THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF NEW YORK

R.F.M., T.D., S.W., and D.A.F.A., on behalf of themselves and all others similarly situated,

Plaintiffs,

v.

KIRSTJEN NIELSEN, in her capacity as Secretary of the Department of Homeland Security; LEE FRANCIS CISSNA, in his capacity as Director of United States Citizenship and Immigration Services; BARBARA VELARDE, in her capacity as Chief of the Administrative Appeals Office of United States Citizenship and Immigration Services; ROBERT M. COWAN, in his capacity as Director of the United States Citizenship and Immigration Services National Benefits Center; THOMAS CIOPPA, in his capacity as Director of the United States Citizenship and Immigration Services New York City District Office; EDWARD NEWMAN, in his capacity as Director of the United States Citizenship and Immigration Services Buffalo District Office; DANIEL RENAUD, in his capacity as Associate Director of United States Citizenship and Immigration Services Field Operations Directorate; GWYNNE DINOLFO, in her capacity as United States Citizenship and Immigration Services Albany Field Office Director; GINA PASTORE, in her capacity as United States Citizenship and Immigration Services Brooklyn Field Office Director; CARMEN WHALING, in her capacity as United States Citizenship and Immigration Services Buffalo and Syracuse Field Office Director; ELIZABETH MILLER, in her capacity as United States Citizenship and Immigration Services Long Island Field Office Director; WILLIAM BIERMAN, in his capacity as United States Citizenship and Immigration Services New York Field Office Director; and BRIAN MEIER, in his capacity as United States Citizenship and Immigration Services Queens Field Office Director,

Defendants.

18 Civ. 5068

MEMORANDUM OF LAW OF *AMICI CURIAE* BY CERTAIN LAW PROFESSORS IN SUPPORT OF PLAINTIFFS' COMPLAINT AND MOTION FOR A PRELIMINARY INJUNCTION

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INTEREST OF *AMICI CURIAE*

Amici curiae are law professors who have taught, written, and practiced in the field of family law in New York State and nationally, and as a group are leading experts regarding the historical, statutory, and common law bases for the New York Family Court's jurisdiction over proceedings which involve the care and custody of minors, as well as those which involve the reunification of minors with their parents or other legal guardians. *Amici* have a professional interest in ensuring that the Court is fully informed of the New York Family Court's longstanding jurisdiction to make determinations regarding minors up to the age of 21.

INTRODUCTION

In recent years, the number of minors seeking refuge in the United States has increased dramatically.[1] These children often have fled their countries to escape violence in their homes and communities, abject poverty, and extreme

[1] *See* Mossaad & Baugh, *Annual Flow Report, Refugees and Asylees: 2016*, at 6, Department of Homeland Security Office of Immigration Statistics (Jan. 2018), https://www.dhs.gov/sites/default/files/publications/Refugees_Asylees_2016.pdf (the number of "credible fear" screening referrals of adults and families with children has risen each year from fewer than 5,100 in 2008 to close to 92,000 screenings in 2016).

governmental dysfunction.[2] New York State, where many of these children have relatives or other community connections, is a frequent destination.[3] Many of those coming to New York and other states are eligible for the form of immigration relief called Special Immigrant Juvenile ("SIJ") Status.

Under 8 U.S.C. § 1101(a)(27)(J) and 8 C.F.R. § 204.11(c), SIJ Status is available to unmarried immigrants under the age of 21 who can provide a determination from a state "juvenile court" that they are dependent on the juvenile court or are committed by the court to the custody of a State entity or an individual; that reunification with one or both parents is not viable due to abuse, neglect, abandonment or a similar basis under state law; and that it is not in their "best interest" to return to their country of origin. A "juvenile court" means a

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[2] *See* Chishti & Hipsman, *Increased Central American Migration to the United States May Prove an Enduring Phenomenon*, Migration Policy Institute (Feb. 18, 2016), http://www.migrationpolicy.org/article/increased-central-american-migration-united-states-may-prove-enduring-phenomenon.

[3] *See Unaccompanied Alien Chidren Released to Sponsors by State*, U.S. Office of Refugee Resettlement, http://www.acf.hhs.gov/orr/programs/ucs/state-by-state-uc-placed-sponsors; and *Unaccompanied Alien Children Released to Sponsors by County*, U.S. Office of Refugee Resettlement, http://www.acf.hhs.gov/orr/unaccompanied-children-released-to-sponsors-by-county.

court located in the United States having jurisdiction under state law to make judicial determinations about the custody and care of juveniles. 8 C.F.R. § 204.11(a).

The New York State Family Court ("Family Court") has had the jurisdiction to make judicial determinations concerning care and custody of juveniles since the Court was created by the New York State legislature in 1962. The Family Court consequently has a discrete yet vital role in minors' pursuit of SIJ Status: the Family Court does not and cannot grant SIJ Status or any immigration benefit, but only a state juvenile court such as the Family Court can make the prerequisite findings for a SIJ Status application to the United States Citizenship and Immigration Services ("USCIS"). *See In re Guardianship of Keilyn GG. (Marlene HH.)*, 159 A.D.3d 1295, 1296 (3d Dep't 2018) (before a child may seek SIJ Status from USCIS, a juvenile court must first issue a special findings order determining that the criteria of 8 U.S.C. § 1101(a)(27)(J)(i)–(ii) are satisfied).

As detailed in the complaint in this action, beginning in mid-2017, USCIS has capriciously deemed a large and increasing number of Family Court orders insufficient to establish the required SIJ findings. *R.F.M. v. Nielsen*, No. 1:18 Civ. 05068 (S.D.N.Y. June 7, 2018), Compl. at ¶¶ 41–46 (hereinafter, "Compl."). The responses depart significantly from previous USCIS adjudication practices where SIJ orders with identical language had for many years been deemed sufficient, and

had resulted in SIJ Status approvals for minors who had been abused, neglected, abandoned, or subjected to a similar family crisis as defined by New York State law. This change in USCIS responses to SIJ applications has transpired without any change in the Federal law, rules, or regulations that govern SIJ matters.

One population of minors targeted by USCIS' new practices are abused, neglected, or abandoned minors who are under 21, but have turned 18 by the time they obtain SIJ findings from the Family Court. USCIS has recently made a number of erroneous claims about the jurisdiction of New York Family Courts over such minors in order to justify denials of SIJ Status. Among other claims, USCIS has wrongly asserted that New York Family Courts (1) do not have jurisdiction over care and custody of minors who have turned 18, and (2) cannot order the reunification of a minor with the minor's parents once the minor turns 18. Compl., ¶¶ 41–46.

Amici curiae are submitting this brief to highlight USCIS' deeply flawed assertions given the historical, statutory, and common law bases for New York Family Courts' jurisdiction over minors ages 18 to 21 for purposes of making care and custody determinations, and reunification findings. *Amici Curiae* are particularly concerned that USCIS is using its misinterpretation of New York State law to compromise the safety, stability, and protection of this vulnerable group of immigrant children under the age of 21 who have been abused, neglected,

abandoned, or suffered through similar family-related traumas. This amicus brief will focus on three issues: (1) the Family Court's authority, in general, to render all essential findings of fact prerequisite to an application for SIJ Status; (2) the Family Court's unambiguous jurisdiction over the care and custody of minors up to age 21, in contrast to the incorrect position taken by USCIS; and (3) the Family Court's unambiguous authority to reunify minors up to age 21 with a parent, in contrast to the incorrect position taken by USCIS.

I. New York State Family Courts Have Jurisdiction to Make All Findings Required for Minors to Apply for Special Immigrant Juvenile Status

New York Family Courts have jurisdiction over a wide spectrum of legal matters related to the care and custody of minors, and the ability of minors to reunify with parents or other legal guardians. For example, the Family Court is the primary court for cases that involve adoptions, child protection matters, custody and visitation determinations, delinquency proceedings, family offense matters, guardianships, and terminations of parental rights. N.Y. Fam. Ct. Act § 115. New York Family Courts have the responsibility to make determinations related to dependency and guardianship (N.Y. Fam. Ct. Act § 661); abuse, neglect, and abandonment (N.Y. Fam. Ct. Act §§ 115(a)(i), (a)(iv)(C), (c); N.Y. Fam. Ct. Act art. 10, pts. 1–8, § 1011 *et seq.*); destitution (N.Y. Fam. Ct. Act art. 10-C, § 1092 *et*

seq.); reunification of families (N.Y. Fam. Ct. Act §§ 1028, 1054, 1055-b, 1089, 1089-a; N.Y. Soc. Serv. Law § 384-b); and best interests of minors (N.Y. Fam. Ct. Act §§ 631, 1027-a(c), 1052(b)(i)(A), 1055-b(a)(ii), 1089(d)). Each of these responsibilities requires the Family Court to promote safety, stability, and permanency for children and families. *E.g.*, *In re Ericka LL*, 256 A.D.2d 1037, 1037–38 (3d Dep't 1998) (affirming termination of parental rights where respondent failed to provide a safe, stable and permanent home).

More specifically, the Family Court has the authority to make all factual and legal determinations necessary for inclusion in a juvenile's application for SIJ Status, and it routinely makes such findings. *See* N.Y. Fam. Ct. Act § 141 (empowering the Family Court with broad discretion to make intervening findings to deal with "the complexities of family life so that its action may fit the particular needs of those before it"); *see also* Form GF-42, New York State Unified Court System (March 2018) (Special Findings Order).[4] As mentioned, SIJ Status requires that the juvenile is deemed dependent on a "juvenile court" or is committed by the juvenile court to the custody of a State entity or an individual; that reunification with one or both parents is not a viable option due to abuse,

[4] This official governmental form is promulgated by the New York Unified Court System, and is available at https://www.nycourts.gov/forms/familycourt/pdfs/gf-42.pdf.

neglect, abandonment, or similar basis under applicable state law; and that it is not in the juvenile's "best interest" to return to his or her country of origin. *See* Introduction, *supra* at 2.

First, New York law provides that juveniles may be dependent on the Family Court, and that the Family Court satisfies the federal definition of "juvenile court." Dependency determinations relate directly to situations where Family Court intervention is required to "ensure that [minors are] placed in a safe and appropriate custody, guardianship or foster care situation." *In re Hei Ting C.*, 109 A.D.3d 100, 106 (2d Dep't 2013). "Appointment of a guardian," in particular, "constitutes the necessary declaration of dependency on a juvenile court." *In re Enis A.C.M.*, 152 A.D.3d 690, 691 (2d Dep't 2017); *accord In re Antowa McD.*, 50 A.D.3d 507 (1st Dep't 2008); *In re Keilyn GG.*, 159 A.D.3d 1295; *In re Karen C.*, 111 A.D.3d. 622, 623 (2d Dep't 2013); *see also* N.Y. Fam. Ct. Act § 661 (providing Family Court with jurisdiction over minors up to age 21 in guardianship proceedings). And the Family Court is undoubtedly a "juvenile court" within the meaning of 8 C.F.R. § 204.11(a) because its jurisdictional mandate covers a wide band of legal matters related to the care and custody of minors. For instance, a guardianship order gives the court-appointed guardian authority over, among other things, the care and control of the minor, the physical custody of the minor, the protection of the minor, the health and medical needs of the minor, and the

education of the minor. N.Y. Fam. Ct. Act § 657(c). In fact, the New York legislature has specifically affirmed that individuals appointed by the Family Court as guardians have the same rights and responsibilities as custodians. N.Y. Bill Jacket, A.B. 8358-B, 231st Leg., 2008 Reg. Sess., Ch. 404 (N.Y. 2008) ("there is no substantive difference between the rights and responsibilities of a custodian or guardian of a child"). *See* Exhibit 1 attached hereto.

Second, Family Courts are empowered either to reunify families or enjoin reunification in situations of abuse, neglect, abandonment or destitution. The reunification provisions reflect an overarching duty to keep families together when feasible, N.Y. Fam. Ct. Act §§ 1028, 1089, 1089-a; N.Y. Soc. Serv. Law § 384-b, but Family Courts are also empowered to intervene in situations of abuse, neglect, abandonment, and destitution, N.Y. Fam. Ct. Act §§ 115(a)(i), (a)(iv)(C), (c); N.Y. Fam. Ct. Act art. 10, pts. 1–8, § 1011 et seq.; N.Y. Fam. Ct. Act art. 10-C, § 1092 *et seq*. In those situations, Family Courts may enjoin reunification with a parent because, among other criteria, it is not in the best interests of the child. *See* N.Y. Fam. Ct. Act § 1028(b) (Family Court may deny a parent's application for reunification after temporary removal if there would be an imminent risk to the child and it is not in the child's best interests); N.Y. Fam. Ct. Act § 1089(d) (Family Court may enjoin reunification at the conclusion of a permanency hearing if it is contrary to the child's best interests). And Family Courts may order

reunification with a parent through discharge from foster care, placement of the child in a parent's custody, or appointment of a parent as guardian of the child, if in the child's best interests. N.Y. Fam. Ct. Act §§ 1054, 1055-b, 1089-a.

Third, Family Courts are empowered to make factual findings as to a child's best interests. Generally, the best interests standards in the Family Court Act require the Family Court always to consider the welfare of the minor when reaching decisions. *See, e.g.*, N.Y. Fam. Ct. Act §§ 631, 1027-a(c), 1052(b)(i)(A), 1055-b(a)(ii), 1089(d); *see also Lo Presti v. Lo Presti*, 40 N.Y.2d 522, 527 (1976) (parental contact determined by a best interests analysis and lies solely in the sound discretion of the Family Court). More specifically, in the context of determining motions for findings that will be used in a petition to USCIS for SIJ Status, the Family Court is required to determine whether it is in the minor's best interest to be returned to the country of origin. *Fifo v. Fifo*, 127 A.D.3d 748, 751 (2d Dep't 2015).

Thus, the Family Court has jurisdiction over motions seeking the essential SIJ findings pertaining to dependency, reunification, and best interests, in traumatic situations involving abuse, neglect, abandonment, and other similar situations under State law, that, unfortunately, all too commonly affect immigrant minors. Accordingly, New York courts have repeatedly acknowledged the Family Court's obligation to issue those findings when sufficient supporting evidence is

presented and in consonance with the Family Court's goals of permanency, stability, and safety. *See*, *e.g.*, *In re Antowa McD.*, 50 A.D.3d 507; *In re Trudy Ann W.*, 73 A.D.3d 793 (2d Dep't 2010); *In re Marisol N.H.*, 115 A.D.3d 185 (2d Dep't 2014); *In re Keilyn GG.*, 159 A.D.3d 1295.

II. New York State Family Courts Have Jurisdiction Over the Care and Custody of Minors Up to Age 21

The Family Court has jurisdiction in a wide variety of proceedings to make determinations regarding custody and caretaking of minors ages 18 to 21. In these proceedings the Family Court determines, for example, whether a minor in State care should remain in State care, return to the care and custody of the State, remain with a parent, return to a parent, or pursue some other caretaking arrangement. N.Y. Fam. Ct. Act §§ 1028, 1055(e), 1087, 1089-a, 1091; *In re Fay GG. (John GG.)*, 97 A.D.3d 918, 920 (3d Dep't 2012) (acknowledging that the Family Court has jurisdiction to place neglected children between ages 18 to 21 into foster care with their consent); *In re Sheena B. (Rory F.)*, 83 A.D.3d 1056 (2d Dep't 2011) (same). The Family Court also has jurisdiction in proceedings that address whether destitute minors up to age 21 should continue to receive the benefits of State-provided services and custodial placements, N.Y. Fam. Ct. Act §§ 1092(d), 1012(k), 1089(d)(2)(viii)(C), as well as in proceedings for minors up to age 21 placed in State care pursuant to a juvenile delinquency matter, for whom the Court

must determine whether ongoing placement in State care is appropriate, N.Y. Fam. Ct. Act § 355.3; *In re Robert J.*, 2 N.Y.3d 339 (2004) (noting that the Family Court has jurisdiction to make custody placement decisions for certain juvenile delinquents up to age 21). When a court issues an order in the context of any of these types of proceedings, the fundamental principles of the relationship between the minor and the caretaker are the same—the caretaker's responsibility for the custody, safety, and well-being of the minor. *See*, *e.g.*, *In re Tabitha T.S.M. (Tracee L.M. – Candace E.)*, 159 A.D.3d 703, 705 (2d Dep't 2018) (grandmother's petition for custody denied where child had closely bonded with her foster family and was healthy, happy, and well-provided for).

In the context of guardianship specifically, the Family Court also possesses all necessary authority over the care and custody of minors aged 18 to 21 to issue the prerequisite findings for SIJ Status. As long as the minor consents to the appointment or continuation of guardianship after the age of 18, the Family Court has jurisdiction to appoint a guardian of a minor up to age 21. *See* N.Y. Fam. Ct. Act § 661(a). The extension of the Court's jurisdiction in guardianship determinations to include minors ages 18 to 21 was an explicit recognition by the State legislature that these minors also merited the protections and benefits of an appointed guardian. The New York legislature amended § 661 to cover youths ages 18 to 21 in 2008, and the legislative history is replete with references to the

importance of ensuring that care and custody related protections, such as the ability to provide education-related, health-related, and placement-related determinations, be given to minors up to age 21 through guardianship proceedings. N.Y. Bill Jacket, A.B. 8358-B, 231st Leg., 2008 Reg. Sess., Ch. 404 (N.Y. 2008) (guardianship extends to age 21 with the minor's consent, giving guardian legal authority to enroll the child in school and consent to medical care, thereby enhancing outcomes).

Significantly, a grant of guardianship encompasses a designation of both caretaking *and* custodial powers to the guardian. Under New York law, "guardianship" of a minor is akin to lawful custody, so there is no question that the Family Court, through its powers to appoint a guardian until a minor reaches age 21, has jurisdiction over both the care and custody of the minor. *See In re Alana M.*, No. A-8869-11, 2011 WL 6445582, at *11 (Fam. Ct. Dec. 22, 2011) (guardianship confers decision-making powers over basic needs of minor and is "akin to lawful custody"); *In re Yardum*, 228 A.D. 854 (2d Dep't 1930) (guardianship involves custody and control of minor); *Allen v. Fiedler*, 96 A.D.3d 1682 (4th Dep't 2012) ("[C]ustody decrees and those appointing a legal guardian of the person create the same sort of relationship between the child . . . and the person to whose care he [or she] is awarded" (citation omitted)); *In re Marisol N.H.*, 115 A.D.3d at 190 ("[t]he distinctions between guardianship and custody are

elusive, as both forms of legal responsibility to a child have very similar attributes") (citing Merril Sobie, Supp. Practice Commentaries, McKinney's Cons. Laws of NY, Book 29A, Fam. Ct. Act § 661, 2014 Pocket Part at 97–98).

In sum, New York Family Courts render findings and issue orders as to the care and custody of minors up to age 21 in a variety of contexts, including in guardianship determinations. USCIS' position that Family Courts do not have jurisdiction over care and custody of minors aged 18–21 is therefore baseless.

III. New York State Family Courts Have Jurisdiction to Make Orders that Reunify a Minor Up to Age 21 With a Parent

The Family Court's broad authority to make determinations for minors ages 18 to 21 regarding custody and caretaking includes the authority to reunify a minor with a parent. For example, the Family Court has jurisdiction through guardianship, custody, child protection, and juvenile delinquency proceedings to determine whether a minor up to age 21 should reunify with a parent or pursue some other caretaking arrangement. N.Y. Fam. Ct. Act §§ 355.3(4)–(6), 355.5(7)(d) (in delinquency proceedings placement extension may be made with child's consent, or return to parent may be ordered after age 18); 1055(e), 1055-b (in dispositional determinations for child protection matters, placement with consent, or return to parent, may be ordered for child after age 18); 1087, 1055(b)(i)(E) (defining "child" to include a person between ages 18 and 21 who

has consented to continuation in foster care, trial discharge to parent or other relative, or return to public charge); 1089 (child may be placed in the custody of a "fit and willing relative or other suitable person," or returned to foster care, until age 21); 1089-a (guardianship petition of a parent to return or place child into parent's custody may be entertained up to age 21 with consent); 1091 (court may order child between ages 18 and 21 to reenter foster care, with consent); 1095–1096 (providing for return of non-destitute children from temporary care to a parent, and providing for placement of destitute children in response to a guardianship petition); *see also* Section I, *supra* at 8–9. In each of these proceedings, the Family Court can order that a minor up to age 21 be returned to the care and custody of a parent, thereby reunifying them with that parent. *Id.*

In guardianship determinations involving minors between the ages of 18 and 21, the Family Court has broad discretion to return children to the legal care and custody or a parent, or to enjoin that reunification. These powers, derived through State statutory law and affirmed in State common law, allow New York Family Courts to appoint a parent, relative, or other appropriate person as the minor's caretaker and custodian through guardianship determinations—including situations where the appointment leads to the reunification of a minor with his or her parent—so long as the Court is satisfied that the appointment will serve the minor's best interests. *See, e.g.*, *In re Karen C.*, 111 A.D.3d 622 (affirming grant

of co-guardianship to mother and uncle of 20-year-old minor); *In re Marisol N.H.*, 115 A.D.3d 185 (reversing Family Court denial of application by mother for guardianship of children ages 19, 18 and 16, because best interests hearing not held). *See also In re Gabriela Y.U.M. (Palacios)*, 119 A.D.3d 581, 583 (2d Dep't 2014) (granting guardianship of 18-year-old to uncle until minor turned 21 because grant is "in her best interests, the paramount concern in a guardianship proceeding"); *In re Alamgir A.*, 81 A.D.3d 937, 938 (2d Dep't 2011) (granting guardianship of 20-year-old to non-relatives because "when considering guardianship appointments, the infant's best interests is paramount"); *In re Sing W.C. (Sing W.C. – Wai M.C.)*, 83 A.D.3d 84, 94 (2d Dep't 2011) (affirming Family Court's order requiring state agency to conduct investigation of home of minor's older brother—and prospective guardian—to assist the Family Court in determining best interests for minor over age 18 in guardianship proceeding).

As a plethora of appellate decisions have made clear, it is well-established that a parent can seek guardianship over his or her own child. *See In re Maura A.R.-R. (Santos F.R. – Fidel R.)*, 114 A.D.3d 687, 688 (2d Dep't 2014) (collecting cases). Indeed, New York courts have found guardianship grants appropriate to reunite parents and children where children are separated from a parent because the parent immigrates to the United States before his or her children to escape brutal violence, or where the parent seeks appointment as the sole legal guardian so that

an abusive or neglectful parent cannot inflict further harm on the child. *See, e.g.*, *In re Marisol N.H.*, 115 A.D.3d at 187 (2014) (mother emigrated from El Salvador first to escape direct threats on her life from gang members, and minors (ages 19, 18 and 16) emigrated once mother had saved enough money; mother's guardianship appropriate to avoid another separation); *In re Ena S.Y. (Martha R.Y. – Antonio S.)*, 140 A.D.3d 778, 780 (2d Dep't 2016) (mother granted sole guardianship of minor under 21 where father physically mistreated mother and minor); *In re Wilson A.T.Z. (Jose M.T.G. – Manuela Z.M.)*, 147 A.D.3d 962, 964 (2d Dep't 2017) (father granted sole guardianship of minor under 21 where mother had failed to provide adequate clothing or education to minor, although financially able to do so). Since Family Courts possess jurisdiction to appoint a guardian for minors between ages 18 and 21, *see id.*; *see also* Section II, *supra*, and since parents can serve as guardians, Family Courts necessarily possess the authority to reunify such minors with parents in the context of a guardianship proceeding.

CONCLUSION

New York Family Courts have jurisdiction over the care and custody of minors up to age 21, such as in guardianship proceedings where the minor consents to jurisdiction. New York Family Courts also have authority to reunify minors between the ages of 18 and 21, such as in guardianship proceedings wherein a

minor is reunified with a parent from whom they were previously removed or separated. Thus, the two central premises of USCIS' recent rejections of SIJ Status applications are incorrect interpretations of New York law, and those rejections are arbitrary and capricious under the federal SIJ scheme.

Dated: June 14, 2018

Respectfully submitted,

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Attorneys for Amici Law Professors

CERTIFICATE OF SERVICE

I hereby certify that on June 14, 2018 this document was filed through the Electronic Case Filing (ECF) system and thus copies will be sent electronically to the registered participants as identified on the Notice of Electronic Filing (NEF).

/s/ David A. Picon
David A. Picon

CERTIFICATE OF COMPLIANCE

I hereby certify that this *amicus* brief contains 3,912 words (exclusive of the cover page, certificate of service, certificate of compliance, table of contents, and table of authorities), and complies with Local Civil Rule 11.1 of the Southern District of New York, as well as with Individual Practice Rule 2.D of Judge John G. Koeltl (to whom this case has been referred).

/s/ David A. Picon
David A. Picon

EXHIBIT 1

PK

CHAPTER 404

LAWS OF 20 08

SENATE BILL _____ ASSEMBLY BILL 8358-B

STATE OF NEW YORK

8358--B

2007-2008 Regular Sessions

IN ASSEMBLY

May 11, 2007

Introduced by M. of A. BRADLEY -- (at request of the Office of Children and Family Services) -- read once and referred to the Committee on Children and Families -- reported and referred to the Committee on Codes -- committee discharged, bill amended, ordered reprinted as amended and recommitted to said committee -- recommitted to the Committee on Children and Families in accordance with Assembly Rule 3, sec. 2 -- reported and referred to the Committee on Codes -- committee discharged, bill amended, ordered reprinted as amended and recommitted to said committee

AN ACT to amend the family court act, the domestic relations law and the surrogate's court procedure act, in relation to the legal powers of custodians and guardians of children

S 4838-B Kruger

DATE RECEIVED BY GOVERNOR:
JUL 25 2008

ACTION MUST BE TAKEN BY:
AUG 06 2008

DATE GOVERNOR'S ACTION TAKEN:
AUG 05 2008

SENATE VOTE 62 Y 0 N HOME RULE MESSAGE ___ Y ___ N

DATE 6/24

ASSEMBLY VOTE 140 Y 0 N

DATE 6/23

A8358-B Bradley Same as S 4838-B KRUGER

06/24/08 A8358-B Senate Vote Aye: 62 Nay: 0
06/23/08 A8358-B Assembly Vote Yes: 140 No : 0

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06/24/08 A8358-B Senate Vote Aye: 62 Nay: 0

Aye Adams	**Aye** Alesi	**Aye** Aubertine	**Aye** Bonacic
Aye Breslin	**Aye** Bruno	**Aye** Connor	**Aye** DeFrancisco
Aye Diaz	**Aye** Dilan	**Aye** Duane	**Aye** Farley
Aye Flanagan	**Aye** Fuschillo	**Aye** Golden	**Aye** Gonzalez
Aye Griffo	**Aye** Hannon	**Aye** Hassell-Thompson	**Aye** Huntley
Aye Johnson C	**Aye** Johnson O	**Aye** Klein	**Aye** Krueger
Aye Kruger	**Aye** Lanza	**Aye** Larkin	**Aye** LaValle
Aye Leibell	**Aye** Libous	**Aye** Little	**Aye** Maltese
Aye Marcellino	**Aye** Maziarz	**Aye** Montgomery	**Aye** Morahan
Aye Nozzolio	**Aye** Onorato	**Aye** Oppenheimer	**Aye** Padavan
Aye Parker	**Aye** Perkins	**Aye** Rath	**Aye** Robach
Aye Sabini	**Aye** Saland	**Aye** Sampson	**Aye** Savino
Aye Schneiderman	**Aye** Serrano	**Aye** Seward	**Aye** Skelos
Aye Smith	**Aye** Stachowski	**Aye** Stavisky	**Aye** Stewart-Cousins
Aye Thompson	**Aye** Trunzo	**Aye** Valesky	**Aye** Volker
Aye Winner	**Aye** Young		

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06/23/08 A8358-B Assembly Vote Yes: 140 No : 0

Yes Abbate	**Yes** Alessi	**Yes** Alfano	**Yes** Amedore
ER Arroyo	**Yes** Aubry	**Yes** Bacalles	**Yes** Ball
Yes Barclay	**Yes** Barra	**Yes** Benedetto	**Yes** Benjamin
Yes Bing	**Yes** Boyland	**Yes** Boyle	**Yes** Bradley
Yes Brennan	**Yes** Brodsky	**Yes** Brook-Krasny	**Yes** Burling
Yes Butler	**Yes** Cahill	**Yes** Calhoun	**Yes** Camara
Yes Canestrari	**Yes** Carrozza	**ER** Christensen	**Yes** Clark
Yes Cole	**Yes** Colton	**Yes** Conte	**Yes** Cook
Yes Crouch	**Yes** Cusick	**Yes** Cymbrowitz	**Yes** DelMonte
Yes Destito	**Yes** Diaz L	**Yes** Diaz R	**Yes** Dinowitz
Yes Duprey	**Yes** Eddington	**Yes** Englebright	**Yes** Errigo
Yes Espaillat	**Yes** Farrell	**Yes** Fields	**Yes** Finch
Yes Fitzpatrick	**Yes** Gabryszak	**Yes** Galef	**ER** Gantt
Yes Gianaris	**Yes** Giglio	**Yes** Glick	**Yes** Gordon
Yes Gottfried	**Yes** Greene	**Yes** Gunther A	**Yes** Hawley
Yes Hayes	**Yes** Heastie	**Yes** Hevesi	**Yes** Hikind
Yes Hooper	**Yes** Hoyt	**Yes** Hyer-Spencer	**Yes** Jacobs
Yes Jaffee	**Yes** Jeffries	**Yes** John	**Yes** Kavanagh
Yes Kellner	**ER** Kirwan	**Yes** Kolb	**Yes** Koon
ER Lafayette	**Yes** Lancman	**Yes** Latimer	**Yes** Lavine
Yes Lentol	**Yes** Lifton	**Yes** Lopez P	**Yes** Lopez V
Yes Lupardo	**Yes** Magee	**Yes** Magnarelli	**Yes** Maisel
Yes Markey	**Yes** Mayersohn	**ER** McDonald	**Yes** McDonough
Yes McEneny	**Yes** McKevitt	**Yes** Miller	**Yes** Millman

Yes Molinaro	**Yes** Morelle	**ER** Nolan	**Yes** Oaks
Yes O'Donnell	**Yes** O'Mara	**Yes** Ortiz	**Yes** Parment
Yes Paulin	**Yes** Peoples	**Yes** Peralta	**Yes** Perry
Yes Pheffer	**Yes** Powell	**Yes** Pretlow	**Yes** Quinn
Yes Rabbitt	**Yes** Raia	**Yes** Ramos	**Yes** Reilich
Yes Reilly	**ER** Rivera J	**Yes** Rivera N	**Yes** Rivera P
Yes Robinson	**Yes** Rosenthal	**Yes** Saladino	**Yes** Sayward
Yes Scarborough	**Yes** Schimel	**Yes** Schimminger	**Yes** Schroeder
Yes Scozzafava	**Yes** Seminerio	**Yes** Spano	**Yes** Stirpe
Yes Sweeney	**Yes** Tedisco	**Yes** Thiele	**Yes** Titone
Yes Titus	**Yes** Tobacco	**Yes** Towns	**Yes** Townsend
Yes Walker	**Yes** Weinstein	**Yes** Weisenberg	**Yes** Weprin
Yes Wright	**Yes** Young	**Yes** Zebrowski K	**Yes** Mr. Speaker

NEW YORK STATE ASSEMBLY
MEMORANDUM IN SUPPORT OF LEGISLATION
submitted in accordance with Assembly Rule III, Sec 1(f)

BILL NUMBER: A8358B

SPONSOR: Bradley

TITLE OF BILL: An act to amend the family court act, the domestic relations law and the surrogate's court procedure act, in relation to the legal powers of custodians and guardians of children

PURPOSE:
This bill would enact a definition of permanent guardianship and clarify the powers of custodians and guardians, including the ability and obligation to enroll a child in school, consent to medical care, and sign voluntary placement agreements

SUMMARY OF PROVISIONS
Section 1 of the bill amends Family Court Act (FCA) § 651 to add cross-references to a new subdivision (d) defining legal custody of a child with respect to applications for custody initiated in Supreme, County or Family Court or guardianship of the person of a minor pursuant to Article 6 of the FCA or the Surrogate's Court Procedure Act (SCPA). The existing subdivision (d) is relettered subdivision (e). Legal custody is defined as the right and responsibility to make decisions, including issuing any necessary consents, regarding the child's protection, education, care and control, health and medical needs, and the physical custody of the person of the child, unless otherwise provided or limited by the court.

Section 2 of the bill amends FCA § 661 relating to the court's jurisdiction over guardianship of the person of a minor and to cross reference new § 651 (d) of the FCA. This section also provides for the appointment of a permanent guardian in certain instances where guardianship and custody of the child have been committed to an authorized agency or both parents of the child are deceased.

Section 3 of the bill amends § 240(1)(a) of the Domestic Relations Law (DRL) relating to custody and child support, to cross reference new subdivision 1-d of such section.

Section 4 of the bill adds a new § 240(1-d) of the DRL pertaining to applications for custody rights initiated in Supreme, County or Family Court or guardianship of the person of a minor under the FCA or SCPA. Legal custody is defined as the right and responsibility to make decisions, including issuing any necessary consents, regarding the child's protection, education, care and control, health and medical needs, and the physical custody of the person of the child, unless otherwise provided or limited by the court.

Section 5 of the bill amends SCPA § 1701 to authorize that court to appoint a permanent guardian for an infant.

Section 6 of the bill amends SCPA § 1702 to grant jurisdiction to the

court to appoint a permanent guardian over an infant who is domiciled or the authorized agency has its principal office in that county.

Section 7 of the bill amends SCPA § 1703 to permit a petition for appointment as a permanent guardian of an infant to be brought by any person on behalf of the infant.

Section 8 of the bill amends SCPA § 1704 to set forth the requirements for a petition for the appointment of a permanent guardian for an infant.

Section 9 of the bill amends SCPA § 1706 pertaining to the procedures for appointment of a guardian of the person of a minor Guardianship of the person of a minor is defined the same as custody under the DRL and FCA, as the right and responsibility to make decisions, including issuing any necessary consents, regarding the child's protection, education, care and control, health and medical needs, and the physical custody of the person of the child, unless otherwise provided or limited by the court

Section 10 of the proposal amends SCPA § 1707 to authorize the court to enter a decree appointing a permanent guardian for an infant where the court determines that permanent guardianship is in the infant child's best interest. A decree of permanent guardianship would expire upon the infant's 18th birthday, unless the infant consents to continuation of the guardianship until his or her 21st birthday, or unless previously vacated by the court in certain limited circumstances.

Section 11 of the bill provides for an effective date of 90 days after enactment.

EXISTING LAW:

FCA § 651 sets forth the jurisdiction of the Family Court over habeas corpus proceedings and petitions for custody and visitation of minors. The Family Court may act in accordance with § 240(1) of the DRL and has the same powers as the Supreme Court with respect to habeas corpus proceedings and proceedings brought by petition or order to show cause.
FCA § 661 provides that the Family Court has the same jurisdiction and authority as the County and Surrogate's Court with respect to guardianship of the person of a minor.
DRL § 240 governs matters of custody and child support stemming from an action to dissolve a marriage.
SCPA § 1701 empowers the Surrogate's Court to appoint a guardian of the person and/or the property of an infant.
SCPA § 1702 sets forth the Surrogate's Court's jurisdiction to appoint a guardian for an infant whose person or property is located in that county.
SCPA § 1703 provides who may petition the Surrogate's Court for appointment as the guardian of the person and/or property of an infant.
SCPA § 1704 sets forth the elements that must be included in a petition to the Surrogate's Court for appointment as the guardian of the person and/or property of an infant.
SCPA § 1706 governs the procedures in the Surrogate's Court for the appointment of a guardian of the person and/or property of a minor.
SCPA § 1707 governs the terms of a decree issued by the Surrogate's Court appointing a guardian of the person and/or property of an infant.

LEGISLATIVE HISTORY:

Portions of this proposal were included in OCFS #4R-05, which was introduced as S.5195 of 2005 and passed in the Senate in 2005 and 2006. Provisions of this proposal were a part of OCFS #6R-06 which was introduced as S.8324 of 2006 and passed in the Senate.

STATEMENT IN SUPPORT:

The proposed legislation will clarify and harmonize provisions regarding custody and guardianship of minors under the FCA, DRL and the SCPA. The proposed legislation is intended to have no effect on the meaning of "care and custody" under SSL § 384-a regarding a child placed in foster care pursuant to a voluntary placement agreement. The rights and responsibilities of a custodian or a guardian are not defined in current law. The lack of definition and seeming overlap between the meaning and effect of an application to be appointed a custodian or guardian of a child has caused confusion to parties, schools, health and medical services providers alike.

Health insurance providers, school districts and medical providers have differing requirements regarding whether a non-parent must have custody or guardianship of a child to provide a child with health insurance, enroll a child in school or provide medical care and treatment. A person who applied for custody may learn that he or she has asked for the wrong legal authority and be forced to commence another proceeding, with an attendant delay to the detriment of the child.

Two articles in the New York Law Journal highlight the confusion across the state regarding determining whether to proceed with an application for custody or guardianship. See Segal, P. and Kaough, M., Weighing Guardianship of a Child versus Custody, 2/25/2002 N.Y.L.J 1, (col.1); Edlitz; S., Guardianship and Custody: Is There a Distinction?, 3/31/2000 N.Y.L.J 1, (col.1).

Case law interpreting applications for guardianship of the person of a child has held that such guardianship "implies the custody and control of the person of an infant". In re Yardum, 228 A.D. 854 (2d Dept., 1930); see also, Matter of Lintol, 12/18/98 N.Y.L.J 38 (col.3); Practice Commentary to McKinney's Consolidated Laws of New York, SCPA, § 1707. Guardianship had historically been a concept associated with probate upon the death of the parents of a child.

However, the current statute does not preclude its application where the parents of a child are still living. Indeed, contested applications for guardianship of the person of a child have required proof of extraordinary circumstances as required by Bennett v. Jeffreys, 40 N.Y.2d 543 (1976), in custody proceedings to establish standing for the proceeding to be brought by the applicant for guardianship against the parent. See In re Tiffany Nicole L., 287 A.D.2d 717 (2d Dept., 2001). Once standing is established in a guardianship proceeding, a determination of the best interests of the child must be made, similar to a custody determination. See In re Justina S., 180 A.D.2d 641 (2d Dept., 1992). Based upon the courts' interpretation, there is no substantive difference between the rights and responsibilities of a custodian or guardian of a child. Codifying consistent legal rights and responsibilities for custody and guardianship of a minor will eliminate the confusion, without making any substantive change in law under the FCA, DRL and SCPA This change, however, is not intended to modify the meaning of care and custody as used in the SSL.

The proposal would also permit the appointment of a permanent guardian of a child in certain limited instances. When a child's parental rights are terminated pursuant to SSL § 384-b, FCA § 634 or through a surrender, and the child is freed for adoption, the voluntary agency receives custody and guardianship of the child, which includes the right to consent to the adoption of the child. Current permanency goals for a child freed for adoption include placement with a fit and willing rela-

tive under FCA § 651 and referral for guardianship of the child under the SCPA or FCA for guardianship of the person of the child. Under current law, neither custody granted to a non-parent under the FCA nor guardianship of the person of child under the FCA or SCPA include the right to consent to the adoption of the child. Thus, these permanency goals are inappropriate for a child freed for adoption because the transfer of legal rights regarding the child would be "incomplete". New official court forms promulgated in response to Chapter 3 of the Laws of 2005 highlight this conundrum by designating these goals as inapplicable for a freed child. However, the permanency goals of adoption or another planned permanent living arrangement with a significant connection to an adult willing to be a permanency resource for the child are not sufficient to apply to all the situations that commonly arise for these children. Where a child is living with a relative who is uncomfortable adopting the child, another legal relationship must be allowed to permit the relative to adequately care for the child, including having the legal authority to enroll the child in school or consent to medical care. The proposal would allow a permanent guardian to be appointed in the limited situations where the child is already freed or both parents are dead. The permanent guardianship would be in effect until the child reaches age 18, unless the court finds by clear and convincing evidence that the guardian failed to or is unable, unavailable or unwilling to provide proper care and custody for the child or it is in the child's best interests to vacate the appointment The permanent guardian would have all the legal rights and responsibilities of a custodian or guardian of the person or the child, and in addition, would be permitted to consent to the adoption of the child.

BUDGET IMPLICATIONS:
None.

EFFECTIVE DATE:
This act shall take effect on the ninetieth day after it shall have become a law.

DIVISION OF THE BUDGET BILL MEMORANDUM

DTG

Session Year 2008

SENATE:
No.

ASSEMBLY:
No. A8358-B

Primary Sponsor: Assemblyman Bradley

Law: Family Court Act; Domestic Relations; Surrogate's Court Procedure Act; **Sections: 661, 657; 74; 1701, 1702, 1703, 1704, 1706, 1707**

Division of the Budget recommendation on the above bill

APPROVE: __ **NO OBJECTION: _X_**

1. Subject and Purpose:

Currently the rights and responsibilities of a custodian or a guardian are not defined in law. This bill would enact a definition of permanent guardianship and clarify the powers of custodians and guardians, including the ability and obligation to enroll a child in school, consent to medical care and sign voluntary placement agreements.

2. Budget Implications:

None.

3. Recommendation:

This bill would clarify statutory provisions regarding custody and guardianship, and has no impact on the State Financial Plan. Accordingly, the Division of the Budget has no objection to its enactment.

Validation: Document ID: 818621-11
Laura L. Anglin, Director of the Budget
By Daniel B. Sheppard
Date: 7/29/2008 4:10:00 PM

STATE OF NEW YORK
DEPARTMENT OF STATE
ONE COMMERCE PLAZA
99 WASHINGTON AVENUE
ALBANY, NY 12231-0001

DAVID A. PATERSON
GOVERNOR

LORRAINE A. CORTÉS-VÁZQUEZ
SECRETARY OF STATE

MEMORANDUM

To: Honorable Terryl Brown Clemons, Esq.
Acting Counsel to the Governor

From: Matthew W. Tebo, Esq.
Legislative Counsel

Date: July 16, 2008

Subject: A.8358-B (M. of A. Bradley)
Recommendation: No comment

The Department of State has no comment on the above referenced bill.

If you have any questions or comments regarding our position on the bill, or if we can otherwise assist you, please feel free to contact me at (518) 474-6740.

MWT/mel

NEW YORK STATE
OFFICE OF TEMPORARY AND DISABILITY ASSISTANCE
40 NORTH PEARL STREET
ALBANY, NEW YORK 12243-0001

David A. Paterson
Governor

David A. Hansell
Commissioner

July 17, 2008

Honorable Terryl Brown Clemons
Acting Counsel to the Governor
State Capitol
Albany, New York 12224

Re: Ten Day Bill
Assembly 8358-B

Dear Ms. Clemons:

The Office of Temporary and Disability Assistance (OTDA) has reviewed the above-referenced Ten Day Bill that was forwarded for our comment.

Assembly 8358-B would amend the Family Court Act, the Domestic Relations Law and the Surrogate's Court Procedure Act to clarify and bring into congruence the defined legal rights and responsibilities of "custodians" and "guardians" for specified purposes, such as the enrollment of minor children in public schools and the coverage of minor children under employer-based health insurance plans. The bill also would provide for the appointment of "permanent guardians" based on numerous criteria, including the wishes of the children and the ability and commitment of the adults to assume full legal responsibility for the children and to raise the children to adulthood.

While OTDA fully supports the efforts to provide for and protect children, the bill would not affect the programs or the administration of this Office, and we defer to the recommendations of the impacted State agencies, and in particular the Office of Children and Family Services.

Thank you for the opportunity to comment on this bill.

Very truly yours,

s/s JPB

John P. Bailly, Jr.
General Counsel

THE STATE EDUCATION DEPARTMENT / THE UNIVERSITY OF THE STATE OF NEW YORK / ALBANY, NY 12234

Counsel and Deputy Commissioner for Legal Affairs
Tel. 518-474-6400
Fax 518-474-1940

July 24, 2008

TO: Counsel to the Governor

FROM: Kathy A. Ahearn

SUBJECT: A.8358-B

RECOMMENDATION: No Objection

REASON FOR RECOMMENDATION:

The State Education Department has no objection to the enactment of this bill.

New York State
Office of
Children &
Family
Services

David Paterson
Governor

Gladys Carrión, Esq.
Commissioner

Capital View Office Park

52 Washington Street
Rensselaer, NY
12144-2796

August 1, 2008

Honorable Terryl Brown Clemons, Esq.
Acting Counsel to the Governor
Executive Chamber
State Capitol
Albany, New York 12224

Re: A.8358-B
Support

Dear Ms. Clemons:

This is in response to your request for comment on the above referenced departmental proposal of the Office of Children and Family Services (OCFS), which expands and enhances, in several ways, the ability of relatives and other interested individuals to care for vulnerable children.

First, the bill allows the court to appoint a permanent guardian for a child who is orphaned or freed for adoption if the court determines it is in the child's best interests. Many children who are orphaned or have been freed for adoption have family members or other significant adults in their lives who would be willing to be a permanent caregiver if they were not required to complete an adoption. Under the bill, a permanent guardian is empowered to make decisions and provide necessary consent on behalf of the child, including consenting to the adoption of the child. The permanent guardianship appointment expires at age 18 unless the child consents to the continuation of guardianship until he or she is 21 years old. By allowing permanent guardianship to be established and possibly continued, the bill will enable more children to have permanent placements, thereby enhancing their outcomes.

Second, the bill amends various provisions of law to clarify that a relative or other person with a lawful order of guardianship or custody may enroll the child in the school district where the guardian or custodian resides. In addition, a person with a lawful order of custody of a child is given the right to enroll the child in the custodian's employer-based health insurance plan if the plan permits enrollment of a child based on a lawful order of guardianship. These changes will enable thousands of relatives and others persons who are caring for children as either guardians or custodians to better provide for the best interests of the children in their care.

Finally, this bill clarifies that the appointment of a guardian under Article 6 of the Family Court Act may continue until the child's 21st birthday if the child consents. Currently, such a guardianship ends when the child turns 18.

Often, young people are unable to assume the full responsibilities of living independently when they reach 18 years of age, this bill will provide them the option to continue to have the legal support of their guardians.

OCFS supports this legislation as it will expand the permanency options for vulnerable children and enhance the ability of relatives and other caregivers to provide for the medical and educational needs of the children in their care.

Thank you for the opportunity to comment.

Sincerely,

Karen Walker Bryce

Karen Walker Bryce, Esq.
Deputy Commissioner and General Counsel

MEMORANDUM

AN ACT to amend the family court act, the domestic relations law and the surrogate's court procedure act, in relation to the legal powers of custodians and guardians of children

Purpose:

This bill enacts a definition of permanent guardianship and clarifies the ability of a custodian or guardian to enroll a child in school and to enroll and receive coverage for the child in their employer based health insurance plan.

Summary of Provisions:

Section 1 of the bill amends Family Court Act (FCA) § 661 relating to the court's jurisdiction over guardianship of the person of a minor and to clarify that a Family Court order of guardianship may continue until the child turns 21 years of age if the child consents to the continuation of such guardianship after the age of 18. This section also provides for the appointment of a permanent guardian in certain instances where guardianship and custody of the child have been committed to an authorized agency or both parents of the child are deceased.

Section 2 of the bill adds a new FCA § 657 to clarify that a person with a lawful order of either custody or guardianship under Article 6 of the FCA has the authority to enroll that child in school in the school district of residence of the custodian or guardian while the child also is residing in such school district. This section also clarifies that a person with an order granting custody of a child under Article 6 of the FCA has the same authority as a person with an order of guardianship to enroll and receive coverage for that child in the custodian's employer based health insurance plan.

Section 3 of the bill adds a new Domestic Relations Law (DRL) § 74 to make similar clarifying amendments as made in section 2 of the bill regarding the authority of a person with an order of custody issued pursuant to the DRL.

Section 4 of the bill amends Surrogate's Court Procedure Act (SCPA) § 1701 to authorize that court to appoint a permanent guardian for an infant or child, where guardianship and custody of the child have been committed to an authorized agency or both parents of the child are deceased.

Section 5 of the bill amends SCPA § 1702 to grant jurisdiction to the court to appoint a permanent guardian over an infant who is domiciled in that county or who is in the care and custody of an authorized agency which has its principal office in that county.

Section 6 of the bill amends SCPA § 1703 to permit a petition for appointment as a permanent guardian of an infant to be brought by any person on behalf of the infant or child.

Section 7 of the bill amends SCPA § 1704 to set forth the requirements for a petition for the appointment of a permanent guardian for an infant or child.

Section 8 of the bill amends SCPA § 1706 to clarify that a permanent guardian has the right and responsibility to make decisions for the child, including medical, educational and custodial decisions as well as the ability to consent to the adoption of the child.

Section 9 of the proposal amends SCPA § 1707 to authorize the court to enter a decree appointing a permanent guardian for an infant where the court determines that permanent guardianship is in the infant child's best interest. A decree of permanent guardianship would expire upon the infant's 18th birthday, unless the infant consents to continuation of the guardianship until his or her 21st birthday, or unless previously vacated by the court in certain limited circumstances.

Section 10 of the bill provides for an effective date of 90 days after enactment.

Existing Law:

FCA § 661 provides that the Family Court has the same jurisdiction and authority as the County and Surrogate's Court with respect to guardianship of the person of a minor.

SCPA § 1701 empowers the Surrogate's Court to appoint a guardian of the person and/or the property of an infant.

SCPA § 1702 sets forth the Surrogate's Court's jurisdiction to appoint a guardian for an infant whose person or property is located in that county.

SCPA § 1703 provides who may petition the Surrogate's Court for appointment as the guardian of the person and/or property of an infant.

SCPA § 1704 sets forth the elements that must be included in a petition to the Surrogate's Court for appointment as the guardian of the person and/or property of an infant.

SCPA § 1706 governs the procedures in the Surrogate's Court for the appointment of a guardian of the person and/or property of a minor.

SCPA § 1707 governs the terms of a decree issued by the Surrogate's Court appointing a guardian of the person and/or property of an infant.

Legislative History:

Portions of this proposal were included in Office of Children and Family Services (OCFS) #4R-05, which was introduced as S.5195 of 2005 and passed in the Senate in 2005 and 2006. Provisions of this proposal were a part of OCFS #6R-06 which was introduced as S.8324 of 2006 and passed in the Senate.

Statement in Support:

The legislation will clarify and harmonize provisions regarding custody and guardianship of minors under the FCA, DRL and the SCPA. The bill clarifies that both legal custodians and legal guardians have the authority to enroll children who are covered under their orders of custody or guardianship and who reside with the custodian or guardian in the school district in which the custodian or guardian resides. The bill also requires that where a health insurance provider provides coverage for a child for whom a non-parent has guardianship, the health insurance provider must also permit a non-parent custodian to enroll the child in the custodian's employer based health insurance plan.

Currently, a person who applied for custody may learn that he or she has asked for the wrong legal authority and be forced to commence another proceeding, with an attendant delay to the detriment of the child. In addition, the bill clarifies that the Family Court order of guardianship under Article 6 may continue until the child turns 21 years of age if the child consents to the continuation of such guardianship after the age of 18.

The proposal would also permit the appointment of a permanent guardian of a child in certain limited instances. When parental rights have been terminated pursuant to Social Services Law (SSL) §§ 383-c, 384, 384-b, or FCA § 631, the voluntary agency receives custody and guardianship of the child, which includes the right to consent to the adoption of the child. Current permanency goals for a child freed for adoption include placement with a fit and willing relative under FCA § 651 and referral for guardianship of the child under the SCPA or FCA for guardianship of the person of the child.

Under current law, neither custody granted to a non-parent under the FCA nor guardianship of the person of child under the FCA or SCPA include the right to consent to the adoption of the child. Thus, these permanency goals are inappropriate for a child freed for adoption because the transfer of legal rights regarding the child would be "incomplete". New official court forms promulgated in response to Chapter 3 of the Laws of 2005 highlight this conundrum by designating these goals as inapplicable for a freed child. However, the permanency goals of adoption or another planned permanent living arrangement with a significant connection to an adult willing to be a permanency resource for the child are not sufficient to apply to all the situations that commonly arise for these children.

Where a child is living with a relative who is uncomfortable adopting the child, another legal relationship must be allowed to permit the relative to adequately care for the child, including having the legal authority to enroll the child in school or consent to medical

care. The proposal would allow a permanent guardian to be appointed in the limited situations where the child is already freed or both parents are dead. The permanent guardianship would be in effect until the child reaches age 18, unless the court finds by clear and convincing evidence that the guardian failed to or is unable, unavailable or unwilling to provide proper care and custody for the child or it is in the child's best interests to vacate the appointment. The permanent guardian would have all the legal rights and responsibilities of a custodian or guardian of the person of the child, and in addition, would be permitted to consent to the adoption of the child.

Budget Implications:

None.

Effective Date:

This act shall take effect on the ninetieth day after it shall have become a law.

Council on Children and Families

52 Washington Street * West Building, Suite 99 * Rensselaer, NY 12144 * Phone: (518) 473-3652 * Website: http://www.ccf.state.ny.us

MEMORANDUM

To: Legislative Secretary

From: Elana Marton, Counsel

Subject: A. 8358-B/S. 4838-B

Date: July 16, 2008

Recommendation: **Support**

The Council on Children and Families supports the above-referenced legislation, which would clarify and unify provisions regarding the custody and guardianship of minors under the Family Court Act, the Domestic Relations Law, and the Surrogate Court Procedures Act. As this legislation would help alleviate any confusion regarding the responsibilities and rights of a custodian or guardian, the Council is supportive of this measure. Further, the Council supports the provision in this legislation, which would allow a permanent guardian to be appointed in certain situations where a relative, for example, is not comfortable adopting the child, but in order to care for the child needs to have the legal rights and responsibilities otherwise conferred upon a custodian or guardian.

NEW YORK STATE
Unified Court System

ANN PFAU
CHIEF ADMINISTRATIVE JUDGE

OFFICE OF COURT ADMINISTRATION

MICHAEL COLODNER
COUNSEL

MARC BLOUSTEIN
FIRST DEPUTY AND LEGISLATIVE COUNSEL

July 17, 2008

Hon. Terryl Brown Clemons
Acting Counsel to the Governor
Executive Chamber
State Capitol
Albany, New York 12224

Re: Senate 8358-B

Dear Ms. Clemons:

Thank you for requesting the comments of this Office on the above-referenced measure, which would amend guardianship provisions of the Family Court Act to clarify that guardianship petitions may be granted for youth between ages 18 and 21 so long as they consent. Also, the measure establishes a new category of "permanent guardianship," which may be ordered pursuant to either section 661(b) of the Family Court Act or sections 1701-1704 of the Surrogate's Court Procedure Act where the court finds that it to be in the best interests of a child (i) who has been freed for adoption, or (ii) whose parents would have been entitled to consent to or receive notice of an adoption but are both deceased.

This measure will provide needed clarity regarding the authority of the court to grant guardianships for older youth with their consent, and the authority of guardians and custodians to enroll their wards in school and obtain health insurance for them. The measure further adds a new category of "permanent guardian" for children freed for adoption or for those whose birth parents are deceased — an option where adoption is not feasible, often because the youth will not consent. For these reasons, we SUPPORT this measure and recommend APPROVAL.

Very truly yours,

Michael Colodner /RB

Michael Colodner

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THE SURROGATE'S ASSOCIATION OF THE STATE OF NEW YORK

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Hon. Lee L. Holzman
Chairman, Executive Committee
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Bronx, New York 10451
718-590-3625

Hon. Guy P. Tomlinson
Vice-Chair, Executive Committee
58 Broadway
P.O. Box 1500
Fonda, New York 12068-1500
518-853-8180

July 17, 2008

Hon. David A. Paterson
Executive Chambers
State Capitol
Albany, New York 12224

Re: A8358-B

Dear Governor Paterson:

The majority in our Association are in favor of the above Bill because it harmonizes and clarifies the provisions regarding custody and guardianship of minors under the FCA, DRL, and the SCPA. However, several members in our Association are concerned that this Bill will result in more custody proceedings being commenced in the Surrogate's Court without the Surrogate's Court having the same support personnel that is available in the Family Court. Consequently, those who have expressed this concern would prefer that the Bill be given further thought and study.

Very truly yours,

Lee L. Holzman,
Chairman, Executive

Committee

LLH:rmt

THE LEGAL AID SOCIETY 1876

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Theodore Levine
President

Steven Banks
Attorney-in-Chief

July 7, 2008

Hon. David A. Paterson
Governor of the State of New York
Executive Chamber
State Capitol
Albany, New York 12224

Re: S.7447-A/A.10808-A,S.4838-B/A.8358-B,S.3175-C/A.5258-C

Dear Governor Paterson:

We write to urge you to sign the three above-referenced bills, all of which The Legal Aid Society strongly supports.

S.7447-A/A.10808-A

This legislation that will provide much-needed clarification relating to when and under what circumstances a court may grant custody or guardianship pursuant to Article 6 to a relative of a child who is the subject of an Article 10 proceeding.

The bill sets out a structure in which a child may be directly placed with a relative or other suitable person under Article 10 early in the child protective proceeding, but may not be placed in the legal custody of a relative or other suitable person under Article 6 until the dispositional stage. These changes, in addition to clarifications regarding which dispositions under Family Court Act § 1052 may be used in combination with one another, should promote uniformity and consistency of practice that will benefit children across the State. The bill should enhance the opportunities for children to be placed in the care of relatives while making more deliberate the determination of when it is appropriate to end supervision or services to respondent parents.

S.4838-B/A.8358-B

This bill provides necessary clarification of the rights and responsibilities of legal guardians and custodians. By defining these roles, the bill will resolve confusion among school districts, health insurers and medical care providers, thus removing obstacles that prevent children from enrolling in school or receiving even the most basic medical care.

The bill also establishes a new status called permanent guardianship. In addition to the rights and responsibilities of a guardian, a permanent guardian would have to right to consent to the adoption of the child. Permanent guardianship would benefit many children in foster care by providing another avenue to permanency for a child who has been freed for adoption but has not been adopted.

S.3175-C/A.5258-C

Finally, as you know, Legal Aid has long advocated for increased protections for commercially sexually exploited children. We urge you to sign the Safe Harbor Act for Exploited Children, which recognizes that sexually exploited children should be treated as victims. In New York State children who are younger than 17 cannot legally consent to sex, yet current law allows children as young as 11 and 12 to be charged criminally and incarcerated for being the victims of sexual exploitation. Incarceration has proven to be wholly ineffective in assisting these young people in turning their lives around. The Safe Harbor Act will create a range of community-based services – such as community outreach, mental health services, crisis intervention, short-term safe houses, and long-term housing – which will truly assist these young people in addressing and resolving critical issues in their lives so they can develop into productive adults.

We would appreciate your support of the above bills which are so vital to families and children. Please feel free to contact me at 212-577-3277 or sbanks@legal-aid.org if you have any questions or concerns. Thank you for your consideration of these matters.

Very truly yours,

Steven Banks

STATE OF NEW YORK

8358--B

2007-2008 Regular Sessions

IN ASSEMBLY

May 11, 2007

Introduced by M. of A. BRADLEY -- (at request of the Office of Children and Family Services) -- read once and referred to the Committee on Children and Families -- reported and referred to the Committee on Codes -- committee discharged, bill amended, ordered reprinted as amended and recommitted to said committee -- recommitted to the Committee on Children and Families in accordance with Assembly Rule 3, sec. 2 -- reported and referred to the Committee on Codes -- committee discharged, bill amended, ordered reprinted as amended and recommitted to said committee

AN ACT to amend the family court act, the domestic relations law and the surrogate's court procedure act, in relation to the legal powers of custodians and guardians of children

The People of the State of New York, represented in Senate and Assembly, do enact as follows:

Section 1. Section 661 of the family court act, as amended by chapter 232 of the laws of 1988, is amended to read as follows:

§ 661. Jurisdiction. [~~The~~] **When initiated in the** family court, **such court** has like jurisdiction and authority **to determine** as [~~is now conferred on~~] county and surrogates courts [~~as concerns~~] *in proceedings regarding* the guardianship of the person of a minor *or infant and permanent guardianship of a child.* [~~The~~] **Such jurisdiction shall apply as follows:**

(a) Guardianship of the person of a minor or infant. When making a *determination regarding the guardianship of the person of a minor or infant, the* provisions of the surrogate's court procedure act shall apply to the extent they are applicable to guardianship of the person of a minor **or infant** and do not conflict with the specific provisions of this act. *For purposes of appointment of a guardian of the person pursuant to this part, the terms infant or minor shall include a person who is less than twenty-one years old who consents to the appointment or* **continuation of a guardian after the age of eighteen.**

EXPLANATION--Matter in *italics* (underscored) is new; matter in brackets [-] is old law to be omitted.

LBD09815-06-8

(b) Permanent guardianship of a child. Where the guardianship and custody of a child have been committed to an authorized agency pursuant to section six hundred fourteen of this article, or section three hundred eighty-three-c, section three hundred eighty-four or section three hundred eighty-four-b of the social services law, or where both parents of a child whose consent to the adoption of the child would have been required pursuant to section one hundred eleven of the domestic relations law or who were entitled to notice of an adoption proceeding pursuant to section one hundred eleven-a of the domestic relations law are dead, the court may appoint a permanent guardian of a child if the court finds that such appointment is in the best interests of the child. The provisions of the surrogate's court procedure act shall apply to the extent that they are applicable to a proceeding for appointment of a permanent guardian of a child and do not conflict with the specific provisions of this act. Such permanent guardian of a child shall have the right and responsibility to make decisions, including issuing any necessary consents, regarding the child's protection, education, care and control, health and medical needs, and the physical custody of the person of the child, and may consent to the adoption of the child. Provided, however, that nothing in this subdivision shall be construed to limit the ability of a child to consent to his or her own medical care as may be otherwise provided by law.

§ 2. The family court act is amended by adding a new section 657 to read as follows:

§ 657. Certain provisions relating to the guardianship and custody of children by persons who are not the parents of such children. (a) Notwithstanding any provision of the law to the contrary, a person possessing a lawful order of guardianship or custody of a minor child, who is not the parent of such child, may enroll such child in public school in the applicable school district where he or she and such child reside. Upon application for enrollment of a minor child by a guardian or custodian who is not the parent of such child, a public school shall enroll such child for such time as the child resides with the guardian or custodian in the applicable school district, upon verification that the guardian or custodian possess a lawful order of guardianship or custody for such child and that the guardian or custodian and the child properly reside in the same household within the school district.

(b) Notwithstanding any provision of law to the contrary, persons possessing a lawful order of custody of a child who are not a parent of such child shall have the same right to enroll and receive coverage for such child in their employer based health insurance plan and to assert the same legal rights under such employer based health insurance plans as persons who possess lawful orders of guardianship of the person for a child pursuant to rule twelve hundred ten of the civil practice laws and rules, article seventeen of the surrogate's court procedure act, or part 4 of this article.

§ 3. The domestic relations law is amended by adding a new section 74 to read as follows:

§ 74. Certain provisions relating to the custody of children by persons who are not the parents of such children. 1. Notwithstanding any provision of law to the contrary, a person possessing a lawful order of guardianship or custody of a minor child, who is not the parent of such child, may enroll such child in public school in the applicable school district where he or she and such child reside. Upon application for enrollment of a minor child by a guardian or custodian who is not the parent of such child, a public school shall enroll such child for

such time as the child resides with the guardian or custodian in the applicable school district, upon verification that the guardian or custodian possess a lawful order of custody for such child and that the guardian or custodian and the child properly reside in the same household within the school district.

2. Notwithstanding any provision of law to the contrary, persons possessing a lawful order of custody of a child who are not a parent of such child shall have the right to enroll and receive coverage for such child in their employer based health insurance plan and to assert the same legal rights under such employer based health insurance plans as persons who possess lawful orders of guardianship of the person for a child pursuant to rule twelve hundred ten of the civil practice laws and rules, article seventeen of the surrogate's court procedure act, or part four of article six of the family court act.

§ 4. Section 1701 of the surrogate's court procedure act, as amended by chapter 167 of the laws of 1976, is amended to read as follows:

§ 1701. Power of court

The court has power over the property of an infant and is authorized and empowered to appoint a guardian of the person or of the property or of both of an infant whether or not the parent or parents of the infant or child are living. Where the guardianship and custody of a child have been committed to an authorized agency pursuant to section six hundred thirty-one of the family court act, or section three hundred eighty-three-c, section three hundred eighty-four or section three hundred eighty-four-b of the social services law, or where both parents of the child whose consent to the adoption of the child would have been required pursuant to section one hundred eleven-a of the domestic relations law are dead, the court may appoint a permanent guardian of a child if the court finds that such appointment is in the best interests of the child.

§ 5. Section 1702 of the surrogate's court procedure act, subdivision 1 as amended by chapter 286 of the laws of 1973, is amended to read as follows:

§ 1702. Jurisdiction

1. Where an infant has no guardian the court may appoint a guardian of his person or property, or of both, in the following cases:

[~~1.~~] (a) Where the infant is domiciled in that county or has sojourned therein immediately preceding the application.

[~~2.~~] (b) Where the infant is a non-domiciliary of the state but has property situate in that county.

2. Where an infant or child has no guardian, the court may appoint a permanent guardian for the child in accordance with the provisions of section seventeen hundred one of this article where the infant is domiciled in that county or where such child is in the care or custody of an authorized agency, as defined in subdivision ten of section three hundred seventy-one of the social services law, and such authorized agency has its principal office in that county.

§ 6. Section 1703 of the surrogate's court procedure act, as amended by chapter 514 of the laws of 1993, is amended to read as follows:

§ 1703. Petition for appointment; by whom made

A petition for the appointment of a guardian of the person or property, or both, of an infant may be made by any person [~~in~~] on behalf of the infant or if the infant be over the age of [~~14~~] fourteen years, it may be made by the infant. A petition for appointment as a guardian of the property of an infant may also be made by the public administrator of the county in which the infant resides where no one else is available

to serve as guardian. The court may grant such a petition of the public administrator upon its certification that all other efforts to appoint a guardian have been exhausted. **A petition for appointment as a permanent guardian of an infant or child may be brought by any person on behalf of the infant or child.**

§ 7. Subdivisions 2 and 3 of section 1704 of the surrogate's court procedure act, subdivision 3 as amended by chapter 666 of the laws of 1976, are amended and a new subdivision 8 is added to read as follows:

2. The names of the father and the mother **whose consent to the adoption of a child would have been required pursuant to section one hundred eleven of the domestic relations law or who was entitled to notice of an adoption proceeding pursuant to section one hundred eleven-a of the domestic relations law,** and whether or not they are living **or have had their parental rights terminated pursuant to section three hundred eighty-three-c, section three hundred eighty-four or section three hundred eighty-four-b of the social services law or section six hundred thirty-one of the family court act,** and if living, their domiciles, the name and address of the person with whom the infant resides and the names and addresses of the nearest distributees of full age who are domiciliaries, if both father and mother are dead.

3. Whether the infant has had at any time a guardian appointed by will or deed or an acting guardian in socage or [~~a guardian of the person appointed~~] guardianship and custody committed pursuant to [~~section 384~~] section three hundred eighty-three-c, three hundred eighty-four or [~~section 384-b~~] three hundred eighty-four-b of the social services law or section six hundred thirty-one of the family court act.

8. In addition, the petition for appointment of a permanent guardian of an infant or child shall include:

(a) an assessment to be performed by the local social services district, which shall contain:

(i) the full name and address of the person seeking to become the guardian;

(ii) the ability of the guardian to assume permanent care of the child;

(iii) the child's property and assets, if known;

(iv) the wishes of the child, if appropriate;

(v) the results of the criminal history record check with the division of criminal justice services of the guardian and any person eighteen years of age or older residing in the guardian's household conducted by the office of children and family services pursuant to subdivision two of section three hundred seventy-eight-a of the social services law if such a criminal history record check has been completed;

(vi) the results of a search of the statewide central register of child abuse and maltreatment records regarding the guardian and any person eighteen years of age or older residing in the guardian's household, including whether such person has been the subject of an indicated report conducted pursuant to subparagraph (e) of paragraph (A) of subdivision four of section four hundred twenty-two of the social services law, if such a search has been conducted; and

(vii) the results of all inspections and assessments of the guardian's home and the child's progress while placed in the home, if any;

(b) a certified copy of the order or orders terminating the parental rights of the child's parents or approving the surrender of the child or the death certificates of the child's parents, as applicable;

(c) the recommendation of the authorized agency involved, if any; and

(d) the suitability, ability and commitment of the permanent guardian to assume full legal responsibility for the child and raise the child to adulthood.

§ 8. Subdivision 1 of section 1706 of the surrogate's court procedure act, as amended by chapter 518 of the laws of 2006, is amended to read as follows:

1. Where process is not issued or upon the return of process, the court shall ascertain the age of the infant, the amount of his **or her** personal property, the gross amount of the rents and profits of his **or her** real estate during his **or her** minority and the sufficiency of the security offered by the proposed guardian. **With respect to applications for appointment as a permanent guardian of a child, the permanent guardian shall have the right and responsibility to make decisions, including issuing any necessary consents, regarding the child's protection, education, care and control, health and medical needs, and the physical custody of the person of the child, and may consent to the adoption of the child. Provided, however, that nothing in this subdivision shall be construed to limit the ability of a child to consent to his or her own medical care as may be otherwise provided by law.** If the infant is over the age of [~~14~~] **fourteen** years the court shall ascertain his **or her** preference for a suitable guardian. Notwithstanding any other section of law, where the infant is over the age of eighteen, the infant shall consent to the appointment of a suitable guardian.

§ 9. Section 1707 of the surrogate's court procedure act, subdivision 1 as amended by chapter 477 of the laws of 2000 and subdivision 2 as amended by chapter 518 of the laws of 2006, is amended to read as follows:

§ 1707. Decree appointing guardian; term of office

1. If the court be satisfied that the interests of the infant will be promoted by the appointment of a guardian or by the issuance of temporary letters of guardianship of his **or her** person or of his **or her** property, or of both, it must make a decree accordingly. **If the court determines that appointment of a permanent guardian is in the best interests of the infant or child, the court shall issue a decree appointing such guardian.** The same person may be appointed guardian of both the person and the property of the infant or the guardianship of the person and of the property may be committed to different persons. The court may appoint a person other than the parent of the infant or the person nominated by the petitioner. When the court is informed that the infant, a person nominated to be a guardian of such infant, the petitioner, or any individual eighteen years of age or over who resides in the home of the proposed guardian is a subject of or another person named in an indicated report, as such terms are defined in section four hundred twelve of the social services law, filed with the statewide register of child abuse and maltreatment pursuant to title six of article six of the social services law or is or has been the subject of or the respondent in or a party to a child protective proceeding commenced under article ten of the family court act which resulted in an order finding that the child is an abused or neglected child the court shall obtain such records regarding such report or proceeding as it deems appropriate and shall give the information contained therein due consideration in its determination.

2. The term of office of a guardian of the person or property so appointed expires when the infant attains majority, unless the infant consents to the continuation of or appointment of a guardian after his or her eighteenth birthday, in which case such term of office expires on

his or her twenty-first birthday, or after such other shorter period as the court establishes upon good cause shown; except that the term of office of a guardian of the person of an infant expires upon the infant's marriage prior to attaining majority. **The appointment of a permanent guardian of a child shall expire when the infant or child reaches the age of eighteen years, unless the infant or child consents to the continuation of a guardian after his or her eighteenth birthday, in which case such term of office expires on his or her twenty-first birthday, or unless vacated by the court prior to the infant or child's eighteenth or twenty-first birthday if the court finds that based upon clear and convincing evidence the guardian failed to or is unable, unavailable or unwilling to provide proper care and custody of the infant or child, or that the guardianship is no longer in the best interests of the infant or child.**

§ 10. This act shall take effect on the ninetieth day after it shall have become a law.