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May 18, 2020

Senator Roxanne Persaud
Chair of Social Services

Assemblywoman Ellen Jaffee
Chair of Children and Families

Re: Assembly Bill A9840

Senator Persaud & Assemblywoman Jaffee:

We, the undersigned, are a group of adoption attorneys and other adoption and child-welfare professionals from across New York State, who work with adoptive families, children, child welfare agencies and the court system to protect and advocate for the rights of adoptive and foster children and their families. We submit this letter to urge you to support Assembly Bill A9840, which relates to a child's eligibility for kinship guardianship assistance payments after a child is adopted by his or her kinship guardian(s).

There are currently three possible dispositions for a child in foster care who has not yet been freed for adoption: (1) continued foster care, (2) release to a relative guardian, or (3) the institution of parental termination proceedings. In cases where termination of parental rights is not appropriate, a child must either remain in foster care or be discharged to the care and custody of a relative guardian. New York State has a strong public policy objective of achieving timely permanence for children in the foster care system, and strongly favors the placement of children with relative guardians rather than continued foster care. The Kinship Guardianship Assistance Program ("kinGAP") was created in 2010 to further this legislative objective by authorizing the



payment of kinship guardianship assistance payments (similar to a foster care subsidy) to incentivize relative guardians to accept custody of children out of foster care.

Pursuant to the Social Services Law, kinGAP payments shall continue until the child turns 18, and shall only terminate sooner if the relative guardian is “no longer legally responsible for the support of the child.” In other words, if the guardianship is terminated, the kinGAP payments would also be terminated. *However, what happens if the guardianship is “terminated” because the guardian subsequently adopts the child?* Currently, the Social Services Law and Domestic Relations Law are silent as to the effect of an adoption on a prior kinGAP order. **Bill A9840 would add language to the Social Services Law clarifying that a child who is entitled to kinGAP payments shall remain eligible for such payments in the event the child is adopted by their relative guardian.** We believe this is the correct result.

Adoption Does Not Terminate, But Rather Cements, a Parent’s Obligation to Financially Support Their Child.

Social Services Law § 458-b(7)(b) states that kinGAP payments shall only terminate if “the relative guardian is no longer legally responsible for the support of the child.” Guidance documents put out by the Office of Children and Family Services (“OCFS”) list various examples of ways in which a guardian may no longer be legally responsible for a child’s support, such as: the child no longer resides in the guardian’s home; the guardianship has been revoked or terminated; the guardian is no longer providing any support for the child; the child has become emancipated. Notably absent from this list is the adoption of the child. An adoption certainly does not relieve a guardian of his or her responsibility to support the child; in fact, it imposes on such guardian an even greater financial responsibility by conferring all of the rights and responsibilities of a parent to such child – including the obligation to financially support the child until the child reaches the age of 21 (Domestic Relations Law § 110, Family Court Act § 413).

Termination of KinGAP Payments Upon Adoption Deters Guardians from Adopting Children, Thereby Denying Children the Ultimate Form of Permanency.

The Social Services Law is clear that it is permissible for a relative guardian to adopt the child after a kinGAP order is issued. This makes sense because, while adoption may not have been an option at the time the kinGAP order was issued, adoption provides more permanency for a child than a kinGAP order and should be pursued if it subsequently becomes appropriate (*see Matter of Jacob*, 86 NY2d 651, 657-58 [1995] (the Court of Appeals has held that “adoption is a means of



securing the best possible home for a child’’)). Thus, it is clearly the State’s intent to encourage participation in the kinGAP program and to encourage subsequent adoptions if they become possible and appropriate. The authorization of kinGAP payments to relative guardians was the legislature’s way of incentivizing participation in the kinGAP program. If these kinGAP payments were to terminate upon adoption, this would provide a significant disincentive not only for adoptions, but for participation in the kinGAP program entirely.

Relative foster parents who are considering their options would be unlikely to choose kinGAP knowing that they would never be able to adopt in the future without losing their kinGAP payments. This is especially true given that the alternative is for the child to remain in foster care (receiving a foster care subsidy) and subsequently pursue a foster care adoption which would entitle the adoptive parents to receive adoption subsidy payments until the child reaches the age of majority. Choosing the foster care option, however (rather than kinGAP), forces the county to pursue a termination of the birth parents’ parental rights, which can take years and delays permanency substantially – the very reason the kinGAP program was established in the first place. Relative guardians who already have a kinGAP order would also be unlikely to pursue an adoption (the ultimate permanency option for the child) if they knew their kinGAP payments would stop after the adoption finalizes; in this scenario, the act of adoption, which creates the ultimate security and stability for the child, simultaneously diminishes the relative’s financial ability to raise the child.

Recent Administrative Hearing Decision Authorized Continuing kinGAP Payments Post-Adoption.

In a 2018 case from upstate New York, relative guardians adopted a child after being appointed as kinship guardians. Approximately two years after the adoption, the county notified the adoptive parents that their kinGAP payments were being terminated due to the adoption. The adoptive parents pursued a fair hearing and the decision to terminate the kinGAP payments was reversed by the Administrative Law Judge. The Judge ruled that the adoptive parents were no less financially responsible for the child after the adoption than they were before and, therefore, continued kinGAP payments were appropriate. The Judge further ruled that: “[T]he State’s interest in achieving timely permanence for children in the foster care system weighs heavily against determining that an adoption terminates eligibility for the kinship guardianship subsidy. Surely the State is not committed to keeping a child with a legal guardian when that guardian is



willing and able to adopt the child and take on the legal rights and responsibilities of a parent” (*In the Matter of the Appeal of Linda Mackanesi*, HID #100198).

While this decision is helpful for other relative guardians who may be considering adoption, guidance is needed from the legislature to institute a consistent policy statewide. Bill A9840 furthers and facilitates the State’s objective of encouraging relative guardians to offer vital permanency options to children in foster care. We respectfully urge you to provide your support for this important piece of legislation.

Please contact the President of our organization, Kathleen (“Casey”) Copps DiPaola, at **518-436-4170**, or by email at kdipaola@theCDSLAWFirm.com to discuss this matter in greater detail. Thank you for your time and attention.

Kathleen (“Casey”) Copps DiPaola

New York Attorneys for Adoption & Family Formation

By: Kathleen (“Casey”) Copps DiPaola, Esq.

President

1 Marcus Blvd., Suite 200

Albany, New York 12205

Phone: (518) 436-4170

Fax: (518) 436-1456

kdipaola@theCDSLAWFirm.com

