

FALL 2001

## ***Kinship Legal Guardianship:***

### ***Relative Caregivers Acknowledged At Last***

#### ***Kinship Legal Guardianship***

Governor DiFrancesco just signed the Kinship Legal Guardianship legislation into law, effective January 2002. This new law creates another option to establish permanency for children who cannot reside with their parents due to a long-term incapacity or inability to perform the regular and expected functions of care and support of their children.

The Kinship Legal Guardianship law can assist families who have assumed the care of children because of a parent's incapacitation in formalizing that relationship legally in order to ensure permanency for that child. ***It supports family decision-making.*** In child abuse and neglect cases, it offers another mechanism to achieve permanency for a child without terminating parental rights.

Although the birth or prior adoptive parents will no longer have rights to legal custody and guardianship, their parental rights will not be terminated. The parents reserve their rights to visitation, their duty to support and the power to consent to adoption. The right to visit with siblings, and/or extended family can be preserved. Such an arrangement does not affect the child's rights to inherit or to other government benefits. It is not a cure for all that ails our troubled child welfare system, but it will provide permanency for more children.

#### ***Who is the kinship legal guardian?***

The kinship legal guardian is one who has made a commitment to and has the ability to raise the child to adulthood, evidenced by the fact that the child has been in their home for a least one year. He/she can be a close family friend or have a legal or biological relationship to the child. The kinship legal guardian assumes the same rights, responsibilities and authority relating to the child as that of the parents, including the obligation to support the child.

#### ***How does one become a kinship legal guardian?***

Beginning in January 2002, a person can file a complaint in Family Court to become the kinship legal guardian of a child who has resided in his/her home for at least the last 12 consecutive months. The complaint or petition must include a kinship caregiver assessment to be completed by one of the designated regional contract providers for the State or by the Division of Youth and Family Services (DYFS). Kinship caregivers should be aware that the Family Court will not accept petitions for filing without the completed assessment. DYFS will complete the assessment in open active litigation cases and in cases wherein the family has been involved with the Division within the last 12 months. The private regional contract providers will complete assessments in non-DYFS cases. The assessment will include a criminal history record background check, a domestic violence central registry check, and a child abuse

registry check of the caregiver and any other adult residing in the caregiver's home. The assessment will also contain information regarding the caregiver's commitment and ability to raise the child.

The applicant must be able to provide the Family Court Judge *with clear and convincing* evidence of the parents' incapacity or inability to assume their regular parental duties for the foreseeable future. But parental incapacity alone is not sufficient to grant the petition. In making a final decision, the Judge shall consider the caregiver's commitment to and ability to assume legal responsibility for the child, the parents' wishes if known, the suitability of the caregiver to raise the child, and the child's wishes if the child is age 12 or older.

### ***Why create this additional option?***

For years advocates have sought to legally formalize the relationship between relatives or other "kin" and the children in their care. Until now these individuals have had informal physical custody or obtained legal custody of the child through the Family Court.

Sometimes a relative is directed by DYFS to seek legal custody through the Court due to an allegation of abuse or neglect. They may seek the child-only grant through county welfare services or struggle to support the child from their own funds. Some caregivers are able to put the child on their own health insurance; others may apply for FamilyCare or Medicaid.

These arrangements can be short-term or continue indefinitely. The relative placement can have both elements of an out-of-home placement like foster care or a family placement, leaving the plan for a child's permanent home unclear. The child may experience confusion and uncertainty about where he/she belongs, especially if temporary custody orders are unsuccessfully contested on a regular basis, because the parent's problem or circumstances have not improved. This continuous litigation often becomes disruptive, creating insecurity for the child and the caretaker.

In 1995, an ACNJ report entitled *Relative Care: A System in Need of Repair* identified a relative care system in a state of disarray. Within DYFS cases, practices varied from county to county, caseworker to caseworker, family to family. The report identified key issues concerning relative caregivers. These included lack of relative identification to use relatives' homes as the initial placement, lack of standards in assessing relative homes, and inadequacy of financial supports and services.

Many of these concerns are applicable to non-DYFS cases as well. But there were broader policy considerations in the non-DYFS situations. Questions arose concerning the appropriate level of involvement by the State in situations wherein the family makes the decision. What if any financial obligation does the State have in such situations? And if the State provides assistance, what is the State's obligation to assess the quality of the home and the suitability of the caregiver now being supported through State funds?

The New Jersey Assembly Task Force on Grandparenting held public hearings and studied the issue, issuing a report in January 2000. Grandparent groups have formed throughout New Jersey in an effort to pool resources and share information through informal networks.

In May 1999, then Senator DiFrancesco introduced legislation to support kinship care providers. A group of advocates began meeting in the fall of 1999, struggling with definitions of "kin" and levels of support. One of the primary obstacles was determining the actual number of kinship families needing assistance. The problems vary in complexity depending on the family circumstances. One aspect was clear; the child ultimately needs to reside with a

caretaker who has some formal permanent legal authority over the child.

### ***Existing New Jersey Law***

Parents are the natural *guardians* of their children. The ideal situation for a child is to grow up in a home with both parents, building relationships that will extend beyond when the child becomes emancipated. When parents separate, court orders are used to legally define the decision-making authority of each parent, and to allocate *parenting time* (visitation) between the parents.

A child who cannot live with his/her parents due to the parents' death, incapacitation, long-term incarceration, abuse or neglect, or abandonment needs an alternative permanent legal living arrangement. In the event of the parents' death the Office of the Surrogate or Probate Court can appointment a guardian for the minor. In 1995, New Jersey passed the *New Jersey Standby Guardianship Act, N.J.S.A.3B:12-67 et.seq*, which allows a terminally ill parent to plan for his/her children's care in the event of death and/or incapacitation. It is not available in DYFS cases.

A third party may seek custody and control of the child(ren) through a custody action filed in the Family Part of the Superior Court. But custody orders do not ensure legal permanency, because custody orders are subject to modification based upon a showing of *changed circumstances*.

DYFS, the State agency mandated to investigate allegations of abuse and neglect, offers services to the family if the child can remain safely in the home and places the child elsewhere when the child cannot safely remain in the home. In most cases, the Division must then provide reasonable efforts to reunify the child with his/her parent(s). DYFS is required to examine cases wherein a child has been in foster care for 15 of the previous 22 months and file for guardianship to allow the child to be placed for adoption, unless a statutory exception is met.

Adoption is the ideal resolution for children who cannot be reunified with birth parents. However, for different and legitimate reasons, some relatives or kin, willing to raise the child, do not wish to terminate the birth parents' rights. The child still needs a **legal** permanent placement, which will provide stability for the child to at least age 18, if not longer. Kinship legal guardianship provides another option, not as final as adoption, but more permanent than custody and long term foster care.

### ***How does this option impact DYFS cases?***

The Children's Bureau of the US Department of Health & Human Services (HHS) convened a working group that issued guidelines in June 1999 to states establishing policy and state legislation governing permanence for children. The guidelines concerning legal guardianship options suggested ***that all permanent placements*** include the following characteristics:

- ◆ *The intent to be permanent throughout the child's minority*
- ◆ *Establish family relationships that will last the child's lifetime*
- ◆ *Make the permanent plan legally secure from modification*
- ◆ *Give the permanent caregiver the same legal responsibility for the child as the birth parent*

◆ *Terminate the State's legal custody of the child and ensure that the permanent caregiver is not subject to continuing State supervision.*

The legislative changes made to New Jersey law pursuant to the federal *Adoption and Safe Families Act of 1997* (ASFA) properly limit the amount of time a child may remain in foster care. While pushing more cases towards permanency decision-making, the law allows different options to achieve permanency. Under ASFA, ***legal guardianship***

means a judicially created relationship between child and caretaker which is intended to be permanent and self-sustaining as evidenced by the transfer to the caretaker of the following parental rights with respect to the child: protection, education, care and control of the person, custody of the person, and decision making. The term 'legal guardian' means the caretaker in such a relationship.

*ASFA, Public Law 105-89 Sec 101(b), 42 U.S.C. 675(7.)* It is more than custody.

One of the statutory exceptions to filing a Title 30 termination of parental rights complaint is "[t]he child being cared for by a relative *and a permanent plan* for the child can be achieved without termination of parental rights." *N.J.S.A. 30:4C-15.3. [emphasis added]* While DYFS guidelines state that a permanent placement with a relative who is willing to become the child's legal guardian may constitute an exception to the filing of a Title 30 action, until now New Jersey law did not provide a mechanism to legally effectuate this arrangement.

Some relatives are willing to make the permanent commitment, although unwilling to participate in the termination of the parental rights of their own son or daughter, niece or nephew. Likewise, parents who recognize their inability to assume their parental responsibilities may want to have their child placed permanently with a relative. Kinship legal guardianship would ensure permanency for the children involved, simultaneously allowing for the resolution of litigation cases to the satisfaction of parents and caretakers, DYFS and the courts.

A kinship legal guardianship arrangement to resolve Title 9 or Title 30 litigation would be handled by the respective attorneys already assigned to represent DYFS, the parents and the children pursuant to *NJSA 9:6-8.43* and *NJSA 30:4C-15.4*. The Division may not have to file a Title 30 complaint in some cases. This mechanism should bring litigation to the end more quickly if all are amenable to the kinship guardianship arrangement, thus achieving permanency for the child on a timelier basis.

### ***How does this option affect Non-DYFS cases?***

The new form of legal guardianship will provide stronger legal protection for the child and the kinship caregiver who has become the consistent nurturing "parent" to the child, without terminating the birth parents' rights. It supports family decision-making and achieves permanency for children.

By allowing families to make their own arrangements regarding a child's care when a parent becomes incapacitated, these relatives will avoid having to seek involvement in the DYFS system just to obtain financial help. Becoming the child's kinship legal guardian is the threshold to obtaining the additional funds through the Department of Family Development.

### ***Financial Assistance Prior to New Law***

Recognizing that relative caregivers need assistance, the State created the Kinship Navigator Program, an information and a referral resource for kinship caregivers that provides wrap around services and childcare subsidies for eligible caregivers. Caregivers up to age 60 are eligible for assistance if their income does not exceed 350% of federal poverty guidelines. Those over age 60 with incomes up to 500% of federal poverty also qualify for services. The telephone number for the Kinship Navigator is 1-877-816-3211.

### ***Financial Assistance in FY 2002***

The Kinship Navigator Program will continue to be funded. The FY 2002 budget also contains funding for three new types of kinship caregivers. Funds will be available for up to 2000 kinship legal guardians who have assumed care of children under the care of DYFS. For the non-DYFS cases, there is funding for up to 8000 kinship legal guardians who have a household income of 150% of federal poverty or less.

The Division also has funding to assist a third group of relative caregivers that need the additional funds to support the initial placement. In these cases, DYFS will still provide services to the parents, and if reunification is unsuccessful and termination of parental rights is not deemed appropriate, the relative caregiver can apply to become the kinship legal guardian.

### ***Informed Decision-Making is Critical***

To determine whether to file a custody or kinship legal guardianship complaint, the relative or "kin" needs to understand the difference between each option in terms of requirements and standards to be met, extent of State intrusion to assess suitability, parameters of responsibility to the child, and potential supports. Generally speaking, the greater the level of support, the greater the level of State intrusion.

Relatives who are willing to commit to a short-term kinship care arrangement can continue to obtain the child-only TANF grant. There is no income eligibility and no in-depth intrusive assessment. Relatives who have had children living in their home may want something more permanent.

To determine the most appropriate arrangement for child(ren) placed because of abuse or neglect, DYFS must inform all relatives contacted of all options along with the level of DYFS involvement connected to each option. Accurate information becomes even more critical in DYFS placements, because of the Division's obligations to work with the parents and statutory timeframes for achieving permanency.

The financial and service supports to a relative who becomes a foster parent are very different than those given to a relative obtaining custody through the Family Part "FD" docket at the Division's direction. Relatives are often not informed of their right to apply to become a foster parent when the children are placed in their home. It is only through informed decision-making that families can make the best permanent arrangements for their children.

All caregivers who apply to become kinship legal guardians and who meet the eligibility requirements for financial assistance need to be told that this additional funding is not an entitlement. Hopefully funding will continue to increase so that more kinship legal guardians can apply for assistance of increasing amounts. However there is no guarantee that the funding will continue. Therefore caregivers must understand that the kinship legal guardian's duty to support the child is not contingent on the State's budget allocation.

All assisting caregivers through the legal kinship guardianship process need to review any and all benefits that a

caregiver receives to make sure that the caregiver understands any potential impact additional funding received as a kinship legal guardian may have upon those benefits, and their obligation to support the child(ren). Caregivers should be informed of all available services. Our goal should be to make sure that all concerned make informed choices.

***Next Steps***

The law also provided for the appointment of seven new judges and additional court staff to process applications. The Administrative Office of the Courts, the Division of Youth and Family Services and Division of Family Development are working together to establish a uniform assessment form for these cases. The Office of the Attorney General and the Office of the Public Defender are at looking at staffing issues.

It is wonderful to see that the various departments and divisions, which will be involved in these cases, are preparing forms and procedures for this new casetype. Hopefully these efforts will streamline what should be a simple process for families.

ACNJ will continue its advocacy efforts to strengthen the program and to ensure that kinship caregivers are aware of their options and apply.

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**SYNOPSIS OF THE KINSHIP LEGAL GUARDIANSHIP LAW**

Provided by the Association for Children of New Jersey – effective January 2002

	<b>Non-DYFS/Informal Kinship Care Arrangements</b>	<b>DYFS/Formal Kinship Care Arrangements**</b>
<b>How These Arrangements are Made</b>	<b>Arrangements are made between family members when parents can no longer care for their child.</b>	<b>Arrangements are made by DYFS, for the protection of the child.</b>
<b>How to Obtain Kinship Legal Guardianship</b>	Kinship caregivers <b>who have provided care and support of a child in their home for at least the past 12 consecutive months</b> may petition the Court to become the child’s kinship	In cases where the Division of Youth and Family Services (DYFS) has been involved in the last twelve months, or has an open or currently active litigation case, <b>DYFS or the</b>

	legal guardian.	<b>parents may ask the court</b> to consider kinship legal guardianship as the final disposition.
<b>Standards for Approval</b>	<p>To award Kinship Legal Guardianship <b>the Judge must find by clear and convincing evidence that each parent’s incapacity is of such a serious nature</b> as to demonstrate that the parents are unable, unavailable or unwilling to perform the regular and expected functions of care and support of the child and that the parents’ inability to perform those functions is unlikely to change in the foreseeable future. However, the Court will not award kinship legal guardianship solely because of parental incapacity. <b>The Judge must find that the potential kinship legal guardian can provide a safe and permanent home and that awarding kinship legal guardianship is in the child’s best interest.</b></p> <p>Judges will use a multitude of factors to make a determination of what is in the child’s best interest including whether proper notice was provided or was attempted to be provided to the child’s parents; the wishes of the parents, if known; the wishes of the child age 12 or older unless inappropriate; the commitment, ability and suitability of the kinship caregiver to raise the child to adulthood; and the results of criminal history and domestic abuse background checks and child abuse registry checks on the caregiver and any other adult(s) living in the caregiver’s home. In DYFS cases, the Division’s reunification efforts will be taken into account.</p>	
<b>Rights Obtained</b>	<p><b>The kinship care provider receives the same rights, responsibilities, and authority over the child as the parents including the obligation to support the child.</b> The birth or prior adoptive parents would no longer have rights to legal custody and guardianship, but their parental rights would not be terminated. The parents reserve their rights to visitation, their duty to support and the power to consent adoption. The right to visit with siblings, and/or extended family can be preserved. Kinship legal guardianship does not affect the child’s rights to inherit or to other government benefits.</p>	
<b>Duration of Rights</b>	<b>Until the child reaches adulthood, at age 18.</b>	
<b>Modification of Rights</b>	To modify or change the final order, <b>clear and convincing evidence</b> must be shown that the parental incapacity is no longer	

	the case and that termination of kinship legal guardianship is in the child's best interest. An order may also be vacated if a court finds that the guardian failed or is unable to provide proper care of the child, or if the guardianship is no longer in the child's best interest.	
<b>Financial Eligibility</b>	<b>Must have kinship legal guardianship and an income below 150% of poverty.</b>	<b>Kinship legal guardianship required. No financial eligibility requirement.</b>
<b>Amount of Monthly Subsidy Available</b>	<b>\$250</b>	<b>\$250</b>
<b>Number of Families Covered in FY2002</b>	<b>8,000</b>	<b>2,000</b>

\*\* Does not include the cases wherein DYFS plans to provide additional financial assistance to relatives at time of placement while reasonable efforts are being provided to reunify the child(ren) with the parents.