

Virtual Training Studyguide: Legal Question & Answer Session

Mariel Willow: I work at Pegasus Legal Services for Children. I'm one of the staff attorneys, and I primarily practice in the area of guardianship. We're a non-profit legal aid who practices in a variety of areas of law involving children.

Derek Garcia: I'm a staff attorney at the Albuquerque office of New Mexico Legal Aid. I work 25% of my time with the Kinship Guardianship Caregivers Project and the CYFD partnered agencies. I devote 75% of my time to a project called Safe to Be You, which is also a statewide project through the office of violence against women in the Department of Justice, a federal project that provides free civil legal services to LGBTQ survivors of domestic violence and other forms of violence in the LGBTQ community. I work quite extensively on cases involving kinship guardianship in that sector and arena and as well as in domestic violence-related situations.

New Mexico Legal Aid generally serves the entire New Mexico community. Because we are dedicated to opening the door to equal access to justice across New Mexico, we are very, very, very grateful for the opportunity to connect even deeper into communities that we haven't reached especially in rural and other sectors that often get overlooked.

We generally have about 14,000 persons per attorney at New Mexico Legal Aid that are potentially eligible for service. A lot of the services that we do provide in the kinship arena, were just gearing up with, just joined the project and very grateful to be there. We try to provide at least advice and counsel telephonically or more extended services including direct representation on various select cases. Good to make your acquaintance and I look forward to helping individuals out if we connect as attorneys and clients.

Vanessa Peake: I'm a private attorney here in Albuquerque and I do actually mainly family law cases with a special focus for the Hispanic community. I do work with kinship guardianships, but also I do specialize with divorce custody and pretty much all the domestic issues that we deal in family law.

Esther Keeswood: This is Esther. My name is Esther Keeswood. DNA, People's Legal Services out of the Farmington office. We have offices all over the Navajo Nation including Flagstaff but our office is the only one in New Mexico now. There was a Crownpoint office but it was closed. We cover a big area of San Juan County, Rio Arriba, Sandoval, and part of McKinley County because they're part of it on the Navajo Nation.

We do a lot of kinship guardianship with the Navajo Nation Courts. We haven't really been doing much in the Jicarilla Apache Court because they don't have kinship guardianship in place there. Then our attorneys, they also do kinship guardianship classes like once a month before the

pandemic. We do a lot of that and we also do a lot of the caregivers' affidavits for school and medical for grandparents or aunts and uncles that need that for their nieces and nephews, so that's us. I have three attorneys in our office and myself licensed in Navajo Nation court as well as the Apaches, and then we have two support staff in our office.

If the father is not on their birth certificates, what rights do they have if any?

Marisol: In New Mexico, you can become in state court. Like Esther said, she practices in Navajo court so I think the answers are going to be different depending on what jurisdiction you're in but in state court, you can be a father in a number of ways. In kinship guardianship cases, you must serve the father. That can be the biological father or a legal parent. For example, if you know the name of the father and you know where he lives, you know he holds himself out to be the father, he needs to be served.

If you don't know who he is and he's not on the birth certificate, then he needs to be served usually by newspaper publication, but that's just a general explanation of parents. I think different attorneys interpret this differently, but generally, if who the father is, the father has general rights to the child just like the mother does regardless of whether there's a finding of parentage or if the father's on the birth certificate.

Esther: Through the Navajo Nation, I don't know if you want to hear that too, if your name is not on the child's birth certificate, you are a stranger to the child. You have no legal right to the child. That is the Navajo Nation Supreme Court opinion. Unless you go into court and say, "Hey, I'm the father," and you file your petition for paternity, that's the only way you'll get recognized as a father. If the father is wanting to get custody, they have to establish paternity first. Otherwise, they have no obligation to pay child support or nothing like that according to the Navajo Nation Supreme Court. However, the mother can also establish paternity just the way that the state court does, take them into court and then establish paternity. One of the things that are very important there is to serve him so you have to know where he's at and you got to know who the father is.

Vanessa: In regards to just the rights of the parents, the father, I would say that here in the Second District and in what I've seen in New Mexico in regards to not so much the kinship of parentage cases, fathers do have the right but like in the Navajo Nation, the father have the rights, general rights like the mother, but they do have to request to the court if they want to have some sort of custody or time sharing or to be required to pay child support. Because if a father calls let's say-- and he's not in the birth certificate, call the cops, the police will not enforce anything if there is not a court order adjudicating that person as the father.

Derek: In state court, yes, they have the right to notice and to potentially be heard at the very least. I've had a case where the biological mother did not know who the biological father was. We would have gladly provided notice of the pending proceeding to appoint the kinship guardians so that that biological father, presumably out there somewhere, could potentially contest that. The court in that particular case did not require us to serve by publication generally because the father was just generally unknown to the biological mother who was consenting to the appointment of the kinship guardianship providers.

At the very least, yes, just to echo, yes, they have the right to notice that the proceeding is going on. Beyond that, they can choose to appear in court and then maybe, just to echo, ordered to pay child support or a visitation schedule if they're going to contest the appointments of the kinship guardians past that point but there is process involved.

If you feel that a parent will agree to kinship, how do you proceed?

Derek: When the biological parent is on board or is wavering and unsure about what it exactly means to be relinquishing parental rights across the board, our typical first step is to really negotiate with that parent and really reach out and to explain and answer questions as the attorney on behalf of the petitioners. I would say as a general answer to that question, allow some time for us to be able to contact the biological parents and make them more comfortable with potentially filing the necessary consent form, which makes uncontested proceeding and then it goes forward a lot quicker and more and with less friction for all family members concerned.

It's a process, it's a very human process just like any other. Just getting on the phone with those interested parties, the biological parents and their counsel if represented and negotiating to see if we can rest assured that if there are agreements that can be made regarding visitation and that sort of thing and negotiated, then we don't have to move forward to a fully contested proceeding. Usually the hang-ups surround, "Well I'm never going to get to see my child again," that sort of thing. In those cases, it's very easy to, with your clients consent, to offer reasonable visitation and that sort of thing as part of obtaining their consent for the appointment.

Mariel: Yes and in addition to that, in state court, you can either get the parent's consent or you can give the parent notice so you have to serve them legally. The two most used ways I think for service in New Mexico is personal service, somebody handing the documents to the parent, and/or certified mail to their house, which they sign for. Then that person is then entitled-- the parent is then entitled to show up in court or respond but they don't have to. What the petitioner, the person asking for guardianship has to show is that the parent is unable and willing to provide adequate care maintenance and supervision for the child.

It doesn't matter whether the parent agrees or not. The other thing is when a parent contests, when they come to court and they disagree that a guardian should be appointed, the court is mandated to appoint a guardian ad litem, which is an attorney that acts in the best interest of the child. They're like an investigator for the court, and they help the court decide what's in the child's best interest.

If a family member or friend wanted to get guardianship when the parent doesn't consent, what is the process?

What they have to do is provide notice to the parents. They can provide notice by certified mail. So they send certified mail with every filed court document inside of it as well as a summons, which is like a document that says, "Hey parent, a case has been filed. Here's the case number. If you want to respond, respond within 30 days." Then they can be served via personal service, either through any adult over the age of 18 who has a valid ID who signs a document like the summons return in front of a notary that says they were served or the sheriff oftentimes will serve.

If you're eligible for free case filing, you can have the sheriff serve for free in the county where you live, the county where the case was filed. When the parent's unknown or unavailable for some other reason, you can serve via the newspaper but you have to get permission from the judge, so it's a bigger hurdle.

Esther: Is the process of service parenting basically almost like New Mexico in the Navaho Nation and as well as the Apache court now.

Say a parent misses numerous visits and disappears for weeks at a time, will the judge still apply a visitation schedule when and if guardianship is appointed and approved?

Mariel: In my opinion, the answer is always maybe. We don't know what the judge is going to do. They're the ultimate decision-makers. If a person asking for guardianship, the petitioner wants visitation to be stopped, they need to make an excellent case because the visitation is the minimum parental right that a parent can retain, or there's other ways how to have visitations. They can do supervised visitation through an agency. You can do counseling between the parent and child. You can suggest something that's less than the visitation schedule that's been happening.

Certainly, there are ways to convince a judge that visitation is not in the child's best interest or that the parent's failure to show up every time is affecting the child. Like what I always suggest to my clients is that they write down the date that visitation was agreed upon, what happened afterwards, whether the parent showed up or didn't show up, how much notice was given, whether the parent asks to reschedule, whether the child was upset after visitation or happy, things like that.

Derek: I would completely agree with that also. It really just depends on your judge or decision-maker and the other factors, whether or not some form of emotional abuse may be occurring if the child has scheduled visitation that needs to be considered. Certainly, in those cases, there's good grounds to withhold visitation and that sort of thing. It all depends on the facts and circumstances, the very specific case and the very specific decision-maker.

Very rare that any legal situation will have a 100% certain this is what the judge is going to do in those sorts of situations. You'll definitely want to at least try to seek advice and counsel of an attorney on how to go about navigating that process. At least mentioned to the-- You're going to go through various options in terms of limiting visitation, supervised visitation as well as other mechanisms which may be available to make sure that the child isn't-- or children are not experiencing harm.

If I'm applying for kinship guardianship, but someone else in the same family is also applying for that guardianship, how do we go about that? What are our options basically if I'm one person and then there's another one that's also trying to appeal that guardianship?

Vanessa: Well, the kinship guardianship was actually created. The full intention of legislation was to provide to the children and a stable environment to be living with someone that has a relationship when the parents cannot provide that to them, a guardian can get that to them, that is stability. The courts, what they're going to be looking at, it's a different factor, but the most important thing will be the best in terms of the child and who the child is residing with, who the child is closer to.

May say that the child has a close relationship with maternal grandma but paternal grandmother also wants to have the child but has never seen the kid, only talk with him over the phone and the child is not used to her. Most likely, the court is going to lean to give it to maternal grandmother because that's where the kid is-- it's a safer space for him or her and it's in the best interest for the development to be with someone that they are used to and they have a closer relationship to.

Mariel: Yes. The other thing is about that before filing the parties have to meet certain requirements. The person asking the court to appoint them guardian has to either have the child's in their home for 90 consecutive days prior to filing without any nonconsenting parents. If I have my brother's child in my house for 90 consecutive days and I'm acting as that child's parents, then I could then go to the court and petition for guardianship on the 91st day.

The other ways that you can petition for guardianship is to claim that there are extraordinary circumstances and the child's been-- it has to actually be extraordinary. It can just feel like my brother didn't enroll my nephew in soccer and he really likes soccer. It has to be something like

probably pretty close to abuse, neglect. We generally do it when a parent is incarcerated or they passed away or a teenager's run away from their home. Otherwise, you have to wait the 90-day period before filing. If one grandparent has - -the child for 90 days and files for guardianship and then the other grandparent doesn't have the child at all, there's an argument to be made by the grandparent whose had the child for 90 days that they're the only one entitled to file for guardianship.

Derek: Yes, just to add to that, I haven't had the particular case where you have dueling petitioners. Usually if there's any contest, it's between the biological parents, and the kinship caregivers. I would say that's why conflicts of interest and that sort of thing are very important for the attorneys to make sure that all interested parties receive notice. Then one petitioner will link up with various attorney maybe who handle their filing and make sure that in the petition itself, other potential petitioners are also listed, so that they can obtain counsel for themselves and participate in the proceeding. Then it really boils down to the judge's decision on what is best for the children in addition to the 90-day factor, where the child has been physically residing for the previous 90 consecutive days as well as, who's economically in the best interests of the children also to provide the best and most appropriate care. Yes, I think it all depends on the facts and circumstances again with that sort of situation. But very important that all interested parties receive notice and an opportunity to be heard in the proceeding.

If the kin caregiver had the custody of the children for at least five months. The bio father did not meet the requirements basically to do meetings with the kids. The caregiver has a caregiver certificate and now the father is wanting to communicate with the kids, but does the kin giver have a mediator dealing with all of that?

Marisol: In order to get guardianship, a judge has to give it to you, a district court judge after you file paperwork in court. If you don't have that, there's some lesser things you could have. Something that, as I mentioned, is the caregiver's authorization affidavit and power of attorney. A power of attorney is something signed by a parent, a document signed by a parent who has custody of a child to let another person enroll that child in school and make medical decisions for them. It's revocable, meaning, again, if I have my brother's child living in my house, and he assigns a power of attorney to me. Then he decides, "Okay, today I'm going to do it," and then I make him upset and tomorrow he picks up the child, he didn't do anything wrong. His power is revocable. Or if he continues to leave the kid in my house but takes away my power of attorney, he can also do that. All it does is allow another person to make medical decisions or even if I have two children, I can give a power of attorney to my sister to allow her to take my child to the doctor on Tuesday, even though I don't give her my child.

At any point in time, I can call the doctor or I can take that paper from my sister. Caregiver's authorization affidavit is generally used when you cannot get ahold of the parent or who has custody of the child. Let's say my brother drops off his son, he leaves town and I'm like, "I need to take this kid to the doctor, what do I do?" I can sign the caregiver's authorization affidavit myself swearing that I'm taking care of this kid and use that paper to access medical care. If he comes back three weeks later, or calls the doctor and says, "No she can't do that," then I can't do it.

What a judge does in a guardianship proceeding, when the order is given, either a temporary order, which lasts six months or a permanent order, which lasts until the child turns 18, or unless there's a further order modifying that, what it does is suspends the parents' rights. While the guardianship is in effect, the parents have no rights to the child, no rights to make any decisions unless the court says otherwise. At that point, the person who has custody of the child, so the guardian then has custody of the child, gets to make all the decisions.

Let's say I get guardianship from a district court judge in the county where the child lives, with order and then my brother contracts me and says, "Hey I want to talk to my son." On the final page, there's generally a line in there that says either- -visitation is at the discretion of the guardian or it says something else. It says mom should have visitation every Wednesday for three hours or the father should have no visitation until he gets a psychological assessment, blah, blah, blah.

Whatever that says, that's what the rule is that apply. If it says visitations at my discretion, I could tell my brother, "Hey, if you're not on meth tomorrow, you can come to Johnny's birthday party. But if you show up and your eyes look all glazed and you're acting crazy, you can't come," that kind of thing. It just depends on what the judge has stated in the order. It's at the discretion of the guardian. However, if you're given guardianship, it's the guardian's discretion, and the guardian is being unreasonable with visitation, that's when the guardian is going to get in trouble.

If I'm just saying, "Oh, you can't come by because we don't like you, we don't want you around here," or whatever, that's not a good reason. It needs to be a valid reason or that parent can come back to court and ask to modify the order, say, "Judge, they won't let me see my kids, I don't know anything about them," blah, blah, blah. Again, it's up to the judge, it's situation dependent, but read what the judge has said, if in fact, you have a guardianship order. If you don't have a guardianship order, then the parent has all their rights, and they can do whatever they want.

Regarding the child, the other common question we get is if the order says dad should have visitation every Wednesday for 30 minutes and then the dad wants more visitation, you don't have to go back to the judge and say, "We want more visitation," you can just give it. What the judge lays out is the minimum required.

Derek: Yes, just to add on that, it's very, very confusing for a lot of folks out there to understand the differences between what the parties may have agreed to out of court and a power of attorney document, which is as Mariel pointed out easily revocable by the granting biological parent at any time. Then their parent parental rights trump that document even if it was in place as a temporary arrangement between the parties or the caregiver's authorization is also dependent on that person providing their consent. At the time, they could be noticed and brought into the situation.

It's very confusing and it all depends on what's already in place. But the caregiver's authorization and power of attorney, if it's not granted by a judge, most likely, it can be undone by the parent. The only way around that is for the petitioners to go into court and actually get rolling on the petition for the permanent guardianship. At that point, the judge will usually issue a judge ordered six months temporary guardianship and allows the visitation line as far as explaining in the very bottom to say exactly what visitation should be occurring in six months pending GAL being brought in, pending further court proceedings.

Then usually a final order appointing the kinship guardians, and then it becomes generally they take the place of the biological parents in terms of the all their rights. Usually, it's then their discretion on visitation and custody and that sort of thing. It all depends on which stage of the proceedings you're in, whether or not you have a temporary power of attorney document that's based on the parent's consent, whether or not it's a caregiver's authorization if you haven't been able to locate or notify the parents. Those are easily undone, not so with the permanent guardianship or the temporary order when you're actually in court. I would say best to consult with an attorney as soon as possible if it does look like it's going to result in a lot of conflict and potential harm to the child.

If the parent is wanting to be involved in the child's lives, but the guardian has already had these children for a while, what would that process look like?

Derek: It's really dependent on what precise paperwork is actually in place. If it's merely a power of attorney, that can be undone by the biological parents at their own discretion, at any time, it's not really up for debate. If that person, they- -have their full biological parental rights, that decides to come back in the picture and undoes the power of attorney that they have, the only recourse is to go to court and file the full petition for kinship guardianship and initiate court proceedings. If it's a caregiver's authorization, same thing holds true with that document. Generally, if the biological parents been out of the picture and that paperwork allows that temporary person to assume the duties and responsibilities of the biological parent, that can always be undone by the biological parent.

However, if you've already been in court if you've already been in front of a judge, and received a temporary order on kinship guardianship, that document cannot be undone by the biological parents without further proceedings and the judge's signature saying that such and such visitation is appropriate or the temporary guardianship is hereby terminated. Usually that gets granted right at the initiation of the kinship guardianship proceedings in court.

Likewise, if the paperwork in place is the permanent order granting the petition for kinship guardianship, in those situations it can't be undone very easily by the biological parent coming back into the picture. It's been done. To undo that process requires a lot of legal make legwork on behalf of the biological parent and it's a much more permanent situation, in fact, 98% permanent in most cases. It really depends on the precise paperwork in place, and the facts and circumstances, and where we are in the procedural posture. I would say the best advice is to run it by an attorney for at least some telephonic advice and counsel in that situation and decide exactly what needs to be done.

Marisel: One simple way to remember it too is that if a judge gives it, only a judge can take it away. If a parent gives it, the parent can take it away. That's a simple way to remember who has the authority.

What are some supports for guardians who are needing help with legal paperwork?

Marisel: I don't want to say we don't help with paperwork, but if you call my office and you say, "I need help filling out that packet," you're not going to get that. The way that our procedure works at Pegasus is we have a general intake line. The phone number is 505-217-160 or you can just look us up and call the mainline.

The intake specialists will gather information about what you're calling about to make sure we can assist and run a conflict check, which is something we have to do, make sure you financially qualify for services. At that point, they'll gather information about your case in the same phone call. It's around maybe 15 to 30 minutes this call. Then the intake specialist will get the information to an attorney and the attorney will determine the level of advice that person should get.

Sometimes we assist with specific questions about the paperwork. If a person doesn't know what to write in regards to, say as a parent, who's the father. Or they're confused about the requirements or the next step, we can answer those questions if the person qualifies for services. What we try to do is provide full representation, meaning that we draft all the paperwork for the guardian, we file it in court. We do all of those things.

We can't always move at the speed that the guardian needs. Sometimes we have 12 callbacks every week with an attorney live on the phone for people who qualify for our services to get additional information. Also sometimes, the courts have Self-Help Days. That's a little bit off because of Coronavirus. There's also private attorneys who might be able to assist just with paperwork. But generally, attorneys like to provide full representation because there's a lot of things that cannot change throughout the case, it's not just paperwork. If it was just paperwork, it would be easy. It's a lot more than that.

Derek: From New Mexico Legal Aid, we generally also have to run conflict of interest checks before the attorneys can even talk with you when you're calling. We also gather a lot of your personal information to be sure that the reviewing attorney understands the full facts and circumstances of the situation completely. We are authorized to give general advice and counsel over the telephone for assistance in assisting you to fill out your own paperwork and file in court yourself.

On a very limited basis, we can also provide potentially direct representation in court to be your actual attorney. The main factor is we have to gather your information and research the case as much as we possibly can before providing advice to you on how to fill out the paperwork. As Mariel pointed out, there are often very changing circumstances in these cases, so we have to be very careful about the advice that we do provide.

Generally, however, if you have questions about paperwork and what specifically to say, I would say the best way to do is to apply for the legal services. We can take applications online through New Mexico Legal Aid, all one word spelled out dot org, so newmexicolegalaid.org. There's an online application as well as an apply for legal help by a phone and that number is 1-833-545-4357. You'll be transferred to our intake unit who will gather your information fully, and then be reviewed by one of the attorneys who may be able to assist you.

We offer also brief services in terms of helping with underwriting legal paperwork but it all depends on the facts and circumstances of the case. Some cases that are contested are too much for us to be able to provide advice and counsel. If we know they're contested cases, we usually like to do full representation on those cases too. It really depends on our resources and time depending on the cases that we've previously committed to.

The best way to receive even some brief advice over the telephone is just to give us a call and we'll definitely assess that as much as possible. Please mention that you're part of either Family Fostering Family or Southwest Family Guidance Center or a CYFD Partnered Agency and working with these projects. That way, our intake personnel ensure that it gets to the appropriate channels for review.

We often require members from the general public to be income qualified also, which doesn't apply in this particular partnership agreement. Be sure to mention which agency or where you're calling from in other words.

Vanessa: I would like to talk a little bit more on the side of the private practice, not like nonprofit organization but the private attorneys. We understand that there are some cases that are highly litigated or complicated or circumstances changes. Also, we understand not just on the legal case and the legal facts but also the life of that person that is presenting these legal facts. Sometimes their income is not high enough to pay a private attorney, neither low enough to qualify to a nonprofit organization so these people are in the limbo. What can you do with this type of cases? I think that private attorneys, there is a type to work with this type of situation and it's called unbundling services, which is it's pretty much dividing the entire process and you're able to just hire an attorney for any specific piece of your case. I understand that is a little bit difficult with cases that is going to require more litigation but sometimes you just need to bring that petition to a court and you're completely lost and you don't know what to do. I think that it's an idea that maybe a private attorney, you can have an initial consultation in contact to this person and may be able to point you out as to how to fill out these documents.

Then after that, maybe they will give you a little bit more time to apply to a nonprofit organization to look for other resources or maybe to start looking for these unbundling services. That's my point of view from the private sector, is that there are options that even though the case will be complicated, sometimes you just need to do to bring that petition to the court at that point and if that's the only thing you can afford at that time.