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Practical Impact of Child Welfare Diversion to 159A Guardianships in Nevada

BY MARINA DALIA-HUNT, ESQ.

Minor guardianship across the country initially derived as an area of law to protect the property rights of legal orphans – when children's fathers died, their mothers could not legally inherit, thus their estates had to be managed by another male relative.[1] Over time, minor guardianship became a tool available for families permitting a relative to step in to care for a child when a parent was unavailable or unsuitable.

Instead of determining who would care for orphaned children, the minor guardianship system developed to address who would care for children when their parents struggled with issues such as substance and alcohol abuse; untreated mental health issues; housing instability and homelessness; incarceration; domestic violence between parents; or physical, emotional, or sexual abuse of children in the home. Some families within the guardianship system opted to enter it to avoid the child entering the dependency system.

However, this decision is not without trade-offs. While minor guardianship can stave off child welfare involvement, including placement of the child into the foster care system, it can also prevent families from reunifying as they may through the dependency system. Further compounding this issue, data across the country and in Nevada indicate that in certain cases, child welfare agencies threaten to remove children unless the parents agree to a change in physical custody to an identified relative or family friend in a practice critics refer to as "hidden foster care" or "shadow foster care."

Hidden Foster Care

Hidden foster care occurs when Child Protective Services (CPS) agencies cause a change in a child's physical custody without any family court action, without placing the child in the agency's own custody, and without reporting the child's removal to the federal government.[2] Cases diverted out of the dependency system through this practice begin the same as a standard dependency matter, but as the case develops, a CPS worker either implicitly or explicitly threatens to place the child in state custody if the parents do not comply with the change in custody. Unlike dependency cases, these separations occur without due process protections and efforts to engage in reasonable efforts to reunify families and without federally mandated timelines for reunification, case-plans, services, or court oversight.

In Nevada, this practice has significant implications for a parent-child relationship and a family's due process rights.

In contrast to the dependency system, where functionally every parent and every child is appointed an attorney, parents in the guardianship system are not provided access to free legal counsel. Beyond access to legal counsel, every member of the family – the child, parent, and potential guardian – loses access to services by entering the guardianship system. A caseworker must develop a case plan to address any safety concerns in the home. This plan could include a parent engaging in a myriad of services, including parenting classes, anger management, therapy, and drug treatment. A visitation schedule between parents, children, siblings, and other family members will be issued, depending on the facts of the case. Regular court hearings are held to assess parents' progress with their case plans. None of this occurs in guardianship.

Most guardianship cases involve one perfunctory court hearing where, relying on the information provided in the Petition for Appointment of Guardian, the court will generally appoint the petitioner guardian over the child if all procedural requirements have been met and no objections are raised. There is no case plan. No caseworker. No reunification plan. No services. No visitation plan. No financial support for the guardian.

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Failing to Consent to Guardianship

The implications of lack of access to counsel and other support services are felt especially at the termination stage of guardianship. Nevada Revised Statute (NRS) 159A.1915 sets forth a tiered standard for a parent seeking to terminate guardianship. If a parent consented to the guardianship at its inception, to terminate the guardianship, the parent must show that (1) they have been restored to suitability defined by NRS 159A.061 as able to provide for their child's basic needs and are not a safety risk to their child, and (2) there has been a material change of circumstances since the guardianship was granted. If a parent did not consent to the guardianship at its inception, the parent seeking to terminate must also show (3) "the welfare of the protected minor would be substantially enhanced by the termination of the guardianship and the placement of the protected minor with the parent."

The Nevada Supreme Court recently explained that there is an affirmative duty to consent to the specific guardianship proposed to preserve the lower burden articulated in NRS 159A.1915.[3] In the same case – *In re M.G.M. and M.F.M.* – the court held that the district court did not abuse its discretion in failing to hold an evidentiary hearing on a natural mother's Petition to Terminate when she had presented evidence that she had maintained housing and employment for years. The *M.G.M.* decision followed a series of cases from the Nevada Supreme Court affirming a policy preference for parents choosing to voluntarily placing their child with a relative in lieu of being forced to do so.[4]

However, this jurisprudential preference for "voluntary" entry into the guardianship system has not yet caught up to the practice of hidden foster care. Per *M.G.M.*, if a parent diverted from the child welfare system fails to affirmatively consent to a guardianship at its inception, they have not only lost the lower burden for termination of the guardianship and are not entitled to an evidentiary hearing to prove their restoration to suitability, but they have also given up access to legal counsel and reunification services that could have either encouraged informed consent to a guardianship or counseled against entering the guardianship system at all. Further, a family does not have a right to visitation within the minor guardianship system, so a family may not be able to maintain the contact necessary to facilitate possible reunification as a parent works to remedy the issues that gave rise to the need for guardianship.[5]

Moving Forward

Other states have enacted a variety of laws aimed at stemming the practice of hidden foster care.[6] Some parents in other states have also initiated federal lawsuits with varying levels of success, arguing that the practice of hidden foster care deprived the parents of their substantive and procedural due process rights.[7] The Nevada Supreme Court held that a parent pressured to consent to a voluntary six-month guardianship could sue individual caseworkers involved in their case for violations of his substantive due process rights.[8] In Clark County's Eighth Judicial District, the chief judge issued an administrative order convening a committee of stakeholders to study various issues relating to 159A guardianship, including hidden foster care, with the goal of ultimately making proposals for improvements.

Though there are significant problems within the minor guardianship system, there is a clear opportunity for improvement. The Family First Prevention Services Act of 2017 (Family First), signed into law in 2018, seeks to avoid children entering the foster care system by offering supports to family members and fictive kin as a tool to prevent unnecessary removal.[9] Through this law, states have the option to use Title IV-E funding to prevent children's entry into foster care by promoting programs that support both parents and guardians of children who are determined to be "candidates for foster care."[10] This funding source provides the opportunity for stakeholders in both the child welfare and guardianship system to think deeply about how the system could be improved to balance the competing interests of keeping children safe while avoiding unnecessary entry into the child welfare system.

ENDNOTES:

1. *See* Deirdre M. Smith, *Keeping it in the Family: Minor Guardianship as Private Child Protection*, 18.2 Conn. Pub. Int. L.J. 277.
2. *See* Josh Gupta-Kagan, *America's Hidden Foster Care System* 72 Stan. L. Rev. 841, 848.
3. *See In re MFM and MGM*, 509 P.3d 47 (2021).
4. *See e.g. Litz v. Bennum*, 111 Nev. 35, 38 (1995) ("This court certainly does not want to discourage parents from willingly granting temporary guardianship, while working through problems in their own lives, if that is in the child's best interest."); *but see Hudson v. Jones*, 122 Nev. 708, 712 (2006) ("The natural parent, by voluntarily establishing the guardianship, does not waive their right to the parental preference at a subsequent proceeding to reevaluate the custody agreement …In contrast, a parent who seeks to modify custody in cases involving a litigated custody dispute and a prior determination of either parental unfitness or extraordinary circumstances justifying the award of custody to a nonparent is no longer entitled to the parental preference.")
5. *See* NRS 159A.0565 ("In an order appointing a guardian or in any order thereafter, the court may award rights of visitation between a protected minor and his or her parents or relatives who are within the fourth degree of consanguinity").
6. *See* Texas 88(R) HB 730 (enacting legislating requiring the CPS agency to notify parents of their right to seek counsel before diversion, imposing time limits on "parental child safety placements," and requiring the agency to track data on hidden foster care arrangements); New Mexico SB 31 (providing legal counsel to parents when the CPS agency asks parents to change who lives with their child.
7. *See e.g., Hogan v. Cherokee County, NC*¸519 F.Supp.3d 263 (W.D.N.C. 2021).
8. *See Eggleston v. Stuart,* 137 Nev. 506 (2021).
9. *See* P.L. 115-123 (2018), amending Title IV-E and Title IV-B of the Social Security Act concerning child welfare programs and policy.
10. *See* Social Security Act, section 475(13) (A "child who is a candidate for foster care" is defined as a child who is identified in a title IV-E prevention plan as being at imminent risk of entering foster care (without regard to whether the child would be eligible for title IV-E foster care maintenance payments, title IV-E adoption assistance or title IV-E kinship guardianship assistance payments), but who can remain safely in the child's home or in a kinship placement as long as the title IV-E prevention services that are necessary to prevent the entry of the child into foster care are provided. A "child who is a candidate for foster care" includes a child whose adoption or guardianship arrangement is at risk of a disruption or dissolution that would result in a foster care placement.).

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