

Kinship Legal Guardianship

*Derived from a Fall 2001 Newsletter article by Mary Coogan, Esq.,
from the Association for Children of New Jersey (www.acnj.org)*

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In November 2001, Acting Governor Donald DiFrancesco signed Kinship Legal Guardianship (KLG) legislation into law, effective January 1, 2002. This new law created 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 KLG law can assist families who have assumed the care of children because of a parent's incapacitation by 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 no longer have rights to legal custody and guardianship, their parental rights are 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 does 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*. This person 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?

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 this completed assessment. DYFS completes this assessment in open active litigation cases and in cases where the family has been involved with the Division within the last 12 months. The private regional contract providers complete the assessments in non-DYFS cases. The assessment includes 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 also contains 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, however parental incapacity alone is not sufficient to grant the petition. In making a final decision, the Judge must 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?

Prior to the enactment of the KLG law, advocates had sought to legally formalize the relationship between relatives or other "kin" and the children in their care. These individuals previously had informal physical custody or obtained legal custody of the child through the Family Court. Sometimes a relative was directed by DYFS to seek legal custody through the Court due to an allegation of abuse or neglect. They could seek a child-only grant through county welfare services or struggle to support the child from their own funds. Some caregivers were able to put the child on their own health insurance; others were forced to apply for *New Jersey FamilyCare* (Medicaid).

These arrangements could be short-term or continue indefinitely. The relative placement could have elements of an out-of-home placement, like foster care, or a family placement, leaving the plan for a child's *permanent* home unclear. Children left in these situations often experienced confusion and uncertainty about where he/she belonged, especially if temporary custody orders were unsuccessfully contested on a regular basis, because the parent's problem or circumstances had not improved. This continuous litigation was often disruptive, creating insecurity for the child and the caretaker. Within DYFS cases, practices for these placements varied from county to county, caseworker to caseworker, family to family.

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.

How does this option impact DYFS cases?

The Children's Bureau of the US Department of Health & Human Services (HHS) has established guidelines concerning legal guardianship options, recommending 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 that 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.* ASFA, Public Law 105-89 Sec 101(b), 42 U.S.C. 675(7.)

One of the statutory exceptions to filing a termination of parental rights (TPR) 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.) 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 TPR complaint, until KLG existed as an option, New Jersey law did not provide a mechanism to legally allow 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 ensures permanency for the children involved, while still allowing for the resolution of litigation cases to the satisfaction of parents and caretakers, DYFS and the courts.

Financial Assistance

Prior to KLG, recognizing that relative caregivers needed assistance, the State created the *Kinship Navigator Program*; an information and referral resource for kinship caregivers that provides wrap-around services and childcare subsidies for eligible caregivers. Caregivers up to age 60 were eligible for assistance if their income did not exceed 350% of federal poverty guidelines. Those over age 60 with incomes up to 500% of federal poverty also qualified for services. More information about the Kinship Navigator is available at 877-816-3211 or <http://www.state.nj.us/humanservices/sp&/Kinnav.html>.

While the Kinship Navigator Program continues to be funded, beginning in 2002, the State budget also included funding for three new types of kinship caregivers; kinship legal guardians who have assumed care of children under the care of DYFS, non-DYFS kinship legal guardians who have a household income of 150% of federal poverty or less, and relative caregivers that need the additional funds to support the initial placement of a child. (NOTE: In the latter cases, DYFS still provides 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).

Level of Support to Kinship Providers

Prior to enactment of the New Jersey Child Welfare Reform Plan in 2004, the financial and service supports to a relative who became a DYFS foster parent were very different than those given to a relative obtaining custody through other means. Relatives were often not informed of their right to apply to become a foster parent when the children were placed in their home. This is no longer the case. Relatives providing out-of-home care for their kin must now go through the same approval process as regular DYFS foster homes, and consequently will receive all of the same supports.

However, relatives must also be informed that once KLG is ordered, DYFS will eventually close the child's case and monthly board and clothing subsidies may be reduced. Relatives must also be informed that *KLG can only be considered an option when adoption has been ruled out as a possibility.*

Comparison of Caregiver's Rights and Responsibilities

	Foster Care	Adoption	KLG
Child remains in the custody of DYFS	YES	NO	NO
Birth parents' rights are terminated	NO	YES	NO
Caregiving parents can make major decisions for the child	NO	YES	YES
Caregiving parents are financially responsible for the child*	NO	YES	YES
Child can have the same last name as the family	NO	YES	NO
Child has inheritance rights	NO	YES	NO
Child is covered by family's insurance**	NO	YES	YES
Legal Guardianship can be transferred (i.e., by a will)	NO	YES	NO
Permanency can be challenged by birth parents***	YES	NO	YES

* Adoption subsidy may be available for certain children considered "hard to place" and continues the foster care board rate and clothing allowance until the child is 18 (or 21 if attending school). KLG includes a monthly kinship care subsidy until the child is 18.

** Children in subsidized adoptions and KLG continue to receive Medicaid benefits until age 18 (or 21).

*** Excluding rights of appeal.