA). Fam. Code § 6220. The court can issue a restraining order and award custody of the child to one parent, subject to supervised visitation rights of the other parent if the court determines visitation is in the child's best interest. Fam. Code § 6223. A parent may obtain custody pursuant to the DVPA even if the parents have never been married. Fam. Code § 6218. The custody order may be modified in a subsequent proceeding, such as a dissolution or an action under the Uniform Parentage Act.

4. Adoption

Adoption is a proceeding that results in a complete substitution of parents, which extinguishes the rights and obligations of the birth parents over their biological child. Statutory provisions for adoption are set forth in Fam. Code § 8500 *et seq.* Once an adoption is complete, the adoptive parents are legally considered the parents of their adoptive child and have all the rights and duties of a parent. Fam. Code § 8616. The adopted child cannot inherit from his/her

birth parents through intestate succession, thus requiring birth parents to write a will if they wish to preserve the inheritance rights of their biological child.

Some California courts have been granting second-parent adoptions, allowing non-marital parties to adopt a child without terminating the birth parent's parental rights, but this is not yet universal.

5. Conservatorship

A conservatorship is a proceeding where a conservator is appointed to provide supervision over the person and/or estate of an adult, or a minor who is married or whose marriage has been dissolved. Prob. Code § 1800 *et seq.* Conservatorship of the person is appropriate when an adult is unable to provide properly for his/her personal needs for health, food, clothing, or shelter. Prob. Code § 1801(a). Conservatorship of the estate is appropriate when a person is substantially unable to manage his/her own finances or to resist fraud or undue influence. Prob. Code § 1801(b). Limited conservatorship is utilized for developmentally disabled adults. Prob. Code § 1801(d). A conservatorship may also be used to place a gravely disabled minor in a mental health treatment facility. Welf. & Inst. Code § 5350 *et seq.*

6. Juvenile Court proceedings

Child custody may also be adjudicated through Juvenile Court proceedings if the following situations are found:

(a) parental neglect, abuse or exploitation (Welf. & Inst. Code § 300);

(b) a child habitually disobedient or beyond control of parent/guardian (Welf. & Inst. Code § 601);

(c) a child violative of crime laws (Welt. & Inst. Code § 602); or

(d) abandonment.

If any of these four situations is found to exist, the Juvenile Court may remove custody of the minor from the parent(s) or other legal custodian by declaring the child a dependent (§ 300) or ward (§ 601, § 602) of the court. The court may place the child under the supervision of a probation officer who may place the child with relatives or friends of the minor, a licensed community care facility or a foster home. Welf. & Inst. Code § 727(a). Guardianships can also arise as part of a permanent plan for dependent children under Welf. & Inst. Code § 300.

7. Emancipation

Under the Emancipation of Minors Act (EMA), Fam. Code § 7000 *et seq.*, three categories of emancipated minors are recognized:

(a) married minors;

(b) minors in the armed services; and

(c) minors who obtain a declaration of emancipation pursuant to the EMA. Fam. Code § 7002.

In order to obtain a declaration of emancipation a minor must be at least 14 years old, willingly living on his/her own with parental or guardian consent or acquiescence, legally supporting him/herself and managing his/her finances. The minor must also establish that emancipation is in his/her best interest. Fam. Code § 7120. Emancipation allows a minor to make decisions regarding his/her health care, education, residence and contractual agreements. Fam. Code § 7050.

C. Deciding whether a guardianship is advisable or necessary

There are a number of reasons why a parent with HIV would want to establish a guardianship for her child. When a parent has HIV she may experience a number of illnesses hindering her ability to care for her child. If the other parent is absent, unfit, abusive, incarcerated or otherwise unable to care for the child, a guardianship should be set up. Many parents do not want their children to be placed in foster care with strangers; others want to place their child with a nonrelative friend. If the parent is in a same-sex relationship, a guardianship is necessary to ensure that the child will be able to stay with her parent's partner.

When one parent dies the surviving parent still has a right to custody unless the surviving parent's parental rights have been previously terminated or limited. If that parent asserts parental rights and objects to the appointment of the proposed guardian, the court must find that placing the child with the parent would be detrimental to the child *and* that it is in the child's best interest to place custody with a non-parent. Fam. Code § 3040(a).

The court will ordinarily order an investigation by DSS, Family Court Services or another agency and ask for a recommendation by the investigating party.

1. When a guardianship is unnecessary

(a) Enrollment in public school. Under previous California law, only parents, legal guardians or other persons having control or charge of a child between the ages of 6 and 16 were able to enroll that child in a public school in the school district where the parent or guardian resided. As of May 27, 1994, Education Code § 48204 was amended to allow an adult caregiver of a minor child to enroll the child as a pupil in a public school.[4] The minor child must be residing in the caregiver's home, located within the boundaries of that school district, and the caregiver must sign a "caregiver authorization affidavit" pursuant to Family Code § 6550. Educ. Code § 48204(d).

A caregiver affidavit is only valid for one year after the date the document was executed. Execution of this affidavit constitutes a sufficient basis for determination of residency of the minor, without the requirement of a guardianship or other custody order, unless the school district determines from the actual facts that the minor is not living with the caregiver. Fam. Code § 6550. *See* APPENDIX F for the full text of Educ. Code § 48204, as amended, and Fam. Code § 6550, the Caregiver's Authorization Affidavit.

[4] In response to 1990 Census findings, that there are 673,563 minors living with nonparent relatives and 207,825 minors living with nonrelatives, the Legislature enacted Family Code § 6550 in order to help ensure that minors living with nonparent caregivers will have unhindered access to public education and essential medical care. Minor's Caregiver Act, ch. 98 (1994)(codified at Cal. Educ. Code § 48204, as amended, and Cal. Fam. Code § 6550).

(b) Minor's estate less than $5,000. If a minor's estate is less than $5,000 a guardianship of the estate is unnecessary. Assets may be paid or delivered directly to a parent to hold in trust until the minor reaches the age of majority. Prob. Code § 3401.

(c) Minor is married or divorced. A guardianship of the person is inappropriate for a married minor or a minor whose marriage has been dissolved. Prob. Code § 1515. A conservatorship is the appropriate legal vehicle for supervision of a married minor. Prob. Code § 1800. However, if a minor's marriage has been *annulled*, then a guardianship is proper. In addition, the statute does not preclude the appointment of a guardian over the estate of a married minor. Prob. Code § 1515

(d) Consent for medical care, enlistment in armed forces. A guardianship may not be necessary for some actions requiring parental consent. A minor, age 16 or older, may petition the Superior Court for consent to receive medical care or to enlist in the armed forces if consent is necessary and the minor has no parent or guardian available to give consent. Fam. Code § 6911 (medical), § 6950 (military).

In addition, Family Code § 6550 allows an adult caregiver to enroll a minor in school and consent to school-related medical care.[5] Fam. Code § 6550(a). If the caregiver is a relative of the minor, the caregiver will also have the same power given to guardians under § 2353 of the Probate Code to consent to and authorize medical and dental care for the minor.[6] Fam. Code § 6550(a). A parent or other person having legal custody of the minor, however, may override the caregiver's authorization to consent to or to refuse medical or dental care for the minor, providing that the parent or legal guardian's decision does not jeopardize the life, health or safety of the minor. Fam. Code § 6550(c).

(e) CalWORKS payments for minor living with relative other than parent. A guardian or relative with whom a child deprived of parental care or support is living[7] may apply for CalWORKS benefits on behalf of that child. CA DSS Manual § 40 - § 117.21. Certain relative caretakers need not be legal guardians of the child in order to apply for CalWORKS for the child. CA DSS Manual § 44 - § 203.22. Counsel should consult with public benefits experts if any of the parties involved currently receive or will apply for government benefits.

2. When a guardianship is necessary

(a) Stability for child. While the "caregiver authorization affidavit" is available for school enrollment and limited medical care, this affidavit is only a temporary device that must be renewed every year. Fam. Code § 6550(b). In addition, the child's parent or other adult having custody of the child may override the caregiver's medical authorization. Fam. Code § 6550(c). A formal legal guardianship can ensure stability for the child in that the guardian's power is not

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[5] School-related medical care" means medical care that is required by state or local government authority as a condition for school enrollment, including immunizations, physical examinations and medical examinations conducted in schools for pupils. Fam. Code § 6550(i)(3).

[6] "Relative" means a spouse, parent, stepparent, brother, sister, stepbrother, stepsister, half-brother, half-sister, uncle, aunt, niece, nephew, first cousin, or any person denoted by the prefix "grand" or "great," or the spouse of any of the person specified in this definition even after the marriage has been terminated by death or dissolution. Fam. Code § 6550(i)(2)

[7] *See* DSS Manual § 41 - § 401 for definition of deprivation of parental support or care.

limited as such because a guardian will have legal custody of the child and can make all decisions regarding the care, custody and control of the child.

(b) Consent to medical care by non-blood-related caregiver. While the "caregiver authorization affidavit" allows a non-blood-related caregiver to enroll a minor in a public school and to authorize school-related medical care, it does not allow for non-blood-related caregivers to give consent for medical treatment outside the school setting. If the intended caregiver is not a blood relative, a guardianship would be necessary for the caregiver to authorize all other medical treatments and procedures. This is especially important if the child is HIV positive since this will necessitate constant medical monitoring and care.

(c) Other parent still alive. A legal guardianship would be advisable when the parent other than the one nominating the guardian is still alive and that other parent is unable, unwilling or unfit to take care of the minor child. The legal guardianship protects the appointed guardian's rights in such a situation where the other parent would attempt to regain custody of the child and/or make decisions regarding the child that would not be in the best interest of the child.

3. Public benefits considerations

(a) California Work Opportunity and Responsibility to Kids (CalWORKS). In order to receive CalWORKS payments for a child living with a nonrelative, the nonrelative must be the legal guardian of the eligible child. CA DSS Manual § 40 - § 117.21.[8]

(b) Supplemental Security Income (SS1) for children with disabilities. Approximately 25% of children born to mothers with HIV are also HIV-infected themselves.[9] Children with HIV infection may be eligible for SSI if they qualify as disabled *and* if they meet the SSI financial restrictions. To determine whether those restrictions are met, a portion of the parents' income and resources may be counted.[10] Note, however, that a legal guardian who is not the child's parent or stepparent is not among the individuals whose income and resources are deemed to be available to the child.[11]

Under the SSI Final Regulations for children with HIV, released in July 1993, a child may automatically qualify as disabled by HIV in one of two ways:

(1) the child has been diagnosed with any one of 47 "stand-alone" illnesses or their equivalents; or

(2) the child has another manifestation of HIV disease and experiences functional impairment as gauged by the child's age.

See Social Security Form 4815-F6, included as APPENDIX I, for Listings of Impairments.

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[8] It should be remembered that an absent biological parent is still liable for the child's support, and a guardian may be able to negotiate some payment directly or work through the courts to obtain child support.

[9] Anastos & Marte, "Women - The Missing Persons in the AIDS Epidemic", Health/PAC Bull. 10 (Winter, 1989).

[10] Only the income and resources of parents or stepparents who live with the child and who are not themselves SSI-eligible are counted for the purpose of determining the child's SSI eligibility. These "deeming" rules can be complex. *See* 20 C.F.R. § 416.1165 (income) and 20 C.F.R. § 416.1202 (resources).

[11] *Id.*

Even if a child does not meet one of these two criteria, he or she may still qualify as disabled if otherwise developmentally impaired. *See* CHAPTER 7: PUBLIC BENEFITS for a general description of qualifying for Social Security.

III. Guardianship Law and Procedure

A. Initial proceedings

Guardianship proceedings vary in each county. This manual outlines the procedure in San Francisco Superior Court. *See* APPENDIX J for San Francisco's Probate Rules. Please call the court clerk in other counties for their procedure. There are specific Judicial Council forms for guardianship, and if "adopted" by rule of court, as indicated in the lower left corner of the form, use of the form is mandatory whenever applicable. Cal. Rules of Court, Rules 928, 982.1, 982.2, 1281 *et seq.*

1. Guardianship standards

Guardianship petitions are filed in Superior Court, Probate Department, typically in the county in which the proposed ward resides. In order to appoint a guardian of the person, the Probate Court must find it "necessary and convenient" to appoint the guardian. Prob. Code § 1514(a). In addition, the court is governed by Fam. Code § 3020 *et seq.*,[12] which provides that custody of a child should be awarded according to the "best interests of the child." Prob. Code § 1514(b); Fam. Code § 3040(a).

To determine the child's best interest, the court must consider:

(a) the health, safety and welfare of the child;

(b) any history of abuse by one parent against the child or against the other parent;

(c) the nature and amount of the child's contact with both parents; and

(d) any other relevant factors. Fam. Code § 3011.

In order to award custody of a child to someone other than that child's parent(s), the court must find that:

(a) awarding custody to a parent would be detrimental to the child; and

(b) the child's best interest would be served by appointing a nonparent. Fam. Code § 3041.

2. Initial assessment

Prior to filing for guardianship, the petitioner's attorney should conduct an assessment interview of the parent, the proposed guardian and the child to determine if guardianship is appropriate.

[12] As of January 1, 1994, all laws relating to Family Law formerly found in the Civil Code, Code of Civil Procedure and Evidence Code have been organized in a central Family Law Code. The substantive laws have not necessarily changed.

For example, if the parent, the proposed guardian or the child receives government benefits, the effects of a guardianship on these benefits should be examined. The attorney should try to obtain as complete a picture as possible regarding the parties involved and determine if there is a chance the guardianship may be contested or if the minor should have appointed counsel. *See* APPENDIX E for sample client questionnaire. As a practice pointer, counsel may want to mail the other parent a letter explaining the guardianship procedure, outlining the effects of guardianship on parental rights and informing that parent of her options if she agrees with or contests the guardianship. *See* APPENDIX H for sample letters of notification.

3. Jurisdiction and venue

Guardianship proceedings are under the exclusive jurisdiction of the Probate Court. Prob. Code § 2200. If the proposed ward is a California resident, proper venue for the filing of the guardianship proceeding is either:

(a) the proposed ward's county of residence; or

(b) any other county that is in the proposed ward's best interest. Prob. Code § 2201.

For non-California wards, venue for guardianship of the person is proper in:

(a) the county of the proposed ward's temporary residence; or

(b) any other county in the proposed ward's best interest. Prob. Code § 2202(a). *See* Prob. Code § 2202(b) for venue of non-resident guardianships of the estate.

If proceedings for guardianship are commenced in multiple counties, the first guardianship granted governs and all other proceedings are dismissed. Prob. Code § 2203(b). The Probate Court may also grant a petition for change of venue. Petitions to transfer venue may be filed by the proposed guardian, the ward, the spouse of the ward, a relative or friend of the ward or any other interested person. Prob. Code § 2212. The procedure for change of venue can be found in Probate Code § 2210 *et seq.*

4. Nomination of a guardian

A parent or an adoptive parent may nominate a guardian of the person and/or estate when:

(a) the other parent nominates the same person or gives written consent to the nomination; or

(b) at the time the petition is filed the other parent is dead or lacks legal capacity to consent to the nomination, or consent of the other parent would not be required for adoption of the child. Prob. Code § 1500.

A parent can nominate a guardian in a will or while she is still alive via a Petition for Guardian. Prob. Code § 1502. For parents with AIDS, nominating a guardian in a will is better than not planning for a child's welfare at all. However, a parent's testamentary nomination might not be upheld by the Probate Court. The Probate Court will appoint the guardian based on the "best interest of the child" standard, but remember that the surviving parent would still be entitled to preference. If the custodial parent is deceased and unable to testify as to why she

chose a particular person as guardian for her child, the court may substitute its judgment for the parent's.

While courts are technically unbiased, judges may have their own individual views as to what a "family" should look like. If a parent wishes to nominate her same-sex lover or another nontraditional person, such as a boyfriend, neighbor, co-worker or close friend, such nominations are more likely to be successful if carried out in a Petition for Appointment of Guardianship during the parent's life. This is especially true if there is a chance AIDS dementia may set in, thus impairing a parent's decision-making capacity and calling into question the parent's choice of guardian.

Under former California law, terminally ill parents were hesitant to apply for guardianship during their lifetime because they would lose custodial rights to their child. Since the guardian has the right to determine the child's residence, the guardian could have the child live with her instead of the parent, even if the parent were still able to care for her child. With the passage of Probate Code § 2105(f), effective January 1, 1994, parents no longer need to lose all rights to their children under the Joint Guardianship provisions. Under this law the Probate Court may appoint a terminally ill parent and a person nominated by that parent as "joint guardians" over the person of the child. *See* SECTION III.E: JOINT GUARDIANSHIP, *below*, for further discussion. *See* APPENDIX G for full text of Joint Guardianship provisions.

5. Manner of nomination

A guardian nomination can be made:

(a) in the petition for appointment of guardian;

(b) at the hearing on the petition; or

(c) in a writing (e.g., a will) signed before or after the petition is filed. Prob. Code § 1502(a).

The nomination is effective when made unless the writing provides that the nomination will occur only upon the occurrence of a specific event such as death or legal incapacity. Prob. Code § 1502(b).

B. Petition for appointment of the guardian

1. Contents of the petition

A guardianship petition can be filed by a relative or another interested person on behalf of the minor, or by the minor if age 12 or older. Prob. Code § 1510(a). If the form has been adopted by the county where the petition is being filed, use of Judicial Council Form is required. We recommend using the forms for all guardianships. Pursuant to Probate Code § 1510(a) – (h), the petition must contain the following:

(1) request that guardian be appointed for the person and/or estate;

(2) name and address of proposed guardian;

(3) name and date of birth of ward;

(4) statement that guardianship is necessary and convenient;

(5) names and addresses of:

a. ward's parents;

b. person with legal custody of the ward or the person caring for the ward;

c. ward's relatives within second degree — i.e., ward's brothers, sisters, parents and grandparents;

d. ward's spouse, if any (for guardianship of estate only);

e. any person nominated as guardian for the ward;

(6) if known to the petitioner:

a. the name of the institution if the ward is a patient or on leave of absence from a state institution under the jurisdiction of the state Dept. of Mental Health or Dept. of Developmental Services;

b. whether the ward is entitled to or receiving VA benefits and the amount of the benefit;

c. any pending adoption, juvenile court, marriage dissolution, or other proceeding affecting custody of the ward;

NOTE: if such a proceeding should arise *after* the petition is filed, the petitioner has 10 days after knowledge of the other proceeding to amend the petition. Prob. Code § 1512.

(7) a statement of intent to adopt if the petitioner intends to adopt the proposed ward.

NOTE: if the ward becomes the subject of an adoption proceeding, the guardianship proceeding will be consolidated with the adoption proceeding. Prob. Code § 1510(h).

The Judicial Council forms contain all the statutorily necessary statements — just be sure to check off the appropriate boxes.

2. Declaration under the Uniform Child Custody Jurisdiction Act (UCCJA)

A Declaration under the UCCJA must also be filed with the Petition since a Guardianship is a "custody proceeding" covered by the Act. This Declaration, found on Judicial Council form MC-150, requires listing the ward's place(s) of residence for the past five years and the names and addresses of the person(s) with whom the ward resided, information regarding any other custody proceeding involving the proposed ward, or persons with custody or visitation rights to the ward. The ward's address may be kept confidential if there are allegations of child abuse. Fam. Code § 3409.

3. Fees and costs

A Petition for Guardianship must be accompanied by a filing fee[13] or by an Application for Waiver of Court Fees.[14] Most ALRP clients are indigent and qualify for a fee waiver. A client is entitled to an automatic waiver of court fees and costs if the client receives certain needs-based government benefits (e.g., CalWORKS, SSI, food stamps, County Relief, General Relief or General Assistance) or meets certain income requirements. *See* Gov. Code § 68511.3 and Cal. Rules of Court 982 and 985. The fee can also be waived if the proposed ward is receiving charity or relief such as CalWORKS, food stamps, or Medi-Cal. Gov. Code § 6102.

4. Notice of Hearing

Notice of Hearing must be given at least *15 days before the hearing* on the Petition for Appointment of Guardian and must state the date, time and place of the hearing and be accompanied by a copy of the petition. Prob. Code § 1511(a). The court *may not shorten time* for notice pursuant to Probate Code § 1511(a) and if an emergency demands shortened time, the petitioner should apply for a temporary guardianship. *See* SECTION III.D: TEMPORARY GUARDIANSHIP, *below*, for further discussion.

The Probate Code requires that notice be served personally[15] or by first class mail, receipt acknowledged,[16] on the following:

(a) the parents[17];

(b) the ward, if 12 years or older;

(c) the person having legal custody of the proposed ward; and

(d) the nominated guardian. Prob. Code § 1511(b).

In addition, service by mail is required on the following:

(a) the ward's relatives named in the petition[18] and;

(b) person caring for the ward if different than person with legal custody. Prob. Code § 1511(c).

Certain government directors or agencies may also have to be served by mail. The local agency designated to investigate guardianships (typically the local Department of Social Services, hereafter "DSS") must be served in all guardianships of the person.[19] Prob. Code

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[13] Fees and filing procedures differ in each county so consult local rules for proper filing procedures.

[14] Some counties require that the Waiver application be accompanied by an Order on Application for Waiver of Court Fees & Costs; San Francisco does not.

[15] *See* Code of Civ. Proc. Sec. 415.10.

[16] *See* Code of Civ. Proc. Secs. 415.30.

[17] In San Francisco, notice is required to be served personally on the parents.

[18] Only relatives within the second degree (i.e. the ward's grandparents, brothers, sisters and parents) require notice.

[19] The DSS will screen the name of the proposed guardian for prior referrals of child abuse or neglect as well as criminal records. The results will be provided to the court.

§ 1516(a). If a nonrelative is nominated as guardian, the state director of social services must also be notified. Prob. Code § 1542. If the ward is a patient in, or on leave from, a state hospital, the director of mental health or director of developmental services must be served. Prob. Code § 1511(d). If the ward receives or is entitled to receive VA benefits, notice must be mailed to the VA office in the court's jurisdiction. Prob. Code. § 1511(e).

Notice is *not required* on the following persons unless ordered by the court:

(a) birth parents or other relatives of a ward who has been relinquished to a licensed adoption agency; and

(b) parents of a ward who has been judicially declared free from parental custody and control. Prob. Code § 1511(f).

The court may dispense with notice if giving notice would be contrary to the interests of justice or if the person to be notified cannot be located despite reasonably diligent attempts to locate. Prob. Code § 1511(g). In San Francisco, if the Order Dispensing with Notice is sought on the ground that a relative within the second degree cannot be found with reasonable diligence and no other notice is required, the court requires a declaration stating specifically what efforts were made to locate the relatives. SF Probate Manual § 12.02(a)(1).

Many ALRP guardianship clients are single mothers who no longer know the whereabouts of the child's father. Since a guardianship suspends a parent's custodial rights, "reasonable diligence" to locate a parent is more extensive than "reasonable diligence" in locating the child's other relatives. A parent whose due process was denied because of lack of notice may petition the court to vacate an order granting guardianship. The location effort should include searching telephone directories, contacting the Department of Motor Vehicles and the Registrar of Voters and interviewing relatives who may have had contact with the missing parent. Note: The efforts necessary to satisfy "reasonable diligence" vary by county. Please consult your local rules for the exact requirements.

Pursuant to Probate Code § 1511(h), proof of notice or court-ordered exemption of notice is required prior to appointment of guardian. The Judicial Council Notice of Hearing form includes the Proof of Service on the back page.

5. Proposed guardian's Declaration in Support of Petition (SF)

San Francisco requires an affidavit or declaration in support of the guardianship petition which includes the following:

(a) why the guardianship is needed, including specific reasons why the parents are unable to care for the proposed ward and whether they consent to the guardianship;

(b) proposed guardian's complete legal name, date of birth, education, employment and health status;

(c) complete legal name, date of birth and relationship of all persons residing in proposed guardian's household;

(d) statement regarding development of minor, naming whom minor has resided with since birth, and any special emotional, psychological, educational or physical needs of the minor and the guardian's ability to provide for those needs;

(e) proposed day-care for the minor, if applicable, and name, address, phone number of minor's school, if any;

(f) housing arrangements of guardian, whether minor will have own room, sharing a room, and if so with whom;

(g) anticipated amount and source of any financial support of the minor;

(h) photocopy of visa if minor is in the U.S. on a student visa;

(i) any arrest record of the guardian and each person who will reside in the guardian's home (include nature of offense, date, place and disposition);

(j) any pending or prior proceedings in Juvenile Court involving the minor or any other person residing in guardian's home (include date, place and disposition);

(k) any prior contact by the minor, guardian or any persons who will reside in guardian's home with Child Protective Services or the DSS.

To protect the privacy interests of the HIV-positive parent and the child, the declaration should be marked "confidential" and it will be filed in a separate folder by the court. San Francisco Probate Manual § 12.02(c)(1). If confidential, this declaration should not be mailed to the DSS as part of the Petition.

6. Special requirements for nonrelative guardians

Probate Code § 1540 – § 1543 set forth additional requirements for appointment of a nonrelative guardian. However, these provisions are inapplicable in the following circumstances:

(a) the petition is only for guardianship of the estate;

(b) the Director of Developmental Services is appointed guardian pursuant to Health and Safety Code § 416 *et seq*.;

(c) the director of county social services is appointed guardian;

(d) the public guardian is appointed guardian; or

(e) the guardianship results from a permanency plan for a dependant child pursuant to Welf. & Inst. Code § 366.25.

The nonrelative guardianship petition, in addition to the other required contents, must also contain the following:

(a) a statement that upon the request of the investigating agency (pursuant to Prob. Code § 1543) the guardian will promptly submit information requested;

(b) a disclosure of any petition for adoption of the proposed ward by the proposed guardian; and

(c) a statement as to whether or not the proposed guardian's home is licensed as a foster family home. Prob. Code § 1541.

GUARDIANSHIP PETITION CHECKLIST

Documents for the Initial Filing:

- Petition for Appointment of Guardianship of Minor
- Application for Waiver of Court Fees & Costs[20]
- Notice of Hearing of Guardianship (Proof of Service on back)
- Declaration Under Uniform Child Custody Jurisdiction Act
- Consent of Proposed Guardian/Nomination of Guardian/Waiver of Notice & Consent
- Declaration of Proposed Guardian
- Acknowledgement of Receipt (for parents, in lieu of Waiver of Notice)
- Confidential Screening Form (Judicial Council Form)
- Duties of Guardian (Judicial Council Form)

7. Investigation

In all guardianships of the person or estate an investigation of the proposed guardian will be conducted unless waived by the court.[21] Prob. Code § 1513(a). For relative guardians, the case will be investigated by the court investigator; for nonrelative guardians by the county agency designated to investigate potential dependency (in San Francisco, the DSS). Prob. Code § 1513(a).

The DSS will conduct a background investigation for both relative and nonrelative guardians to determine whether the proposed guardian has any criminal convictions or whether the DSS has received any referrals on the proposed guardian for child abuse or neglect. For nonrelative guardians the DSS will conduct a "home study," which takes approximately six weeks to complete. For relative guardians a home study will be conducted only if problems exist. In San Francisco the probate investigator will typically ask questions of relative guardians immediately prior to the Petition Hearing. The court can waive the full report if no problems are apparent.

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[20] Counties other than San Francisco may require that the Waiver application be accompanied by an Order on Application for Waiver of Court Fees & Costs.

[21] This Section is inapplicable to guardianships resulting from a permanency plan for a dependent child pursuant to Welfare & Institutions Code Sec. 366.25. Prob. Code Sec. 1513(e).

(a) Contents of the investigative report. Pursuant to Probate Code § 1513(a), unless waived by the court, the investigator will file a report discussing the following:

(a) social history of guardian;

(b) social history of ward, including assessment of any special needs, and capability of guardian to meet needs;

(c) relationship of ward to guardian; length and character of relationship; if applicable, how guardian acquired physical custody of ward; ward's attitude toward proposed guardianship, unless attitude is affected by ward's developmental, physical or emotional condition;

(d) anticipated length of guardianship, plans of both birth parents and guardian for stable and permanent home for the child (waivable by court for relative guardians).

The report must be considered by the court and reflected in the minutes of the court's ruling on the Petition.[22] Prob. Code § 1513(b). The author of the report may be called and examined by any party to the proceeding. The report is confidential and is only available to persons who have been served and their attorneys. Prob. Code § 1513(d).

If, during the course of the investigation, any party alleges that the minor's parent(s) is unfit (as defined by Welf. & Inst. Code § 300), the case will be referred to DSS and guardianship proceedings will be suspended until the child dependency investigation is completed. Prob. Code § 1513(c).

(b) Assessment of the costs of the investigation. The county may assess costs of the investigation against:

(1) the proposed ward's parent(s) or person charged with the support and maintenance of the child; and

(2) the guardian of the estate of the proposed ward. Prob. Code § 1513.1(a).

However, the county may waive any or all assessments on the basis of hardship. Prob. Code § 1513.1(a). Most ALRP clients are indigent and can qualify for a waiver.

C. The guardianship hearing

1. Appointment of guardian

In an uncontested guardianship the court will appoint a guardian if it is necessary and convenient to appoint a guardian and if the guardianship is in the best interest of the child. If the appointment is opposed by either parent, before appointing a non-parent guardian the court must find that awarding custody to a parent would be detrimental to the child and the child's best interest would be served by appointing the non-parent. *See* SECTION III.A.1: GUARDIANSHIP STANDARDS, *above*.

[22] Sometimes DSS does not complete the report in a timely manner. Counsel should contact the court clerk prior to the hearing to determine if the report has been filed. If not, the court may waive the report so long as DSS has completed a background report on the proposed guardian.

At the hearing, the court will appoint a guardian if a guardian is both necessary and convenient for the proposed ward. In San Francisco, guardianship hearings are held only on Tuesdays at 1:00 p.m. before the Probate Judge or the Probate Commissioner. The presence of the proposed guardian and ward is required. At this point the court may appoint counsel for the ward if appointment would be helpful to resolution.[23] Prob. Code § 1470(a).

During the hearing, the court may ask questions about the parents, the Petition, the investigative reports and other areas in order to ascertain the necessity of the guardianship. If a parent appears to contest the guardianship, the probate investigator will conduct a mediation and further investigation if necessary.[24] No further notice of hearing is required unless court ordered. Prob. Code § 1463.

As a practice pointer, if counsel knows that the guardianship will be opposed, counsel should prepare an Order for Temporary Guardianship and Letters of Temporary Guardianship and present the Order to the Court at the time of the hearing. Thus, if the matter is continued, pending the FCS report, the court may still appoint a temporary guardian to act until the continued hearing date. The temporary guardian will have legal authority to make decisions on the ward's behalf during the interim period. *See* SECTION III. D: TEMPORARY GUARDIANSHIP.

At the hearing the court may order a six-month or one-year Status Conference to remain apprised of the ward's well-being. A Status Report should be submitted by mail to the court before the hearing, and the court may waive appearance at the hearing if no problems are apparent.

HEARING CHECKLIST

- Contact necessary parties (ward, guardian, parent(s)).[25]
- Contact court to see if investigative report has been filed.
- Forms to Bring: Order Appointing Guardian of Minor and Letters of Guardianship.

2. Letters of guardianship

If the guardianship petition is approved, the guardian must take an oath and file the required bond (if necessary) prior to the issuance of the Letters of Guardianship. Prob. Code § 2300. The court will sign the Order Appointing Guardian of a Minor and the guardian signs the Letters of Guardianship. Once the Letters are issued, the guardian has official custody over the ward. The ward, if 12 years of age or older, must be mailed a copy of the Order Appointing Guardian of a Minor, unless she is present at the hearing (which she should be), in which case she should be served at that time. Prob. Code § 2312.

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[23] The court shall fix a reasonable sum for compensation and expenses of appointed counsel at the conclusion of the matter. Prob. Code Sec. 1470(b). Fees and expenses may be assessed against the ward's parent or the ward's estate unless unjust. Prob. Code Sec. 1470(c) & (d).

[24] FCS will investigate the matter and interview the proposed guardian, the child (if of an age to state an opinion), the opposing parent(s) and, if necessary, other family members. FCS will then report its finding to the court.

[25] All that is required is that counsel have proof of service. If you believe the other parent will obstruct the proceedings you do not need to do anything to ensure his presence than send the notice.

3. Bonds

If the guardian is appointed only as guardian of the person, a bond need not be filed unless required by the court. Prob. Code § 2322. If one is appointed guardian of the estate, a bond is necessary before Letters of Guardianship are issued. Prob. Code § 2320.

D. Temporary guardianship

Typically a guardianship proceeding takes five to eight weeks from the time of filing to the appointment of a guardian. In situations requiring the appointment of a guardian in less than 15 working days (required time for notice of hearing), counsel should apply for temporary guardianship, *ex parte*[26]. Prob. Code § 2250. *See* APPENDIX G for full text. Temporary guardianships are usually sought when a parent becomes temporarily ill, is temporarily unable to perform parental duties or dies suddenly.

On or after the filing of a Petition for Appointment of Guardian any person entitled to petition for appointment of guardian may file a petition for appointment of temporary guardian of the person and/or estate. Prob. Code § 2250(a). The court may appoint a temporary guardian to serve pending the final determination of the court upon the Petition for Appointment of Guardian. Prob. Code § 2250(b).

1. Notice required

Unless the court orders otherwise, at least five days prior to the appointment notice of the proposed appointment must be *personally delivered to*: (a) the minor, if 12 or older; (b) the minor's parent(s); and (c) any person having a valid visitation order with the proposed ward effective at the time the petition was filed. Prob. Code § 2250(c). Under the 1994 amendments, evidence that a custodial parent has died or is incapacitated may constitute good cause for the court to order that notice need not be delivered. Prob. Code § 2250(c).

For a temporary guardianship granted *ex parte*, the court may set a hearing for reconsideration if the regular guardianship hearing has not been held within 30 days of the granting of the temporary guardianship. Notice is required pursuant to Prob. Code § 1511. Prob. Code § 2250(d). A temporary guardianship terminates 30 days after the appointment of the temporary guardian, unless good cause exists for extension, for example, until a fulll hearing on the petition can be held. Prob. Code § 2257.

2. Powers of a temporary guardian

A temporary guardian only has the power, authority and duty necessary to provide for the temporary care, maintenance and support of the ward and that which is necessary to conserve and protect the ward's property from loss or injury. Prob. Code § 2252(a). The temporary guardian may consent to medical treatment for the ward pursuant to provisions in Probate Code § 2353.

CHECKLIST FOR TEMPORARY GUARDIANSHIP

[26] Appointment are required for *ex parte* hearings in San Francisco. Also, local rules require phone notice 24 hours in advance to all relatives in second degree. A declaration of such notice and personal service to parents, or reasons for waiver of service, are required.

- File with or after Petition for Appointment of Guardian has already been filed.
- Necessary Forms: Petition for Appointment of Temporary Guardian, Order Appointing Temporary Guardianship, Letters of Temporary Guardianship.
- Proposed Guardians must be present at hearing (SF).
- Proposed Ward should also be present at hearing (SF).

E. Joint guardianship for terminally ill Parents

Probate Code § 2105(f) provides that if a custodial parent has been diagnosed with a terminal condition,[27] as evidenced by a declaration executed by a licensed physician, the court may appoint the custodial parent and that parent's guardian nominee as joint guardians over the person of the minor. If the noncustodial parent objects to the appointment, the court must find that granting custody to the noncustodial parent would be detrimental to the minor. Prob. Code § 2105(f). *See* APPENDIX G for full text.

Joint guardianship greatly facilitates the ability of HIV-positive parents to appoint guardians for their minor children. Unlike standby guardianship laws passed in other states, California's joint guardianship law allows a parent and non-parent to *share* custody from the moment of the court's order. This puts a non-parent in a legal position to act on behalf of the children when the parent is incapacitated. By the same token, it allows the parent to retain custody and care for her children as long as possible. Because they are *sharing* custody, it is essential that the joint guardians discuss ahead of time their plans for working together. Probate Code § 2105(f) requires that joint guardians concur in order to exercise a power. Sometimes the non-parent joint guardian agrees to stay in the background and step in on an "as needed" basis. At other times the non-parent joint guardian is actively involved in the care of the children.

Commencement of the guardianship proceeding before the HIV-positive parent's death or incapacitation allows the parent to participate and exert more control over the process than by nomination in a will. This is especially important if the nominee is a non-relative or a same-sex partner. California's new joint guardianship law is available to all terminally ill parents and will hopefully ease the transition for children following a parent's death or incapacitation.

F. Duties and powers of a guardian of the person

A guardian has the duty and responsibility for the care, custody, control and education of the ward. Prob. Code § 2351(a). The guardian may determine the residence of the ward anywhere within the state without court permission, and out of state only with court permission; however, the ward need not live with the guardian. Prob. Code § 2352. A guardian has the power to consent to medical treatment for the ward but this power is limited by Probate Code § 2356, which limits a guardian's power to commit the ward, consent to experimental drug or convulsive shock treatment, or sterilization.

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[27] Terminal Condition" is defined as an "incurable and irreversible condition" that, without life support treatment, "will, within reasonable medical judgment, result in death within two years." Prob. Code Sec. 2105(f). (Currently efforts are underway to remove the two-year requirement. Be sure the Probate Code was not changed before submitting a confidential doctor's letter to the court.)

A guardian may not unduly restrict the ward's freedom without court authorization. For instance, a guardian may not take the ward to unsatisfactory places, unjustifiably confine the ward, deny visits to family or friends, or forbid the ward from obtaining medical care. The course of remedy for maltreatment is to file for Writ of Habeas Corpus. *Browne v. Superior Court* (1940) 16 Cal. 2d 593, 107 P.2d 1.

Like a parent, a guardian may also be liable for the ward's tortious conduct in fatal traffic accidents (Veh. Code § 17708), willful misconduct resulting in property damage or death or injury of another (Civ. Code § 1714.1), use of firearms resulting in personal or property damage (Civ. Code § 1714.3) or shoplifting (Penal Code § 490.5).

G. Termination of guardianship

A guardianship terminates upon the death, marriage, adoption or majority of the ward. Prob. Code § 1600. A parent, guardian or ward may also petition the court for termination of the guardianship. Prob. Code § 1601. If the court determines the guardianship is no longer necessary or is not in the ward's best interest, the court may order termination. Prob. Code § 1601. Notice of the termination hearing must be served 15 days before the hearing on the guardian, the ward, the ward's spouse and any interested party who has appeared in the matter. Prob. Code § 1460, § 1601. Despite termination of the guardianship the court will have continuing jurisdiction over the proceeding for the purpose of settling the accounts or any other purposes incident to enforcement of court orders and judgments. Prob. Code § 2630.

APPENDICES

Appendix A: Declaration of Client

Roberta Achtenberg
National Center for Lesbian Rights
870 Market Street, Suite 570
San Francisco, CA 94102
(415) 392-6257

Attorney for Respondent, ARTIE DOE

Superior Court of California

County of _____

In Re Marriage of)	Case No._____
)	
Julia Doe, Petitioner)	DECLARATION IN SUPPORT OF
AWARD	
)	OF CHILD CUSTODY TO FATHER
Artie Doe, Respondent	)
_____)	

I, Artie Doe, do hereby declare:

Although I have AIDS, having been diagnosed more than a year ago, I am fully able to take complete care of my own physical and business needs. I run my own household, and am able to clean, cook, shop, do the laundry, visit friends, garden and accomplish the other tasks of daily life, unhindered.

During the number of times that my eight year old son has stayed with me in my home, and most recently when he came to live with me, I was able to care for him, to keep our household in order and to see to it that all of his needs were met.

I am responding extremely well to treatment and in the past months have gained a good deal of weight, evidence of my improving health. My doctor has stated to me on numerous occasions that my physical condition is such that, in his medical opinion, I am doing quite well and should therefore be more than able to care for myself and my son into the indefinite future. I have a part-time job to supplement my income and I have spent the last few weekends repairing our car.

I declare under penalty of perjury that the foregoing is true and correct and that this Declaration was signed by me in _____, California.

Dated:_____ _____

ARTIE DOE

Appendix B: Declaration of Physician

Roberta Achtenberg
National Center for Lesbian Rights
870 Market Street, Suite 570
San Francisco, CA 94102
(415) 392-6257

Attorney for Respondent, ARTIE DOE

Superior Court of California

County of _____

In Re Marriage of)	Case No._____
)	
Julia Doe, Petitioner)	DECLARATION IN SUPPORT OF AWARD
)	OF CHILD CUSTODY TO FATHER
Artie Doe, Respondent)	

I, "Joe Roe," M.D., hereby declare:

I am a physician licensed to practice medicine in the State of California. I was awarded my M.D. by the University of Colorado in 1977. I became board certified in internal medicine in 1980. I became board certified in infectious diseases in 1982. I am in private practice in San Francisco, limited to infectious diseases. I am an attending physician at the AIDS Clinic at San Francisco General Hospital and am an Assistant Clinical Professor of Medicine at the University of California at San Francisco.

I have published a number of articles in medical journals on various subjects relating to AIDS. Further, I am thoroughly conversant with the research and publications of others on the issue of AIDS and its transmissibility.

AIDS is not a disease which is casually transmitted in the household. Family and other household members are not placed at risk of contracting AIDS by virtue of living in the household of someone with AIDS. The agents that cause the various diseases from which AIDS patients suffer do not cause such diseases in healthy people and are also not casually transmitted to household members, provided routine methods of cleanliness are observed.

Numerous studies affirm the experience of those, like myself, who practice in the field, that AIDS is not casually transmitted in the household. Perhaps the most notable recent study is Friedland, G.H., M.D., *et al*., "Lack of Transmission of HTLV III/LAV Infection to Household Contacts of Patients with AIDS or AIDS-Related Complex with Oral Candidiasis," New England Journal of Medicine, 1986; 314:344-9 (attached hereto as Exhibit A), while a comprehensive summary of studies to date is furnished in Sande, M., M.D., "Transmission of AIDS: The Case Against Casual Contagion," New England Journal of Medicine, 1986 314:380-1 (attached hereto as Exhibit B). I base my expert opinion that AIDS is not casually transmissible to persons living in the same household as a person with AIDS on those and other studies, my own research and my experience as a clinician.

I declare under penalty of perjury that the foregoing is true and correct and that this Declaration was signed by me in San Francisco, California.

Dated:_____ _____

MINOR'S ATTORNEY
Legal Services for Children, Inc.
1254 Market Street, 3rd Floor
San Francisco, CA 94102
(415) 863-3762
(415) 863-7708 (fax)

Attorney for Minor

SUPERIOR COURT OF CALIFORNIA
CITY AND COUNTY OF SAN FRANCISCO
PROBATE DIVISION

Guardianship of the Person of, JANE DOE A Minor. _____	) Case No.:)) DECLARATION OF LICENSED) PHYSICIAN REGARDING PARENT'S) TERMINAL ILLNESS)) Date:) Time: 9:00 a.m.) Div.: Probate

I, _____, declare as follows:

1. I am physician licensed to practice medicine in the State of California.
2. I have examined and treated ELIZABETH DOE, the mother of the MINOR, JANE.
3. I have diagnosed Ms. DOE with a terminal condition. It is my medical opinion that Ms. DOE'S condition is incurable and irreversible. Further, Ms. DOE'S condition, without the administration of life sustaining treatment, will within reasonable medical judgment result in death.

I declare under penalty of perjury under the laws of the State of California that the foregoing is true and correct to the best of my knowledge, and that this declaration is executed on _____, at San Francisco, California.

_____

Licensed Physician
JOE ROE, M.D.

Appendix C: Declaration of Psychotherapist/Priest

Roberta Achtenberg
National Center for Lesbian Rights
870 Market Street, Suite 570
San Francisco, CA 94102
(415) 392-6257

Attorney for Respondent, ARTIE DOE

Superior Court of California

County of _____

In Re Marriage of)	Case No._____
)	
Julia Doe, Petitioner)	DECLARATION IN SUPPORT OF
AWARD	
)	OF CHILD CUSTODY TO FATHER
Artie Doe, Respondent	)
_____)	

I, THE REVEREND "JOE JONES," Ph.D., hereby declare:

I am an ordained Catholic priest of the Congregation of Holy Cross and am a psychotherapist specializing in marriage and family therapy. I am a licensed marriage and family counselor and child psychotherapist in private practice. I was granted a Ph.D. in Sociology from Florida State University with a specialization in Social Psychology and Marriage and Family Relations. I also have the following professional training: M.A. (Sociology), University of Notre Dame, Indiana; M.A. (Religion), Holy Cross College, Washington, D.C., 1965; A.B. (Philosophy), University of Notre Dame.

I have a Post-Doctorate Certificate in Marriage and Family Therapy, Institutes of Religion and Health, New York, N.Y., 1978. 1 also have post-doctorate training in Individual Psychotherapy and Marriage and Family Therapy from the Institutes of Religion and Health, New York, N.Y.

I have held five other positions as a psychotherapist since 1975, including being the Executive Director and Staff Psychotherapist at St. Joseph Valley Pastoral Counseling Center, South Bend, Indiana.

I currently am an Assistant Professor of Psychology at the College of Notre Dame, Belmont, California. I have held other assistant professorships as well as a visiting professorship since 1970. I have been an ordained Roman Catholic Priest since 1965, and have held numerous pastoral positions.

All of the above experience includes extensive pastoral counseling and marriage and family counseling. In my practice I have provided therapy for families who have lost children, mates

who have lost mates, and adults who have lost parents at a young age. I have also been counselor to families where one member is suffering from a life-threatening illness. In all these cases, I encourage loved ones to face the issues of separation and life-threatening illness head-on. By that I mean that adults, as well as children, should not be shielded from pain, but rather, should transform it.

To be physically separated from a parent, especially in an abrupt manner, poses potential developmental problems of serious magnitude. To illustrate this point, I recently had a male client in his thirties who undergoing marital difficulties. As therapy progressed, it became obvious to both of us that the problem stemmed from his childhood. This particular client had been physically separated from his terminally ill mother when he was eight or nine. Additionally, he was not allowed to be present at her death. Consequently, he was never able to grieve or come to terms with the death of his mother. As a consequence, he projected his unresolved feelings about his mother's illness and death onto his wife, which hindered his ability to be truly intimate with her. He would experience exaggerated fears of death every time his wife had even minor illnesses and was plagued by constant fears that his wife would leave him.

It is my opinion that it is both spiritually and psychologically beneficial for a child to face a parent's life-threatening illnesses, as opposed to being shielded from it. To be separated from a parent with a life-threatening illness can create unrealistic and sometimes frightening fantasies for the child. A child needs to be in an environment which can provide the needed long-term support and love to deal with the issues involved. The child needs the opportunity to be with the parent to enjoy the love and nurturing available during that parent's lifetime.

In situations involving life-threatening illnesses there is an opportunity for a child to develop a psychologically as well as a spiritually healthy attitude toward life, and issues of potential separation from a beloved parent. The chance for healthy development cannot be underestimated when a child is faced with perhaps painful experiences at a tender age.

In my opinion, there is nothing about the fact that a parent is suffering from a life-threatening illness that should disqualify him from being his child's custodial parent when that child has expressed a desire to live with that parent and, in every other respect, it would be in the child's best interest.

I do not believe it is healthy to shield children from pain and sadness, in the same way we do not want to shield them from joy. The notion of spiritual life is to see the joy in pain, and the life in death. These are principles in which I truly believe and which I incorporate in my professional and pastoral counseling.

I declare under penalty of perjury that the foregoing is true and correct and that this Declaration was signed by me in San Francisco, California.

Dated:_____ _____

THE REVEREND "JOE JONES," PH.D.

Appendix D: Trial Brief

Roberta Achtenberg
National Center for Lesbian Rights
870 Market Street, Suite 570
San Francisco, CA 94102
(415) 392-6257

Attorney for Respondent, ARTIE DOE

Superior Court of California

County of _____

In Re Marriage of)	Case No._____
)	
Julia Doe, Petitioner)	RESPONDENT'S TRIAL BRIEF
)	
Artie Doe, Respondent	)
_____)	

I. FACTUAL BACKGROUND

Petitioner and Respondent were married in January of 1978 and their son Shawn (now eight years old) was born in November of 1978 some ten months after their marriage. The parties shared caretaking responsibilities for the child until their separation in 1983 when respondent father took custody of the child for the year following their separation. Then Petitioner and Respondent tried being together "for the sake of the child" until that arrangement became impracticable. Petitioner mother then became primary caretaker, and at some time in 1984, against Respondent's objections, she moved in with Respondent's father and his second wife.

Respondent is a homosexual. He first became aware of his sexual feelings toward a person of the same sex shortly before his marriage to Petitioner. Respondent confided that information in Petitioner. Both Petitioner and Respondent thought that they could live happily together, nonetheless. They turned out to be wrong. Until the present proceeding, Petitioner expressed little hostility toward Respondent on account of his homosexuality, though she displayed great disappointment at the breakup of the marriage. All that seemed to change, however, when the child began stating his desire to go and live with his father.

The child knows of his father's sexual orientation and seems to be nonjudgmental about it. In fact, from November of 1986 until the present, the child has consistently expressed a very clear desire to live in his father's custody.

Respondent is an honest, well-spoken, self-educated man with a healthy, authoritative parenting style. He and his child have a deep and abiding commitment to one another and a relationship which Respondent knows needs to be nurtured, given the child's age, his expressed preference to

live with Respondent and the emotional needs of the child engendered by Respondent's present medical condition.

Respondent has AIDS. He first became symptomatic in April of 1985 but had no confirmed diagnosis until he was hospitalized in August 1986 with a bout of pneumocystis carinii pneumonia. Upon discharge, he began a good recovery and in November 1986, was started on the drug AZT, which he takes currently. He has responded extremely well to this therapy and, according to his doctor's estimates, is functioning at 95% of his former capacity.

As the testimony of the three court-appointed experts[28] will establish, and as the testimony of Respondent's AIDS expert will demonstrate, Respondent is physically quite capable of taking care of his child's needs at present. In the numerous and lengthy visits which the child has had with Respondent since November 1986, Respondent has well demonstrated his ability both physically and psychologically to attend to the child's care. Respondent lives in a well-kept home with Rodney Jones, his partner of four years, and next door to his mother and stepfather with whom they and his son Shawn have a close relationship. Respondent has made arrangements to have the child placed in a program of weekly counseling in which father would also participate to help the child better understand his father's medical condition and to prepare the child for his father's eventual death and the grief which will follow. It is hard to know how long Respondent can be expected to live. What is clear, however, is that for whatever time he has left, it would be in this child's best interests to live in his father's custody, to cherish this time with his father and to live through this tragedy with the kind of guidance and love which only his father can give him.

II. HISTORY OF THIS LITIGATION

On January 7, 1987, Petitioner filed a petition for dissolution of marriage and sought *ex parte* orders from this Court granting her custody pending a hearing. What Petitioner failed to tell the court was that the child was lawfully in the custody of his father at the time, and that the child, in fact, was enrolled in and attending school in Santa Rosa. What she also did not tell the court was that Respondent had taken the child to live with him based on the child's request that he do so. Petitioner knew at all times where the child was. What she told the Court, instead, was that she should be allowed to pick the child up, giving no notice, because she feared Respondent would flee the jurisdiction. That assertion seems to be thin at best, given the fact that she knew that Respondent suffered from a life-threatening disease and was on medical disability. She also told the court that Respondent is a homosexual, and predicated her entitlement to certain extremely limiting *ex parte* orders on that fact. Petitioner preyed on the Court's understandable lack of knowledge regarding both the facts about homosexual parenting and the law in California that prohibits [such a consideration from forming the basis of] a presumption that a homosexual parent is unqualified to be the custodial parent of his or her child.

Having obtained these *ex parte* orders, Petitioner served them upon Respondent with a police escort and without notice. Thus began one of many of Petitioner's acts of callous disregard for

[28] The three court-appointed experts are Dr. Lillian Barnes from the Office of Family Court Services, Dr. Sanford Fredman, a clinical psychologist appointed by the court to perform psychological tests on the father, mother and child, and Mr. Jeff Dena Christensen, MA., M.F.T., also appointed to visit homes of each parent, analyze the family structure and assess which home would be the more appropriate for the child. All of the Court's experts agree that custody should be vested in the father. (*See* Discussion, Section N, ***infra.***)

the child's emotional well-being, as, over the past seven months, the child has attempted in his child's way to express to almost anyone who will listen that he wants to live with his father for what will almost certainly be the very few years his father has left.

On January 28, 1987, Petitioner and Respondent appeared for the first OSC hearing. Prior to the hearing Petitioner, confronted with Respondent's counter-petition for custody, his counter declarations and his memorandum on points and authorities on the law and facts regarding homosexual parents, stipulated to a lifting of all the *ex parte* orders and entered into an agreement to provide Respondent with extended and lengthy visitation pending family evaluation and a report thereof by the Office of Family Court Services. The case was continued until March 24, 1987 and an interim visitation schedule was set giving the father the entire spring school break (March 27 through April 24), two weekends per month, unhindered telephone contact, and unlimited additional visitation whenever he was to be in the area,[29] provided he gave reasonable notice. Petitioner and Respondent were given joint legal custody as well.

Dr. Barnes met with all parties, spent an extensive amount of time with the child, and issued a report recommending custody of the child to the father, with liberal visitation to the mother. On March 24, 1987 both parties returned to court and this Court ordered that two additional experts be appointed to evaluate the parents, the child and their respective homes. All visitation orders were to remain in effect and the case was placed on the assignment calendar for Friday, June 5, 1987, with an anticipated trial date of Tuesday, June 9, 1987.

Unfortunately, while father went immediately to meet with the experts and to ensure that the investigation would take place in a timely fashion, mother did not. Instead she dragged her feet and, when asked in her April 23 deposition why she had not yet seen the evaluator Mr. Christensen, she responded that she thought that the evaluator was supposed to contact hers.[30] Due to her procrastination, Mr. Christensen was unable to complete his report until late June — two weeks beyond the scheduled trial date. Additionally, although both parties were informed on March 24 (at the second OSC hearing) that the experts would not submit their reports to the parties until all fees were paid, and although ordered by this Court to pay one-half the cost of the experts' evaluations, Petitioner failed to pay or to make arrangements to pay, thereby insuring that neither party would receive Mr. Christensen's report on the day it was completed, June 22, 1987. Respondent was not forewarned that Petitioner would be unable to pay, and thus her failure to pay was the cause of even more delay.[31] Subsequently, this Court, upon its own motion, appointed Mr. Larry Allen as attorney for the child. Mr. Allen requested of both parties' attorneys that interviews be set up with him, each of the parties and the child. Respondent immediately made an appointment to meet with Mr. Allen. Petitioner did not contact Mr. Allen until July 29. More importantly, she did not make the child available to Mr. Allen, so that it fell upon Respondent father to take time from a weekend visit with the boy to bring him to Mr. Allen's office so that the boy could consult with his own attorney.

It can only be assumed that despite the fact that she initiated this litigation, Petitioner has no interest in seeing it completed in a timely fashion. Despite the assertion of all the Court's experts

[29] Respondent lives next door to his own mother in Clearlake, California, some 700 miles from Apple Valley where Petitioner resides.

[30] Deposition of Julia Doe, page 30, lines 6 – 10.

[31] Ultimately, this Court ordered that Mr. Christensen be paid from County funds and his report was released on July 28, 1987.

that the child is in need of resolution of this conflict, as quickly as possible, Petitioner has engaged in what can only be described as dilatory tactics.

III. LEGAL STANDARD

In deciding between competing parental claims of custody, the Court must make an award "according to the best interests of the child." Cal. Civ. Code § 4600(b). This test, established by statute, governs all custody proceedings. In re B.G. (1974) 11 Cal. 3d 679, 695-696. The trial court has broad discretion to make a best-interests determination. *Adleson v. Adleson* (1958) 160 Cal. App. 2d 1.

This trial marks the first court determination of custody of Shawn Doe. Therefore, each party bears the burden of demonstrating that custody with him or her would be in the child's best interests. Neither has the added burden of establishing, for example, that changed circumstances render it essential that he or she receive custody. *Burchard v. Garay* (1986) 42 Cal. 3d 531, 539. In essence, therefore, despite the fact that Petitioner filed first, thereby making it incumbent upon Respondent to answer/respond, Respondent is on an equal footing with Petitioner regarding the burden in this proceeding. To the extent that the de facto custody arrangement prior to a court determination could have been either good or bad, and since the de facto custodial arrangement has not heretofore been evaluated and reviewed by a court, neither party (whether heretofore primary or secondary custodial parent) has the benefit of any presumption. Instead, each has an independent affirmative obligation to show that custody of the child, vested in him or her would be in the child's best interest. *Burchard*, *supra*, at 538.

A custody determination should be based upon many considerations, not the least important of which is an assessment of the emotional bonds between parent and child; upon an inquiry into "the heart of the parent-child relationship...the ethical, emotional, and intellectual guidance the parent gives to the child throughout his formative years, and often beyond." *In re Marriage of Carney* (1979) 24 Cal. 3d 725, 739. While the court will want to look at the fact that the child at some point has been living primarily with the mother (while moving freely back and forth to the father), the Court should assess how each parent has been able to address and can now address the particular needs of the child, given the life circumstances in which the child now finds himself. Given the father's profound bond with the child, the child's expressed preference to live with his father, the father's prospects for a shortened life and the father's ability (as compared with the mother's seeming inability) to help the child deal in the present with the father's illness and eventual death, custody of the child should be awarded to the father.

Father speaks well of mother, and never stands in the way of the child's contact with her. On the contrary, as the testimony will bear out, mother finds the bond between father and son threatening, is jealous of their relationship, and attempts to disrupt their effective communication. Despite offers of settlement by Respondent, Petitioner has made no efforts to settle this matter, either after receipt of Dr. Barnes' report recommending custody to the father or after being informed of the concurrence in Dr. Barnes' recommendation by Dr. Fredman and Mr. Christensen, the Court's two additional appointed experts.

Instead of facing the child's current needs, mother dismisses them, preferring instead to defend her action with specious allegations that AIDS is casually contagious,[32] and with some equally misguided assertion that Respondent's homosexuality will cause the child to become homosexual.[33] She cannot let herself see that it is really in the child's best interest to spend with father the time that father has left. As the experts point out, unfortunately for mother, she is defeating her own purpose. Pursuing that path, she will lose her son emotionally. Letting him go now will mean she may actually get him back.

A. The fact that father suffers from a life-threatening disease is a factor in making a "best interests" determination. The fact that the disease is AIDS is not an appropriate consideration.

One of the central issues in this custody dispute has become mother's contention that AIDS is casually transmissible, and that the child would be at risk if he were to live in his father's home.[34] As Respondent's experts[35] will testify, father's AIDS is no threat to the child's well-being and should not govern this Court's best-interests determination.

AIDS is not casually transmitted to members of a household in which an AIDS patient resides. There is not even one shred of medical evidence to that effect. Dr. Friedland concludes that those engaging in "non-sexual contacts with patients with AIDS or AIDS-related complex [ARC]...are at minimal or no risk for horizontal transmission of HTLV-III/LAV infection." Friedland, et al. "Lack of Transmission of HTLV-III/LAV Infection to Household Contacts of Patients with AIDS or AIDS-Related Complex with Oral Candidiasis," New England Journal of Medicine, 1986; 314:344, 347.

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[32] Respondent's First Set of Interrogatories:
Question #1:
"Do you contend that AIDS can be transmitted through casual contact, e.g., hugging, kissing, sharing a drinking glass, living in the same house?"
Answer #1:
"Yes. I feel that we don't know enough about AIDS, that there are many facts as yet unknown to the public which have [sic] yet to be able to determine that it cannot be transmitted through casual contact."
Question #2:
"Please state each and every fact on which you base that contention."
Answer #2:
"It is known that the virus is found in tears, saliva and blood and that even through casual contact, in some instances, has been known to be transmitted."

[33] Respondent's First Set of Interrogatories
Question #3:
"Do you contend that children of homosexual parents are more likely to become homosexual adults than are children of heterosexual adults?"
Answer #3:
"I believe that is it [sic] a strong probability."
Question #4:
"If your answer to the preceding question is 'yes,' please state each and every fact on which you base that contention.
Answer #4:
"Children generally tend to look to their parents as role models. Children generally tend to assume that conduct exhibited by their parents is acceptable."

[34] *See* note 4, *supra*.

[35] Respondent's AIDS experts include Mr. Alex Taylor, M.P.H., San Bernardino County's own AIDS health officer.

For his study on potential risk to household members Dr. Friedland chose 101 household members through a screening process. The participants were mostly biological children of adult AIDS patients. *Id.* at 345. The participants were screened to ensure that they were not members of the well-established high-risk groups: homosexual men, heterosexual partners of persons with AIDS, recipients of transfusions of blood and blood products, and intravenous drug abusers.

Ninety-four of the 101 participants lived with the AIDS patients for three months while the patient was symptomatic. Sixty-eight of the participants had initial or continuing contact with the patient after diagnosis for a median of nine months. *Id.* at 346. One hundred of 101 household members did not acquire the virus despite prolonged, close non-sexual contact. The only person to become infected was a five-year-old child, who researchers learned had acquired the virus perinatally from her mother, who had AIDS.

The participants in Dr. Friedland's study enjoyed precisely those activities associated with parenting and sharing a home. The household contacts studied included the everyday activities common to all families, such as: 83% kissed the patient, 79% hugged the patient, 48% shared drinking glasses, 90 – 92% shared bath, showers, and toilets, 51% shared combs, 65% shared dishes. *Id.* at 346. The medical evidence that AIDS is not transmitted through casual contact between AIDS patients and their children is overwhelming.

There is further confirmation in the medical literature that Shawn is not at risk of infection with the virus by virtue of living in his father's home. In Dr. Sande's survey of recent medical studies conducted on the transmission of AIDS, he concludes that "[t]he AIDS virus is spread sexually, by injection of contaminated blood and vertically from mother to fetus." Sande, "Transmission of AIDS: The Case Against Casual Contagion," New England Journal of Medicine, 1986; 314:380, 382. Dr. Sande further states, "[g]roups whose members are highly unlikely to acquire the virus (i.e., virtually no-risk groups) include...anyone who has casual contact with persons infected with the AIDS virus, including...family members." *Id.* at 382.

Although medical researchers have isolated HTLV-III/LAV (the etiological agent of AIDS) in tears and saliva, these amounts were so minuscule as to pose no threat of infection to those who come into contact with an AIDS patient. Dr. Ho, in his study, concluded "[H]TLV-III is present infrequently in saliva of infected persons. When it was detected in 'the saliva of one patient...the amount of the virus was small. These findings are consistent with epidemiologic data indicating that casual transmission of HTLV-III does not occur, even among household members exposed to saliva of infected persons." Ho, "Infrequency of Isolation of HTLV-III Virus from Saliva in AIDS," New England Journal of Medicine, 1985; 313:1606.

In 1985 the National Institutes of Health had isolated HTLV-III in the tears of one AIDS patient. As the authors noted, "[d]espite positive cultures from a variety of body fluids of infected persons, however, spread from infected persons to household contacts who have no other identifiable risks for infection has not been documented. Furthermore, there is no evidence to date that HTLV-III/LAV has been transmitted through contact with tears of infected individuals or through medical instruments..." (Update, "Recommendations for Preventing Possible Transmission of Human TLymphotropic Virus type III/Lymphadenopathy-Associated Virus from Tears," MMWR, 1985; 34:553, 534.) Also, the AIDS virus is fragile, dying quickly when exposed to air.

Those studies which have focused on the transmission of AIDS have uniformly concluded that the virus by its very nature is not casually transmitted. As Dr. Palmer will further testify, there is no dispute about such conclusions among reputable AIDS experts. There is no medical evidence to support Petitioner's contention that Shawn will contract AIDS by living with and being cared for by his father.

B. The fact that Respondent is a homosexual is also not an appropriate basis upon which this Court should predicate its custody decision.

As was pointed out in Respondent's earlier brief, homosexuality, per se, cannot be used as a basis to deny a father custody of his minor child. *Nadler v. Superior Court* (1967) 255 Cal. App. 523. Without a showing of nexus or causative connection between the father's sexual orientation and concrete harm to the child, Respondent's sexual orientation is not even relevant. In California, our courts have a long tradition of making custody decisions informed by fact, and not on the basis of society's prejudices (*see In re Carney* (1979) 24 Cal. 3d 725) or even on the basis of a judge's own personal disagreement with the way a parent conducts her or his own private life. As the Court of Appeals stated in *Stack v. Stack* (1961) 189 Cal. App. 2d 357, 371: "The Courts have frequently warned that a Judge should not base his decision upon his disapproval of the morals or other personal characteristics of a parent that do not harm a child." *See also In re Marriage of Wellman* (1980) 104 Cal. App. 3d 992, 999. As Respondent's expert, Dr. Wardell Pomeroy, will testify, the mythology surrounding homosexuality and the speculation regarding adverse impact on a child's psyche by virtue of a parent's homosexuality are totally unfounded and unsupported by fact. For example, Petitioner's contention that there is a strong possibility that children of homosexual parents are more likely to become homosexual adults than are children of heterosexual parents[36] is totally in error. While there may be disagreement among experts about what factors, in what combination, dictate whether someone will be homosexual or heterosexual, there is no serious dispute that children do not develop their sexual orientation by emulating their parents. It is important to note that the vast majority of homosexuals, like Artie Doe, were reared by heterosexual parents. All the scientific research dispels the myth that any correlation exists between a parent's sexual orientation and that of his child. Indeed, every study on the subject reveals that the incidence of homosexual orientation among children of homosexuals occurs as frequently and in the same proportion as in the general population.[37]

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[36] *See* note 5, *supra*.

[37] Kirkpatrick, M., Smith, K. and Roy, R., "Lesbian Mothers and Their Children: A Comparative Survey," Paper, American Orthopsychiatric Association (1980). Cohen, "Children of Homosexuals Seem Headed Straight," *Psychology Today* 1978; 12:44 – 45; Hoeffer, "Children's Acquisition of Sex-Role Behavior in Lesbian-Mother Families," 51 *Am. J. of Orthopsychiatry* 1981; 51(3):536, 542 (noting no significant difference in the acquisition of sex-role traits between the children of lesbian and heterosexual mothers and hypothesizing that children's peers have the greatest influence on their sex-role development); Weeks, "Two Cases of Children of Homosexuals," 6 *Child Psychiatry & Hum. Dev.* 1975; 6(1):26 – 32 (finding it impossible to distinguish specific aspects of the children's development that are directly related to their parents' sexuality); Green, R., "Sexual Identity of 37 Children Raised by Homosexual or Transsexual Parents," *Am. J. Psych*. 1978; 135:692 – 697. *See also* Green, R., "The Best Interests of a Child with a Lesbian Mother," *Bull. Am. Acad. of Psychiatry & L.*; 10(1):7,14 (finding "no significant [gender identity] differences for the boys or girls in either [the heterosexual or lesbian] set of families." *See also* California Commission on Personal Privacy 364 (it is as likely that the left-handed minority will "convert" members of the right-handed majority as it is that homosexuals can "convert" heterosexuals).

When asked via interrogatories whether or not mother contended that the child was being or would be adversely affected by his father's homosexuality, mother responded that "embarrassment, shame and ridicule by peers and society" were the forms which she predicted the adverse impact would take, and when asked to state what facts she relied on to justify her prediction, she responded: "the way children and adults react to others who are considered different or unusual by the standards of society in general.[38]

It is critical for this Court to note that there are many who considered different or unusual by the standards of society in general. However, difference or even the fact that someone may tease or harass a child over it, is not a basis under California law to predicate a custody decision. In *In re Carney* (1979) 24 Cal. 3d 725, 736, mother tried to wrest custody from father on the ground that father had become a quadriplegic and therefore it should be assumed that he could not care for his minor children adequately, and he could not play the kinds of games men are supposed to play with their sons. Further, she contended that due to the fact that his father's body was disfigured and he had to ride around in a wheelchair, the children would surely be teased and harassed because of their father's condition. The California Supreme Court rejected those arguments, based so obviously on negative stereotypes, failure to engage in an individualized determination of the depth of the bond between father and sons, and on the common prejudice which surely exists in society against those who are physically handicapped. Instead, the Court rebuked the trial court for its willingness to adopt society's prejudices against the disabled in lieu of making an individualized determination on the basis of this disabled person's particular abilities. Without a proven causal connection between a parent's condition, activities, or status and present harm to the child, no such decision should have been made. *Id.*

The role of the court is not to act as conduit for the prejudices of society. Surely, there is prejudice against homosexuals in this society.[39] However, that prejudice does not even lead to psychological maladjustment in homosexuals themselves.[40] There is no scientific or factual basis upon which to assume that harassment of the child of a homosexual takes place with any great frequency.[41] Further, and more important, there is no support for the proposition that

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[38] *See* Petitioner's Answers to Interrogatories, #7A and #7B.

[39] It has been suggested by mental health professionals and social scientists that anti-gay prejudice emanates from the same kinds of sources as does racial prejudice. *See, e.g.*, Larsen, *et al.*, "Anti-black Attitudes, Religious Orthodoxy, Permissiveness, and Sexual Information: A Study of the Attitudes of Heterosexuals Toward Homosexuality," *J. Sex Res.* 1983; 19(2):105 – 118.

In their dissent from the denial of certiorari in *Rowland v. Mad River School District*, 470 U.S. 1009, 105 S.Ct. 1373 (1985) Justice Brennan and Marshall argue persuasively that homosexuals are a suspect class for the purposes of equal protection analysis. They state that "...[hlomosexuals have historically been the object of pernicious and sustained hostility, and it's fair to say that discrimination against homosexuals is likely...to reflect deep-seated prejudice rather than rationality." *Id.* at 1377, quoting *Doe v. Plyler* 457 U.S. 202, 216, n. 4 (1982).

[40] An impressive body of authority has developed showing that people who are predominantly homosexual in their behavior and feelings are no more prone to suffer from psychopathology than those who are predominantly or exclusively heterosexual. *See, e.g.*, Clark, "Homosexuality and Psychopathology in Nonpatient Males", 35 *Am. J. Psychoanalysis* 1975; 35:163,167 (a properly controlled study yielded "convincing evidence that homosexuality is not a criterion predictor of psychopathology"); Oberstone and Sukonek, "Psychological Adjustment and Life Style of Single and Heterosexual Women", 1 *Psychology of Women Quarterly* (1976) (no major difference found in psychological adjustment of lesbians or heterosexual women); Montagu, "A Kinsey Report on Homosexualities", *Psychology Today* 1978; 12:62,66 ("[hiomosexuals appear, on the whole, to be as psychologically well-adjusted as heterosexuals") . *See generally* G. Weinberg, "Society and the Healthy Homosexual" (1972).

[41] At least with respect to the research that has been done in the area, it appears that only about 5% of the children who have lived with an openly gay parent have been harassed on any consistent basis by other children. Susoeff, Steve, "Assessing

harassment or "stigmatization" has been instrumental in producing emotional problems in the children of homosexuals.[42]

With respect to stigmatization, the California Supreme Court does not stand alone against popular prejudice and the likelihood of harassment of those who are different. It must be pointed out that the United States Supreme Court has stated that efforts to shield children from popular prejudice cannot take the form of infringing on a parent's right to Equal Protection of law. In *Palmore v. Sidoti* (1985) 466 U.S. 429; 104 S.Ct. 1879, 1882, the Court acknowledged that an award of custody of a white child to her white mother and black stepfather might mean that the child would suffer the stigma and ridicule of racial prejudice from her peers. Still "[p]rivate biases may be outside the reach of law, but the law cannot directly, or indirectly, give them effect."

When asked whether the child has already been adversely affected by the father's homosexuality, mother states "not to my knowledge."[43] Thus, it is clear that mother is engaging in pure speculation of future harm, an impermissible basis upon which this Court would be entitled to predicate a custody determination. *See In re Marriage of Urband* (1977) 68 Cal. App. 3d 796. As will be stated in one form or another by the court's experts, neither Dr. Barnes, Dr. Fredman nor Mr. Christensen is of the opinion that fear of possible future stigmatization should be a significant factor in the case. Each will testify that it is the nature and quality of the parent-child relationship and the parents' respective abilities to help the child through this time of living, and anticipated loss, that should be the factor and that, on that basis, custody of the child should be with his father.

Finally, there is at least one additional myth which pervades the new lore about gay parents and about which Dr. Pomeroy will testify: that children placed in their custody are at risk of molestation or abuse, either by that parent or that parent's friends.[44] Research on the sexual abuse of children, however, shows that offenders are, in disproportionate numbers, heterosexual men.[45]

An important distinction must be made between fixated pedophiles (adults who are sexually attracted primarily or exclusively to children) and adults who sexually abuse children but whose

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Children's Best Interests When a Parent is Gay or Lesbian: Toward a Rational Custody Standard," 32 *UCLA L. Rev.* 852, 877, citing Miller; "Gay Fathers and Their Children," 26 *Fam. Coord.* 1979; 28(4):544,548; Green, "Children Raised by Homosexual or Transsexual Parents," 135 *Am. J. Pshch.* 1978; 135(6):692,695.

[42] Benedek, P., M.D. & Schetky, D., M.D., eds., Emerging Issues in Child Psychiatry and the Law, Chapter on "Lesbian Mothers/Gay Fathers" by Kirkpatrick, M., M.D. and Hitchens, D.1., J.D. (1985).

[43] *See* Petitioner's Answers to Interrogatories, #20.

[44] *See* Voeller, "Gay Fathers," *Fam. Coord.* 1978; 27: 149,154 (discussing the popular though mistaken concerns about child molestation by gay men).

[45] *See Baker v. Wade*, 553 F. Supp. 1121, 1130 (1982) reversed on other grounds, 769 F.2d 289 (1985) ("[t]he vast majority of sex crimes committed by adults on children are heterosexual, not homosexual"). The *Baker* decision cites Sam Houston State University, Criminal Justice Center, Responding to Child Sexual Abuse: A Report to the 67th Session of the Texas Legislature (1980); *see also* American Humane Association, Children's Division, Protecting the Child Victim of Sex Crimes Committed by Adults 216-17 (V. De Francis, ed., 1969 (97% of sex offenders against children are male and 90% of victims are female); National Organization for Women, Sexual Child Abuse: A Contemporary Family Problem (1979) ("[c]riminal behavior or severe emotional maladjustment, and child molestation, are *not* more likely to be found [among gay men] than in comparable groups of heterosexual individuals").

predominant sexual orientation is toward adults.[46] Pedophiles generally do not have sexual relationships with adults and therefore are not identifiable as either homosexual or heterosexual. On the other hand, as to a small group of pedophiles who originally preferred sexual relationships with members of their own age group, they led predominantly heterosexual lives.[47] In fact, adult males who choose young boys to molest typically report that they are not interested in and are even repulsed by adult homosexual activity.[48]

IV. THE COURT'S EXPERTS AGREE THAT IT WOULD BE IN THE CHILD'S BEST INTERESTS TO LIVE IN HIS FATHER'S PRIMARY PHYSICAL CUSTODY

The Court has the benefit in this case of information gathered by three experts whom the Court appointed to conduct investigations of the parties and Shawn. These three people, Lillian Barnes, Ph.D., Sanford Fredman, Ph.D., and Jeff Dena Christensen, MA., M.F.T., have completed their inquiries. They will testify, and their lengthy reports will be placed in evidence.

A. Dr. Barnes' Testimony

As the chief mediator for the Court's Office of Family Court Services, Dr. Barnes did extensive interviews with the Doe family and issued two voluminous reports. She was in an excellent position to observe interactions among Petitioner, Respondent and child and to evaluate Petitioner's and Respondent's reactions to each other's assertions during the mediation. Dr. Barnes' report is replete with information suggesting that Petitioner's motives have less to do with Shawn's best interests than with her own irrationality and stubbornness. Dr. Barnes found it noteworthy that:

> [m]other's response is remarkable for its paucity of denial [e.g., she did not deny the assertions made by Respondent]. Mother, for the most part, listened quietly. Her chief concerns rested on the unknown effects of AIDS upon family members, particularly Shawn. Arrangements were made for mother to speak with father's physician, Dr. Kubota, via telephone the next day.

Report of Dr. Barnes, March 23, 1987 (hereafter "Barnes Report"), p. 5, lines 23 – 27).

Mother's oft-repeated fears about AIDS have a disturbingly disingenuous quality. She is allegedly afraid for her son's health but did not seek to have this court deny visitation between Shawn and his father on the ground that such visitation would endanger the child's health. Ms.

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[46] *See* Croth, A. Nicholas, "Patterns of Sexual Assault Against Children and Adolescents," in Sexual Assault of Children and Adolescents at 6 (A.W. Burgess, ed., 1978). The fixated pedophile is a person who has been primarily or exclusively attracted to significantly younger people since adolescence. When such an offender does engage in sexual activity with a member of his own age group, "it is clearly a departure from his usual pattern of sexual encounters and [is] precipitated by external events or circumstances." *Id.* The regressed pedophile is a person who was sexually attracted to members of his age group originally and later replaced adults with children. During this period of regressive behavior, this offender's sexual encounters with adults usually continue to coexist with his sexual encounters with youngsters. *Id.* at 9.

[47] *See* Groth, A. Nicholas, Men Who Rape: The Psychology of the Offender, at 14, Plenum Press, New York 1979.

[48] *Id.* at 149.

Doe cannot have it both ways. She cannot allege that AIDS is casually transmitted to permanent household residents but poses no threat to temporary residents.[49]

The specious quality of Petitioner's alleged concerns about AIDS transmissibility is also revealed by the fact that, despite Dr. Barnes' facilitation of communication between Petitioner and Respondent's doctor, Petitioner had not contacted the physician as of April 23, the date Petitioner was deposed and an entire month after the mediation. *See* Deposition of Julia Doe, April 23, 1987, p. 84, line 18 – p. 86, line 9. Further, according to Dr. Kubota, she has not contacted him to date.

Dr. Barnes' report also indicates that Petitioner's irrational fears are the only basis for the present litigation:

> Father says mother agreed to allow Shawn to live with him because Shawn had expressed a strong preference to live with father. *Mother was sympathetic to this request. Then, she stated, she changed her mind.* She didn't want Shawn to live with father based on her concerns over possible risks to Shawn's health in father's household.

Barnes Report, p. 3, lines 20 – 24 (emphasis added).

Shawn was forcibly removed from Respondent's custody by uniformed law enforcement officers because Petitioner "changed her mind." Yet she has not presented the merest shred of credible evidence that her change of mind was supported by scientifically recognized fact. Indeed, she can never present such evidence because it simply does not exist. Nevertheless, Petitioner has shown herself capable of clinging tenaciously to her fear-mongering tactics in this case.

> At the close of mediation, mother *clearly stated* her desire to have Shawn continue living with her *regardless of any information* given her by father's physician concerning AIDS *or Shawn's custody preference*.

Barnes Report, p. 7, lines 15 – 18 (emphasis added). Obstinacy clearly prevails over reason in Petitioner's attitudes about the issues in this case.

B. Dr. Fredman's Testimony

Dr. Fredman has basically concurred in Dr. Barnes' opinions concerning advisability of Shawn living with Respondent. Dr. Fredman has stated that "significant weight" should be given to the child's preference to live with his father, given that both parents are at least minimally qualified. He further stated that Mr. Doe "is capable of providing the parenting skills necessary to provide a good home and home environment for raising Shawn."

Dr. Fredman has also pointed out that the AIDS and homosexuality issues should not impinge on the "best interests" consideration in this case.

[49] Her casual transmission theories are absolutely without merit, as shown elsewhere herein.

> The issue of Mr. Doe being gay and having AIDS, while they [sic] are bound to be of concern to the Court, ought not enter these considerations. There is research indicating gay parents are quite capable of providing adequate parenting and emotional security for raising the heterosexual child. The studies to date indicate that AIDS cannot be passed on by any casual contact such as that occurring in the home, given the casual nature of the contact that might occur between Shawn and his father.

Report of San Fredman, Ph.D., regarding evaluation of Artie Doe, May 18, 1987, p. 3.

C. Mr. Christensen's Testimony

Mr. Jeff Dena Christensen, M.A., M.F.T., was also appointed by this Court to do a family assessment of the Doe family and to make recommendations to this Court regarding custody of Shawn. Mr. Christensen is a family therapist with 10 years' experience as a social worker doing home studies and family evaluation in Riverside and San Bernardino counties. He spent five hours each with Respondent and Petitioner and a total of 1 1/2 hours with the child. He also interviewed everyone living in the households of the parties, respectively. Additionally, he interviewed maternal and paternal grandparents and as many of the child's aunts and uncles on both sides as he could contact.

He will testify that based on the information gathered, and his observation, he recommends custody of Shawn to the father:

> Recommendations:
>
> It is respectfully recommended that the Court make the following orders:
>
> 1. That Shawn Doe be placed in the care and custody of his father, Artie Doe, and that this custody arrangement remain in effect until such time that Mr. Doe's physical condition prohibits, or significantly limits him from providing adequate care to his minor son.
>
> 2. When Mr. Doe's condition precludes his being able to remain with the paternal grandmother, Mrs. Kathy Smith, so as to allow continued contact with the father during the final stages of the father's illness.
>
> 3. To assist Shawn Doe during this difficult process, that the father and son enjoin therapy services on a regular basis.
>
> 4. That Shawn return to the care and custody of his mother, Mrs. Julia Doe, after the father's death and subsequent funeral services.
>
> 5. That the therapist for the father and son, and physician for Mr. Doe monitor Mr. Doe's health and ongoing parenting abilities and at such a time they deem Mr. Doe's health has limited his parenting abilities, so as to render them inadequate, that they recommend to have Shawn then reside with the paternal grandmother, Mrs. Kathy Smith.
>
> 6. That Mr. Doe's physician, Dr. Kubota, should be enlisted to provide specific recommendations to the father, Rodney, the paternal grandmother, and Shawn regarding

specific guidelines and cautions on preventing the passage of body fluids in its various forms.

Christensen Report, p. 29.

Mr. Christensen goes on to state why he finds father's physical condition to be of little impediment to effective parenting:

> There is no current information which the undersigned is aware of that evidences that AIDS may be contracted casually; however, there is evidence to the contrary. Mr. Doe is an appropriate and nurturing parent, who by current information has a rather limited life span left to him. It is the opinion of the undersigned that Shawn Doe's needs, both short and long term, would best be met if he were in the care and custody of the father, Artie Doe.

Christensen Report, p. 28.

In addition to the affirmative reasons why Shawn should live with Respondent, there are also negative qualities existing in Petitioner's home that indicate that Shawn's best interests would not be served by maintaining the status quo, regardless of the occurrence of this litigation. Shawn's extended family constellation has been described above. Apparently, Respondent's father's antagonism did not escape Dr. Fredman's scrutiny. Dr. Fredman has recommended that

> [s]hould the court decide to have Sean [sic] remain in his Mother's custody, I feel this should be contingent upon her moving from her in-laws [sic] home. Given the intense interfamilial hostility that exists, I feel it would be in Sean's [sic] best interests for Sean [sic] and his mother to reside elsewhere.

Report of Sanford Fredman, Ph.D., regarding evaluation of Shawn Doe, p. 5.

Dr. Barnes also addressed the problems posed by Petitioner's residing with Respondent's father.

> Because of the animosity that father [Respondent] perceives between himself and the paternal grandfather, as reported in mediation, the present home situation may very well be or have the potential for becoming untenable for Shawn, particularly in view of mother's intention to accelerate her education program, thereby placing Shawn in the care of his grandparents for longer periods.

Barnes Report, p. 8, lines 20 – 25.

Respondent is uniquely qualified to provide primary nurturing of Shawn's emotional development. The bereavement that awaits Shawn requires as much advance preparation as possible in order to ensure that the child's actual mourning will proceed as healthily as possible. Dr. Barnes was aware of Shawn's special needs, and has warned that depriving Shawn of regular contact with his father may cause emotional harm to the child.

> [T]here is a high risk should father become terminally ill that the child may suffer extreme mental anguish, guilt and attendant abnormal grief reaction by not being part of father's life until the very end.

Barnes Report, p. 8, lines 1 – 4.

Dr. Barnes, Dr. Fredman and Mr. Christensen also saw fit to recommend ongoing psychological counseling for Shawn. Dr. Barnes states:

> It is essential that Shawn remain in psychotherapy regardless of placement in order to understand better the complex human relationships he has been born into and may be forced to relinquish through death or possible court intervention.

Barnes Report, p. 8, line 9 – 12. Despite this recommendation, the evidence will show that Petitioner has not made psychotherapy available to Shawn.

It is clear that Shawn's best interests can be served only by award of custody to Respondent. To maintain the status quo would 1) elevate Petitioner's deliberate, cultivated ignorance over demonstrable fact; 2) continue to subject Shawn to the inappropriate behavior of his grandfather; 3) deny the child's "stated custody preference"; and 4) ignore the thoughtful, objective recommendations of the experts appointed by the court.

CONCLUSION

As Mr. Christensen expressed it, placement of Shawn with his; father "would allow Shawn the (only) opportunity to be involved with and part of his father's life in a meaningful manner." Christensen Report, p. 28. He goes on to point out that if Shawn were to be deprived of this opportunity, "[t]here is sufficient probability of his having difficulty with emotional resolution in his future years." *Id.*

He notes the ultimate irony involved in this case. He recognizes that whether mother knows it or not, allowing her son this time with the father will enhance the possibility of her having a good relationship with her son in the future. Christensen states finally: "Having Shawn in the care and custody of his father would limit the mother's immediate short-term contact, however, the mother would have the rest of her life and Shawn's life to experience together." *Id.* One would think that should be enough.

Dated: _____, 19___,

Respectfully submitted
Roberta Achtenberg
Attorney for Respondent

Appendix E: Sample Client Questionnaire

I. ANY DOMESTIC VIOLENCE ORDERS? YES/___/ NO/___/

A. IF YES,

1. IN WHAT COUNTY:_____

2. KIND OF MATTER:_____

II. ANY PREVIOUS CUSTODY ORDERS? YES/___/ NO/___/

A. IF YES,

1. IN WHAT COUNTY:_____

2. KIND OF MATTER:_____

III. ANY PREVIOUS VISITATION ORDERS? YES/___/ NO/___/

A. IF YES,

1. IN WHAT COUNTY:_____

2. KIND OF MATTER:_____

IV. ANY JUVENILE AUTHORITY INTERACTION? YES/___/ NO/___/

A. IF YES,

1. IN WHAT COUNTY:_____

2. KIND OF MATTER:_____

_____
_____
_____
_____
_____
_____
_____
_____
_____

* Forms reprinted with the permission of the Volunteer Legal Services Program of the Bar Association of San Francisco.

1. PROPOSED GUARDIAN :_____

a. ADDRESS : _____

b. PHONES : W: _____ H: _____

i. MESSAGE : _____

c. EMPLOYER

i. NAME : _____

ii. ADDRESS : _____

d. SOCIAL SEC. # : _____

e. DOB : _____

f. RELATIONSHIP TO CHILD: _____

g. ROOMS AT HOME : _____

h. ANY PRIOR ARREST RECORD YES/___/ NO/___/

i. IF YES,

i. IN WHAT COUNTY: _____

ii. KIND OF MATTER: _____

2. SPOUSE OF CLIENT: _____

a. ADDRESS: _____

b. PHONES: W: _____ H: _____

i. MESSAGE: _____

c. EMPLOYER

i. NAME: _____

ii. ADDRESS: _____

d. SOCIAL SEC. #: _____

e. DOB: _____

f. RELATIONSHIP TO CHILD: _____

g. ANY PRIOR ARREST RECORD YES/___/ NO/___/

h. IF YES,

i. IN WHAT COUNTY:_____

ii. KIND OF MATTER: _____

3. OTHER ADULTS LIVING IN THE HOME? YES/___/ NO/___/

a. IF YES,

i. NAME: _____

(1) RELATIONSHIP TO CHILD: _____

(2) RELATIONSHIP TO GUARDIAN: _____

(3) EMPLOYED? YES/___/ NO/___/

(4) ANY PRIOR ARREST RECORD? YES/___/ NO/___/

(a) IF YES,

(i) IN WHAT COUNTY:_____

(ii) KIND OF MATTER: _____

ii. NAME: _____

(1) RELATIONSHIP TO CHILD: _____

(2) RELATIONSHIP TO GUARDIAN: _____

(3) EMPLOYED? YES/___/ NO/___/

(4) ANY PRIOR ARREST RECORD? YES/___/ NO/___/

(a) IF YES,

(i) IN WHAT COUNTY:_____

(ii) KIND OF MATTER: _____

4. DOCTOR'S NAME OF PARENT WITH HIV: _____

DOCTOR'S ADDRESS: _____

_____

5. OTHER MINORS LIVING IN THE HOME? YES/___/ NO/___/

a. IF YES,

i. NAME: _____

(1) RELATIONSHIP TO CHILD: _____

(2) RELATIONSHIP TO GUARDIAN: _____

(3) EMPLOYED? YES/___/ NO/___/

(4) ANY PRIOR ARREST RECORD? YES/___/ NO/___/

(a) IF YES,

(i) IN WHAT COUNTY:_____

(ii) KIND OF MATTER: _____

ii. NAME: _____

(1) RELATIONSHIP TO CHILD: _____

(2) RELATIONSHIP TO GUARDIAN: _____

(3) EMPLOYED? YES/___/ NO/___/

(4) ANY PRIOR ARREST RECORD? YES/___/ NO/___/

(a) IF YES,

(i) IN WHAT COUNTY:_____

(ii) KIND OF MATTER: _____

6. CHILD

a. NAME: _____

b. DATE OF BIRTH: _____

c. RESIDENCE(S)

i. ADDRESS(ES): _____

ii: DATES :_____

d. MOTHER

i. NAME: _____

ii. ADDRESS: _____

iii. PHONES: _____

iv. DOB: _____

v. SS#: _____

vi. CONSENT?: _____

vii. VISIT?: YES/___/ NO/___/

e. IF YES,

i. WHEN: _____

ii. WHERE: _____

f. DRUGS? YES/___/ NO/___/

g. MATERNAL GRANDPARENTS:

i. MOTHER'S MOTHER

(1) NAME: _____

(2) ADDRESS: _____

(3) PHONES: _____

(4) CONSENT? : _____

ii. MOTHER'S FATHER

(1) NAME: _____

(2) ADDRESS: _____

(3) PHONES: _____

(4) CONSENT? : _____

h. FATHER

i. NAME: _____

ii. ADDRESS: _____

iii. PHONES: _____

iv. DOB: _____

v. SS#: _____

vi. CONSENT?: _____

vii. VISIT?: YES/___/ NO/___/

i. IF YES,

i. WHEN: _____

ii. WHERE: _____

j. DRUGS? YES/___/ NO/___/

k. PATERNAL GRANDPARENTS:

i. FATHER'S MOTHER

(1) NAME: _____

(2) ADDRESS: _____

(3) PHONES: _____

(4) CONSENT? : _____

ii. FATHER'S FATHER

(1) NAME: _____

(2) ADDRESS: _____

(3) PHONES: _____

(4) CONSENT? : _____

Appendix F: Education Codes § 48204, § 6550, & § 6552

§ 48204. Residency requirements for school attendance

< Text of section operative until July 1, 1998 >

Notwithstanding Section 48200, a pupil shall be deemed to have complied with the residency requirements for school attendance in a school district, provided he or she is any of the following:

(a) A pupil placed within the boundaries of that school district in a regularly established licensed children's institution, or a licensed foster home, or a family home pursuant to a commitment or placement under Chapter 2 (commencing with Section 200) of Part 1 of Division 2 of the Welfare and Institutions Code. An agency placing a pupil in a home or institution described in this subdivision shall provide evidence to the school that the placement or commitment is pursuant to law.

(b) A pupil for whom interdistrict attendance has been approved pursuant to Chapter 5 (commencing with Section 46600) of Part 26.

(c) A pupil whose residence is located within the boundaries of that school district and whose parent or legal guardian is relieved of responsibility, control, and authority through emancipation.

(d) A pupil who lives in the home of a caregiving adult that is located within the boundaries of that school district. Execution of an affidavit under penalty of perjury pursuant to Part 1.5 (commencing with Section 6550) of Division 11 of the Family Code by the caregiving adult shall be a sufficient basis for a determination that the pupil lives in the caregiver's home, unless the school district determines from actual facts that the pupil is not living in the caregiver's home.

(e) A pupil residing in a state hospital located within the boundaries of that school district.

(f) An elementary school pupil, one or both of whose parents, or whose legal guardian, is employed within the boundaries of that school district.

(1) Nothing in this subdivision requires the school district within which the pupil's parents or guardians are employed to admit the pupil to its schools. Districts may not, however, refuse to admit pupils under this subdivision on the basis, except as expressly provided in this subdivision, of race, ethnicity, sex, parental income, scholastic achievement, or any other arbitrary consideration.

(2) The school district in which the residency of either the pupil's parents or guardians is established, or the school district to which the pupil is to be transferred under this subdivision, may prohibit the transfer of the pupil under this subdivision if the governing board of the district determines that the transfer would negatively impact the district's court-ordered or voluntary desegregation plan.

(3) The school district to which the pupil is to be transferred under this subdivision may prohibit the transfer of the pupil if the district determines that the additional cost of

educating the pupil would exceed the amount of additional state aid received as a result of the transfer.

(4) Any district governing board prohibiting a transfer pursuant to paragraph (1), (2), or (3) shall identify, and communicate in writing to the pupil's parent or guardian, the specific reasons for that determination and shall ensure that the determination, and the specific reasons therefor, are accurately recorded in the minutes of the board meeting in which the determination was made.

(5) The average daily attendance for pupils admitted pursuant to this subdivision shall be calculated pursuant to Section 46607.

(6) Unless approved by the sending district, this subdivision does not authorize a net transfer of pupils out of any given district, calculated as the difference between the number of pupils exiting the district and the number of pupils entering the district, in any fiscal year in excess of the following amounts:

(A) For any district with an average daily attendance for that fiscal year of less than 501, five percent of the average daily attendance of the district.

(B) For any district with an average daily attendance for that fiscal year of 501 or more, but less than 2,501, three percent of the average daily attendance of the district or 25 pupils, whichever is greater.

(C) For any district with an average daily attendance of 2,501 or more, one percent of the average daily attendance of the district or 75 pupils, whichever is greater.

(7) Once a pupil is deemed to have complied with the residency requirements for school attendance pursuant to this subdivision and is enrolled in a school in a school district whose boundaries include the location where one parent or both parents of a pupil is employed, or where the pupil's legal guardian is employed, the pupil shall not have to reapply in the next school year to attend a school within that school district and the district governing board shall allow the pupil to attend school through the 12th grade in that district if the parent or guardian so chooses, subject to paragraphs (1) to (6), inclusive.

(g) This section shall remain in effect only until July 1, 1998, and as of that date is repealed, unless a later enacted statute, which is enacted before July 1, 1998, deletes or extends that date.

§ 6550. Authorization affidavits; scope of authority; reliance on affidavit

(a) A caregiver's authorization affidavit that meets the requirements of this part authorizes a caregiver 18 years of age or older who completes items 1-4 of the affidavit provided in Section 6552 and signs the affidavit to enroll a minor in school and consent to school-related medical care on behalf of the minor. A caregiver who is a relative and who completes items 1-8 of the affidavit provided in Section 6552 and signs the affidavit shall have the same rights to authorize medical care and dental care for the minor that are given to guardians under Section 2353 of the Probate Code.

(b) The affidavit shall not be valid for more than one year after the date on which it is executed.

(c) The decision of a caregiver to consent to or to refuse medical or dental care for a minor shall be superseded by any contravening decision of the parent or other person having legal custody of the minor, provided the decision of the parent or other person having legal custody of the minor does not jeopardize the life, health, or safety of the minor.

(d) No person who acts in good faith reliance on a caregiver's authorization affidavit to provide medical or dental care, without actual knowledge of facts contrary to those stated on the affidavit, is subject to criminal liability or to civil liability to any person, or is subject to professional disciplinary action, for such reliance if the applicable portions of the affidavit are completed.

This subdivision shall apply even if medical or dental care is provided to a minor in contravention of the wishes of the parent or other person having legal custody of the minor as long as the person providing the medical or dental care has no actual knowledge of the wishes of the parent or other person having legal custody of the minor.

(e) A person who relies on the affidavit has no obligation to make further inquiry or investigation.

(f) Nothing in this section shall relieve any individual from liability for violations of other provisions of law.

(g) If the minor stops living with the caregiver, the caregiver shall notify any school, health care provider, or health care service plan that has been given the affidavit.

(h) A caregiver's authorization affidavit shall be invalid unless it substantially contains, in not less than 10-point boldface type or a reasonable equivalent thereof, the warning statement beginning with the word "warning" specified in Section 6552. The warning statement shall be enclosed in a box with 3-point rule lines.

(i) For purposes of this part:

(1) "Person" includes an individual, corporation, partnership, association, the state, or any city, county, city and county, or other public entity or governmental subdivision or agency, or any other legal entity.

(2) "Relative" means a spouse, parent, stepparent, brother, sister, stepbrother, stepsister, halfbrother, half-sister, uncle, aunt, niece, nephew, first cousin, or any person denoted by the prefix "grand" or "great," or the spouse of any of the persons specified in this definition, even after the marriage has been terminated by death or dissolution.

(3) "School-related medical care" means medical care that is required by state or local governmental authority as a condition for school enrollment, including immunizations, physical examinations, and medical examinations conducted in schools for pupils.

§ 6552. Form of authorization affidavit

The caregiver's authorization affidavit shall be in substantially the following form:

Caregiver's Authorization Affidavit

Use of this affidavit is authorized by Part 1.5 (commencing with Section 6550) of Division 11 of the California Family Code.

Instructions: Completion of items 1-4 and the signing of the affidavit is sufficient to authorize enrollment of a minor in school and authorize school-related medical care. Completion of items 5-8 is additionally required to authorize any other medical care. Print clearly.

The minor named below lives in my home and I am 18 years of age or older.

1. Name of minor: _____
2. Minor's birth date: _____
3. My name (adult giving authorization): _____
4. My home address: _____

_____

5. [ ] I am a grandparent, aunt, uncle, or other qualified relative of the minor.
6. Check one or both (for example, if one parent was advised and the other cannot be located):

   [ ] I have advised the parent(s) or other person(s) having legal custody of the minor of my intent to authorize medical care, and have received no objection.

   [ ] I am unable to contact the parent(s) or other person(s) having legal custody of the minor at this time, to notify them of my intended authorization.

7. My date of birth: _____
8. My California's driver's license or identification card number: _____

Warning: Do not sign this form if any of the statements above are incorrect, or you will be committing a crime punishable by a fine, imprisonment, or both.

I declare under penalty of perjury under the laws of the State of California that the foregoing is true and correct.

Dated: _____ Signed_____

Notices:

1. This declaration does not affect the rights of the minor's parents or legal guardian regarding the care, custody, and control of the minor, and does not mean that the caregiver has legal custody of the minor.

2. A person who relies on this affidavit has no obligation to make any further inquiry or investigation.

3. This affidavit is not valid for more than one year after the date on which it is executed.

Additional Information:

TO CAREGIVERS:

1. "Qualified relative," for purposes of item 5, means a spouse, parent, stepparent, brother, sister, stepbrother, stepsister, half-brother, half-sister, uncle, aunt, niece, nephew, first cousin, or any person denoted by the prefix "grand" or "great," or the spouse of any of the persons specified in this definition, even after the marriage has been terminated by death or dissolution.

2. The law may require you, if you are not a relative or a currently licensed foster parent, to obtain a foster home license in order to care for a minor.

If you have any questions please contact your local department of social services.

3. If the minor stops living with you, you are required to notify any school, health care provider, or health care service plan to which you have given this affidavit.

4. If you do not have the information requested in item 8 (California driver's license or I.D.), provide another form of identification such as your social security number or Medi-Cal number.

TO SCHOOL OFFICIALS:

1. Section 48204 of the Education Code provides that this affidavit constitutes a sufficient basis for a determination of residency of the minor, without the requirement of a guardianship or other custody order, unless the school district determines from actual facts that the minor is not living with the caregiver.

2. The school district may require additional reasonable evidence that the caregiver lives at the address provided in item 4.

TO HEALTH CARE PROVIDERS AND HEALTH CARE SERVICE PLANS:

1. No person who acts in good faith reliance upon a caregiver's authorization affidavit to provide medical or dental care, without actual knowledge of facts contrary to those stated on the affidavit, is subject to criminal liability or to civil liability to any person, or is subject to professional disciplinary action, for such reliance if the applicable portions of the form are completed.

2. This affidavit does not confer dependency for health care coverage purposes.

Appendix G: Probate Code § 2105 and § 2105.5

§ 2105. Joint guardians or conservators; appointment

(a) The court, in its discretion, may appoint for a ward or conservatee:

(1) Two or more joint guardians or conservators of the person.

(2) Two or more joint guardians or conservators of the estate.

(3) Two or more joint guardians or conservators of the person and estate.

(b) When joint guardians or conservators are appointed, each shall qualify in the same manner as a sole guardian or conservator.

(c) Subject to subdivisions (d) and (e):

(1) Where there are two guardians or conservators, both must concur to exercise a power.

(2) Where there are more than two guardians or conservators, a majority must concur to exercise a power.

(d) If one of the joint guardians or conservators dies or is removed or resigns, the powers and duties continue in the remaining joint guardians or conservators until further appointment is made by the court.

(e) Where joint guardians or conservators have been appointed and one or more are (1) absent from the state and unable to act, (2) otherwise unable to act, or (3) legally disqualified from serving, the court may, by order made with or without notice, authorize the remaining joint guardians or conservators to act as to all matters embraced within its order.

(f) If a custodial parent has been diagnosed as having a terminal condition, as evidenced by a declaration executed by a licensed physician, the court, in its discretion, may appoint the custodial parent and a person nominated by the custodial parent as joint guardians of the person of the minor. However, such an appointment shall not be made over the objection of a noncustodial parent without a finding that the noncustodial parent's custody would be detrimental to the minor, as provided in Section 3041 of the Family Code.

"Terminal condition," for purposes of this subdivision, means an incurable and irreversible condition that, without the administration of life-sustaining treatment, will, within reasonable medical judgment, result in death within two years.

§ 2105.5. Multiple guardians or conservators; liability for breach of another guardian or conservator

(a) Except as provided in subdivision (b), where there is more than one guardian or conservator of the estate, one guardian or conservator is not liable for a breach of fiduciary duty committed by another guardian or conservator.

(b) Where there is more than one guardian or conservator of the estate, one guardian or conservator is liable for a breach of fiduciary duty committed by another guardian or conservator of the same estate under any of the following circumstances:

(1) Where the guardian or conservator participates in a breach of fiduciary duty committed by the other guardian or conservator.

(2) Where the guardian or conservator improperly delegates the administration of the estate to the other guardian or conservator.

(3) Where the guardian or conservator approves, knowingly acquiesces in, or conceals a breach of fiduciary duty committed by the other guardian or conservator.

(4) Where the guardian or conservator negligently enables the other guardian or conservator to commit a breach of fiduciary duty.

(5) Where the guardian or conservator knows or has information from which the guardian or conservator reasonably should have known of the breach of fiduciary duty by the other guardian or conservator and fails to take reasonable steps to compel the other guardian or conservator to redress the breach.

(c) The liability of a guardian or conservator for a breach of fiduciary duty committed by another guardian or conservator that occurred before July 1, 1988, is governed by prior law and not by this section.

Appendix H: Sample Letters of Notification

LEGAL SERVICES FOR CHILDREN, INC.

1254 MARKET STREET, 3RD FLOOR, SAN FRANCISCO, CA 94102 ○ (415) 863-3762 ○ FAX (415) 863-7708

March 15, 1995

TO WHOM IT MAY CONCERN:

Please be advised that Kevin Kid has contacted Legal Services for Children for the purpose of arranging for Greta Guardian to be appointed Kevin's legal guardian. The minor is now residing with Ms. Guardian at 1111 Third Street in San Francisco.

Legal Services for Children is presently processing the various documents necessary for the guardianship application. It will, however, take approximately six weeks to complete the process of having Ms. Guardian appointed legal guardian. I am, therefore, writing this letter to assure all interested parties that the guardianship is in process and to request that all appropriate cooperation and assistance be given to the proposed guardian and ward.

Please contact the undersigned if any questions or concerns regarding the above matters remain.

Very truly yours,

Attorney

LEGAL SERVICES FOR CHILDREN, INC.

1254 MARKET STREET, 3RD FLOOR, SAN FRANCISCO, CA 94102 ○ (415) 863-3762 ○ FAX (415) 863-7708

LEGAL SERVICES FOR CHILDREN, INC.

1254 MARKET STREET, 3RD FLOOR, SAN FRANCISCO, CA 94102 ○ (415) 863-3762 ○ FAX (415) 863-7708

March 15, 1995

Mom O. Kid
1111 Third Street
San Francisco, CA 94124

Dear Ms. Kid:

Your son has contacted Legal Services for Children to ask for help in having Greta Guardian appointed as his legal guardian.

A legal guardian is an adult, appointed by a Probate Court judge, who takes care of a minor child. A guardianship allows the child to live with the guardian outside the parents' home. It also allows the guardian to enroll the child in school, consent to medical care for the child, and do other things necessary for the child's care.

A guardianship does not end your own parental relationship with your child; it simply allows another person to be a substitute parent for as long as necessary. A guardianship can be ended, by going back to the court, whenever it is no longer needed. Also, it ends automatically when the child turns eighteen.

If you agree that Ms. Guardian should be your child's legal guardian, please sign and date the enclosed form under the headings "Nomination of Guardian," and "Waiver of Notice and Consent," in the places marked with a red "X." Then, please send the signed form back to us in the enclosed stamped envelope. (Even if you sign these forms, we will send you a notice telling you when and where the court hearing is, and you are welcome to attend.)

If you do not agree that [name] should be your child's legal guardian, you may appear in court and oppose the guardianship petition. You may want to talk with an attorney before the hearing.

If you have any questions about the guardianship, please contact us at (415) 863-3762.

Sincerely,

LEGAL SERVICES FOR CHILDREN, INC.

1254 MARKET STREET, 3RD FLOOR, SAN FRANCISCO, CA 94102 ○ (415) 863-3762 ○ FAX (415) 863-7708

LEGAL SERVICES FOR CHILDREN, INC.

1254 MARKET STREET, 3RD FLOOR, SAN FRANCISCO, CA 94102 ○ (415) 863-3762 ○ FAX (415) 863-7708

March 15, 1995

Mom O. Kid
1111 Third Street
San Francisco, CA 94124

Dear Ms. Kid:

Your son has contacted Legal Services for Children to ask for help in having Greta Guardian appointed as his legal guardian.

This letter is to notify you of the time and place of the court hearing on the guardianship. Enclosed are a copy of the guardianship petition and a Notice of Hearing. The hearing will take place on [date and time].

If you do not agree with the guardianship, you may appear at that time. You may want to talk to an attorney before the hearing.

Whether you agree with the guardianship or not, please sign and date the enclosed form, headed "Notice and Acknowledgement of Receipt," at the places marked with a red "X." Then, please send it back to us in the enclosed stamped envelope. This form simply shows that you have received the guardianship papers; it does not mean that you agree with the guardianship or waive any of your rights.

If you do not sign and return the Notice and Acknowledgement of Receipt form, we will have to send out a process server to give you the papers. You may be held liable for the cost of hiring a process server.

If you have any questions about the guardianship itself or the legal procedures involved, please contact us at (415) 863-3762.

Sincerely,

[attorney]
[social worker]

LEGAL SERVICES FOR CHILDREN, INC.

1254 MARKET STREET, 3RD FLOOR, SAN FRANCISCO, CA 94102 ○ (415) 863-3762 ○ FAX (415) 863-7708

LEGAL SERVICES FOR CHILDREN, INC.

1254 MARKET STREET, 3RD FLOOR, SAN FRANCISCO, CA 94102 ○ (415) 863-3762 ○ FAX (415) 863-7708

March 15, 1995

Kyle Bourne
SF Department of Social Services
P.O. Box 7988
San Francisco, CA 94107

RE: Guardianship of Kevin Kid

Enclosed please find a copy of the guardianship petition filed in the above-referenced case. We are scheduled to appear in court on March 30, 1995 at 9:00 a.m.

The following information will facilitate your background check on Greta Guardian, proposed guardian, and Lance Jones, her husband (but not a proposed guardian):

Name: Greta Guardian
CDL No:
Social Security Number:
Date of Birth:

Name: Lance Jones
CDL No:
Social Security Number:
Date of Birth:

Please note that a confidential declaration is included with the petition. Feel free to give me a call if you have any questions.

Sincerely,

Staff Attorney

LEGAL SERVICES FOR CHILDREN, INC.

1254 MARKET STREET, 3RD FLOOR, SAN FRANCISCO, CA 94102 ○ (415) 863-3762 ○ FAX (415) 863-7708

Appendix I: Social Security Form 4815-F6

Supplemental Security Income (Title XVI)

Disabled children who qualify financially may receive children's SSI benefits. The following form, SSA-4815-F6, is the Medical Report Form used in support of SSI disability claims for children with HIV. The form is an accurate summary of the disability requirements (or "Listings") for children with HIV. A fuller discussion of the children's Listings can be found in 20 C.F.R. Pt. 404, Subpt. P, Appendix 1, § 114.08; *also found at* 58 Fed. Reg. 36008 *et seq*. (July 2, 1993).

The children's HIV listings take into consideration the child's inability to engage in normal activity for her age, as well as her failure to develop as expected for her age. This is in accordance with the Supreme Court's decision in *Sullivan v. Zebley*, 493 U.S. 521 (1990).

In order to be eligible for SSI, children must also meet the financial eligibility criteria. If the child lives with her parent, the parent's income will be deemed to be available to the child, unless the parent is also an SSI recipient. The deeming rules are complicated. *See* 20 C.F.R. 416.1165(h)(1993); *also found at* 57 Fed. Reg. 48559 (Oct. 27, 1992). <u>If the child is not living with her parent, neither the parent's income nor the custodial adult's income will be deemed.</u>

Social Security Disability Insurance (Title II)

A dependent child of a disabled adult who receives SSDI is eligible for an SSDI children's benefit. A survivor's benefit is also available after the parent dies. The child does not need to be disabled in order to receive children's benefits under Title II.

MEDICAL SOURCE INSTRUCTION SHEET FOR COMPLETION OF ATTACHED SSA-4814-F6
(Medical Report On Child With Allegation Of Human Immunodeficiency Virus (HIV) Infection)

A claim has been filed for your patient, identified in section A of the attached form, for Supplemental Security Income disability payments based on HIV infection. MEDICAL SOURCE: Please detach this instruction sheet and use it to complete the attached form.

I. PURPOSE OF THIS FORM:
IF YOU COMPLETE AND RETURN THE ATTACHED FORM PROMPTLY, YOUR PATIENT MAY BE ABLE TO RECEIVE PAYMENTS WHILE WE ARE PROCESSING HIS OR HER CLAIM FOR ONGOING DISABILITY PAYMENTS.

This is not a request for an examination. At this time, we simply need you to fill out this form based on existing medical information. The State Disability Determination Services will contact you later to obtain further evidence needed to process your patient's claim.

II. WHO MAY COMPLETE THIS FORM:
A physician, nurse, or other member of a hospital or clinic staff, who is able to confirm the diagnosis and severity of the HIV disease manifestations based on your records, may complete and sign the form.

III. MEDICAL RELEASE:
An SSA medical release (an SSA-827) signed by your patient's parent or guardian should be attached to the form when you receive it. If the release is not attached, the medical release section on the form itself should be signed by your patient's parent or guardian.

IV. HOW TO COMPLETE THE FORM:
- If you receive the form from your patient's parent or guardian and section A has not been completed, please fill in the identifying information about your patient.
- You may not have to complete all of the sections on the form.
- **ALWAYS COMPLETE SECTION B.**
- **COMPLETE SECTION C, IF APPROPRIATE.** If you check at least one of the items in section C, go right to section E.
- **ONLY COMPLETE SECTION D IF YOU HAVE NOT CHECKED ANY ITEM IN SECTION C.** See the special information section below which will help you to complete section D.
- **COMPLETE SECTION E IF YOU WISH TO PROVIDE COMMENTS ON YOUR PATIENT'S CONDITION(S).**
- **ALWAYS COMPLETE SECTIONS F AND G. NOTE:** This form is not complete until it is signed.

V. HOW TO RETURN THE FORM TO US:
- Mail the completed, signed form, as soon as possible, in the return envelope provided.
- If you received the form without a return envelope, give the completed, signed form back to your patient's parent or guardian for return to the SSA field office.

Continued on the reverse →

VI. SPECIAL INFORMATION TO HELP YOU COMPLETE SECTION D

HOW WE USE SECTION D:

- Section D asks you to tell us what other manifestation(s) of HIV your patient may have. It also asks you to give us an idea of how your patient's ability to function has been affected. Complete only the areas of functioning applicable to the child's age group.
- We do not need detailed descriptions of the functional limitations imposed by the illness; we just need to know whether your patient's ability to function has been affected to the extent described.
- For children age 3 to attainment of age 18, the child must have a "marked" restriction of functioning in two areas to be eligible for these payments. See below for an explanation of the term "marked."

SPECIAL TERMS USED IN SECTION D

WHAT WE MEAN BY "MANIFESTATION(S) OF HIV INFECTION": ***(See Item 48.a)***

"Manifestation(s) of HIV Infection" may include:

Any condition listed in section C, but without the findings specified there (e.g., oral candidiasis not meeting the criteria shown in Item 27 of the form, diarrhea not meeting the criteria shown in Item 38 of the form); or any other condition that is not listed in section C (e.g., oral hairy leukoplakia, hepatomegaly).

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WHAT WE MEAN BY "MARKED": ***(See Item 48.d — Applies only to children age 3 to 18)***

- When "marked" is used to describe functional limitations, it means more than moderate, but less than extreme. "Marked" does not imply that your patient is confined to bed, hospitalized, or placed in a residential treatment facility.
- A marked limitation may be present when several activities or functions are impaired or even when only one is impaired. An individual need not be totally precluded from performing an activity to have a marked limitation, as long as the degree of limitation is such as to seriously interfere with the ability to function independently, appropriately, and effectively in an age-appropriate manner.

PRIVACY ACT NOTICE: The Social Security Administration is authorized to collect the information on this form under sections 205(a), 223(d) and 1633(e)(1) of the Social Security Act. The information on this form is needed by Social Security to make a decision on the named claimant's claim. While giving us the information on this form is voluntary, failure to provide all or part of the requested information could prevent an accurate or timely decision on the named claimant's claim. Although the information you furnish is almost never used for any purpose other than making a determination about the claimant's disability, such information may be disclosed by the Social Security Administration as follows: (1) to enable

a third party or agency to assist Social Security in establishing rights to Social Security benefits and/or coverage; (2) to comply with Federal laws requiring the release of information from Social Security records (e.g., to the General Accounting Office and the Department of Veterans Affairs); and (3) to facilitate statistical research and audit activities necessary to assure the integrity and improvement of the Social Security programs (e.g., to the Bureau of the Census and private concerns under contract to Social Security).

We may also use the information you give us when we match records by computer. Matching programs compare our records with those of other Federal, State, or local government agencies. Many agencies may use matching programs to find or prove that a person qualifies for benefits paid by the Federal government. The law allows us to do this even if you do not agree to it.

Explanations about these and other reasons why information you provide us may be used or given out are available in Social Security offices. If you want to learn more about this, contact any Social Security office.

TIME IT TAKES TO COMPLETE THIS FORM

We estimate that it will take you about 10 minutes to complete this form. This includes the time it will take to read the instructions, gather the necessary facts, and fill out the form. If you have comments or suggestions on this estimate or on any other aspect of this form, write to the Social Security Administration, ATTN: Reports Clearance Officer, 1-A-21 Operations Bldg., Baltimore, MD 21235-0001, and to the Office of Management and Budget, Paperwork Reduction Project (0960-0503), Washington, D.C. 20503. **SEND ONLY COMMENTS RELATING TO OUR ESTIMATE OR OTHER ASPECTS OF THIS FORM TO THE OFFICES LISTED ABOVE. ALL REQUESTS FOR SOCIAL SECURITY CARDS AND OTHER CLAIMS-RELATED INFORMATION SHOULD BE SENT TO YOUR LOCAL SOCIAL SECURITY OFFICE, WHOSE ADDRESS IS LISTED IN YOUR TELEPHONE DIRECTORY UNDER THE DEPARTMENT OF HEALTH AND HUMAN SERVICES.**

Form SSA-4815-F6 (6-93)

MEDICAL REPORT ON CHILD WITH ALLEGATION OF HUMAN IMMUNODEFICIENCY VIRUS (HIV) INFECTION	DO/BO CODE:

The individual named below has filed an application for a period of disability and/or disability payments. If you complete this form, your patient may be able to receive early payments. (This is not a request for an examination, but for existing medical information.)

MEDICAL RELEASE INFORMATION

☐ Form SSA-827, "Authorization to Release Medical Information to the Social Security Administration," attached.

☐ I hereby authorize the medical source named below to release or disclose to the Social Security Administration or State agency any medical records or other information regarding the child's treatment for human immunodeficiency virus (HIV) infection.

CLAIMANT'S PARENT OR GUARDIAN'S SIGNATURE (*Required only if Form SSA-827 is **NOT** attached)*	DATE

A. IDENTIFYING INFORMATION

MEDICAL SOURCE'S NAME	CLAIMANT'S NAME
CLAIMANT'S SSN	CLAIMANT'S DATE OF BIRTH

B. HOW WAS HIV INFECTION DIAGNOSED?

☐ Laboratory testing confirming HIV infection

☐ Other clinical and laboratory findings, medical history, and diagnosis(es) indicated in the medical evidence

C. OPPORTUNITISTIC AND INDICATOR DISEASES: ***Please check if applicable.***

BACTERIAL INFECTIONS

1. ☐ **MYCOBACTERIAL INFECTION** (e.g., caused by M. avium-intracellulare, M. kansasii or M. tuberculosis), at a site other than the lungs, skin, or cervical or hilar lymph Nodes
2. ☐ **PULMONARY TUBERCULOSIS**, resistant to Treatment
3. ☐ **NOCARDIOSIS**
4. ☐ **SALMONELLA BACTEREMIA**, recurrent non-Typhoid
5. ☐ **SYPHILIS OR NEUROSYPHILIS** (e.g., meningovascular syphilis) resulting in neurologic
10. ☐ **COCCIDIOIDOMYCOSIS,** at a site other than the lungs or lymph nodes
11. ☐ **CRYPTOCOCCOSIS,** at a site other than the lungs (e.g., cryptococcal meningitis)
12. ☐ **HISTOPLASMOSIS,** at a site other than the lungs or lymph nodes
13. ☐ **MUCORMYCOSIS**

PROTOZOAN OR HELMINTHIC INFECTIONS

14. ☐ **CRYPTOSPORIDIOSIS, ISOSPORIASIS, OR MICROSPORIDIOSIS,** with diarrhea lasting for

or other sequelae

6. ☐ In a child less than 13 years of age, **MULTIPLE OR RECURRENT PYOGENIC BACTERIAL INFECTION(S)** of the following types: sepsis pneumonia, meningitis, bone or joint infection, or abscess of an internal organ or body cavity (excluding otitis media or superficial skin or mucosal abscesses) occurring 2 or more times in 2 years

7. ☐ **MULTIPLE OR RECURRENT BACTERIAL INFECTION(S),** including pelvic inflammatory Disease, requiring hospitalization or intravenous antibiotic treatment 3 or more times in 1 year

FUNGAL INFECTIONS

8. ☐ **ASPERGILLOSIS**

9. ☐ **CANDIDIASIS**, at a site other than the skin, urinary tract, intestinal tract, or oral or vulvovaginal mucous membranes; or candidiasis involving the esophagus, trachea, bronchi, or lungs

1 month or longer

15. ☐ **PNEUMOCYSTIS CARINII PNEUMONIA OR EXTRAPULMONARY PNEUMOCYSTIS CARINII INFECTION**

16. ☐ **STRONGYLOIDIASIS,** extra-intestinal

17. ☐ **TOXOPLASMOSIS** of an organ other than the liver, spleen, or lymph nodes

VIRAL INFECTIONS

18. ☐ **CYTOMEGALOVIRUS DISEASE,** at a site other than the liver, spleen, or lymph nodes

20. ☐ **HERPES SIMPLEX VIRUS** causing mucocutaneous infection (e.g., oral, genital, perianal) lasting for 1 month or longer; or infection at a site other than the skin or mucous membranes (e.g., bronchitis, pneumonitis, esophagitis, or encephalitis); or disseminated infection

20. ☐ **HERPES ZOSTER**, disseminated or with multidermatomal eruptions that are resistant to treatment

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21. ☐ **PROGRESSIVE MULTIFOCAL LEUKOENCEPHALOPATHY**

22. ☐ **HEPATITIS**, resulting in chronic liver disease manifested by appropriate findings (e.g., persistent ascites, bleeding esophageal varices, hepatic encephalopathy)

MALIGNANT NEOPLASMS

23. ☐ **CARCINOMA OF THE CERVIX**, invasive, FIGO stage II and beyond

24. ☐ **KAPOSI'S SARCOMA**, with extensive oral lesions; or involvement of the gastrointestinal tract, lungs, or other visceral organs; or involvement of the skin or mucous membranes with extensive fungating or ulcerating lesions not responding to treatment

25. ☐ **LYMPHOMA** of any type (e.g., primary lymphoma of the brain, Burkitt's lymphoma, immunoblastic sarcoma, other non-Hodgkins lymphoma, Hodgkin's disease)

26. ☐ **SQUAMOUS CELL CARCINOMA OF THE ANUS**

SKIN OR MUCOUS MEMBRANES

27. ☐ **CONDITIONS OF THE SKIN OR MUCOUS MEMBRANES**, with extensive fungating or ulcerating lesions not responding to treatement (e.g., dermatological conditions such as eczema or psoriasis, vulvovaginal or other mucosal candida, condyloma caused by human papillomavirus, genital ulcerative disease)

HEMATOLOGIC ABNORMALITIES

28. ☐ **ANEMIA** (hematocrit persisting at 30 percent or less), requiring one or more blood transfusions on an average of at least once every 2 months

33. ☐ **PROGRESSIVE MOTOR DYSFUNCTION** affecting gait and station or fine and gross motor skills

GROWTH DISTURBANCE WITH

34. ☐ **INVOLUNTARY WEIGHT LOSS (OR FAILURE TO GAIN WEIGHT AT AN APPROPRIATE RATE FOR AGE) RESULTING IN A FALL OF 15 PERCENTILES** from established growth curve (on standard growth charts) that persists for 2 months or longer

35. ☐ **INVOLUNTARY WEIGHT LOSS (OR FAILURE TO GAIN WEIGHT AT AN APPROPRIATE RATE FOR AGE) RESULTING IN A FALL TO BELOW THE THIRD PERCENTILE** from established growth curve (on standard growth charts) that persists for 2 months or longer

36. ☐ **INVOLUNTARY WEIGHT LOSS GREATER THAN 10 PERCENT OF BASELINE** that persists for 2 months or longer

37. ☐ **GROWTH IMPAIRMENT**, with fall of greater than 15 percentiles in height which is sustained; or fall to, or persistence of, height below the third percentile

DIARRHEA

38. ☐ **DIARRHEA**, lasting for 1 month or longer, resistant to treatment, and requiring intravenous hydration, intravenous alimentation, or tube feeding

CARDIOMYOPATHY

39. ☐ **CARDIOMYOPATHY** (chronic heart failure; or other sever cardiac abnormality not responsive to treatment)

29. ☐ **GRANULOCYTOPENIA**, with absolute neutrophil counts repeatedly below 1,000 cells/mm^3 and Documented recurrent systemic bacterial infections occurring at least 3 times in the last 5 months

30. ☐ **THROMBOCYTOPENIA**, with platelet counts repeatedly below 40,000/mm^3; with at least one spontaneous hemorrhage, requiring transfusion in the last 5 months; or intracranial bleeding in the last 12 months.

NEUROLOGICAL MANIFESTATIONS OF HIV INFECTION (e.g., HIV ENCEPHALOPATHY, PERIPHERAL NEUROPATHY) RESULTING IN:

31. ☐ **LOSS OF PREVIOUSLY ACQUIRED, OR MARKED DELAY IN ACHIEVING, DEVELOPMENTAL MILESTONES OR INTELLECTUAL ABILITY** (including the sudden acquisition of a new learning disability)

32. ☐ **IMPAIRED BRAIN GROWTH** (acquired microcephaly or brain atrophy)

PULMONARY CONDITIONS

40. ☐ **LYMPHOID INTERSTITIAL PNEUMONIA/PULMONARY LYMPHOID HYPERPLASIA** (LIP/PLH complex), with respiratory symptoms that significantly interfere with age-appropriate actives, and that cannot be controlled by prescribed treatment.

NEPHROPATHY

41. ☐ **NEPHROPATHY,** resulting in chronic renal failure

42. ☐ **SEPSIS**

43. ☐ **MENINGITIS**

44. ☐ **PNEUMONIA** (non-PCP)

45. ☐ **SEPTIC ARTHRITIS**

46. ☐ **ENDOCARDITIS**

47. ☐ **SINUSITIS**, radiographically documented

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NOTE: **If you have checked any of the boxes in section C, proceed to section E if you have any remarks you wish to make about this patient's condition. Then proceed to sections F and G and sign and date the form.**

If you have not checked any of the boxes in section C, please complete section D. See part VI of the instruction sheet for definitions of the terms we use in section D. Proceed to section E if you have any remarks you wish to make about this patient's condition. Then, proceed to sections F and G and sign and date the form.

D. OTHER MANIFESTATION(S) OF HIV INFECTION

48. a. ANY MANIFESTATION(S) OF HIV INFECTION INCLUDING DISEASES LISTED IN SECTION C, items 1-47, but without the specified findings described above, or any other manifestations(s) of HIV infection; please specify type of manifestations(s):

_____

_____

_____

AND ANY OF THE FOLLOWING FUNCTIONAL IMITATION(S), COMPLETE ONLY THE TIMES FOR THE CHILD'S PRESENT AGE GROUP.

b. BIRTH TO ATTAINMENT OF AGE 1 — Any of the following:

1. ☐ **COGNITIVE/COMMUNICATIVE FUNCTIONING** generally acquired by children no more than one-half the child's chronological age (e.g., in infants 0-6 months, markedly diminished variation in the production or imitation of sounds and severe feeding abnormality, such as problems with sucking, swallowing, or chewing); or
2. ☐ **MOTOR DEVELOPMENT** generally acquired by children no more than one-half the child's chronological age; or
3. ☐ **APATHY, OVER-EXCITABILITY, OR FEARFULNESS**, demonstrated by an absent or grossly excessive response to visual stimulation, auditory stimulation, or tactile stimulation; or
4. ☐ **FAILURE TO SUSTAIN SOCIAL INTERACTION** on an ongoing, reciprocal basis as evidenced by inability by 6 months to participate in vocal, visual ,and motoric exchanges (Including facial expressions); or failure by 9 months to communicate basic emotional responses, such as cuddling or exhibiting protest or anger; or failure to attend to the caregiver's voice or face or to explore an inanimate object for a period of time appropriate to the infant's age; or
5. ☐ **ATTAINMENT OF DEVELOPMENT OR FUNCTION** generally acquired by children no more than two-thirds of the child's chronological age in two or more areas (i.e., cognitive/communicative, motor, and social).

c. **AGE 1 TO ATTAINMENT OF AGE 3 —** Any of the following:

1. ☐ **GROSS OR FINE MOTOR DEVELOPMENT** at a level generally acquired by children no more than one-half the child's chronological age; or

2. ☐ **COGNITIVE/COMMUNICATIVE FUNCTION** at a level generally acquired by children no more than one-half the child's chronological age; or

3. ☐ **SOCIAL FUNCTION** at a level generally acquired by children no more than one-half the child's chronological age; or

4. ☐ **ATTAINMENT OF DEVELOPMENT OR FUNCTION** generally acquired by children no more than two-thirds of the child's chronological age in two or more covered by 1,2, or 3.

d. **AGE 3 TO ATTAINMENT OF AGE 18 —** Limitation in at least two of the following areas:

1. ☐ Marked impairment in age-appropriate **COGNITIVE/COMMUNICATIVE FUNCTION** (considering and historical and other information from parents or other individuals who have knowledge of the child, when such information is needed and available); or

2. ☐ Marked impairment in age-appropriate **SOCIAL FUNCTIONING** (considering information from parents or other individuals who have knowledge of the child, when such information is needed and available); or

3. ☐ Marked impairment in **PERSONAL/BEHAVIORAL FUNCTION** as evidenced by marked restriction of age-appropriate activities of daily living (considering information from parents or other individuals who have knowledge of the child, when such information is needed and available); or persistent serious maladaptive behaviors destructive to self, others, animals, or property, requiring protective intervention; or

4. ☐ **DEFICIENIECES OF CONCENTRATION, PERSISTENCE, OR PACE** resulting in frequent failure to complete tasks in a timely manner.

E. REMARKS: (*Please use this space if you lack sufficient room in section D or to provide any other comments you wish about your patient.)*

F. MEDICAL SOURCE'S NAME AND ADDRESS (*Print or type)* TELEPHONE NUMBER (Area Code)

DATE

KNOWING THAT ANYONE MAKING A FALSE STATEMENT OR REPRESENTATION OF A MATERIAL FACT FOR USE IN DETERMINING A RIGHT TO PAYMENT UNDER THE SOCIAL SECURITY ACT COMMITS A CRIME PUNISHABLE UNDER FEDERAL LAW, I CERTIFY THAT THE ABOVE STATEMENTS ARE TRUE.

G. SIGNATURE AND TITLE (e.g., physician, R.N.) OF PERSON COMPLETING THIS FORM

✱

FOR OFFICIAL USE ONLY

☐ FIELD OFFICE DISPOSITION

☐ DISABILITY DETERMINATION SERVICES DISPOSITION

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Appendix J: Sample Parent Letter

August 26th, 1999

Mom O. Kid
123 Fourth Street
San Francisco, CA 94111

Dear Ms. Kidd,

Your son, Kevin Kidd, has asked our office for help in appointing as his legal guardian Greta Guardian.

A legal guardian is an adult, appointed by a Probate Court judge, who takes care of the minor child. A guardianship allows the child to live with the guardian outside of the parent's home. It also allows the guardian to enroll the child in school, consent to medical care for the child, and do other things necessary for the child's care. A guardianship does not end your own parental relationship with your child; it simply allows another person to be a substitute parent for as long as necessary. A guardianship can be ended by going back to the court, whenever it is no longer needed. Also, it ends automatically when the child turns eighteen.

If you agree that Greta Guardian should be your child's legal guardian, please sign and date the enclosed form under the headings "Nomination of Guardianship," and "Waiver of Notice and Consent," in the places marked with a red "X." Then, please send the signed form back to us in the enclosed stamped envelope. (Even if you sign these forms, we will send you a notice telling you where and when the court hearing is, and you are welcome to attend.)

If you do not agree that Greta Guardian should be your child's legal guardian, you may appear in court and oppose the guardianship petition. You may want to talk to an attorney before the hearing. Even if you do not agree with the guardianship please sign and return to us the enclosed "NOTICE AND ACKNOWLEDGEMENT OF RECEIPT." This document lets the Court know that you received the guardianship papers. If you do not send back that form we will have to have you personally served and you may be liable for the cost of that service.

If you have any questions about the guardianship, please contact us at (415) 863-3762.

Sincerely,

Ann Attorney
Attorney for Kevin Kidd

Appendix K: Sample "Attachment 13" (required attachment for petition that states reason for guardianship)

Attachment 13

Joint guardianship of the minors with their parent, Mary Doe and their older sister, Dana Doe is necessary and convenient, pursuant to Probate Code 2105(f), due to Mrs. Doe's serious illness. Joint guardianship will enable Dana Doe to assist in the care of the minors when their parent is ill and to be available to provide long-term care for them should their parent become unable to do so.

SAN FRANCISCO PROBATE MANUAL

CHAPTER ONE
ORGANIZATION AND ADMINISTRATION

1.1

Probate Department Administration.

The probate department is open weekdays from 8:30 a.m. to 12:00 noon and from 1:30 p.m. to 4:30 p.m.. It is presided over by the Probate Judge with the assistance of the Probate Commissioner and is administered by the Director and Assistant Director of the Probate Examiners and Investigators.

Telephone numbers for the Probate Department are as follows:

Courtroom Dark: (415) 554-5073; Probate Secretary: (415) 554-7004; The Court Investigators: (415) 554-5113; The Status of Calendared Matters: (415) 554-7001; General Information Recording: 554-7002. (Effective January 1, 1995)

1.2

Requirement of an Appearance.

The following matters require appearance of counsel and/or parties at the hearing:

a) Applications for appointment of guardian or conservator (other than temporary guardian or conservator, see manual, Chapter 12). Appearance by proposed appointee, other than a corporate fiduciary, is also required. The minor must also appear if the appointment is for guardian of the person.

b) Termination of guardianship or conservatorship (other than on death of minor or conservatee, or minor attaining majority). Conservatee MUST appear. Minor MUST appear if there is a waiver of accounting.

c) Confirmation of sales of real and personal property.

d) Petition for instructions.

e) A petition for removal of trust from continuing jurisdiction of the Court (Probate Code Section 17352).

f) Petition for probate of lost or destroyed will. Oral testimony will be taken only when requested by the Court.

All other matters (except as otherwise provided by law) may ordinarily be submitted without an appearance. Evidence to support such nonappearance matters should be contained in a verified petition and/or declarations under penalty of perjury **timely filed before the hearing date**.

(Effective January 1, 1995)

95.1

1.3

Hearings re Probate Matters.

Petitions for appointment of a conservator or guardian are heard on Thursdays at 9:00 a.m. and require an appearance. All other matters requiring an appearance are heard on Monday, Tuesday, and Wednesday calendars at 9:00 a.m.. On the Monday, Tuesday, and Wednesday calendars, sales are heard first. All other matters are ordinarily heard in the following order: uncontested matters, followed by contested matters requiring a hearing time of 20 minutes or less. Contested matters requiring a hearing of more than 20 minutes may be specially set at the time of the scheduled hearing or will be placed on the end of the regular morning calendar if time allows. All interested counsel must be present for a special setting. Hearings requiring more than two court afternoons will normally be referred to Department One. (Effective January 1, 1995)

1.4

Review of Files Prior to Hearing.

All files (except those for which a proposed order has not be timely submitted) are reviewed by an Examiner prior to the day of the hearing. If a matter is unopposed and approved by the Examiner, it will be presented to the court for signature and no appearance of counsel will be necessary. If the matter is not approved, the Examiner will prepare notes setting forth the reasons. **If the basis of the non approval is a failure to satisfy statutory requirements or procedures of the Court as set forth in this manual, the matter will be continued at lease two weeks for such compliance.** If the non approval is based on other grounds, the matter will be

b). Other Pleadings. In order for supplemental or opposition papers to be considered by the Court prior to the hearing, a courtesy copy of the papers must be delivered to the Examiners FIVE DAYS before the hearing with the scheduled hearing date noted on the face sheet. FAILURE TO SUBMIT SUPPLEMENTAL PAPERS IN A TIMELY MANNER WILL RESULT IN AN AUTOMATIC TWO WEEK CONTINUANCE. (Effective January 1, 1995)

1.6

Availability of Approved Orders Signed by the Court.

Approved orders signed by the Court will be available after 9:30 a.m.. on the day of the hearing in the office of the Court Clerk. The Clerk will return endorsed file copies of orders if a self-addressed, stamped envelope is provided. (Effective January 1, 1995)

1.7

Continuances.

a) Requested by Counsel. Continuances requested by counsel may be made only in Court or through the Courtroom Clerk (554–5073). A continuance will not be granted if there is opposing counsel unless a request is made in open Court or by a timely stipulation of all counsel to a date to be arranged with the Courtroom Clerk.

If a matter has been specially set, i.e., at any time other than the regular 9:00 a.m. calendar, it may not be continued without the stipulation of counsel and the approval of the Judge or Probate Commissioner scheduled to hear the matter. (For this permission, telephone the courtroom Clerk.)

put on the appearance calendar.

Counsel may telephone the rulings line (554-7001) the day before the hearing to determine whether a matter has been approved, continued or placed on the appearance calendar. If a matter has been previously granted, the calendar posted outside the courtroom on the day of the hearing will so state. (Effective January 1, 1995)

1.5

Submission of Proposed Order and Other Pleadings before Date of Hearing.

a) Order. Except in the case of confirmations of sales, orders must be submitted to the PROBATE COURTROOM at least TWO WEEKS in advance of the scheduled hearing date, with the scheduled hearing date noted on the face sheet. Failure to submit the proposed order at least TWO WEEKS in advance will result in an automatic continuance for at last TWO WEEKS. The proposed order should be prepared on the assumption that the petition will be granted.

Probate sales cannot be taken off the calendar or continued except for good cause and appearance of counsel at the time of the hearing is required.

b) Continuances by the Court. When an attorney falls to appear at a hearing, the matter will ordinarily be dropped from the calendar unless a further continuance has been requested. The Court may drop the matter from the calendar where successive continuances have been requested but no satisfactory progress Is evident. If the hearing Is required and has been set by special order of Court and there is no appearance, an Order to Show Cause and a citation may be issued. (Effective January 1, 1995)

1.8

Hearings Before Commissioner.

The Commissioner may sit as a temporary Judge (Judge Pro Tem) on stipulation of all parties litigant or their counsel. Should any party object to the Commissioner hearing the matter as Judge Pro Tem, the objection must be made at the time the matter is assigned or called for hearing. A failure to object shall be deemed a stipulation that the Commissioner may hear the matter as temporary Judge. (Effective January 1, 1995)

1.9

Law and Motion.

All law and motion pertaining to probate matters shall be heard by the Probate Department. Motions are to be filed at the probate window and a hearing date will be assigned at that time. Refer to Section 16 of the City and County of San Francisco Manual for Law and Motion and Writs and Receivers for filing deadlines for moving, opposition and reply papers. Endorsed filed copies are to be delivered to the Probate Courtroom, Attention: "Staff Attorney". (Effective January 1, 1995)

1.10

Discovery.

All motions and other matters concerning discovery in probate proceedings shall be noticed for hearing before a Court Commissioner in the Discovery Department unless the Probate Judge directs otherwise. The word "DISCOVERY" shall be typed in bold face on the title page of all documents relative to such matters. (Effective January 1, 1995)

1.13

Settlement Conference Statements.

Settlement conference statements are due in the probate department five (5) court days prior to the conference. Refer to San Francisco Superior Court Local Rule 2.12(f). (Effective January 1, 1995)

1.14

Trial.

Trials will be heard by the probate department unless specified otherwise by the Court. (Effective January 1, 1995)

1.15

Will Contests.

All will contests or objections to petitions for probate must utilize the probate case number of the first petition filed in the decedent's estate. (Effective January 1, 1995)

1.16

Compromise of Claims.

Petitions for compromise of minor's claims are to be filed and a hearing date set in Deportment One for hearing on the uncontested calendar. (Effective January 1, 1995)

1.17

Ex Parte Matters.

a) Contents of Petition. A petition for an ex parte order must be verified and must contain sufficient evidentiary facts to justify issuing the order. Conclusions or statements of ultimate facts are not sufficient and a foundation should be shown for the petitioner's personal knowledge.

1.11

Discovery Cut-off.

Discovery cut-off is thirty (30) days before trial pursuant to Code of Civil Procedure Section 2024(a). (Effective January 1, 1995)

1.12

Settlement Conferences.

The Judge or Commissioner will schedule settlement conferences as requested by counsel. Appointments may be made with the Courtroom Clerk at 554-5073. Settlement conferences will also be ordered and scheduled by the Court in matters requiring extended hearing. (Effective January 1, 1995)

b) Citations. An endorsed filed copy of the petition setting forth the relief requested, with hearing date affixed, must be submitted together with a separate ex parte petition requesting a Court order allowing the issuance of a citation and a separate order directing the Clark's Office to issue a citation. Said petition may be submitted ex parte with no appearance required.

c) Temporary Restraining Orders. All applications for temporary restraining orders or orders to show cause pertaining to probate matters may be presented to the probate department between 2:30 p.m. and 3:30 p.m. each day. The procedure for obtaining a temporary restraining order Is set forth in Section 153 of the San Francisco Superior Court Manual for Law and Motion and Writs and Receivers.

95.1

d) Notice. For all ex parte petitions requiring appearance and all applications for temporary restraining orders, twenty-four (24) hour notice ordinarily shall be deemed to be reasonable time for informing any interested or opposing party under California Rule of Court 379. A declaration must accompany the petition setting forth to whom notice was given, indicating notification of the time and place of the ex parte hearing, and a statement that notice pursuant to this section has been complied with.

e) Special Notice Allegation. All petitions for ex parte orders must contain a statement on special notice. The statement shall either recite that no request is on file and in effect or shall list the parties requesting special notice and have attached the proof of service on such parties or specific waivers of notice.

f) Presentation of Petition. Ex parte petitions not requiring a personal appearance may be left in the "Ex Parte In-Box" outside the Probate Department. If a stamped, self-addressed envelope is provided, conformed copies of the signed order will be mailed to counsel; otherwise, signed orders may be picked up in the office of the Court Clerk. Ex parte petitions requiring a personal appearance may be presented between 2:30 p.m. and 3:30 p.m. Monday through Friday.

g) Separate Order Must Accompany Petition. Except where a Judicial Council form is used, a petition for ex parte order must be accompanied by a separate order complete in itself.

h) Ex Parte Orders. An ex parts order may be signed by either the Commissioner or the Judge. If for any reason

1.19

Summary Determination of Disputes (Probate Code Section 9620).

Normally, Section 9620 summary determination hearings are conducted by the Probate Commissioner sitting as temporary Judge pursuant to stipulation. Such matters may be calendared by calling the Courtroom Clerk. (Effective January 1, 1995)

counsel desires the Judge's signature, then such matter should be presented to the Commissioner for initial review prior to the presentation to the Judge.

i) Order Prescribing Notice. Where an order prescribing notice is required, the petition must allege the names and addresses of all individuals to whom notice should be given and the method suggested.

j) Guardian Ad Litem. Petitions for the appointment of a guardian ad litem in a probate matter may be presented ex parte. Petitions for the appointment of a guardian ad litem in all other matters are to be presented in Department One. (Effective January 1, 1995)

1.18

Procedural Questions.

Should counsel encounter procedural questions that cannot be resolved by reference to the Probate Code, this manual or legal research, such matters may be presented to the Court by letter. The Court does not give legal advice nor render advisory opinions. (Effective January 1, 1995)

95.1