THE DILEMMA OF KINSHIP CARE:
GRANDPARENTS AS GUARDIANS,
CUSTODIANS, AND CAREGIVERS
OPTIONS FOR REFORM

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1996 Edgar A. Sandman Fellows

APRIL 1998
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THE DILEMMA OF KINSHIP CARE:
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OPTIONS FOR REFORM

EXECUTIVE SUMMARY

Kinship care may be defined as any form of residential caregiving provided to children by relatives. Kinship care may be initiated by private family agreement or may involve the custodial supervision by a local social service agency. According to the Census Bureau, 4.3 million children lived with relatives in 1992. Grandparents provided homes for 2.4 million of these children. Grandmothers make up more than half of the total number of kinship caregivers, comprising between 50% and 60%.

The primary focus of this study is an examination of the effectiveness of legal procedures and practices throughout New York regarding grandparents and other caregivers raising their kin as adoptive parents, guardians, legal custodians, foster parents and informal custodians. The Government Law Center (GLC) study sought to determine whether grandparents and other kin have the decision making authority that is necessary to care for children while maintaining the best possible relationship with the natural parent. It also investigated routine procedures with special emphasis on the New York Surrogate’s Court
Procedure Act § 1726, Family Court Act § 1017, and Social Service Law § 383-c.

Written surveys and personal interviews with family court judges, family and surrogate's court clerks, law guardians, social services employees and grandparents who are raising their grandchildren provided much of the source material in this study. In addition, a survey of relevant statutes in all fifty states was conducted. This information formed the basis for many of the legislative options presented in Part IV.

While kinship care is not new, the problems kinship caregivers face under current New York laws and practices impede their ability to serve the best interests of the children in their care.

These problems include:

• Grandparents and other caregivers are often unable to obtain prompt medical treatment for children in their care.

• Inconsistent school district policies regarding school enrollment may prevent enrollment of a child in one district but allow for enrollment in a different district.

• Temporary delegations of parental authority are generally not authorized by statute.

• Standby guardianship is underutilized, due to a lack of recognition of its potential for appointment of a guardian in estate planning.

• Suitable relatives are often not informed of the opportunity to become foster parents - contrary to the mandate under § 1017 of the Family Court Act.

• The benefits of "open" adoption law (Social Service Law § 383-c) are available only

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1 The surveys are on file at the office of the Government Law Center

2 Pub L 105-89, Adoption and Safe Families Act, § 403 encourages states to provide standby guardianship for incapacitated and debilitated parents and guardians
to foster children, and "open" adoption of foster children creates procedural complexities that result in unnecessary termination proceedings.

- Practitioners disagree about the authority of guardians, legal custodians, and informal caregivers to make important decisions for a child in their care. The statutes fail to set forth working definitions that clarify and compare the roles of the three levels of care.

This report discusses the difficulties grandparents and other kinship caregivers face under current law; reviews how other states have responded to these difficulties; examines the legal and policy issues that must be confronted in deciding how to serve the best interests of children in their grandparents' care; and offers legislative options based on an analysis of the various problems.

Policy makers should consider the following options in order to serve the best interests of children in their grandparents' care and to alleviate the difficulties grandparents and other caregivers face:

1. Amend § 2504(5) of the Public Health Law to Cover Ordinary Medical Treatment

2. Enact a Statute That Permits a Parent, Guardian, or Legal Custodian to Designate an Agent to Consent To Any Medical Treatment on Behalf of a Minor and Exempt Health Care Providers from Liability If He or She Relies In Good Faith Upon the Representation

3. Amend Education Law § 3212 to Provide That an Informal Custodian Is a "Person In Parental Relation" to the Child

4. Permit a Parent, Guardian, or Legal Custodian to Authorize a Child's Caregiver to Enroll a Child in School and Provide That the Residency Requirement for Free Tuition May Be Met by Informal Caregivers With Whom a Minor Intends to Reside Permanently

5. Enact a Parental Power of Attorney Statute
#6 Amend Family Court Law § 1017 to Require Proof That Suitable Relatives Have Been Given the Opportunity to Become Foster Parents

#7 Create a Kinship Adoption or a Kinship Guardianship That Ameliorates the Hardships Facing Relatives Whose Only Current Choice Is to Adopt

#8 Encourage the Use of Mediation Prior to Court Enforcement of an Adoption Agreement

#9 Amend Domestic Relations Law § 115-b and § 117 to Permit Enforcement of Cooperative Adoption Agreements in All Cases

#10 Enumerate the Authority and Rights Associated with Guardians of the Person and Legal Custodians

#11 Add "Legal Custodian" to Statutes That Give Authority or Responsibility to "Parents and Guardians"

The problems and options presented above are the product of a study on kinship care by the 1996 Edgar A. Sandman Fellows. The topic expands on the 1995 White House Mini-Conference on Aging, "Grandparents as Caregivers: The Legal, Economic, Social and Policy Issues of Kinship Care," sponsored by the Government Law Center of Albany Law School (GLC) and responds to one of the resolutions related to grandparents raising grandchildren which was passed by the 1995 White House Conference on Aging, namely that "financial, social, and legal supports be given as needed to grandparent caregivers and that caregivers be ensured access to public benefits and services."
NOTE

In endeavoring to translate the findings of our research into a useful discussion of ways to assist families who are taking care of family, three assumptions were considered necessary: 1) information gleaned from written surveys provided valuable research data but was to be viewed as a compilation of anecdotal evidence; 2) generalizations concerning family custodial arrangements were fraught with the potential for error when attempting to portray complex individual circumstances, but were still necessary to a discussion of legislative options; and 3) obstacles facing grandparents raising their kin is an elder law issue, regardless of the age of the kinship caregiver.
ACKNOWLEDGEMENTS

We would like to express our appreciation to all who contributed to this endeavor, particularly Professor Katheryn Katz of Albany Law School, Patricia Salkin Associate Dean and Director of the Government Law Center of Albany Law School, and Rose Mary Bailly, Esq., Coordinator of the Government Law Center's Aging Law & Policy Program, for their insightful comments and editorial assistance. We would also like to thank Jeffrey Li, ALS Class of '98, for his creative assistance in developing the computerized charts that appear in the Appendices.

It is our hope that this study may enable kin to better serve the best interests of our children.
I. INTRODUCTION

For many, the old adage - "family takes care of family" - rings true today. Approximately 2.2 million children currently live in homes without a parent present and over two thirds of these children live with grandparents and close to one million grandparents care for their grandchildren without the assistance of either natural parent. This number is expected to grow as the baby boom generation becomes grandparents and their children become parents. Kin caring for kin may not be a uniquely modern phenomenon, but the magnitude of our modern "reparenting" situation certainly is.

There are no "typical" grandparent caregivers. They range in age from thirty to over eighty years old. They are grandparents and great-grandparents. They may be African

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1 This Government Law Center (GLC) paper focuses on 1) the dilemmas of informal custodians, 2) information and access to kinship foster care, 3) open adoption; and 4) custody and guardianship. Grandparent visitation, third party custody disputes between parents and kinship caregivers, welfare reform, child care, and housing discrimination are, for the most part, beyond the scope of this study.


4 AARP Grandparent Information Center, Grandparent Headed Households and Their Grandchildren Leaflet (1994)(hereinafter Grandparent Headed Households Leaflet). Forty-four percent of the reported reasons that grandparents have assumed the primary caregiving role for their grandchildren is substance abuse by the parent(s). Id This number is expected to keep pace with the upsurge of the teenage substance abuse and HIV/AIDS. Id

5 "Historically, grandparents have been the stabilizing force for families during periods of crisis." Herbert Stupp, New York City Department for the Aging, Unplanned Parenthood: Grandparents Raising Grandchildren, Policy Recommendations Submitted to the White House Conference on Aging 9 (1995)(hereinafter Unplanned Parenthood).

American, Caucasian, Hispanic, and Latino. They include the affluent, the middle class, and the poor; They reside in urban, suburban, and rural communities.

Despite their differences, grandparents are raising grandchildren for similar reasons. The children may come into their care because of a parent's death, divorce, or incarceration, or a parent's financial, social, or health problems. The increase in one parent families, absentee fathers, youthful mothers, and parental drug addiction have also challenged grandparents to bridge gaps between generations.

While the bridges grandparent caregivers build are unique to each family situation, their caregiving arrangements are usually classified into two major categories - formal care and informal care. In a formal care arrangement, the judicial system or the state becomes involved and adoption, guardianship, legal custody, or foster care results. The formal caregiver has a recognized legal status and the authority to make decisions regarding schools, medical care, insurance, and other routine care situations. In an informal care arrangement, neither the judicial system nor the state is involved. The informal caregiver has no recognized legal status and the

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7 Grandparent Headed Households Leaflet, supra, at 1


9 Deborah Chalfie, AARP, Going it Alone: A Closer Look at Grandparents Parenting Grandchildren 4 (1994)(hereinafter Going it Alone). (Twenty-seven percent midlife and older grandparent caregivers live at or below the poverty level, 14 percent are near poor; and 56 percent of grandparent caregiver households have incomes of less than $20,000.)

10 Id., see also Unplanned Parenthood, supra, at 9 (A study of 11,000 families involved in the kinship foster care program revealed that 77 percent of the children in the study could not be cared for by their parents due to substance abuse by their parents. Id

11 A Tangled Web, supra, at 1.

12 For a concise overview of informal care as well as other issues presented in this report, see June Melvin Mickens and Debra Ratttermman Baker, Making Good Decisions About Kinship Care, ABA Center on Children and the Law (1997).
caregiver's authority to make decisions is not uniformly recognized. Nevertheless, the informal care arrangement is often preferred by families because formal care arrangements, i.e., guardianship, adoption and custody, are not considered necessary for decision making and/or they may be regarded as antagonistic to otherwise amicable family relationships."

While many states have recently expressly recognized the importance of relatives within various custody and guardianship statutes,\footnote{You Are Not Alone, supra. at 631} the legal system frequently fails to recognize or to facilitate the role of family members such as grandparents or other relatives who voluntarily and informally assume the role of caregiver for children on a short or long term basis. As one commentator describes it, "much remains to be done."\footnote{See, e.g., N.Y Family Court Act § 1017 (McKinney 1997) (mandates a preference for placement with suitable relatives upon a finding that a child is in need of a caregiver other than his or her parents).} This study included a review of what other states have done or are in the process of doing, and written surveys and personal interviews with family court judges, family and surrogate's court clerks, law guardians, social services employees and grandparents in New York who are raising their grandchildren. In the concluding phase of the study, options for reform were presented to a Roundtable of representatives from these groups\footnote{For instance, the distinctions between informal caregivers, guardians, and legal custodians are not clear. Even between guardianship and legal custody, there is much disagreement. See GLC survey respondents' comments regarding practical distinction between guardianship and legal custody. The chart of the results is included at Appendix A. The survey results are on file at the office of the GLC.} for their review and comment. This study is intended to provide legislators and policy makers with a perspective on potential legislative reforms that can

\footnote{The Roundtable Discussion was held on November 15, 1996 at the GLC. The participants included representatives from Albany Law School, the Area Agencies on Aging, the Assembly Aging and Judiciary Committees, Brookdale Grandparent Information Project, Head Start, the Judiciary in Family Court, New York State Law Guardians, New York State Intergenerational Network, New York State Office for Aging, the Office of Court Administration, Statewide Youth Advocacy, and several grandparent support groups.}
address the legal problems facing kinship caregivers in the following areas: (1) informal custody; (2) custody challenges; (3) kinship foster care; (4) "open" adoption; and (5) guardianship and legal custody.

II. DILEMMAS OF KINSHIP CAREGIVERS

The dilemmas facing informal custodians involve the status of their authority to consent to medical treatment, enroll or be responsible for a child in school, and to make other routine decisions.

A. Medical Consent

Grandparents are often unable to obtain prompt medical attention for a child in their care because hospitals and other health care providers are reluctant to accept their authority. The authority of a caregiver to consent to medical treatment in New York depends on two factors: the caregiver's legal status and the nature of the treatment for which consent is sought. Both formal and informal caregivers can consent to the immunizations mandated by the state department of health. However, the consent of the informal caregiver must be authorized by the parent, guardian or legal custodian.

For other medical treatment, formal caregivers (a guardian or legal custodian) have the authority to consent provided their order of appointment so stipulates. Informal caregivers have no authority to consent. A health care proxy cannot be used to delegate an agent for someone


18 NY Public Health § 2504(5) (McKinney 1996). See also NY Mental Hygiene § 80.00 et seq (McKinney 1996)
else," and while an attorney-in-fact under the power of attorney law may have the authority to make health care decisions for a child, the suggested statutory form, the common use of an attorney to draft a power of attorney instrument, and the attendant difficulties of proceeding under a power of attorney have resulted in its not being recognized nor commonly used for the purpose of delegating medical decision making authority to an agent.21

In the absence of legislation in this area, hospitals and other facilities have developed various institutional policies regarding the authority to consent to medical treatment. The inconsistencies among the various policies have further complicated the matter.22 Some hospitals require proof of a legal relationship to the child, such as guardianship or legal custody, in which the caregiver has been granted the authority to consent to treatment.23 Other hospitals recognize a writing signed by a parent or guardian that gives a grandparent or other non-parent the authority to consent to treatment on behalf of a minor.24 For a number of the caregivers who

19 N.Y Public Health Law § 2981 (McKinney 1996) A competent adult can appoint an agent to make health care decisions on the adult's own behalf. See Office of the Attorney General, State of New York, Acts Which by Public Policy May Not Be Delegated to an Agent: Formal Opinion No. 84-F16 (1984)(Durable powers of attorney are primarily financial tools and cannot be used to designate an agent to make a principal's health care treatment decisions.)

20 Vincent J Russo and Marvin Rachlin, NEW YORK ELDER LAW PRACTICE § 38.9 (West 1997). See Gen Oblig Law § 5 -15021 (McKinney 1996)

21 GLC survey and interviews with grandparents participating in grandparent support groups. The survey results are on file at the office of the GLC.

22 Data obtained from a telephone survey of twenty hospitals in New York State conducted by the GLC in July 1996. The survey results are on file at the office of the GLC.

23 The GLC survey indicated that approximately 45% of the custody petitions in New York City and Long Island were filed for the purpose of obtaining a child's medical care but, throughout the remainder of the State; a much smaller percentage of custody petitions were filed for the purpose of obtaining a child's medical care. The survey results are on file at the office of the GLC.

24 Certain educational institutions also allow a caregiver's consent via permission of the parent or guardian. One school provided a form entitled "Parental Consent - Delegation for Medical Treatment" which authorized a parent or legal guardian to authorize a named individual to consent to medical treatment if the parent or guardian cannot be reached. The form must be renewed annually.
have taken on the parenting role because of parental drug addiction or other reasons that makes
the parent unavailable, this latter requirement may be impractical, or even impossible, and thus a
petition for custody or guardianship—the only alternative—is necessary.

Recognizing parental delegations of authority to consent to medical treatment would
lessen overall uncertainty for many caregivers and could protect medical providers who accept a
caregiver's consent from liability if parents subsequently object to the treatment. It would also
lessen the number of court petitions initiated solely for the purpose of obtaining medical consent
authority.

From the Roundtable discussion and the surveys conducted by the GLC, it appears that a
consensus is growing around the notion that New York needs a law authorizing a delegation of
parental authority for medical treatment of a minor so long as the delegation is signed by the
parent or guardian and witnessed or notarized. There also appears to be a growing consensus in
favor of immunity on behalf of medical providers who rely in good faith on such a delegation of
authority. One option which received widespread support at the Roundtable discussion was the
creation of a statute that would allow a parent to delegate in writing the authority to consent to
any medical treatment on behalf of a minor. Some members of the Roundtable group suggested
enhancing the procedural safeguards by adding a requirement that the delegation be witnessed.
Participants were less enthusiastic about a proposal to permit a relative to consent to medical
treatment based on the relative's representation in an affidavit that he or she is related to the child

23 See note 10 supra

26 This option would be similar to existing statutes in California and the District of Columbia. See D.C.
and the parent is unavailable to give consent." Many participants expressed concerns about the undermining of parental authority and the potential for fraud.

B. School Enrollment

Caregivers are often either uninformed or misinformed about the rights of a minor to attend school without paying tuition in the district where the caregiver resides.

New York Education Law § 3212 places responsibility for a child's attendance at school upon a "person in parental relationship." Such persons do not include informal caregivers if the parent is still available in the community, that is, the parent has not abandoned the child or can be found. Thus, a grandparent could have a child living with him or her but not be in charge of the child's education - a non-present natural parent would still be responsible for the child's educational readiness and attendance.21

The threshold responsibility requirement is not the same as the residency requirement. New York Education Law § 3202 provides that a child is entitled "to attend the public schools maintained in the district in which such person resides without the payment of tuition".22 If a student does not "reside" in a particular district, the student will be required to pay tuition if the student chooses to attend school in that district.


28 "A person in parental relation to another individual shall include his father or mother, by birth or adoption, his step-father or step-mother, his legally appointed guardian, or his custodian. A person shall be regarded as the custodian of another individual if he has assumed the charge and care of such individual because the parents or legally appointed guardian of such individual have died, are imprisoned, are mentally ill, or have been committed to an institution, or because they have abandoned or deserted such individual or are living outside the state or their whereabouts are unknown." N.Y. Educ. Law § 3212(1) (McKinney 1997).

The statutory definition of a student's residence is the place where the student is regularly provided with food, clothing, and shelter. residence for public schooling is also based on the student's physical presence in the district with the intent to remain. The presumption is that a student resides with his or her parents.

This statutory presumption may be rebutted “by examining the totality of the circumstances.” The following factors are taken into consideration:

1) whether the student is living apart from his/her parents for reasons other than to take advantage of the educational programs of the district;
2) whether a total and irrevocably permanent transfer of custody and control has occurred; and
3) whether the student's current circumstances meets all indicia of residency.”

The fact that the person seeking to enroll the student is the student's "guardian" or "legal custodian" alone does not satisfy the residency requirements for the child. On the one hand, this legal status is inherently not permanent; on the other hand, it must be shown that such individual has indeed taken on the care and custody of the child. In addition, overcoming the presumption that a child resides with his or her parents by showing that the caregiver has taken on the care and custody of the child may prove even more difficult for informal caregivers who, by definition, have no legal relationship with the child, no legal obligations to support the child, and no formal documentation to support the assertion that they have taken on the permanent care and custody of

30 N Y. Family Court Act § 1012(f)(A)(Mckinney 1989)
a child. Even an informal custodian who has obtained the parent's written delegation of care and control cannot rebut the presumption. If the parent continues to support the child while the child resides with grandparents, the transfer is considered temporary and the student must pay tuition.35

Despite the fact that State Education Department Guidelines indicate that a court order is not necessary to establish a residence apart from one's parents where the child's actual and only residence is with the person with whom the child lives,36 eleven counties surveyed37 require court papers or notarized documents showing guardianship before a non-parent caregiver could enroll a child in school. Fourteen counties require court papers or notarized documents showing legal custody. In other districts, policies include requiring affidavits verifying custody or letters from parent(s), or filling out a school district's informational form. The City School District of The City of New York has specific enrollment regulations38 which state that a nonparent seeking to register a student in a public school in the New York City School District need not present evidence of legal guardianship. The non-parent must, however, "explain to the school the circumstances under which the student came to reside with the nonparent."39 Three counties have no set policy; they make decisions on a case by case basis. 40


37 Data obtained by a telephone sampling of 35 counties in New York State conducted by the GLC. A compilation of the data is on file at the GLC office.

38 Regulations of the Chancellor, City School District of the City of New York, No. A-150, issued 11/1/94.

39 Regulations of the Chancellor, City School District of the City of New York, No. A-150, 2.2.1, issued 11/1/94.

40 See note 37 supra
While responsibility for a child's education and eligibility for free tuition have separate criteria, the requirements of individual school districts appear to consolidate the two. For example, guardianship may meet the responsibility criteria but it does not necessarily meet the residency requirement; however, it may be accepted as evidence of residency. Also, legal custody does not *per se* meet the responsibility criteria, but it may be accepted as both proof of responsibility and residency. Furthermore, a full time informal caregiver may meet both the requirement of responsibility and residency, but that status may not be accepted as satisfying either element. The problems for part time informal custodians are even more complex as the following example illustrates. A grandmother cared for a child three school days a week absent a court order or custody agreement. The father supported his daughter, cared for the child two days a week and alternated weekends with the child's mother. The daughter was held to reside in the school district of the father. She could not be enrolled in the grandmother's school district where she lived the greater part of the school week without being subjected to tuition requirements and the grandmother could not be responsible for the child's educational activities.

C. General Delegations and Transfers of Parental Authority

1. Delegations

A parent may find it necessary to place a child with relatives for a short period of time, for example, when a parent goes away on vacation or business or, for a long period of time in more extreme circumstances, for example, when the parent has problems with substance or alcohol.

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42 *Id*
alcohol abuse. Legal custody or guardianship requires relinquishing a greater degree of parental authority than may be necessary or desired. Parents may fear losing authority over the child or resent the caregiver’s assumption of legal authority. Rather than choosing these formal alternatives, many parents resort to informal custody arrangements and delegate decision making authority to a relative through a private oral or written agreement. 41

In New York, statutes permit the delegation of parental authority for: 1) transfers of "care and custody" to the local social service department; and 2) the designation of a relative over the age of twenty-one to accompany a hunter between twelve and fourteen years old and hold the proper permits. 42 New York’s General Obligations Law also appears to permit a general delegation of powers related to personal relationships and affairs pursuant to the power of attorney statute, 43 however, there does not seem to be any general recognition of the use of this statute for the purpose of parental authorization.

Aside from appearing to permit a delegation of authority, to the extent that New York law appears to give an informal caregiver some authority to make routine decisions, the statutes provide no useful guidance as to the creation of the informal relationship or the indicia of the relationship. Moreover, the description of the informal relationship appears to vary from statute

41 For instance, many states follow the Uniform Probate Code’s Delegation of Parental Authority Statute. See Appendices B and B-1.

42 N Y Soc. Serv. Law § 384-a(1) (McKinney 1996) (the statute also permits "any person to whom a parent has entrusted the care of a child" to authorize such a transfer)


44 N Y. Gen. Oblig. Law § 5-1502I(12) (McKinney 1996) (Section 5-15021 of the General Obligations Law provides that the agent may be appointed: "to do any other act or acts, which the principal can do through an agency, for the welfare of the spouse, children, or dependents of the principal or for the preservation and maintenance of the other personal relationships of the principal to parents, relatives, friends and organizations.").
to statute. The relationship may be described as:

- a "person in parental relation to a child"\(^{47}\)
- a "person who has assumed the charge and care of the child"\(^{44}\)
- "the person or persons having the actual custody of such minor or minors"\(^{44}\)
- "a person having custody of the infant"\(^{50}\)
- "a person with whom an infant resides"\(^{51}\)
- anyone who has a child "dependent upon them for care."\(^{52}\)

The GLC survey asked if parents should be able to delegate their authority in a notarized writing.\(^{53}\) Eighty-four percent of the respondents replied yes. Of these positive responses, 28% thought the effective period of the delegation should not be limited; 39% thought the effective period should be limited. Of those who wanted some limitation on the period of time, 32% selected a period of one year, 40% selected as agreed upon between the parties, 16% selected six months, 6% selected three months, and the remaining 6% evenly split their selections among longer periods of three years, two years or eighteen months.

\(^{47}\) This phrase is used in both the Education Law and the Public Health Law. The Public Health leaves out step-parents. Both definitions leave out full time informal caregivers if the parents are available, and legal custodians N Y Educ. Law § 3212 and N Y Public Health Law § 2164 (McKinney 1997)

\(^{48}\) N Y Pub Health Law § 442 (McKinney 1996)(a "person who has assumed the charge and care of the child")

\(^{50}\) N Y Art & Cult. Aff. Law § 35.03(2)(c)(McKinney 1996); N.Y. Art & Cult. Aff. Law. § 35.05 (McKinney 1996)(a person having custody of the infant)

\(^{51}\) N.Y. CPLR § 309(a) (McKinney 1996)(a person with whom an infant resides)

\(^{52}\) N.Y. Ins Law §§ 3216 (a)(3), 4235(f)(1), 4304(d)(1), and 4305(c)(1) (McKinney 1996)(anyone who has child "dependent upon them for care.")

\(^{53}\) See results of the survey at Appendix C
Although the Roundtable Discussion focused on the authority for health care decisions and school enrollment, participants expressed interest in further discussion regarding the concept of a general parental delegation of authority.

2. Transfers

In response to the upsurge in single parent families, some states have enacted standby guardianship statutes to address the absence of a second parent who could continue to make major decisions for a minor when one parent becomes incapacitated or dies.\textsuperscript{54}

Until the enactment of New York's standby guardianship legislation, the traditional method for appointing a guardian was by petition,\textsuperscript{55} will,\textsuperscript{56} or deed.\textsuperscript{56} Appointment by deed is somewhat of a misnomer because the deed is treated as a testamentary substitute rather than an \textit{inter vivos} designation.\textsuperscript{57}

Section 1726 of the SCPA, the standby guardianship statute, has two procedural alternatives for appointment of a standby guardian.\textsuperscript{58} Under the first alternative, a parent or guardian who has progressively chronic illness or is suffering from a irreversibly fatal illness can

\textsuperscript{54} These statutes were intended to assist single parents with HIV/AIDS in coping with the tragic foreseeability of their own incapacity, debilitation, and eventual death, and its effects upon their children. Margaret Valentine Turno, Practice Commentaries, Surr Ct Proc. Act § 1726, (McKinney 1996)

\textsuperscript{55} N Y Surr Ct Proc. Act § 1709 (McKinney 1996)

\textsuperscript{56} A person named in a will or deed has three months after filing for probate or filing the deed to qualify for appointment as guardian. 66 N.Y. Jur. 2d Infants § 143 (1987). The court has discretion and is not bound to appoint the one named. 66 N.Y. Jur. 2d Infants § 133 (1987).

\textsuperscript{57} N Y Dom. Rel. Law § 81 (McKinney 1996).

\textsuperscript{58} "Thus a deed by a parent appointing a guardian for his children is a testamentary instrument and does not take effect until his death." 66 N.Y. Jur. 2d Infants 130 (1987). \textit{See also} N.Y. Dom. Rel. Law § 81 (McKinney 1996)

\textsuperscript{59} \textit{See N Y Surr. Ct. Proc. Act} § 1726 (Mc Kinney 1996). \textit{See also} Appendix D.

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petition the court for the appointment of a standby guardian.\textsuperscript{60} Under the second alternative, the parent or guardian may designate a standby guardian in a private writing to which two witnesses attest. In addition to allowing parents to ensure what person will assume guardianship, New York's statute allows guardians to appoint or designate a standby; "thus a grandmother having guardianship of a child, could provide for a successor.\textsuperscript{61}

a. Petition Appointments

In a petition appointment, the court appoints a standby guardian to become effective upon incapacity or death (the choice selected by the petitioner).\textsuperscript{62} Incapacity is defined as mental impairment; it does not include physical impairment.\textsuperscript{63} Upon proof of the condition of the parent or guardian, the court will appoint a standby guardian if the interests of the child will be promoted.\textsuperscript{64} The appointment does not grant the standby guardian any immediate authority. The guardian's authority becomes effective upon the incapacity or death (or later consent) of the principal.\textsuperscript{65} This procedure gives an ill parent or guardian the comfort of knowing that the appointed successor is accepted by the court, and can act when needed.\textsuperscript{66}

\begin{itemize}
\item \textsuperscript{60} N Y Surr Ct Proc Act § 1726 (3) (n) (McKinney 1996)
\item \textsuperscript{61} Margaret Turano, Surr Ct Proc Act § 1726 Practice Commentaries (McKinney 1996).
\item \textsuperscript{64} N.Y. Surr. Ct. Proc. Act § 1726(1) (McKinney 1996)
\item \textsuperscript{65} N Y Surr Ct Proc. Act § 1726(3)(d)(i) (McKinney 1996).
\item \textsuperscript{66} Id
\item \textsuperscript{67} Id
\end{itemize}
b. Designation Appointment

Unlike the petition appointment, the written designation is not predicated on the existence of any chronic or fatal illness.48 Under the statute, a writing signed by the parent or guardian becomes effective only upon the parent or guardian's death, incapacity, or debilitation.49 The determination of debilitation — defined in the statute as a physical impairment — is accompanied by the principal's written consent to the commencement of the standby guardian's authority.50 When the person is physically unable to sign the consent, another can sign the writing in the person’s presence.51 As with the original designation, the consent must be witnessed.52 This procedure for designations of a standby guardian, essentially the same mechanism as a springing durable power of attorney,53 is New York's nearest approach to a statutory endorsement of a procedure for an informal (non-court) transfer of parental authority.54

Both a petition standby guardian and a designated standby guardian must inform the court of the commencement of the guardianship to ensure its continuation.55 The appointment may be

72 Id
74 Id
75 Except that a springing power of attorney would delegate the powers of the principal to an agent upon some expressed condition precedent, not designate a concurrent guardian. N.Y. Gen. Oblig. Law § 5-1506 (McKinney Supp. 1998).
rescinded after 90 days unless proof of the principal's death or incapacity is provided to the court. A designated guardian must provide similar proof within sixty days, or the designation expires. Unlike the appointed standby, the designated standby must petition for appointment within that period.

In New York the use of standby guardians has yet to become common. Little more than half of the seventeen courts responding to the GLC survey said they have had occasion to make appointments using the statute. Seventy five percent of responding law guardians had not seen it used since its enactment in 1992. In addition New York State Office for the Aging Legal Service Providers also had not had occasion to use it.

Both pre-approved appointments and written designations offer significant planning tools for attorneys who are drafting powers of attorney, health care proxies, trusts, and wills for individuals who are parents or guardians of minors. The springing power of a standby guardian statute offers security beyond a will or deed. This fills an important niche in kinship care; however, it fails to create the availability of a continuum of care via a writing that does not need court approval.

Participants at the Roundtable Discussion expressed concern about this wisdom of appointing guardians before they are needed. The uncertainty of future circumstances and the

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78 Id

79 Primarily the statute would be used by Surrogate's Courts; therefore, the absence of appointments in Family Courts may be due to jurisdictional procedures.

80 Joyce McConnell, Standby Guardianship Sharing the Legal Responsibility for Children, 7 Md. Contemp. I. Issues 249, 266 (1995/1996) (hereinafter Standby Guardianship). "By design, the law prior to the 1994 Standby Guardian Law left the children of single parents unprotected, subjecting them to the likelihood that if their custodial parent became ill, there would be no adult legally authorized to step in and fill the vacuum of responsibility. It is the vacuum that the Maryland state legislature sought to fill when it contemplated the Standby Guardian Law."
quality of the principal's judgment were among the cited reasons for questioning the statute's
effectiveness in the kinship care setting. The possibility of court disputes arising when a parent
or principal guardian attempts to revoke the standby authority was also noted. These views
support the continuation of existing limitations on use of standby guardianship.

D. Kinship Foster Care

Although grandparents are not legally obligated to provide care for their grandchildren,
many feel an obligation to assist. Studies have shown that the placement with relatives,
particularly grandparents, limits the trauma of family separation and allows continuity of
religious, ethnic and cultural values. Nevertheless, providing care and custody for a child
presents a financial burden to a grandparent or other relative who has retired or who may need to
retire in order to care for children in need of full-time care. Recognition that placement with
relatives generally serves the child's best interests led in part to the enactment of Section 1017 of
the New York Family Court Act which mandates a preference for placement with relatives when
a child is deemed to be in need of out-of-home care.81

Under the statute, if a relative is deemed suitable, the local social services commissioner
must inform the relative of the opportunity of, and procedures for, becoming a foster parent.82
Next, the commissioner must report to the court concerning whether a suitable relative exists
with whom the child may appropriately reside and whether such a relative seeks approval as a

81 See also Social Service Law § 384-a(1-a) (McKinney 1996)("Prior to accepting a transfer of care and
custody, a local social services official shall conduct an immediate investigation to locate relatives of the child and
to determine whether the child may appropriately be placed with a suitable person related to the child and whether
such relative seeks approval as a foster parent pursuant to this chapter for the purposes of providing care for such
child ")

82 N Y. Family Court Act § 1017 (McKinney 1989).
foster parent, or prefers to provide free care and custody for the child during the pendency of any court orders. New York is only one of a handful of states that statutorily authorizes relatives to receive the same payment rate as nonrelatives — one of the reasons that New York’s legislation has been on the forefront of progressive kinship care legislation. However, federal legislation now requires all states to seek out relatives as foster parents.\(^4\)

Despite this statutory mandate, kinship foster care has been utilized unevenly throughout the state. Placement with relatives generally occurs in New York City, partly because the supply of foster parents has not been able to keep pace with the need.\(^5\) Suitable relatives are also generally informed of the possibility of becoming foster parents in the Buffalo region. The GLC survey, however, indicates that elsewhere, suitable relatives are apparently not regularly informed of this possibility. In many upstate regions, for example, relatives are often told to file for custody or are steered toward caring for the child informally. Consequently, kinship foster care is uncommon outside of New York City and Buffalo. A recent report by the Office of the Comptroller confirms that this situation is the result of management decisions by the local social services department.\(^6\)

Many reasons have played a role in this development, including the cost of kinship foster care, concerns regarding abuse and misuse of the financial benefit of the system, county attempts

\(^{3}\) ld

\(^{4}\) 42 U.S.C § 671(a)(18). This law requires states consider giving preference to an adult relative over a non-related caregiver ld See also P.L 105-89, Adoption and Safe Families, Section 303 creates an advisory panel to study states’ use of kin in foster care.

\(^{5}\) Interview by Fellows with attorneys in New York City. The results of these interviews are on file at the office of the GLC

\(^{6}\) New York State Office of the Comptroller, Division of Management Audit, Department of Social Services Kinship Foster Care Report 95-S-106, 6 (Nov. 1996).
to maintain costs, fear of ready access by abusive parents, and ignorance of how the system is intended to work. Discussions with legal professionals in upstate New York reflect a persistent view that families in New York City and the Buffalo area rotate children from one relative to another, motivated solely by the desire to continue to receive foster care payments -- which are nearly double Family Assistance payments. Also, when the child has been abused by the parents, placement with kin is sometimes considered as endangering the child since abuse and neglect can be intergenerational in nature. Furthermore, some courts appear reluctant to give preference to kin since the parent may have easy access to the child, despite structured visitation requirements imposed by local departments of social services.

Studies by the Child Welfare League's Task Force on Permanency Planning show, however, that kin have strengths which benefit children and parents. These studies found that "the majority of kinship care families ... were poor but stable and hardworking families who cared about each other and could not understand the path that their children or siblings had chosen." Another study concluded that grandparents are as successful at child raising as biological parents." A 1990 New York City case study found that placement with grandmothers

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87 This information has been obtained from interviews conducted by the GLC. The results of these interviews are on file at the office of the GLC.


89 ld. at 10


91 Glenn Saltzman and Patricia Pakan, Feelings in the Grandchildren Triad (or Relationship), 2 Parenting Grandchildren: A Voice For Grandparents 4-6 (1996)
who had raised the dysfunctional parent generally does not perpetuate the dysfunctionality." Rather, most of the cases reviewed revealed that the parent was the only dysfunctional family member\(^2\) and the parent's negative and irresponsible behavior was triggered by substance abuse problems.\(^3\)

Although preferential placement with relatives was premised on kinship foster care arrangements being limited in duration, kinship foster care placements are not so limited. The placements average 4.7 years.\(^4\) These arrangements have been criticized as becoming "too comfortable" for parents because parents do not have to assume full-fledged responsibility for the child's care and the children receive greater financial assistance than the parent could have offered. The long period of time is one factor in the general disregard of the statutory preference for relatives as foster parents. It sometimes does not further the State's ultimate goal of permanency planning for children. This goal is that "every child deserves a caring, legally recognized and continuous family in which to mature."\(^5\) Until recently, this meant that reunification with the biological parent(s) was the paramount goal of permanency planning. However, the surge in parental abuse has caused federal and state government to rethink the

\(^2\) Bernard Meyer & Maryjane Lunk, *Kinship Foster Care: the Double Edged Dilemma* Intro (1990) (hereinafter *Kinship Foster Care: the Double Edged Dilemma*) "Based on data gathered from 100 New York City case records, representing 300 children in cases that were active in the Child Welfare Administration's Direct Care unit between July 1987 and August 1989. Other material came from discussions and interviews conducted with 48 people involved in various aspects of the system and from the State Department of Social Services data and Family Court observation"

\(^3\) *Id*

\(^4\) *Id* From 1987 to 1996, the number of child abuse cases reported nationally rose from 2.2 million to 3.1 million. See John Gibaut, *Nobody’s Child*, ABA Journal 451 (December 1997)


\(^6\) *Kinship Foster Care: the Double Edged Dilemma*, supra, at 14
importance of reunification." Further, the Task Force on Permanency Planning of the Child Welfare League of America has recognized that part of the problem revolves round the definition of family." Children living with their grandparents are living with family, regardless of whether the state government views family as a more limited entity, such as a nuclear family."

E. Cooperative Adoption for Kinship Caregivers

"The decline in willing anonymous biological parents and the concomitant rise in special needs children seeking adoption has altered the face of adoption in recent years. This change in the adoption pool has shifted adoption from a service catering to infertile couples to a child welfare service." Currently, relatives and foster parents make up over sixty percent of those

97 Adoption and Safe Families Act 1997. Pub. L. 105-89 [H.R. 867] Nov. 19, 1997. The law amended Section 471(a)(15) of the Social Security Act (42 U.S.C. 671(a)(15)) to decrease emphasis on reunification with natural parent and that reasonable efforts to reunite a child with a parent can be qualified by the state's concern for the safety of the child

98 Id

99 "The most important issue is whether the child feels secure in the caretaker setting" - whether the placement is in the child's best interests. Second, today's families are rarely limited to mom, dad, and children. Step-parents, step-brothers and step-sisters, single parents, grandparents, step-grandparents, and even great-grandparents are frequently what a family considers "family." For example in Native American cultures and in many African American cultures, extended family is not a new phenomenon, but one that has existed for centuries. So, in essence, as it is implemented in New York, permanency planning really aims to return the child to his or her natural mother or father. And if that's not possible, it aims to place the child with another adult who is willing to take on the title of mother or father as an adoptive parent. Policy makers may need to take a second look at ideas of permanency planning in light of today's nontraditional extended family networks. If kinship foster care is indeed a policy which remains in effect, suitable kin should be informed of their rights. Id

100 "By the 1970's however, the increased availability of contraceptives and abortions as well as generally declining birth rate created a shortage of infants." Susan L. Brooks, Rethinking Adoption: A Federal Solution to the Problem of Permanency Planning for Children with Special Needs, 66 N.Y.U. L.Rev. 1130, 1137 (1991)(hereinafter Rethinking Adoption).

101 Id at 1137

102 Id
who adopt.\textsuperscript{103} The traditional anonymous adoptive parent is more anomaly than norm.\textsuperscript{104} In
general, the reasons for the increase in kinship adoption parallel the reasons for the increase of
kinship care.\textsuperscript{105} However, the dramatic increase in the number of children in the foster care
system has created a class of children trapped in foster care who could be adopted but are unable
to find willing adoptive parents. At present, up to 500,000 children are confined to the limbo of
foster care \textsuperscript{106}.

The traditional requirement of complete severance of the natural parent and the child has
become a formidable barrier to adoption by relative caregivers. Along with the complete
severance rule,\textsuperscript{107} two other legal doctrines have come under scrutiny in response to the need for
permanent homes for foster children: the parental rights doctrine\textsuperscript{108} and the best interest of the

\textsuperscript{103} "A majority of adoptions in this country are by relatives and stepparents Another fifth of adoptions
involve foster parents." Annette Ruth Appell, The Move Toward Legally Sanctioned Cooperative Adoptions Can It
Survive the Uniform Adoption Act? 30 Fam. L.Q. 483, 488 (Summer 1996)(hereinafter The Move Toward Legally
Sanctioned Cooperative Adoptions).

\textsuperscript{104} "A confluence of demographic and social changes has undermined this secretive adoption model, based
on the adoption of anonymous infants - now is an increasingly scarce form of adoption." Annette Ruth Appell,
Blending Families Through Adoption Implications for Collaborative Adoption Law and Practice, 75 B. U. L. Rev.
997, 1008 (September 1995)(Blending Families Through Adoption)

\textsuperscript{105} See text at pp 2-5 supra

\textsuperscript{106} Steering Committee on the Unmet Legal Needs of Children, Promoting the Adoption of Children: What
Lawyers Can Do, ABA 1 (1997)

\textsuperscript{107} Rooted not in the common law but in Roman civil law, the severance doctrine "adoption natur
\textit{umtatur}," had its first legislative endorsement in Massachusetts (1851). It did not enter English law until 1926.
Rethinking Adoption, supra, at 1135 It was enacted in New York in 1873. In the Matter of Jacob, 86 N.Y.2d 651,
660, 673, N E.2d 397, 411, 636 N.Y.S.2d 716, 729 (1995). "The adoption paradigm that has dominated most of this
century is one of exclusivity, secrecy and transposition, through which the adoptee - usually an infant - is taken
from one family and given to another, with all vestiges of the first family removed." Blending Families Through
Adoption, supra, at 997

\textsuperscript{108} Alexandra Dylan Lowe, Parents and Strangers The Uniform Adoption Act Revisits the Parental Rights
Doctrine, 30 Family Law Q 379 (Summer 1996)(hereinafter Parents and Strangers).
child doctrine.109

One response to the changing character of the traditional concept of family adoptions has been the development of open adoption, and, in particular, cooperative adoption.110 The word "open" has two distinct meanings. In its broadest sense, it connotes an adoption with any post adoption contact between the child (or the adoptive parents) and the biological parents. It leaves "open" the door between the child's past and future.111 In the narrow sense, it relates to the child's opportunity to be informed about his or her birth parents at a suitable time.112 Somewhere between these two extremes, "cooperative" adoption allows for an ongoing relationship between the biological parents, the adopting parents and the adopted child.

Within the past decade, at least eight states have enacted some form of enforced open adoption, and in one state a high court decision has sanctioned enforcement of adoption agreements.113 The eight states now permitting legal enforcement of future contact adoption agreements offer another avenue to adoption in addition to private agreements or court ordered


110 "A handful of states have begun to find these agreements enforceable." Randall B. Hicks, ADOPTION IN AMERICA 111 (Wordslinger) (1995)

111 Open adoption defined as "an adoption in which the birth parent meets the adoptive parents, relinquishes all legal, moral and nurturing rights to the child, but retains the right to continuing contact and knowledge of the child's whereabouts and welfare " Rethinking Adoption, supra, at 1141, quoting A. Sorosky et al, Open Adoption, 21 Soc. Work 97, 100 (1976).

112 Open refers to "ending the closed, complete confidentiality" of adoption records The Move Toward Legally Sanctioned Cooperative Adoption, supra, at 493.

post-adoption contact. Court sanctioned agreements present an opportunity for both sets of parents and, in some instances, older adoptees to control the relationship and reap the benefits of open adoption. Oregon has developed a model for using adoption agreements between foster parents who are adopting and surrendering parents who are approaching a court termination of parental rights.\footnote{Minnesota has sanctioned enforcement of adoption agreements between relatives regardless of the circumstances surrounding the adoption.} In 1991, the New York Legislature enacted amendments to Social Service Law § 383-c which permits a parent who is surrendering a child for adoption to "make an agreement"\footnote{See discussion regarding enforcement in Legislative Options.} with the adoptive parents. New York's "conditional adoption" statute applies only to foster care children and their foster parents. It addresses only the fact that open adoption has been found to have particular benefits for children in foster care.\footnote{Minn Stat § 259 48 as amended July 1, 1997} These benefits are related to the desire to decrease the large number of children stranded in "permanent" foster care\footnote{N Y Soc Serv. Law § 383-c(3)(b) & § 383-c (b)(ii) (McKinney 1996).} and to fill the emotional needs of older potential adoptees.\footnote{"Contacts between birth families and foster families who subsequently adopt have been found to have positive consequences for the children and adoptive parents" Blending Families Through Adoption, supra, at 1014.} New York's statutory language is very sparse. In

\footnote{Increase in foster care - doubling in past two decades Blending Families Through Adoption, supra, at 1012 Maryjane Link, Permanency Outcomes in Kinship Care A Study of Children Placed in Kinship Care in Erie County, New York, Child Welfare League of America 509, 515 (1996) This article offers a study of adoption by relatives and indicates that children beyond the age of three are less likely to be adopted. Mediation and cooperative adoption attempt to increase the adoption of older children trapped in permanent foster care.} 

\footnote{"The startling rise in the number of children entering and remaining in foster care has profound implications for the nature of adoption. Many of these children will be legally severed from their birth families and adopted by foster families or relatives. These children usually know their birth families and may be unwilling or unable to relinquish contact with them. In these adoptions, "Secrecy is not only frequently impossible, but often advisable because these children remember their past and have emotional ties to their birth families. In many of these cases, adoptions do not involve the hallmarks of secrecy and confidentiality. Instead, foster-adoptees often}
the context of surrenders it describes the severance of parental rights and states the surrendering parent agrees to them "unless the parties have agreed to different terms." The statute does not address the approval, enforcement and modifications of such an agreements. What little case law there is regarding the enforcement of the agreement is split. One court has found the agreements enforceable, but another court has found only standing to petition for enforcement. However, there is growing opinion that enforcement will become the rule.

Openness in adoption and the legal enforcement of agreements could also assist families not yet in the foster care system who are in competition for the child's emotional and social ties. Often times, in kinship care, the natural parent contends with the kinship caregivers in an acrimonious struggle that guardianship and custody cannot permanently resolve. What may be best for the child is not best for the natural parent, yet there appears no acceptable compromise available to that parent.

Mediation may offer a technique for successful compromises. Indicators of what is appropriate for mediation describe "disputes [which] usually involve a continuing relationship between the parties creating a real stake in the outcome of the process, shared interest and/or responsibilities arising from the dispute and a range of acceptable solutions to meeting the

\[\text{\textsuperscript{120}}\text{ N Y. Soc. Serv. Law § 383-c(3)(b) & § 383-c (5)(b)(u) (McKinney 1996).}\]

\[\text{\textsuperscript{121} In re Gerald, 214 A.D.2d 445, 625 N.Y.S. 2d 512 (1st Dep't 1995).}\]

\[\text{\textsuperscript{122} In the Matter of Alexandra C., 157 Misc.2d 262, 596 N.Y.S.2d 958, 962 (Fam Ct., Queens Co. 1993).}\]

\[\text{\textsuperscript{123} Interviews by Fellows with legal practitioners in the Capital Region. The results of these interviews are on file at the office of the GLC.}\]
parties' need and minimizing future clashes.\textsuperscript{124}

F. The Choice of Informal or Formal Relationship between Grandparent and Child

A grandparent or relative who is caring for a child on a continuing informal basis will undoubtedly at some point question what authority can be exercised with respect to the child and whether it is necessary to establish a formal legal relationship with the child. At first blush, the answers to these questions appear quite simple: a grandparent or relative without a formal relationship with the child would lack authority to make decisions on behalf of the child; only grandparents or other relatives who had a formal relationship, such as adoption, guardianship, or legal custody, would have the legal authority granted under the statute governing that relationship. However, for grandparents in New York the choices and their differences are less than clear.

New York offers some statutory recognition of informal caregivers.\textsuperscript{125} Under various statutes, authority is granted to persons who stand in an informal relationship to a child, albeit the authority is for specified situations. It is difficult, however, to summarize the authority granted because the statutes do not use a uniform expression to denote informal caregivers. Instead, the statutes describe the relationship with a variety of phrases, some of which appear inclusive and

\textsuperscript{124} Court-Referred ADR in New York State Final Report of the Chief Judge's New York State Court Alternative Dispute Resolution Project 133 (May 1996)

\textsuperscript{125} 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 "lawful custody" and in practice family courts recognize who has the care, custody and control of such child. N.Y. Dom. Law § 71 (McKinney 1997) Court can make orders of visitation for brothers and sisters to visit their sibling as well as "any person who has physical custody of the child. N.Y. Dom. Rel Law § 75-e (McKinney 1996). New York like many states provides for notice to person(s) having care and custody of a minor when the minor is involved in a proceeding, but this notice usually does not extend any special status to the custodian. N.Y. CPLR § 1201 (McKinney 1997).
some of which may be inadvertently under-inclusive of the entire class of informal caregivers.

For example, if the caregiver can be described as a person in parental relationship to a child, the caregiver may make certain health care decisions; if the caregiver can be described as a person having custody, the caregiver can consent to employment or a contractual relationship for the child. It is unclear what circumstances would satisfy these statutory descriptions.

Consequently, informing informal caregivers as to the extent of their authority is fraught with uncertainty.

There is also a great deal of uncertainty surrounding the rights and responsibilities of formal relationships. While adoption is relatively straightforward, guardianship and legal custody lack clear distinctions, both in law and practice. To begin with, many laws regarding the care of children refer to "a parent or guardian." These statutes limit certain activities to parents or guardians, but the enumerated powers are often the same ones associated with a legal

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126 N.Y. Public Health Law § 2164 (McKinney 1997).

127 N.Y. Art & Cult. Affr. § 35.05 (McKinney 1997).

128 See Appendixes G, H and I See also responses to GLC survey question concerning the practical distinctions between legal custody and guardianship at Appendix A

129 See, e.g., N.Y. Al. Bev. Law § 65-c (2)(b) (McKinney 1997)(Only a parent or guardian can give alcoholic beverages to a person under the age of twenty-one); N.Y. Al. Bev. Law § 99-f (McKinney 1997)(Only a parent(s) or lawful guardians can petition the liquor authority to obtain a special permit allowing any person under the age of eighteen to perform as an entertainer in an establishment licensed to sell alcoholic beverages); N.Y. Civ. R. L. § 509 McKinney 1997)(Only a parent or guardian can provide written consent for the use of a minor's portrait or picture for advertising purposes); N.Y. Dom. Rel. Law § 15 (McKinney 1997)(Only a parent or guardian may consent to the marriage of a minor, unless to the minor's knowledge nor parent or guardian is living, then the written consent of the "person under whose care or government the minor or minors may be before a license shall be issued"); N.Y. Dom. Rel. Law § 15(2) (McKinney 1997)(Parents or guardians can consent to marriage); N.Y. Dom. Rel. Law § 15 (McKinney 1997)("If there is no parent or guardian of the minor or minors living to their knowledge, then the town or city clerk shall require the written consent to the marriage of the person under whose care or government the minor or minors may be before a license shall be issued."); N.Y. Ment. Hyg. Law § 9.90 (McKinney 1997)(Only a parent or guardian or the mental hygiene legal service may consent to the transfer of a mentally ill minor); N.Y. Pub. Health Law § 1399-ff (McKinney 1997)(only a parent or guardian can make a complaint regarding sale of tobacco products to their child); N.Y. Soc. Serv. Law § 384 (1)(d) (McKinney 1997)(Adoption), N.Y. Veh. & Tr. Law § 2410 (McKinney 1997)(Only a parent or guardian can allow an unattended child under sixteen to operate an ATV upon their property).
custodian.

On its face, only guardianship under New York law enjoys a very broad authority similar to that of a parent ranging from giving alcohol to a minor to consenting to the marriage of a minor. When a guardian is appointed by a court\footnote{Both Surrogate's Court and Family Court may appoint a guardian.} to oversee the person of a minor, that guardian assumes responsibility for the minor's care, custody, maintenance, and control. Guardianship includes almost all or all parental authorities and obligations, depending on the status of the parents.\footnote{A Family Court judge responding to the GLC survey stated that "when guardianship is transferred no residual rights [of a parent] remains until or unless retained by the court." See Appendix A.} Guardians, in a legal sense, are very similar to parents, falling just short of the ultimate replacement -- adoption.\footnote{If a parent is surviving, the parent may still have some residual rights, such as the authority to consent to the marriage of a minor N.Y. Dom. Rel. Law § 15(2) (McKinney 1997)}

Guardians, like parents, can be responsible for support;\footnote{N Y Dom. Rel. Law § 32 (McKinney 1997)} no other relatives share this responsibility.\footnote{N.Y. Penal Law § 260.05 provides that a "[p]erson is guilty of non-support of a child when, being a parent, guardian or other person legally charged with the care or custody of a child less than sixteen years old, he fails or refuses without lawful excuse to provide support for such child."} They also share similar responsibilities ranging from liability for damages caused by a minor over ten to liability for services rendered to a person under twenty-one and

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Guardians, however, do not always have the same legal relationship as a parent. A guardian has a fiduciary duty of the "highest and most sacred character." 66 N.Y. Jur. Infants § 262 (1987). The difference between a legally imposed fiduciary duty and the duty of a natural parent is the fundamental difference between a parent and a guardian. Only a parent can consent to the adoption of their child (if they have not somehow forfeited their rights), or in the alternative, a guardian can consent to the adoption, however, even here there is an exception - some benevolent organizations can consent if the actual person having custody can be found N Y. Ben. Ord. Law § 12 (McKinney 1951)

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There are many other instances of authority being granted singly to parents or guardians. See e.g., N.Y. Educ. Law § 802 (Mc Kinney 1997) (consent to instruction in the pledge of allegiance); N.Y. Educ. Law § 912-a (McKinney 1997) (consent to drug detection urine analysis in schools)
liability for support. While a guardian generally takes over when the child's parents have died, a guardian may be appointed even when the parents are still alive although, in such a case, the parents are not relieved of their obligations by virtue of the appointment.

A legal custodian has certain rights and responsibilities specifically authorized by statute, or pursuant to a judgment, decree or order of a court or otherwise authorized by law. Custody means the actual care and supervision of the minor for the purpose of providing care, maintenance, and control. There are a number of similarities between custodians and guardians, particularly with respect to both their authority and liability. Persons who are guardians or custodians can acquiesce to contracts involving the minor or employment of the minor, consent to the restraining of the child, be held liable for permanently neglecting the child or endangering the welfare of the child, and represent a minor in civil suit.

In addition, some statutes which include legal custodians alongside parents and guardians also include informal custodians.

135 N Y Family Ct. Act § 614(1)(d) (McKinney 1997). This definition, used in the GLC survey, received widespread acceptance

136 N Y CPLR § 1201 (McKinney 1997)

137 N Y Art & Cult. Affr. § 35.05 (McKinney 1997)(Only a "parent or parents having custody, or other person having custody of the infant" may acquiesce to court approval of a contractual obligation binding an infant, or to obtain or consent to the employment or exhibition of such minor as a model), N Y Pub. Health L. § 2442 (McKinney 1997)(Only a parent or guardian or a "person legally empowered to act on behalf of the human subject" may consent in writing to human research upon a minor), N Y Pub. Health L. § 2961 (18) and § 2967 (McKinney 1997)(Only a parent [who has custody of the minor] or a legal guardian can consent to orders not to resuscitate), N Y Gen Oblig Law § 3-112 (McKinney 1997)(Only a parent, guardian, local social services department, or foster parent is liable for property damages caused by a minor); N Y CPLR § 1201 (McKinney 1997)(an infant can appear by representation in court only by his parent(s) guardian, or legal custodian.)

138 N Y. Art & Cult. Affr. § 35.05 (McKinney 1997)(Only a "parent or parents having custody, or other person having custody of the infant" may acquiesce to court approval of a contractual obligation binding an infant, or to obtain or consent to the employment or exhibition of such minor as a model); N Y CPLR § 309(a) (McKinney 1997)(A parent or guardian or "any other person with whom he reside" may be the recipient of personal service upon an infant), N Y Pub. Health L. § 2442 (McKinney 1997)(Only a parent or guardian or a "person legally empowered to act on behalf of the human subject" may consent in writing to human research upon a minor); N Y. Pub Health L. § 2961 (18) and § 2967 (McKinney 1997)(Only a parent [who has custody of the minor] or a legal
But there remain some important differences between legal custodians and guardians besides the legal proceeding and the right to physical control. The authority of a legal custodian to consent to routine or major medical procedures for a minor is not found in any statute and in practice acceptance by medical providers of a legal custodian's consent is sometimes difficult to obtain.\textsuperscript{139} Obtaining acceptance of a legal custodian's authority is subject to the regulations of individual provider organizations, who may require guardianship.\textsuperscript{140}

Even guardians, and certainly legal custodians, sometimes have difficulty obtaining health insurance for a minor.\textsuperscript{141} New York's Insurance Law permits but does not mandate that health insurance policies cover persons upon whom a child is dependent. Policies routinely cover guardians, but grandparents in support groups have related incidences of denied coverage caused by confusion over what was contained in the policy.\textsuperscript{142} Legal custodians, however, have no statutory recognition as decision makers for health care of a minor and thus may find their
guardian can consent to orders not to resuscitate). N.Y. Gen. Oblig. Law § 3-112 (McKinney 1997)(Only a parent, guardian, local social services department, or foster parent is liable for property damages caused by a minor); N.Y. CPLR § 309(a) (McKinney 1997)(A parent or guardian or "any other person with whom he reside" may be the recipient of personal service upon an infant) N.Y. CPLR § 1201 (McKinney 1997)(an infant can appear by representation in court only by his parent(s) guardian, or legal custodian); N.Y. Educ. Law § 3212 (McKinney 1997)(Only a person in parental relation to a child can take charge of a child's education.)(A "person in parental relation to a child is defined as a child's "father or mother, by birth or adoption, his legally appointed guardian, or his custodian. A person shall be regarded as the custodian of a child if he has assumed the charge and care of the child because the parents or legally appointed guardian of the minor have died, are imprisoned, are mentally ill, or have been committed to an institution, or because they have abandoned or deserted such child or are living outside the state or their whereabouts are unknown"). \textit{See also} N.Y. Pub Health Law § 2164 (McKinney 1997)(a similar definition of a person in parental relation to a child provides that such a person can consent to immunization).

\textsuperscript{139} \textit{See} Section II A

\textsuperscript{140} \textit{See e.g.} N.Y. Ins. Law § 321(c) (McKinney 1997)(Only a parent or guardian can consent to release of medical information.)

\textsuperscript{141} Four separate provisions of the Insurance Law provide that a parent or person upon whom the child is "chiefly dependent for support, or a parent or person upon whom a child is "dependent" may obtain health insurance." N Y Ins Law §§ 4235(f), 4305(c), § 321(4)(c), § 3216(c)(4)(A) (McKinney 1997).

\textsuperscript{142} Interview with grandparents attending support groups in Westchester, Dutchess, Albany, and Saratoga counties.
health insurance precludes the addition of a minor in their custody. Other areas where the two relationships are treated differently by law include a guardian's ability to name a successor and the occasional use of joint custody.\footnote{There is no statutory authorization for joint guardianship in New York}

In addition, the term "legal custody" is not consistently used in the statutes, assuming that the terms used are intended to reflect legal custody. For example, a parent, guardian and "custodian" can be found to have permanently neglected a child if he or she fails to maintain contact during a year that a child is in foster care.\footnote{N.Y. Family Ct Act § 614(1)(d) (McKinney 1997)} Likewise, a parent, guardian or "other person legally charged with the care or custody of a child less than eighteen years old" can be found guilty of endangering the welfare of a child.\footnote{N.Y. Penal Law § 260.10(1) & (2) (McKinney 1997)} A parent, guardian, or "other person or institution having lawful control or custody of him" must consent before a child under sixteen can be restrained,\footnote{N.Y. Penal Law § 135.00 (McKinney 1997)} and a parent, guardian, or "other person having custody of the infant" can acquiesce to contracts involving a minor.\footnote{N.Y. Art & Cult. Affr. Law § 35.03 (1)(b)(c) (McKinney 1997). \textit{But see} N.Y. Gen. Oblig. Law § 3-107 (McKinney 1997) (parents and guardians need Surrogate's Court approval for contracts providing for certain services by an infant). \textit{See also} 66 NY Jur. 2d Infants § 249 (1987)("It is the general rule that a guardian has no power to make a contract upon or enforceable by his ward, although a guardian may under very limited circumstances bund his ward on a contract which is beneficial to the ward.").}

In sum, legal custody, whether temporary or permanent, entails fewer rights and less authority than adoption or guardianship,\footnote{AARP, \textit{A Guide to Kinship Care} 3 (1996)} and is less consistently and rationally used throughout New York's statutory law. Since custody is often awarded pursuant to a divorce, some of the
lack of empowerment for legal custodians may be because they, as parents, were already the guardian of their child.

The GLC survey provided definitions of legal custody and guardianship of the person and asked respondents to comment on the definitions.49 Fifty-six of the seventy-one respondents to the GLC survey answered that they agreed with the definitions of legal custody and guardianship of the person. Many of the fifteen who disagreed objected to the word "possession" that was offered in the definition of legal custody. All of these felt "possession should be replaced by a less pejorative word, one that does not connote a chattel." The only other major distinction made by the objectants regarded the difference between physical custody and legal custody, noting that legal custody may not mean "having the child in the physical presence of."

There was no agreement as to the "practical distinctions" between the authority of a guardian of the person and that of a legal custodian. The most common response received was that "there is no distinction," or "the distinction if any is unclear to most."

Anecdotal evidence from the GLC survey and a review of the statutes demonstrate the need to clarify and enunciate the rights, responsibilities, authority, and liability of informal and formal kinship caregivers. Kin should have correct information about the scope of their authority. That information could come from consistent and accessible terms, definitions and descriptions. This reports suggests the need for a statutory definition of "guardian" and "legal custodian" and a definition for "kinship custodian" and delineates within that category subcategories of informal caregivers. A consistent definition could assist in clarifying the rights, responsibilities and overall authority of informal caregivers.

49 See Appendices E & E-1.
III. LEGISLATIVE OPTIONS TO FACILITATE KINSHIP CARE

Solutions enabling kinship care may be as varied as the types of family relationships that come under the broad umbrella of kinship care. Commentators in the field offer a variety of suggestions. Some states have adopted one or more statutes that address aspects of kinship care. The following options are set forth as a starting point for discussion as legislators confront the task of bringing clarity and certainty to the authority of the kinship caregiver. This study begins with some proposals directed at New York's law that may also be adopted in other jurisdictions.

Option #1

AMEND SECTION 2504(5) OF THE PUBLIC HEALTH LAW TO COVER ORDINARY MEDICAL TREATMENT

Public Health Law § 2504 lists certain situations and persons that warrant legal recognition of the right to consent to medical treatment. In 1994, Section 2164 of the Public Health Law, which defines what "person(s) in a parental relationship" may consent to immunization of a child in their care, was amended to add a list of relatives who may consent to immunization. The resulting definition includes almost all kinship caregivers. This category of persons in a parental relationship could also be granted the power to consent to normal medical treatment. Such an authorization would enable kinship caregivers to obtain medical treatment without resorting to a guardianship proceeding.

The current statute addresses one situation -- immunizations. Expanding the statutory authority of caregivers so that they are empowered by law to consent to more general medical treatment would clearly address the scope of the caregivers' authority, and account for the parent's possible objection to the caregiver's medical treatment decision.
ENACT A STATUTE THAT PERMITS A PARENT, GUARDIAN, OR LEGAL CUSTODIAN TO DESIGNATE AN AGENT TO CONSENT TO ANY MEDICAL TREATMENT ON BEHALF OF A MINOR AND EXEMPT HEALTH CARE PROVIDERS FROM LIABILITY IF HE OR SHE RELIES IN GOOD FAITH UPON THE REPRESENTATION

In New York, informal and legal custodians cannot consent to medical care other than immunization and emergency treatment. In practice, some hospitals and medical facilities accept the consent of a legal custodian or a written authorization signed by the parent or guardian which pre-approves a relative's decision regarding medical treatment. There is no statutory authority regarding the procedure for such a written authorization other than the personal relations power contained in a general power of attorney, and that authority is not clearly stated.

Other states have developed solutions that lessen the uncertainty facing a grandparent caregiver who wishes to consent to medical treatment for a minor. Three elements of existing legislation are significant: first, who is authorized to consent, second, how the caregiver is authorized, and third, the type of medical treatment the consent covers.

With respect to who is authorized to consent, states have developed several alternatives. They include (1) persons designated in a writing by a parent or (2) persons authorized by law to consent.

The Health Care Consent Act, a model act promulgated by the Uniform Law Commission, permits parents to authorize anyone in writing to give medical consent. One of the Act's intentions was to assist "parents who want to delegate health-care decision-making to a

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temporary custodian of the children," such as a camp director or relative, may do so pursuant to the model act. The delegation must be in a signed, witnessed writing.

The Uniform Probate Code also contains a parental delegation statute that includes the power to delegate medical decisions. Many states have similar requirements ranging from the general power of attorney; to statutes specifically delegating parental authority, to a writing signed by the appointing person and witnessed by a person other than the health care provider.

Other statutes allow caregivers to consent to medical treatment for a minor in their care based on their relationship to the child. Some states provide a procedure for demonstrating the relationship. Texas, for instance, permits anyone to consent to treatment on behalf of a minor so long as such person signs a writing which includes his or her name and relationship to the child. California allows the grandparent or relative to consent so long as the relative states in an affidavit that he or she has notified the parent or legal custodian that he or she intends to authorize medical care and has received no objection.


151 Id

152 152.UPC § 5-102 Seventeen states have adopted this statute. See Option # 5 See Appendices B & B-1

153 The Comment to the Uniform Probate Code’s Parental Delegation of Authority states that one of the statute’s purposes is to permit emergency medical treatment when a parent or guardian is unavailable. UPC § 5-102 Comment Seventeen states have adopted this uniform act but only six states have included the commentary. See Appendix B-1

154 Ind P L. 205 (1987) N.C. Gen. Stat. § 32A-34 (1995); D.C. Code Ann. § 16-4901 (1996)(The statute further states that such conveyance of authority shall be presumed to have been lawfully conveyed and must be honored by licensed medical practitioners.)


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States also differ with respect to the type of treatment for which consent can be given. Some permit consent to any medical, surgical, dental, or mental health treatment. Others limit authority to assistance in cases that occur daily and routinely in medical practice. Participants in the GLC Roundtable Discussion and respondents to the GLC survey generally favored a general medical consent authorization by a parent or guardian.

Authorizing the parent or guardian gives the parent or guardian some discretion regarding the nature of the authority that is conveyed to the caregiver. Creating a statute which identifies the authorized caregivers could result in eliminating the parent's discretion and create problems regarding possible objections by the parents.

Option # 3

AMEND EDUCATION LAW § 3212 TO PROVIDE THAT AN INFORMAL CUSTODIAN IS A “PERSON IN PARENTAL RELATION” TO THE CHILD

Although it would appear that an informal custodian should be able to enroll a child in a school and also be responsible for the child’s education, Section 3212 of the Education Law limits the latter authority to “persons in parental relation” who are defined as “parents, guardians, and custodians.” Custodians are further defined as “persons who have taken charge because the parent or guardian have died, are imprisoned, are mentally ill, or have been committed to an

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160 A survey conducted by the GLC asked whether consent to medical treatment should be honored so long as the power to consent is authorized by a writing signed by a parent or legal guardian. Eighty-two percent of family court judges throughout New York State responded "YES." Ninety-six percent of social services' legal departments and county attorneys representing social services' legal departments responded "YES." Statutory recognition of this procedure may be one viable option. See Appendix C.

161 This option is not intended to affect the requirements for permanent residency in order to qualify for free tuition.
institution or because they have abandoned or deserted such individual or are living outside the state or their whereabouts are unknown." This definition does not include many relative caregivers. One option would be to amend Section 3212 to include all informal caregivers as a "custodian" who is a "person in parental relation."

One difficulty with this option is how "informal caregiver" would be defined. The type of relationships do not neatly fall into any general definition. Any categorization would need to be carefully worded in order to include the greatest number of kinship caregivers and to take into account the variety of descriptions for caregivers already present in New York law.

Option # 4

PERMIT A PARENT, GUARDIAN, OR LEGAL CUSTODIAN TO AUTHORIZE A CHILD'S CAREGIVER TO ENROLL A CHILD IN SCHOOL AND PROVIDE THAT THE RESIDENCY REQUIREMENT FOR FREE TUITION MAY BE MET BY INFORMAL CAREGIVERS WITH WHOM A MINOR INTENDS TO RESIDE PERMANENTLY

When informal caregivers seek to enroll a child in a school district or to make decisions regarding their participation in school programs, they are often asked by the school district to provide proof of their authority. While the New York State Department of Education regulations do not require legal custody or guardianship as proof, many school districts do. Within some counties this requirement increases significantly the number of petitions filed in family court. Grandparents and other relatives must then choose guardianship or custody according to the demands of the local school district. Not only is the choice a difficult and confusing one, but it may be the wrong legal status for a particular grandparent, or a status that is undesirable. Moreover, while school districts may justify this demand as providing proof of an intention to remain, i.e., the permanent residency requirement for free tuition, neither permanent custody nor
guardianship is a guarantee of permanent residence, nor does the state's guidelines for proof of residency require custody or guardianship. 162

It is one issue to establish residency, but there is another issue as to who is authorized to consent to school activities or to enroll a child in school. Education Law § 3212 permits only "persons in parental relation" to have authority for a child's schooling, and defines such persons as parents, guardians, and "custodians" who have taken charge because such individuals have "died, are imprisoned, are mentally ill, or have been committed to an institution, because, they have abandoned or deserted such individual or are living outside the state or their whereabouts are unknown." 163 Such a definition not only does not include legal custodians, it does not include the great number of children living informally with relatives because of unfortunate circumstances. Since Section 3212's characterization of who can be responsible for a child's schooling does not need to be linked to permanent residency, the list of those authorized seems unduly restrictive, as well as in conflict with the indicia of permanent residency.

In addition to the contradiction between enrollment/consent eligibility and proof of residency, guardianship and custody are revocable, and a parent always retains a "right" to raise the child, 164 so neither legal status is absolute proof of a permanent residency with a nonparent. Clearly, the proof of authority (i.e., guardianship or legal custody) is not conclusive proof of residency unless it is coupled with an intention to retain control of the child within the district until the child's maturity. In other words, custody, guardianship, or a delegated authorization to a relative or other caregiver (which is a wider in scope than the statutory "person in parental

162 See discussion at text at pp 8-11 supra

163 N.Y. Educ. Law § 3212(1) (McKinney 1997).

relation") could suffice for enrollment, while residency could be proven by an examination of the totality of circumstances, rather than proof of custody or guardianship.

The authorization for school activities and the authorization for school enrollment are also discrete issues. The former may be needed only after a child is already enrolled. It presents a fairly customary situation where the parent, guardian, or person in parental relation is present in the home but may be absent for a reasonable period of time. A simple authorization could be sufficient to release a school from liability.

Other states do not limit the categories of caregivers who can enroll a child in school. For instance, in Washington D.C., a parent, guardian, or other person who has custody or control of a minor can enroll the child in school;¹⁶⁵ there is no barrier to grandparents who are informal custodians enrolling a child in school. In California, a grandparent or other statutorily qualified relative caregiver who can attest that the child resides with them can enroll the child in school.¹⁶⁶ The grandparent must advise the parent of the intended enrollment if possible.¹⁶⁷ Utah's education law permits a delegation of the parental right of custody to a third party via a durable power of attorney.¹⁶⁸ The statute enables a parent to formally establish custody in a grandparent-caregiver so that the child may meet board residency requirements and be enrolled in school. Similarly, Minnesota's Designated Parent Act provides authorization for school


¹⁶⁶ Cal Fam Code § 6552 (1996)

¹⁶⁷ Id The statute also provides that the 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. Id

Option # 5

ENACT A PARENTAL POWER OF ATTORNEY STATUTE

The absence of statutory recognition for the informal practice of parental delegation of authority often impedes grandparents and other kinship caregivers who are seeking to assume the responsibilities of parenthood and act with the authority and rights of a parent. In the words of one commentator, this is a "critical issue that must be addressed." While statutes governing general powers of attorney often include language that refers to the parental authority, as a practical matter, general powers of attorney are not used for this purpose. For example, New York’s General Obligations Law § 5-1502I, provides that an agent can be authorized “[i]n general, and in addition to all the specific acts enumerated in this section to do any other act or acts, which the principal can do through an agent, for the welfare of the spouse, children, or dependents of the principal or for the preservation and maintenance of the other personal relationships of the principal to parents, relatives, friends and organizations.” In theory, New York’s general power of attorney could be used to delegate such authority. But there does not appear to be any general use of this section as an authorization for a delegation of parental authority. A separate statutory recognition of the de facto practice of parents, guardians, and legal custodians delegating authority to grandparents and other kinship caregivers could

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170 You Are Not Alone, supra, at 631.

171 Randi Mandelbaum, Trying to Fit Square Pegs into Round Holes: The Need for a New Funding Scheme for Kinship Caregivers, 22 Fordham Urban L. J. 907, 907 (Summer 1995) (hereinafter Trying to Fit Square Pegs into Round Holes).

eliminate both confusion about who has this authority and unnecessary court proceedings for non-contested guardianship of the person and legal custody. It could also serve the best interests of the children by facilitating these informal care situations.

Seventeen states have adopted a parental power of attorney based on the parental power of attorney in the Uniform Probate Code.\textsuperscript{173} This act empowers a parent or guardian\textsuperscript{174} to delegate any parental authority to anyone the parent or guardian chooses by a properly executed power of attorney.\textsuperscript{175} There are no eligibility requirements regarding whom the parents may appoint. The statutes all appear to endorse the unconditional delegation of parental powers.\textsuperscript{176} The only explicit limits on the agent's authority in the UPC based statutes are limits to consent to adoption or marriage of the child. Six of these states\textsuperscript{177} have adopted the commentary to Section 5-102

\textsuperscript{173} See UPC § 5-102 and Comment (Appendix B-1). See also Appendix B and C.

\textsuperscript{174} The UPC model and sixteen state statutes permit the guardian to delegate his or her authority. Missouri did not include guardians in its statute, Mo. § 475.024 (1995). Maine requires that the guardians delegation be filed in court, Me Title 18A § 5-104. Minnesota allows a power of attorney but not the lengthier designation agreement to be made by a guardian. Minn §§ 524.5-505; 257A 01 (1996)

\textsuperscript{175} See Standby Guardianship at 254. ("It is theoretically possible for one to execute power of attorney and thereby transfer legal authority to another to make decisions on behalf of one's minor child. The extent to which such a transfer is legally valid, however, is undecided.") Enactment of a parental delegation statute appears necessary to the recognition of such a power.

\textsuperscript{176} Alaska and Minnesota's's statutes explicitly recognize the most expansive parental delegations of power. Alaska Stat § 326 020 (1997), Minn Stat § 257A 01 (1997) The Alaska statute permits delegation of "any powers regarding care, custody or property of minor, except the power to consent to marriage or adoption of a minor ward " Alaska Stat. § 326.020 (1997).

\textsuperscript{177} Alabama, Idaho, Montana, Nebraska, North Dakota, and Utah. Ala. Code § 26-2A-7 (Michie 1996); Idaho Code § 15-5-104 (1996); Mont. Code Ann. § 30 -2604 (1996); N.D Cent. Code § 30.1-26-04 (1995); Utah Code Ann § 75-5-103 (1996) Alabama's commentary adds that the purpose of this delegation is for situations where the parent or guardian is "not accessible" such as an extended business trip, hunting trip, or vacation. and that the statute "includes authority regarding the health, support, education, or maintenance of the person or property of the ward that goes well beyond consenting to health care." Commentary, Ala. Code § 26-2A-7 (Michie 1996). Montana's commentary states that "[it] should be emphasized that the chapter contains many provisions designed to minimize or avoid the necessity of guardianship, And that "[a] parent or guardian is permitted to delegate his authority for short periods as necessitated by anticipated absence or incapacity." Mont. Code Ann. § 72-5-103 (1996) Chapter 5 Official Comments

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which describes this Section as helpful in reducing problems to consents for emergency treatment."

Minnesota has adopted a second type of delegation statute, the Designated Parent Act, enacted during the spring 1996 session. A designation pursuant to this statute can remain in effect for as long as four years and it also can be renewed. Its purposes clearly go beyond authorization for short term care. Its delegation period, unlike the other statutes, permits custodial authority beyond a school year and hence may be able to satisfy public school residency requirements. As such, it is a more permanent custodial arrangement than the other statutes. Minnesota’s Designated Parent Act, unlike the UPC, also provides a statutory form and permits voluntary state registration of the form.

Although the parental power of attorney in the Uniform Probate Code and in the seventeen adopting states generally follows the format of a general power of attorney, it has one distinction. The UPC and many of the adopting states limit the period of time of the delegation

178 See Comment to UPC § 5-102 in Appendix B-1

179 Minn Stat Ann. § 524.5-505 (1996)

180 Although Michigan has a six month period, its commentary notes that a child placed in a home for the purpose of "securing a suitable home" is considered a resident of that home for educational purposes. Mich. § 27.5404 (Interpretive Notes and Decisions 10) (1996)


to a specific length of time ranging from six months to one year.\textsuperscript{133} Both delegation and designation appear renewable.\textsuperscript{134}

While limiting the length of time of the parental power of attorney may complicate proving indicia of residency, it does appear to safeguard the rights of parents against the potential for such delegations being deemed an abandonment of the child or an extraordinary circumstance. However, the six month period may not meet the needs of parents or guardians whose absence is rooted in more exacerbative causes such as drug rehabilitation, incarceration, marital discord, or mental illness. A yearly renewal period may be better aligned to the causes that give rise to kinship care. Some recent studies have indicated that stable long term care provided by grandparents can significantly improve the behavior of children.\textsuperscript{135} If kin, under present societal conditions, are to be empowered to provide care without formal court proceedings then a renewal period of a year or more may be appropriate.\textsuperscript{136}

Aside from the formal custodial alternatives of adoption, foster care, guardianship, and


\textsuperscript{134} "This section does not preclude immediate renewals of the delegation for another temporary period, but the section contemplates "temporary" delegations of powers and is not intended to permit an abrogation of the primary responsibilities of the parent or guardian.” Ala Code § 26-2A-7 Comment (1996)

\textsuperscript{135} Glen Saltzman Ph.D. and Patricia Pakan, Ph.D., Grandparents Raising Grandchildren the Grandchildren (1996)(unpublished study on effects of grandparents as caregivers, on file at Northeastern Ohio Universities College of Medicine. "Data from the 50 thousand family national health survey we have determined that the children being raised by grandparents seem to be better in almost every health category measured than are children in parent-headed families (both parents present), and much better than some other family configurations (e.g. single parents or step-parent present)." Conclusions drawn from this study have been published in A Voice for Grandparents

\textsuperscript{136} Another possible judicial use of the parental power of attorney is its evidentiary value. It shows both delegation and the parent’s responsible action of delegating
custody, the substantial number of children in the care of their relatives, particularly grandparents, suggests that parents and grandparents be given the ability to tailor a custodial arrangement without unnecessary court proceedings. The delegation of parental authority via a writing similar to a power of attorney and governed by the law of agency fits well with the privatization of family law. Instead of increasing unwanted interference by the state as parens patriae in custodial relations, it could create flexibility in informal arrangements between caregivers. It follows the agency principle that determines authority by the intention of the principal; it can be tailored to allow specific delegations of personal decision making; and it is

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187 Standby Guardianship, supra, at 254. Prior to standby guardianship, the traditional options available to a parent who needed to empower another to take legal responsibility of a child were foster care and traditional adoption. Id

188 There has been a 16 percent increase in the number of children living with their relatives in the last ten years and today, nearly 3.2 million children live with their grandparents or older relatives. Unplanned Parenthood, supra, at 9.

189 You Are Not Alone, supra, at 627. Twenty-nine percent of grandparents surveyed viewed the arrangement as not permanent. Id

190 Jana B. Singer, The Privatization of Family Law, 5 Wis. L. Rev. 1444 (1992) "Over the past twenty-five years, family law has become increasingly privatized. In virtually all doctrinal areas, private norm creation and private decision making have supplanted state-imposed rules and structures for governing family related behavior. This preference for private over public ordering has encompassed both the substantive legal doctrines governing family relations and the preferred procedures for resolving family law disputes." Id.

191 Mary Ann Mason, The History of Child Custody in the United States (Colombia University Press 1994), see also 45 N Y Jur 2d Domestic Relations § 416 (1997)(Supreme Court in New York has role of parens patriae)

192 Karen Czapanskiy, Grandparents, Parents and Grandchildren Actualizing Interdependency in Law, 26 Conn. L. Rev. 1314, 1354 (Summer 1994). "What the California medical decision-making delegation statute, the springing guardianship statutes, and the Children Act demonstrate is that increasing attention to shared responsibility and mutual respect, while reducing parental autonomy and exclusivity is with the realm of legal imagination in appropriate circumstances." Id

193 Scope of agent's actual authority is determined by the intention of the principal or by the manifestation of that intention to the agent. 1 N Y. Jur. 2d Agency § 71 (1997).

a restrictive, not an expansive, power. In addition, the authority would still be delegated, limited by the scope of the powers delegated in the writing, and would thus avoid any premature termination of parental rights. All these considerations should be weighed in drafting any new legislation.

Option # 6

FAMILY COURT ACT § 1017 COULD BE AMENDED TO REQUIRE PROOF THAT SUITABLE RELATIVES HAVE BEEN GIVEN THE OPPORTUNITY TO BECOME FOSTER PARENTS

New York's Family Court Act § 1017 mandates a search for suitable relatives whenever a child is brought into the custody of the State Department of Children and Family Services. At present, a majority of the counties in New York do not make serious attempts to place children with relatives. Some of this resistance results from a perception that kinship care is used as an alternative to public assistance. However, the documented experience of the counties where kinship caregivers are sought as foster parents is that there is neither widespread opportunism nor continuance of family dysfunctionality.

In addition, The Personal Responsibility Act of 1996 and the recent Adoption and Safe Families Act both recognize that kinship caregivers are the best alternative to indefinite foster care.

New York already has enacted the statutory authority to seek out suitable relatives. The executive agency charged with oversight of foster care, however, does not have a policy


describing how districts should locate relatives. As a result, the department itself admitted, "some districts may not be identifying all relatives who are willing and suitable to care for the children". Section 1017 of the Family Court Act could be amended to incorporate a uniform policy for the search and a uniform period within which the search must be conducted. This amendment could ensure compliance with prior legislative intent.

Option # 7

CREATE A KINSHIP ADOPTION OR A KINSHIP GUARDIANSHIP THAT AMELIORATES THE HARDSHIPS FACING RELATIVES WHOSE ONLY CURRENT CHOICE IS TO ADOPT

In light of the development of a federal mandate that children in foster care be moved into a permanent plan as quickly as possible, and that roughly half of all adoptions of foster care children are already made by relatives, other relative foster care parents who may be unwilling or unable to adopt could be encouraged to take on a permanent parental relationship.199

The use of all suitable and willing relatives promotes the state's interest in the child's welfare and reduces the potential of the children's loss of their family ties. New York relative foster parents should have an opportunity for a middle ground, where parents and relatives acting as foster care parents can maintain a constructive relationship that is in the child's best interests.200

In addition, while adoption assistance for hard to place children and children with special needs

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198 State Of New York Office of the State Comptroller, Division of Management Audit, Department of Social Services Kinship Foster Care Report 95-S-106, at 6 (Nov. 22, 1996).

199 At the Fall 1997 Conference of Grandparent's United for Children's Rights, grandparents voiced a concern that they would be forced into adopting even though some view this alternative as too extreme for their circumstances.

is subsidized under Article IV-E of the Social Services Law and thus can be continued to adopting relatives, relatives who cannot adopt should have a legal status that removes the child from the custody of the state (and the parent) and also continues a reduced level of assistance.

This report has discussed the benefits of extended families and of a child's continued relationship with their natural parent after adoption. The benefits of contact are now well established. Whatever may be the form a family takes, it is necessary to recognize that a child can have simultaneous natural parents and psychological parents who may or may not be the same persons. By acknowledging and delineating the legal status of these new families the state would insure that the best interests of the children of these families are served.

The 1997 legislative session had both a kinship adoption and a kinship guardianship bill. Both followed the developing federal position that children should be placed permanently as soon as possible after entering foster care, and both created a custodianship that did not disenfranchise the natural parent. Through this option relatives could be empowered to become kinship guardians or to take on a limited adoption in the form of a kinship adoption.

**Option # 8**

**ENCOURAGE THE USE OF MEDIATION PRIOR TO COURT ENFORCEMENT OF AN ADOPTION AGREEMENT**

New York Social Service Law § 383-c has been criticized for its vagueness regarding enforceability. In general, courts have decided it is enforceable, but the means of enforcement is unclear. Other states have employed mediation as a means to address enforceability. In Oregon, mediation is used to coax a recalcitrant parent into surrendering a child when the alternative is a

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201 Concurrent Kinship Adoption, NY S B 493, Foster Child Kinship Guardianship, NY A.B. 5176.
court termination proceeding, and for establishing the adoption agreement between the two sets of parents. 202 Minnesota requires an attempt at mediation for adoptions where the child resided with a relative at some time before the adoption. 203 Other states, including Idaho, Colorado, Arizona, California, Iowa, Massachusetts, and Washington have established or are in the process of establishing similar mediation programs. 204

Oregon's initiative, called Teamwork for Children, has been in operation for six years. The Oregon model is based on a 1991-93 pilot project that successfully made cooperative permanent plans in 86% of over 300 cases, with an average time from the beginning of mediation to adoption of 4.9 months. 205 Oregon's mediators are neutral volunteers; they do not work as employees of the court. The first practical goal of the mediation is to help birth parents select adoptive parents. When adoptive parents are in place, then the language of the surrender document refers to an attached agreement that outlines post-adoption contact. This language gives the surrendering parent standing to bring an action if the agreement is breached by the adoptive parents. The parties must attempt mediation first before any court proceeding. Agreements have served to stop termination proceedings which already had trial dates. On the other hand, the agreements specify that if the surrendering parents do not live up to their side of the agreement, the court can eliminate the terms from the surrender. The success of this program

202 See discussion in Section II E. See Appendix F.


204 Interview by Fellows with Jeanne Eter, director of Teamwork for Children on file at the GLC. Currently, a proposal for funding a nationwide initiative is before the Children's Bureau, Administration on Children, Youth & Families Dept. of Health & Human Services.

205 Id
has resulted in Oregon § 109.305 which provides that mediation is an integral part of adoption agreements involving children in foster care.\textsuperscript{206}

Given the apparent increasing interest in mediation in the adoption setting, the Legislature could conduct further study of its potential use in New York. In doing so it could identify the potential benefits of mediation such as reducing adversity and increasing cooperation between birth and adoptive parents, and encouraging minimal contacts between the parties, the potential difficulties of using mediation where the parties are not necessarily participating at the same level of strength, and how the lessons learned in New York about the use of mediation in other family conflicts can be used beneficially in the adoption setting.

Option # 9

AMEND DOMESTIC RELATIONS LAW § 115-b & § 117 TO PERMIT ENFORCEMENT OF COOPERATIVE ADOPTION AGREEMENTS IN ALL CASES

Statutory enforcement of such agreements in New York is limited to cases where the child was adopted through the foster care system.\textsuperscript{207} The statute governing such adoptions, Social Services Law 383-c, provides minimal guidance.\textsuperscript{208} New York's Domestic Relation Law § 115-b parallels Social Service Law 383-c,\textsuperscript{209} except the law governing private adoptions does not provide for the enforcement of adoption agreements.

Eight states now permit legal enforcement of future contact adoption agreements (e.g.,


\textsuperscript{208} The Move Toward Legally Sanctioned Cooperative Adoption, supra, at 502.

cooperative adoptions). At least one state, Minnesota, provides for enforcement of a private adoption agreement.\textsuperscript{210} The statutes differ in procedures and conditions necessary for enforcement, but all (except New York's) expressly provide that a breach or modification of the agreement does not affect the validity of the adoption.\textsuperscript{211}

Option # 10

ENUMERATE THE AUTHORITY AND RIGHTS ASSOCIATED WITH GUARDIAN OF THE PERSON AND LEGAL CUSTODIAN

Currently, the Surrogate's Court Procedure Act, the Domestic Relations Law, and the Family Court Act do not provide definitions of a guardian and a legal custodian that underscore the practical distinctions between the two.\textsuperscript{212} The closest any statute comes to merging the two (and informal caregivers) is Domestic Relations Law § 15 which gives the authority to consent to marriage to parents or guardian, or, if neither exists, then to the person who has custody.

Defining both types of authority and including an enumeration of the situations wherein a guardian and legal custodian are empowered to act would clarify their respective roles. Any subsequently enacted legislation could refer to these definitions, and add whatever additional authority that is to be provided in the new law.

While it would require a simple software global search to gather all the references to guardians and legal custodians imbedded in the statutes of other states, careful examination of


\textsuperscript{211} The Move Toward Legally Sanctioned Cooperative Adoption, supra at 502. Indiana and New Mexico give the child a direct voice into the post-adoption contact agreement. New Mexico ensures that the court retains jurisdiction over the agreements. Washington incorporates the agreement into a court order. In Washington, Oregon, and Nebraska, the courts scrutinize the agreement to ensure that it is in the child's best interests. Washington and Nebraska also consult with the law guardian before approving an agreement. Nebraska limits the agreement to only visitation.

\textsuperscript{212} See Appendices A and I
the substance of each statute would be necessary to develop a clear understanding of the nature of the authority and duties of guardians and custodians. This work would provide the basis for developing a comprehensive definition of each legal status. The resulting legislation would enable legal practitioners and the public to comprehend when a guardianship was necessary, and when legal custody or informal custody suffice.

Option # 11

ADD "LEGAL CUSTODIAN" TO STATUTES THAT GIVE AUTHORITY OR RESPONSIBILITY TO "PARENT AND GUARDIAN"

Kinship caregivers are frequently the legal custodians, and the sole caregivers for children. Family courts should not have to refer kinship caregivers to a Surrogate's Court guardianship proceeding or award a guardianship when an award of custody may suffice. The difference between guardianship and legal custody should be delineated in order to make recognizable the distinctions and advantages, and the practical consequences of each status. The uniform laws do not offer much guidance in this area. Other state's statutes also do not offer any comprehensive picture of the authority and duties of these different legal roles. Minnesota's Designated Parent Act circumvents the lack of authorization by allowing a parent to designate to another whatever the law permits the parent to do.

Nevertheless, considerations should be given to including the term "legal custodian" in statutes that empower only a parent or guardian to perform routine tasks of parental caregiving in order to make it feasible for the custodian to act with the same authority where appropriate and whenever possible. The list of actions that only a parent or guardian can perform for a child

213 The Uniform Probate Code, the Uniform Guardianship and Protective Proceedings Act, and the Uniform Child Custody Jurisdiction Act contain listings that could provide guidance in the undertaking.
APPENDIX A

PRACTICAL DISTINCTION BETWEEN
LEGAL CUSTODY AND GUARDIANSHIP OF THE PERSON

Survey question:
If there is a practical distinction (aside from judicial procedures) between "legal custody" and "guardianship of the person," please explain that distinction.

FAMILY COURT
1st Dept. The distinction - if any - is unclear to most.

2nd Dept.: I've always viewed guardianship as the residual parental authority. When a parent loses or relinquishes custody, they retain a right or interest superior to any but the custodian. When guardianship is transferred no residual right remains until or unless retained by the court. "Legal" means there must be a substantially good reason to change the legal custody whereas guardianship can be easily changed almost at the whim of the judge for good cause.

4th Dept.: Guardianship emphasizes a fiduciary relationship whereas custody emphasizes the care and supervision of the child. Legal custody is more definite than guardianship.

LAW GUARDIANS
1st Dept:
"I wish I could explain it. The NY statutes and judges can't seem to give a practical difference betw the two."

"No practical distinction, in my view."

"One is permanent, while the other can be for a special time and purpose."

"A guardian of the person may not necessarily have physical custody."

2nd Dept.:
"There appears to be no operational definitions and much confusion."

(Two ansered) "No distinction."

"No practical distinction except other than the terminology which confuses the average person and in some cases causes undue concern and stress."
Totally different items.

"Guardianship can be w/ an adult. W/minors there is a different degree of proof to change custody."

1st&2nd Dept.: - Terms vary from case to case. I could write a book and still not explain the differences and/or similarities.

3rd Dept.: "Guardianship entails continuing and closer court scrutiny."

"Legal custody routinely reviewed by the court, guardianship is not."

(Three answered) "Little or no distinction." One qualifies this by saying issues of child support and tax implications arise.

Distinction w/in "legal custody" depending on whether it's w/in the state or an individual.

(Two answered) I'm not sure.

Guardian often short term arrangement.

Guardian does not imply a familial relationship as does custody.

Possible for DSS to have legal custody and not guardianship.

Legal custody entitled to visitation or custodial visitation by right.

4th Dept: (Three answered) little or no practical distinction.

A guardian can be changed upon a showing of a failure to do his or her duty. Custodian should be changed only upon a showing that change is in the child's best interests.

Problem arises as to what standard to use to revoke guardianship - best interests or extraordinary circumstances.

The courts in NY treat them the same - this is wrong & should be changed.

Guardian not responsible for actual care; custodian is.

Guardianship used less often.

Guardianship seen as more ltd. in scope.

Guardianship connotes a temporary appointment.

Custody connotes a permanent duration.
Legal & physical custody are different.

Legal custody - relatives; guardianship - nonrelatives.

Legal custody btn parent & child; guardianship involves 3rd parties.

Possibly the legal standard to care for investment assets.

Guardianship is much harder to change than legal custody which just entails a petition to family court.
### APPENDIX B

State Statutes - Delegations of Parental Powers

#### Parental Delegation of Powers

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<tr>
<th>State</th>
<th>Year</th>
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<th>No Consent to Marriage or Adoption</th>
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## Parental Delegation of Powers

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APPENDIX B-1

UPC § 5-102 Delegation of Powers by Parent or Guardian

A parent or guardian of a minor or incapacitated person, by a properly executed power of attorney, may delegate to another person, for a period not exceeding 6 months, any power regarding care, custody, or property of the minor child or ward, except the power to consent to marriage or adoption of a minor ward.

Comment

The source of this section is 1969 UPC § 5-104.

This section permits a temporary delegation of parental powers. For example, parents (or a guardian) of a minor plan to be out of the county for several months. They wish to empower a close relative (an uncle e.g.) to take any necessary action regarding the child while they are away. Using this section, they could execute an appropriate power of attorney giving the uncle custody and power to consent. Then, if an emergency operation were required, the uncle could consent on behalf of the child; as a practical matter he would of course attempt to communicate with the parents before acting. The section is designed to reduce problems relating to consents for emergency treatment.

The problems touched by the section include some that would be eased but not eliminated if the jurisdiction has enacted the Model Health Care Consent Act. A guardian's authority over a ward, described in § 5-209 (guardians of minors) and § 5-309 (guardians of incapacitated persons), includes authority regarding the care, custody and control of the ward that goes well beyond consenting to health care.

In contrast to § 5-101, which relates only to certain business affairs of minors, this section is pertinent to the affairs of minors and, incapacitated persons for whom guardians have been appointed.
APPENDIX C
Parental Delegation Survey

Should Written Parental Authority be Delegable by Parents? (81 Respondents)

- 84% - Yes
- 16% - No

For Unlimited Time? (68 Respondents)

- 28% - Yes
- 72% - No

If Not Unlimited, Time Period Suggested? (46 Respondents)

- As Agreed: 40%
- 3 Years: 2%
- 2 Years: 2%
- 18 Months: 2%
- 12 Months: 32%
- 6 Months: 16%
- 3 Months: 6%
A bill for an act
relating to children; providing for transfer of
custody of a child to a relative by a consent decree;
authorizing communication or contact agreements
between adoptive parents and birth parents; providing
for a relative conference and relative care agreement
following a report of child abuse or neglect; amending
Minnesota Statutes 1996, sections 257.02; 259.59, by
adding a subdivision; 260.191, subdivision 3b;
260.241, subdivision 1; and 518.158; proposing coding
for new law in Minnesota Statutes, chapters 257; 259;
and 626.

BE IT ENACTED BY THE LEGISLATURE OF THE STATE OF MINNESOTA:

Section 1. Minnesota Statutes 1996, section 257.02, is
amended to read:

257.02 [SURRENDER OF PARENTAL RIGHTS.]

No person other than the parents or relatives may assume
the permanent care and custody of a child under 14 years of age
unless authorized so to do by an order or decree of court.
However, if a parent of a child who is being cared for by a
relative dies, or if the parent is not or cannot fulfill
parental duties with respect to the child, the relative may
bring a petition under section 260.131. Except in proceedings
for adoption or by a consent decree entered under section
257.0215, no parent may assign or otherwise transfer to another
parental rights or duties with respect to the permanent care and
custody of a child under 14 years of age. Any such transfer
shall be void.

Sec. 2. [257.0215] [CUSTODY CONSENT DECREES.]
A parent may transfer legal and physical custody of a child to a relative by a consent decree entered under this section. The court may approve a proposed consent decree if the custody arrangement is in the best interests of the child and all parties to the decree agree to it after being fully informed of its contents. A consent decree under this section must:

1. Transfer legal and physical custody of the child to a named relative and state that this includes the ability to determine the child's residence; make decisions regarding the child's education, religious training, and health care; and obtain information and public services on behalf of the child in the same manner as a parent;

2. Indicate whether the transfer of custody is temporary or permanent; and

3. Include an order for child support in the guidelines amount and an allocation of child care costs as provided by section 518.551, subject to income withholding under sections 518.611 and 518.613, and section 518.6111, if enacted, and including an order for medical support under section 518.171.

Either a parent or a relative who is party to a consent decree under this section may file a motion to modify or terminate the consent decree at any time. A party who has custody of a child under this section must seek modification of the consent decree before transferring physical or legal custody of the child to anyone.

For purposes of this section, "relative" means an adult who is a stepparent, grandparent, brother, sister, uncle, aunt, or other extended family member of a minor by blood, marriage, or adoption.

Sec. 3. [259.58] [COMMUNICATION OR CONTACT AGREEMENTS.]

If an adoptee has resided with a birth relative before being adopted, adoptive parents and that relative may enter an agreement under this section regarding communication with or contact between a minor adoptee, adoptive parents, and a birth relative. For purposes of this section, "birth relative" means a parent, stepparent, grandparent, brother, sister, uncle, or...
aunt of a minor adoptee. This relationship may be by blood or marriage. For an Indian child, birth relative includes members of the extended family as defined by the law or custom of the Indian child's tribe or, in the absence of laws or custom, nieces, nephews, or first or second cousins, as provided in the Indian Child Welfare Act, United States Code, title 25, section 1903.

(a) An agreement regarding communication with or contact between minor adoptees, adoptive parents, and a birth relative is not legally enforceable unless the terms of the agreement are contained in a written court order entered in accordance with this section. An order must be sought at the same time a petition for adoption is filed. The court shall not enter a proposed order unless the terms of the order have been approved in writing by the prospective adoptive parents, a birth relative who desires to be a party to the agreement, and, if the child is in the custody of an agency, a representative of the agency. An agreement under this section need not disclose the identity of the parties to be legally enforceable. The court shall not enter a proposed order unless the court finds that the communication or contact between the minor adoptee, the adoptive parents, and a birth relative as agreed upon and contained in the proposed order would be in the minor adoptee's best interests.

(b) Failure to comply with the terms of an agreed order regarding communication or contact that has been entered by the court under this section is not grounds for:

(1) setting aside an adoption decree; or

(2) revocation of a written consent to an adoption after that consent has become irrevocable.

(c) An agreed order entered under this section may be enforced by filing a petition or motion with the family court that includes a certified copy of the order granting the communication, contact, or visitation, but only if the petition or motion is accompanied by an affidavit that the parties have mediated or attempted to mediate any dispute under the agreement.
or that the parties agree to a proposed modification. The
prevailing party may be awarded reasonable attorney's fees and
costs. The court shall not modify an agreed order under this
section unless it finds that the modification is necessary to
serve the best interests of the minor adoptee, and:

(1) the modification is agreed to by the adoptive parent
and the birth parent or parents; or

(2) exceptional circumstances have arisen since the agreed
order was entered that justify modification of the order.

Sec. 4. Minnesota Statutes 1996, section 259.59, is
amended by adding a subdivision to read:

Subd. 3. This section does not prohibit birth relatives
and adoptive parents from entering a communication or contact
agreement under section 259.58.

Sec. 5. Minnesota Statutes 1996, section 260.191,
subdivision 3b, is amended to read:

Subd. 3b. [REVIEW OF COURT ORDERED PLACEMENTS; PERMANENT
PLACEMENT DETERMINATION.] (a) If the court places a child in a
residential facility, as defined in section 257.071, subdivision
1, the court shall conduct a hearing to determine the permanent
status of the child not later than 12 months after the child was
placed out of the home of the parent. Not later than ten days
prior to this hearing, the responsible social service agency
shall file pleadings to establish the basis for the permanent
placement determination. Notice of the hearing and copies of
the pleadings must be provided pursuant to section 260.141. If
a termination of parental rights petition is filed before the
date required for the permanency planning determination, no
hearing need be conducted under this section. The court shall
determine whether the child is to be returned home or, if not,
what permanent placement is consistent with the child's best
interests. The "best interests of the child" means all relevant
factors to be considered and evaluated.

If the child is not returned to the home, the dispositions
available for permanent placement determination are:

(1) permanent legal and physical custody to a relative
pursuant to the standards and procedures applicable under
chapter 257 or 518. The social service agency may petition on
behalf of the proposed custodian;

(2) termination of parental rights and adoption: the social
service agency shall file a petition for termination of parental
rights under section 260.231 and all the requirements of
sections 260.221 to 260.245 remain applicable. An adoption
ordered under this subdivision may include an agreement for
communication or contact under section 259.58; or

(3) long-term foster care; transfer of legal custody and
adoptions are preferred permanency options for a child who cannot
return home. The court may order a child into long-term foster
care only if it finds that neither an award of legal and
physical custody to a relative, nor termination of parental
rights nor adoption is in the child's best interests. Further,
the court may only order long-term foster care for the child
under this section if it finds the following:

(i) the child has reached age 12 and reasonable efforts by
the responsible social service agency have failed to locate an
adoptive family for the child; or

(ii) the child is a sibling of a child described in clause
(i) and the siblings have a significant positive relationship
and are ordered into the same long-term foster care home.

(b) The court may extend the time period for determination
of permanent placement to 18 months after the child was placed
in a residential facility if:

(1) there is a substantial probability that the child will
be returned home within the next six months;

(2) the agency has not made reasonable, or, in the case of
an Indian child, active efforts, to correct the conditions that
form the basis of the out-of-home placement; or

(3) extraordinary circumstances exist precluding a
permanent placement determination, in which case the court shall
make written findings documenting the extraordinary
circumstances and order one subsequent review after six months
to determine permanent placement. A court finding that
extraordinary circumstances exist precluding a permanent
determination must be supported by detailed factual
findings regarding those circumstances.

(c) In ordering a permanent placement of a child, the court
must be governed by the best interests of the child, including a
review of the relationship between the child and relatives and
the child and other important persons with whom the child has
resided or had significant contact.

(d) Once a permanent placement determination has been made
and permanent placement has been established, further reviews
are only necessary if otherwise required by federal law, an
adoption has not yet been finalized, or there is a disruption of
the permanent or long-term placement. If required, reviews must
take place no less frequently than every six months.

(e) An order under this subdivision must include the
following detailed findings:

1. how the child's best interests are served by the order;

2. the nature and extent of the responsible social service
agency's reasonable efforts, or, in the case of an Indian child,
active efforts, to reunify the child with the parent or parents;

3. the parent's or parents' efforts and ability to use
services to correct the conditions which led to the out-of-home
placement;

4. whether the conditions which led to the out-of-home
placement have been corrected so that the child can return home;

and

5. if the child cannot be returned home, whether there is
a substantial probability of the child being able to return home
in the next six months.

(f) An order for permanent legal and physical custody of a
child may be modified under sections 518.18 and 518.185. The
social service agency is a party to the proceeding and must
receive notice. An order for long-term foster care is
reviewable upon motion and a showing by the parent of a
substantial change in the parent's circumstances such that the
parent could provide appropriate care for the child and that

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removal of the child from the child's permanent placement and
the return to the parent's care would be in the best interest of
the child.

Sec. 6. Minnesota Statutes 1996, section 260.241,
subdivision 1, is amended to read:

Subdivision 1. If, after a hearing, the court finds by
clear and convincing evidence that one or more of the conditions
set out in section 260.221 exist, it may terminate parental
rights. Upon the termination of parental rights all rights,
powers, privileges, immunities, duties, and obligations,
including any rights to custody, control, visitation, or support
existing between the child and parent shall be severed and
terminated and the parent shall have no standing to appear at
any further legal proceeding concerning the child. Provided,
however, that a parent whose parental rights are terminated:

(1) shall remain liable for the unpaid balance of any
support obligation owed under a court order upon the effective
date of the order terminating parental rights; and

(2) may be a party to a communication or contact agreement
under section 259.58.

Sec. 7. Minnesota Statutes 1996, section 518.158, is
amended to read:

518.158 [GRANDPARENT RELATIVE EX PARTE TEMPORARY CUSTODY
ORDER.]

Subdivision 1. [FACTORS.] It is presumed to be in the best
interests of the child for the court to grant temporary custody
to a grandparent relative under subdivision 2 if a minor child
has resided with the grandparent relative for a period of 12
months or more and the following circumstances exist without
good cause:

(1) the parent has had no contact with the child on a
regular basis and no demonstrated, consistent participation in
the child's well-being for six months; or

(2) the parent, during the time the child resided with the
grandparent relative, has refused or neglected to comply with
the duties imposed upon the parent by the parent and child

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relationship, including but not limited to providing the child
necessary food, clothing, shelter, health care, education, and
other care and control necessary for the child's physical,
mental, or emotional health and development.
Subd. 2. [EMERGENCY CUSTODY HEARING.] If the parent seeks
to remove the child from the home of the grandparent relative
and the factors in subdivision 1 exist, the grandparent relative
may apply for an ex parte temporary order for custody of the
child. The court shall grant temporary custody if it finds,
based on the application, that the factors in subdivision 1
exist. If it finds that the factors in subdivision 1 do not
exist, the court shall order that the child be returned to the
parent. An ex parte temporary custody order under this
subdivision is good effective for a fixed period not to exceed
14 days. A temporary custody hearing under this chapter must be
set for not later than seven days after issuance of the ex parte
temporary custody order. The parent must be promptly served
with a copy of the ex parte order and the petition and notice of
the date for the hearing.
Subd. 3. [FURTHER PROCEEDINGS.] If the court orders
temporary physical custody to the grandparent relative under
subdivision 2 and the grandparent relative or parent seeks to
pursue further temporary or permanent custody of the child, the
custody issues must be determined pursuant to a petition under
this chapter and the other standards and procedures of this
chapter apply. This section does not affect any rights or
remedies available under other law.
Subd. 4. [RETURN TO PARENT.] If the court orders permanent
custody to a grandparent relative under this section, the court
shall set conditions the parent must meet in order to obtain
custody. The court may notify the parent that the parent may
request assistance from the local social service agency in order
to meet the conditions set by the court.
Subd. 5. [DEFINITION.] For purposes of this section,
"relative" means an adult who is a stepparent, grandparent,
brother, sister, uncle, aunt, or other extended family member of
the minor by blood, marriage, or adoption.

For an Indian child, "relative" includes members of the extended family as defined by the law or custom of the Indian child's tribe or, in the absence of law or custom, nieces, nephews, or first or second cousins, as provided in the Indian Child Welfare Act of 1978, United States Code, title 25, section 1903.

Sec. 8. [626.5565] [RELATIVE CARE AGREEMENT.]

Subdivision 1. [DEFINITIONS.] (a) For purposes of this section, "relative" means an adult who is a stepparent, grandparent, brother, sister, uncle, aunt, or other extended family member of the minor by blood, marriage, or adoption.

For an Indian child, "relative" includes members of the extended family as defined by the law or custom of the Indian child's tribe or, in the absence of law or custom, nieces, nephews, or first or second cousins, as provided in the Indian Child Welfare Act of 1978, United States Code, title 25, section 1903.

(b) For purposes of this section, "relative care" means one or more of the following: respite care, a monitoring agreement, a designated parent agreement under chapter 257A, access to information about a child, the right to make decisions about a child's residence, education, religious training, or health care, a custody consent decree under section 257.0215, or joint or sole legal or physical custody of a child.

(c) For purposes of this section, "relative care agreement" means an agreement regarding the care of a child that has been reached by the parents and interested relatives of the child after the parents and interested relatives have participated in a facilitated relative care conference under this section.

Subd. 2. [RELATIVE CARE CONFERENCE.] If, upon assessment of a report of neglect or physical or sexual abuse under section 626.556, a local social service agency determines that child protective services are needed, the local social service agency may proceed under this section if it appears from the circumstances of the individual case that a relative care Section 8
agreement may be in the best interests of the child. The local
social service agency may select a facilitator to convene a
relative care conference. A facilitator must be certified under
chapter 494.
Written notice of the conference must be provided to the
parents and to all relatives who have expressed an interest in
participating or have been identified by other relatives. The
notice must state that the purpose of the conference is to
provide an opportunity for the parents and relatives to reach an
agreement regarding the care of the child and explain the forms
of relative care listed in subdivision 1. The notice must also
inform the parents and relatives of the potential consequences
and range of options if they do not enter into a relative care
agreement that is in the best interests of the child and that
the local service agency may intervene with protective services
or determine that the child should be placed out of the home.
The local social service agency shall participate in a
relative care conference for the purposes of protecting the
child's best interests but may not be a party to a relative care
agreement reached by the parents and any participating
relatives. A relative care agreement remains in effect unless
it expires by its own terms or a parent or a relative who is a
party to the agreement seeks to modify or end the agreement. If
a relative care agreement results in a transfer of physical
custody under section 257.0215 or chapter 518, a parent who
seeks to have the child returned to the home of the parent
without the consent of the relative with whom the child is
staying shall file a motion with the court that approved the
custody consent decree or ordered the transfer of custody under
chapter 518. The parent has the burden of establishing that:
(1) the conditions that led to the transfer of physical
custody have been corrected; and
(2) the parent has demonstrated the ability to care for and
provide a stable home for the child.
Sec. 9. [EFFECTIVE DATE.]
Sections 1 to 8 are effective July 1, 1997.
109.305. Interpretation of adoption laws; agreement for continuing contact.

(1) The rule that statutes in derogation of common law are to be strictly construed does not apply to the adoption laws of this state.

(2) Nothing in the adoption laws of this state shall be construed to prevent the adoptive parents, the birth parents and the child from entering into a written agreement, approved by the court, to permit continuing contact between the birth relatives and the child or the adoptive parents. As used in this subsection, "birth relatives" includes birth parents, grandparents, siblings and other members of the child's birth family.

(3) Failure to comply with the terms of an agreement made under subsection (2) of this section is not grounds for setting aside an adoption decree or revocation of a written consent to an adoption.

(4) (a) An agreement made under subsection (2) of this section may be enforced by a civil action. However, before a court may enter an order requiring compliance with the agreement, the court must find that the party seeking enforcement participated, or attempted to participate, in good faith in mediating the dispute giving rise to the action prior to filing the civil action.

(b) The court may modify an agreement made under subsection (2) of this section if the court finds that the modification is necessary to serve the best interests of the adopted child, that the party seeking modification participated, or attempted to participate, in good faith in mediation prior to seeking modification of the agreement and that:

(A) The modification is agreed to by all parties to the original agreement; or

(B) Exceptional circumstances have arisen since the parties entered into the agreement that justify modification of the agreement.

HISTORY 1957 c.710 @ 15, subsections (2), (3) and (4) enacted as 1993 c.401 @ 1

NOTES

109.305 (2) to (4) were enacted into law by the Legislative Assembly but were not added to or made a part of ORS chapter 109 or any series therein by legislative action. See Preface to Oregon Revised Statutes for further explanation.
APPENDIX G
Definitions of Legal Custody and Guardian of the Person

Custody means the actual possession of the minor for the purpose of providing care, maintenance, and control.

Legal custody means custody specifically authorized by statute, or pursuant to a judgment, decree or order of a court, or otherwise authorized by law.

Guardianship of the person means a person standing in a fiduciary relationship to a minor who has been appointed by a court to oversee the person of a minor, and who is responsible for their care, custody, maintenance, and control.
Appendix H

Definitions of Legal Custodian and Guardians Survey

79% Agree

21% Disagree

A Total of 10 respondents disagree.
(21% of respondents)

A Total of 50 respondents agree.
(79% of respondents)
Legal Custody and Guardianship Survey

APPENDIX I

Legal Custody and Guardianship

Legal Custody

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