

# The Legal Issues of Raising Grandchildren and Other Young Family Members

Legal issues encountered by grandparents who seek to acquire the legal authority to care for and make decisions for their grandchildren.

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# The Legal Issues of Raising Grandchildren or Other Young Family Members

## IN GENERAL:

- \* The natural or surviving parent has the right to custody and control of their minor child and the direction of their education.
- \* The natural parents have to be found unfit to remove custodial rights.
- \* In any proceeding concerning a child, such as custody, guardianship, or visitation, courts use the standard of what is in the best interest of the child.

## WHY DO I NEED LEGAL CUSTODY / GUARDIANSHIP?

- \* To acquire the authority necessary to care for a child and meet the child's financial, medical, and educational needs.
- \* Without legal authority, the grandparent may not be able to obtain medical records or medical care for the child, control the child's finances, or enroll the child in school.

## FIVE WAYS TO OBTAIN LEGALLY THE RIGHT TO CARE FOR A CHILD IN ILLINOIS:

- \* Illinois Marriage and Dissolution Act - custody proceeding
  - o Custody – custodian may determine the child's upbringing, including but not limited to, his / her education, health care and religious training, unless otherwise limited by the court. The custodian has the general care and control of the person and estate of the child.
- \* Illinois Probate Act - Guardianship proceeding
- \* Juvenile Court Proceedings
- \* Habeas Corpus Act – habeas proceeding
- \* Adoption Act – adoption proceeding

## CUSTODY UNDER THE ILLINOIS MARRIAGE AND DISSOLUTION ACT

### WHEN CAN YOU FILE A PETITION FOR CUSTODY?

- \* A non-parent can file a petition only if the child is not in the physical custody of one of his / her parents.
- \* When one of the parents is deceased, a grandparent who is the parent of the deceased parent can file a petition for custody if, *at the time of the parent's death*:
  - o The surviving spouse had been absent for more than one month without the deceased spouse knowing his or her whereabouts;
  - o The surviving parent was in State or Federal custody; or
  - o The surviving parent received supervision or had been convicted of violence toward the deceased spouse or the child, or had been convicted of violating an order of protection entered for the protection of the deceased spouse or the child.

## GRANDPARENT VISITATION RIGHTS

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- \* Child must be one year old or older.
- \* Grandparent can file petition if one parent has unreasonably denied the grandparent visitation, and at least one of the following conditions exist:
  - o The child's other parent is deceased or has been missing for at least three months;
  - o A parent of the child is incompetent as a matter of law;
  - o A parent of the child has been incarcerated in jail or prison for the three months prior to the filing;
  - o The mother and father of the child are divorced or legally separated and at least one parent does not object to the grandparent having visitation;
  - o The child was born out of wedlock and the parents are not living together; for paternal grandparents, paternity must have been established by court.
- \* Grandparent visitation rights end upon termination of parental rights or non-relative adoption of the child.

## LEGAL GUARDIANSHIP UNDER ILLINOIS PROBATE ACT:

WHEN CAN YOU FILE A PETITION FOR GUARDIANSHIP?

- \* A non-parent can file a petition for a hearing only if one or more of the following apply:
  - \* The child has no living parent, adoptive parent, or adjudicated parent;
  - \* The child has no living parent whose whereabouts are known;
  - \* The child has no living parent who is willing and able to make child care decisions;
  - \* Any living parent's parental rights have been terminated;
  - \* The parent or parents have notice of the hearing and fail to object;
  - \* The parent or parents voluntarily relinquish custody;
    - o Some courts require written documentation of voluntary relinquishment.
    - o If both parents are living, both must voluntarily relinquish custody.
  - \* The State or DCFS intervenes in the parent-child relationship, and the child is in need of a guardian because the child has been abused or neglected.

WHAT A COURT WILL LOOK TO AT TIME OF PETITION FOR VOLUNTARY RELINQUISHMENT:

- \* Who has physical possession of the child;
- \* How that possession came about;
- \* The nature and duration of the possession of the child and;
- \* Who is providing for the child's care, custody, and welfare?

WHERE TO FILE THE PETITION:

- \* Where the minor resides, or
- \* For a nonresident, it's where his / her personal or real property is located.

## TYPES OF GUARDIANSHIPS:

### TWO TYPES OF GUARDIANS - GUARDIAN OF THE PERSON AND GUARDIAN OF THE ESTATE:

- \* Person:
  - \* Authority over minor's residence, care, custody, and education (health care and personal care)
  - \* File regular reports with court.
- \* Estate:
  - \* Responsible for care, management, and investment of minor's estate. (similar to trustee)
  - \* Need court approval for most transactions affecting the minor's estate.
  - \* File financial accountings as ordered by court.
  - \* No need for an estate guardian if the minor:
    - \* Has no current or anticipated assets, other than personal possessions, and
    - \* Their income is derived from social security.

### “STAND-BY” AND “SHORT TERM” GUARDIANSHIP:

- \* Natural parent has to designate guardian in writing.
  - \* Need to give other parent proper notice and that parent has to consent also or fail to object after notice (unless found unfit).
  - \* Not interfere with rights of other living / fit parent.
- \* “Stand-by” Purpose – allows a parent to designate who receives guardianship of the child in event of parent death, incapacity, or other inability to function in a parental role.
  - \* Does not take effect until time of parent's incapacity.
- \* “Short-term” Purpose – person assumes immediate guardianship for maximum of 60 days (or shorter if written in document).
  - \* Cannot act as guardian for estate of minor, except for applying / receiving government or other benefits.
  - \* Takes effect without any court action, although a parent can ask to terminate or shorten the time limit.
- \* There are specific forms set out in the Probate Act for each type of guardianship.

## JUVENILE COURT PROCEEDINGS

### A MINOR CAN BE REMOVED FROM HIS / HER PARENT(S) IF THE COURT FINDS:

- \* The minor was abused or neglected;
  - \* Minor is at risk of harm from parent(s) or custodian.
- \* The minor requires authoritative intervention;
- \* The minor is addicted to drugs or alcohol; or
- \* The minor is delinquent.

### ROLE A GRANDPARENT CAN PLAY IN JUVENILE PROCEEDING:

- \* Party petitioner or respondent (person responsible for care of minor prior to court proceeding) to the action.
  - \* This way, the grandparent is entitled to notice of the proceedings.

- \* Utilized as a temporary or permanent placement of the minor.
- \* Intervene as a party in the action.

TEMPORARY PLACEMENT / CUSTODY:

- \* This is the first opportunity for grandparents to seek custody, either in their own right or through placement by DCFS.
- \* A hearing for custody must be conducted within 48 hours, exclusive of weekends and holidays, for all matters except delinquency cases.
- \* In delinquency cases, a hearing must be held within 40 hours of the minor being taken into custody.
  - \* During the sentencing of a delinquent minor, the court may decide to place the child with grandparents if detention is not warranted.
- \* The earlier the grandparent becomes involved in the case, the greater the success of obtaining temporary custody.
- \* If the parent of a child who was abused, neglected, or dependant and made a ward of the court does not fulfill the requirements of the court in attempting to regain custody of the child within 12 months, the parent may be declared unfit and adoption proceedings may begin.

ADJUDICATORY HEARING:

- \* Once temporary placement of minor is arranged, the matter is set for an adjudicatory hearing.
- \* Court hears allegations and determines whether the minor is abused, neglected, or dependent.

DISPOSITIONAL HEARING:

- \* Court determines what is in the best interest of the minor, and for the public.
- \* Determines who will receive custody of the minor.
- \* Parental rights may be terminated if the court finds it in the best interest of the minor.

THE ILLINOIS ADOPTION ACT

ADOPTION

- \* Terminates the parental rights of the minor's parents, and transfers those rights to the grandparent adopting the minor.
- \* Parental rights cannot be terminated unless the court finds the parents unfit or the parents consent to the adoption.
- \* Adoption is the most final and permanent solution for the child; once it is accomplished, the rights of the natural parents are permanently severed.

WHERE TO FILE THE PETITION:

- \* Where the petitioner (person who wants to adopt) resides, if he or she is an Illinois resident;
- \* The county where the minor child resides or was born; or
- \* The county where one of the natural parents resides.

#### CONSENT OF THE NATURAL PARENTS

- \* Parents can terminate their rights voluntarily by consenting to the adoption or by the surrender of the child to an agency.
- \* Consent must be in writing.
- \* Consent or surrender is irrevocable unless the parent can show it was obtained by duress or fraud.
- \* Consent or surrender must be made by both parents, unless one parent is deceased or it is otherwise not required by the Adoption Act.

#### PETITION FOR ADOPTION

- \* The grandparent must file a petition for adoption under the Adoption Act.
- \* Grandparent not need be a resident of Illinois.
- \* If grandparent is married, both spouses need to bring the petition.
- \* The court will need the names and last known addresses of the parents, if known.
- \* If the parent is a minor or disabled, the court needs to know.

#### COURT HEARING

- \* The court will determine the validity of the parental consent or surrender.
- \* A guardian *ad litem* will be appointed for the minor child
  - \* If the parent is a minor or a disabled person, a guardian *ad litem* will be appointed.
- \* If the parents are found unfit, the child may be:
  - \* A ward of the court and placed in the custody of the petitioner; or
  - \* Adopted immediately.

#### BIRTH CERTIFICATE

- \* The child, after being adopted, is issued a new birth certificate.
- \* The adoption files and records are to remain confidential.

#### HABEAS CORPUS

##### WRIT OF HABEAS CORPUS

- \* Challenges the custody of the minor by another and commands the determination of the legality of the custody.
- \* The person challenging custody needs to show the custodian or guardian's custody of the minor is not valid.
- \* The court looks to the best interest of the child.

#### OTHER ALTERNATIVES

##### ILLINOIS POWER OF ATTORNEY ACT:

- \* Illinois Power of Attorney Act, 755 ILCS 45/1-1
  - \* Some schools and medical facilities honor written instruments that delegate these decisions.

#### SCHOOL:

- \* Guardianship is often required by a child's school in order for a grandparent to enroll them, but this is not a law.
- \* The child may be enrolled, tuition-free, in the district where the child is residing.

#### PARENTS SEEKING RETURN OF CHILDREN:

- \* Parents may initiate legal proceedings to seek the return of their children.
- \* The court will look at:
  - \* The circumstance under which the parents lost or voluntarily gave up custody;
  - \* Length of time the child has been living with the grandparent;
  - \* Any change in the circumstances the parent alleges at the time the petition for return is filed.

### FINANCIAL AND MEDICAL ASSISTANCE

#### AID TO FAMILIES WITH DEPENDENT CHILDREN (AFDC)

- \* Federally funded but administered by the state.
- \* Provides cash assistance to households with dependent children.
- \* Child must be deprived of parental support and under the care of and living with a "caretaker relative." (grandparents are caretaker relatives)

#### MEDICAID

- \* Federal program providing health care benefits to needy persons.
- \* Children who receive AFDC are automatically covered under Medicaid.

### ADDITIONAL ASSISTANCE

#### WIC (WOMEN, INFANTS, AND CHILDREN):

- \* WIC is a supplemental nutrition program that provides nutrition education and counseling and food vouchers to help children get the food they need for proper growth and development. (administered in Illinois by the Department of Human Services)
  - \* You must be a parent, guardian, or caretaker who has an infant or child younger than 5 years of age. Your income must be within the WIC guidelines and the WIC clinic must find you have a medical or diet health risk like low iron, low weight gain, or need to improve your diet.
  - \* Contact WIC at 1-800-323-GROW.

#### CHILD ONLY GRANTS:

- \* Temporary Assistance to Needy Families (TANF) provided financial assistance in the form of cash assistance to help families care for children who need help.
  - \* Contact WIC at 1-800-323-GROW
- \* Tips for Grandparent Raising Grandchildren in Illinois:

- \* Tips on Easter Seals programs, immunizations, emergency care, legal assistance, custody requirements for school enrollment, and support groups.
- \* For information on programs and services assisting older adult caregivers in their efforts to provide quality care for their family's children call 1-800-252-8966.

#### EXTENDED FAMILY SUPPORT PROGRAM

- \* A statewide program that provides short term support and service to individuals who are caring for related children outside the formal child welfare system. The program affords children the opportunity to live with family members instead of becoming part of the formal child welfare system.
- \* A caseworker is appointed to the family for 3 months to assist the family in obtaining Child only Grants, obtaining private guardianship through probate courts, and access limited funding for bedding, food, uniforms, and other services that assist in stabilizing the child's living arrangements.
- \* Need a referral from 1) the State Central Registry, when caregivers contact the child abuse hotline seeking assistance or 2) Child Protective Investigators who refer relative caregivers who do not need protective services but would benefit from supportive services.

#### PARENT HELP LINE:

- \* Provides support, tips, referrals to community resources and parenting classes at 1-888-727-5889

#### AARP GRANDPARENT INFORMATION CENTER:

- \* Established the Grandparent Information Center to provide information and resources to help grandparents cope with their primary caregiving roles.
- \* Online: [www.aarp.org/families/grandparents/](http://www.aarp.org/families/grandparents/)
- \* Email: [gic@aarp.org](mailto:gic@aarp.org)
- \* Mail: AARP Foundation Grandparent Information Center, 601 E Street, NW Washington, DC 20049
- \* Phone: 1-888-OUR-AARP (1-888-687-2277)
- \* Fax: 1-202-434-6466

#### THE FOUNDATION FOR GRANDPARENTING:

- \* News and Resources for Grandparents Raising Grandchildren.
- \* Online at [www.grandparenting.org/](http://www.grandparenting.org/)

#### CHILDREN'S HEALTH INSURANCE:

- \* In Illinois, Kid Care 1-800-226-0768 or Medicaid at 1-800-252-8635.

#### UNITED STATES GOVERNMENT SITE FOR GRANDPARENTS RAISING GRANDCHILDREN:

- \* Links to Benefits & Assistance, Health & Safety Resources, Reports & Publication, and State Resources. Online at [www.firstgov.gov/Topics/Grandparents.shtml](http://www.firstgov.gov/Topics/Grandparents.shtml)

#### AFFIDAVIT FOR ENROLLMENT OF CHILD WHOSE PARENT RESIDES OUTSIDE THE DISTRICT:

- \* Contact the State Board of Education, or
- \* Print off the website of the Self Help Legal Center, part of the Legal Clinic of Southern Illinois University of Law online at [www.law.siu.edu/selfhelp/info/school/index.htm](http://www.law.siu.edu/selfhelp/info/school/index.htm)



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Illinois Probate Act 755 ILCS 5/1-1 *et seq.*  
Illinois Marriage and Dissolution of Marriage Act 750 ILCS 5/601 *et seq.*  
Juvenile Court Act 705 ILCS 405/1-1 *et seq.*  
Illinois Adoption Act 750 ILCS 50/1 *et seq.*  
Habeas Corpus 735 ILCS 5/10 *et seq.*

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