

**Kinship Guardian Assistance Program Fair Hearing**  
**Hearing ID:**  
**Schenectady County**  
**Re: and**

**MEMORANDUM OF LAW**  
**IN SUPPORT OF ADOPTIVE PARENTS’**  
**REQUEST FOR CONTINUING KINSHIP**  
**GUARDIANSHIP ASSISTANCE PAYMENTS**

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*Day v. Summit Sec. Services Inc.*, 53 Misc.3d 1057 [Sup. Ct. NY Cty. 2016]

*Matter of Jacob*, 86 NY2d 651 [1995]

*People v. Jones*, 26 NY3d 730 [2016]

*Marylou L. v. Tenecha L.*, 182 Misc.2d 457 [Kings Cty. Fam.Ct. 1999]

*Riley v. County of Broome*, 95 NY2d 455 [2000]

## STATEMENT OF FACTS

A full recitation of relevant facts is set forth in the "Stipulation of Facts," submitted herewith.

### ARGUMENT

#### POINT I

#### **THE KINSHIP RELATIVE GUARDIANS COMPLIED WITH ALL RELEVANT PROVISIONS OF THE SOCIAL SERVICES LAW AND THEIR RECEIPT OF KINSHIP GUARDIAN ASSISTANCE PAYMENTS WAS PROPER.**

The New York State Social Services Law was amended in 1989 when the Legislature revised section 392 in order to authorize the court to direct that a child in the foster care system be placed in the custody of a relative (*see* Social Services Law § 392). There are now three possible dispositions for a child in foster care who has not yet been freed for adoption: (1) continued foster care, (2) release to a parent, guardian, relative or other suitable person, or (3) the institution of parental termination proceedings (*Marylou L. v. Tenecha L.*, 182 Misc.2d 457 [Kings Cty. Fam.Ct. 1999]).

In 2010, the relative placement was incentivized by the enactment of the Kinship Guardianship Assistance Program (Article 6, Title 10 of the Social Services Law). Now, if the Department of Social Services (hereinafter, "DSS") determines that the child is eligible and it is appropriate to place the child with a relative guardian, such relative guardian may apply to the social services official who has custody of the child to receive kinship guardian assistance payments (Social Services Law § 458-b(2)).

Pursuant to Social Services Law § 458-b(3), "[i]f the social services office determines that the child is eligible for kinship guardian assistance payments and it is in the best interests of the child for the relative to become the legal guardian of the child, the social services official shall enter into an agreement with the prospective relative guardian authorizing the provision of kinship guardian assistance payments... by the issuance by the court of letters of guardianship of the child to the prospective relative guardian and the child being finally discharged from foster care to such relative."

Assuming such an arrangement is made, such arrangement shall be made "pursuant to a written agreement between the social services official and the prospective relative guardian" (Social Services Law § 458-b(4)(a)).

As is more fully set forth in the accompanying Stipulation of Facts, DSS and the Petitioners entered into a KinGAP agreement in June of 2012 and the child was then discharged from foster care in August of 2012 when Schenectady County Family Court issued an Order Appointing Kinship Guardian, naming the Petitioners as the child's kinship guardians.

"Once the prospective relative guardian with whom a social services official has entered into an agreement...has been issued letters of guardianship for the child and the child has been finally discharged from foster care to such relative, a social services official shall make monthly kinship guardianship assistance payments for the care and maintenance of the child" (Social Services Law § 458-b(S)(a)). Said payments shall be made to the child's relative guardian "until the child's eighteenth birthday" (Social Services Law § 458-b(7)(a)).

Social Services Law § 458-b(7)(b)(i) further provides that kinship guardian assistance payments shall *only* terminate if "the relative guardian is no longer legally responsible for the support of the child, including if the status of the legal guardian is terminated or the child is no longer receiving any support from such guardian."

## **POINT II**

### **KINGAP PAYMENTS TERMINATE ONLY UPON LACK OF LEGAL RESPONSIBILITY FOR SUPPORT OF THE CHILD.**

Social Services Law § 458-b(7)(b) states that KinGAP payments shall not be made "if the relative guardian is no longer legally responsible for the support of the child." The definition of a relative guardian is "a person or persons who was appointed, as a guardian or permanent guardian for a child after entering into an agreement with a social services official for the receipt of payments and services in accordance with this title" (Social Services Law § 458-a(4)).

Petitioners clearly fit into the definition of a relative guardian because they were appointed guardians of Dominic after entering into a KinGAP Agreement with DSS. It is also undisputed that they remain financially responsible for Dominic. In fact, their adoption served to further cement their financial obligation to Dominic as "[a]doption is the legal proceeding whereby a

person takes another person into the relation of child and thereby acquires the rights and incurs the responsibilities of a parent in respect of such other person” (Domestic Relations Law § 110).

Social Services Law § 458-b(7)(b) goes on to provide examples of ways a relative guardian might no longer be legally responsible for the support of the child, “including if the status of the guardian is terminated or the child is no longer receiving any support from such guardian.”

As discussed above, the child is still receiving all of his support from the Petitioners. There has also not been a termination of the guardianship in this matter. The KinGAP Order states that “unless terminated by the Court, the appointment shall last until the subject’s 18<sup>th</sup> birthday.” The subsequent Order of Adoption does not refer to the KinGAP Order or Linda Mackanesi and ’s status as Dominic’s guardians, and there was never a separate order terminating the KinGAP Order. Article VII of the Domestic Relations Law regarding Adoptions and Title 10 of Article 6 of the Social Services Law regarding KinGAP are both silent as to the effect of an adoption on a prior KinGAP Order. As such, Petitioners guardianship of the child remains in place and these examples of when KinGAP payments should terminate and wholly inapplicable to this case.

Even if it is determined that the guardianship was somehow terminated by the adoption (which it was not), the termination of the guardianship is simply an example provided by the statute of a way in which a relative guardian might no longer be legally responsible for the support of a child. However, fitting into the example does not necessarily mean that the circumstances satisfy the actual standard, to wit: that the guardians are no longer legally responsible for the support of the child. The examples simply illustrate the standard, but do not change or override it. A non-legal analogy illustrates this point: you would have to have your vehicle towed if you are no longer able to drive your car, including because you ran out of gas, you got into an accident or your battery died. Getting into an accident is an *example* of a reason you would no longer be able to drive your car, but getting into an accident (the example) does not necessarily mean that you are no longer able to drive your car (the standard). There could be many examples of times when you get into an accident but are still able to drive your car, thus obviating the need to have your car towed. The same is true for the instant situation: although the Court may find the guardianship to have terminated upon the adoption (which, it is submitted, it has not), such termination (the example) does not mean that the Petitioners are no longer financially responsible for the child (the standard).

The relevant regulations further support this interpretation of the statute. To implement the restriction on the receipt of KinGAP payments if a relative guardian is no longer legally responsible for the support of the child, 18 NYCRR § 436.6(a) requires that DSS “on an annual basis, must remind the relative guardian of the relative guardian’s obligation to support the child and to notify [DSS] if the relative guardian is no longer providing any support or is no longer legally responsible for the support of the child.” This section makes absolutely no mention of the illustrative example of termination of guardianship, and instead focuses solely on the actual standard: support of the child. Additionally, the Office of Children and Family Services (hereinafter, "OCFS") released a guidance document entitled "Know Your Permanency Options: The Kinship Guardianship Assistance Program." A copy of this guidance document is attached hereto as **EXHIBIT A**. This document lists examples of ways in which a relative guardian may no longer be eligible to receive kinship guardianship assistance payments:

1. If the child no longer resides in the guardian’s home;
2. If the guardianship has been revoked, terminated, suspended or surrendered;
3. If the guardian is no longer providing any support for the child;
4. If the guardian is no longer legally responsible for supporting the child;
5. If the child gets married;
6. If the child enlists in the military;
7. If the child dies.

This list expands upon the examples provided in the statute and, clearly, all of these examples are ways in which the standard (no longer being responsible for the support of the child) might be met. This further supports the argument that the termination of the guardianship is no the standard but rather is an example of the standard. Also, notably absent from this list is the adoption of the child.

Therefore, KinGAP payments were wrongfully terminated so long as the Petitioners remain financially responsible for the support of the subject child. It is undisputed that they do. As such, the determination to terminate KinGAP payments should be reversed.

### POINT III

#### **PUBLIC POLICY FAVORS CONTINUED PROVISION OF KINGAP PAYMENTS WHERE A RELATIVE GUARDIAN SUBSEQUENTLY ADOPTS THE CHILD.**

“In matters of statutory construction, the primary task is to determine that which the legislature intended (*see People v. Jones*, 26 NY3d 730, 733 [2016]). “Of course, the words of the statute are the best evidence of the Legislature's intent” (*Riley v. County of Broome*, 95 NY2d 455 [2000]). If the language is clear and unambiguous, the courts must follow the plain meaning of the statute (*see Statutes § 76; Best Way Beer & Soda Distribs. v. New York State Liq. Auth.*, 99 AD2d 727 [1st Dep’t 1984]). If, however, the language is ambiguous, the courts will examine the underlying legislative intent and purpose of the statute (*see Riley*, 95 NY2d at 463–64)” (*Day v. Summit Sec. Services Inc.*, 53 Misc.3d 1057 [Sup. Ct. NY Cty. 2016]).

In the event the Court disagrees with the statutory interpretation set forth above, it is submitted that Social Services Law § 458-b(7)(b) is, at least, ambiguous on this particular issue, and legislative intent must be explored in determining how to interpret such section.

A critical objective of the State is to achieve timely permanence for children in the foster care system. The Kinship Guardianship Assistance Program was created to further that objective, specifically by filling a hole for children where neither termination of parental rights nor adoption was an appropriate outcome at that time. The 2017 NY Assembly Sponsors’ Memorandum for the KinGAP legislation reinforces this point: "The enactment of the subsidized kinship guardian assistance program ("KinGAP") in 2010 marked a milestone in adding a valuable permanency alternative to the menu of options available to expedite the exodus of children from foster care into permanent families. Experience with the program, especially in New York City where it is frequently utilized, has demonstrated its enormous value, not only for the children and families who are its beneficiaries, but also for the State in its constant quest to improve its record in achieving timely permanency for the children in its care."

After a KinGAP Order is issued, circumstances can change and adoption by the relative guardians may become an option for the subject child. An adoption after a KinGAP Order is issued is specifically anticipated by Social Services Law § 458-b(8). The OCFS guidance document entitled “Know Your Permanency Options: The Kinship Guardianship Assistance Program” also specifically advises potential relative guardians that they are “not prevented from adopting [the subject] child at any time in the future.” This make sense because, while adoption may not have been an option at the time the KinGAP Order was issued, adoption provides more

permanency than a KinGAP Order and should be pursued if it subsequently becomes appropriate. The Court of Appeals has determined that “the adoption statute [reflects] the humanitarian principle that adoption is a means of securing the best possible home for a child” (*Matter of Jacob*, 86 NY2d 651, 657-58 [1995]).

Thus, it is clearly the State’s intent to encourage participation in the KinGAP program and subsequent adoptions if they become possible and appropriate. An interpretation of Social Services Law § 458-b(7)(b) which terminates KinGAP payments to relative guardians who subsequently adopt would provide a disincentive for both. Relative foster parents who are considering their options will be unlikely to choose KinGAP knowing that they will never be able to adopt in the future without losing their KinGAP payments when the other alternative is a foster care adoption with subsidy payments until the child reaches the age of majority. Choosing the foster care adoption option, however, forces DSS to pursue termination of the birth parents’ parental rights, which can take years and delays permanency substantially. Relative guardians who already have a KinGAP Order will also be unlikely to choose to pursue an adoption, the ultimate permanency option for the child, if they know their KinGAP payments will stop after the adoption finalizes.

The disincentive for relative guardians with a KinGAP Order to pursue a subsequent adoption is amplified by the fact that an adoption subsidy will be impossible to obtain from a practical standpoint. SSL § 458-b(8) indicates that an adoption subsidy should be available when converting a KinGAP arrangement into an adoption. In practice, this would be inadvisable if not impossible. First, an adoption subsidy is not available for a private adoption (Office of Children and Family Services, “New York Adoption Subsidies”). Please see **EXHIBIT B**. Second, an agency adoption after a KinGAP Order has been issued would be difficult if not impossible to accomplish, as the KinGAP Order transfers custody of the child to the relative guardians and DSS does not retain any custodial rights to such child (*see* Social Services Law § 458-b(5)). As such, an agency adoption (in which an adoption subsidy is available), cannot be achieved without the child first being transferred back into the custody of DSS. DSS has no obligation to accept the child back into its custody (*see* Social Services Law §§ 383-c(2), 384-a(2)), and placing a child back into foster care is a huge step backwards in terms of permanency. It also triggers several obligations on the part of DSS, including potentially the obligation to attempt to reunite the child with birth parents (*see* Social Services Law §§ 384-a, 384-b) who have been out of the picture for a longer period of time after the KinGAP Order was issued.

Thus, while it appears that the Legislature intended for children who were adopted after a KinGAP Order was issued to be eligible for an adoption subsidy, in reality that would be nearly impossible to achieve. Allowing KinGAP payments to continue in this situation is not only a reasonable interpretation of the language of Social Services Law § 458-b(7)(b), but it achieves the same purpose as allowing an adoption subsidy in this situation. The KinGAP payments are equal to the amount of adoption subsidy payments and both also provide identical medical assistance (Social Services Law §§ 458-b(6), 458-d, 453). Thus, there will be no added financial burden on DSS or the State, and the State's objective of achieving efficient permanency for children in foster care will be promoted.

#### **POINT IV**

#### **PETITIONERS JUSTIFIABLY RELIED ON THE CONTINUED PROVISION OF KINGAP PAYMENTS FOLLOWING THE ADOPTION AS THEY CONTINUED FOR ALMOST TWO YEARS DESPITE THE DEPARTMENT HAVING NOTICE OF THE CHILD'S ADOPTION.**

As is discussed above, the Social Services Law places an obligation on the relative guardian to inform the social services official "of any circumstances that would make the relative guardian ineligible for such payments" (Social Services Law § 458-b(7)(b)(i)).

Here, in an abundance of caution, your affiant notified the Commissioner of the Schenectady County Department of Social Services on May 16, 2016 that the child's adoption had finalized on May 5, 2016. There was no response until February 2, 2018, when the petitioners were notified by DSS that they were no longer entitled to receive kinship guardianship assistance payments, given that they had adopted the child, and such payments were thereafter terminated.

As is described in the annexed Stipulation of Facts, DSS was involved in this proceeding from the outset (beginning in March 2015) and was fully aware that Petitioners were seeking to adopt the child. At no point did DSS oppose the adoption or take the position that KinGAP payments were going to end post-adoption. As such, the Petitioners justifiably relied on the belief that payments would continue post-adoption. Following the adoption, KinGAP payments did in fact continue, uninterrupted, for approximately two years. As such, DSS ratified the Petitioner's belief that they were entitled to ongoing KinGAP payments, despite being promptly notified of the child's adoption.

**CONCLUSION**

For all of the reasons more fully set forth herein, it is respectfully requested that the Department of Social Services be directed to resume making KinGAP payments or begin making adoption subsidy payments to the adoptive parents, and that said payments be retroactive to the date that KinGAP payments were terminated (January 1, 2018).

Dated: November 19, 2018  
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Respectfully submitted,

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