

## LEGAL FACT SHEET

### When a Child is Removed and Relatives are Not Located or Not Notified of Their Options for Care

#### Summary

This Fact Sheet discusses what relatives can do to become caregivers when the requirements explained in the Kinship Navigator companion Fact Sheet, “When a Child is Removed - Duty to Locate and Notify Relatives of Their Options for Care”, were *not* followed. That Fact Sheet describes the various laws and administrative directives duties and obligations of the local department of social services and the Family Court related to locating and informing relatives of their options for care. In general, failures to follow the requirements are either a failure to locate a relative or a failure to properly inform or, more pointedly, a failure to provide an opportunity to become a foster parent. Strategies for challenging such failures are described below.

#### Acronyms and Abbreviations Used in this Fact Sheet

This Fact Sheet cites New York statues (laws) which are mainly found in sections of the Family Court Act (FCA) and Social Services Law (SSL); regulations which are found in the NYS Code of Rules and Regulations part 18 (18 NYCRR), and administrative directives, called Administrative Memorandum (ADM), Office of Children and Family Services (OCFS) child welfare manuals, guides, and informational booklets, which are available at the OCFS website.

#### Duty to Locate and Inform

[FCA §1017](#) is the primary Family Court Act statute describing the obligations of the department and the Court. The statute is detailed and should be carefully reviewed. In sum, the department must search diligently for relatives and must inform all contacted relatives with information about their caregiving options. As stated in FCA §1017 and explained in the OCFS booklets, and in Family Court [form 10-7e](#), there are three options for care: 1) foster care (if qualified), 2) “direct” custody (which is temporary custody subject to the jurisdiction of the Article Ten proceeding, but without the supports provided by foster care), and 3) Article Six custody/guardianship (which is private care, also without the supports provided by foster care). For a fuller explanation of these options and of the Kinship Guardianship Program (KINGAP) (which offers a subsidy to kinship foster parents after exiting foster care), *see* the Kinship Navigator Fact Sheet, “Relatives And Family Friends Seeking To Become Caregivers Of Children In State Care”, and the OCFS informational booklets that are required to be distributed to potential caregivers:

- [Know Your Resources: Nonparent Caregiver Benefits \(Pub. 5194\)](#)
- [Know Your Options: Kin Caring for Children \(Pub. 5175\)](#)
- [Make an Informed Choice: Kin Caring for Children \(Pub. 5120\)](#)
- [Know Your Permanency Options: The Kinship Guardianship Assistance Program \(Pub. 5108\)](#)

#### Relatives Means the Same as “Kin”

It is important to note that the requirement to locate relatives is not only about locating blood relatives, but also applies to others including non-blood relations, like stepparent and even family friends. Who are considered relatives in this broader definition is talked about in the Kinship Navigator Fact Sheet, “When a Child is Removed - Duty to Locate and Notify Relatives of Their Options for Care”, which notes that the word kin may be used interchangeably to refer to this wider class of relatives.

## LEGAL FACT SHEET

### When Kin are Not Located

There are many unfortunate incidents when kin do not know or learn about a removal. Sometimes kin may not even know that a child exists or where the child is living. Obviously, in such instances, local departments of social services clearly cannot be faulted for failing to locate kin. In other instances, kin are identified but cannot be located. For these kin, who are not located, there is still an opportunity to become a caregiver, *see* below discussion on challenges to Article Ten's and especially on FCA §1028-a.

### Failure to Properly Inform

As described in the Kinship Navigator Fact Sheet, "When a Child is Removed - Duty to Locate and Notify Relatives of Their Options for Care", kin must be properly informed. Proper information includes provision of the above listed OCFS booklets *and also* that they are not verbally told misleading or incorrect information by child welfare workers. Kin who believe they were not properly informed may challenge the placement of a child, even if placed with a relative.

Kin who are located and informed must choose one of three custodial options, as stated in FCA §1017: private care pursuant to Article Six, direct custody, or foster care. The three options are explained here and also in Kinship Navigator Fact Sheets, "Relatives And Family Friends Seeking To Become Caregivers Of Children In State Care" and "When a Child is Removed - Duty to Locate and Notify Relatives of Their Options for Care".

### Kin's Strategies to Become Caregivers

Since the locating and informing requirements are part of an Article Ten proceeding, challenges are part of that Article Ten court proceeding. There is no challenge available via an Office of Children and Families administrative "special hearing".

Challenges include: 1) request to the local department of social services, 2) appearing at the Family Court and exercising the "right to be heard," 3) intervening in the Article Ten, 4) petitioning via FCA §1028-a, or 5) using a FCA §1061 motion.

Outside of the Article Ten, kin may petition to become a private Article Six custodian or guardian. And in some circumstances, then possibly seek to become a foster parent. As a last resort, kin may file an Article 78 challenge based upon the department's failure to follow the law.

It must be noted that the described challenges do not represent all the strategies that may be available and are not substitute for obtaining legal advice.

### Article Ten Challenges

Unless kin are convinced that they want to become private legal custodians or guardians, it is important that they exercise their "right to be heard" in the Article Ten before starting an Article six custody action, as the article six may preclude them becoming a foster parent or using the Article Ten challenges. In deciding to file an Article Six, it is strongly recommended that relatives obtain legal advice.

While not guaranteed to obtain an assigned counsel, relatives who cannot afford an attorney may request the court to assign counsel pursuant to FCA §262. *See* the Kinship Navigator Fact Sheet, "Assignment of Counsel to Indigent Kinship Caregivers".

## LEGAL FACT SHEET

### 1. *Request to the Local Department of Social Services*

Relatives who were not notified pursuant to the Article Ten but learn that a child has been removed, should contact the local department and explain who they are and how they hope to be a resource for a child in state care. Departments are very focused on placing children with relatives, and accordingly the opportunity for kinship foster care are increasing. OCFS' directive, 20-OCFS-ADM-18 "Kin-First Firewall Practice," requires local departments of social services to establish a kin-first firewall practice to increase safe and appropriate kinship placements for children and requires a higher level of review to verify that all viable options have been explored to achieve a kinship placement. The relative should then be informed of the date/time of the Article Ten, afforded the "right to be heard", and provided the appropriate informational booklets about their options.

A relative contacting the local department, who is unsure that they will be helped, should contact the local county's kin firewall team and ask to be connected to a team member who is responsible for firewall reviews.

Since the local department is required to report to the family court judge whether any relatives, including grandparents, wish to assume care as a private custodian, a "direct" custodian, or a foster parent. Once the relative has notified the department, if the department is unhelpful or seems to be delaying helping, relatives should appear in Family Court and request to be "heard" in order to make sure that the judge is informed about their desire to care for the child.

### 2. *Appearing at the Family Court and Exercising the "Right to be Heard"*

FCA 1017 states that notified relatives have a "right to be heard" at the proceedings. However, even though not notified of the proceedings, relatives that have an interest in the care of a child should appear at the court hearing and exercise the right to be heard, in order to ensure that the judge knows of their willingness to provide care.

### 3. *Intervening in the Article Ten*

FCA §1035(f) permits certain relatives - adult siblings, grandparents, aunts, uncles – to intervene in the Article Ten proceedings for the purpose of obtaining temporary or permanent custody. They must have the consent of the respondent parent or the parent must have failed to appear. Intervention permits the "intervenor" to participate as party to the extent permitted by the statute.

### 4. *Petitioning via FCA §1028-a Application*

In certain circumstances, when a child is already in foster care but placed with a non-relative, a relative can file a FCA §1028-a petition. In summary, the relative must have not previously refused to be considered becoming a foster parent or custodian for the child without a good reason (like their health, inadequate housing, etc.); the relative could qualify as a foster parent; and the application is brought no later than six months after the relative got notice that the child was in in state care and no later than twelve months after the removal.

For relatives who have not been contacted, or who have not been informed of their options, this petition may offer a way to become a foster parent. *Also See* Kinship Navigator Fact Sheet, "Relatives And Family Friends Seeking To Become Caregivers Of Children In State Care".

## LEGAL FACT SHEET

### 5. *Using a FCA §1061 Motion*

FCA §1061 permits a Family Court judge to modify or vacate any order made in a child protective proceeding upon a showing of good cause.

FCA §1061 states: “Staying, modifying, setting aside or vacating order. For good cause shown and after due notice, the court on its own motion, on motion of the corporation counsel, county attorney or district attorney or on motion of the petitioner, or on motion of the child or on his behalf, or on motion of the parent or other person responsible for the child's care may stay execution, of arrest, set aside, modify or vacate any order issued in the course of a proceeding under this article.”

If relatives who appear at an Article Ten proceeding and are not properly informed about their opportunities for care or provided an opportunity to become a foster parent or a direct custodian, this statute offers an opportunity for kin to seek one of those placements. Voicing their complaint in an appearance at the Article Ten should provide the judge with the opportunity to consider exercising the judicial power to modify or vacate orders, and to order that the kin be considered for approval as a foster parent or another placement resource.

### **FCA §1061 and Article Six Custody or Guardianship Proceedings - Unlikely but Possible**

In general, kin who initiate Article Six custody or guardianship petitions are unlikely to have an opportunity to become foster parents. If kin wish to become private custodians or guardians, then Article Six petitions should be initiated.

While FCA §1017 options include temporary custody via an Article Six that may become permanent custody at the Article Ten dispositional hearing and at that hearing all options are still open, reliance on such an outcome is highly uncertain and most unlikely.

Moreover, FCA §1055-b permits the Court to join the Article Six with the Article Ten, and then limits the outcomes at the dispositional hearing to those available under the Article Six rules. Similarly, FCA §1089-a permits joining the two Articles at a permanency hearing and then also limits the outcome to Article Six. See also 17-OCFS-ADM-02. Again, these statutes further suggest that Article Six is likely to preclude any other option.

However, while there is no guarantee that a judge will consider a FCA §1061 motion, when suggested as part of an Article Six, there is case law where this has happen. In *Matter of Randi*, a grandmother sought Article Six custody because she had not been informed of her opportunity to become a foster parent. The Court used the grandmother’s FCA §1061 motion to force the county to consider the grandmother for approval as a foster parent. *Matter of Randi NN. v Joseph MM. (2009, 3d Dept)* 68 App Div. 3d 1458, 891 NYS2d 52.

FCA §1061 and the *Randi NN* case present an opportunity for a relative to seek to gain custody and then motion to qualify as a foster parent of a child who is subject to an Article Ten. Given the complexity of such court procedures, it is advised that the relative have attorney representation.



## LEGAL FACT SHEET

### Administrative Law Challenges (OCFS Special Hearings) to Local Department's Failure to Perform its Duty to Inform

The Office of Children and Families Services is required by statutes to provide an administrative law review for certain situations: For OCFS, such reviews are called “special hearings.” But currently, there is no administrative law review for situations where the local department fails to search, to inform, or to assist relatives in becoming foster parents.

While there is no administrative law review, there is still one other opportunity to go to court via an Article 78 and claim that the local agency didn't follow the law.

### Article 78 Challenges

Before bringing an Article 78 proceeding, a petitioner must have exhausted all of his or her administrative remedies. Since in the situations we are discussing, there is no administrative law remedy, the relative may start a challenge in the county Supreme Court (County Supreme Courts are the trial courts in New York State, and they are where most cases are filed).

Guidance for Article 78's is found at the New York State Court help web pages, at <https://nycourts.gov/courthelp/>. There is a filing fee of \$305, which can be waived by applying for a poor person order.

Attorneys who work with child welfare law and public assistance law often file Article 78's. It is recommended that the relative seek counsel or help from a legal assistance provider who specializes in child welfare law. The Kinship Navigator web site lists legal resources.

The most well know case, where a relative used an Article 78 to challenge a foster care placement with a non-relative is *Debra VV. v. Johnson*, 2<sup>nd</sup> Dept; 26 A.D.3d 714, 811 N.Y.S.2d 457 (N.Y. App. Div. 2006). In *Debra VV*, an aunt was told by the Albany County local department of social services that there was no such thing as kinship foster care, and contrary to [Social Services Law § 384-a \(2\) \(h\) \(ii\)](#), she was not helped to become a foster parent. The court found that the county failed its statutory duty to inform and must consider qualifying the aunt as a foster parent.

### Conclusion

This Fact Sheet provides an overview of ways for relatives to become caregivers, including becoming foster parents, when a child is removed, if the local department of social services fails to locate and/or to inform relatives, and insure that they are properly given the opportunity to become foster parents.

There is a long history of complaints about such failures. Local departments are continuing to make progress in fulfilling their legal obligations, but there are still instances when relatives will have to advocate for their rights. It is hoped that this Fact Sheet will help them to succeed.

*Updated September 28, 2021. 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 Family Center 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 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.*