

## LEGAL FACT SHEET

---

### KINSHIP NAVIGATOR – 2018 GUIDE TO NYS KINSHIP LAW

---

#### **Purpose of this Booklet**

The purpose of this booklet is to provide information about laws and resources for kinship caregivers and also for the professionals who serve kinship families. While most guidebooks do not contain citations to law, the authors recognized that in order to successfully advocate for themselves, both caregivers and professionals should have access to applicable laws. Their best tool is to know the legal authority (citation). Therefore, this guide contains many references to laws that relate to kinship care and is current as of October 2018.

Because laws change, the authors caution that the citations herein are not legal advice, and readers should talk to an attorney to obtain up to date legal information and advice.

Published by NYS Kinship Navigator, a Catholic Family Center Program funded by New York State and administered by the New York State Office of Children and Families to provide a statewide information and referral network for kinship caregivers.

Prepared by Gerard Wallace, Esq., Director, NYS Kinship Navigator, with updates by Jessica Brand, Esq.

## LEGAL FACT SHEET

### TABLE OF CONTENTS

KINSHIP CARE: BACKGROUND INFORMATION .....	4
Definition of Kinship Care.....	4
Statistics on Kinship Care in New York State .....	4
Causes of Kinship Care.....	4
Kinship Children Face Special Challenges .....	5
Legal Abbreviations for References to Statutes.....	5
New York State Agency Abbreviations.....	5
KINSHIP CARE: SPECIAL LAWS AND SPECIAL ASSISTANCE .....	5
A. How Kin Become Caregivers .....	5
Parents Will Consent.....	5
Parent Will Not or Cannot Consent .....	5
Child Protective Services or Police Request Relatives to Assist – Before Removal .....	6
Child Protective Services Request Relatives to Assist – After Removal.....	6
What are Your Options? .....	7
When Children are Already in Foster Care.....	7
Relatives Who are Caregivers and Want to be Foster Parents.....	8
Relatives Seeking Custody or Guardianship Post Termination of Parental Rights .....	8
Incarcerated Parents and Termination of Parental Rights – Special Exemption.....	8
Parents Can Regain their Rights – After Termination .....	9
Children’s Visits to Incarcerated Parents.....	9
Grandparent Visitation.....	9
B. Custodial Arrangements.....	10
Informal Custody .....	10
Legal Custody .....	13
Guardianship .....	14
Foster Care .....	16
Adoption .....	19
C. Legal Assistance.....	19
New York State Laws (Statutes).....	20
New York State Regulations.....	20

## LEGAL FACT SHEET

New York and Federal Case Law .....	20
D. Financial Assistance.....	20
Family Assistance (Temporary Assistance to Needy Families - TANF).....	20
Food Stamps (Supplemental Nutrition Allowance Program) .....	21
Women, Infant and Children Supplemental Nutrition .....	22
Supplemental Security Income .....	22
Social Security Benefits.....	22
Tax Benefits .....	22
Child and Dependent Care Tax Credit.....	22
Earned Income Tax Credit (EITC).....	23
Child Tax Credit.....	23
Free Tax Information .....	23
E. Health Care and Other Services.....	24
Health Insurance Coverage .....	24
Medicaid .....	24
Eligibility .....	24
Child/Teen Health Program (CTHP) .....	24
Child Health Plus and Family Health Plus.....	24
Special Education Services .....	25
Child Care is Sometimes Available .....	25
Child Care Centers.....	25
Family Child Care Homes.....	26
In-home Care .....	26
Summer Day Camps .....	26
School-Age Child Care .....	26
F. 2018 Update.....	26
Written Designations by Parents.....	26
Deportation of Parents and the Care of Children.....	26
School Enrollment.....	27
Legal Custody – Nonparents.....	27
Grandparent Visitation.....	28

## LEGAL FACT SHEET

### KINSHIP CARE: BACKGROUND INFORMATION

#### Definition of Kinship Care

Kinship caregivers are grandparents, other relatives, non-blood relatives such as stepgrandparent, and non-related persons who assume full-time care of children in the caregivers' homes.

Kinship care is sometimes called kin care or non-parent care. Another term is grandfamilies. Sometimes in order to distinguish between foster care and non-foster care, kinship care is divided into:

- private (also called informal kinship care, “kincare”, or non-foster kinship care,
- public (also called formal kinship care, “kinship”, or kinship foster care.

In New York State, over 95% of kinship caregivers are not foster parents.

In this book we'll use the term kinship care to mean both private and public. We'll talk about laws that apply to both, and laws that apply only to private (non-foster) or only to public (foster) kinship care.

#### Statistics on Kinship Care in New York State

New York State has a large population of kinship caregivers. In 2002, there were 186,435 non-parent custodial arrangements for New York's children.<sup>1</sup> Approximately 70% of these arrangements involved grandparents.<sup>2</sup> More than 55,000 children have lived with a grandparent for more than five years. Grandparent caregivers are split almost evenly between the greater New York City area and the rest of the state.<sup>3</sup>

The 2009 American Community Survey shows 141,157 New York grandparents as primary caregivers. 21.7% had income below the poverty level. 54,305 were age sixty or older. Of the 141,157, 46% are white, 29.4% African American, and 27.7% Hispanic. Regarding children, 48.9% were under six years of age, 29.3% from six to eleven years, and 21.85 were from twelve to seventeen years old.

#### Causes of Kinship Care

Children enter kinship care because of parental:

- Abuse, neglect or abandonment
- Alcohol and/or substance abuse
- Death
- Mental illness
- Inability or unwillingness to parent
- Incarceration
- Military deployment

<sup>1</sup> ADAM SAFIR & HAROLD LEIBOVITZ, *State Profile of New York, 2002 National Survey of America's Families* (Urban Institute 2002).

<sup>2</sup> U.S. BUREAU OF THE CENSUS, U.S. Census 2000 (Over 412,000 grandparents resided with their grandchildren in 2000).

<sup>3</sup> *Id.*

## LEGAL FACT SHEET

### Kinship Children Face Special Challenges

Children in kinship care face many special challenges, including loss of their parents, possible abuse/neglect by their parents, physical disabilities, mental health issues, poverty, developmental delays, and others.

### Legal Abbreviations for References to Statutes

DRL = Domestic Relations Law  
FCA = Family Court Act  
SCPA = Surrogate's Court Procedure Act  
SSL = Social Services Law

### New York State Agency Abbreviations

OCA = Office of Court Administration  
OTDA = Office of Temporary and Disability Assistance  
OCFS = Office of Children and Family Services  
OFA = Office for the Aging

*For information on how to research statutes, regulations, and case law, See Legal Assistance section.*

## KINSHIP CARE: SPECIAL LAWS AND SPECIAL ASSISTANCE

### A. How Kin Become Caregivers

#### Parents Will Consent

When parents are willing to consent to guardianship or custody, then grandparents, relatives, and other kin are not subject to any barriers to becoming caregivers. However, even in those instances, courts will usually want to review their background, ordering a home study, criminal background check, and a child abuse registry check. When a child welfare agency is involved, this check may extend beyond New York State to the entire nation.

#### Parent Will Not or Cannot Consent

If parents are unwilling to consent, the relative will have to petition family court via a guardianship or custody petition. The petitioner will have to prove an extraordinary circumstance at a fact-finding hearing. Extraordinary circumstances are very similar to the reasons that children come in kinship care.

Once the court finds that extraordinary circumstances exist, then the court must hold a trial on the best interests of the child. Trials involving a parent and a non-parent caregiver happen frequently, and there is a large number of cases that supply precedents for these proceedings. Of these, the most important is *Bennett v. Jeffreys*, 40 N.Y.2d 543 (1976).

## LEGAL FACT SHEET

In Bennett, the New York State Court of Appeals expanded the circumstances whereupon a trial court must decide custody based upon the best interests of children. The Court's decision specifically added a new circumstance – “an extended disruption of custody.” Since then, numerous courts have decided such circumstances exist. See for instance, *Matter of Gray v. Chambers*, 222 A. D.2d 753 (1995).

An extended disruption of custody means that a child has lived with the caregiver for an extended period of time. Courts have found periods as short as six months to be long enough.

Importantly, courts consistently find that an extended disruption of custody, when accompanied by evidence that the non-parent had a close relationship with the children, and the failure of the parent to make efforts to resume their parental role is an extraordinary circumstance. *Matter of McDevitt v. Stimpson*, 281 A.D.2d 860, 862 (2001); *Cote v. Brown*, 299 A.D.2d 876, 2002

Grandparents also have a special statute about extraordinary circumstances. Domestic Relations Law (DRL) Section 72(2) specifically states that an extended disruption of custody for twentyfour months or more is an extraordinary circumstance in a custodial contest with an “absent” parent.

### Child Protective Services or Police Request Relatives to Assist – Before Removal

Often grandparents and relatives are contacted by a Child Protective Worker or a law enforcement official and asked to care for children and there is no formal legal proceeding to remove the child. Such requests are legally valid. However, once the relative agrees and takes a child into their home, they are truly on their own. It is unlikely that they'll be given the chance to become a foster parent. Visit the NYS Kinship Navigator for more information on informal placements.

Upon arrest, parents should immediately make plans for their children. Some police officials will provide them with a handout that tells how to arrange care. This handout provides a simple parental designation and a list of resources. It's available at <http://www.nycourts.gov/ip/justiceforchildren/NewContent/2-Incarcerated%20Parent%20Flyer-English.pdf> or by contacting the NYS Kinship Navigator.

### Child Protective Services Request Relatives to Assist – After Removal

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.<sup>1</sup> DSS must attempt to locate “all of the child's grandparents.” 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.

In practice, however, relatives are often not notified about removal of children from their parents or, if informed of removal, are not informed of their option to become foster parents.

Currently, in response to the federal Fostering Connections to Success and Improving Adoptions Act (P.L. 1010-351, Oct. 2008), DSS's must act with “due diligence” and complete the search for relatives, including all

## LEGAL FACT SHEET

grandparents, within thirty days. According to a NYS Office of Children and Family Services (OCFS) (11-OCFS-ADM-03), DSS must also provide each contacted relative with two booklets:

- “OCFS requires that relatives be given a copy of *Having a Voice and a Choice: New York State Handbook for Relatives Raising Children*, if the relative is considering becoming the child’s caregiver (See 09 OCFS-ADM-04). As an option, OCFS also developed a brochure
- *Know Your Options: Relatives Caring for Children* (See 10 OCFS- INF-03).
- A new publication, entitled *Know Your Permanency Options: The Kinship Guardianship Assistance Program (KinGAP)* must accompany the handbook in situations where the handbook is required, per 09 OCFS-ADM-04.”

This is a very important legal requirement. Caregivers who are not given the booklets should contact the caseworker and the NYS Kinship Navigator. They may still be eligible to become foster parents. Links to these publications can be found at the Kinship Navigator website: <https://www.nysnavigator.org/legal-resources/legal-fact-sheets/>

### What are Your Options?

Placements after removals are governed by FCA 1017. Relatives seeking to care for children have three options: private custody, “direct” custody, and foster care.

Private custody means that DSS agrees to the relative petitioning to become a legal custodian or guardian.

Placements pursuant to FCA (2)(ii), are usually called “direct custody.” They are sometimes referred to as “N” docket placements or “1017” placements. They are the subject of much discussion inside child welfare agencies and of complaints from kinship advocates. In late 2011, the OCFS notified local county DSS’s that they must track and report the use of such placements. This is an important step towards regulating direct placements.

Direct placements mean that DSS still has care and control of the child, continues efforts to assist the parent, continues the Article Ten proceedings, but does not pay a foster care stipend to the caregiver.

Given the disadvantages of direct placements, relatives should consider becoming foster parents. DSS workers may offer many arguments to dissuade kin. One common reason is that the child cannot be placed with the caregiver until after foster care certification and certification will take a long time. While it may be true, it is only a local practice, not the state law. Some DSS’s choose to place before certification, as “emergency placements,” and some DSS’s make certification easy to achieve. Relatives should ask to speak to a supervisor, check with the state office, and call the NYS Kinship Navigator as soon possible.

### When Children are Already in Foster Care

If relatives seek to become the primary caregivers of a child already in foster care, DSS may choose to continue placement with the foster family. Foster parents have limited protections from removals, including access to a fair hearing, and they have no fundamental right to care for children.

## LEGAL FACT SHEET

Social Services Law 383(3) however permits foster parents who have been in continuous care of a child for twelve months to intervene in "any custody proceeding." In such situations, the relative may petition for custody or guardianship or use FCA 1028-a to seek to become a foster parent.

FCA 1028-a permits relatives to petition to become foster parents of children who are not in their care. There are many specific conditions that must be satisfied in order to have the petition heard, including:

- the relative has not refused previously to be considered as a foster parent or custodian of the child, provided, however, that an inability to provide immediate care for the child due to a lack of resource or inadequate housing, educational or other arrangements necessary to care appropriately for the child shall not constitute a previous refusal;
- the local social services district has refused to place the child with the relative for reasons other than the relative's failure to qualify as a foster parent pursuant to the regulations of the office of children and family services; and
- the application is brought within six months from the date the relative received notice that the child was being removed or had been removed from his or her home and no later than twelve months from the date that the child was removed.

If a relative wants to become the foster parent of a child and meets the requirements, they can file petition under FCA 1028-a.

### Relatives Who are Caregivers and Want to be Foster Parents

Relatives who are caregivers often complain that they want to be foster parents and that there is no court procedure to force DSS to make them foster parents. They can ask DSS and very infrequently DSS will agree. However, caregivers could transfer custody to DSS and then hope DSS places children with them. Because of the risk, almost always relatives choose not to transfer. Sometimes, a judge will order DSS to make the caregivers foster parents. Caregivers should ask and ask again, and also contact the NYS Kinship Navigator.

### Relatives Seeking Custody or Guardianship Post Termination of Parental Rights

Custody petitions usually do not survive post termination, for the simple reason that children need new parents (adoption) or guardians (who replace parents). Therefore, as a rule, it is better to petition for guardianship. In petitions for custody that are started before termination of parental rights, relatives may prevail. But if the relative loses, upon appeal, one appellate court has declared that it lacks jurisdiction over a custody appeal that would be decided subsequent to termination. Because orphans can only be adopted or placed in guardianship.

When children are freed for adoption, relatives should seek to petition for guardianship or adoption, not for custody.

### Incarcerated Parents and Termination of Parental Rights – Special Exemption

New York has a special law that can help parents to keep their parental rights while they are incarcerated. DSS is not required to file for termination when children are in foster care for 15 of the most recent 22 months, if on



## LEGAL FACT SHEET

a case by case basis it determines that an incarcerated parent has played a “meaningful role” in the child’s life and there is no documented reason why the agency must terminate. Social Services Law 384-b (3)(I)(I). See also 11-OCFS-ADM-7.

### Parents Can Regain their Rights – After Termination

In situations where children in foster care are not yet adopted, parents whose rights have been terminated may petition for restoration of their rights. FCA 635. See also 11- OCFS-INF-02. This new law can assist parents to regain parental rights. The petition contains a number of conditions:

- the child is 14 years of age or older;
- at least two years have elapsed since the issuance of the order transferring guardianship and custody of the child (the termination order);
- the original adjudication terminating parental rights was not based upon severe or repeated child abuse; and
- the child is under the jurisdiction of the Family Court, has not been adopted, and has a permanency goal other than adoption.

### Children’s Visits to Incarcerated Parents

For children who are in kinship foster care, the DSS worker has an obligation to assist in finding an incarcerated parent and in arranging visits. The Department of Corrections website offers a guide, “Handbook for the Families and Friends of New York State DOCCS Offenders” that contains information about visitation. Additionally, each correctional facility, county jails, and other secure facilities have their own rules about visitation. Most importantly, kinship caregivers will need court-ordered custody or guardianship, or a notarized statement from a parent, in order to bring children into a secure facility. Visit <http://www.doccs.ny.gov/> and look at the services listed in the left column or contact the Division of Ministerial, Family and Volunteer Services, NYS Dept. of Correctional Services, Harriman State Campus – Building 2, 1220 Washington Avenue, Albany, NY 12225-2050 (518-402-1700).

### Grandparent Visitation

Sometimes children are not in the care of a grandparent or other relative. There are special statutes that govern the right of grandparents to visit children who are living with their parents or who are in state care. DRL 72 (visitation with parents); FCA 1081 & 1083 (visitation of children in foster care). See *E.S. v. P.D.*, 8 N.Y.3d 150 (2007), also, *Matter of Loretta D. v. Commissioner of Social Services of City of New York*, 177 A.D.2d

573, 574-5 (2<sup>nd</sup> Dept. 1991)). In general, grandparents have a right to seek visitation in court, but no legal right to visitation.

## LEGAL FACT SHEET

### B. Custodial Arrangements

In New York State there are several custodial options for grandparents and other relatives who are raising children. Grandparents and relatives can become the lawful caregivers of children via:

- Informal custody
- Legal custody
- Guardianship
- Foster care
- Adoption

#### Informal Custody

Informal custody does not involve a court petition, court hearings, or court orders. It is privately arranged. Informal custody can happen when parents are not able or willing to care for or when parents are deceased, cannot be found, are incarcerated, or for any other reason are not capable of providing for their children. Informal caregivers have limited authority to make decisions for children. In general, most informal custodians fit the definition of a “person in parental relation,” and the informal custodian has authority to immunize and to take charge of schooling. If they have a written designation form from the parent, they may also have authority to make other medical decisions.

#### “Person in Parental Relation”

New York’s public health law and education law (PHL 2164, 2504, EDL 02 & 3212) contain a technical definition of a person in parental relation. The definition includes some but not all informal custodians. Person in parental relation includes custodians who have:

- 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, or have designated the person pursuant to title fifteen-A of article five of the general obligations law as a person in parental relation to the child.

Informal custodians who fit one of the described circumstances or have a written designation from a parent or guardian have responsibility for immunization and school attendance.

In addition, another law permits any grandparent, adult brother or sister, adult aunt or uncle who has assumed care to consent to immunizations (Public Health Law 2504[5

## LEGAL FACT SHEET

### Written Designations by Parents

New York permits parents to designate someone to make the same decisions that any “person in parental relationship” can make as well as to make routine medical decisions. There are two kinds of written notes authorized by New York Law. The simpler one is good for one month from the day of writing. It does not need to be notarized. The longer note is good for six months and must be notarized. Both are renewable.

Informal custodians who have a written designation can make routine medical decisions for a child. The Public Health Law Section 2504(2) says that a person authorized by a parental designation:

- may consent to any medical, dental, health and hospital services for such child for which consent is otherwise required which are not: (a) major medical treatment as defined in subdivision (a) of section 80.03 of the mental hygiene law; (b) electroconvulsive therapy; or (c) the withdrawal or discontinuance of medical treatment which is sustaining life functions.

No informal custodian, even those with written designation, has the right to consent to surgery or other major medical decisions. For more information about “persons in parental relationship” consult an attorney or visit the NYS Kinship Navigator website’s legal fact sheets.

Thirty Day and Six Month written designation forms are available from the NYS Kinship Navigator.<sup>4</sup>

Parents have a legal right to care for their children. They can consent to informal custody or to parental designations, and they can revoke their consent at any time. Upon revocation, an informal custodian will have no right to continue caring unless they get the assistance of a court or Child Protective Services.

### Emergency Care

Public Health Law 2504(4) makes sure that children can receive medical care in an emergency. There is no requirement that someone be a “custodian,” a “person in parental relation” or have legal orders of custody or guardianship. Anyone can help a child to get care when it is an emergency. The law says:

- Medical, dental, health and hospital services may be rendered to persons of any age without the consent of a parent or legal guardian when, in the physician's judgment an emergency exists and the person is in immediate need of medical attention and an attempt to secure consent would result in delay of treatment which would increase the risk to the person's life or health.

### School Enrollment

In order to enroll a child in school, caregivers can seek a court order of custody or guardianship or remain an informal custodian, and attempt to prove to the local school district that they meet the educational requirements

---

<sup>4</sup> Also available in English and Spanish at the NYS Permanent Commission on Justice for Children website:

<http://www.nycourts.gov/ip/justiceforchildren/incarceratedparents.shtml>

## LEGAL FACT SHEET

for school enrollment. Education law requires that the informal custodian has taken on the care and control of a child and the child is living with them with the intention to remain there for the foreseeable future.

Informal caregivers must talk to the local school officials and prove the two requirements via sworn statements and other documentation showing that the parents are unable or unwilling to care for their children and that the children are residing with the informal caregiver. See also the Navigator's school enrollment toolkit.

When school districts deny school enrollment applications, then caregivers must ask for a fair hearing by the state education department. This process can take a long time and local districts can refuse to permit children to attend school during the appeal. If this situation arises, caregivers should contact their local legal services or the NYS Kinship Navigator.

As said, it is necessary to show that a caregiver has assumed care and control of the child and that the child is residing with the caregiver and will continue to live in their home. Schools may demand legal custody or guardianship in order to prove that caregivers have assumed the care and control of a child, but that is not the law. Instead, school districts should only ask for an affidavit stating that the caregiver has care and the reason they are caring for the child. An affidavit from the parent attesting to the fact that the caregiver has assumed the full care and control of a child may also be necessary. Schools can also request documents that prove where the relative and child live. Suitable documentation includes a utility bill, driver's license, medical insurance card, a letter from the Department of Social Services, etc.

Also, a recent law mandates that local school districts must accept custody or guardianship orders as conclusive proof of residency and control. But this does not mean that only custody or guardianship permit enrollment. See NYS Kinship Navigator legal fact sheets on education.

Following the aforementioned procedure should allow caregivers to enroll their grandchildren in school, see their grandchildren's school records, and make decisions about their grandchildren's education.

### What Else May Informal Custodians Do?

Laws regarding access to birth certificates, medical records, school records, court records, and other documents are all different. Check with the local agency, an attorney, or visit the NYS Kinship Navigator.

### Laws Aren't Always Followed

While the law declares who can make medical decisions, the reality is that often medical providers accept the authority of grandparents and other relative caregivers, and never inquire about court orders or parental designations. Sometimes, a statement from the caregiver, or the parent, or from a social worker, which shows the caregiver's relationship to your child, is enough to get medical care for a child.

## LEGAL FACT SHEET

### What Financial Assistance and Services Do Informal Custodians Qualify For?

All informal caregivers who have assumed the care and control of children who are living with them are eligible for financial assistance and other services. See section on financial assistance and services.

### Advantages of Legal Custody or Guardianship

Informal Custodians have limited authority. For more authority they should consider going to court to get orders of custody, guardianship, or adoption.

For instance, if a relative caregiver needs to make major medical decisions then it may be necessary to obtain legal guardianship or legal custody. Most importantly, without court orders, there is no legal right for informal custodians to keep children from their parents. Unless parental rights have been terminated or a court order prohibits the parent from taking a child, parents have the right to care for their children.

### Legal Custody

Legal custody is a legal arrangement that is ordered by a family court. A relative or other non-parent caregiver should seek legal custody when he/she wants clear legal authority to care for the child, especially to ensure that a parent must go to court before regaining custody. It is important to note that legal custody is never really permanent because under certain circumstances parents can petition the court to regain custody. Also, a judge may limit the authority of a custodian or award a joint custody with a parent.

Grandparents and other relatives (and sometimes non-relatives) who want legal custody must get the parents' consent or go to court and prove to the judge that the parents are not able to care for the child.

If the parents do not agree to consent, then it will be necessary to prove an "extraordinary circumstances" that make it necessary for the court to decide whose custody is in the child's best interest. "Extraordinary circumstances" is a legal term. It includes abandonment, persistent neglect, unfitness, abuse, and other extraordinary circumstances, such as an extended period of time during which the child lived with a non-parent.

In almost all proceedings, the parents will have the right to a lawyer, and a lawyer (called the "attorney for the child" (formerly "law guardian") will be appointed to represent the child.

A special New York law (DRL 72[2]) provides that a period of two years residence with a grandparent is an "extraordinary circumstance" which will allow a judge to hold a custody trial.

For caregivers of children with an imprisoned parent, extraordinary circumstances aren't necessary because the parent will usually consent. However, absent consent, the imprisonment and subsequent inability of the parent to provide a home for a child is itself an extraordinary circumstance.

In custody or guardianship orders based upon parental consent, a parent can regain custody by going to court and revoking their consent. The judge will not hold a trial to decide custody unless the caregiver then claims an extraordinary circumstance, such as an extended disruption of custody. If, in a preliminary hearing, the judge

## LEGAL FACT SHEET

finds that there are extraordinary circumstances, then the judge will hold a trial to decide whose custody is in the best interests of the child.

For all future custodial disputes, a finding of extraordinary circumstances is very important. No longer can parents just revoke their consent. Instead, they must show a “change in circumstances” before a judge will hear their petition to regain custody.

All departments follow *Guinta v. Doxtator*, Fourth Dept. April 29, 2005; 20 A.D.3d 47. Subsequent to an order of custody based on a finding of an extraordinary circumstance, the sole consideration for trial is whether either party established a “change of circumstances which reflects a real need for change to ensure the best interests of the child.”

Petitions for legal custody can be obtained from the local Family Court or from the official site of the New York Court Administration, available at:

[www.nycourts.gov/forms/familycourt](http://www.nycourts.gov/forms/familycourt).

### Guardianship

Guardianship is a legal arrangement granted to a non-parent by either a family court or surrogate’s court. Guardianship provides legal authority similar to parental authority. In New York State, there are two types of guardianship: guardianship of the person, whereby the guardian has the legal authority to make all daily decisions concerning a child, including his/her education, medical care, and where he/she will live; or guardianship of the property whereby the guardian is placed in charge of a child's property and finances.

There is also a special guardianship called “permanent guardianship,” available when parents are deceased, or their rights have been terminated. Permanent guardianship is similar to adoption, but a child’s name does not have to be changed and the caregiver does not become the parent. Special forms for permanent guardianship as well as other court forms are available at [www.nycourts.gov/forms/familycourt](http://www.nycourts.gov/forms/familycourt).

### Similarities between Guardianship and Legal Custody

Generally speaking, judges follow the same standards of review for both guardianship of the person and legal custody. However, there are some important differences. All guardianship proceedings will include a child abuse registry check and a criminal record check for all members of the household. Such investigations are not mandatory in custody proceedings. However, sex offender registry checks are mandatory. DRL 240(1)(a-1)(3); also SSL 424-a.

In both types of proceedings, judges may choose to interview children in their chambers. This interview is called an in camera interview. It is mandatory that there be a stenographic record of the interview. FCA 664.

The practical effect of guardianship and legal custody are often the same, but sometimes differences do occur, though not frequently. Guardians and parents have full authority to apply for government records and

In a petition for guardianship or legal custody, make sure to use the words “extraordinary circumstance” when stating the reasons why custody is being sought.

## LEGAL FACT SHEET

documents. Legal custodians do not. Parents and guardians always have the authority to make major medical decisions, but legal custodians may not have their authority accepted by some medical providers. While usually no one questions the authority of legal custodians, to avoid uncertainty, the issue can be avoided if the court order expressly grants such authority.

As for similarities, for both guardians and legal custodians the responsibility and rights of the parents remain intact. Parents are still responsible for the financial support of the child. If the court orders it, they may also be allowed to visit their child. And in both cases, the parent still has the right to petition the court to regain control of their child.

While both Family Court and Surrogate's Court may appoint a guardian, some counties prefer to hear petitions for guardianship of the person by family members in family court.

A few statutes state that guardians and legal custodians have the same authority. DRL 74 and FCA 657 state that both guardians and legal custodians can enroll children in school and can place children on a caregiver's health insurance. The standby guardianship statute (below) includes both guardians and legal custodians.

### Standby Guardianship

Standby Guardians are persons who can step in to become the guardians of children when parents, *guardians*, *legal custodians*, and *caretakers*, who cannot locate the parents, become debilitated, incapacitated, or die.

The Standby Guardianship statute, Surrogate's Court Procedure Act Section 1726, has two very different ways to name a successor guardian:

- Option One: If the principal (parent, guardian, legal custodian or other authorized informal caregiver) is chronically ill or dying, they can go to court with the person chosen to be the standby guardian and ask the court to appoint that person as the standby guardian. Upon incapacity or death, the standby guardian becomes an active guardian, but he/she must go to court within ninety days for confirmation of the appointment.

When the principal goes to court to have the court appoint the standby guardian, they are taking steps to make sure that the person chosen as standby guardian will be appointed by the court to act as the child's guardian when they die or are no longer able to take care for a child, but they do not give up their current right to make decisions for the child.

- Option Two: The principal can designate a standby guardian by writing and signing a document in front of two witnesses who are at least 18 years old that states:
  - the principal's name;
  - the name, address, and telephone number of the proposed standby guardian;
  - whether the authority of the standby guardian will be to make decisions for the daily needs of the child, the child's finances and property, or both; and
  - whether the authority or the power of the standby guardian should begin when the principal becomes debilitated, incapacitated, or dies.

## LEGAL FACT SHEET

When a principal designates a standby guardian in writing, they are recommending a person to be the child's guardian. If the court agrees, the court will appoint or name that person as the child's guardian. When a principal makes such a designation, he/she does not give up their current exclusive right to make decisions for the child. Upon debilitation, incapacity, or death, the standby guardian must go to court within sixty days and petition for appointment. The suggested standby guardian form is below:

- The standby guardianship form is available here: <https://www.nysnavigator.org/wp-content/uploads/Designation-of-Standby-Guardianship-BLANK-FORM-Fillable-Form.pdf>

### Foster Care

Children who are abused, neglected, or abandoned by their parents (or when parents are arrested or imprisoned) are often placed in the legal custody of the Commissioner of Social Services after a court has decided that their parents cannot care for them. This proceeding is governed by Article 10 and 10-A of the Family Court Act. Once a removal occurs, Section 1017 of this law mandates that relatives, including all grandparents, are notified of their options. Many relatives report that they are not fully informed. For a discussion of how relatives should be informed and what are their options are see above section, "How Kin Become Caregivers."

Children who are removed from their homes are placed in a foster family home, a group home, a child care institution, or with relatives. Relative placements may be used as "emergency placements," in which case the relative can later qualify as a foster parent.

However, not all counties choose to make such placements. If any child welfare official requests a relative to take care of a child, they must provide the relative with two booklets ("Having a Voice and a Choice" and "Know Your Permanency Options") that explain their options.

It is important for caregivers to know that once a child is living in their home, it is probably too late for them to become foster parents. Grandparents and other relative caregivers who want to become foster parents should make sure that the child is first placed in the care and control of the State. They can then ask to become the kinship foster parent. In most instances, the court will place the child with them.

### Reunification with Parent - State Obligation

The goal of foster care is to find a permanent home for the child. The Commissioner of Social Services, through the child welfare agency, will try first to reunite the parent and child. If this cannot happen, the agency may go to court to request that the rights of the parent be terminated so that a permanent home can be found for the child. The agency will then want to find a permanent home for the child.

For relative foster parents, if both return to parent and adoption are ruled out, then caregivers can apply for KinGAP (relative guardianship subsidies). See Section below.

Contact an attorney, a legal service provider or the NYS Kinship Navigator if a child has been placed in your home and a child welfare worker did not provide you with the two booklets.



## LEGAL FACT SHEET

### Kinship Foster Care

New York State law requires the Commissioner of Social Services or the child welfare agency to look for relatives to become foster parents. Upon finding a suitable relative, the local department and the family court judge should inquire whether the relative wishes to become a foster parent, to take direct custody with the continuing involvement of the department, or to become an independent legal custodian.

Kinship foster care is foster care granted to a grandparent or another relative of a child until the parent and child are reunited or until a permanent home is found for the child. A kinship foster care parent has temporary physical custody of the child, not legal custody. Legal custody of that child remains with the Department of Social Services (DSS). This means that the kinship foster care parent takes care of the child's daily needs but cannot make any legal or major decisions regarding the child without first obtaining the consent of DSS. An advantage of kinship foster care is that foster care payments are paid, and other forms of assistance are available. See OCFS website for a list of services. Services may include family services, payment of special expenses, assistance with visitation, and educational assistance for the child. Like foster parents, kin must be certified after completing a foster parent course and submitting to an investigation. Unlike foster parents, the agency can waive non-safety requirements.

Some relatives are awarded temporary custody, often called "direct" or "N docket" custody. The relative is subject to the department's scrutiny and oversight, like a foster parent, but will not receive foster care payments. In this situation, the department will continue efforts to "reunite" the parents with their children, and eventually the parents may regain custody.

Many relatives choose not to become kinship foster parents, nor to become "N Docket" temporary custodians, because they prefer to take care of the child without the department of social services supervision and involvement in their home. These relatives can petition for legal custody. Courts may want to wait for efforts at reunification to be exhausted before granting private custody.

### Kinship Guardianship Subsidies Program (KinGAP)

In 2011, special guardianship subsidies became available to relative foster parents (kinship foster care). This program is called "KinGAP". See Social Services Law 458- a-f.

KinGAP permits relatives to leave foster care and continue to receive the same financial assistance. Assistance payments must be at same rate as adoption subsidy and based on foster care maintenance rate guardian received while the child was in foster care.

#### **Child Welfare Laws are Continually Changing!**

The law regarding kinship foster care is changing rapidly because of the need to place foster children in permanent homes, and because relatives and children are gaining more legal rights. Everyone interested in the well-being of children should rely upon up-to-date legal information and advice from a competent attorney.

Kinship foster parents are eligible when:

- the child must be in foster care and placed with the relative for at least six previous consecutive months;
- the agency must have determined that the permanency goals for the child are to not return to the parents' home or to be adopted;
- the child and relative guardian must demonstrate a strong attachment; and

## LEGAL FACT SHEET

- the relative demonstrates a strong commitment to permanently care for child.

The child must be consulted if age 14 or older, must consent if age 18. Relative guardian and household members must have a State and federal criminal background check and be cleared through the State Child Abuse Registry or other state equivalent if they lived elsewhere in past five years.

If the conditions are met, then the local department and the relative must enter into a subsidy assistance agreement before initiating the guardianship proceeding. See OCFS KinGAP site for court forms.

Relative guardians are also eligible to receive up to \$2,000 in non-recurring expenses to obtain legal guardianship. Assistance continues until the child is 18, or until age 21 if the child 16+ when the relative assumed guardianship, and the child remains in school (unless incapable of doing so). Assistance ends when the relative guardian is no longer legally responsible or not providing support for the child.

Child care assistance is governed by local rules. Additionally, relative guardians under KinGAP are able to access some foster care services.

OCFS has published thorough explanations of KinGAP. The Court Administration has also published court forms in a very focused effort for this program to succeed. Materials are available at the OCFS web site on its KinGAP pages and at the OCA website's family court forms section. For more information, including available services and what to do if the local child welfare agency denies your application for KinGAP, read [Know Your Permanency Options](#) or contact the NYS Kinship Navigator.

For kinship foster parents with incarcerated parents, the local agency must have concluded that "return to parent" is ruled out. Lengthy prison sentences are a reason to rule out return. Also, the agency must rule out adoption. Given the opportunity to waive termination of parental right, this "rule out" is also reasonable.

Kinship advocates are still concerned that KinGAP will not reach all eligible caregivers because of ongoing problems with notification to relatives. They also are concerned that kin may not qualify for subsidies because the rule out of adoption condition is not met. For questions about KinGAP, contact the NYS Kinship Navigator.

### Waiver of Termination for Incarcerated Parents

As mentioned, New York permits a case by case determination by the local district to make an exception to the rule that parental rights must be terminated after a child is in foster care for fifteen of the last twenty-two months. Given that it is also permissible to waive terminations when a child is in kinship foster care, there are very good reasons to "rule out" adoption. If the parents are not coming home soon, KinGAP is a suitable permanency goal.

### Reasons Not To Use KinGAP

The most important reason not to seek a relative guardianship relates to the level of care needed for children and to the need for absolute permanency. Relatives should discuss what services will not be continued when relatives become guardians under KinGAP and whether they wish to insure permanency by adopting. See [Know Your Permanency Options](#), talk to your case worker, and call the NYS Kinship Navigator.

## LEGAL FACT SHEET

### Adoption

Adoption replaces the birth parents with adoptive parents, who assume the full rights and responsibilities of parents. In general, adoption ends the birth parents' involvement with the child, but there are exceptions. Parents can agree to surrenders and to adoptions with certain enforceable conditions related to continuing contact with their children and/or the designation of the adoptive parent. DRL 112-b; FCA1055-a; SSL 383-c.

Caregivers who adopt a child assume legal and financial responsibility for the child's care, education and support. This means that the child cannot receive a public assistance grant based solely on the child's income and resources. See the section on Financial Assistance below.

### Adoption Subsidies Program

Relative and non-relative foster parents may receive an adoption subsidy that is similar to their foster care payments. Adoption subsidies are available for all foster adopted children who are "handicapped" or "hard to place." Social Services Law (SSL) 453.

Most foster children are considered hard to place. Additionally, in order to be eligible for an adoption subsidy the child must be in the legal custody of the Department of Social Services and the kinship relative must be a certified foster parent. Another special feature to adoption of kinship foster children is the chance for the birth parents to make an enforceable agreement indicating who may adopt the child or what contacts the surrendering parent may have with the child.

Children subject to Article Ten proceedings must have their parents' rights terminated within 22 months of placement. However, there is an exception from initiating the termination when children are placed with relatives. Additionally, NYS has a special exception from terminations for incarcerated parents. See above section "Waiver of Termination for Incarcerated Parents." The agency on a case by case basis may choose not to terminate if it is determined that the parent has acted in good faith to maintain a parental relationship with their children.

In New York State, adoption is sought at the family court in the jurisdiction where the child resides or in the county Surrogate's Court.

### C. Legal Assistance

Legal assistance is only sometimes available. Some family court probation departments will help in filling out forms. In a few counties, judges will assign legal counsel to caregivers who are unable to pay for legal representation. A few legal services organizations and kinship service providers offer consultations and limited legal representation. And in some counties, there are "help desks" at family court where volunteer attorneys or local legal service providers offer limited assistance. To find out about legal assistance, contact the NYS Kinship Navigator.

## LEGAL FACT SHEET

### New York State Laws (Statutes)

- New York State Laws are available online at <http://public.leginfo.state.ny.us/menugetf.cgi?COMMONQUERY=LAWS>
- DRL (Domestic Relations Laws) are found by clicking on DOM
- SSL (Social Services Laws) are found by clicking on SOS
- FCA (Family Court Act, located at the end of the listing under COURT ACTS, are found by clicking on FCT.

### New York State Regulations

Called the NYCRR, New York Codes, Rules, and Regulations. Regulations are published by state agencies, they are also laws. The NYCRR primarily contains state agency rules and regulations adopted under the State Administrative Procedure Act (SAPA). Title 18 of the NYCRR contains codes, rules and regulations for social services.

### New York and Federal Case Law

Case law refers to judicial decisions that have the same effect as laws because they create precedents which courts must follow. Many cases are available at free sites. Often the case can be found by searching for it by name of parties. Visit:

- <http://law.justia.com/>
- <http://caselaw.findlaw.com/courts/New-York>
- <http://www.lexisnexis.com/partners/barassociations/modules/nysba/caselaw.asp>

Each court maintains a court library open to the public. Information is available at <http://www.nycourts.gov/lawlibraries/publicaccess.shtml>

### D. Financial Assistance

Most relative caregivers need financial assistance. There are a number of government programs that provide financial assistance for low income and/or financially needy children. These include:

#### Family Assistance (Temporary Assistance to Needy Families - TANF)

*(See also the Kinship Navigator: Guide to NYS Public Assistance)*

Family Assistance (TANF) is cash public assistance, available from your local department of social services (DSS). It assists needy children and their families to help pay for basic needs. Eligibility is based on the number of people in the family unit, family income and assets. Two types of grants are available.

## LEGAL FACT SHEET

If the adult caregivers want assistance based on their income and resources, then they are required to participate in work activities, job training or community work experience, unless they are disabled or elderly (over sixty).

A second type of grant does not look at the income and resources of the relative caregivers. This grant is based only on the income and resources of the children, because the non-parent caregivers do not have the legal obligation to support the children. Such grants are officially called “non-parent” grants.

For example, caregivers should be aware that their income does not count in determining eligibility unless they are applying for Family Assistance for themselves and the child or if they have adopted the child. Applications just for the child are called a non-parent or “Child Only” grant in which the caregiver is considered a “non-needy caretaker.” In this case you should fill out the applications for the child, not for the caregiver. For instance, if the question is, “Do you have a bank account?” the answer is no - if the child does not have an account. It is a good idea to write “non-parent grant” on the top of the first page. For more information See the ["How to Apply for Public Assistance"](#) guide on the NYS Navigator website.

If the caregiver also meets the criteria for family assistance, he/she can apply for themselves and for the children in their care as a family unit. In this case, all income and assets will be counted in determining eligibility. It is important to know that the New York State Welfare Reform Act of 1997 has imposed a cumulative five-year time limit on Family Assistance, but that the time limit does not apply to non-parent grants.

Grandparents and other relative caregivers who seek a non-parent grant will be asked to inform the department of their income and resources. The department does not use this information to decide eligibility for the non-parent grant, but the department is required by federal law to record the adult relative caregiver’s income and resources.

Sometimes kinship caregivers are told that they must have legal custody or guardianship in order to apply for a non-parent grant. This is not the law. In such instances, caregivers have a right to make out the application. Contact a legal assistance program or the NYS Kinship Navigator and ask for help in applying. If the application is denied, appeal by asking for a “fair hearing.” Caregivers can fax their request to the state office indicated in their denial letter. Upon appeal, a high percentage of denials are found without merit. It is a legal right for anyone to apply for public assistance and to appeal (by asking for a fair hearing) a denial of assistance.

All Family Assistance recipients are automatically eligible for Medicaid.

### **Food Stamps (Supplemental Nutrition Allowance Program)**

Food Stamps are used to purchase food items and are redeemed by using a Common Benefit Card. Food Stamp eligibility is based on the income of everyone in the household. For instance, if a grandchild is income eligible for Family Assistance but the grandparent does not qualify, it is unlikely that the family unit would be eligible for Food Stamps. However, under certain circumstances for persons who have disabilities and must cook separate meals, their food stamp eligibility will be determined under special rules that take their circumstance under consideration.

## LEGAL FACT SHEET

### Women, Infant and Children Supplemental Nutrition

Women, Infant and Children (WIC) clinics provide special supplemental nutrition for high-risk pregnant and breast-feeding women, as well as to infants and children up to five years of age. Clients gain access to medical care and are provided supplemental food vouchers, nutrition education and breast-feeding support. The WIC program is free to women, infants and children who are found to be medically and financially eligible. Application forms are available at all Health Department offices.

### Supplemental Security Income

Supplemental Security Income (SSI) is cash assistance for people who are aged, blind or disabled and have limited income and resources. For information call Social Security at 1-800-772-1213.

### Social Security Benefits

Social Security Benefits are monthly cash benefits for unmarried children under the age of 18 (or full-time students under 19 and older disabled children) whose parents have died. The parent in question must have worked, paid Social Security taxes, and earned enough credits to generate benefits. Applications should be made to the Social Security office, not DSS. Caregivers will need original documents or certified copies of the child's Social Security card and birth certificate, the parent's Social Security number, the parent's death certificate, and the deceased parent's W-2 forms or Federal tax return (if self-employed) for the most recent year.

If a child has lived with a grandparent for at least six months before the grandparent applies for Social Security and the child's parents are dead or disabled, the child is eligible for the benefits of the grandparent. A child who is adopted by their grandparent is also eligible.

### Tax Benefits

In addition to financial assistance, there are also certain tax benefits for which relatives raising children may be eligible. These benefits are “credits” which are financially more advantageous than deductions. Credits are the most effective way of reducing income taxes, because credits directly reduce the amount of taxes that you owe. Some credits are “refundable” which means that if the credit is larger than the amount of taxes due, then a refund is paid out.

### Child and Dependent Care Tax Credit

The Child Care Credit is a benefit for working people with children who pay for someone else to care for the children while they are working. The provider must not be the claimant's spouse, child, or anyone else that is a dependent. In a single parent family, the single parent must be working. In a two-parent family, both parents must be working. In order to qualify, the child must be either less than 13 years old, or older than 12 and

## LEGAL FACT SHEET

physically or emotionally unable to care for themselves. The child must have a social security or Individual Taxpayer Identification Number (TIN) and must live with the parents or relative caregiver. The credit is based

on the cost of child care. The parent must provide the child care provider's social security or ID number, the name of their organization, and the address. For more information, call the IRS and ask for Publication 2441.

### Earned Income Tax Credit (EITC)

The Earned Income Tax Credit (EITC) is a special benefit for low and moderate income working people including grandparents and other relatives who are raising children. The EIC program provides additional income via this “refundable” credit because it will pay out any unused credit. EITC is a tax credit program that is administered by the United States Internal Revenue Service (IRS). In most cases, the EITC does not affect eligibility for benefits like TANF, Medicaid, Food Stamps, SSI, or public or subsidized housing. The only way to get the EIC is to file an income tax return with Form 1040A or 1040 and attach Schedule EITC. Caregivers can file an income tax return even if they have low or no income as long as a child has lived with them for more than half of the year. For more information, call the IRS and ask for Publication 596.

### Child Tax Credit

Parents, guardians and other taxpayers who are eligible to claim a child as a dependent on their tax return may also be eligible for a federal tax credit of up to \$1,000 per child. The child tax credit is one of several tax-related benefits for families and children. If you have one or more qualifying children and more than \$3,000 of earned income in 2011, you may be eligible for a refund of up to 15% of your earned income that exceeds \$3,000. Or, if your earned income is less than \$3,000, you may be eligible for a refundable credit if you have three or more qualifying children and you paid Social Security taxes that exceeded your earned income credit.

For more information, call the IRS and ask for Publication 8872 “Additional Child Tax Credit.”

### Free Tax Information

Free tax assistance and help completing the necessary forms is available to caregivers.

You can call the IRS office at 1-800-829-3676 for forms. You can also call the IRS at 1-800-829-1040 for further information and help in preparing forms. See the NYS Kinship Navigator’s [“Tax Credit Fact Sheet”](#) for information on additional tax credits.

During income tax season, many county area offices for the aging (such as the New York City Department for the Aging) provide assistance by IRS trained volunteers in preparing and filing simple federal and state income tax forms for people 60 years and over.

Additionally, the AARP Tax Aide Program with its local sites that operate from February 1st to April 15th can help complete the appropriate forms. Contact the AARP Tax Aide Program at 1-888-227-7669 to find the site location nearest you.

## LEGAL FACT SHEET

The Office of Temporary and Disability Assistance (OTDA) also publishes a list of Volunteer Income Tax Assistance Sites (VITA) each year. Visit the OTDA web site to find a location nearest to you.

### E. Health Care and Other Services

#### Health Insurance Coverage

Relative caregivers may find it difficult to find health insurance coverage for children. Caregivers in the paid work force that have employer-provided group insurance still run into problems because employer provided group health insurance may not cover children in kinship care arrangements. Contact your employer and/or insurance company to find out for sure what coverage you have. Note that DRL 74 and FCA mandate that health insurance providers cover children when their non-parent legal custodian or guardian seeks to add them to their insurance policy.

Medicare does not provide health coverage for children, so Medicare recipients must look elsewhere.

#### Medicaid

In New York State the medical assistance program is called Medicaid. It is a program funded by the state and federal governments, which helps people who are receiving public assistance and/or have a low income pay for doctor and hospital bills and some medication. Kinship caregivers can apply for Medicaid for children at their local DSS offices. They should make sure to apply and sign the application form as soon as possible because payment for medical expenses can only go back three months from the date of application.

#### Eligibility

Federal law requires states to provide Medical Assistance benefits to individuals who receive Family Assistance (TANF, formerly AFDC) grants or Supplemental Security Income (SSI) and children in foster care.

Note: If a caregiver has been told that the child is not eligible for Family Assistance or SSI, you should still apply for Medicaid on their behalf by going to your local DSS.

#### Child/Teen Health Program (CTHP)

The Child/Teen Health Program (CTHP) is a provision of the federal Medicaid program, which provides financially needy children with preventive health care. Every child who is eligible for Medicaid is eligible for federally funded CTHP services. CTHP is a critical program because it provides many services that may not be available to adult Medicaid recipients.

#### Child Health Plus and Family Health Plus

In addition to the Medicaid program, New York State also offers low-cost health insurance for children up to age 19 called Child Health Plus and Family Health Plus for adults between the ages of 19 and 64. The programs are available to NYS families who are not eligible for Medicaid and have limited or no health insurance.



## LEGAL FACT SHEET

Even if family income is high, caregivers can enroll a child in the program (although payments will be higher). The fees for Child Health Plus are based on family size and income.

### Special Education Services

Any student with a disability is entitled to receive a "free and appropriate public education in the least restrictive environment." If a caregiver suspects that a child has a disability and would benefit from special services, they must request this in writing. Send a letter to the Committee on Special Education in the school district or to the principal of the school. The letter should include the reasons for making this request and any details that describe the child's areas of difficulty. Date the letter and keep a copy.

The Committee on Special Education (CSE) will send a plan for an evaluation. Federal law permits grandparents and other relative caregivers to participate in the deliberations of the CSE. The evaluation must include a physical examination, an individual psychological evaluation (when necessary), a social history, an observation of the student in the classroom and appropriate educational evaluations and assessments relating to the areas of suspected disability. Once agreement is reached on the plan, including the appropriate tests, the caregiver should sign and return the plan.

In New York, the school district has 40 school days from the date of the grandparent's original letter or within 30 school days from receipt of the signed consent to complete the evaluation. The results of the evaluation are used to determine a child's individual needs.

If the evaluation determines that a child requires special education, the recommendation will identify the disability, describe the child's strengths and areas of need, list goals that the child should reach in a year's time, include short-term instructional objectives to be mastered or major accomplishments to be gained that will lead toward reaching the annual goals, and identify the types of programs and services that the child will receive. All of this information will be included in the Individualized Education Program (IEP).

The needs of many children with disabilities can be met in a public-school setting with peers who are not disabled. Alternative programs should be considered only when the student's needs cannot be met within the regular school setting. The success of any student's educational program relies on the active participation of all persons responsible for the student. Your involvement, as a caregiver, is essential. For more information, see <http://www.p12.nysed.gov/specialed/publications/policy/parentguide.htm>

### Child Care is Sometimes Available

Assistance with child care is sometimes available from the local DSS. Contact the NYS Kinship Navigator and visit OCFS's website for more information. The following are the types of childcare:

### Child Care Centers

These are full or part day programs in public or private locations. They include day care centers and Head Start programs (free part day program for income eligible children). Children are grouped according to age.

## LEGAL FACT SHEET

---

### Family Child Care Homes

Care for children in the home of another family. Children of various ages can be accommodated in a small group setting and flexible hours can be arranged. The number of children allowed in the care of any family childcare home is regulated by the state.

### In-home Care

This is care in a child's own home by a person hired specifically for that purpose.

### Summer Day Camps

Camps offer summer activities usually for school-age children. Programs vary from number of hours per day to number of weeks in a session.

### School-Age Child Care

School-age child care means care provided on a regular basis to seven or more school-age children who are under 13 years of age or who are incapable of caring for themselves. The children may attend school or kindergarten at a public or private school. Such care is provided for compensation or otherwise.

## F. 2018 Update

### Written Designations by Parents

An advantage of the parental designation form is the ability to designate that the caregiver's authority to act begins either from a specific date, or "springs" from a specified event. For example, if a parent wants the caregiver to have authority only in the event the parent is deported, the parent can state that the designation commences upon "date of deportation", and the caregiver's authority to act would begin upon the date of deportation and last for either thirty days or six months from the date the parent is deported.

In 2018, the period of time in which a designation can last was extended from up to six months to up to twelve months.

### Deportation of Parents and the Care of Children

NYS Kinship Navigator provides resources on its website for people who become caregivers of children remaining in the United States due to the parents' deportation or detention by immigration authorities. These resources include fact sheets describing the types of custody and basic procedure for becoming custodians; parental designation forms; caregivers' rights with respect to obtaining children's vital documents; OCFS

## LEGAL FACT SHEET

policies on children of deported or detained parents; and an emergency plan in case of the detention or deportation of family members.

Both the standby guardianship statute (discussed hereinabove) and the parental designation statute have been recently expanded to protect families facing separation due to immigration issues. The standby guardianship language was expanded in 2018 to include “administrative separation” (the term used to describe detention or incarceration due to immigration violations) as grounds on which a parent can appoint a standby guardian for their children.

### School Enrollment

Persons in parental relation can enroll children in school and be responsible for most schooling activities, provide birth certificates for enrollment, receive report cards, and consent to class trips. They do not get all the powers of a parent, just those listed in approximately twenty statutes in the Education Law that empower a person in parental relation.

Any person who is responsible for a child’s education may participate in planning the Individualized Education Plan for children who have disabilities. Even if children are living with persons in a parental relationship (including parental designees), they need to fulfill other criteria in order to qualify for free tuition. School

districts have often demanded proof of legal custody or guardianship as a requirement for school admission or as documentation of responsibility and residency. A 2015 regulation (Department of Education regulation 8 NYCRR 100.2(y)(3) § 100.2(y)) expressly states that persons in parental relation are not required to be legal guardians or custodians as a condition of school enrollment. Rather, caregivers must prove residency and assumption of care and control.

The new regulation affirms the case law which holds that court orders are not required under the Education Law. A district may require a sworn affidavit from the child’s parents acknowledging their transfer of custody and control. Students must prove by an examination of the totality of the circumstances that they are permanent residents of the school district and intend to remain permanently in that district. Because grandparents can show that the child is residing with the intent to remain, they don’t need legal custody or guardianship to get children accepted (tuition-free) for public school in the districts in which they reside. However, FCA § 657 and DRL § 74 expressly state that guardianship and custody orders establish enrollment eligibility. Some school districts flipped this requirement, demanding guardianship or custody orders, but the new regulation should eliminate such requirements. Education law does not preclude persons in parental relationship and other caregivers without court orders from establishing enrollment eligibility by a totality of the circumstances.

### Legal Custody – Nonparents

In 2015, the New York State Court of Appeals decided *Matter of Suarez v. Williams*, 2015 NY Slip Op 09231 (NYS Ct. Appeals, Dec. 2015), which held that an extended disruption of custody constituted an extraordinary circumstance, despite the parent’s regular presence in the child’s life. This case makes it easier for grandparents who have had custody of a child for an extended period of time to meet the first prong of the two-step analysis established under *Bennett v. Jeffreys* for determining whether a nonparent may obtain custody against a parent.

## LEGAL FACT SHEET

DRL § 72[2][a] defines an “extended disruption of custody” to “include, but not be limited to, a prolonged separation of the respondent parent and the child for at least twenty-four continuous months during which the parent voluntarily relinquished care and control of the child and the child resided in the household of the

petitioner grandparent or grandparents, provided, however, that the court may find that extraordinary circumstances exist should the prolonged separation have lasted for less than twenty-four months”. Once the non-parent has established standing based on extraordinary circumstances, the court will proceed to make a determination of custody based on the best interest of the child.

The definition of a “parent” is ever expanding. In the landmark decision of *Brooke S.B. v. Elizabeth A.C.C.*, 28 N.Y.3d 1 (2016), the Court of Appeals held that where a partner shows by clear and convincing evidence that the parties agreed to conceive a child and to raise the child together, the non-biological, non-adoptive partner has standing, as a parent, to seek visitation and custody, without having to first prove extraordinary circumstances.

### Grandparent Visitation

In *Troxel v. Granville*, 530 U.S. 57 (2000), the paternal grandparents petitioned for visitation with children born out-of-wedlock, following the death of the children’s father. The Supreme Court held that the Washington statute providing that any person may petition for visitation and the court may order visitation rights for any person when visitation serves the best interest of the child violated substantive due process rights of the mother.

In practice, when grandparents seek visitation under DRL § 72, the court must first find standing based on death or equitable circumstances and if the court concludes that the grandparents have established the right to be heard, then it must determine if visitation is in the vest interest of the grandchild. See *E.S. v. P.D.*, 8 N.Y.3d 150 (2007).



## LEGAL FACT SHEET

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 Family Center program, funded by the New York State Office of Children and Family Services. Catholic Family Center 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.