



**FINAL REPORT OF THE
VIRGINIA COMMISSION ON YOUTH**

**TO THE GOVERNOR AND
THE GENERAL ASSEMBLY OF VIRGINIA**

**Study on Legal Guardianship of a
Minor by Court Petition**

**COMMONWEALTH OF VIRGINIA
RICHMOND
2020**

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Virginia House of Delegates

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TABLE OF CONTENTS

I. Authority for Study	1
II. Members Appointed to Serve	1
III. Executive Summary	2
IV. Study Goals and Objectives	4
A. Identified Issues	5
B. Study Activities	5
V. Methodology	6
A. Advisory Group	6
B. Research and Analysis	7
VI. Background and Analysis	8
A. Background	8
B. Michigan Model	13
C. Proposed: Full/Permanent and Temporary Guardianship	16
D. Proposed: Limited Guardianship	19
E. Other Topics Raised by the Advisory Group	21
VII. Findings and Recommendations	24
VIII. Acknowledgments	25
<p>Appendix A: Guardianship Advisory Group Membership</p> <p>Appendix B: Proposed Guardianship Model Flowchart</p> <p>Appendix C: Overview of Guardianship, Entrustment, and Kinship Arrangements in Virginia</p> <p>Appendix D: Legal Framework for Virginia Child Custody Cases</p> <p>Appendix E: Proposed Guardianship Model</p> <p>Appendix F: Navigating Access to Education for Students Not Living With Their Parents: Unaccompanied Homeless Youth, Foster Care, and Guardianship</p> <p>Appendix G: Legal Custody and Guardianship in Virginia</p>	

I. Authority for Study

Section 30-174 of the *Code of Virginia* establishes the Commission on Youth and directs it to “study and provide recommendations addressing the needs of and services to the Commonwealth’s youth and their families.” This section also directs the Commission to “encourage the development of uniform policies and services to youth across the Commonwealth and provide a forum for continuing review and study of such services.” Section 30-175 of the *Code of Virginia* outlines the powers and duties of the Commission on Youth and directs it to “undertake studies and to gather information and data ... and to formulate and report its recommendations to the General Assembly and the Governor.”

During the 2019 study year, the Commission on Youth reviewed Virginia’s foster care system. At its December 4, 2019, meeting, the Commission approved nineteen recommendations in the areas of workforce recruitment and retention, Fostering Futures, kinship care, and foster care family recruitment and retention. As a result of feedback from local department site visits during its study, the Commission determined that guardianship of a minor by court petition is a potential legal arrangement that needed to be explored further. In other states, a person interested in the welfare of a minor will seek guardianship to prevent that child’s involvement with the foster care system.

The Commission adopted the following recommendation related to guardianship at its December 4, 2019, meeting:

- Direct the Commission on Youth to study adding guardianship of a minor as a legal arrangement in Virginia by creating an Advisory Group to:
 - a. Look at the benefits as well as the obstacles this change would create.
 - b. Determine the potential impact on school enrollment and medical care.
 - c. Investigate what would be the rights of the parties in such an arrangement.
 - d. Explore the possible implementation of state-funded guardianship assistance.

At its June 17, 2020, meeting, the Commission approved a study plan on legal guardianship of a minor by court petition.

II. Members Appointed to Serve

The Commission on Youth is a standing legislative commission of the Virginia General Assembly. It is comprised of twelve members: three Senators, six Delegates, and three citizens appointed by the Governor.

2020 membership of the Virginia Commission on Youth is listed below.

Senator David W. “Dave” Marsden, Burke, Chair
Senator Barbara A. Favola, Arlington
Senator David R. Suetterlein, Roanoke County
Delegate Emily M. Brewer, Smithfield, Vice-Chair
Delegate Rob B. Bell, Albemarle
Delegate Joshua G. Cole, Fredericksburg
Delegate Karrie K. Delaney, Fairfax
Delegate Elizabeth R. Guzman, Woodbridge
Delegate Jerrauld C. “Jay” Jones, Norfolk
Deirdre S. “Dede” Goldsmith, Abingdon
Avi D. Hopkins, Chesterfield
Christian Rehak, Radford

III. Executive Summary

During the 2019 study year, the Commission on Youth reviewed Virginia’s foster care system. At its December 4, 2019, meeting, the Commission approved nineteen recommendations in the areas of workforce recruitment and retention, Fostering Futures, kinship care, and foster care family recruitment and retention. As a result of feedback from local department site visits during its study, the Commission determined that guardianship of a minor by court petition is a potential legal arrangement that needed to be explored further. In other states, a person interested in the welfare of a minor will seek guardianship to prevent that child’s involvement with the foster care system.

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The Commission on Youth commenced its study and conducted three Advisory Group meetings with interested stakeholders throughout the summer and fall on the following dates: June 15, July 20, and October 6, 2020.

Draft study findings and recommendations were presented at the Commission's October 21, 2020, meeting. The Commission received written public comment through December 5. After receiving public comment at the December 9, 2020, meeting, the Commission on Youth approved the following recommendations:

Guardianship

Recommendation 1

Request that the Virginia Department of Social Services convene a study group with impacted stakeholders to study ways to develop full/permanent, temporary, and limited guardianship in Virginia to reflect the need for additional permanency goals for children. Further, request that the Virginia Department of Social Services complete its study and submit a final report with recommendations to the Commission on Youth and Governor by December 1, 2021.

For this work group, the Virginia Department of Social Services shall collaborate with the Virginia Family Law Coalition, family law attorneys, the Supreme Court of Virginia, Juvenile and Domestic Relations District Court judges, local departments of social services, advocates, parents, and any other interested stakeholders that it deems appropriate.

Family Partnership Meetings

Recommendation 2

Request the Board of Social Services develop regulations for the use of family partnership meetings by local departments.

Kinship Navigator

Recommendation 3

Introduce a budget amendment to enact funding for a statewide Kinship Navigator Program. The budget amendment amount will be based on input from the Virginia Department of Social Services.

Diversion Program Supports

Recommendation 4

Request by letter and direct by budget amendment for the Virginia Department of Social Services to create a diversion program supporting relative and fictive kin families who have received temporary physical and legal custody from the court. DSS shall develop a diversion program that makes use of all federal and state monies available to provide a payment to relative and fictive kin families who have temporary custody through a court order that is equal to the monthly payments that current foster care families receive. DSS shall investigate the feasibility of using Family First dollars as a part of this payment. The Department shall report back to the Commission on Youth by November 30, 2021, with the steps needed to implement the diversion program.

IV. Study Goals and Objectives

During the 2019 study year, the Commission on Youth reviewed Virginia's foster care system. At its December 4, 2019, meeting, the Commission approved nineteen recommendations in the areas of workforce recruitment and retention, Fostering Futures, kinship care, and foster care family recruitment and retention. As a result of feedback from local department site visits during its study, the Commission determined that guardianship of a minor by court petition is a potential legal arrangement that needed to be explored further. In other states, a person interested in the welfare of a minor will seek guardianship to prevent that child's involvement with the foster care system.

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At its June 17, 2020, meeting, the Commission approved a study plan on legal guardianship of a minor by court petition.

In its study plan the Commission on Youth highlighted several identified issues and detailed the study activities to be committed throughout the year. They are as follows:

A. IDENTIFIED ISSUES

- According to the Office of the Administration for Children and Families (ACF), legal guardianship is an option available to parents who are planning for the care of their children in their absence due to a variety of situations, such as illness or incarceration.
- In states with laws relating to guardianship for minors, a legal guardian has court-sanctioned custody and the ability to enroll the child in school, as well as to make medical, disciplinary, and other decisions relating to the well-being of the child.
- States that allow legal guardianship of a minor commonly have provisions for general and limited guardianships. The definition of these terms vary widely state by state.
- Unlike a number of other states, Virginia does not have a statutory mechanism for the granting of guardianship of a minor by court petition. Virginia does have standby guardianship, but that is only used in specific scenarios related to the debilitating condition or death of a parent. Virginia also has testamentary guardians related to wills and estates.
- Virginia law, however, does provide for transfer of legal custody. In Virginia, a party with a legitimate interest who is granted legal custody of a child has the ability to enroll the child in school, as well as to make medical, disciplinary, and other decisions relating to the well-being of the child.
- The National Conference of Commissioners on Uniform State Laws (NCCUSL) has for years debated and presented uniform laws related to guardianship of a minor to legislators across the United States. This organization most recently approved the Uniform Guardianship, Conservatorship, and other Protective Arrangements Act (UGCOPAA).
- Permanent/full, temporary, and limited models of guardianship were identified and explored by the Guardianship Advisory Group that met throughout the summer and fall of 2020.

B. STUDY ACTIVITIES

The Commission's approved study plan includes the following activities:

- Review and analyze Virginia laws, policies, and procedures related to the following:
 - Standby guardianship
 - Power of attorney to delegate parental or legal custodial powers
 - Temporary entrustment
 - Kinship guardianship
 - Transfer of custody process
 - Guardianship of incapacitated persons and minors
 - Formal and informal kinship care
- Conduct extensive background and literature reviews:
 - Guardianship of a minor in other states

- Subsidized guardianship in other states
- Convene an Advisory Group of impacted stakeholders:
 - Commonwealth’s attorneys
 - County attorneys
 - Court Appointed Special Advocates (CASA)
 - Division of Legislative Services
 - Juvenile Court judges
 - Kinship families
 - Legal Aid Justice Center
 - Local Departments of Social Services
 - Patrick Henry Family Services
 - Secretary of Health and Human Resources
 - Virginia Bar Association – Family Law Coalition
 - Virginia Bar Association – Wills, Trusts & Estates Section
 - Virginia Department of Social Services
 - Virginia League of Social Services Executives
 - Virginia Poverty Law Center
 - Virginia’s Court Improvement Program – Supreme Court of Virginia
 - Virginia’s Kids Belong
 - Voices for Virginia’s Children
- Present findings and recommendations to the Commission on Youth.
- Receive public comment.
- Prepare final report.

V. Methodology

The findings and recommendations of this study are based on a number of distinct activities conducted by the Commission on Youth.

A. ADVISORY GROUP

In order to accomplish the work of this study, the Commission on Youth formed an Advisory Group to further review guardianship. The Advisory Group was co-chaired by Senator Barbara Favola and Delegate Emily Brewer. The Advisory Group met on the following dates:

- June 15, 2020
- July 20, 2020
- October 6, 2020

The Advisory Group consisted of representatives from the following organizations:

- Commonwealth’s attorneys
- County attorneys
- Court Appointed Special Advocates (CASA)
- Division of Legislative Services
- Juvenile Court judges
- Kinship families
- Legal Aid Justice Center
- Local Departments of Social Services
- Patrick Henry Family Services
- Secretary of Health and Human Resources
- Virginia Bar Association – Family Law Coalition
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- Virginia Department of Social Services
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- Virginia Poverty Law Center
- Virginia’s Court Improvement Program – Supreme Court of Virginia
- Virginia’s Kids Belong
- Voices for Virginia’s Children

A list of the Advisory Group members can be found in Appendix A at the end of this report. Due to the active state of emergency related to the Covid-19 pandemic, this Advisory Group met electronically pursuant to Item 4-0.01 of the 2020 Appropriation Act. As such, all three of these meetings remain accessible to the public in archive form on the Commission on Youth’s website.

Each meeting of the Advisory Group featured different presentations and conducted a roundtable discussion on the topic of guardianship. The Advisory Group heard a staff presentation from the Commission on Youth as well as presentations from the Department of Social Services, Court Improvement Program at the Office of the Executive Secretary of the Supreme Court of Virginia, Generations United and the ABA Center on Children and the Law, and the Department of Education. These presentations can be found in the appendices at the end of this report.

B. RESEARCH AND ANALYSIS

Commission on Youth staff reviewed literature related to kinship and guardianship. Specifically, staff analyzed articles and publications by the National Conference of State Legislatures (NCSL), Grandfamilies, Administration for Children and Families (ACF), and law review articles.

To gain a better understanding of Virginia’s current landscape, staff studied prior Commission on Youth reports on kinship care and other models such as Safe Families. Staff reviewed the

Department of Social Services Child and Family Services Manual, including sections entitled “Achieving Permanency Goal Custody Transfer to Relatives” and “Family Engagement,” as well as other reports and materials from DSS. Staff also met and interviewed DSS employees. Additionally, staff reviewed the *Code of Virginia* and Virginia Administrative Code on the topics of custody, guardianship, and kinship care. This review of statutes and regulations was presented to the Advisory Group at its first meeting.

Further, staff reviewed the Michigan Model of Guardianship which was used as the proposed model for this study.

VI. Background and Analysis

A. BACKGROUND

Guardianship in Virginia

Guardianship across the country is broadly defined as an option “available to parents who are planning for the care of their children in their absence due to a variety of situations, such as illness or incarceration.”¹ Furthermore, guardianship “allows parents to name a caregiver and to give the caregiver certain legal rights regarding the care of the child. Legal guardians have custody of the children and the authority to make decisions concerning the protection, education, care, discipline, etc.”²

Virginia does not have a broadly defined guardianship statute. Virginia uses standby guardianship and testamentary guardianship, which are tailored to specific situations.

According to the Children’s Bureau, “standby guardianship laws provide parents with a way to legally transfer custody of their child during their lifetime, while also allowing them to retain a measure of authority over the child.”³ In Virginia, a standby guardian is defined in § 16.1-349 of the *Code of Virginia* as follows:

A person who, in accordance with this article, is designated in writing or approved by the court to temporarily assume the duties of guardian of the person or guardian of the property, or both, of a minor child on behalf of or in conjunction with a qualified parent upon the occurrence of a triggering event. The term shall be so construed as to enable the parent to plan for the future care of a child, without terminating parental or legal rights, and to give

¹ U.S. Department of Health & Human Services, Administration for Children & Families, Children’s Bureau. (July 13, 2020). *What does it mean to be a legal guardian; where can I find information?* Retrieved from: <https://www.acf.hhs.gov/cb/faq/custody3/>.

² Ibid.

³ U.S. Department of Health & Human Services, Administration for Children & Families, Children’s Bureau. (June 2018). *Standby Guardianship*. Retrieved from: <https://www.childwelfare.gov/pubPDFs/guardianship.pdf>.

the standby guardian the authority to act in a manner consistent with the known wishes of a qualified parent regarding the care, custody and support of the minor child.

Standby guardianship was added to the *Code of Virginia* in 1998. Its intended use is to help a parent who is facing a terminal illness plan for the future care of his or her child.

Virginia Standby Guardianship		
Authority:	Establishment:	Used for:
§ 16.1-349	Written designation by parent or petition to the Juvenile and Domestic Relations Court.	To arrange for the future care of a minor child as a result of a debilitating illness, disease or injury afflicting the parent.

The other type of guardianship arrangement used in Virginia is testamentary guardianship. This type of guardianship is used in the case of the death of a parent. Section 64.2-1701 of the *Code of Virginia* defines testamentary guardians as follows:

Every parent may by will appoint (i) a guardian of the person of his minor child and (ii) a guardian for the estate bequeathed or devised by the parent to his minor child for such time during the minor's infancy as the parent directs.

In situations where a guardian has not been appointed by will, the *Code of Virginia* also provides for appointment of a temporary guardian until a guardian appointed by the circuit court or clerk has given his or her bond, or while there is no guardian.

Virginia Testamentary Guardianship		
Authority:	Establishment:	Used for:
§ 64.2-1700-1706	By will or by circuit court or the circuit court clerk where the minor resides.	Upon the death of a parent, to provide for the care and management of the minor's estate, real and personal, as well as the minor's health, education, maintenance, and support.

Kinship Guardianship in Virginia

One additional type of guardianship in Virginia is kinship guardianship, also known as KinGAP. KinGAP is only an option for children who are already in Virginia's foster care system. It is defined in § 63.2-1305 of the *Code of Virginia* as follows:

The Kinship Guardianship Assistance program is established to facilitate placements with relatives and ensure permanency for children for whom adoption or being returned home are not appropriate permanency options. Kinship guardianship assistance payments may include Title IV-E maintenance payments, state-funded maintenance payments, state special services payments, and nonrecurring expense payments made pursuant to this section.

Kinship guardianship allows a child to maintain a permanent home with a relative caregiver without terminating the parents’ parental rights.⁴ Furthermore Virginia’s kinship guardianship law permits the state to access federal funding for kinship guardians in support of these children.

Virginia Kinship Guardianship		
Authority:	Establishment:	Used for:
§ 63.2-1305	Approval as foster parents, plus situation meets other eligibility criteria established by statute.	To maintain family connections while gaining the stability of a permanent home with a relative caregiver.

Because KinGAP includes certain eligibility criteria, it is not always available to families who seek to provide care for relatives. The criteria is as follows:

- B. A child is eligible for kinship guardianship assistance under the program if:
 1. The child has been removed from his home pursuant to a voluntary placement agreement or as a result of a judicial determination that continuation in the home would be contrary to the welfare of the child;
 2. The child was eligible for foster care maintenance payments under 42 U.S.C. § 672 or under state law while residing for at least six consecutive months in the home of the prospective kinship guardian;
 3. Being returned home or adopted is not an appropriate permanency option for the child;
 4. The child demonstrates a strong attachment to the prospective kinship guardian, and the prospective kinship guardian has a strong commitment to caring permanently for the child; and

⁴ See *supra* note 1.

5. The child has been consulted regarding the kinship guardianship if the child is 14 years of age or older.⁵

A relative of a child who is not eligible for kinship guardianship may choose to seek custody of the child instead, but this option does not come with the same financial support available to kinship guardianship providers.

The three types of guardianships used in Virginia that deal with the care of a minor are specifically tied to the failing health of a parent, his or her death, or the fact that the child is already in foster care. Virginia does not have a broadly defined guardianship that allows a parent to plan for their child's care in their absence for incarceration and other challenges.

Custody in Virginia

Situations that do not fall under standby, testamentary, or kinship guardianship are addressed by Virginia's current transfer of legal custody statutes. In Virginia, a party with a legitimate interest may petition the court for custody of a child. Once granted legal custody of a child, that person has the ability to enroll the child in school, as well as to make medical, disciplinary, and other decisions relating to the well-being of the child. Section 16.1-228 of the *Code of Virginia* defines legal custody as follows:

A legal status created by court order which vests in a custodian the right to have physical custody of the child, to determine and redetermine where and with whom he shall live, the right and duty to protect, train and discipline him and to provide him with food, shelter, education and ordinary medical care, all subject to any residual parental rights and responsibilities.

As noted above, a party with a legitimate interest may petition for custody of a child. This is set by statute in § 16.1-241 of the *Code of Virginia*:

A party with a legitimate interest shall be broadly construed and shall include, but not be limited to, grandparents, step-grandparents, stepparents, former stepparents, blood relatives and family members.

The party with a legitimate interest must first overcome the law's presumption in favor of the parents by clear and convincing evidence. These factors established by the Supreme Court of Virginia are (1) parental unfitness; (2) a previous order of divestiture; (3) voluntary relinquishment; (4) abandonment; and (5) special facts and circumstances constituting an extraordinary reason for taking a child from its parent.⁶ Next, the party with a legitimate interest

⁵ § 63.2-1305. Kinship Guardianship Assistance program.

⁶ *Bailes v. Sours*, 231 Va. 96 (1986).

must establish to the court that awarding them custody is in the best interests of the child. This is set out by § 20-124.3 of the *Code of Virginia* as follows:

1. The age and physical and mental condition of the child, giving due consideration to the child's changing developmental needs;
2. The age and physical and mental condition of each parent;
3. The relationship existing between each parent and each child, giving due consideration to the positive involvement with the child's life, the ability to accurately assess and meet the emotional, intellectual and physical needs of the child;
4. The needs of the child, giving due consideration to other important relationships of the child, including but not limited to siblings, peers and extended family members;
5. The role that each parent has played and will play in the future, in the upbringing and care of the child;
6. The propensity of each parent to actively support the child's contact and relationship with the other parent, including whether a parent has unreasonably denied the other parent access to or visitation with the child;
7. The relative willingness and demonstrated ability of each parent to maintain a close and continuing relationship with the child, and the ability of each parent to cooperate in and resolve disputes regarding matters affecting the child;
8. The reasonable preference of the child, if the court deems the child to be of reasonable intelligence, understanding, age and experience to express such a preference;
9. Any history of (i) family abuse as that term is defined in § 16.1-228; (ii) sexual abuse; (iii) child abuse; or (iv) an act of violence, force, or threat as defined in § 19.2-152.7:1 that occurred no earlier than 10 years prior to the date a petition is filed. If the court finds such a history or act, the court may disregard the factors in subdivision 6; and
10. Such other factors as the court deems necessary and proper to the determination.

If custody is awarded by the court to the party with a legitimate interest, it may be appealed to the circuit court, *de novo*, which means it is reheard new without any preconceived notions. Finally, an order of custody is always modifiable. For more information about the custody process in Virginia, please see Appendix D at the end of this report.

As exists presently in Virginia, the current options for guardianship are for matters of illness and death, by will, or when a child is in relative foster care. When these specific situations do not apply, families have the option of transfer of custody to care for a relative child.

The remaining topics in this section will discuss the work of the Legal Guardianship of a Minor by Court Petition Advisory Group relating to expanding minor guardianship options in Virginia.

B. MICHIGAN MODEL

The Legal Guardianship of a Minor by Court Petition Advisory Group heard presentations on a proposed guardianship model (the Michigan Model) and received information on Michigan's guardianship laws.

In Michigan, three types of guardianships are available: general, temporary, and limited.

General Guardianship ⁷

General guardianship in Michigan is defined by statute. It allows a person interested in the welfare of a minor to petition for guardianship under certain enumerated grounds:

Petition:

(1) A person interested in the welfare of a minor, or a minor if 14 years of age or older, may petition for the appointment of a guardian for the minor. The court may order the family independence agency or a court employee or agent to conduct an investigation of the proposed guardianship and file a written report of the investigation.

Grounds:

(2) The court may appoint a guardian for an unmarried minor if any of the following circumstances exist:

(a) The parental rights of both parents or the surviving parent are terminated or suspended by prior court order, by judgment of divorce or separate maintenance, by death, by judicial determination of mental incompetency, by disappearance, or by confinement in a place of detention.

(b) The parent or parents permit the minor to reside with another person and do not provide the other person with legal authority for the minor's care and maintenance, and the minor is not residing with his or her parent or parents when the petition is filed.

⁷ Michigan Legislature. *700.5204 Court appointment of guardian of minor; conditions for appointment*. Retrieved from: <http://www.legislature.mi.gov/mileg.aspx?page=mcl-700-5204>.

(c) All of the following:

- (i) The minor's biological parents have never been married to one another.
- (ii) The minor's parent who has custody of the minor dies or is missing and the other parent has not been granted legal custody under court order.
- (iii) The person whom the petition asks to be appointed guardian is related to the minor within the fifth degree by marriage, blood, or adoption.

This type of general guardianship is typically used for situations where the parent is not available, the child does not get support from the parent, and the child does not live with the parent. This type of guardianship does not require the consent of the parents if the court finds that proper grounds exist for the arrangement. Additionally, the court may review this arrangement as it considers necessary, and the guardian must file an annual report with the court until the child reaches 18 years of age. Finally, the parent may petition to terminate the guardianship at any time.⁸ Any court review or termination hearing uses a best interests of the minor analysis when determining the continuation of the guardianship.

Temporary Guardianship⁹

Temporary guardianship is used only in the course of proceeding for a general guardianship:

- (3) If necessary, the court may appoint a temporary guardian with the status of an ordinary guardian of a minor, but the temporary guardian's authority shall not exceed 6 months.

The justification for this temporary appointment is that it may be necessary where immediate decisions affecting the child's health or welfare is required.

Limited Guardianship¹⁰

Michigan's limited guardianship is used in voluntary situations. It requires parental consent and utilizes a placement plan.

⁸ Michigan Legislature. *700.5208 Petition to terminate guardianship of minor*. Retrieved from: <http://www.legislature.mi.gov/mileg.aspx?page=mcl-700-5208>.

⁹ Michigan Legislature. *700.5213 Procedure for court appointment of guardian, temporary guardian, or lawyer-guardian ad litem for minor*. Retrieved from: <http://www.legislature.mi.gov/mileg.aspx?page=mcl-700-5213>.

¹⁰ Michigan Legislature. *700.5205 Court appointment of limited guardian; requirements*. Retrieved from: <http://www.legislature.mi.gov/mileg.aspx?page=mcl-700-5205>.

Petition and Grounds:

(1) The court may appoint a limited guardian for an unmarried minor upon the petition of the minor's parent or parents if all of the following requirements are met:

(a) The parents with custody of the minor consent or, in the case of only 1 parent having custody of the minor, the sole parent consents to the appointment of a limited guardian.

(b) The parent or parents voluntarily consent to the suspension of their parental rights.

(c) The court approves a limited guardianship placement plan agreed to by both of the following parties:

(i) The parents with custody of the minor or, in the case of only 1 parent having custody of the minor, the sole parent who has custody of the minor.

(ii) The person or persons whom the court will appoint as the minor's limited guardian.

The petition for limited guardianship is instituted by the parents. The parents must voluntarily agree to the suspension of their parental rights and agree to a placement plan.

Placement Plan:

The proposed limited guardianship placement plan shall be attached to the petition requesting the court to appoint a limited guardian. The limited guardianship placement plan shall include provisions concerning all of the following:

(a) The reason the parent or parents are requesting the court to appoint a limited guardian for the minor.

(b) Parenting time and contact with the minor by his or her parent or parents sufficient to maintain a parent and child relationship.

(c) The duration of the limited guardianship.

(d) Financial support for the minor.

(e) Any other provisions that the parties agree to include in the plan.

A placement plan that has been agreed to by both parties and the court may be modified as necessary with court approval. A limited guardianship arrangement may also be terminated by petition of a parent at any time. In reviewing the petition, the court shall terminate the limited

guardianship if it determines that the minor's parent or parents have substantially complied with the limited guardianship placement plan.

Similar to a general guardianship, the court may review the limited guardianship arrangement as it considers necessary, and the guardian must file an annual report with the court until the child reaches 18 years of age.

Limited guardianships are most often used by a parent in crisis who would benefit from having a close relative act as guardian of his or her child for a pre-determined period of time.

Michigan's three models of guardianship were presented to the Legal Guardianship of a Minor by Court Petition Advisory Group to form the basis for a proposed model in Virginia. More information can be found on Michigan's model in Appendix E.

C. PROPOSED: FULL/PERMANENT AND TEMPORARY GUARDIANSHIP

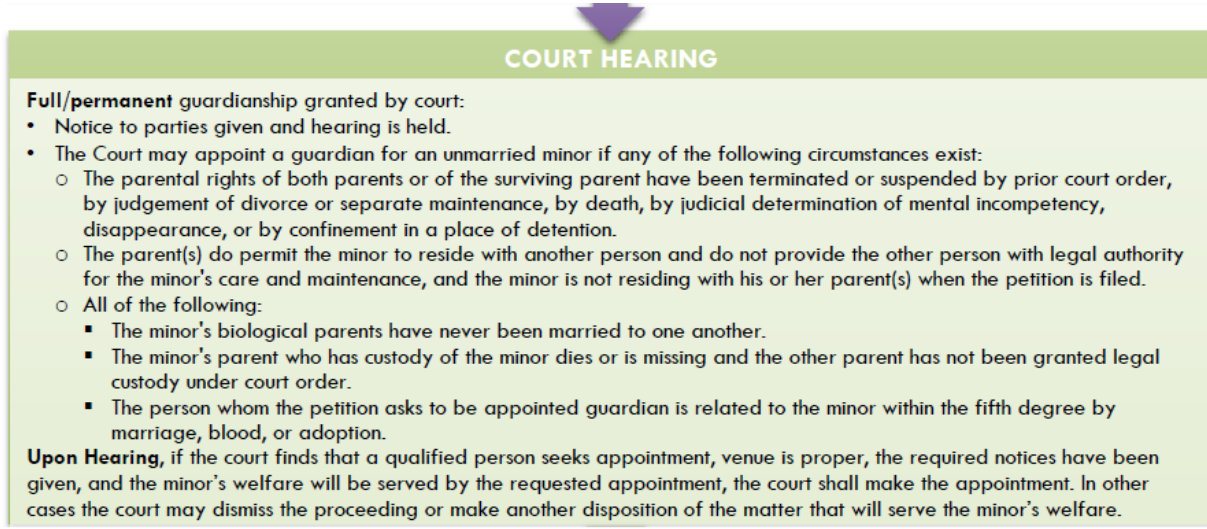
The Legal Guardianship of a Minor by Court Petition Advisory Group considered a proposed model for full/permanent and temporary guardianship at its meetings. The following discussion of that proposal references the proposed guardianship model flowchart, which is included in its totality in Appendix B.

Court Petition



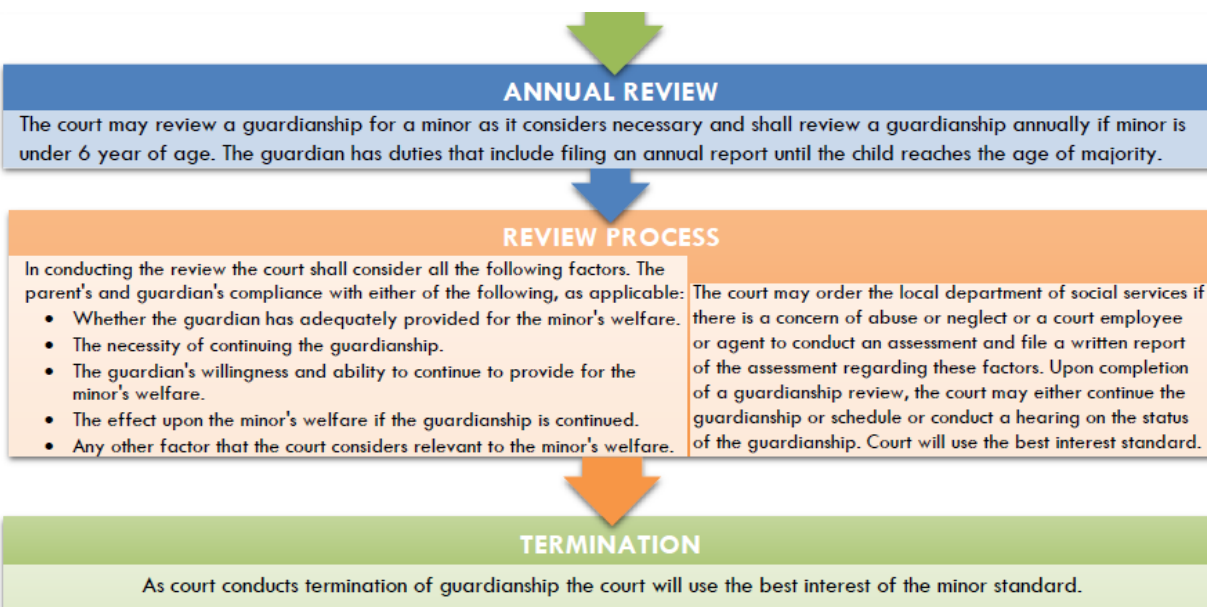
In the proposed model, a petition is filed by a person interested in the welfare of a minor or by a minor over the age of 14. Notice is given to parties who have a stake in the process. After the court is petitioned, temporary guardianship may be awarded as an ancillary step in the process for full guardianship. The purpose of temporary guardianship is to ensure that the temporary guardian can enroll the child in school and authorize medical care.

Court Hearing



At the court hearing, the court may appoint a full/permanent guardian for a minor under certain circumstances enumerated above. If there has been a proper petition, proper notice has been given, if one of the above enumerated circumstances has been met, and if the court determines that the minor's welfare is being served, then the court shall make the appointment.

Annual Review



Once a full/permanent guardianship is established under this proposed model, it typically lasts until the child reaches the age of 18. While in effect, the guardianship is maintained through an annual review process. Every year, a review form is sent to the guardian and the guardian must

file it. The form and guardianship arrangement may be reviewed by the court, but it must be reviewed for children under 6 year of age.

Under the proposed model, termination can be raised by the parents. If this occurs, a best interest hearing is conducted.

Advisory Group Review

The Advisory Group's review of the proposed full/permanent model highlighted the benefits of the proposal, some concerns about the proposal, and cleavages with current law.

Proponents of the model argued that guardianship is both a better process and a more widely understood term than third party custody. Some members of the Advisory Group stated that, within families, guardianship is often a less adversarial term than custody. In addition, for families currently engaged in informal kinship care, the concept of guardianship allows modifications or termination to occur more easily than under current transfer of custody law. Members of the Advisory Group also shared anecdotal evidence that guardianship is more easily understood by health insurance companies, and its use would help ensure that a child would not encounter a lapse in coverage. Finally, proponents highlighted the fact that the yearly review, an element not found in the current transfer of custody process, would allow for additional oversight, ensuring that the guardianship continues to provide for the child's welfare.

Concerns about this proposed model included questions raised about ensuring that notice would properly go to both parents when a petition is filed. The proposed annual review and review process also concerned some members of the Advisory Group. It was noted that the yearly court review would not be feasible, since the court acts on petition and could not execute an automatic review under current court procedure. Additionally, the review process and the proposed assessment by a court employee would take additional resources that the court currently does not have. Any assessment would also be outside of the court's current role in custody matters. Finally, several of the stakeholders in the Advisory Group wanted to ensure that any best interest standard used for the proposed full/permanent guardianship would be specific to guardianship and not just parental custody matters.

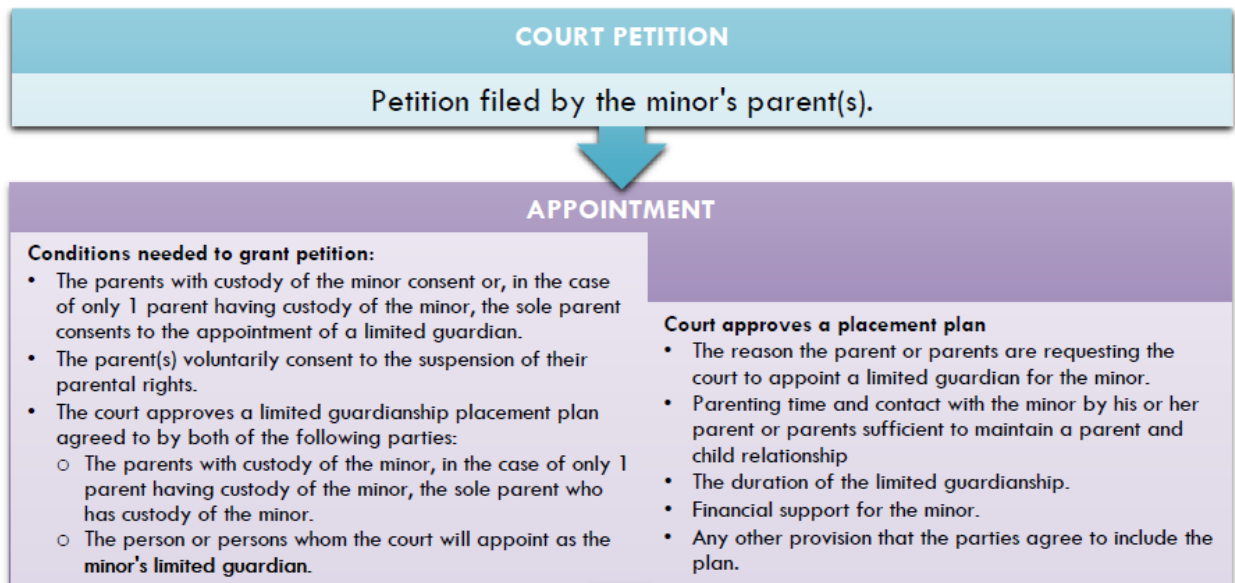
The proposed full/permanent guardianship model flowchart can be found in Appendix B. Minutes and presentations from all Advisory Group meetings are archived on the Commission on Youth's website under the 2020 meetings tab.¹¹

¹¹ Virginia Commission on Youth. *2020 Commission Meetings*. Retrieved from: vcoy.virginia.gov/meetings.asp.

D. PROPOSED: LIMITED GUARDIANSHIP

The Legal Guardianship of a Minor by Court Petition Advisory Group also considered a proposed model for limited guardianship. The following discussion of that proposal references the proposed guardianship model flowchart, which is included in its totality in Appendix B.

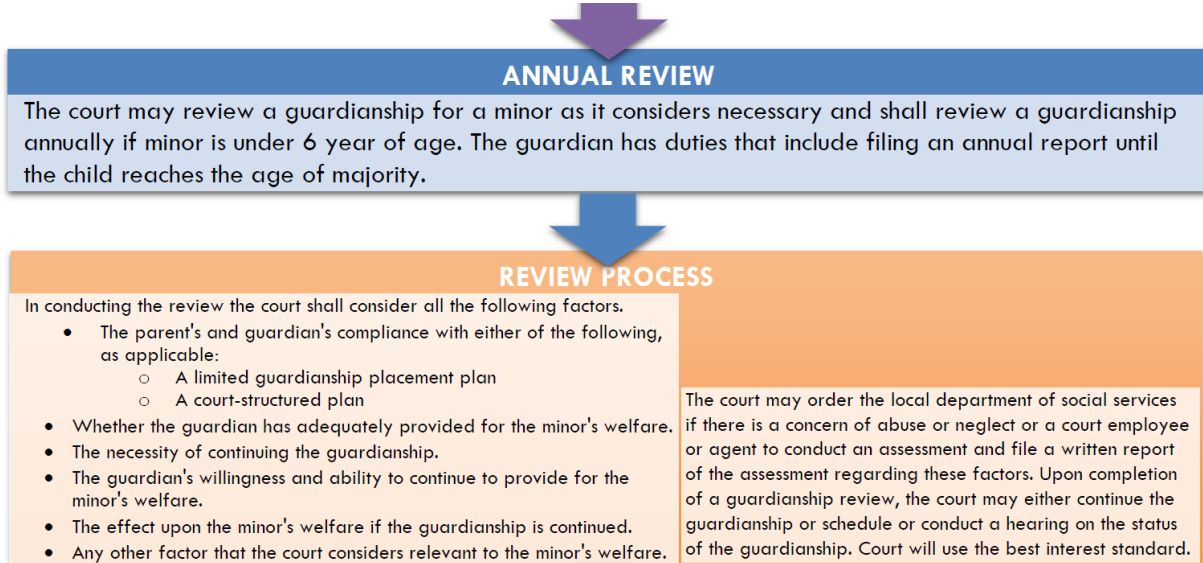
Court Petition and Appointment



In the proposed limited guardianship model, parents initiate the guardianship and file the petition before the court. This is different from the full/permanent guardianship model, in which a person interested in the welfare of the minor files the petition.

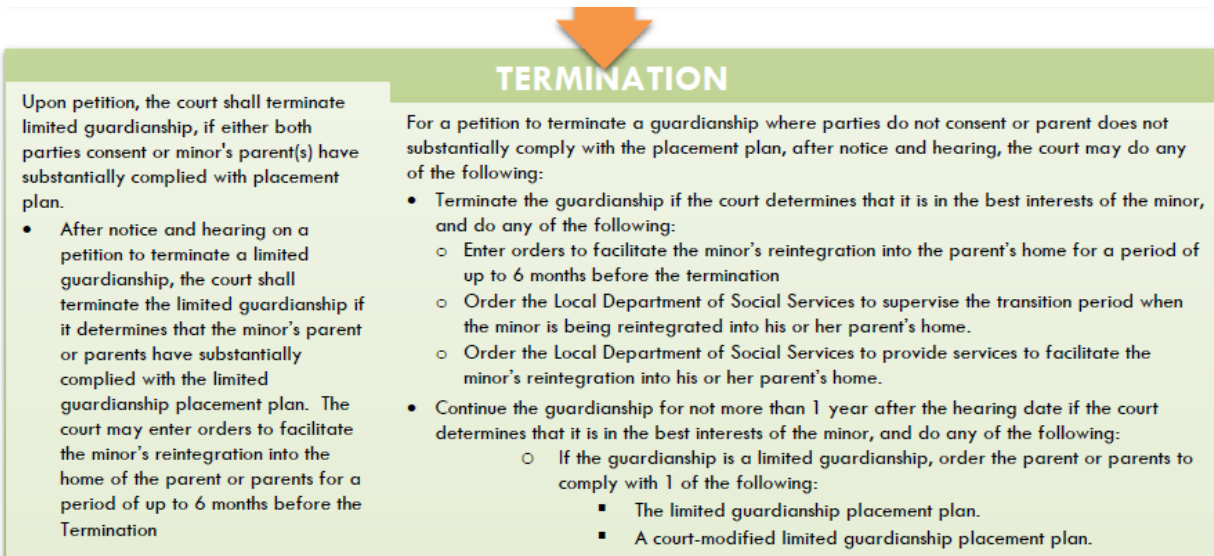
In its consideration of the petition, the court will also review a limited guardianship placement plan which outlines the arrangement. The placement plan dictates details such as parenting time and parental contact with the minor, duration of the guardianship, financial support, and any other additional provisions deemed necessary. The placement plan must be agreed to by the parents and the guardian and approved by the court.

Annual Review



Similar to the proposed full/permanent guardianship model, the annual review process for limited guardianship is completed by the guardian, who submits a form to the court. The limited guardianship must be reviewed by the court each year for children under 6 years old, and reviewed by court discretion for older children. During the court review process, the court considers the parents' and guardian's compliance with the placement plan.

Termination



A parent may petition to terminate the limited guardianship at any time. As with the review process, the court will look at whether both parties consent and if the minor's parents have substantially complied with the placement plan. The limited guardianship could be continued by

the court for up to one year after the hearing of a petition to terminate. This would occur if the court determines that continuation is in the best interest of the child.

Advisory Group Review

The Advisory Group reviewed the proposed limited guardianship and members raised some potential benefits and concerns. Proponents of the proposed limited guardianship model argued that a parent in crisis (e.g., facing incarceration or seeking out substance abuse treatment) cannot grant a relative the legal power to enroll their child in school, determine medical care, or make legal decisions for their child unless they requested that relative seek permanent legal and physical custody of the child. The only other option under current Virginia law is § 20-166, Power of Attorney to Delegate Parental or Legal Custodial Powers. However, this law requires the involvement of a licensed child placing agency and is not available widely across the state. Limited guardianship was raised by proponents as a way to provide a parent in crisis with another tool in the toolbox that would allow that parent to plan for the care of their child for a limited duration of time.

Some members raised concerns about the model's use of a placement plan as part of the petition approval process. These members were concerned that it was unclear who would help craft the placement plans and what additional resources would be necessary for the courts and local departments of social services to accomplish this. Additionally, members noted that under current law, financial support for the minor is petitioned separately during custody matters, and support granted under limited guardianship would necessarily have to follow the same legal process. Finally, some members were concerned that designing a new tool for a parent in crisis might create a presumption against that same parent in the future. This is because under the proposed limited guardianship model, when a parent files a petition for limited guardianship they would be voluntarily consenting to a suspension of their parental rights.

The proposed limited guardianship model flowchart can be found in Appendix B. Additionally, all of the Advisory Group meetings are archived on the Commission on Youth's website under the 2020 meetings tab.¹²

E. OTHER TOPICS RAISED BY THE ADVISORY GROUP

In the course of debating the proposed guardianship models, the Legal Guardianship of a Minor by Court Petition Advisory Group discussed the role of Family Partnership Meetings (FPMs) in regard to diversion, and the use of kinship navigators by families supporting kin outside of the foster care system.

¹² Ibid.

Family Partnership Meetings (FPMs)

Family Partnership Meetings (FPMs) help families with decision making and engagement throughout their involvement with the child welfare system. FPMs are led by a trained facilitator who is separate from the trained facilitator connected to the family. These meetings are held at several critical decision points, including:¹³

- For all decisions involving prevention of out-of-home placements in CPS families assessed at “very high” or “high” risk of abuse or neglect.
- Prior to a child’s removal from a birth or adoptive family.
- Prior to a change of placement.
- Prior to a change of goal.
- When a meeting is requested by the parent, child, or service worker.

FPMs can be used to prevent children from entering the foster care system, to obtain services, and to help plan for placement with relatives or kinship guardians. The use of FPMs in these situations aligns with diversion and keeping children out of foster care when possible.

FPMs are well detailed in Virginia Department of Social Services’ guidance. However this practice is not defined in the *Code of Virginia* and is only referenced briefly in regulations.¹⁴

Kinship Navigator

During its discussion on Guardianship, the Advisory Group discussed how many families who take care of kin have assistance options available to them, but they are never made aware of those options. An answer to this dilemma is the Kinship Navigator.

A Kinship Navigator “offers supports to kinship caregivers to assess needs and arrange necessary services to provide support, education, and information to caregivers to ensure that all of the kinship caregivers are aware of and have access to supportive services, such as financial benefits, therapeutic services, and training.”¹⁵ Kinship Navigators assist with the school registration process

¹³ Virginia Department of Social Services. (March 2020). *Child and Family Services Manual, Practice Foundations, Family Engagement*. Retrieved from: https://www.dss.virginia.gov/files/division/dfs/fe/intro_page/manual/effective_03_2020/2_Family_Engagement.pdf.

¹⁴ 22 VAC 40-201-40. Foster Care Placements.

¹⁵ The Greater Williamsburg Regional Kinship Program. Provided by email communication. (September 3, 2019).

as well as supportive services such as obtaining a birth certificate and social security card or providing clothing and hygiene supplies as necessary.¹⁶

Currently in Virginia there are six Kinship Navigators that serve 40 localities and 33 percent of the state. In 2019, Virginia's Kinship Navigator programs served 655 youth and 591 kinship caregivers, providing information, referrals, and other follow-up services.¹⁷

VA Kinship Navigators: ¹⁸

Arlington Department of Social Services – partnering with Alexandria, Fairfax, Prince William, and Loudon DSS

Bedford Department of Social Services – partnering with Amherst, Appomattox, Campbell, Lynchburg, and Nelson DSS

Dickenson Department of Social Services – partnering with Buchanan, Russell, Tazewell, Lee, Wise, Scott, and Norton DSS

James City County Department of Social Services – partnering with Williamsburg and York-Poquoson DSS

Virginia Beach Department of Human Services – partnering with Chesapeake, Portsmouth, Suffolk, and Norfolk DSS

Smyth Department of Social Services – partnering with Wythe, Bland, Bristol, Carroll, Galax, Giles, Grayson, Montgomery, Pulaski, Radford, and Washington DSS

The Federal Government allocated its third year of funding to these programs, which is set to end in September 2021. The General Assembly has expressed interest in expanding Kinship Navigator access across the state. Language was included in the 2020 Appropriation Act requesting the Department of Social Services to develop a plan to provide access statewide to a Kinship Navigator program.¹⁹

¹⁶ The Greater Williamsburg Regional Kinship Program. *Kinship Services Brochure*. Retrieved from: <https://jamescitycountyva.gov/DocumentCenter/View/6623>.

¹⁷ Virginia Department of Social Services. (September 25, 2020). Retrieved from: <https://twitter.com/VDSS/status/1309532532350816262>.

¹⁸ Virginia Department of Social Services. *What is Kinship Care?* Retrieved from: http://familyfirstvirginia.com/prevserv/kinship_nav.html.

¹⁹ 2020 Appropriation Act. Retrieved from: <https://budget.lis.virginia.gov/item/2020/1/hb30/chapter/1/354/>. (Item 354, Q).

VII. Findings and Recommendations

After presenting findings and recommendations at the Commission on Youth’s December 9, 2020, meeting and receipt of public comment, the Commission approved the following recommendations:

Guardianship

***Finding:** Full/permanent, temporary, and limited guardianship models presented to the Commission on Youth Advisory Group need further exploration by the Department of Social Services if they are to be implemented.*

Recommendation 1 – Request that the Virginia Department of Social Services convene a study group with impacted stakeholders to study ways to develop full/permanent, temporary, and limited guardianship in Virginia to reflect the need for additional permanency goals for children. Further, request that the Virginia Department of Social Services complete its study and submit a final report with recommendations the Commission on Youth and Governor by December 1, 2021.

For this work group, the Virginia Department of Social Services shall collaborate with the Virginia Family Law Coalition, family law attorneys, the Supreme Court of Virginia, Juvenile and Domestic Relations District Court judges, local departments of social services, advocates, parents, and any other interested stakeholders that it deems appropriate.

Family Partnership Meetings

***Finding:** Currently, family partnership meetings (FPMs) are found in guidance and referenced in regulations. Guidance indicates that these meetings are to be held:*

- *For all decisions involving prevention of out-of-home placements in CPS families assessed at “very high” or “high” risk of abuse or neglect.*
- *Prior to a child’s removal from a birth or adoptive family.*
- *Prior to a change of placement.*
- *Prior to a change of goal.*
- *When a meeting is requested by the parent, child, or service worker.*

***Finding:** Advisory Group discussion highlighted the role of FPMs as a beneficial social work practice, and no concerns were raised about the current process.*

Recommendation 2 – Request the Board of Social Services develop regulations for the use of family partnership meetings by local departments.

Kinship Navigator

***Finding:** The 2020 Appropriation Act contains language that states: “The Department of Social Services shall develop a plan to provide access statewide to a Kinship Navigator Program which will provide services to kinship caregivers who are having trouble finding assistance for their unique needs and to help these caregivers navigate their locality's service system, as well as federal and state benefits.”*

Kinship Navigators that are already funded across the state in various localities are supported by Federal grant dollars.

Recommendation 3 – Introduce a budget amendment to enact funding for a statewide Kinship Navigator Program. The budget amendment amount will be based on input from the Virginia Department of Social Services.

Diversion Program Supports

***Finding:** There exists a lack of financial support parity available for kinship caregivers who are awarded temporary legal and physical custody by the courts, and this is presently a barrier to diversion.*

Recommendation 4 – Request by letter and direct by budget amendment for the Virginia Department of Social Services to create a diversion program supporting relative and fictive kin families who have received temporary physical and legal custody from the court. DSS shall develop a diversion program that makes use of all federal and state monies available to provide a payment to relative and fictive kin families who have temporary custody through a court order that is equal to the monthly payments that current foster care families receive. DSS shall investigate the feasibility of using Family First dollars as a part of this payment. The Department shall report back to the Commission on Youth by November 30, 2021, with the steps needed to implement the diversion program.

VIII. Acknowledgments

The Virginia Commission on Youth extends special appreciation to the members of the Advisory Group for their assistance on this study.

**Legal Guardianship of a Minor by Court Petition
Advisory Group**

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Virginia House of Delegates

The Honorable Barbara Favola

Senate of Virginia

Rachel Becker

Secretary of Health and Human Resources

Nannette M. Bowler

Virginia Department of Social Services

The Honorable Gayl Carr

Fairfax County Juvenile and Domestic
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Suffolk County Juvenile and Domestic
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Formed Families Forward

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Services

Proposed Temporary Guardianship and Full/Permanent Guardianship

When family is outside the child welfare system.

Introduction

In what situations is temporary and full/permanent guardianship used?

Parent(s) is absent and does not provide for their minor child's care or maintenance. A person interested in the welfare of a minor files petition for guardianship. Approved guardian supports minor and is able to provide him or her school access, consent to medical care, and ability to access other services the child needs.

How does it differ from custody?

Guardianship is similar to third party custody as they have rights over the child. The court may order parent(s) to pay reasonable support and order parenting time and contact of the minor with his or her parent(s).

However, unlike custody, guardian must file yearly reports to the court so that the court can determine if the guardianship continues to provide for the minor's welfare and the necessity of continuing the guardianship.

COURT PETITION

A person interested in the welfare of the minor (relative/fictive kin), or a minor if 14 years or older may petition for the appointment of a guardian for the minor.

Procedure: The petitioner shall give notice of the time and place of hearing of a petition for the appointment of a minor's guardian to each of the following:

- The minor, if 14 years of age or older.
- The person who had the principal care and custody of the minor during the days preceding the date of the petition.
- Each living parent of the minor, or if neither of them is living, the adult nearest of kin to the minor.



COURT GRANTS TEMPORARY GUARDIANSHIP

Court grants *temporary* guardianship (up to six months) to relative/fictive kin pending a hearing on *full/permanent* guardianship.



COURT HEARING

Full/permanent guardianship granted by court:

- Notice to parties given and hearing is held.
- The Court may appoint a guardian for an unmarried minor if any of the following circumstances exist:
 - The parental rights of both parents or of the surviving parent have been terminated or suspended by prior court order, by judgement of divorce or separate maintenance, by death, by judicial determination of mental incompetency, disappearance, or by confinement in a place of detention.
 - The parent(s) do permit the minor to reside with another person and do not provide the other person with legal authority for the minor's care and maintenance, and the minor is not residing with his or her parent(s) when the petition is filed.
 - All of the following:
 - The minor's biological parents have never been married to one another.
 - The minor's parent who has custody of the minor dies or is missing and the other parent has not been granted legal custody under court order.
 - The person whom the petition asks to be appointed guardian is related to the minor within the fifth degree by marriage, blood, or adoption.

Upon Hearing, if the court finds that a qualified person seeks appointment, venue is proper, the required notices have been given, and the minor's welfare will be served by the requested appointment, the court shall make the appointment. In other cases the court may dismiss the proceeding or make another disposition of the matter that will serve the minor's welfare.



ANNUAL REVIEW

The court may review a guardianship for a minor as it considers necessary and shall review a guardianship annually if minor is under 6 year of age. The guardian has duties that include filing an annual report until the child reaches the age of majority.



REVIEW PROCESS

In conducting the review the court shall consider all the following factors. The parent's and guardian's compliance with either of the following, as applicable:

- Whether the guardian has adequately provided for the minor's welfare.
- The necessity of continuing the guardianship.
- The guardian's willingness and ability to continue to provide for the minor's welfare.
- The effect upon the minor's welfare if the guardianship is continued.
- Any other factor that the court considers relevant to the minor's welfare.

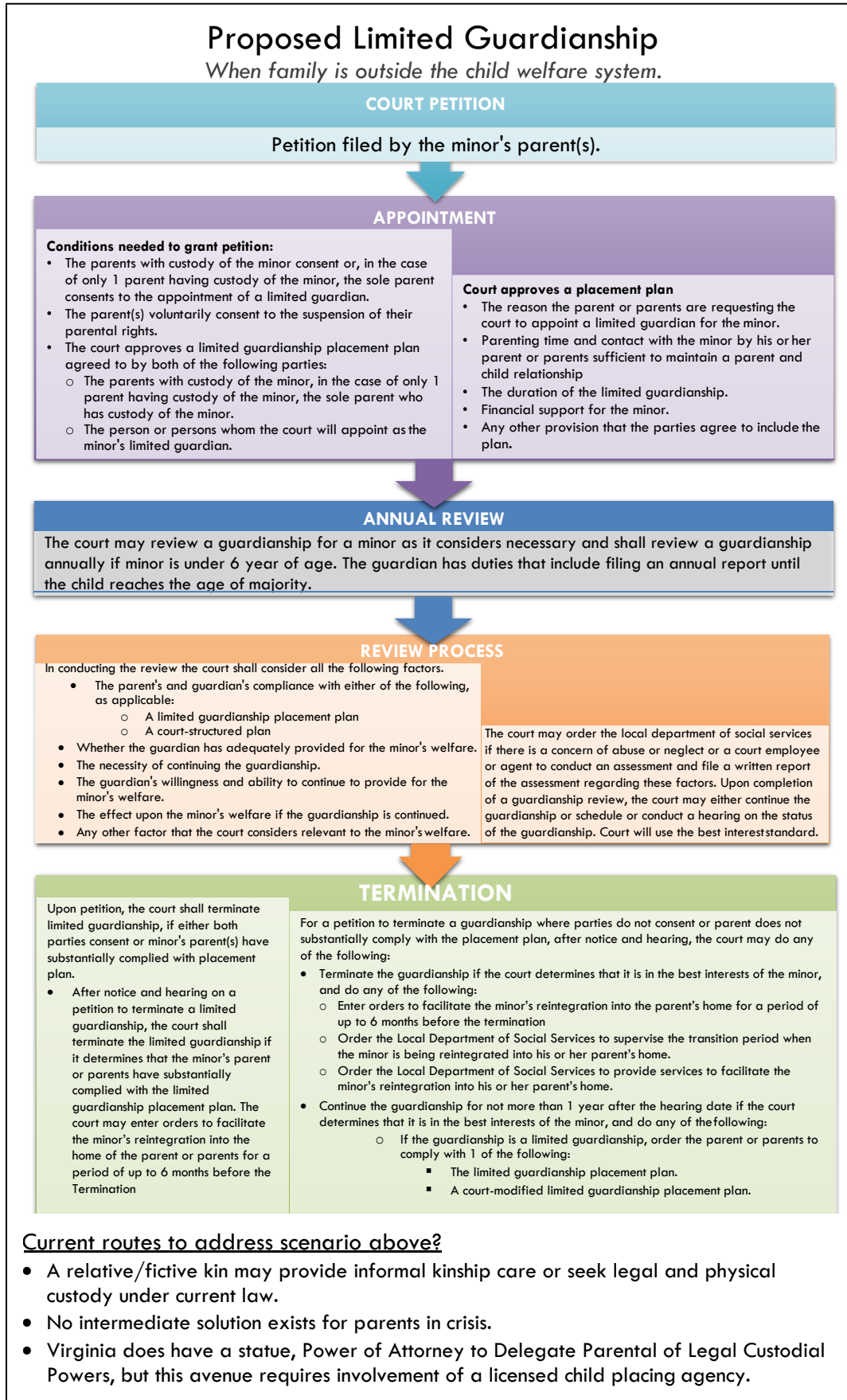
The court may order the local department of social services if there is a concern of abuse or neglect or a court employee or agent to conduct an assessment and file a written report of the assessment regarding these factors. Upon completion of a guardianship review, the court may either continue the guardianship or schedule or conduct a hearing on the status of the guardianship. Court will use the best interest standard.



TERMINATION

As court conducts termination of guardianship the court will use the best interest of the minor standard.

Source: Virginia Department of Social Services



When family is in the child welfare system


PROPOSED FULL/PERMANENT GUARDIANSHIP

The court can appoint a guardian for a minor once the abuse and neglect case has been adjudicated.



Note: Replacing '*legal custody*' phrase, currently in code, with '*full/permanent guardianship*' when appointment is made by the court.

Important Note: '*Guardianship*' will now replace '*legal custody*' regardless of the minor being in or out of the child welfare system. There will no longer be third-party custody, which will only require a code change from '*legal custody*' to '*guardianship*'. This change provides consistent nomenclature whether the minor is in or out of the child welfare system when courts are granting legal rights to relative/fictive kin for the minor.

Note: '*Guardianship*' is a more neutral term rather than '*custody*', and better understood by the public. This leaves the term '*custody*' solely for the purpose between biological parents.




COMMONWEALTH OF VIRGINIA
Commission on Youth



Overview of Guardianship, Entrustment, and Kinship Arrangements in Virginia

June 15, 2020
Will Egen

Virginia's Landscape



- A look at what currently exists in Virginia to support children in need of care outside of the home.
- Certain terms that might be relevant to today's discussion may have different meanings in different contexts.

2

Terms for Review



- Standby guardianship
- Guardianship of incapacitated persons and minors
- Power of attorney to delegate parental or legal custodial powers
- Temporary entrustment
- Kinship guardianship
- Formal and informal kinship care
- Legal custody

3

Standby Guardianship



- "Standby guardian" means a person who, in accordance with this article, **is designated in writing or approved by the Juvenile and Domestic Relations District Court to temporarily assume the duties of guardian of the person or guardian of the property**, or both, of a minor child on behalf of or in conjunction with a qualified parent upon the occurrence of a triggering event.
- Standby Guardianship was added to the *Code of Virginia* in 1998 and can be found at §§ 16.1-349 thru. 355 of the *Code of Virginia*.
- Allows a parent who is seriously ill to designate a standby guardian.

4

Guardianship of Incapacitated Persons



Incapacitated persons:

- "Guardian" means a person appointed by the court who is responsible for the personal affairs of an incapacitated person.
- "Conservator" means a person appointed by the court who is responsible for managing the estate and financial affairs of an incapacitated person.
- According to § 64.2-2001, "a petition for the appointment of a guardian or conservator shall be filed with the circuit court of the county or city in which the respondent is a resident or is located or in which the respondent resided immediately prior to becoming a patient, voluntarily or involuntarily, in a hospital."
- The Governor signed SB 1072 (Mason, 2020), which prohibits, except for good cause shown, the court from appointing as guardian or conservator for the respondent an attorney who has been engaged by the petitioner to represent the petitioner.

5

Guardianship of Minors



Minors:

- According to § 64.2-1701, a parent may by will appoint a guardian of the person of his minor child and a guardian for the estate. This person is known as the testamentary guardian.
- A guardian of a minor may also be appointed by the circuit court, or clerk, and a minor of at least 14 years old may nominate his own guardian.
- Until a guardian appointed by the circuit court or clerk has given his bond, or while there is no guardian, the court or clerk may appoint a temporary guardian. (§ 64.2-1706)

6

Power of Attorney to Delegate Parental or Legal Custodial Powers



- "A parent or legal custodian of a child, by a properly executed power of attorney, may delegate to another person, for a period not to exceed 180 days, any of the powers regarding the custody, care, and property of the child."
- The power of attorney to delegate parental or legal custodial powers was added to the *Code of Virginia* in 2019 and can be found at §§ 20-166 thru. 167 of the *Code of Virginia*.
- It is required that a licensed child-placing agency that assists parents and legal guardians with the process of delegating parental and legal custodial powers of their children be a signatory to the power of attorney.

7

Temporary Entrustment



Temporary Entrustment:

- A parent or guardian may voluntarily request that a local department take custody of the child for a temporary period of up to 180 days.
- Court approval is needed for placements longer than 90 days. (§§ 63.2-903 and 16.1-277.01)
- Temporary entrustments may be terminated by the parent at any time.
- Not all local departments use temporary entrustments.

8

Kinship Care



Types of kinship care:

- Kinship Guardianship (KinGAP)
- Formal and informal kinship care

Kinship care:

- The full-time care, nurturing, and protection of children by relatives (§ 63.2-100)

Fictive kin:

- Means persons who are not related to a child by blood or adoption but have an established a relationship with the child or his or her family (§ 63.2-100)


9

Kinship Guardianship (KinGAP)




- KinGAP is an option for children already in foster care. A KinGAP provider must be a licensed foster care family.
- The purpose of KinGAP is to **facilitate placements with kin caregivers** and ensure permanency for a child for whom adoption or being returned home are not appropriate permanency options.
- § 63.2-1305 outlines the eligibility requirements, which include that the child demonstrates a strong attachment to the prospective kinship guardian, and that the child has been consulted regarding the kinship guardianship if the child is 14 years of age or older.
- The Governor signed SB 178 (Favola, 2020), which expands eligibility for KinGAP by allowing payments to be made to fictive kin who receive custody of a child of whom they had been the foster parent.

10

Formal and Informal Kinship Care 	
Informal Kinship Care	Approved Kinship Care (Formal)
Child must reside in household, custody not required	Child in Custody of Local Department of Social Services (LDSS)
Informal arrangement	Kinship caregivers are eligible to become approved as foster parents
"Child Only" TANF grant for relative caregivers (not fictive kin)	Monthly maintenance, same as approved foster families
Child welfare involvement is irrelevant and does not always occur	<u>Approval Requirements</u>
<u>SB 776 (Barker, 2016) Public schools, residency of children in kinship care.</u> Allows a child receiving kinship care from an adult relative to enroll in the school division where the kinship care provider resides.	Same requirements as approved foster families
	Temporary waivers for pre-service training offered to relatives only
	Approval/License renewed every 3 years

Source: Adapted from VDSS Division of Family Services, December 19, 2019 11


Legal Custody 
<ul style="list-style-type: none"> ▪ "Legal custody" means (i) a legal status created by court order which vests in a custodian the right to have physical custody of the child, to determine and redetermine where and with whom he shall live, the right and duty to protect, train and discipline him and to provide him with food, shelter, education and ordinary medical care, all subject to any residual parental rights and responsibilities or (ii) the legal status created by court order of joint custody as defined in § 20-107.2. (§ 16.1-228) ▪ The <i>Code of Virginia</i> also includes provisions for the petition (§ 16.1-277.02) and relief of custody (§ 16.1-278.3), as well as custody generally (§ 16.1-278.15).

12



Presentation available at:


<http://vcoy.virginia.gov>
(Under meetings tab)



LEGAL FRAMEWORK FOR VIRGINIA CHILD CUSTODY CASES

*Sandra Karison, Director, Court Improvement Program
Office of the Executive Secretary, Supreme Court of Virginia*

Court Improvement Program • Office of the Executive Secretary • Supreme Court of Virginia



Presentation Roadmap



- CASE INITIATION**
 - Jurisdiction and Venue
 - Case Processing
 - Court Referrals and Orders
- CUSTODY & VISITATION ARRANGEMENTS**
 - Best Interests of the Child
 - Third-Party Custody Cases
 - Disposition
- POST-TRIAL REMEDIES**
 - Appeal
 - Modification



JURISDICTION

- SUBJECT MATTER JURISDICTION
 - Va. Code § 16.1-241
 - Juvenile and Domestic Relations District Courts
 - Exclusive original jurisdiction
 - Custody, visitation, support, control or disposition of a child
- CONCURRENT JURISDICTION
 - Va. Code § 16.1-244
 - Circuit Courts
 - Habeas corpus
 - Custody, guardianship, visitation, support
 - Incidental to the determination of pending causes
 - Divorce cases
- UNIFORM CHILD CUSTODY JURISDICTION AND ENFORCEMENT ACT (UCCJEA)
 - Virginia must be child's home state

VENUE

- Va. Code § 16.1-243. Original venue in cases involving custody or visitation shall be commenced in the city or county which, in order of priority:
 1. Is the home of the child at the time of the filing of the petition, or had been the home of the child within 6 months before the filing of the petition and the child is absent from the city or county because of his removal or retention by a person claiming his custody or for other reasons, and a parent or person acting as a parent continues to live in the city of county;
 2. Has significant connection with the child and in which there is substantial evidence concerning the child's presence or future care, protection, training and personal relationships;
 3. Is where the child is physically present and the child has been abandoned or it is necessary in an emergency to protect the child because he has been subjected to, or threatened with mistreatment or abuse or is otherwise neglected or dependent; or
 4. It is in the best interest of the child for the court to assume jurisdiction as no other city or county is an appropriate venue

CASE INITIATION

- Va. Code §§ 16.1-260 – 16.1-265. Juvenile Court Service Unit intake, petitions, investigation, summonses.
 - a. Self-represented individual files petition (one per child) and supporting documents with intake; attorneys may file directly with clerk and motions in the case may be filed with the clerk
 - b. The petition is sworn to and includes:
 - i. The child's name, age, date of birth, and address
 - ii. Mother's name and address
 - iii. Father's name and address
 - iv. Current custodian's name and address
 - v. Specific facts that bring the child into the court's jurisdiction

CASE INITIATION

- c. Supporting documents filed with the petition
 - i. Va. Code §§ 16.1-146.1 – 16.1-146.38 – UCCJEA affidavit
 - Are there other state proceedings or prior court orders concerning the child?
 - Where has the child lived for the past 5 years?
 - Are there pending proceedings in other states?
 - Establish Virginia as the child's home state
 - ii. Va. Code § 8.01-15.2 – Servicemember's Civil Relief Act affidavit
 - Is a party to the proceedings in the military service?
 - iii. Agreement or stipulation (optional)
 - iv. Va. Code § 16.1-69.48:5 – Filing fee (\$25)
 - One fee for one or multiple children
 - Petitioner may apply for waiver on account of poverty as provided in Va. Code § 17.1-606

CASE INITIATION

☐ Va. Code § 16.1-241 Party with a Legitimate Interest

The authority of the juvenile court to adjudicate matters involving the custody, visitation, support, control or disposition of a child shall not be limited to the consideration of petitions filed by a mother, father or legal guardian but shall include petitions filed at any time by any party with a legitimate interest therein.

A party with a legitimate interest shall be broadly construed and shall include, but not be limited to, grandparents, step-grandparents, stepparents, former stepparents, blood relatives and family members.

A party with a legitimate interest shall not include any person (i) whose parental rights have been terminated by court order, either voluntarily or involuntarily, (ii) whose interest in the child derives from or through a person whose parental rights have been terminated by court order, either voluntarily or involuntarily, including, but not limited to, grandparents, stepparents, former stepparents, blood relatives and family members, if the child subsequently has been legally adopted, except where a final order of adoption is entered pursuant to § 63.2-1241 [stepparent adoption], or (iii) who has been convicted of a violation of subsection A of § 18.1-61 [rape], § 18.2-63 [carnal knowledge of a child between 13 and 15 years of age], subsection B of § 18.2-366 [incest], or an equivalent offense of another state, in the United States, or any foreign jurisdiction, when the who is the subject of the petition was conceived as a result of such violation.

The authority of the juvenile court to consider a petition involving the custody of a child shall not be proscribed or limited where the child has previously been awarded to the custody of a local board of social services. Va. Code § 16.1-241 (A); see also Va. Code §§ 16.1-278.15; 20-124.1 (definition of “person with a legitimate interest”).

CASE PROCESSING AND APPOINTMENTS

☐ Va. Code §§ 16.1-263, 16.1-264

- Summonses issued by the clerk to:
 - the parents, guardian, legal custodian or other persons standing in loco parentis
 - such other persons as appear to the court to be proper or necessary parties to the proceedings, and
 - the child, if 12 years of age or older.
- Subpoenas for witnesses will be made at the request of any party.

☐ Va. Code § 16.1-266 – Appointment of counsel.

- No right to counsel for parties
- GAL may be appointed.


COURT REFERRALS AND ORDERS



- Some courts may schedule a pre-trial hearing or control date prior to the hearing on the merits of the case. The court may order a *pendent lite* order providing for temporary custody of the child pending the final determination. Va. Code § 20-103.

 - Va. Code § 20-103(A) – Parent education seminar in contested cases (includes “any person with a legitimate interest”) See also Va. Code § 16.1-278.15.


 - Va. Code § 20-124.4 – Mediation. In any appropriate case the court shall refer the parents or persons with a legitimate interest to a dispute resolution orientation session.

 - Va. Code § 16.1-278.15 – custody or psychological evaluations, drug-testing, etc.
- 

CUSTODY AND VISITATION ARRANGEMENTS



“In determining custody, the court shall give primary consideration to the best interests of the child.” Va. Code § 20-124.2.

- No presumption in favor of any form of custody or either parent
 - Assure children of contact with both parents
 - Encourage parents to share in child-rearing responsibilities
 - Court shall give due regard to the primacy of the parent-child relationship
- Modification cases
- Material or substantial change in circumstances since the last order
 - Best interests of the child
- 

CUSTODY AND VISITATION ARRANGEMENTS

- ❑ Nonparent/third party – When a third party, such as a grandparent, is seeking custody or visitation with a child, the court cannot merely apply a best interests of the child inquiry. They must consider the fundamental liberty interests of the parents in the care, custody, and control of their children, which the United States Supreme Court has said is “perhaps the oldest of the fundamental liberty interests recognized by the Court.” Troxel v. Granville, 530 U.S. 57, 65 (2000).

Must first prove:

- Parental unfitness
- Previous order granting custody to a nonparent
- Voluntary relinquishment by the parents
- Abandonment
- Special facts and circumstances constituting an extraordinary reason for taking a child from his parent or parents

Then must prove:

- Custody or visitation given to third party would be in the best interests of the child.

CUSTODY AND VISITATION ARRANGEMENTS

- ❑ Va. Code § 20-124.3 - Best Interests of the Child.
 1. The age and physical and mental condition of the child, giving due consideration to the child’s changing developmental needs;
 2. The age and physical and mental condition of the each parent;
 3. The relationship existing between each parent and each child, giving due consideration to the positive involvement with the child’s life, the ability to accurately assess and meet the emotional, intellectual and physical needs of the child;
 4. The needs of the child, giving due consideration to other important relationships of the child, including but not limited to siblings, peers and extended family members;
 5. The role that each parent has played and will play in the future, in the upbringing and care of the child;

CUSTODY AND VISITATION ARRANGEMENTS

- Va. Code § 20-124.3 - Best Interests of the Child (continued) -
 6. The propensity of each parent to actively support the child's contact and relationship with the other parent, including whether a parent has unreasonably denied the other parent access to or visitation with the child.
 7. The relative willingness and demonstrated ability of each parent to maintain a close and continuing relationship with the child, and the ability of each parent to cooperate in and resolve disputes regarding matters affecting the child;
 8. The reasonable preference of the child, if the court deems the child to be of reasonable intelligence, understanding, age and experience to express such a preference;
 9. Any history of family abuse as that term is defined in § 16.1-228 or sexual abuse. If the court finds such a history, the court may disregard the factors in subdivisions 6; and
 10. Such other factors as the court deems necessary and proper to the determination.

DEFINITIONS

- Va. Code § 16.1-228 – "Legal Custody" means
 - i. A legal status created by court order which vests in a custodian the right to have physical custody of the child, to determine and redetermine where and with whom he shall live, the right and duty to protect, train and discipline him and to provide him with food, shelter, education and ordinary medical care, all subject to any residual parental rights and responsibilities, or
 - ii. The legal status created by court order of joint custody

DEFINITIONS

- ❑ Va. Code § 16.1-228 – “Residual parental rights and responsibilities” means all rights and responsibilities remaining with the parent after the transfer of legal custody or guardianship of the person, including but not limited to:
 - The right of visitation
 - Consent to adoption
 - The right to determine religious affiliation
 - The responsibility for support

POST-TRIAL

- ❑ Va. Code 16.1-296 – Appeals of juvenile and domestic relations district court orders are made to the circuit court for a *de novo* hearing in which the case is reheard in its entirety by the circuit court judge.
 - The same factors and considerations that judges in the juvenile and domestic relations district courts must make in custody and visitation cases apply to the circuit court judge’s hearing of the case.
 - The circuit court “shall have all the powers and authority granted by the chapter to the juvenile and domestic relations district court. Unless otherwise specifically provided by this Code, the circuit court judge shall have the authority to appoint counsel for the parties and compensate such counsel” in accordance with the statutory provisions governing appointment of counsel in Title 16.1.
- ❑ Va. Code § 20-108 – Revision of decrees in custody and visitation – child custody is always modifiable.



Types of Guardianship in VA

2

- Standby Guardianship
- Title IVE Kinship Guardianship Assistance Program



Definitions of Guardians in VA

3

- Uniform Adult Guardianship and Protection Proceedings (64.2-2100)**
 For child under 18: Where a parent or guardian for a respondent under age 18, or any other person brings the petition and there is no living parent or guardian of respondent under 18. The petition may be filed no earlier than six months prior to the respondents 18th birthday.
- Testamentary Guardians:**
 Every parent may by last will and testament appoint (i) a guardian of the person of his minor child and (ii) a guardian for the estate bequeathed by the parent to his minor child for such time during the child's infancy as the parent shall direct.



Background

4

Findings of the Final Report of the Virginia Commission on Youth: Barriers to Kinship Care in Virginia (September 2011):

- “As outlined by the Virginia Children’s Services Transformation, there are a number of challenges facing kinship care families. First, there are frequently problems accessing accurate information regarding kinship care and available services. Often, without specific knowledge on the subject, kinship care families struggle to understand all their legal options, cannot access legal services or advice, and face difficulties enrolling children in schools or accessing medical care.”
- Recommendation 2 Stated:** Request the Department of Social Services clarify policies and provide training to ensure kinship care, both formal and informal kinship care, is identified as a goal for permanency.



Proposed Guardian Analysis

5

Informal Kinship

(no government involvement)

Kinship Diversion

- CPS referral (no petition filed)
- FPM meeting

Formal Kinship

- CPS referral (no petition filed)
- FPM meeting prior to 5 day hearing
- Court holds 5 day hearing



Proposed Guardianships

6

- **Temporary Guardianship:**

The guardianship is exactly what it states: it is temporary. If necessary to protect the child, the court may appoint a temporary guardian for six months. A temporary guardian is appointed only in the course of proceeding for a general guardianship.

- **General Guardianship:** (Also known as permanent, regular or ordinary)

Does not require parental consent for the filing of the petition but notice and a hearing must be given. A person interested in the welfare of a minor, or the minor if 14 years of age or older may petition the court.

- **Limited Guardianship:**

Requires voluntary consent of the parent or parents with legal custody of the child. It is a court-sanctioned consent arrangement. There are four circumstances when this can be done. In addition to finding parental consent, the court must approved a limited guardianship placement plan agreed to by the parties.



Myths

7

- Relative guardianship is not permanent enough and should not be considered as a permanency option;
- If children move from foster care to guardianship with relatives they will likely re-enter care;
- If a child is placed in guardianship with a relative, the child will never be able to be adopted.



Questions

8



Navigating Access to Education for Students not Living With Their Parents:

Unaccompanied Homeless Youth, Foster Care, and Guardianship

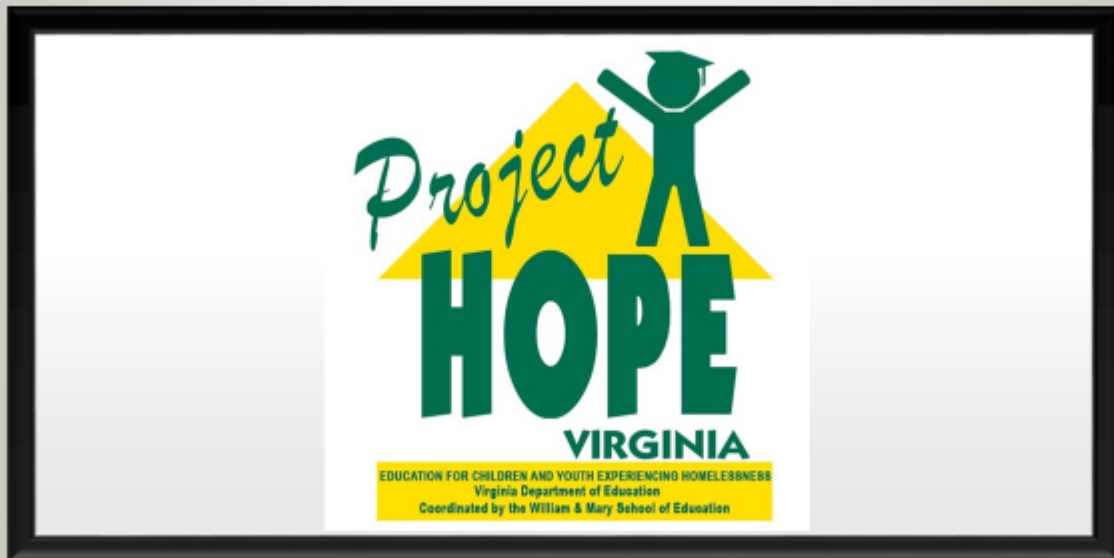
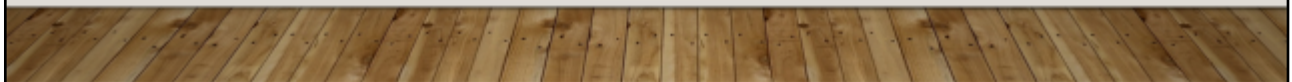
PATRICIA A. POPP, PH.D.

STATE COORDINATOR FOR THE EDUCATION OF HOMELESS CHILDREN AND YOUTH

VDOE EDUCATIONAL STABILITY LIAISON FOR STUDENTS IN FOSTER CARE

PROJECT HOPE-VIRGINIA

WILLIAM & MARY SCHOOL OF EDUCATION



Pertinent Legislation

- McKinney-Vento, Title IX, Part A of the Every Student Succeeds Act (2015)
- Fostering Connections to Success and Increasing Adoptions Act of 2008
 - Every Student Succeeds Act, Title I, Part A
- Families First Act
- Code of Virginia § 22.1-3(A)(4)(iii)

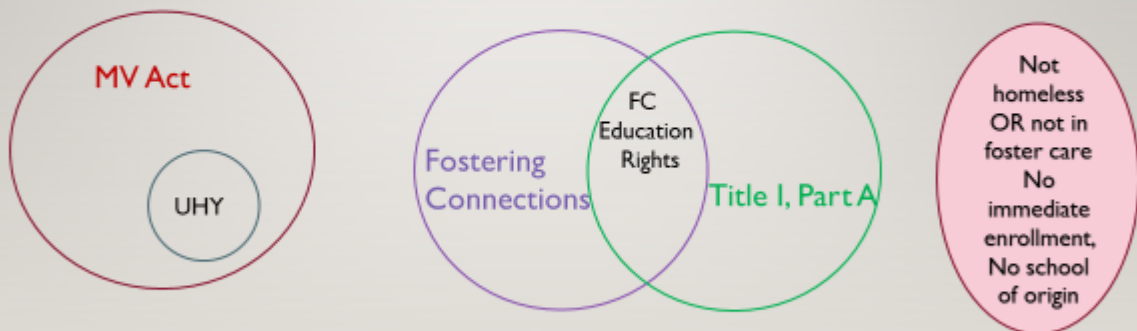
Educational Rights for Students Experiencing Homelessness and Students in Foster Care

- Immediate Enrollment
- School Stability
 - Right to stay in the school of origin when in the student's best interest
 - Transportation to maintain school of origin

Children and youth not in the physical custody of a parent

- Unaccompanied homeless youth (UHY)
- Children and youth in foster care
- Other children and youth not with their parents/guardians

Post ESSA: 2015 -



Code Of Virginia § 22.1-3(a)(4)(iii)

- (iii) an adult relative providing temporary kinship care as that term is defined in § 63.2-100. Local school divisions may require one or both parents and the relative providing kinship care to submit signed, notarized affidavits (a) explaining why the parents are unable to care for the person, (b) detailing the kinship care arrangement, and (c) agreeing that the kinship care provider or the parent will notify the school within 30 days of when the kinship care arrangement ends, as well as a power of attorney authorizing the adult relative to make educational decisions regarding the person. A school division may also require the parent or adult relative to obtain written verification from the local department of social services where the parent or parents live, or from both that department and the department of social services where the kinship provider lives, that the kinship arrangement serves a legitimate purpose that is in the best interest of the person other than school enrollment. With written consent from the parent or adult relative, for the purposes of expediting enrollment, a school division may obtain such written verification directly from the local department or departments of social services. The verification process shall be consistent with confidentiality provisions of Article 5 (§ 22.1-287 et seq.) of Chapter 14 of this title and Chapter 1 (§ 63.2-100 et seq.) of Title 63.2. If the kinship care arrangement lasts more than one year, a school division may require continued verification directly from one or both departments of social services as to why the parents are unable to care for the person and that the kinship care arrangement serves a legitimate purpose other than school enrollment. A local school division may enroll a person living with a relative in a kinship care arrangement that has not been verified by a local department of social services

Word from the National Center on Homeless Education (NCHE)

- **Planned** or **unplanned/emergency**
 - Medical need
 - Immigration
 - Incarceration
 - Safety plans/diversion

December 2019/January 2020 Survey:
School Division MV Liaisons

- 71/132 - 54% response rate
- Students identified as homeless: 11,320
(total approx. 20,000)

About how many unaccompanied students did your LEA consider for MV eligibility last year as a result of (*subgroup*) that would not be eligible based on the information in this memo?

Subgroup/Responses	Estimated # Students who would NOT be MV eligible based on planned/unplanned	Reported slight or significant increase in subgroup: % of LEAs responding / Estimated # Students
Safety Plans	211	37% / 158
Immigration	98	49% / 79
Medical Need	29	4% / 1
Incarceration	122	29% / 82

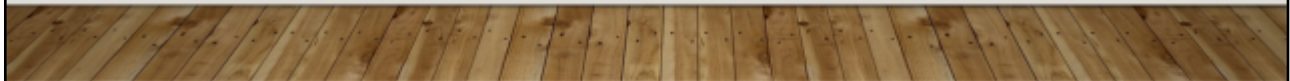
LEA COUNT	QUESTION/RESPONSE	NUMBER OF STUDENTS IN THOSE LEAS
Unaccompanied youth who are not found eligible for McKinney-Vento protections and attempt to enroll may (check all that apply):		
41 LEAs	Be enrolled through established administrative processes/waivers	392 students
53	Be required to obtain additional documentation	420
26	Face long enrollment delays	345
20	Not be enrolled at all, or may be disenrolled	146

LEA count	Question/Response	Number of students in those LEAs
When there are enrollment delays for unaccompanied students that are not McKinney-Vento eligible, how long do delays typically last?		
17 LEAs	N/A - unaccompanied students are enrolled without delay	82
33	One week or less	256
13	Up to 1 month	148
1	Up to 3 months	0
0	6 months or more	0
4	These students are not allowed to enroll at all, or are disenrolled	47

LEA COUNT	QUESTION/RESPONSE	NUMBER OF STUDENTS IN THOSE LEAS
In regards to maintaining school of origin, unaccompanied students in the above situations who are not McKinney-Vento eligible (check all that apply):		
28 LEAs	Would likely be able to maintain school of origin through other established means	135 students 30 safety plan
15	Would likely be able to access transportation services to maintain school of origin through existing policies	22 6 safety plan
34	Would have no options outside of McKinney-Vento to maintain school of origin; students would likely transfer to another school if placed with family/friend outside of the school of origin's zone	353 159 safety plan

Main “take aways” regarding enrollment of students without parents who are not homeless or in foster care

- Liaisons would like more direction
- Code of Virginia does not mandate enrollment
- There are school divisions where students cannot enroll
- Even with enrollment options, maintaining school of origin is unlikely



Consideration for Guardianship

- Include these students in the Code of Virginia under:
 - § 22.1-3. Persons to whom public schools shall be free.
- Recognize that immediate enrollment and school stability mandates rights will not apply
 - Possibilities for school stability will vary by locality
 - Funding would be needed to address transportation needed for school stability

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Legal Custody and Guardianship in Virginia

Virginia Commission on Youth
July 20, 2020

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ABA Center on Children and the Law

Grandfamilies.org

- Mission: promote access to justice for children and families
- Structure:
 - 15-person team of attorneys and core staff
 - Grant projects across the country focused on:
 - improving legal representation, and
 - improving legal systems that impact children and families' lives
 - Connect child welfare and other legal topics (e.g. immigration, education access, kin caregiving)
- Approach:
 - Collaboration and coalition building
 - local, state and national levels

www.americanbar.org/child



Generations United

Grandfamilies.org

- Generations United’s mission is to improve the lives of children, youth, and older adults through intergenerational collaboration, public policies and programs
- Since 1998, Generations United’s National Center on Grandfamilies:
 - Guided by GRAND Voices – a national network of caregiver advocates
 - Provides technical assistance to states and other providers
 - Federal advocacy
 - Raises awareness through media outreach, weekly communications and events
 - Provides information and resources at www.gu.org and www.grandfamilies.org

**generations
united**
Because we're stronger together®

3

Our Work in Virginia

Grandfamilies.org

Through a partnership with Casey Family Programs, Generations United and ABA:

- Presented at Three Branch Training, October 2019
- Conducting statewide kinship assessment
 - On-line surveys
 - Information sessions postponed due to COVID-19
 - Review of laws, regulations, policies, materials and licensing standards
- Analysis
 - Analyze laws, regulations and policies, and information from surveys and information sessions
 - Identify barriers to relative foster care approval/licensing
- Recommendations
 - Policy and statutory recommendations
 - Provide other state examples of tools and best practices
- Trainings

4



Kinship Overview

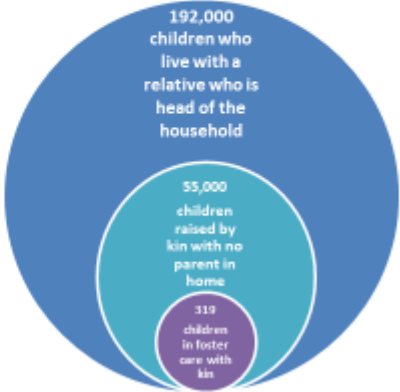
Children in Kinship Families



United States:



Virginia:

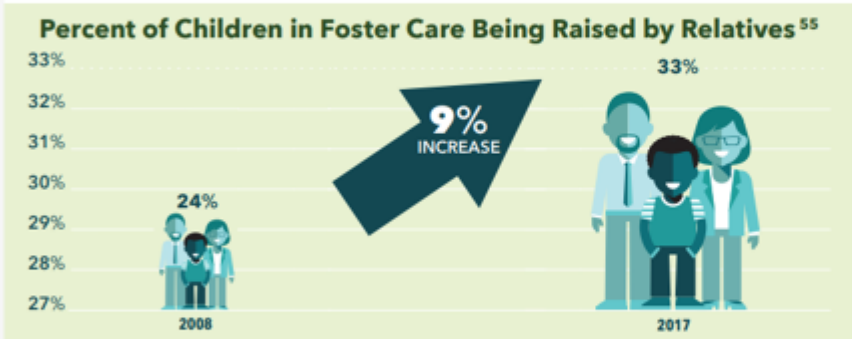


Comparison of Kinship Care in Numbers



For every 1 child in foster care with relatives:
19 children in the United States
 over **170** children in Virginia
 being raised by relatives outside the foster care system

Kinship Foster Care in Numbers



In Virginia:
 6.13% of foster
 children are with
 approved relatives

www.gu.org



Data is not publicly available on the percentage of these children who are with approved/licensed relatives.

Kinship Families Strengths: Children Thrive

Grandfamilies.org

* See Children Thrive in Grandfamilies fact sheet, available at www.grandfamilies.org and www.gu.org

9

Legal Continuum: Care and Custody

Grandfamilies.org

10

Legal Custody and Guardianship

Grandfamilies.org

- Legal Custody and Guardianship - legal responsibility to make decisions, provide care, and access services for a child is transferred from parent to another caregiver
 - Legal Custody – typically refers to family or juvenile court
 - Guardianship – typically refers to probate courts (except subsidized kinship guardianship)
- Court does not terminate parental rights or responsibilities
- Parents preference and best interest of the child considered
- Modifications allowed - parents can go back to court and ask that guardianship or legal custody be terminated and child returned to parent
- Allows caregiver to make decisions for the child and access services
- Legal custody is similar to guardianship, but the status of “guardian” may give access to more services and rights than “legal custodian”

11

Subtypes of Legal Custody & Guardianship

Grandfamilies.org

Guardianship

- Guardianship by Probate – clause in will names guardian upon death of parent and court approval/appointment.
- Temporary guardianship – parent appoints person to have temporary control of child.
- Limited guardianship – powers of guardian limited to those set forth in order of appointment.
- Standby guardianship – pre-appointed future guardian steps in after triggering event occurs.
- Guardianship by Family or Dependency Court – several states have, and many were enacted in part as mechanism to implement the federal Kinship Guardianship Assistance (GAP)

Legal Custody:

- De facto custody – child’s primary caregiver for some period of time in the parents’ absence granted custody.

More information:

<https://www.grandfamilies.org/Topics/Care-Custody/Care-Custody-Summary-Analysis>

12

Virginia Care and Custody Laws

Grandfamilies.org

Juvenile and Domestic Relations District Courts (JDRC)

- Private cases:
 - Legal Custody and Visitation Arrangements for Minor Children - § 20-124.2
 - Standby Guardianship - § 16.1-349
- Dependency cases:
 - Temporary Custody at removal - § 16.1-252
 - Legal Custody granted at disposition or permanency hearing - § 16.1-278.2
(This is the legal vehicle for Kinship Guardianship Assistance - § 63.2-1305)
 - Approval of entrustment agreement transferring legal custody of the child to a relative - § 16.1-277.01
 - Termination of residual parental rights - § 16.1-283

Probate Court

- Appointment by Parent in a Will - § 64.2-1701
- Nomination of Guardian by Minor 14 or older - § 64.2-1703
- Temporary Guardianship - § 64.2-1706

13

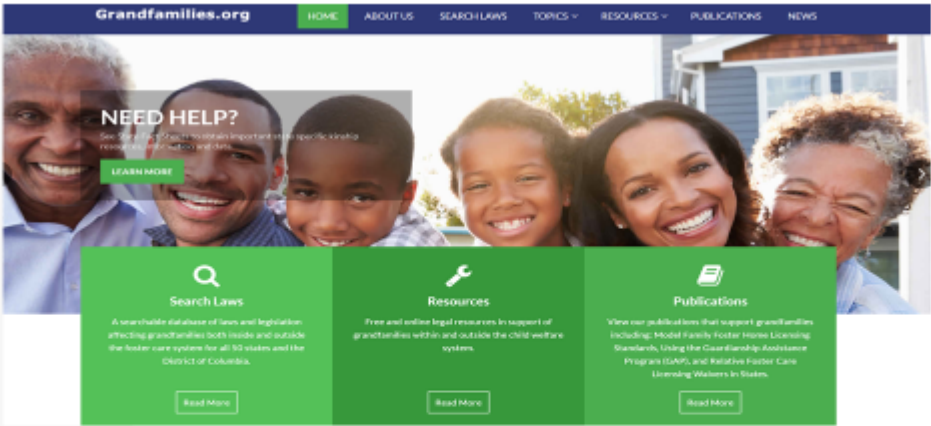
Missing Elements of Virginia Care and Custody Laws

Grandfamilies.org

- Temporary Custody or Guardianship in non-DSS or probate cases
 - Benefits:** Allows for a short-term relationship and a pathway to full guardianship
- Limited Custody or Guardianship
 - Benefits:** Allows for designation of specific rights and powers – e.g., educational
- Modification/termination process to return child safely to parent or to change existing order
 - Benefits:** Allows for clear standard and delineation of elements to allow children to return to parents or to modify orders
- Streamlined process for filing and resolution of cases
 - Benefits:** Allows for more accessible establishment of legal relationships (e.g., bench cards, pro se forms and clinics)


14


Additional Resources



www.grandfamilies.org

A collaboration of:
ABA Center on Children and the Law
Generations United
Casey Family Programs





The GrandFacts state fact sheets for grandfamilies include state-specific data and programs as well as information about public benefits, educational assistance, legal relationship options and state laws. Visit www.grandfamilies.org to find this and all GrandFacts state fact sheets.


Virginia

The Children

- 55,000 (2%) children live with a relative with no parent present.
- 124,297 (9.4%) children under 18 live in homes where householders are grandparents or other relatives.
 - 113,887 (7.2%) of these children live with grandparents.
 - 48,810 (2.2%) of these children live with other relatives.

The Grandparents

- 67,584 grandparents are householders responsible for their grandchildren who live with them. Of these:
 - 23,293 (34.5%) do not have parents present.
 - 41,188 (60.9%) are under age 60.
 - 41,128 (60.9%) are in the workforce.
 - 9,907 (14.7%) are in poverty.
 - 16,241 (24.1%) have a disability.
 - 18,504 (27.4%) are unmarried.
 - Race/ethnicity:
 - 37,311 (55.1%) are white (not Hispanic or Latino)
 - 21,543 (31.9%) are black or African American
 - 5,065 (7.5%) are Hispanic or Latino origin
 - 2,499 (3.7%) are Asian
 - 338 (0.5%) are American Indian or Alaska Native
 - 68 (0.1%) are Native Hawaiian or other Pacific Islander
 - 1,216 (1.8%) are multiracial
 - 1,488 (2.2%) are some other race



17



Questions– Contact Us

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18