

LEGAL FACT SHEET

Initial Foster Care Placement of Children*

Once a child is removed from a parent's home by Child Protective Services, the Department of Social Services (DSS) must search for "suitable relatives" and offer them the opportunity to become foster parents.¹ The extent of the search is not completely discretionary with the Department of Social Services. DSS must attempt to locate "all the grandparents."² Any contacted relative must be told that they can ask to become a foster parent or to assume care privately and that if the family does not assume care there is a likelihood of adoption by the foster parents. Relatives who choose to become foster parents must meet standards similar to non-relative foster parents.

The legislative intent of this law gave special attention to the role of grandparents.³

Sometimes relatives assume the custody of a child pursuant to the neglect proceedings. Use of this custodial arrangement varies from county to county, and inquiry should be made both with the county and with an attorney about this arrangement.

When a child is placed with a non-relative foster family, the Adoption and Safe Families Act mandates that DSS attempt to terminate parental rights if the parent is unable to assume parental duties within fifteen of the first twenty-two months of placement.⁴

Foster Parents versus Relatives

If relatives choose to become the primary caregivers of a child already in foster care, DSS may choose to continue placement with the foster family.⁵ In such situations, the relative may petition for custody or guardianship or use Family Court Act 1028-a, to seek to become a foster parent. In petitions started before termination of parental rights, relatives may prevail.⁶ But if the relative loses, one appellate court upon appeal has declared that it lacks jurisdiction over a custody appeal that would be decided subsequent to termination.⁷

¹ N.Y. Family Court Act §1017(1) and NY Social Services Law §384-a. In practice, however, relatives are often not notified about the removal of children from their parents or, if informed of removal, are not informed of their option to become foster parents. See State of New York Office of the State Comptroller, Division of Management Audit, Department of Social Services Kinship Foster Care Report, 96-106 (Nov. 22, 1996). See also U.S. Department of Health and Human Services Administration for Children and Families, Administration of Children, Youth and Families Children's Bureau, Report to the Congress on Kinship Foster Care, June 2000. P. 38, "Children in kinship care appear to have significantly higher well-being than children in non-kin foster care."

² NY CLS Family Ct Act § 1017...the court shall direct the local commissioner of social services to conduct an immediate investigation to locate any non-respondent parent of the child and any relatives of the child, including all of the child's grandparents [fig 4], all suitable relatives identified by any respondent parent or any non-respondent parent and any relative identified by a child over the age of five as a relative who plays or has played a significant positive role in his or her life [fig 5], and inform them of the pendency of the proceeding and of the opportunity for becoming foster parents or for seeking custody or care of the child,...

³ Section 1. Legislative intent. The legislature hereby finds that, with 413,000 children living in grandparent headed households in New York State, grandparents play a special role in the lives of their grandchildren and are increasingly functioning as care givers in their grandchildren's lives. In recognition of this critical role that many grandparents play in the lives of their grandchildren, the legislature finds it necessary to provide guidance regarding the ability of grandparents to obtain standing in custody proceedings involving their grandchildren. This guidance is in no way intended to limit the state of the law as it relates to the ability of any third party to obtain standing in custody proceedings between such third party and the child's birth parent or parents.

⁴ 45 C.F.R. 1356.21 (i).

⁵ Foster parents cannot be considered as a resource for permanent placement because of the contractual nature of their arrangement with DSS. *Smith v. Organization of Foster Families*, 431 U.S. 86, 97 S. Ct. 2094; 53 L.Ed.2d (1997). "[A]ny such authorized agency may in its discretion remove such child from the home where the child was placed or boarded." Social Services Law

⁶ *In the Matter of Marylou L. v. Tenecha L.*, 182 Misc. 2d 457, 465, 698 N.Y.S.2d 827, 834 (Kings Co. Fam. Ct. 1999).

⁷ *In re John C.*, 718 NYS2d 314 (1st Dept. 2000) Grandmother filed for custody of child in foster care, lost case and while custody petition was on appeal, child was freed for adoption; custody petition must be dismissed now – grandmother could seek to adopt.

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When petitions for custody or guardianship are filed after termination, petitions are frequently denied. Even adoption petitions are unlikely to prevail because Social Services Law states a preference for permanent placement with the foster family when a child is eligible for adoption. But one court has declared that it may be in the best interests of children to be placed with relatives rather than to be adopted by foster parents, *Matter of G. B.*, 801 NYS2d 233.

Subsidized Adoption and Guardianship

Relative and non-relative foster parents may receive an adoption subsidy that is similar to their foster care payments. Maintenance subsidies are available for all foster adopted children who are handicapped or "hard to place," up to age 21.⁸ Adoption subsidy payments are made to a designated representative payee.

Similarly, New York now provides for Kinship Guardianship Assistance to a "prospective relative guardian" under a program codified in law in 2011.⁹ "Prospective relative guardian" can be ones that are related to the child through blood, marriage, or adoption who has been caring for the child as a fully certified or approved foster parent for at least six consecutive months prior to applying for kinship guardianship assistance payments.¹⁰

A child is eligible to receive kinship guardianship assistance if it meets four criteria: a) The child has been in foster care for at least six consecutive months in the home of the prospective relative guardian; and (b) The child being returned home or adopted are not appropriate permanency options for the child; and (c) The child demonstrates a strong attachment to the prospective relative guardian and the prospective relative guardian has a strong commitment to caring permanently for the child; and (d) That age appropriate consultation has been held with the child, provided however with respect to a child who has attained fourteen years of age, that the child has been consulted regarding the kinship guardianship arrangement, and with respect to a child who has attained eighteen years of age, that the child has consented to the kinship guardianship arrangement.

§383(2). But, Social Services Law §383(3) permits foster parents who have been in continuous care of a child for twelve months to intervene in "any custody proceeding."

"[W]here a child has not been freed for adoption the court must determine whether it is nonetheless appropriate to continue to foster care temporarily, or whether the child should be permanently discharged to the biological parent (or a relative or "suitable person")." *Matter of Michael B. v. Marvin B.*, 80 N.Y.2d 299, 314, 604 N.E.2d 122, 131, 590 N.Y.S.2d 60, 69 (1992); Social Services Law §392(6)(a)-(c). "[I]n cases controlled by Social Services Law §392(6), analysis must begin not by measuring biological parent against foster parent but by weighing past and continued foster care against discharge to the biological parent, or other relative or suitable person within Social Services Law §392(6)(b)," *Matter of Michael B. V. Marvin B.*, 80 N.Y.2d 299, 314, 604 N.E.2d 122, 131, 590 N.Y.S.2d 60, 69 (1992).

⁸ N.Y. Soc. Serv. L. §453. Title IV-E of the Social Security Act.

⁹ NY CLS Soc Serv § 458-b.

¹⁰ NY CLS Soc Serv § 458-a.

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Guardianship means full custody rights

New York amended the Family Court Act and the Surrogates Court Act in 2008 to clarify and harmonize the laws¹¹ giving the rights of a guardian to care for a child to include all necessary powers of legal custody and control. Previous confusion between the powers of adoption and guardianship had kept many prospective relative caregivers from seeking legal guardianship. Now, “[t]he general rule is that guardianship of the person of an infant implies the custody and control of the person of an infant.”¹² This gives a relative guardian “the right and responsibility to make decisions, including issuing any necessary consents, regarding the child's protection, education, care and control, health and medical needs, and the physical custody of the person of the child.”¹³

The above information is not legal advice. It is not a substitute for consulting an attorney. Up-to-date legal advice and legal information can only be obtained by consulting with an attorney. Any opinions, legal opinions, findings, conclusions or recommendations expressed in this publication or on the NYS Kinship Navigator website or by any person or entity to whom you may be referred are those of the Kinship Navigator, Catholic Charities Family and Community Services and/or the person or entity you are referred to and do not necessarily represent the official views, opinions, legal opinions or policy of the State of New York and/or the New York State Office of Children and Family Services (OCFS). NYS Kinship Navigator is a Catholic Charities Family and Community Services program, funded by the New York State Office of Children and Family Services. Catholic Charities Family and Community Services is the only agency authorized by New York State to provide a statewide information and referral service to kinship caregivers. The information herein is published by the NYS Kinship Navigator.

¹¹ Assembly memo in support of Bill Jacket L, Chapter 404, May 11, 2007.

¹² Matter of Allen v. Fiedler, 96 A.D.3d 1682, 1684 (N.Y. App. Div. 4th Dep't 2012)

¹³ Ibid, Bill Summary.