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**Stretching the boundaries of parental rights and responsibilities**

It is well settled that parents have a constitutional right to raise their children.<sup>i</sup> Not only are parents entitled to bring up their children as they choose, but they are granted the freedom and the fundamental right to enjoy a relationship with their children. In Stanley v. Illinois,<sup>ii</sup> the Supreme Court held:

The Court has frequently emphasized the importance of the family. The rights to conceive and to raise one's children have been deemed "essential," "basic civil rights of man," and "[r]ights far more precious . . . than property rights."<sup>iii</sup>

The New Jersey Supreme Court has acknowledged that a parent has a constitutionally protected fundamental right to the companionship of their child, although that right is limited.<sup>iv</sup> Parents have a constitutionally protected, fundamental liberty interest in raising their biological children, even when those children have been placed in the care of others.<sup>v</sup>

We as family law attorneys are faced with the ever evolving concept of what constitutes a family and who should be treated like a parent. This most frequently presents itself in the form of grandparents seeking custody of grandchildren and non-parent partners seeking access to children.

**Kinship Legal Guardianship is a viable alternative for some relative caretakers in long term custody situations which is often overlooked by family law practitioners.**

Most seasoned family law attorneys or attorneys who specialize in DCP<sup>vi</sup> matters have come across situations involving parental incompetence where Kinship Legal Guardian ("KLG") might be appropriate, but this option is too often overlooked as being something available only in DCP litigation.

We are all familiar with the scenarios. A birth parent has serious substance abuse problems, mental health problems or, as in many cases, both. Grandparents often step in to seek custody to avoid protracted DCP involvement and are left to sort out these relationships without Division assistance years later. In addition, there are occasions where unemancipated children have children they are too young or immature to parent. Grandparents or close relatives step up to assume custody under a non-dissolution docket while the parent continues to struggle with legal, medical and personal problems. During the biological parent's struggles, the child becomes enmeshed in the family of the relative caretaker. Once the child has been in the care of a relative for a significant period of time, there may need to be a balancing between best interests of the child, permanency and the right of a parent to raise his /her child. Although the KLG statute has been in

existence since 2002, there appear to be no or very few privately filed KLG applications, with most occurring by consent in the context of DCPD initiated litigation.

### **KLG and its underutilization by the private bar:**

Many situations in which a relative has legal or physical custody of a child are inappropriate for private adoption proceedings. For example, if a natural parent is struggling with substance dependency issues but still has a relationship with the child, termination of parental rights followed by adoption may not be realistic.<sup>vii</sup> When the prospect of a private adoption proceeding is not appropriate for whatever reason, KLG is a little explored alternative for family members seeking to establish a more secure form of custody. Custody is always modifiable, KLG is the more permanent option, only modifiable under limited circumstances.<sup>viii</sup> KLG is intended to afford the custody arrangement permanency, unlike an award of legal or physical custody:

The establishment of the status of “kinship legal guardians” answers a policy dilemma that haunted placement officials, judges and caregivers for many years. No longer must family relatives act without legal authority to provide care to children in cases in which termination proceedings were not appropriate or possible.... [w]hile kinship legal guardianship is intended to be permanent and self-sustaining, it is not as comprehensive as an adoption. <sup>ix</sup>

In order to qualify to become a KLG caretaker the individual must meet certain criteria:

“Caregiver” means a person over 18 years of age, other than a child’s parent, who has a kinship relationship with the child and has been providing care and support for the child, while the child has been residing in the caregiver’s home, for either the last 12 consecutive months or 15 of the last 22 months. <sup>x</sup>

This may not be an onerous burden when considering a parent who suffers from serious addiction or mental health issues.

The subject child has to be less than 18 years old: “Child means a person under 18 years...”<sup>xi</sup> Venue rests in the county where the caregiver resides: “A *motion* for kinship legal guardianship of a child pursuant to N.J.S.A. 3B:12A-1 to -6 shall be brought or the venue laid in the county where the caregiver resides.” R. 5:9A-3(a). The statute permits the application by motion. <sup>xii</sup>

In making a determination about a relative’s request to be appointed the KLG caretaker, the Court “shall consider:”<sup>xiii</sup>

- (1) “if proper notice was provided to the child’s parents;”
- (2) “the best interests of the child;”

- (3) *“the kinship caregiver assessment;”* which mirrors an adoption agency home study;
- (4) *“in cases in which the division is involved with the child as provided in ... [N.J.S.A.] (C. 30:4C-85), the recommendation of the division, including any parenting time or visitation restrictions;”*
- (5) *“the potential kinship legal guardian’s ability to provide a safe and permanent home for the child;”* (Emphasis added)
- (6) *“the wishes of the child’s parents, if known to the court;”*
- (7) *“the wishes of the child if the child is 12 years of age or older*
- (8) *“the suitability of the kinship caregiver and the caregiver’s family to raise the child;”*
- (9) *“the ability of the kinship caregiver to assume full legal responsibility for the child;”*
- (10) *“the commitment of the kinship caregiver and the caregiver’s family to raise the child to adulthood;”*
- (11) *“the results from the child abuse record check conducted pursuant to... ([NJSA] C. 30:4c-86);”*
- (12) *“the results from the criminal history record background check and domestic violence check conducted pursuant to ... [N.J.S.A.] 30:4C-86...”* <sup>xiv</sup>

There has to be more than parental incapacity for the Court to award KLG, KLG “shall not” be awarded “solely because of parental incapacity.”<sup>xv</sup> There must be relationship between the child and the kinship care provider at the time the application is made to the Court. This relationship would exist if the person seeking KLG had been a caretaker for the child in question for the time frame specified above. The evidentiary standard for a granting of a KLG is “clear and convincing.”<sup>xvi</sup> To grant a KLG the Court must find that:

- (1) Each parent’s incapacity is of such a serious nature as to demonstrate that the parents are unable, unavailable or unwilling to perform the regular and expected functions of care and support of the child;
- (2) The parents’ inability to perform those functions is unlikely to change in the foreseeable future;
- (3) (applicable to DCPD cases only); and
- (4) The awarding of kinship legal guardianship is in the child’s best interests.<sup>xvii</sup>

The standard required must be proven by:

Clear and convincing evidence is evidence upon which the trier of fact can rest “a firm belief or conviction as to the truth of the allegations sought to be established.”<sup>xviii</sup> It must be “so clear, direct and weighty and convincing as to enable either a judge or jury to come to a clear conviction, without hesitancy, of the truth of the precise facts in issue.” <sup>xix</sup>

Analysis for Prongs 1 & 2 of N.J.S.A. 3B:12A-6(d) : “Each parent’s incapacity is of such a serious nature as to demonstrate that the parents are unable, unavailable or unwilling to perform the regular and expected functions of care and support of the child” and “[t]he parents’ inability to perform those functions is unlikely to change in the foreseeable future.” A parent who has been drug involved for the last several years can fall into this category. A parent struggling with untreated and significant mental health issues can potentially fall into this category as well.

Legal Analysis under Prong 4 of N.J.S.A. 3B:12A-6(d): The awarding of KLG is in the child’s best interests requires analysis under a simple best interests standard using the factors set forth in N.J.S.A. 9:2-4(c). A best interest evaluation or parenting risk assessment may be sufficient to address these factors depending on the strength of the moving parties case the depth of the opposition. A third party seeking such an infringement upon a parent’s rights may need expert opinion to justify a transfer of custody from the parent without the weight of DCPD involvement.

**KLG is intended to be a permanent custodial arrangement affording the child and kinship caretaker greater stability compared to an award of custody.**

In New Jersey, KLG is “intended to be permanent and self-sustaining...”<sup>xx</sup> The permanency of a KLG arrangement is well established in New Jersey law:

Kinship Legal Guardianship means a caregiver who is willing to assume care of a child due to parental incapacity, with the intent to raise the child to adulthood, and who is appointed the kinship legal guardian of the child by the court... [a] kinship legal guardian shall be responsible for the care and protection of the child and for providing for the child’s health, education and maintenance.<sup>xxi</sup>

A KLG caretaker has the same rights to the child as a parent would have, except the KLG caretaker cannot consent to an adoption. A KLG caretaker:

shall have the same rights, responsibilities and authority related to the child as a birth parent, including but not limited to: making decisions concerning the child’s care and well-being; consent to routine and emergency medical and mental health needs; arranging and consenting to educational plans for the child; applying for financial assistance and social services for which the child is eligible; applying for a motor vehicle operator’s license; applying for admission to college; responsibility for activities necessary to ensure the child’s safety, permanency and well-being; and ensuring the maintenance and protection of the child.<sup>xxii</sup>

The birth parent retains the “obligation to pay child support” and “the right to visitation or parenting time with the child, as determined by the court.”<sup>xxiii</sup> The KLG arrangement terminates by law when the child reaches the age of 18 or stops attending school full time.<sup>xxiv</sup>

There are limited reasons for which a Court might elect to vacate an Order for KLG prior the child reaching the age of majority:

An order of judgment awarding kinship legal guardianship may be vacated by the court prior to the child’s 18<sup>th</sup> birthday if the court finds that the kinship legal guardianship is no longer in the best interests of the child, *or in cases where there is an application to return the child to the parent, based on clear and convincing evidence, the court finds that the parental incapacity or inability to care for the child that led to the original award of kinship legal guardianship is no longer the case and termination of the kinship legal guardianship is in the child’s best interests.*<sup>xxv</sup>

A KLG may also be vacated “if, based on clear and convincing evidence, the court finds that the guardian failed or is unable, unavailable or unwilling to provide proper care and custody for the child, or that the guardianship is no longer in the child’s best interests.”<sup>xxvi</sup>

The few published cases addressing vacating KLGs have been as a result of DCPD initiated litigation in the trial courts. The moving party has the burden of proof to justify the extreme relief of vacating the KLG.<sup>xxvii</sup> The Court hearing the application “may request that the Division be involved in the case or that Division may determine that it wishes to take a position in the case.”<sup>xxviii</sup>

The Supreme Court has noted that the trial court “may request that the Division be involved in the case or the Division may determine that it wishes to take a position in the case.”<sup>xxix</sup> The Division’s involvement in many of these cases may have been fleeting and limited to encouraging the relatives to seek custody under non-dissolution dockets before the Division removes the child from an unfit parent or views the relative caretaker negatively for not seeking custody. These involved relatives are often placed in a catch 22, either they file for custody now and sort out the relationships years later or face negative consequences by being viewed as not adequately protective by the Division.

The New Jersey Administrative Code provides the Division guidance on whether to take a position on a motion to vacate a KLG Order by setting forth nine very specific factors:

- (1) The child’s age;
- (2) the duration of the Division’s involvement with the child, prior to the granting of the kinship legal guardianship;
- (3) the total length of time the child was in

out-of-home placement; (4) the length of time the child has lived with the guardian, prior to and after the granting of the kinship legal guardianship; (5) when the kinship legal guardianship was granted; (6) what the original harm or risk of harm to the child was; (7) the parent's present fitness to care of the child; (8) any subsequent allegations of abuse or neglect received by the Division and their findings; (9) and what plan is proposed for the child if the guardianship is vacated.<sup>xxx</sup>

If the Division is involved, it is responsible for preparing a parenting assessment addressing the appropriateness of vacating a KLG.<sup>xxxi</sup> The Division should be involved if they were involved with the petition for KLG in the first place; or if there is prima facie evidence to support vacating the KLG and the Division wishes to take a position. Id. at 224.

Regardless of whether the Division becomes involved, the burden is on the parent seeking to vacate the KLG to satisfy the two pronged test by clear and convincing evidence that

(1) a change in [the parent's] life that would support a finding that she was regained the ability to care for her child; and (2) that termination of the kinship legal guardianship is in the best interests of the child.<sup>xxxii</sup>

Both prongs must be proven by the parent by a clear and convincing standard. Simply providing proof of successful completion of substance abuse treatment, for example, is not sufficient to vacate the KLG.

**There are other relationships deserving of judicial recognition as the concept of family continue to evolve.**

There are legally recognized means by which a non-parent can achieve the status of a parent. A psychological parent is a third party who has stepped in to assume the role of the legal parent. It is a concept rooted in case law, not statutory law. A psychological parent is one who is not a parent to the child based upon their "genetic contribution, gestational primacy, or adoption."<sup>xxxiii</sup> A psychological parent will not be found to exist, barring, "a showing of parental gross misconduct, abandonment, unfitness, or "exceptional circumstances."<sup>xxxiv</sup> In most of the cases undertaken by family law practitioners, the most common reason for claims of psychological parent status fall under "exceptional circumstances." Ibid.

A psychological parent is a third party who has stepped in to assume the role of the legal parent. The status of psychological parent can be sought by a step parent or partner to establish parenting time over the opposition of the legal parent or can be used by a legal parent to establish support against the psychological parent.

In the case of Sorentino v. Family and Children's Society of Elizabeth,<sup>xxxv</sup> a 16 year old mother's surrender of her child to an adoption agency was found to be coerced and the father of the child was not given the proper notification of the surrender, yet the child had been in the continued custody of the foster parents for 31 months. Although the surrender was found to be invalid, the court was required to have a hearing to determine whether transfer of custody to the natural parents would cause serious harm to the child, inasmuch as the foster parents had become psychological parents of the child.

In J.R. v. L.R. v. S.G.<sup>xxxvi</sup>, where a husband found out after more than 10 years of marriage that his "daughter" was not his biological child, he was nonetheless found to be her psychological parent and charged with contributing to her support, although their relationship had broken down and J.R. withdrew his love and affection from the child.

The concept of psychological parent cuts both ways in it can be used by a non-parent to force visitation or even custody and can be used by a parent to force a non-parent into support obligations for a child.

To be found to be a psychological parent the moving party must prove establish four elements:

(1) that the biological or adoptive parent consented to, and fostered, the petitioner's formation and establishment of a parent-like relationship with the child;<sup>xxxvii</sup>

(2) that the petitioner and the child lived together in the same household;

(3) that the petitioner assumed the obligations of parenthood by taking significant responsibility for the child's care, education and development, including contributing towards the child's support, without expectation of financial compensation [a petitioner's contribution to a child's support need not be monetary]; and

(4) that the petitioner has been in a parental role for a length of time sufficient to have established with the child a bonded, dependent relationship parental in nature.<sup>xxxviii</sup>

"Exceptional circumstances," sometimes known as "extraordinary circumstances", have been recognized as an alternative basis for a third party to seek custody and visitation of another person's child.<sup>xxxix</sup>

The "exceptional circumstances" category contemplates the intervention of the Court in the exercise of its *parens patriae* power to protect a child.<sup>xl</sup>

The "exceptional circumstances" test does not require proof that a legal parent is unfit. The Court has explicitly stated that "exceptional circumstances" may rebut the presumption in favor of a parent seeking custody even if there is no basis for terminating parental rights on statutory grounds and, indeed, even if the parent is "deemed to be a fit parent ...."<sup>xli</sup> "[E]xceptional circumstances' based on the probability of serious psychological harm to the child may deprive a parent of custody."<sup>xlii</sup>

If a psychological parent relationship is established, the psychological parent is considered on par with the natural parent(s).<sup>xliii</sup> Thereafter, custody and parenting time

issues are determined as between the parent and the psychological parent based on the best interest of the child is the standard. Id.

In the recent case of D.G. v. K.S.<sup>xliv</sup>, the same-sex spouse of the natural father of a child sought to be deemed the psychological parent of the child. In D.G. the biological parents were long-time friends who agreed, with S.H., D.G's same sex partner to conceive a child together, raise the child together and to create a "tri-parenting" relationship. They agreed to use D.G.'s sperm, K.S.'s egg and agreed to give the child S.H.'s last name. Their agreement worked and inured to the benefit of the child for several years. K.S. decided she wanted to relocate to California with the child. The court found that the S.H. was a psychological parent to the child.<sup>xlv</sup> S.H. had lived with the child her whole life, S.H. had undertaken financial obligations on the child's behalf. S.H.'s involvement with the child was with the consent and encouragement of both biological parents since before the child's birth. S.H. had a bonded relationship with the child who called him, "papa." The court found S.H. to be the psychological parent of the child. Once S.H. was established as the psychological parent he had equal standing regarding the custody determination and had an obligation to pay support for the child.

Where custody is sought, by a third party, the court must conduct a two-step analysis. The first step is to determine whether the presumption in favor of the legal parent is overcome by either a showing of "unfitness" or "exceptional circumstances."<sup>xlvi</sup> If the third party rebuts that presumption then the court proceeds to the determination whether awarding custody or other relief to the third party would promote the best interests of the child.<sup>xlvii</sup>

The difference between a KLG and a more typical psychological parent situation is that a KLG requires some abdication of parental responsibility or parental unfitness. A psychological parent relationship requires no unfitness. A step-parent or partner may become a psychological parent by way of their independent relationship with the child, often with the implicit or implied consent of the natural parent. Both, once found, will or may, result in a financial obligation of the KLG/psychological parent.

While there are significant positive aspects when a group of influential, appropriate and caring adults surround a child with love and support, there can be a downside to the involvement of so many other adults and family members invading the sphere of parental influence. The issue becomes how far the boundaries of parental rights and responsibilities should be stretched, especially in situation where parents are fit and appropriate.

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<sup>i</sup> N.J. Div. of Youth & Family Servs. v. F.M., 211 N.J. 420, 447 (2012).

<sup>ii</sup> 405 U.S. 645, 92 S.Ct. 1208, 31 L.Ed.2d 551 (1972).

<sup>iii</sup> <sup>iii</sup> Id. at 651 (citations omitted).

<sup>iv</sup> In re Baby M, 109 N.J. 396, 450, 452 (1998).

<sup>v</sup> Santosky v. Kramer, 455 U.S. 745, 102 S.Ct. 1388, 71 L.Ed.2d 599 (1982).

<sup>vi</sup> New Jersey Department of Child Protection and Permanency, formerly known as DYFS.

<sup>vii</sup> See N.J.S.A. 9:2-9 to 18; N.J.S.A. 9:3-37 to 56.

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- viii See N.J.S.A. 9:2-4; see Dorfman v. Dorfman, 315 N.J. Super. 511 (App. Div. 1998); Faucett v. Vasquez, 411 N.J. Super. 108 (App. Div. 2009); Fawzy v. Fawzy, 400 NJ Super. 567 (App. Div. 2008); Mastropole v. Mastropole, 181 N.J. Super. 130 (App. Div. 1981); Sheehan v. Sheehan, 51 N.J. Super. 276 (App. Div. 1958).
- ix Introductory Comment, N.J.S.A. 3B:12A-1, et. seq.
- x N.J.S.A. 3B:12A-2.
- xi N.J.S.A. 3B:12A-2.
- xii N.J.S.A. 3B:12A-4(b).
- xiii The italicized provisions are quoted from N.J.S.A. 3B:12A-6(a) and the content behind the quotation is the legal argument of counsel.
- xiv NJSA 30:4C-86 requires criminal history and domestic violence checks for the caregiver in a KLG application. It does not provide for similar checks for the biological parents. Although served with a discovery request specifically tailored to glean information regarding criminal background and substance abuse treatment records, the parents have both failed to respond.
- xv N.J.S.A. 3B:12A-6(b).
- xvi N.J.S.A. 3B:12A-6(d).
- xvii N.J.S.A. 3B:12A-6(d).
- xviii Matter of Purrazzella, 134 N.J. 228, 240, (1993).
- xix Matter of Seaman, 133 N.J. 67, 74, (1993); In Re Registrant R.F., 317 N.J. Super. 379,384 (App Div. 1998).
- xx N.J.S.A. 3B:12A.
- xxi N.J.S.A. 3B:12A-2.
- xxii N.J.S.A. 3B:12A-4(a)(1).
- xxiii N.J.S.A. 3B:12A-4(a)(3) and (4).
- xxiv N.J.S.A. 3B:12A-6.
- xxv N.J.S.A. 3B:12A-6(f), emphasis added.
- xxvi N.J.S.A. 3B:12A-6(g).
- xxvii See D.Y.F.S. v. L.L., 201 N.J. 210 (2010).
- xxviii D.Y.F.S. v. L.L., supra, 201 N.J. at 224, citing N.J.A.C. 10:132A-3.5(a), (b).
- xxix D.Y.F.S. v. L.L., supra, 201 N.J. at 224, citing N.J.A.C. 10:132A-3.5(a), see also N.J.A.C. 10:132A-3.6.
- xxx N.J.A.C. 10:132A-3.6
- xxxi D.Y.F.S. v. L.L., supra, 201 N.J. at 224.
- xxxii D.Y.F.S. v. L.L., supra, 201 N.J. at 225.
- xxxiii N.J.S.A 9:17-39.
- xxxiv V.C. v. M.J.B., 163 N.J. 200, 219 (2000).
- xxxv 72 N.J. 127, 132 (1976)
- xxxvi 386 N.J. Super. 475 (2006).
- xxxvii Consent may be implicit or implied. See K.A.F. v. D.L.M., 437 N.J. Super. 123,139 (2014).
- xxxviii D.G. v. K.S., 444 N.J. Super. 423 (2015)(citations omitted).
- xxxix See Watkins v. Nelson, 163 N.J. 235, 247-48, 748 A.2d 558 (2000).
- xl Sorentino v. Family & Children's Soc'y of Elizabeth, 72 N.J. 127, 132 (1976); Adoption of M., 317 N.J. Super. 531, 541 (Ch.Div.1998).
- xli Watkins, supra, 163 N.J. at 246-48, ; see also V.C., supra, 163 N.J. at 219; Sorentino, supra, 72 N.J. at 131-32.
- xlii Watkins, supra, at 246-47 (citing Sorentino, supra, 72 N.J. at 131-32).
- xliii V.C. v. M.J.B., 163 N.J. 200, (2000).
- xliv 444 N.J. Super. 423 (Ch. Div. 2015)
- xlvi Id. at 46.
- xlvi Watkins, supra, 163 N.J. at 247, 254.
- xlvii Id. at 254; P.B., supra, 370 N.J. Super. at 594; see also Moriarty, supra, 177 N.J. at 117.