

The following Memorandum of Guardianship was prepared by Sydney L. Cummings, Attorney, and presented to the court on 10/17/2003. At the time, Sydney was working as the Guardian ad Litem Attorney Advocate in District 3B for Carteret County. All confidential information has been deleted for the document.

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NORTH CAROLINA  
CARTERET COUNTY

IN THE GENERAL COURT OF JUSTICE  
DISTRICT COURT DIVISION

File Number:  
Film Number:

**In the matter of: CONFIDENTIAL**

GUARDIAN AD LITEM  
MEMORANDUM OF LAW

### **STATEMENT OF THE CASE**

On August 29, 2003, a Permanency Planning Review was held in this matter pursuant to N.C.G.S. §7B-907 before the Honorable Jerry Waddell, judge presiding. During said Permanency Planning Review, a report from the Guardian ad Litem, was presented and accepted into evidence. Further, a report from Department of Social Services ("DSS") was presented and accepted into evidence. Both reports contained recommendations as to what type of permanent plan should be adopted by the court regarding the minor child. Both reports recommended to the court that reunification efforts by DSS with the mother be suspended and that the minor child's maternal grandmother, should be granted guardianship of the minor child as the permanent plan for the minor child. Judge Waddell questioned the legal basis and the consequences of appointing a guardian for the minor child. The brief was filed pursuant to request by Judge Waddell at the aforementioned hearing for presentation in court on October 17, 2003. The Permanency Planning Review was continued in progress until October 17, 2003

### **ISSUES**

1. What legal basis allows a judge to appoint a guardian for the minor child in a juvenile abuse, neglect, or dependency case such as this case?
2. What are the characteristics of guardianship?
3. If DSS has custody of the minor child when a guardian is appointed, does custody automatically remain with DSS unless otherwise ordered?
4. What are the differences in guardianship and custody?
5. What role do DSS, the Guardian ad Litem, and the court play after guardian or custodian is appointed?

### **STATEMENTS OF THE FACTS**

On May 5, 2002, DSS filed a juvenile petition and an order to assume custody of the minor child. A non-secure custody hearing was held on May 22, 2002. Both the adjudication and disposition hearing was held on May 12, 2002 with DSS retaining custody of the minor child with placement authority. Review hearings were held on September 13, 2002, March 7, 2003 (continued), April 17, 2003, and July 11, 2003. A Permanency Planning Review was continued in progress on August 29, 2003 to October 17, 2003.

The minor child has resided in the home of her maternal grandmother since May

2002 where she is being well cared for in a safe environment and her needs are being met. There have been minimal life-style changes for respondent mother since DSS has custody of the minor child.

A Permanency Planning Review hearing pursuant to N.C.G.S. §7B-907 was noticed for hearing on August 29, 2003, at which time, both DSS and the Guardian ad Litem recommended to the court to suspend reunification efforts by DSS with respondent mother and to allow the minor child's maternal grandmother to become guardian of the minor child as the permanent plan.

### **ARGUMENT**

A Permanency Planning Review hearing pursuant to N.C.G.S. §7B-907, shall be held within 12 months after the initial order removing custody from the parents/caretakers of the juvenile if the is not returned home at this hearing, statue requires the court to then make written findings regarding the child's permanent plan. According to the statute, two of the criteria that the court shall consider when determining the child's permanent plan are as follows.

1. "Where the juvenile's return home is unlikely within six months, whether legal guardianship or custody with a relative or some other suitable person should be establisher, and if so, the rights and responsibilities which should remain with the parents" N.C.G.S. §7B-907(b)(2).
2. "Where the juvenile's return home is unlikely within six months, whether adoption should be pursued and if so, any barriers to the juvenile's adoption" N.C.G.S. §7B-907(b)(2).

The purpose of a Permanency Planning Review hearing is to "develop a plan to achieve a safe, permanent home for the juvenile within a reasonable amount of time N.C.G.S §7B-907(a). The avenues for a permanent plan, according to the statute appear to consist of guardianship, custody, or adoption.

### **Adoption**

If the court determines that adoption should be the permanent plan, and a proceeding to terminate paternal rights of one or both of the juvenile's parents is necessary to effectuate such plan, the statue requires DSS to file a petition to terminate parental rights within 60 days of the Permanency Planning Review hearing or within a time frame specified by the court if it is not possible to file such a petition within 60 days N.C.G.S. §7B-907(b)(2).

### **Guardianship**

As to the issue of what legal basis allows a judge to appoint a guardian for the minor child in a juvenile abuse, neglect, or dependency case such as this case, several statutes specifically provide the court with the authority to "appoint a guardian of the person for the juvenile." These statues include N.C.G.S §7B-906 (Review hearing), N.C.G.S §7B-907 (Permanency Planning Review hearing) and N.C.G.S. §7B-600 (Appointment of guardian), N.C.G.S §7B-907 and N.C.G.S. §7B-906 both state that such appointment of a guardian should be made pursuant to section §7B-600, which specificity

addresses appointment of guardians for juveniles. There are two types of court hearings in which a judge can appoint a guardian for a juvenile. One such time is a Permanency Planning Review hearing if the court determines that guardianship should be the juvenile's permanent plan §7B-907. Another such time is at a Review hearing, if the court makes detailed findings of facts relating to guardianship being in the best interest of the juvenile N.C.C.S. §7B-906. Section 600 of Chapter 7B also addresses when a guardian can be appointed for a juvenile in an abuse, neglect, or dependency case. The section allows a guardian to be appointed "when the court finds it would be in the best interests of the juvenile" §7B-600(a).

With regards to the issues of the various characteristics of guardianship, section 600 of Chapter 7B describes the legal nature of guardianship and describes various functions that a guardian may perform. The section states as follows:

The guardian shall have the care, custody, and control of the juvenile or may arrange a suitable placement for the juvenile and may represent the juvenile in legal actions before any court. The guardian may consent to certain actions on the part of the juvenile in place of the parent including (i) marriage, (ii) enlisting in the armed forces, and (iii) enrollment in school. The guardian may also consent to any necessary medical, psychological medical, or surgical treatment for the juvenile §7B-600(a).

N.C.G.S. §7B-600(a) further places limits upon the guardian in its description as follows: "The guardian shall operate under the supervision of the court with or without bond and shall file only such reports as the court shall require." It is left to the court's discretion whether or not to require a bond or report regarding said guardianship.

Section §7B-600(b) also describes the manner in which a court may review the appointment of a guardian. Specifically, the section requires that a party must file a motion or petition under Section §7B-906 (Review hearing) or N.C.G.S. §7B-1000 (Motion to Modify or Vacate an Order). This procedure for obtaining a review would apply not only when the juvenile case is still in the posture to be reviewed routinely in a N.C.G.S. §7B-906 Review hearing, but also when DSS has been relieved of the duty to conduct periodic judicial reviews regarding the juvenile §7B-906(b). It appears that a guardianship appointment would have to be reviewed in the juvenile court setting and may be reviewed only pursuant to section §7B-906 (Review hearing) of section §7B-1000 (Motion to Modify or Vacate an Order)

N.C.G.S. §7B-600(a) also provides that there are three different circumstances in which the authority of the guardian shall be terminated. The circumstances are as follows: 1) upon court order, 2) upon emancipation of the juvenile, or 3) when the juvenile attains the age of majority. The statute provides that if the juvenile is emancipated or attains the age of majority, the authority of the guardian automatically terminates without any further court intervention §7B-600(a).

With regards to a court ordered termination of guardianship, N.C.G.S. §7B-600(b) places restrictions upon such a termination. The statute states that once a court has determined that an appointment of a guardian is in the best interest of the juvenile and has also made such findings as required in N.C.G.S §7B-907 at a Permanency Planning Review hearing:

..the court may not terminate the guardianship or order that the juvenile be reintegrated into a parent's home unless the court finds that the relationship between the guardian and the juvenile is no longer in the juvenile's best interest, that the guardian is unfit that the guardian has neglected a guardian's duties, or that the guardian is unwilling or unable to continue assuming a guardian's duties §7B-600b).

Relevant to this decision is the case of In Re Williamson, 77 N.C. App. 53, cert denied, 316 N.C. 194 (1986). Williamson was denied prior to the enactment of N.C.G.S. §7B-600. When the Williamson decision was issued, however, N.C.G.S. §7A et seq contained a similar provision to the applicable statute in this case. The North Carolina Court of Appeals ruled that a legal guardian of a child's person, unlike a mere custodian, is not removable for a mere change of circumstances. The Court further held that a showing of unfitness or neglect of duty must first be shown before a guardian can be removed. 77 N.C. App. 53, cert denied, 315 N.C. 194 (1986).

In addressing the differences between guardianship and custody, it is clear from the statutory description in section §7B-600(a) of guardianship that guardianship and custody are regarded as two different legal terms. It is also apparent that the term guardianship encompasses custody within its parameters. In other words, a person that is a guardian of a juvenile is also considered to be the juvenile's custodian. However, there is no statute that indicates that the term custody encompasses guardianship. Therefore it would not be necessary for the court to appoint a person as both guardian and custodian of the juvenile, as the statutory language in section §7B-600(a), prescribes this per definition of the duties of a guardian. Further, the description in section §7B-600(a) makes it clear that a guardian has more authority than a mere custodian.

With regards to whether DSS retains custody of a minor child when a guardian is appointed, custody would appear to be automatically transferred to the guardian upon appointment of the guardian based on the legal nature and description of guardianship provided by section §7B-600(a). However, since there is no explicit statutory instruction as to this transfer of authority, it would be prudent to release DSS from its custodial responsibility before proceeding with the appointment of a guardian as a measure to prevent future attacks on the court order.

### **Custody**

If the court determines that custody should be the juvenile's permanent plan N.C.G.S §7B-907 specifically allows the judge to or make any disposition authorized by N.C.G.S. §7B-903, including the authority to place the child in the custody of either a parent, any relative, or any other individual at any time during the case if that is in the best interest of the juvenile.

### **Further Review Hearings After Guardian or Custodian Appointed**

In addressing the issue of what role DSS, like Guardian ad Litem, and the court should play after a guardian or custodian is appointed in an abuse, neglect, or dependency case, Chapter 7B of the North Carolina General Statutes provides a procedure. It is important to note that there is a difference between a) terminating the jurisdiction of the

court, b) no longer conducting reviews, and c) terminating either DSS or Guardian ad Litem involvement. When the permanent plan of guardianship or custody is achieved successfully and certain criteria are met, the court may waive further periodic review hearings and to terminate DSS or Guardian ad Litem involvement as opposed to terminating the courts jurisdiction.

With respect to waiver of review hearings, section N.C.G.S. §7B-906(b) provides five different conditions, all of which must be met, before the court can order that periodic review hearings are waived, The conditions are as follows:

1. "The juvenile has resided with a relative or has been in the custody of another suitable person for a period of at least one year;
2. The placement is stable and continuation of the placement is in the juvenile's best interest;
3. Neither the juvenile's best interest nor the rights of any party require that review hearings be held every six months;
4. All parties are aware that the matter may be brought before the court for review at any time by the filing of a motion; and
5. The court order has designated the relative or other suitable person as the juvenile's permanent caretaker or guardian of the person" §7B-906(b)(I-55).

Once the periodic review hearings are waived, DSS and the Guardian id Litem would have no explicit statutory obligation to continue involvement in the case and could therefore be released by the court of their continuing duties.

However, even after a guardian or custodian has been appointed for the juvenile and review hearings have been waived by the court, it is important that the court retain jurisdiction and the juvenile's case for the duration of the child's minority. The statutes allow for this continued court jurisdiction through various sections which refer to the procedure for reviewing the case at a date prior the suspension of review hearings. Specifically, section §7B-906 states that the court must not refuse to hear or waive a review hearing if a motion is filed by a party seeking such review. Also, the same section states that if a guardian has been anointed, the court shall follow section §7B-600. Section §7B-600 allows for such review hearings, even after such hearings have been waived by the court in a prior order if a party files a motion for such a hearing. If the court has terminated the jurisdiction of the court, such hearings would be unable to occur and the purpose of the law would be frustrated. Further, it is unclear per the statutes or case law what happens to a court ordered guardianship when the juvenile court terminates guardianship over the matter. Therefore, to insure the validity of the order creating the guardianship and to allow the matter to be reviewed at some later date, the court should retain jurisdiction until the child reaches the age of majority or is emancipated.

The following information is from the North Carolina Guardian ad Litem Attorney Manual 2002 Edition, Volume I. Administrative Office of the Courts Guardian Ad Litem Program, Kella W. Hatcher, J.D. published by the WEST GROUP A THOMSON COMPANY

## **PERMANENCY OPTIONS<sup>1</sup>**

### **Explanation and Comparison of Custody, Guardianship, and Adoption**

#### **I. Permanency Defined**

- A. Permanency can best be defined as a positive, nurturing relationship with at least one adult that is characterized by mutual commitment and is legally secure. Permanency is the goal for every child in foster care.
- B. Elements of permanency
  - 1. Commitment: This is the most critical aspect of permanency. Everyone needs someone to step up and say, "I'll be there for you." This is commitment. Although the statutes require that placement with a relative be considered, you have to consider the best interests of the child, which means that you need to consider the "bond" between the child and the adult.
  - 2. Positive, nurturing relationship
  - 3. Legally secure

#### **II. Permanency Options—An Overview**

- A. There are three permanency options outside of reunification with the parents:
  - 1. Adoption—the most legally secure
  - 2. Guardianship (pursuant to G.S. 7B-600) —less legally secure than adoption
  - 3. Custody—least legally secure of the three options
- B. Guardianship should only be sought as the permanent plan if adoption is not an option or would not be in the best interests of the child.
- C. Custody should only be sought as the permanent plan if neither adoption nor guardianship is available as an option or would not be in the best interests of the child.

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<sup>1</sup> *[This paper was compiled by Kella Hatcher and Debra Sasser, Associate Counsels for the North Carolina Guardian ad Litem Program, based on lectures and handouts presented in October 2000 by Chuck Harris, Chief of Children's Services, North Carolina Department of Health and Human Services, and Jane Thompson, J.D., Assistant Attorney General. It also incorporates information from the North Carolina Health and Human Services On-line Publications, Children's Services Manual, Chapter VI.](#)*

### III. Adoption

- A. Adoption is the **most legally secure** relationship that can be established between a child and an adult who did not give birth to the child.
- B. Before adoption can occur, there would have to be **relinquishment** of the child by the parent(s) or a **termination** of parental rights.

1. **Relinquishment:** Where the parent of guardian voluntarily consents to permanently transfer legal and physical custody of his/her child to DSS (or a licensed child placing agency) for the purpose of adoption.

a. **Designated relinquishment:** Where the parent designates the individual who will adopt the child and DSS approves this selection, or where the parent retains the right to consent to the prospective adoptive parent selected by the agency. N.C. Gen. Stat. § 48-3-703(a)(5). Where the individual designated by the parent does not or cannot adopt, the parent may choose to revoke the relinquishment. N.C. Gen. Stat. § 48-3-703(c).

b. **General relinquishment:** Where the parent agrees that DSS may place the child with prospective adoptive parents selected by DSS.

2. **Termination of parental rights:** Where a petition is filed seeking the court to terminate parental rights. N.C. Gen. Stat. §§ 7B-1100 – 7B-1113. When a parent cannot be found or when the parent will not agree to voluntarily surrender (relinquish) the child for the purpose of adoption, then a proceeding to terminate parental rights must be brought.

**Note: Adoptability and TPR.** Proving adoptability is not required by case law in order to prove best interest in the dispositional phase of a TPR proceeding, but some judges are reluctant or may even refuse to find best interest unless an adoption option is presented. They do not want to create a “legal orphan.” To “prove” adoptability:

- a. Have foster parents who are ready to adopt the child and consider having one or both of them testify at disposition;
- b. Plan for adoption from the very beginning (i.e., the foster-adopt program). Look for adoptive families as options even before adoption is a legal option;
- c. Have the foster care workers or adoption workers testify as to the county’s track record with adoption and that the child has been referred to the four private child-placing agencies which have contracted with the Division to help DSS find adoptive homes.

- C. **DSS Custody and adoption assistance:** Adoption is not appropriate for everyone, but if one wants adoption to be available as an option down the road, remember that if the child was ever in DSS custody (for at least one day), adoption assistance is available (so long as the other eligibility requirements, including “special needs,” are met).

1. **DSS Custody.** When a child is placed for adoption after having been in the custody or placement responsibility of an agency, it is likely that the child will be eligible for adoption assistance because of his special needs status.

2. **When to establish eligibility.** Eligibility for adoption assistance benefits *should be* established prior to a child’s placement for adoption, but *must be* established prior to the issuance of the

Decree of Adoption.

**Note: No residency requirement.** If a child is eligible for Adoption Assistance (including the requirement that the child be in the custody of DSS), the child remains eligible regardless of whether or not the child resides in North Carolina.

**D. Filing the adoption petition**

1. **Who petitions.** This is typically done by DSS. If the foster parent, relative, or other potential adoptive parent files it, they take on burden of the expense and other responsibilities. If DSS files it, they are responsible for the costs and related responsibilities.

2. **Post-adoption Services**

- a. **Post-adoption services** are required and should be available to children without regard to income to assure the stability of the adoption placement.
- b. **Post-adoption contact agreements** allow adoptive parents and biological parents to enter into agreements whereby contact between child and biological parents and/or siblings/grandparents are permitted under the terms of the agreement (note that such agreements are not currently addressed by North Carolina law).
- c. **In the event an adoption does disrupt** and cannot be repaired, the child can be relinquished to DSS or a licensed child placing agency and be immediately free for another adoptive home.

**E. Financial Assistance Available for adoption**

1. Availability of assistance, in general

- a. Adoption assistance is available for all “special needs” children when other certain criteria are met.
- b. The **federal** adoption assistance program is limited to those adoptive children who meet the eligibility criteria for the federal AFDC program as it existed as of July, 1996 (predates Work First Phase I) or the Supplemental Security Income (SSI) program.
- c. In addition, North Carolina counties use **state and local** funds (without federal reimbursement) to provide assistance to adoptive children with special needs who do not meet the federal eligibility criteria and to provide benefits that are not covered by the federal program.

2. **Conditions for Eligibility.** Eligibility for subsidy is determined by the **status** of the child involved and by that **child’s special needs**. A child for whom adoption is the plan, or who has already been adopted, may be determined eligible for Adoption Assistance if all of the following conditions are met:

- a. **Child Removed from Parents:** The child has been removed from his parents by a Voluntary Placement Agreement subject to judicial review or by a court order that includes the language in reference to best interest and reasonable effort; and
- b. **A North Carolina Agency has Placement Responsibility:** The child is in the placement responsibility of a North Carolina agency (e.g., DSS) authorized to place children for adoption, or was at the time of the filing of the adoption petition in the custody of a North Carolina agency or had been in the placement responsibility of an

agency who subsequently placed the child in the custody of a person now pursuing adoption of that child.

In general, foreign-born children are not eligible for adoption assistance. However, if a foreign born child enters the foster care system due to abuse, neglect, dependency, adoption disruption or adoption dissolution, that child's eligibility is determined in the same way as any other child.

- c. **Child Can/Should Not Return to Parents.** It has been determined that the child cannot or should not be returned to his parents. This means that the state must have reached that decision based on evidence by a court order legally clearing the child through TPR, or the existence of a petition for TPR, or a relinquishment by the parent to a child-placing agency, or, in the case of an orphan child, verification of the death of the parents, or the parent gives consent to adoption directly to a family approved by the agency that is legally responsible for placement (this is often the foster family or a relative); and
- d. **Special Needs.** The child has "special needs." A child is considered a child with special needs when the state has determined:
  - (i) That there exists, with respect to the child, a specific factor or "condition" because of which it is reasonable to conclude that such child cannot be placed with adoptive parents without providing adoption assistance or medical assistance.
  - (ii) Conditions:
    - (a) Child's ethnic background;
    - (b) Child's age;
    - (c) Membership in a minority
    - (d) Child in a sibling group that is being placed together; or
    - (e) The presence of factors such as medical conditions or physical, mental, or emotional handicaps. Includes *potential* handicaps.
    - (f) Child is in foster care (meets requirement that it would be difficult to place the child without payment of the subsidy).
- e. **Reasonable Efforts Have Been Made to Place Child Without Adoption Assistance.** Finally, there must be a demonstration that a reasonable, but unsuccessful, effort has been made to place the child with appropriate adoptive parents without providing adoption or medical assistance.

Waiver of Requirement: This requirement is waived when it would be against the best interests of the child because of such factors as the existence of significant emotional ties with prospective adoptive parents while in the care of such parents as a foster child.

### 3. Financial Circumstances as a Consideration for Eligibility

- a. **Circumstances of the Child.** The financial criteria for federal adoption assistance eligibility address the circumstances of the child rather than the adoptive parents.
- b. **Circumstances of the Adoptive Parent.** The financial circumstances of the parents become relevant only in determining the *amount* of adoption assistance and should not be considered in determining whether the child is eligible for the program. An income requirement or a means test cannot be imposed to restrict eligibility for adoption assistance. The agency may negotiate with the adoptive parents as to the amount of the monthly cash payment, partly on the basis of their income. In regard to children with an income, such as, but not limited to, Social Security benefits, Veteran's benefits, Supplemental Security benefits, this income may be a

consideration in the negotiation of the amount of the Adoptive Assistance payment. However, receipt of such income shall not arbitrarily or automatically generate a denial, termination, or reduction in the receipt or amount of Adoption Assistance monthly cash payments.

4. **Who Establishes Eligibility:** Establishing the eligibility for adoption assistance is a task of the services staff of a child's resident agency. The agency is required to use the Adoption Assistance Eligibility Checklist (DSS-5012). Documentation sufficient to establish eligibility can be in the form of statements of diagnosis and/or prognosis from physicians, psychiatrists, speech and other therapists, etc. Documentation in reference to high-risk potential should be supported by information about the child's and birth parents' background. This documentation shall be attached to the DSS-5012.

## 5. Funding Sources

### a. IV-E (Monthly Cash Payments):

- (i) Children are eligible to receive assistance under the IV-E program if, at the time they are cleared for adoption either through TPR or relinquishment, they are eligible for or recipients of IV-E foster care assistance benefits, or are eligible for or recipients of SSI benefits, or are recipients of Family Assistance (TANF) benefits living in a relative's home who was given custody by a North Carolina child placing agency. (Note that IV-E cannot be used if the child came into foster care under relinquishment, but can be used if they came in under a non-secure and there was a subsequent relinquishment.)
- (ii) Children who were eligible for SSI, but are no longer eligible because of new definitions, are entitled to adoption assistance up to the county's rate.
- (iii) Funding for IV-E adoption assistance cash payments is a combination of federal, state and county funds.

b. **IV-B (Monthly Cash Payment):** Children found eligible for monthly cash benefits who are not IV-E eligible are eligible to receive monthly cash payments from IV-B funds. Funding is derived from federal IV-B funds, (which North Carolina has retained the discretion to use and has opted to make available for non IV-E children), and county funds.

c. **SAF (Monthly Cash Payment):** The State Adoptive Fund is available for children with special needs who are placed by private agencies. Funding for this category of children is provided from IV-B funds and state funds. No county funds are required as match, with the exception of the Medicaid.

### d. Vendor Payments

Adoptive parents will be expected to explore and use available resources other than these benefits for payment of services related to alleviating the child's special needs. However, for children also approved for assistance after adoption from the Children's Special Health Services, Division of Maternal and Child Health, Department of Environment, Health and Natural Resources, benefits from the vendor categories of Adoption Assistance are to be exhausted before the family turns to children's Special Health Services for assistance. Vendor payments are not included in the requirements of PL 96-272 for a subsidy program. Therefore, whether the children are IV-E or IV-B eligible, the funding source is IV-B and county funds and the county share is the same. SAF-eligible children receive vendor payments reimbursed through IV-B funds.

### e. Medicaid

- (i) For IV-E eligible children, Medicaid should automatically be triggered by an application filed by the social worker in the child's behalf.
- (ii) For IV-B children, Medicaid coverage is available for special medical or rehabilitative needs. The child's Adoption Assistance worker in the county makes the determination of whether the child has special medical needs. Once the child is initially determined as Medicaid eligible under special needs criteria, the eligibility determination is binding as long as adoption assistance remains in effect (unless child begins receiving income other than adoption assistance, then a redetermination of eligibility is required to ascertain if the child remains eligible based on income). A redetermination of financial eligibility is not required. Coverage terminates at age 18 or whenever the adoption assistance is terminated.

f. **Non-recurring**

- (i) Non-recurring adoption expenses are considered an administrative expenditure of the Title IV-E adoption assistance program.
- (ii) Federal reimbursement is available at a 50% matching rate for state expenditures up to \$2,000 for any adoption.
- (iii) The child is eligible for this benefit and reimbursement is available under this program regardless of whether or not the child is IV-E eligible.
- (iv) The county's share of these nonrecurring expenses is 25 %.

6. **Benefits Available**

- a. **Adoption Assistance Agreement:** North Carolina offers benefits in several categories. In order to offer these benefits, an adoption assistance agreement with the adopting parents must be in place. Any individual child may qualify for all types. Also, if a subsidy is in place for one type of benefit, additional types may be added in the future if the circumstances warrant it.

b. **Categories**

- (i) Monthly Cash Benefits: In an effort to assure permanency for children, most counties continue adoption assistance at the *state standard foster care rate*, including special costs. The maximum amount of payment may vary from child to child and may change for an individual child over time.
  - (a) Children who are HIV positive or who have AIDS may receive additional payments while in foster care and may receive these additional benefits as part of the adoption assistance payment.
    - (A) This amount varies and ranges from \$800-\$1600. This is all state money and there is no county match.
    - (B) With this supplemental payment, a child with HIV/AIDS who is adopted will receive the same benefits as if such child remained in foster care
  - (b) Other children may receive additional money for their therapeutic needs while in foster care, and the county may choose to continue this supplement when the child is adopted. **The county is responsible for all supplemental payments, except for children who are HIV positive. (Submit request for HIV payment on monthly basis on Form 5159.)**
  - (c) Current State foster care payment rate: \$315 for child age 0-5; \$365 for child age 6-12; \$415 for child age 13-18.

- (d) Sources of monthly cash payment: IV-E, IV-B, & SAF funds.
- (e) Some counties supplement these costs for both foster care and adoption
- (f) The Adoption Assistance Monthly Cash Payment continues until the child turns 18
- (g) Adoption assistance looks at the child's needs and not the adoptive parents' income
- (h) Application for adoption assistance needs to be done prior to the final decree of adoption

(ii) **Vendor Payment to Medical or Therapeutic Providers**

- (a) Handicapping Conditions: Vendor payments provide assistance for services or treatment for handicapping conditions that existed prior to the time of the child's placement for adoption. It is not necessary for these conditions to have been identified prior to the placement, but rather to have existed.
- (b) Cap on payment: Medical care providers may be paid up to \$1200 per child, per year for medical treatment of services not covered by any medical insurance; therapeutic care providers may be paid up to \$1200 per child, per year for non-medical services (e.g., psychological, tutorial, therapy, etc.)
- (c) Source of payment: Agencies make payments on behalf of the child and are then reimbursed by the Division through IV-B funds.
- (d) Termination of payment: Adoption Assistance Vendor payments continue until the child turns 18

(iii) **Non-recurring expenses**

- (a) Available only to parents adopting special needs children regardless of whether the child was in the foster care system.
- (b) Although non-recurring costs covers attorneys' fees and preplacement assessments, these funds should not be used for these tasks since DSS should be doing this as part of its casework.
- (c) Parents adopting special needs children are eligible for reimbursement of non-recurring costs of the adoption. The non-recurring expenses for the adoption of a special needs child must be reimbursed by the state agency responsible for the administration of the adoption subsidy program. This is true whether the adoption is an independent placement or one facilitated by a public or private agency.
- (d) Eligibility requirement. The child is eligible under the criteria established for children receiving adoption assistance, with the exception of the requirement that the child be in the custody or placement responsibility of a child-placing agency.
- (e) Reimbursable costs include *adoption fees, court costs, attorney fees, and other expenses* that are directly related to the **legal** adoption of a child with special needs, which are not incurred in violation of state or federal law and which are not reimbursed from other sources or other funds. These expenses can include such costs as the *preplacement assessment, including physical and psychological examinations, transportation and reasonable costs of lodging and food for the child and/or the adopting parents when necessary to*

*complete the placement or adoption process and supervision of the placement.*

- (f) In cases where siblings are placed and adopted either separately or together, each child is treated as an individual with separate reimbursement for non-recurring adoption expenses up to the maximum amount allowable for each child.
  - (g) Foreign adoptions. Payments are available to parents participating in intercountry adoptions as long as the child meets the requirements as outlined above with the exception of the child being in the custody or placement responsibility of a child-placing agency.
  - (h) Parents' financial condition not relevant. If parents have reimbursable expenses that are allowable, the reimbursement of these expenses must not depend on the income and resources of the parents.
  - (i) There can be no limit placed on either the amount in any type of non-recurring expenses or the number of types of non-recurring expenses for which a child may be eligible. The only allowable limit is for the total amount of incurred expenses of \$2,000 per child.
  - (j) Counties make direct payments and request reimbursement from the State on the 5095.
- (iv) **Medicaid**
- (a) In North Carolina, children who receive adoption assistance must be evaluated for eligibility for Medicaid benefits.
  - (b) IV-E eligible children are categorically eligible and the Medicaid should automatically be triggered by an application filed by social worker on the child's behalf.
  - (c) The county with custodial responsibility is responsible for the Medicaid application.
  - (d) Non IV-E (i.e., IV-B) children may be eligible for Medicaid coverage if they have special medical or rehabilitative needs (special needs) and the child's income is below allowable limits.
    - (1) If the child own income (e.g., SSA) exceeds the eligibility amount as determined by the Medicaid eligibility specialist, then Medicaid is not available.
    - (2) Financial eligibility is determined based upon the child's income and resources only. Income and resources of the adoptive parents are not counted. As federal requirements specify that these children meet Categorically Needy income and resource requirements, they must be eligible under M-AF criteria. **(Refer to Family and Children's Medicaid Manual, dated 10-1-94)**
- (v) **Social Services Benefits:** Children who are recipients of adoption subsidy are eligible for services without regard to income. This provides an opportunity for the social worker and family to identify a set of post-adoption services that may be helpful in keeping the new family system intact. These services may be funded through Social Services Block Grant or Permanency Planning funds as well as all county money.

#### **IV. Guardianship:**

##### **A. Guardianship, in general**

1. This is a permanency option for children that is more secure than custody, but not as secure as adoption. It is appropriately used when reunification and adoption are not possible.
2. Juvenile court guardianship is governed by 7B-600 and is different from Chapter 35A guardianship.
3. With guardianship, the parents' rights do not have to have been terminated.
4. The guardian shall have the care, custody and control of the child and may represent the child in legal matters before the court. The guardian may consent to certain actions on the part of the child in place of the parent (example, consent to marriage, enlisting in the armed forces, enroll in school).
5. Guardianship awarded in the context of a permanent plan for a child shall continue unless the court finds that the relationship between the guardian and the juvenile is no longer in the juvenile's best interest, that the guardian is unfit, the guardian has neglected its duties or the guardian is unwilling or unable to continue to assume the duties. N.C. Gen. Stat. § 7B-600(b).
6. A juvenile court order appointing a guardian is valid for as long as the juvenile court retains jurisdiction over the case, unless the court terminates the guardianship pursuant to G.S. § 7B-600(b). It is unsettled what happens to a court-ordered guardianship when the juvenile court terminates jurisdiction over the matter. To insure validity of the order creating the guardianship, it is therefore recommended that the juvenile court retain jurisdiction over the case until the guardianship is terminated by a subsequent order or until the child reaches 18 years or is otherwise emancipated.
7. For suggestions concerning a guardianship order under Chapter 7B, see section V.G, below.

##### **B. Kinship Assessment:** DSS utilizes a "kinship assessment tool" whereby they evaluate potential placements using specific criteria.

1. DSS is to assess whether the potential caregiver(s) have/has a lifetime commitment to the child and how they fit into the family system.
2. DSS is to assess such things as what kind of access the biological parent(s) would/should have, whether the caregivers believe that the alleged perpetrator (potentially their son/nephew, etc. . .) actually engaged in abuse/sexual abuse of the child they will care for (affecting the likelihood that the child will receive appropriate protection from this person).

##### **C. Important steps at non-secure hearing to prepare for a potential guardianship placement**

1. Identify the fathers
2. Identify all the relatives that are willing and able to take care of the child and with whom it would be in the child's best interest to reside
3. Identify any other individuals who are potential guardians

##### **D. Financial assistance available for guardianship**

1. **TANF:** Relatives who are appointed by the juvenile court as guardians under G.S. 7B-600 may qualify for TANF Child Only benefits. In addition, relatives who have a child placed with them

when DSS retains legal custody may also qualify for Child Only benefits. It should be noted that eligibility for TANF is not automatic and anyone interested in learning if they would be eligible under particular circumstances should contact their county department of social services, Work First Program.

2. **Medicaid** or North Carolina Health Choice for Children.

3. **Child support:** Since the court case stays open, the parents can be obligated to pay child support to the guardian.

4. **County funds in the 19 IV-E Waiver Counties for Assisted guardianship.** The 19 IV-E waiver counties can opt to provide assisted guardianship at the same rate of payment as foster care and adoption assistance (there is no vendor payment for guardianship). A certain set of criteria must be met for a guardian to receive these funds. So far, only 5 of these counties have chosen to use assisted guardianship because those funds are scheduled to end July 2002; but there is the potential, now that guardianship will become more common with more statutory definition, that they could still opt to do assisted guardianship and anyone is free to try to convince them to do so. This waiver project may also be extended past July 2002.

5. **No federal child welfare funds** (i.e., IV-E) can be used for assisted guardianship. Note, however, that the IV-E waiver project may change this so that guardians receive the same level of support as foster parents or adoptive parents.

#### E. **Standard for modification of a 7B-600 Guardianship**

1. Pursuant to section 7B-600(b), the court may not terminate a 7B-600 guardianship or order that the juvenile be reintegrated into a parent's home unless the court finds one of the following:

- That the relationship between the guardian and the juvenile is no longer in the juvenile's best interest;
- That the guardian is unfit;
- That the guardian has neglected a guardian's duties; or
- That the guardian is unwilling or unable to continue assuming a guardian's duties.

2. At any hearing to review the appointment of the guardian, the court can order an assessment by DSS, even though DSS may no longer have any role in the case.

#### F. **DSS's Role Once the Court Appoints a 7B-600 Guardian for the Child.**

1. **Until review hearings are properly waived pursuant to 7B-906(b)**, DSS's only role is to schedule the review hearings. See 7B-906(a) (DSS shall make a timely request to calendar each review). This is DSS's only *official* role after guardianship (or custody) is granted. DSS can work with the family and assist them in applying for "330 services," which is voluntary on the part of the custodian or guardian, but it allows DSS to remain involved with a family. This falls in line with the recommendation that the order granting guardianship or custody should also include what services are needed from DSS. See suggestions for custody orders below. See also custody section on DSS's role for possible way to require DSS supervision.

2. **After review hearings are waived**, DSS has no role at all in the case. This does not mean that the court should terminate jurisdiction over the case (i.e., should not close the court case). This simply means that there are no periodic reviews, but the court retains jurisdiction in the event that a party files a motion pursuant to 7B-906(b) or 7B-1000 seeking a review hearing.

#### G. **Permanence if Guardianship Ends**

Unlike adoption where the adoptive parent can relinquish the child to DSS, making him immediately free for adoption, if guardianship ends and the child returns to DSS custody, quick permanence will probably not be possible. The parents' rights have not been terminated, grounds for TPR may not exist and the parents may not be willing to relinquish the child to DSS now that guardianship, usually with a relative they approved of, has ended.

### V. **Custody**

A. **An adult can be granted custody of a child.**

B. **This is the option with the least permanency** as a parent can file a motion for review and ask the court to return the child to him based on the parent's change in circumstance.

1. This is the first permanency plan that comes to mind; it is used the most; and it is the least secure.

2. This option should only be used when reunification, adoption, and guardianship have been ruled out.

C. **There is no termination of parental rights required.**

D. **Relative's rights over a child relative**

1. **Absent DSS involvement:**

- a. Can get a Power of Attorney from the child's parents, which gives the relative a right to physical custody of the child, the right to seek medical treatment, and the right to enroll the child in school (if accepted by the school).
- b. Can hire a private attorney and seek custody of the child via an action filed pursuant to Chapter 50.
- c. Seek guardianship of the child under Chapter 35A, but only if there is no living natural parent. Note that guardianship pursuant to Chapter 35A is different from the guardianship that is available in a child protection proceeding pursuant to N.C. Gen. Stat. § 7B-600.

2. **With DSS involvement and the filing of a petition alleging abuse, neglect, or dependency:**

- a. A relative can get Chapter 7B custody or guardianship of the child.
  - (i) The court can grant custody to a relative or other individual at any time during the course of the child protection proceedings, but the court must continue to review the case until the child has resided with the relative or been in the custody of the other individual for a year. N.C. Gen. Stat. § 7B-906(b).

- (a) With a **relative**, the year can include any time the child *resided* with the relative prior to the filing of the petition.
  - (b) If the child is placed with a person who is *not a relative*, then the child **MUST** be *in the “custody”* of the non-relative for a full year before the court can waive the hearings.
  - (c) Once the year requirement is completed, the court can waive review hearings pursuant to 7B-906 so long as the other requirements of 7B-906 are met.
- (ii) Even if the court waives further review hearings, the court **MUST** conduct a review hearing upon motion of a party.

- b. A relative can hire an attorney and seek Chapter 50 custody of the child via a motion in the cause in the Chapter 7B action (so long as the relative is a party to the action or is allowed to intervene) or via a separate Chapter 50 action. In the latter event, the juvenile court could appropriately terminate its jurisdiction.

E. **Standard for modification of a 7B custody order:** In addition to those review hearings set by the court, there are two vehicles for any party in an abuse, neglect, or dependency case to get the court to reconsider a custody order. A party may make a motion pursuant to G.S. 7B-1000 or 7B-906(b)(4) to get the case back in front of the court. The court may not waive or refuse to conduct a review hearing if a party files a motion seeking review under 7B-906. N.C.G.S. § 7B-906. When a hearing is conducted as a review hearing under 7B-906, the judge’s decisions are based on the *best interest* of the child standard, and pursuant to section 7B-903(a)(2)b the court has the authority to make orders relating to custody. N.C.G.S. §§ 7B-906 & 7B-903. When a hearing is conducted pursuant to a motion made pursuant to section 7B-1000, the judge may modify or vacate the order in light of *changes in circumstances or the needs of the juvenile*. See *In re Brenner*, 83 N.C. App. 242 (1986). This leads to some confusion as to the standard applied for modification of custody orders, depending upon the context in which the order is made and whether the party has made a motion pursuant to 7B-1000 or 7B-906.

It can be argued that when a hearing is conducted in an attempt by one party to change an order concerning the child’s custody, there is a requirement of a finding of changed circumstances (*see, e.g., In re Williamson*, 77 N.C. App. 53 (1986)) for custody to be modified. However, when “changes in circumstances” is read along with the language of “or the needs of the juvenile,” as is also stated in section 7B-1000, this appears to lead back to the *best interest* standard, which is the essentially the same standard in regular review hearings set by the court or held in response to a motion by a party. This may be a simple semantic difference; therefore when a party is seeking to change orders affecting custody, the judge would be prudent to refer, in the order, to whether there has been a “change in circumstances,” to the “needs of the juvenile,” and to the “best interests” of the juvenile. This way, it will be less likely that the order could be attacked for failure to apply the appropriate standard in determining whether to modify orders concerning custody of the child.

**Because the standards for changing custody are less stringent than the standards for changing guardianship, custody is considered more “temporary” and less “secure” than guardianship.**

F. **What happens if custody “disrupts”** (i.e., the custodian doesn’t want custody of the child anymore):

1. There can be an “unofficial” return of the child to the parents.
2. The custodian may take the child to DSS and say that they can’t do this anymore. The concern with this option is that when the child is returned to DSS, the child is probably not freed for another permanent plan and will go into foster care until such time as the child ages out.

3. If custody is out of county, there is no clear-cut answer on which county has jurisdiction over the child when the placement disrupts. Therefore, you need to be very clear when dealing with placing the child in the custody of an individual who resides in a different county.

**G. Suggestions concerning a custody order or guardianship under Chapter 7B**

1. Remember that the order will be shown to many third parties (e.g., health care providers, and schools), so “sanitize” the order as much as possible without sacrificing the required findings of fact and conclusions of law.

2. These orders should address the issue of visitation with the parents.

3. The order should include what services are needed from DSS in addition to granting custody. Before a custody order is entered, discuss the needs of the family that is taking custody (e.g., day care, transportation, and health care) and see what DSS can provide so this can be included in the custody order to help insure that custody is successful. Some services the relative has come to rely on from DSS may not be available, or may no longer be available at no cost to the relative, once DSS no longer is the child’s custodian.

Note, however, that when DSS does not have custody, services are available on a voluntary basis – the person receiving services can sign a service agreement. Another advantage to DSS providing services is that it keeps DSS involved, which is of tremendous benefit should the placement fall through.

**H. DSS’s Role Once the Court Grants Custody of the Child to a Relative or other Person.**

1. **Until review hearings are properly waived pursuant to 7B-906(b)**, DSS’s only role is to schedule the review hearings. *See* 7B-906(a) (DSS shall make a timely request to calendar each review). This is DSS’s only *official* role after custody (or guardianship) is granted. DSS can work with the family and assist them in applying for “330 services,” which is voluntary on the part of the custodian or guardian, but it allows DSS to remain involved with a family. This falls in line with the recommendation that the order granting guardianship or custody should also include what services are needed from DSS. See suggestions for custody orders above.

There may be a way to extend DSS supervision of a case that would not be voluntary, a way that the court COULD order DSS to continue to supervise the child even after the court grants custody (and maybe even guardianship) to a relative or other person: Section 7B-906(d) authorizes the court at any review hearing (including the one at which further review hearings are waived) to make any disposition authorized by 7B-903. Since under section 7B-903(2)a the court has the authority to order DSS to supervise the child in his/her home—if the child needs more adequate care or supervision—then this is a way to try to get continued DSS supervision. This does not seem to address the question of services, but will at least provide a way to have continued supervision if review hearings are being waived, but there is some concern about whether this placement will work.

2. **After review hearings are waived**, DSS has no role at all in the case. This does not mean that the court should terminate jurisdiction over the case (i.e., should not close the court case). This simply means that there are no periodic reviews, but the court retains jurisdiction in the event that a party files a motion pursuant to 7B-906(b) or 7B-1000 seeking a review hearing.

I. **Funding Sources**

1. **TANF:** Custodians (persons who have been given legal responsibility but not guardianship to provide care and supervision for the child) may apply for TANF (Temporary Assistance for Needy Families, formerly AFDC) payments for the children as child(ren) only cases. One who is not a legal custodian may not be able to get child only benefits.

a. Child Only benefits do not consider the income of the legal custodian in determining eligibility. However, if the child has other income (such as SSI), the child may not be eligible for TANF. If the child is not a U.S. citizen or a "qualified alien," he is not eligible for TANF benefits. Anyone interested in learning whether they qualify for TANF should contact their county department of social services, Work First Program.

b. Payment for TANF is less than that for children in adoption or assisted guardianship  
One child-\$181  
Two children-\$236  
Three children-\$272  
Four children-\$297

c. The amount of payment may be reduced by any other income (e.g, SSI) of the child's.

2. **Medicaid:** If the child receives TANF there will be Medicaid.

If there is no Medicaid, custodians are encouraged to apply for North Carolina Health Choice for Children.

3. **Child support:** Since the court case stays open, the parents can be obligated to pay child support to the custodian.