



NYS Kinship Navigator

LEGAL CUSTODY AND GUARDIANSHIP

Informal Custody Is Lawful Custody

Most non-parent primary caretakers for children do not have court orders of legal custody or guardianship. They are **lawful custodians**, but their legal authority and control of children is incomplete.ⁱ Some important laws regarding informal caregivers use the phrases "person in parental relationship"ⁱⁱⁱ and "primary caretaker."ⁱⁱⁱ Since September 2005, parents may designate their authority for a limited period of time to a non-parent caregiver. *See* designation forms.

Legal Custody and Guardianship of the Person

All Family courts have jurisdiction to hear legal custody and guardianship petitions. In some counties family court will only hear legal custody petitions; in other counties family courts will also hear guardianship petitions. Domestic Relations Law § 240 and Article Six of the Family Court Act govern legal custody. The Surrogate's Court Procedures Act § 1700 ff., Domestic Relations Law § 81 and Article Six of the Family Court Act govern legal guardianship of the person for children.

Differences Between Legal Custody and Guardianship of the Person

In general, legal custody proceedings are appropriate for disputes between spouses, and guardianship proceedings are more appropriate for providing parental authority to a non-parent. Only guardianship proceedings must include a criminal record and state child abuse registry search.

Non-parent legal custodians have no statutory right to consent to medical treatment for children, but medical providers will usually act on the consent of legal custodians.^{iv}

Private health insurance policies may cover lawful custody, legal custody, and guardianship. However, policies are not obligated to provide coverage, so a particular policy may cover only legal guardianship or only legal custody.^v

Standby Guardianship

Since 2000, parents, guardians, legal custodians, and primary caretakers who cannot locate the natural parents can name a standby guardian via a petition to Family Court or to Surrogate's Court, or by a written designation that is witnessed. The authority of a standby guardian becomes effective upon the named springing event, i.e., debilitation, incapacity, or death.^{vi} See standby guardianship designation form.

Keeping Children in a Grandparent's Home

Since January 2004, Domestic Relations Law § 72 contains a new provision governing custody disputes between a grandparent and an absent parent. When children who reside in a grandparent's home for two or more years, a grandparent can petition for custody and the court must decide custody based on the best interests of children. For lesser periods of time, courts may decide based on children's best interests. This law applies to only grandparents. It does include circumstances where a grandparent may be sharing parenting duties with a resident parent who becomes sick or dies. Courts may consider lesser periods of time for both grandparents and other relative primary caregivers to warrant a best interest trial, because an extended disruption of custody is an "extraordinary circumstance" that opens the door to a full custody trial between the non-parent and absent parent.

* The above information is not legal advice. It is not a substitute for consulting an attorney. Up to date legal advice and legal information can only be obtained by consulting with an attorney.

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ⁱ The arrangements that parents and grandparents have created without state involvement exist apart from lawful custody as it is defined in the Domestic Relations Law. However, they are a form of "custody" and in practice family courts recognize the person who has informal custody and provide notice to "a party having care, custody, and control", N.Y. Dom. Law § 71 and "any person who has physical custody", N.Y. Dom. Rel. Law § 75-e. *But see*, N.Y. Civ. Prac. L. & R. § 1201.

ⁱⁱ N.Y. Educ. Law § 3212(2); N.Y. Public Health Law § 2164.

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- iii N.Y. Surrogate's Court Procedure Act S 1726.
 - iv N.Y. Pub. H. Law § 2504.
 - v N.Y. Ins. Law §§ 42235(f), 4305(c), 321(4)(c), 3216©(4)(A).
 - vi Surrogate's Court Procedure Act § 1726.

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