

Potential SIJS Custodians and Guardians

Eligibility, Responsibilities, and Requirements

June, 2023

This document has been modified and adapted from Safe Passage Project (Nov. 2021), “Special Immigrant Juvenile Status Manual, 4th Edition: A Step-By-Step Guide for Safe Passage Project Pro Bono Attorneys.” Available at: <https://www.safepassageproject.org/wp-content/uploads/2021/11/SIJS-Manual-Nov.-2021.pdf>

Custodian Eligibility, Responsibilities, and Requirements

Absent a court order, both biological parents have equal rights to the legal and physical custody of their child. A custodian can be appointed for a child until the child’s 18th birthday. While anyone who has a role in the life of a young person can petition to be the young person’s custodian, note that under New York State case law, “extraordinary circumstances” must exist in order for a non-biological parent to be appointed as the child’s custodian¹. **Therefore, in circumstances where a non-biological caretaker wishes to have the legal authority to care and make decisions for a young person, that adult can petition to become the young person’s legal guardian. In New York, a young person who is over the age of 18 can no longer have a custodian appointed, but is eligible to have a guardian appointed up until age 21.** The custodial parent will be responsible for the housing, education, financial support, and general well-being of the child. The court will examine what is in the best interest of the child in determining custody. Custodial parents do not have to have lawful immigration status.

Who can be a Guardian?

Any adult over the age of 18 can be appointed as a young person’s guardian, if it is in the young person’s best interests.² The guardian does not have to be biologically related to the young person. Guardians can be family friends, school teachers, religious figures, or any other responsible adult in the young person’s life with their best interests in mind. Guardians do not have to have lawful immigration status.

Guardian Responsibilities & Requirements

Governed by Article 6 of the Family Court Act (FCA) and Article 17 of the Surrogate’s Court Procedure Act (SCPA), a guardian (similar to a custodian) should safe-guard the child’s physical and emotional well-being. Guardians have decision-making authority and legal responsibility for the child. This allows the guardian to secure medical treatment for the child, enroll them in school, obtain a passport for them, etc. A guardian is not financially responsible for the child. If a youth is in need, though, a responsible guardian would take steps to find assistance for the youth. If a proposed guardian has assisted the child financially (buying clothes and food, for instance), that is a good indication that the proposed guardian has the child’s best interests at heart.

Under New York law, a guardian can be appointed for youth up to the age of 21. A grant of guardianship does not sever the familial relationship between a parent and a biological child; a guardian does not become the child’s parent, nor do the child’s parents lose their parental rights simply because another individual is named guardian of their child.

Guardianship: Additional Procedural Requirements

On January 4, 2017, Chief Judge Edwina Richardson-Mendelson issued a memorandum (found [here](#)) to all New York State Family Court judges, attorneys and clerks. The memo states that “[o]rdering fingerprints in any specific case is *at the discretion of the Family Court Judge*. Ultimately the decision to exercise discretion in requiring fingerprinting rests on whether the court is satisfied, on a case-by-case basis, that the child is safe and secure under the guardian’s care and that the guardian holds the child’s best interests as paramount, or whether there is an identifiable cause for concern that may be allayed by procuring fingerprinting results.”³

Though ordering a criminal background check and fingerprints remains in the discretion of the Family Court adjudicator, in practice, most family court judges and referees do order them in guardianship proceedings. The proposed guardian and

¹ See *Matter of Bennett vs. Jeffreys*, 40 N.Y.S. 2d 543 (Ct. of App. 1976).

² See, e.g., *In the Matter of the Guardianship of Michael Lafontant, an Infant*, 617 N.Y.S.2d 292 (Surrogate’s Ct., Rockland Cty. 1994); *Matter of Marisol N.H.*, 115 A.D.3d 185 (N.Y. App. Div. 2d Dep’t 2014).

³ See Advisory Council on Immigration Issues Memo issued on January 4, 2017; emphasis added.

all members of the guardian's household over the age of 18 are subject to the background check. The background check's purpose is to look for any history of criminal activity or child protective violations that are cause for concern.

Fingerprints: The proposed guardian and all members of the proposed guardian's household who are over age 18 will likely be required to be fingerprinted in the Family Court or using a method prescribed by the Family Court. The fingerprint results initiate a background check, which looks for criminal histories or offenses against children. Certain criminal offenses will prevent a person from being named a guardian, so the proposed guardian's criminal history, and the criminal history of household members, is certainly an area into which you should inquire.

Record of Past Residences: The proposed guardian and the members of the household who are over 18 must provide all of their addresses for the past 28 years. This address history is also part of the background check that searches for criminal histories and allegations of child abuse, neglect, and abandonment.

Court-Ordered Investigation (COI): The proposed guardian should be aware that a representative from the Administration for Children's Services (ACS) or the Probation Office may visit their home and perform a Court-Ordered Investigation (COI) in order to evaluate the conditions of the household in which the young client lives. In general, ACS or the Probation Office will contact the proposed guardian directly to arrange an inspection; as the *pro bono* attorney, you most likely do not have to coordinate the inspection. After obtaining the guardian's schedule, the person conducting the inspection may show up at the home unannounced. All household members present in the home at the time of the inspection should be prepared to be interviewed.

Willingness to Appear in Court: Lastly, the proposed guardian, as well as your young client, should expect to appear in Family Court several times. They will provide oral testimony. The judge will ask the proposed guardian and the child about their relationship, living situation, and why it is in the child's best interest for the guardian to be appointed.

FAQ: Guardianship and Custody

Q: Does a guardian have to be related to the child?

A: No, a guardian does not have to be related to the child. In 2014, the Court ruled that no specific familial relationship is required to petition for guardianship.⁴

Q: Does the guardian have to have legal status within the United States?

A: No, the guardian does not have to be a U.S. citizen, resident, or have any form of legal documented status within the United States. State courts should not inquire into a guardian's status nor relay such status to USCIS.⁵ However, we cannot guarantee the safety of an undocumented custodian or guardian in Family Court; there have been reports of immigration enforcement operations in or near Family Courts in 2017.

Q: Can a biological/natural parent petition for guardianship?

A: Yes, a natural parent can petition for guardianship over her own biological child. Under the Surrogate's Court Procedure Act, any person may petition for the guardianship of an infant.⁶

Q: What about step-parents? Can a step-parent be a custodian or guardian?

A: Yes! Step-parents can be custodians/guardians or co-custodians/co-guardians with their spouse (your client's biological parent). Alternatively, if the step-parent is a lawful permanent resident or U.S. citizen, there may be a way for the step-parent to file a family-based immigration petition for your young client.

Q: Does the guardian have to live with the child?

A: No, the guardian does not have to live with child.⁷ However, some judges are more skeptical of guardianship proceedings where the proposed guardian does not reside with the child, even though there is absolutely no requirement that they live together.

⁴ See *Matter of Marisol N.H.*, 115 A.D.3d 185 (N.Y. App. Div. 2d Dep't 2014).

⁵ The court in *Matter of Lafontant* found that the petitioner's lack of lawful immigration status did not preclude him from being appointed as guardian. In *the Matter of the Guardianship of Michael Lafontant, an Infant*, 617 N.Y.S.2d 292 (Surrogate's Ct., Rockland Cty. 1994).

⁶ SCPA §1703. In *In re Marisol N.H.* the Court held that appointment of guardianship may be granted to a natural parent. See *Matter of Marisol N.H.*, 115 A.D.3d 185 (N.Y. App. Div. 2d Dep't 2014).

⁷ *Matter of Axel S.D.C. v. Elena A.C.*, 139 A.D.3d 1050 (N.Y. App. Div. 2d Dep't 2016).