

September 28, 2020

Advocates' position on guardianship

Dear Sen. Favola, Del Brewer, and Deputy Commissioner Bowler:

We very much appreciate your time and attention in regard to our concerns relating to adding a system of child guardianship statutes to Virginia code as the Commission on Youth Guardianship Workgroup considers whether or not to recommend this action.

After much discussion, we find our concerns would be ameliorated by two things: 1) some consideration of codifying the “Best Interests of the Child” that would be specific to non-parental custody/guardianship situations, including in child welfare proceedings; and, 2) changes to the termination of parental rights statutes to clarify that, when a court transfers custody (or guardianship!) to a relative or fictive kin (currently “person with a legitimate interest”) as a permanency option, a parent’s rights need not be terminated, thus preserving the child’s rights of inheritance and other benefits as well as recognizing the importance of the parental/child relationship to the child. It is clear that there is broad agreement among those working in this space in the Commonwealth that placement with relatives for custody/guardianship/ foster family when parents cannot retain or regain custody is in the best interests of children; but our statutory scheme does not currently reflect this priority—nor does our current practice, despite VDSS guidance on the issue, as evidenced by, for example, our low rates of utilization of relatives as foster parents and our high rates of aging out of foster care.

One advantage of transferring custody or guardianship to a relative—in addition to maintaining the important connection to family—is that it can provide permanency to a child without requiring the termination of a parent’s rights. This is especially important in a situation where the parent is making efforts to rehabilitate, but has not done so by the mandated deadlines: should that parent, at some point in the future, become an appropriate custodian for their own child, she can petition the court for custody; or make such a showing at a regular guardianship review hearing. This is especially important in the context of the opioid epidemic, where parents often cannot overcome a substance use disorder within the timeframe of the federal and state laws governing the length of time a parent has to reunite with their child who has been removed to foster care. This heartbreaking story provides an example of why this is important: <https://www.nytimes.com/2019/01/13/opinion/mothers-addiction-custody.html>

Further, studies increasingly show that separation of children from parents is traumatic, and permanently severing their relationship with their parent solidifies that trauma, as well as extinguishing their legal relationship to siblings, grandparents, and extended family. We also know that many children are never adopted from foster care, leaving them to age out into young adulthood without a permanent family of

any kind. The majority of children who age out of foster care seek out their parents whose rights were terminated--but they no longer have rights of inheritance and other advantages that would ordinarily accrue to them. Guardianship without termination of parental rights--for those parents who would be appropriate, should their issues resolve--provides permanency without the complete severing of the relationship.

We also would support guardianship in diversion practice, where a court would have eyes on situations where children are currently “removed” from parents’ care without court oversight or due process--sometimes permanently. Ongoing guardianship, with frequent court reviews, would ensure parents do not lose their children to the custody of relatives without court oversight; and would also make it easier for relatives to seek financial supports for the children they care for.

Sincerely,

Valerie L’Herrou, Virginia Poverty Law Center
Allison Gilbreath, Voices for Virginia’s Children
Rachael Deane, Legal Aid Justice Center