

LEGAL FACT SHEET

Can Kinship Caregivers Get Assigned Counsel in Family Court?

Assignment of Counsel to Indigent (Poor) Kinship Grandparents, Relatives, and Other Caregivers

Family Court custody and guardianship (parts three and four of Article Six of the Family Court Act) disputes between non-parents (kin) and parents present a persistent legal question. Can indigent kinship caregivers get assigned counsel?

While parents have a well-established constitutional right to counsel that is codified in Family Court Act Section 262(a)(v), which assigns counsel when parents are parties in Article Six proceedings for custody or guardianship. For non-parents who are already caring for children, especially grandparents, their petitions for custody or guardianship have no corresponding FCA 262 provision expressly identifying a right to counsel for petitioning indigent kinship caregivers.

This lack of express statutory authority can prohibit kinship caregivers from petitioning, or, when they do petition, representing themselves (i.e. pro se, which is Latin for on behalf of oneself). Lack of counsel can negatively impact the best interests of children, often precluding the opportunity to consider their best interests.

Some Judges May Be Assigning Counsel

The Kinship Navigator has spoken to judges who do currently assign counsel, including judges in Orange, Onondaga, Ulster, and Nassau. The Kinship Navigator list is not exhaustive, because the Navigator has only inquired in counties where it has offered CLE credits on kinship law. In none of the counties where CLE programs were presented has the judiciary categorically rejected assignment of counsel. In fact, all have stated that some of their judges routinely make assignments. However, the assignment is not a common practice. And many counties may not be willing to make assignments.

None of the judges or law clerks interviewed by the Kinship Navigator provided written determinations justifying the assignment. Such a determination may have been written, as required by FCA 262(b), but a review of case law and McKinney's commentary offers no guidance.

Parent Representation Commission

In 2018, the Court Administration created the Parent Representation Commission, which is charged with examining the quality and effectiveness of counsel for parents in a variety of family court proceedings. The Commission is also considering the assignment of legal counsel to indigent relative caregivers, as suggested in oral and written testimony by the Kinship Navigator's director at the October 10th Albany hearing. For a copy of the testimony, please contact the Kinship Navigator.

Courts Can Currently Assign Counsel

While the absence of counsel can have dire consequences for children living with relatives, judges are actually not expressly precluded from assignment of counsel by the statute. There is a potential for application of FCA 262(b),

FCA 262 (b) governs "Assignment of Counsel in Other Case" and permits assignment of counsel when mandated by state or federal constitutional protections. Considering the U. S. Supreme Court's decision in *Moore, v. City of East Cleveland*, 431 U. S. 494 (1977), which established a fundamental liberty interest in extended families living together, and which has

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created substantive and procedural due process rights for extended families in housing and child welfare cases. It is not unreasonable that when the state provides counsel to indigent parents, it has a commiserate duty to assign to extended family members who have already assumed parenting duties.

FCA 262 already protects certain relative caregivers in certain Article Ten proceedings (FCA 262(i), (v), (ix)). Moreover, *Bennet v. Jeffreys*, 40 NYS2d 543 (1976) established an extraordinary circumstance conditioned on residential care for an extended disruption of custody, and DRL 72(2) established 24 months of care as extraordinary circumstances for grandparents. Both apply to contested Article Six custodies. Additionally, according to the codified Uniform Custody Jurisdictions Enforcement Act, DRL 75-a(13), a “person acting as parent” have standing to petition for custody. Such persons include non-parents who have physical custody of children for six months during the preceding twelve months. Such persons who are ‘acting as parents’ can petition, but according to *Bennet*, they still must prove extraordinary circumstances. Given the case law and statutory standing of caregivers, the interests of caregivers and children may be sufficient to warrant protection.

Providing assigned counsel would help ensure that the best interests of vulnerable children are considered.

Conclusion

Since the right to counsel has yet to be determined, under current practice, Family Court Article Six custody and guardianship of the person indigent kinship caregiver petitioners could be provided with assignment of counsel. Kinship caregivers who petition for custody or guardianship, may want to request the family court judge to assign counsel. Judges may deny the request. But some may be willing to make assignments. Caregivers will then need to provide evidence of their financial circumstance in order to justify their claim of indigence.

In sum, while there is no established right to counsel, judges may be willing to provide assignments
