

## LEGAL FACT SHEET

### INFORMAL CUSTODY, LEGAL CUSTODY, AND LEGAL GUARDIANSHIP

#### Informal Custody Is Lawful Custody

Most non-parent primary caretakers for children do not have court orders of legal custody or guardianship. They are informal custodians, with incomplete authority and control of children in their care.<sup>1</sup> Some important laws regarding informal custodians use the phrases "person in parental relationship"<sup>2</sup> and "primary caretaker."<sup>3</sup> In addition, parents may designate much of their authority for a limited period of time to a nonparent caregiver via a writing, similar to a power of attorney. See parental designation forms in Caregiving without Going to Court and Education sections and also see <https://nysteachs.org/topic-resource/designation-of-person-in-parental-relation-form/>.

#### Legal Custody and Guardianship of the Person

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

#### Difference between Legal Custody and Guardianship of the Person

In general, legal custody proceedings are appropriate for disputes between spouses, and guardianship proceedings are more appropriate for providing parental authority to a non-parent. However, this distinction has become less important as changes to laws have made the two more similar in authority. There are still important distinction regarding the standards for judicial review. Only guardianship proceedings must include a criminal record and state child abuse registry search. For important statutes that provide authority for legal custodians and guardians, see Surrogate's Court Procedures Act § 1726, Domestic Relations Law § 74, and Family Court Act § 657.

Private health insurance policies may cover lawful custody, legal custody, and guardianship. However, policies are not obligated to provide coverage, so a particular policy may cover only legal guardianship or only legal custody.<sup>4</sup> However, if a policy covers legal guardianship then Domestic Relations Law § 74 and Family Court Act § 657 mandate that legal custody also be included even if the policy is silent on the inclusion of legal custody.

<sup>1</sup> The arrangements that parents and grandparents have created without state involvement exist apart from lawful custody as it is defined in the Domestic Relations Law. However, they are a form of "custody" and in practice family courts recognize the person who has informal custody and provide notice to "a party having care, custody, and control", N.Y. Dom. Law §71 and "any person who has physical custody," N.Y. Dom. Rel. Law §75-e. *But see*, N.Y. Civ. Prac. L. & R. §1201.

<sup>2</sup> N.Y. Educ. Law §3212(2); N.Y. Public Health Law §2164.

<sup>3</sup> N.Y. Surrogate's Court Procedure Act S 1726.

<sup>4</sup> N.Y. Pub. H. Law §2504.

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### Standby Guardianship

Pursuant to Surrogate's Court Procedures Act § 1726, parents, guardians, legal custodians, and primary caretakers who cannot locate the natural parents can name a standby guardian via a petition to Family Court or to Surrogate's Court, or by a written designation that is witnessed. The authority of a standby guardian becomes effective upon the named springing event<sup>5</sup>, i.e., debilitation, incapacity, death, or administratively separated in a federal immigration matter.<sup>6</sup> See Designation of Standby Guardianship forms.

### Keeping Children in a Grandparent's Home

Domestic Relations Law § 72(2) contains a provision governing custody disputes between a grandparent and an absent parent. When children who reside in a grandparent's home for two or more years, a grandparent can petition for custody and the court must decide custody based on the best interests of the children. For lesser periods of time, courts may decide based on the children's best interests. This law applies to only grandparents. It does include circumstances where a grandparent may be sharing parenting duties with a resident parent who becomes sick or dies. Courts may consider lesser periods of time for both grandparents and other relative primary caregivers to warrant a best interest trial, because an extended disruption of custody is one of the "extraordinary circumstance" that opens the door to a full custody trial between the nonparent and absent parent.

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<sup>5</sup> Surrogate's Court Procedure Act §1726.

<sup>6</sup> N.Y. Ins. Law §§42235(f), 4305©, 321(4)(c), 3216(c)(4)(A)