

Minor Guardianship Proceedings in Vermont

2012 Report to the Vermont Legislature

Submitted December 15, 2012
By the Act 56 Minor Guardianship Committee

Report of Minor Guardianship Committee

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Introduction

Section 23 of Act 56 (H.264), passed by the 2011 Vermont Legislature, established a committee to study jurisdiction over proceedings on minor guardianship.

The charge was to study issues, including the following:

- (1) the circumstances under which it is appropriate to transfer minor guardianship proceedings between the probate and family divisions, including which division should have authority to order the transfer and the criteria which should govern whether the transfer should proceed;
- (2) The involvement of the department for children and families in open cases in the family division when a CHINS proceeding has not been filed;

- (3) The unofficial involvement of the department for children and families in minor guardianship proceedings in the probate division;
- (4) whether the probate division should have the authority to make the department for children and families a party to minor guardianship proceedings in the probate division instead of transferring the proceeding to the family division; and
- (5) Whether and which substantive, procedural, or jurisdictional changes to minor guardianship proceedings would best serve the interests of children.

On behalf of Commissioner Yacovone, Deputy Commissioner Cynthia Walcott convened the first meeting of the committee on 10/13/2011. She has acted as chair of the committee.

The Act required a report by 1/12/2012. The committee concluded rather quickly that more time would be needed to ensure a quality product that would sufficiently address the issues of concern. In our report, we expressed the committee’s intent to make a comprehensive set of recommendations to the Vermont General Assembly by January 2013. We asked the General Assembly to renew its charge to the committee, authorize it continued work throughout 2012, and set a new due date for its report, in January 2013. This did occur.

Membership and Structure

The following members are serving on the committee, as specified by the act.

- Trine Bech - Executive Director, Vermont Parent Representation Center
- Hon. George Belcher - Judge, Washington Probate Court (retired July 2012)
- Hon Joanne Ertel – Judge, Windsor Probate Court (replaced Judge Belcher, as of July 2012)
- Betsy Blackshaw – attorney appointed by the Vermont Bar Association
- Judi Daly – social worker for Casey Family Services
- Hon. Amy Davenport – Administrative Judge for the Vermont Trial Courts
- Lynn Granger - Vermont Kin as Parents
- Robert Sheil - Juvenile Defender
- William Sullivan – Guardian ad Litem, Addison County
- Cynthia Walcott – DCF Deputy Commissioner, Family Services Division

All original committee members have continued to serve. In addition, several other individuals with subject matter expertise attended on a regular basis:

- | | |
|----------------|--|
| Linda Deliduka | Vermont Kin-Kan |
| Lane Dunn | Vermont Parent Representation Center |
| Karen Shea | DCF Child Protection and Field Operations Director |
| Sandi Yandow | Vermont Kin-Kan |

Meetings have been held at least monthly. In 2012, two sub-committees were formed to do more intensive work – one was focused on legal issues and the others on the services needed to support successful minor guardianships.

Sources of Information

The committee reviewed multiple documents and heard presentations from a variety of experts (see Appendix 1)

Committee Decision-making

The group agreed that whenever possible, we would attempt to come to consensus. When that was not possible, we would clearly articulate the different points of view.

Why Are We Concerned?

Minor guardianship through the probate court has long provided an avenue for families to “take care of their own”. Through the minor guardianship procedure in probate court, families are able to enter into voluntary arrangements for the care of minor children without state intervention. When the arrangement is consensual, i.e. the agreement and its implications are understood and agreed to by parents and the proposed guardian, the process works well.

It is not uncommon, however, for the situation to turn contentious and complicated when guardians and parents disagree about the duration of the guardianship, the degree of parent-child contact, and the conditions under which a child should return to the parent’s custody, etc. For these “complex cases”, the current statute is not working well. There are concerns on all sides.

- Families are often in the midst of substantial crisis. They need information and assistance in order to make the best decision that will work for the child and family, not only in the very short term, but potentially for a longer period. There is no routinely available peer or professional support available to families at this time.
- Even though serious issues are at stake, parties are not usually represented by an attorney. Or, one party may be represented, creating an imbalance of power.
- Children may experience disruption and trauma and may need assistance to ensure they receive adequate support and appropriate services.
- Parents lack understanding about their rights as parents, the legal process, the potential long term consequences and other alternatives that may be available.

- Both parents and guardians often decide to agree to a guardianship because they believe that otherwise DCF will take custody of the child(ren).¹ In making this choice they have little understanding about the differences between the two proceedings in terms of the availability of services and supports.
- Guardians lack understanding regarding available financial assistance and the long-term financial implications of guardianship.
- No social work services are available to advise and assist either the family or the probate judge.
- The Vermont statute which governs the establishment and review of minor guardianship in Vermont has not been comprehensively revised since the 1920s. It was written long before Vermont began to experience the kind of social issues that now force families to seek alternative ways to raise their young family members.

Guardianship in the Context of the Vermont Courts

In Vermont, there are three distinct types of cases where issues related to child custody are decided:

- Minor guardianship petitions that involve the transfer of custody/guardianship from a parent to a third person, most often a relative. Primary jurisdiction over minor guardianship cases is in the probate division of the superior court;
- Divorce or parentage proceedings involving custody disputes between two parents. The family division of the superior court has exclusive jurisdiction over these cases; and
- CHINS petitions involving the possible transfer of custody from a parent to either the State (DCF) or to a relative. CHINS stands for “child in need of care or supervision.” Again, exclusive jurisdiction over CHINS petitions rests with the family division.

A major difference between the probate division and the family division is the judge. Cases in the probate division are heard by elected probate judges who have no jurisdiction to sit on cases in the family division. Cases in the family division are heard by appointed superior judges who are not authorized to hear cases in the probate division except in the rare circumstance when a superior judge transfers a case in the probate division to the family division pursuant to 4 V.S.A. §455 (see below).

Minor Guardianship Petitions in the Probate Division

In FY 2012, 456 petitions for minor guardianship were filed in the probate division. The majority of these guardianships were created based upon a voluntary agreement between parents and a relative (most often a grandparent). The authority of the guardian may be limited to financial issues or may involve the custody and care of the child. The focus of the Committee’s attention

¹ Parents and relatives often perceive a statement that DCF will seek custody unless a parent agrees to a guardianship, as a threat to the integrity of the family. Rightly or wrongly, they believe that they will never regain custody if the State initiates a CHINS proceeding. The Committee strongly believes that decisions about the initiation of a CHINS proceeding should be based on the merits of the case, not a parent’s unwillingness to agree to a guardianship.

has been on minor guardianships that involve the custody of the child. Voluntary custodial guardianships may occur for a variety of reasons including parental inability to care for a child because of military service, serious illness, or incarceration. Ideally, the decision is based upon the agreement of both parents, but there are times when the agreement is based on the consent of only one parent because the whereabouts of the other parent are unknown. When a guardianship is voluntary the main issue for the judge to decide is whether the proposed guardian is a suitable person to care for the child.

When a minor guardianship is contested (i.e. one or both parents do not agree to the guardianship), the probate judge must first decide whether the parents are “unsuitable” to care for the child. It is up to the petitioner (usually the proposed guardian) to prove “unsuitability” of the parents. A finding of “unsuitability” can be based on parental abuse, abandonment or neglect of a child or the inability to provide proper parental care. It can also be based on a finding that the child is beyond a parent’s control. If the judge determines that a parent is not “unsuitable”, the petition is dismissed.

Guardianship statutes do not currently address the issue of parent child contact and do not currently require even in consensual cases that there be an agreement with respect to the expected duration of the guardianship. As long as the guardianship exists, the guardian is required to provide an annual report to the court to keep the court informed concerning the child’s wellbeing and progress. At the end of FY2012, there were 2,843 minor guardianships under the jurisdiction of the probate division.

Guardianships can be terminated by consent at any time. However, if a parent seeks to terminate a guardianship and the guardian does not agree, the guardianship cannot be continued unless there is a finding of parental “unsuitability” by the court.

Even in contested cases, attorney representation for either the proposed guardian or the parent(s) is relatively rare. Representation for the child is also rare.

Appeals from a probate decision in a guardianship case are to the Supreme Court if the issue is solely an issue of law. If the issue involves disputed factual issues or a dispute as to how the law was applied to the facts, the appeal is heard “de novo²” in the civil division of the superior court.

Transfer of Guardianship Cases from Probate to Family Division: A minor guardianship case can be transferred from the probate division to the family division by a superior judge sitting in the family division if the judge determines that the identity of the parties, issues and evidence are so similar that transfer would expedite resolution of the case. A transfer could occur, for example, where the mother has filed in the probate division to have the child’s grandmother

² A “de novo” appeal is an appeal where the parties start from the beginning and put on their evidence all over again before a different court.

have guardianship and, at the same time, the father files a request in the parents' divorce case to have custody of the child transferred from the mother to himself.

Divorce and Parentage cases in the Family Division

Divorce and parentage cases are part of the domestic docket in the Family Division. These cases involve issues related to child custody (parental rights and responsibilities), parent child contact and child support. The major distinction between child custody issues in the domestic docket of the family division and contested custody issues in minor guardianship cases in the probate division is that the dispute in domestic cases is always between parents. From a constitutional perspective, parents have an equal right to custody of the child. Therefore, the court does not have to make an initial finding of parental unsuitability. The sole focus of the court in a contested case is which parent is best able to have primary care for the child and an appropriate schedule of contact for the non-custodial parent.

Another major difference between custody cases in the domestic docket and guardianship cases in the probate division is the standard required to subsequently modify a final order of the court. In the domestic docket, a parent seeking to modify custody or even parent child contact, must make an initial showing that there has been a real and substantial change in circumstance since the final order. In a guardianship case, a party may seek to modify or terminate the guardianship order at any time without having to show that there has been any change since the last order.

About one quarter to one third of the litigants in divorce cases are represented by attorneys. In parentage cases, the percentage of represented litigants is around 8%. Judges can appoint an attorney to represent the child, but this occurs mainly in contested cases between parents who are not represented.

CHINS cases in the Family Division

The state's attorney may file a petition in the Family Division seeking a transfer of custody to the State (DCF) on the grounds that the child is CHINS because the child has been abused, neglected, or abandoned or because the child is without proper parental control or is beyond the control of the child's parents. If the judge finds a child to be CHINS (i.e. in need of care or supervision), the judge may transfer custody of the child to DCF. In the alternative, the judge may also order that the child remain in the parent's custody under specified conditions or transfer custody to a relative or other person with a significant relationship with the child. Judges are empowered to issue "ex parte" emergency orders that transfer custody to DCF providing that a hearing is held within 72 hours of the transfer.

CHINS cases are similar to minor guardianship cases in two respects. First, because the issue of custody is between the State and one or both parents, the State (like the proposed guardian in a contested minor guardianship case) has to show that the parent is "unfit." Second, the

definition of parental “unfitness” is basically the same as the definition of “unsuitability” in the guardianship context, i.e. proof that the parent abused, neglected or abandoned the child or is not capable of providing proper parental care.

Notwithstanding these similarities, CHINS cases differ from minor guardianship cases in some very fundamental ways. The major distinction is the involvement of the State in the family’s life. A second important distinction is the focus on permanency for the child in a CHINS case. If parents have not been able to resume parental responsibilities within a finite amount of time (usually about 12 months from the time the child comes into state custody), the State will in most cases seek to terminate parental rights so that the child can be freed for adoption. By contrast, the duration of a guardianship case is open ended with no defined or anticipated time line. Another important distinction involves uncontested cases. If a guardianship is created by consent, there is no finding of parental unsuitability. By contrast, there is always a merits decision in a CHINS case that reflects on parental fitness. Even when the case is uncontested, the parties must stipulate that the child was CHINS, i.e. abused, neglected, etc. Finally, whereas most parties are unrepresented in a guardianship case, all parties in a CHINS case are represented by counsel. The child has both an attorney and a guardian ad litem. In addition to attorney representation, DCF assigns a social worker who acts as a case manager. If the child is placed in DCF custody, the social worker will arrange services for the child such as parent coaching during visits and make referrals to services for the parents. The social worker is also charged with proposing a detailed disposition case plan for the approval of the court and authoring other periodic reports.

Permanent Guardianships in CHINS cases: As indicated above, permanency for the child is a significant focus in a CHINS case. Return of custody to one or both parents, often referred to as reunification, is one form of permanency. Another is adoption following the termination of parental rights and responsibilities. A third, but less frequently used option, is the creation of a “permanent guardianship” usually with a relative acting as guardian. Permanent guardianships can only be created based on certain specified statutory criteria.³ Unlike a minor guardianship in the probate division, a parent is precluded from seeking to terminate a permanent guardianship. Once the family division judge establishes a permanent guardianship, the case is transferred to the probate division to monitor the guardianship. A relative who is a permanent guardian may be eligible for a guardianship subsidy if the child was in DCF custody and placed with the relative for at least six months.

Challenges with Current Legal Structure of Minor Guardianship

The legal structure for minor guardianships has not been comprehensively revised since the 1920s when it was first authorized by the Legislature. The current structure poses many challenges including:

³ See 14 V.S.A. 2664

- The current structure lacks specificity with respect to procedure and appears to be more focused on guardians appointed to control a minor’s assets as opposed to guardians appointed to assume custody of a child.
- Over the past twenty years, the Vermont Supreme Court has issued several important decisions in minor guardianship cases. Specifically, the Supreme Court has defined the meaning of parental “unsuitability” and created evidentiary standards consistent with federal and state constitutional law. These rulings have not been incorporated into the statutory structure.
- The right of parents to have contact with their child is not addressed.
- The transfer provisions between the probate and family divisions rely entirely on the discretion of the family division judge who may be unaware of proceedings in the probate division involving the same child or siblings of the child.
- The de novo appeal structure to the civil division makes little sense. At the very least, the appeal should be to the family division rather than the civil division.
- While DCF is sometimes involved with a family prior to the commencement of a guardianship proceedings, the DCF’s status in the court proceeding is not addressed in the statute. Nor is its role defined once the guardianship is created.

Proposal for Future Legal Structure

A major effort of the Committee has been to develop recommendations for a comprehensive revision of Vermont’s minor guardianship statutes. These recommendations are specifically outlined in Appendix 2. While the Committee was able to reach consensus with respect to a number of provisions, consensus was not reached on others. With respect to provisions upon which we did not reach consensus, the Committee has outlined possible alternatives.

The following is an outline of the provisions upon which we reached consensus and those where we have posed some alternatives:

Provisions with Consensus:

- **Statement of Purpose**
- **Definitions:** including definition of a child, a parent, a child in need of guardianship, parties; interested persons, parent child contact.
- **Scope of Powers and Duties of a Guardian:** including powers and duties of a financial guardian and a custodial guardian.
- **Appeals:** all appeals should be direct to the Supreme Court;
- **Venue and Change of Venue Provisions**
- **Content of Petition and Notice to parents**
- **Distinction between Consensual and Nonconsensual Guardianships**
- **Consensual Guardianship:**
 - requirements for written agreement to ensure informed consent
 - required findings by court
 - No transfer to family division in a consensual case except when there is a pending case in the family division involving the same child or family.

- **Nonconsensual Guardianship:**
 - Presumption in favor of parent and petitioner’s burden of proof
 - Appointment of attorney for child
 - Required findings by court
- **Contents of Guardianship Order – Family Plan**
- **Review Hearings and Reports**
- **Termination of Guardianship**
- **Presumption in favor of Parent Child Contact**
- **Automatic Transfer from Probate to Family in cases where there are active proceedings in a Family Case involving custody of the same child/ren**
 - Transfer from Probate Division to Family Division is automatic as soon as it becomes known that there are active proceedings in both divisions
 - Transfer triggers an on the record discussion between probate judge and family judge about the case similar to UCCJEA
 - Following this discussion, family judge decides whether the family division should decide the guardianship issues or whether the guardianship issues should be transferred back to probate
 - If the family division decides the guardianship issues and creates or maintains a guardianship, the case is transferred back to probate division to monitor the guardianship.
- **DCF’s role:** DCF should not be a party, but should be available to testify in guardianship proceedings involving families who have received services from DCF prior to the filing of the petition. DCF’s role following the creation of the guardianship should be limited by agency policy.

Provisions without Consensus but With Alternative Options

1. Transfer from probate to family Division in nonconsensual case where there is no active proceeding in family division involving custody of the child/ren

a. Option A

Nonconsensual guardianships should be decided in the probate division if there are no active proceedings in the family division involving custody of the children (see automatic transfer above). In making findings on the issue of the unsuitability of a parent, the rules of evidence apply (i.e. hearsay is inadmissible except as permitted by the rules of evidence.) Appeals of decisions in these cases should be direct to the Supreme Court.

b. Option B

All nonconsensual guardianships should be decided by the family division even when there are no active proceedings in the family division involving the child/ren.

2. Ex Parte Emergency Guardianship Orders

- **Option A:** under certain limited circumstances where at least one parent agrees or where the child’s safety is in danger, a probate judge should have authority to issue an emergency guardianship order providing that the application for an emergency

order is accompanied by a sworn statement that (1) the child is not in the physical custody of the parents; (2) the child has resided with the petitioner for at least six months and the parent does not reside in the same household; (3) the petitioner has acted as the “guardian in fact;” and (4) identification of the resulting harm if the emergency order is not granted. A hearing on whether the emergency guardianship should continue shall be held within 72 hours of the granting of the emergency order with notice to both parents.

- **Option B:** An emergency guardianship order may be granted only if both parents are deceased or have a significant medical incapacity.

Needed Services and Supports

Currently the resources available in Vermont to educate and support parents, guardians and their children in guardianship situations are woefully insufficient. Jurisdictions around the country have demonstrated that peer supports are as effective, if not more effective, than professional support. While the committee recognizes that finding public resources to expand services to these families is challenging, we believe that Vermont needs to build a system of services for these families that includes a robust peer support program as well as other supports for children, parents and guardians. The possibility of funding such a system or part thereof through Medicaid should be explored.

The committee has chosen to focus primarily on the development of excellent educational materials that include information about the process as well as peer supports and other services that are available to families.

Information/Education

It is important to note that educational needs change over time, but are ongoing at the following periods:

1. When a guardianship is being considered as a solution to a family challenge;
2. After the guardianship has been created, when the family is adjusting;
3. Ongoing, as the family works towards reunification; and,
4. If it becomes clear that guardianship will be a longer term solution for the family.

The committee recommends that excellent educational materials be widely available in a variety of formats, and targeted toward parents, guardians and children.

- Website with up-to-date content (statewide and local) and links to relevant sites;
- Printed materials;
- Videos, accessible DVDs and on-line.
- Augmentation of information currently available through the 211 call center.

This website should also have a section which is geared to professionals who interact with or serve these families, to assist them in becoming more informed about the issues they face. Ideally, on-line training would be provided through the website.

Currently, the Family Services Division offers training for kin who are providing care as licensed foster parents for relative children in DCF custody. Training is delivered through teleconferences for kinship care providers, and through in-person training delivered in groups that also include unrelated foster parents. Potentially, teleconference content is appropriate for kin providers who have guardianship through the probate court, if resources exist to expand.

Peer Support and Peer Navigation

Currently there are a number of peer support groups for families involved in guardianship proceedings. Two organizations that focus exclusively on peer support for kin and their families are described below.

Vermont Kin as Parents (VKAP)

Vermont Kin as Parents is a grassroots, nonprofit organization committed to supporting kin who are raising relatives' children.

VKAP offers information about resources to kinship families; assists in the development of support groups for kinship caregivers and the children in their care; organizes an annual kinship care conference, and publishes a quarterly newsletter. VKAP also educates public and private agencies about the issues faced by caregivers and their families and advocates at the local, state, and national level for the supports kinship families need.

Vermont K.I.N-K.A.N (Kinship Information and Navigation - Kinship and Advocacy)

The KIN-KAN is a group of kinship caregivers, kinship caregiver advocates and service providers throughout Vermont whose purpose is to:

- Inform kinship caregivers and agencies about state and national programs/issues impacting kinship caregivers.
- Advocate at local, state and national levels for support of kinship families.
- Provide a networking system for caregivers and agencies.
- Encourage the development of community partnerships with kinship caregivers to improve, expand, and sustain programs and services to kinship families.
- Link kinship families with services in their communities and provide direct supports to the families.
- Identify and establish a network of Kinship support in each county of Vermont.
- Increase knowledge and awareness of Kinship caregivers and their needs among the education, health, housing, human/social service providers and legal community.

- Collaborate with other statewide organizations dedicated to building support and services for kinship caregivers.

Kinship Support Groups

The websites of the organizations mentioned above indicate that kinship support groups are currently meeting around the state in Milton, Barre, St. Johnsbury, Ferrisburg, Newport, Burlington, Orange Co., Derby, Rutland, Brattleboro, Springfield, Westminster and Bellows Falls.

Peer Navigation

Peer navigation is a service delivered by a peer who has experienced what you have experienced, who can help you to sort through options and choices, and can refer you to needed services and supports.

Peer navigation is recognized nationwide as an effective model to assist families. It has been tested in many arenas, including behavioral health. The federal Children’s Bureau has funded two rounds of grants in order to test the use of peer navigation in kinship care. Very promising models have emerged. Unfortunately, the match requirement for these grants (25% in years 1 and 2, and 50% in year 3) made Vermont stakeholders conclude that it was not feasible to apply.

Currently, the availability of peer navigation relies almost entirely upon volunteers. Making these services available statewide in an organized and systematic way would require funding.

A potential companion service is “warmline” telephone support, which can be helpful to parents and guardians who need a listening ear. Warmline support is not a crisis service, but rather a support service.

Assessment and Early Planning

All parties need access to assistance in understanding expectations in their particular situation. This includes informed consent in consensual guardianships. See Appendix 3 - Draft Form for Informed Consent. In addition, they need a format and structure for their conversations. The committee recommends that the probate court adopt a format for a Family Plan that will clarify expectations, and establish a plan for the child’s contact with his or her family of origin. An example of such a plan is included as Appendix 4.

Ongoing Assessment

Presently, guardians report to the court annually, in writing. The form in use was developed for guardians of adults. The committee recommends that the probate courts adopt a new format, tailored to minor guardianships, and a process to ensure that they are used, filed and reviewed. See Draft Report Form, Appendix 5.

Professional Services and Supports

The committee recognizes that, for a small minority of families, professional social work services are really necessary. This area of social work is not within the statutory mandate of the Department for Children and Families, nor do they have the current capacity to provide such services.

Role of DCF Family Services (FSD)

After discussion with the committee, the department intends to issue a policy to address issues with respect to its role with families who opt to create a minor guardianship. Specifically policy will require:

1. When the division is conducting an investigation or assessment related to child safety, and the child cannot remain safely at home, it is appropriate to work with the family on an alternative living arrangement for the child with a relative only if the situation is anticipated to resolve within 30 days. Otherwise, a CHINS petition should be sought.
2. When it is necessary for the child(ren) to be in the care of an alternative caretaker on an extended basis in order to address identified dangers, it is not appropriate for the social worker to encourage or recommend that the family address that concern through the use of probate court for a minor guardianship.
3. There are times, however, when the family itself may decide to file a petition for minor guardianship. The social worker should make it clear that this is the family's choice.
4. If requested to do so by a probate judge, the FSD social worker will attend a court hearing and provide information relevant to the proceedings.
5. FSD has neither the statutory responsibility nor the staff capacity to provide assessment, case planning or case monitoring services for these cases.
6. If a minor guardianship is established during the time that the division has an open case, the social worker will review the case with his or her supervisor, with a focus on any unresolved dangers. Assuming that safety has been achieved for the children, the worker should plan for timely closure of the case. Before closure, the worker should offer information to the new guardian(s) and the parents about services and supports that are available to them in the community. Absent a new report of concern, the case will be closed within 3 months.

Summary and Recommendations

The Minor Guardianship Committee respectfully recommends that the general assembly:

1. Revise Title 14, Subchapter 2, Article 1, entitled Guardians of Minors, based on the recommendations of this committee. See Appendix 2.

2. Hear testimony from parents and guardians to better understand their perspectives and needs – and the needs of the involved children - to inform considerations about low-cost resources that may be put in place to meet those needs.
3. Hear from a variety of stakeholders in order to resolve the issues upon which the committee was unable to reach consensus.
4. Ask the Probate Oversight Committee to update forms currently in use, including the minor guardianship petition, to ensure that forms are written in plain language.
5. Ask the Court Administrator to adopt the forms developed/revised by this committee, specifically an informed consent form for consensual guardianships (Exhibit 3); a family plan (Exhibit 4); and a revised annual report (Exhibit 5).
6. Hear from the department for children and families on progress towards issuing policy that will provide role clarity for its social work staff with respect to minor guardianship proceedings.

Appendix 1 - Documents and Presentations Reviewed

Existing Vermont procedures for establishing minor guardianships.

A paper from Judge George Belcher written in September 2011; *“A General Description of the Minor Guardianship System in Vermont.”*

A 2008 paper from the Children’s Law Center of Massachusetts; *“A Study of the Nature and Management of Guardianship of Minor Cases in Massachusetts Probate and Family Court.”*

A 2011 paper prepared by Julia Zalenski, legal intern with the Vermont Parent Representation Center; *“Minor Guardianships Created by the Probate Court when the Department for Children and Families is involved: presentation of the problems and Possible Solutions.”*

The Vermont Supreme Court ruling in re KMM; No 2010-145.

Fact Sheet prepared by Vermont Kin as Parents outlining the differences between foster care and custody through the JPA or probate guardianship, and the application for creating minor guardianships.

There were presentations and information sharing from:

Joan Vance, Foster and Kin care Specialist, UVM Extension Service, concerning the early results of a study of kinship providers.

Linda Schoenbeck, social worker from the Vermont Parent Representation Center, on parent’s perspectives in the court system.

Alex Banks, lawyer with the South Royalton Legal Clinic, concerning the best interest of the child through the legal process.

Karen Shea regarding the DCF/Family Services Division, concerning the use of the Structured Decision Making Assessment of Danger and the Family Safety Planning Process.

Sandi Yandow, from Vermont K.I.N.-K.A.N., regarding Vermont K.I.N.-K.A.N.’s multi-generational peer support delivery model.

Lynn Granger, from Vermont Kin as Parent, about its service delivery model.

Appendix 2 - Outline For Guardianship Statute

1) Statement of Purpose

- a) The law presumes that the interests of minor children are best promoted in the children's own home. However, when parents are temporarily unable to care for their children, guardianship is a process by which they can make arrangements to have a family member or other third party take care of them.
- b) Family members can make better decisions about minor children when they are informed about the law and the supports that are available, and they understand the consequences of their decisions.
- c) Decisions about raising children by someone other than a parent should be based on the informed consent of the parties without a finding of parental unfitness.
- d) When informed consent of the parents cannot be obtained, parents have a fundamental liberty interest in raising their children unless a proposed guardian can show parental unsuitability by clear and convincing evidence.
- e) Research demonstrates that timely reunification between parents and their children is more likely when children have safe and substantial contact with their parents.
- f) It is in the interests of all parties including the children, that parents and proposed guardians have a shared understanding about the length of time that they expect the guardianship to last, the circumstances under which the parents will resume care for their children and the nature of supports and services that are available.

2) Definitions

- a) Child: an individual who is under the age of 18 and is or is alleged to be a child in need of guardianship.
- b) Parent/Custodial Parent/Non Custodial Parent (See Title 33): a person who is a child's biological or adoptive parent. Definition includes custodial and noncustodial parents
 - i) Custodial parent: a parent who, at the time of the commencement of the guardianship proceeding, has the right and responsibility to provide the routine daily care and control of the child. The rights of the custodial parent may be held solely or shared and may be subject to the court-ordered right of the other parent to have contact with the child.
 - ii) Noncustodial parent: a parent who is not a custodial parent at the time of the commencement of the guardianship proceeding.
- c) Child in Need of Guardianship See 33 V.S.A. 5102(3)
 - i) Based on consent of the parties due to
 - (1) Serious illness or terminal illness of a custodial parent;
 - (2) Physical or mental health of the parent or the child such that proper care and supervision of the child cannot be provided by the parent;
 - (3) The loss of habitability of the child's home as the result of a natural disaster;
 - (4) The incarceration of a parent;
 - (5) A period of active military duty of a parent;
 - (6) Another reason articulated by the parties.
 - ii) Where there is no consent, based on a court finding that the child is:

- (1) Abandoned or abused by the child's parent;
- (2) Without proper parental care, subsistence, education, medical or other care necessary for the child's well being;
- (3) Without or beyond the control of his or her parent.
- d) Parties or Interested Persons
 - i) Party includes the following persons: child, parent, proposed guardian.
 - ii) Interested Person:
 - (1) Any person with whom the child has resided within sixty days prior to the commencement of the guardianship proceeding who is not a party.
 - (2) The Commissioner of the Department for Children and Families or his or her designee is an interested person in a guardianship proceeding if the department has an open case that involves a child in need of guardianship. The department shall receive notice of all court hearings and a representative of the department may be required to attend hearings and may be called as a witness.
 - (3) DCF shall adopt a policy limiting its role in cases where a guardianship has been established as described in the Report. (See Ex. 6)
- e) Parent Child Contact: the right of a parent to have visitation with the child by court order.

3) Powers and Duties of Guardian

- a) Financial guardian: The duties of a financial guardian include:
 - i) Receive funds paid for the support of the minor including child support and government benefits;
 - ii) Apply any available money of the minor to the minor's current needs;
 - iii) Conserve any excess money of the minor for the minor's future needs;
 - iv) Report annually to the Probate Court regarding funds received on behalf of the minor and account for how such funds have been spent.
- b) Custodial guardian: The duties of a custodial guardian include:
 - i) Take custody of the minor and establish the minor's place of residence
 - ii) Make decisions related to the minor's education;
 - iii) Make decisions related to the minor's physical and mental health including consent to medical treatment and medication;
 - iv) Decisions concerning the minor's contact with other persons including the minor's parents, except that if the court has made specific orders with respect to parent child contact, the guardian shall comply with such orders.
 - v) Report annually or as otherwise ordered by the Probate Court regarding the minor's health, medical and dental needs/care; educational progress and needs; contact between the minor and minor's parents; the minor's strengths and areas of concern. The guardian shall provide a copy of the annual report to the parents of the minor if their address is known.

4) Jurisdiction/Transfer from Probate to Family Division

- a) **Active Proceedings Involving Custody of Same Child/ren in Family Division**

Regardless of whether the guardianship is consensual or nonconsensual, transfer to the family division is automatic if there are active proceedings involving custody of the child/ren in the family division. The procedure is as follows:

- Transfer from Probate Division to Family Division is automatic as soon as it becomes known that there are active proceedings in both divisions;
- Transfer triggers an on the record discussion between probate judge and family judge about the case in accordance with subsection (c) of this section;
- Following this discussion, family judge decides whether the family division should decide the guardianship issues or whether the guardianship issues should be transferred back to probate;
- If the family division decides the guardianship issues and creates or maintains a guardianship, the case is transferred back to probate division to monitor the guardianship.

b) No Active Proceedings Involving Custody of Same Child/ren in Family Division

i) **Consensual Cases:** Jurisdiction over uncontested cases remains with Probate Division

ii) **Nonconsensual Cases:** *the Committee did not reach consensus but offers two separate options:*

a. Option A – Majority View

Nonconsensual guardianships should be decided in the probate division if there are no active proceedings in the family division involving custody of the children (see automatic transfer above). In making findings on the issue of the unsuitability of a parent, the rules of evidence apply (i.e. hearsay is inadmissible except as permitted by the rules of evidence.) Appeals of decisions in these cases should be direct to the Supreme Court.

b. Option B – Minority View

All nonconsensual guardianships should be decided by the family division even when there are no active proceedings in the family division involving the child/ren.

c) Communication between Divisions

Procedure for probate judge and family judge to discuss transfer of jurisdiction: on the record with notice to parties similar to UCCJEA. 15 V.S.A. §1068

- i) A probate judge and a superior judge assigned to the family division may communicate with each other on questions of proper jurisdiction for a minor guardianship proceeding.
- ii) Communication between courts on schedules, calendars, court records, and similar matters may occur without informing the parties. A record need not be made of such communication.
- iii) With respect to all other communications regarding jurisdiction, a record shall be made of the communication. Whenever possible, parties shall be provided notice of the communication and an opportunity to be present when it occurs. If a party is unable to be present, the party shall be given access to the record.

5) Appeal from Decision of Probate Court

All appeals in minor guardianship cases are direct to the Supreme Court.

6) Venue and Change of Venue

- a) With consent of the parties, venue can be either where child resides or where proposed guardian resides, based on agreement of parties.
- b) If parties cannot agree to the appropriate venue:
 - i) If a guardianship has not been established, venue is where the child has primarily resided for the past 6 months
 - ii) If the guardianship has been established, venue is where the guardian resides.

7) Filing of Petition

- a) Content of Petition
 - i) Reason for the guardianship – why it is necessary
 - ii) Whether the parties are in agreement
 - iii) Names and addresses of all parties: parents, child, proposed guardian
 - iv) The names of all members of the proposed guardian's household and their relationship, if any, to the guardian and to the child.
 - v) Child's current school and grade level
 - vi) If the proposed guardian plans to change the child's current school in the event the petition is granted, the name of the school where the child would be enrolled and the estimated date upon which that would occur.
 - vii) UCCJEA information re where child has resided in past 5 years and household members
 - viii) Prior or current court proceedings involving the child
 - ix) Child support
 - x) Parent child contact orders
 - xi) DCF involvement
- b) Service
 - i) Current Rule: certified mail. If certified mail refused, then first class mail.
 - ii) If location of a parent(s) is unknown: Both parents should receive notice. However, the probate judge may waive notice requirement to a parent who cannot be located after diligent effort or the identity of the parent is unknown. If a parent does not receive notice of the guardianship proceeding and subsequently appears after the guardianship is created, the parent may request that the guardianship proceeding be re-opened and, upon such request, the probate court shall re-open the proceeding.

8) Conduct of Hearings

- a) **Rules of Evidence:** Probate Rule 43 (relaxed rules of evidence) applies to minor guardianship proceedings except in a nonconsensual case when a judge makes a determination that a child is in need of guardianship based on the unsuitability of a parent in which case the traditional rules of evidence apply See 4(b)(2) - Option A above .

b) Attendance by Minors

- 14 years or older, minor must attend
- 13 years or younger, minor has option to attend
- If minor called as a witness, counsel should be appointed

9) Emergency Guardianship Order:

The committee did not reach consensus as to whether the probate judge could issue an ex parte emergency guardianship order. The Committee offers two possible options:

- **Option A (Minority View):** *under certain limited circumstances where at least one parent agrees or where the child's safety is in danger, a probate judge should have authority to issue an emergency guardianship order providing that the application for an emergency order is accompanied by a sworn statement that (1) the child is not in the physical custody of the parents; (2) the child has resided with the petitioner for at least six months and the parent does not reside in the same household; (3) the petitioner has acted as the "guardian in fact;" and (4) identification of the resulting harm if the emergency order is not granted. A hearing on whether the emergency guardianship should continue shall be held within 72 hours of the granting of the emergency order with notice to both parents.*
- **Option B (Majority View):** *An emergency guardianship order may be granted only if both parents are deceased or if both parents have significant medical incapacity. An Emergency exists only when the petitioner can show that a decision must be made prior to the time when a hearing can be held.*

10) Consensual Guardianship – Merits Hearing

- a) Written Agreement in the presence of and with approval of the Court;
- b) Content of Agreement: The agreement shall include: responsibilities of guardian; expectation with respect to duration; agreements with respect to parent child contact and parental involvement in decision making; understanding and voluntary waiver of rights. A proposed form for informed consent is attached as Ex. 3.
- c) Findings by Court:
 - i) Notice
 - ii) Agreement is voluntary
 - iii) Proposed Guardian is Suitable
 - iv) Guardianship is in the best interests of the child

11) Nonconsensual Guardianship- Merits Hearing

- a) A guardianship is considered to be nonconsensual if a parent is opposed to the guardianship or if a parent who previously agreed to a voluntary guardianship, now seeks to terminate the guardianship.
- b) Presumption in favor of parent and burden of proof:

The right to care for one's child is a constitutionally protected fundamental liberty interest. There is a presumption that the best interests of the minor lie with parental custody. A party seeking guardianship of a child may overcome the presumption in favor of the parent, by establishing that the child is a child in need of guardianship by clear and convincing evidence.

- c) Appointment of GAL for child: Upon motion of a party or the court's own motion, the court may appoint a guardian ad litem for the child.
- d) Appointment of Attorney for child: Attorney for a child shall be appointed if the child will be called as a witness. Attorney for a child may be appointed in other cases.
- e) Findings
 - i) Notice to parents
 - ii) Child is a child in need of guardianship
 - iii) Proposed guardian is suitable
 - iv) Guardianship is in the best interests of the child.

12) Guardianship Order: Suggested provisions

- a) Goal of Guardianship
- b) Authority of Guardian
- c) Family Plan: The committee recommends that the plan address the topics listed in the proposed form for a plan that is attached as Ex. 4
- d) Parent Child Contact
- e) Term of Order
- f) Reviews

13) Review Hearings and Reports

- a) Review Hearings: The probate court may schedule a review hearing for the purpose of determining progress with respect to the family plan. The guardian and the parents shall receive notice of such review hearings. The committee recommends that the report address the topics listed in Ex. 5.
- b) Reports by the Guardian: The guardian shall file an annual status report with the Probate Court as provided in 3(b) (5). The court in its discretion may order that reports be filed more frequently. The guardian shall send copies of all such reports to the parents at their last known address.

14) Termination of a Guardianship

- a) Termination of a Consensual Guardianship: A parent may file a motion to terminate a guardianship at any time. The motion shall be filed with the Court and served upon the guardian. Upon the filing of a motion to terminate, the court shall terminate the guardianship **unless** the guardian files a motion to continue the guardianship within 30 days of service of the motion to terminate. If the guardianship was established on a consensual basis, the guardianship shall be considered nonconsensual upon the filing of a motion by the guardian to continue the guardianship. The matter shall be set for hearing and shall proceed as a nonconsensual case as described in paragraph 11. The

parent does not have to demonstrate a change of circumstance and the burden is on the guardian to overcome the presumption in favor of the parent.

- b) Termination of a nonconsensual guardianship: IF the guardianship was established on a nonconsensual basis or if the court has previously found in favor of the guardian after a contested merits hearing on the guardian's motion to continue the guardianship, a parent seeking to terminate the guardianship has an initial burden of establishing a change in circumstance since the last guardianship order.

15) Parent Child Contact

It is presumed that the guardian will permit the child to have contact with parents and siblings and that such contact will be reasonable with respect to duration and frequency. If there is an existing schedule of contact between a non-custodial parent and a child in a domestic case, it is presumed that the guardian will honor the contact schedule and ensure that the child is available for contact. If the proposed guardian and the parents cannot agree on a contact schedule, either party can file a motion for the probate court to establish a schedule of parent child contact.

Appendix 3 _ Draft form for Informed Consent

Consent for the Establishment of a Minor Guardianship

Part I to be filled out by parent 1:

- Yes No 1. I agree that the establishment of a minor guardianship for (list names of involved children) is in my child's (children's) best interests at this time. Children's names:

- Yes No 2. I am the custodial parent or non-custodial parent of the child (children.) I understand that this is a very important decision and I have given this matter a lot of thought.
- Yes No 3. As one of the parents of this/these child (children), I understand that I have the legal right to raise my child/children. I understand that I do not have to voluntarily agree to this guardianship; I am entitled to a full legal proceeding to determine if I am suitable or unsuitable to parent at this time. However, in this situation, I freely, without threats or intimidation by any person, agency or organization, agree to the establishment of a minor guardianship, without a full court process, for my child/children.
- Yes No 4. I acknowledge that at this time, I am unable to provide the day- to-day care that my child (children) requires. It is because I want to ensure that my child (children) get their needs met, that I am voluntarily agreeing to the appointment of _____ as the legal guardian(s) of my child (children.)
- Yes No 5. I expect this guardianship to last until_____.
- Yes No 6. The guardian(s) and I have a plan that identifies what needs to happen for the guardianship to end.
- Yes No 7. Regardless of the length of the guardianship, I have discussed with the proposed guardians that it is important for the child (children) to maintain a relationship with me as their parent and the proposed guardian(s) has assured me that this connection is in place through activities including parent-child contact (visitation), phone calls, my inclusion in school, medical or other meetings and appointments related to the child(children) or other means of relationship building between me and my child (children) as appropriate or as directed by the court.
- Yes No 8. I understand that if I want to end this voluntary guardianship for my child (children), I may petition the court to do so. If the guardian(s) do not agree, they will have to prove to the court that I am unsuitable to parent at that time

Signed:

Parent

Date

Consent for the Establishment of a Minor Guardianship

Part II to be filled out by parent 2:

- Yes No 1. I agree that the establishment of a minor guardianship for (list names of involved children) is in my child's (children's) best interests at this time. Children's names:

- Yes No 2. I am the custodial parent or non-custodial parent of the child (children.) I understand that this is a very important decision and I have given this matter a lot of thought.
- Yes No 3. As one of the parents of this/these child (children), I understand that I have the legal right to raise my child/children. I understand that I do not have to voluntarily agree to this guardianship; I am entitled to a full legal proceeding to determine if I am unsuitable to parent at this time. However, in this situation, I freely, without threats or intimidation by any person, agency or organization, agree to the establishment of a minor guardianship, without a full court process, for my child/children.
- Yes No 4. I acknowledge that at this time, I am unable to provide the day- to-day care that my child (children) requires. It is because I want to ensure that my child (children) get their needs met, that I am voluntarily agreeing to the appointment of _____ as the legal guardian(s) of my child (children.)
- Yes No 5. I expect this guardianship to last until _____.
- Yes No 6. The guardian(s) and I have a plan that identifies what needs to happen for the guardianship to end.
- Yes No 7. Regardless of the length of the guardianship, I have discussed with the proposed guardians that it is important for the child (children) to maintain a relationship with me as their parent and the proposed guardian(s) has assured me that this connection is in place through activities including parent-child contact (visitation), phone calls, my inclusion in school, medical or other meetings and appointments related to the child(children) or other means of relationship building between me and my child (children) as appropriate or as directed by the court.
- Yes No 8. I understand that if I want to end this voluntary guardianship for my child (children), I may petition the court to do so. If the guardian(s) don't agree, they will have to prove to the court that I am unsuitable to parent at that time

Signed:

Parent _____

Consent for the Establishment of a Minor Guardianship

Part III to be filled out by the proposed guardian(s):

- Yes No 1. I understand and accept that as a legal guardian for the above named child (children,) I have the legal responsibility of caring for the child (children) as if they were my own child (children.) This includes the responsibility to seek out and utilize appropriate supports and services that may benefit the child (children,) ourselves, or our family. These can include financial assistance, counseling, special education, etc.
- Yes No 2. I understand that I am accountable to the Probate Court, which has the authority to review my performance as a guardian.
- Yes No 3. I expect this guardianship to last until _____.
- Yes No 4. The parents and I have a plan that identifies what needs to happen for the guardianship to end.
- Yes No 5. I have agreed to and understand what steps the parents need to take in order to properly care for their children. (See attached family plan)
- Yes No 6. I understand that in some situations I may also need to follow directions from the court to carry out duties as a legal guardian.
- Yes No 7. Regardless of the length of the guardianship, I understand that it is important for the child (children) to maintain a relationship with their parents. I agree in good faith to ensure that this connection is in place through activities including parent-child visitation, phone calls, parental inclusion in school, medical or other meetings and appointments related to the child(children) or other means of relationship building between the parents and their child (children) as appropriate or as directed by the court.
- Yes No 8. I understand that if the parent(s) file a petition to terminate the guardianship and I/we don't agree, I will have to prove to the court that the parent(s) are unsuitable to parent at that time.
9. I understand that if I want the guardianship to terminate I must file a petition to terminate it with the court.

Signed:

Guardian #1

Date

Guardian #2

Date

Appendix 4 – Proposed Family Plan

Minor Guardianship
Family Plan
Draft 11-26-12

Child/Children's Name(s): _____

Parent 1 Name: _____

Parent 2 Name: _____

Guardians Names: _____

Date of Plan: _____

Please check all of the people who were involved in developing this plan:

- Parent 1 Parent 2 Guardian 1 Guardian 2
 Child/children Other: _____

1. What agreement has been reached by family members about how long this temporary guardianship is expected to last?
2. How will the family know when the child can return to the parent's care?
3. What is the plan for ongoing contact between the child, parents, siblings and others who may be important to the child? (Be specific about when, where, how often.)
4. How will the guardians keep the parents informed about and involved in making major decisions for the children?
5. Do the parents have information about whom to contact if they decide that they want support or services?
6. Does the guardian have information about who to contact if the guardian decides that he or she needs support or services?

Signature: _____ Date: _____

Appendix 5– Proposed Topics to Include in Annual Report of Guardian

Guardian’s Annual Report

I am the guardian for the above named child. The following is my annual report concerning the child for the period from _____ to _____. This report is made under oath.

- 1)** The current address and living situation of the child:
- 2)** The current address and living situation of each parent:
- 3)** The child’s health and development during this period including strengths and concerns;
- 4)** The services the child has received including medical, dental, mental health and any other services.
- 5)** The child’s educational progress including the name of the child’s school/day care or early education program, the child’s grade level; and the child’s educational achievements during the year.
- 6)** Contact between the child and each parent during the year including the frequency and duration of contact and whether it was supervised.
- 7)** Ways in which the parents have been involved in the decision making for the child.
- 8)** A summary of how the guardian has carried out his/her responsibilities and duties, including efforts to include the parents in the child’s life.
- 9)** Recommendations as to:
 - a) Whether the guardianship order or the plan should be amended;
 - b) Whether the guardianship should be terminated.
 - c) Whether the guardianship should be continued. If the guardianship should be continued, an explanation of the reasons why.

The form should have language indicating that a copy has been sent to the parents and a list of interested parties and their addresses.