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**GRANDPARENT CAREGIVERS: PLANNING
FOR THE FUTURE OF THEIR
GRANDCHILDREN**

FALL 2000



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at 67 (Fall 2000).*

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GRANDPARENT RIGHTS NEWS

Grandparent Caregivers: Planning for the Future of Their Grandchildren

By Gerard Wallace

As grandparents and others who have assumed primary responsibility for the care of children (grandparent caregivers) age, they naturally become more concerned with insuring the future care of their grandchildren and often wish to designate a guardian who can act in their place upon their incapacity or death.



Not all grandparent caregivers, however, can choose who will succeed them. The ability to petition for the appointment of a successor or to designate a successor in a legal instrument depends upon the legal relationship of the grandparent to the grandchild. The authority of grandparents who have legal custody and of informal caregivers (those who do not have court orders) does not include the naming of a successor. Courts will appoint the successor designated by a child's adoptive parent or guardian whenever the appointment of that guardian is in the child's best interest.¹ Thus, only a grandparent who has adopted the child or who has been appointed legal guardian can influence the naming of a successor guardian.

In addition to the designation of a guardian in a will, a parent or a guardian can use the Standby Guardianship Statute to provide for a standby guardian who can act not only after death, but also before death.² Under a standby guardianship, an adoptive parent or a guardian can either petition family or surrogate's court for the appointment of a standby guardian or designate a standby guardian in a written instrument.

A petition for appointment of a standby guardian must allege that the parent or guardian suffers from a progressive illness or is terminally ill. The petition results in the appointment of a standby guardian whose guardianship becomes effective upon the stated triggering conditions—incapacity or death of the parent or guardian.

A written designation of a standby guardian is similar to a springing power of attorney except that it must be witnessed instead of notarized. Although the designated standby guardian has not been appointed

by a court, the standby can act as guardian upon the occurrence of the stated triggering conditions—debilitation, incapacity, or death of the parent or guardian.

Both court-appointed and designated standby guardians must have their authority confirmed by a court within a limited period of time after the triggering conditions have occurred by petitioning a court for permanent appointment.

The standby guardian designation provides for the care of a child effective not only upon incapacity or death, but also upon debilitation and is therefore a useful planning tool for both parents and guardians. Since standby guardianship is not available to grandparents who are informal caregivers or who have legal custody, grandparents who can obtain the consent of the natural parents (or without consent when the natural parents are deceased or unfit) may want to seek guardianship or adoption.

“. . . only a grandparent who has adopted the child or who has been appointed legal guardian can influence the naming of a successor guardian.”

When advising grandparents who are considering whether to become guardians or adoptive parents, attorneys must ensure that they understand the financial consequences of adoption for the grandchild. Adoption can provide additional future income for the children who may be eligible for Social Security benefits.³ On the other hand, adoption may immediately eliminate a child's public assistance grant.

Under the current welfare law, Temporary Assistance to Needy Families (TANF), relatives upon whom a child is dependent for care can seek assistance in the form of a “child only” grant.⁴ Under this type of grant, the income of the child is the only resource deemed available to the child for purposes of determining eligibility.⁵ Once a child is adopted, however, the grandparent, now the legal parent, becomes legally responsible for support. The adop-

tive parent's income and resources are then necessarily included in the determination of eligibility for financial assistance and the adopted child is no longer eligible for a "child only" grant. Many grandparents have lost invaluable income by adopting their grandchildren.

"Many grandparents have lost invaluable income by adopting their grandchildren."

Knowledge about the consequences of adoption and guardianship can help grandparents plan adequately. By supplying information about the consequences of various choices, the legal advisor can confidently assist grandparents who have devoted their elder years to raising their grandchildren in making the best choices for the future of those children.

Gerard Wallace is the Director of the Grandparent Caregiver Law Center at the Brookdale Center on Aging of Hunter College in New York City. He is a member of the New York City Kinicare Task Force, the New York State Bar Elder and Family Law sections and the Advisory Council to Catholic Charities Grandparent Caregiver Program in Albany and Generations United in Washington, D.C. He graduated from Albany Law School in 1997 where, as a Sandman fellow, he published a monograph on the legal issues of grandparent caregivers. In private practice, he continued to concentrate on this issue. He has participated in numerous conferences and spoken to dozens of grandparents groups. Recently, as Director, he filed an amicus curiae brief in the grandparent visitation case, *Troxel v. Granville*.

Endnotes

1. The power to appoint guardians of the person and of the property resides solely with the court. N.Y. Dom. Rel. Law §§ 80-85.
2. N.Y. Surr. Ct. Proc. Act § 1726.
3. Under certain limited circumstances, a child who is not adopted can also qualify. If the grandparent cared for the child for 12 months preceding application for Social Security benefits and the natural parents are disabled or deceased or if under state law the child would qualify as an intestate heir, the child is eligible. In New York, a child can qualify as an intestate heir via equitable adoption in instances where an agreement to adopt existed and the adopting grandparent has already assumed parental duties but the adoption was not finalized. See 42 U.S.C.S. §§ 402(d), 416(e) (2000); *Rodriguez v. Morris*, 136 Misc. 2d 103, 519 N.Y.S.2d 451 (Sup. Ct., Suffolk Co. 1987).
4. N.Y. Soc. Serv. Law § 349.
5. Grandparents are not legally responsible for support, and thus their income and resources are not counted as available to the child.

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