

## **Relative Caregiver Consent Authorization Legislation in the United States and Proposed Legislation for Minnesota**

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### **Introduction**

Social phenomena such as single parenthood, teen pregnancy, AIDS, drug use, neglect, incarceration, unemployment and poverty have altered the manner in which children are being raised. In 2002, 5.8 million children in the United States lived with their grandparents. For 2.4 million of these children, the grandparents were the primary caregivers.<sup>1</sup> Of these 2.4 million grandparent caregivers, 1.27 million provided this care without any parent present.<sup>2</sup> By 2006, there were 6.7 million children raised in grandparent or relative-headed households.<sup>3</sup> For 2.68 million of these children, the grandparents were the primary caregivers.<sup>4</sup>

In Minnesota, the situation is similar. In 2006, 39.3% of grandparents living in Minnesota were responsible for the care of their grandchildren.<sup>5</sup> This meant that there were 37,621 children (3% of all children in Minnesota) being cared for by a grandparent.<sup>6</sup> In 2007, 33,975 children were living in grandparent-headed households (2.6% of all

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<sup>1</sup> U.S. Census Bureau: "Grandparents Living With Grandchildren: 2000," Census Brief, <http://www.census.gov/prod/2003pubs/c2kbr-31.pdf>; Generations United, Fact Sheet: A Guide to the National Family Caregiver Support Program and Its Inclusion of Grandparents and Other Relatives Raising Children, (September 2003), [http://ipath.gu.org/GU\\_Fa8161318.asp](http://ipath.gu.org/GU_Fa8161318.asp).

<sup>2</sup> U.S. Census Bureau: "Children's Living Arrangements and Characteristics: March 2002," <http://www.census.gov/prod/2003pubs/p20-547.pdf>.

<sup>3</sup> Generations United Website, <http://gu.org/Censu9201347.asp>; this page provides references to actual U.S. Census Bureau tables available for download at the U.S. Census Bureau Download Center: [http://factfinder.census.gov/servlet/DownloadDatasetServlet?\\_lang=en](http://factfinder.census.gov/servlet/DownloadDatasetServlet?_lang=en).

<sup>4</sup> U.S. Census Bureau: Percent of Grandparents Responsible for their Grandchildren: 2006, [http://factfinder.census.gov/servlet/GRTTable?\\_bm=y&-geo\\_id=01000US&-\\_box\\_head\\_nbr=R1001&-ds\\_name=ACS\\_2006\\_EST\\_G00\\_&-redoLog=false&-format=US-30&-mt\\_name=ACS\\_2003\\_EST\\_G00\\_R45\\_US30](http://factfinder.census.gov/servlet/GRTTable?_bm=y&-geo_id=01000US&-_box_head_nbr=R1001&-ds_name=ACS_2006_EST_G00_&-redoLog=false&-format=US-30&-mt_name=ACS_2003_EST_G00_R45_US30).

<sup>5</sup> Id.

<sup>6</sup> 2006 American Community Survey, Table B09006: Relationship to Householder for Children under 18 in Households, [http://factfinder.census.gov/servlet/DatasetMainPageServlet?\\_program=ACS&-submenuId=&-lang=en&-ts=](http://factfinder.census.gov/servlet/DatasetMainPageServlet?_program=ACS&-submenuId=&-lang=en&-ts=).

children in the state).<sup>7</sup> An additional 26,322 children lived with another relative caregiver.<sup>8</sup> These statistics reveal that over 60,000 children, over 5% of all children living in Minnesota, are being cared for by a relative other than the parent.

The vast majority of relative caregivers in the United States are raising children “informally” without a legal relationship, such as legal custody or guardianship.<sup>9</sup> Many relative caregivers who raise children informally do not want to assume legal custody of the child. They hope that the parents will be able or willing to raise the children at some point in the future. The caregiver may also wish to avoid the often lengthy and emotion proceedings necessary to gain legal custody of the child. Because a court must reach conclusions about the fitness of the parents and the “best interests” of the child, this process can strain family relationships, rather than keep the family together.

These “informal” relative care relationships face unique problems. Without a legal obligation to care for a child, relative caregivers are often precluded from state financial assistance, food support, and medical insurance. Furthermore, the relative caregiver is also often denied the ability to make decisions regarding schooling and medical care because they are not legally authorized to provide the necessary consent.<sup>10</sup>

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<sup>7</sup> “Grandfacts: A State Fact Sheet for Grandparents and Other Relatives Raising Children; Minnesota, September 2007,” <http://www.grandfactsheets.org/doc/Minnesota%2007%20New%20Template.pdf>. U.S. Census Bureau data from the 2006 American Community Survey indicated that in 2006, there were 37,621 children (or 3% of all children) under 18 in Minnesota being cared for by a grandparent.

<sup>8</sup> Id.

<sup>9</sup> For comprehensive reasons, this paper will use the term “kinship caretakers” to describe those taking care of children who are in some manner related to that child. These relationship could include grandfather, grandmother, brother, sister, half-brother, half-sister, stepbrother, stepsister, uncle, aunt, first cousin or first cousin once removed, nephew, niece, person of preceding generation as denoted by prefixes of “great,” “great-great,” or “great-great-great,” or a spouse of any person named in the above groups even after the marriage ends by death or divorce.

The National Family Caregiver Support Program defines “grandparent or older relative who is a relative caregiver” to mean: a grandparent or step grandparent of a child, or a relative of a child by blood or marriage, who is 60 years of age or older and – (A) lives with the child; (B) is the primary caregiver of the child because the biological or adoptive parents are unable or unwilling to serve as the primary caregiver of the child; and (C) has a legal relationship to the child, such as legal custody or guardianship, or is raising the child informally. Generations United, Fact Sheet: A Guide to the National Family Caregiver Support Program and Its Inclusion of Grandparents and Other Relatives Raising Children, (September 2003), [http://ipath.gu.org/GU\\_Fa8161318.asp](http://ipath.gu.org/GU_Fa8161318.asp).

<sup>10</sup> Laura Weinrib, *Kinship Care Reform: A Proposal for Consent Legislation in Massachusetts*, 87 Mass. L. Rev. 23, 23-27 (2002).

Compounding this problem is the fact that many caregivers are responsible for children over the course of many years and many developmental stages in the life of the child. In 2000, 39% of grandparent caregivers were responsible for their grandchildren for 5 or more years.<sup>11</sup> Consequently, many caregivers are forced to deal with educational and medical consent issues multiple times.

### **Current Problem in Minnesota**

In Minnesota, there are several ways that a relative caregiver can obtain the ability to grant consent for a minor in their care. First, through a delegation of powers, the parent, legal custodian or guardian of a child can grant to the relative caregiver “any powers regarding care, custody, or property of the minor...” including the authority to enroll the child in school or obtain medical treatment.<sup>12</sup> No lawyer is needed to execute a delegation of parental authority, but can last no longer than a year and can be revoked by the parent at any time.<sup>13</sup> The caregiver has no legal custody over the child and financial responsibility for the child remains with the parent(s).<sup>14</sup>

Second, relative caregivers in Minnesota can use the De Facto Custodian and Interested Third Party Law that went into effect on August 1, 2002 to gain the legal authority necessary to obtain medical care or enroll the child in school.<sup>15</sup> To qualify as a *de facto* custodian, the caregiver must show three things by clear and convincing evidence: 1) he or she has been the primary caregiver of the child; 2) during the two years immediately preceding the filing of the petition for custody, the child resided with the caregiver for a) a total of six months or more if the child is less than three years old, or b) a total period of one year or more if the child is three years or older; and 3) the parent has refused or neglected to comply with the duties imposed upon the parent by the parent-child relationship.<sup>16</sup>

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<sup>11</sup> U.S. Census Bureau: “Grandparents Living With Grandchildren: 2000,” Census Brief, <http://www.census.gov/prod/2003pubs/c2kbr-31.pdf>.

<sup>12</sup> Minn. Stat. § 524.5-211, *Delegation of Powers by Parent or Guardian*.

<sup>13</sup> *Id.*

<sup>14</sup> *Id.*

<sup>15</sup> Minn. Stat. § 257C

<sup>16</sup> *Id.*

While these two laws provide caregivers some authority to consent, there is the possibility that a problem will arise when the two laws intersect. When a caregiver files a petition for custody as a *de facto* custodian, if the caregiver has been relying on the delegation of powers (in order to place the child in school or gain medical care), Minnesota courts might rule that the possession of the Delegation of Powers is an indication that the parent has not “refused or neglected to comply with the duties imposed upon the parent by the parent-child relationship” as required by the *de facto* statute.<sup>17</sup> Consequently, the time in which the child has been cared for under the Delegation of Powers cannot be counted as part of the required time necessary to become a *de facto* custodian. In essence, if a Delegation of Power has been used by a caregiver who is presently seeking *de facto* custody, the “clock must start over” and begin counting only after the Delegation of Powers has run out.

The purpose of this paper is to provide interested parties with relative consent authorization legislation that could be introduced in the 2009 legislative session. Such legislation would provide Minnesota relative caregivers with the authority to consent to educational and medical care of the child(ren) in the care when 1) the parent is unable or unwilling to assume their parental obligations, and 2) the caregiver does not consider it beneficial to seek the legal custody of the child.

### **Distinction Between Consent and Consent Authorization Law**

When considering consent laws, care must be taken in defining consent. When consent is defined too broadly, it can appear that Minnesota is far behind other states in creating relative consent law. For example, one report indicates that in 2002 at least twenty-five states had medical and/or educational consent laws.<sup>18</sup> Generations United reports that since that time, additional states have passed such consent laws.<sup>19</sup> Furthermore, according to the American Bar Association’s Kinship Care Legal Research

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<sup>17</sup> *Id.*

<sup>18</sup> See Mayfield, et. al, Kinship Care in Washington State; Prevalence, Policy and Needs, 2002, Appendix C, <http://www.wsipp.wa.gov/rptfiles/KinshipCareWA.pdf>. Twenty-three states had medical consent laws, six states had educational consent laws and four states had both.

<sup>19</sup> For up-to-date state-specific information regarding medical and educational consent legislation, see Generations United, Grandfamilies State law and Policy Resource Center, available at: <http://www.grandfamilies.org/index.cfm?page=searchresults&topics=19>.

Center, twenty-eight states and the District of Columbia have laws that enable a relative to consent to medical treatment of a child in their care.<sup>20</sup> Unfortunately, these numbers are somewhat deceiving. A closer look at the laws of these states reveal that most of these laws simply describe who can consent to emergency medical treatments in the advent that the parent is not located. *See Mo. Ann. Stat. § 431.061 (2006)*. Some laws, such as the consent law of Pennsylvania, are more similar to a delegation of power in which a parent, legal guardian or legal custodian of a child can confer upon another person the power to consent to treatment of a child. *11 Pa. Stat. Ann. §2513(a) (2006)*.

For purposes of clarity, a distinction will be made in this paper between consent law and consent authorization law. For medical care, consent law provides a clear hierarchy of consent so that when a child needs medical care and the parent is unavailable, the requisite consent for that treatment can be obtained from someone. Medical consent laws primarily provide direction and immunity to medical professionals who need to perform medical procedures on a minor child, but must obtain legal consent before doing so. In this sense, medical consent laws are reactionary in nature.

In contrast, consent authorization laws could be considered proactive laws. These laws are intended to grant caregivers the authority to make both emergency and non-emergency medical and educational decisions on behalf of children in their care. These laws often state that a caregiver has the same rights to authorize medical care or make educational decisions as a parent or guardian. *See Cal. Fam. Code § 6550(a) (2005)*; *Okla. Stat. tit. § 10021.6(A)(2001)*.

When the consent laws of each state are evaluated using the above distinction, there are only eight states that currently possess consent authorization laws.<sup>21</sup> The laws in these states provide caregivers of minor children in their care the legal authority to act on behalf of those children. Without gaining legal custody of the child, the caregiver stands in the place of the “missing” parent and is able to make educational and health decisions

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<sup>20</sup> “Kinship Caregiving and Medical Consent Laws: An In-Depth Analysis,” A Summary Memo by the American Bar Association’s Kinship Care Legal Research Center, <http://www.abanet.org/child/kinshipcare.shtml>.

<sup>21</sup> California, Delaware, Louisiana, Maryland, Montana, New Mexico, Ohio, and Oklahoma. See chart in Appendix for statutes and more details.

for the child as if they were the parent. In general, these consent authorization laws are very similar from state to state.

The goal of this paper is to provide model consent authorization legislation for Minnesota. First, this paper will briefly mention two components of consent authorization law that need to be considered, but which are beyond the scope of this paper. Second, this paper will set out necessary components of consent authorization law that all ten states possess. Third, this paper will present a short evaluation of various components of consent authorization law that vary from state to state. Fourth, this paper will conclude with proposed consent authorization legislation and its accompanying consent authorization affidavit.

## **Minnesota Consent Authorization Considerations**

### **A. Unresolved Components**

There are numerous practical and textual items to consider when constructing consent legislation. To begin, there are two components that are not evaluated in this paper. First, in the area of health care, consideration should be given to whether the federal Health Insurance Portability and Accountability Act (HIPAA) may have an impact on state consent authorization law. HIPAA is the federal law that requires providers of health care services to safeguard the personal information of those in their care. In Minnesota, the Minnesota Health Records Act, govern the use of a patient's health information.<sup>22</sup> While a consent authorization law would allow a kin caregiver access to this information per se, it will be important to evaluate whether a state's consent law will adequately hold up to federal and state privacy law if challenged. Inherent in the process of making decisions for a child, is the reality that the relative caregiver granting consent will need access to the medical information related to the child. It seems that specific legislation allowing access to medical information would be superfluous if legislation allows a caregiver to consent to medical treatment. This paper assumes as much and does not evaluate the question further.

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<sup>22</sup> Minn. Stat. §§ 144.291-144.298.

Second, the area of education, consideration should be given to the impact of the Family Educational Rights and Privacy Act (FERPA).<sup>23</sup> FERPA is a federal law that protects the privacy of student education records. The law applies to all schools that receive funds under an applicable program of the U.S. Department of Education. Furthermore, consideration needs to be given to the possible conflict between consent authorization legislation and the current Minnesota Children with a Disability law.<sup>24</sup>

## **B. Necessary Components**

### **1. Parental rights are not superceded by caregiver authority to consent**

In all current consent authorization laws, the decisions by a caregiver shall be superceded by any contravening decision of a parent or person having legal custody of the child. This contravening decision will only supercede a caregiver's decisions if they do not jeopardize life, health, safety, or welfare of the child. Ohio law requires the parent, guardian, or custodian to deliver written notice of their negation, reversal, or disapproval of a caregiver's decisions to the caregiver and the person(s) relying on the affidavit to provide services to the child. *Ohio Rev. Code § 3109.72 (2008)*. The model legislation presented below contains a similar statement. This is intended to prevent frivolous and unsubstantiated, impassioned reactions by a parent or legal custodian.

### **2. Immunity to providers**

Seven of the eight states with caregiver consent authorization laws, Maryland is the exception, have language that grants immunity to a provider of services who relies in good faith upon a caregiver's consent authorization. This immunity protects from civil and criminal liability and from professional disciplinary actions. This immunity applies even if the care or treatment is contrary to the wishes of the parent or legal guardian, as long as the provider has no actual knowledge of those contrary wishes. All but one state with immunity for service providers, Delaware is the exception, also state that the provider is not required to investigate the facts as found on an authorization affidavit. Most states also provide that nothing will relieve a provider from liability for other

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<sup>23</sup> 20 U.S.C. § 1232g; 34 CFR Part 99

<sup>24</sup> Minn. Stat. § 3525

violations of the law or for failure to act with the ordinary standard of care appropriate to their profession; Louisiana and New Mexico lack this provision. The model legislation presented below contains all three immunity provisions.

### **3. Warning in affidavit**

All states that provide an affidavit example require a warning in the authorization affidavit that states that any false representation is a crime punishable by a fine, imprisonment, or both. The Ohio authorization affidavit lists the specific section of code that governs falsification and the chapters that govern sanctions. *Ohio Rev. Code §3109.66 (2008)*. The Louisiana and New Mexico laws requires that the warning statement begin with the word “warning,” be typed in not less than ten-point boldface type, and be enclosed in a box with three-point rule lines. *La. Rev. Stat. § 9:975 (2008)*; *N.M. Stat. § 40-10B-15 (1978)*. The model legislation presented below contains a warning statement.

## **C. Important Components**

The following are aspects of consent authorization legislation that must be considered in light of the desired results of the proponent of such consent authorization legislation. This paper attempts to address the concerns of each aspect and proposes a best solution that is incorporated into the proposed legislation.

### **1. To whom is authority to consent granted?**

The actual proponents of a caregiver consent authorization bill must decide this question. The proponents will need to consider stakeholders and the likelihood of success of the bill that could depend upon whom is granted consent authority. There are three categories of person to consider for consent authority; grandparents, other relatives, and interested third parties. The proposed legislation in this paper does not grant consent authority to interested third parties for several reasons.

First, there are fewer examples of children being raised in informal situations by non-relative third parties. These situations tend to be characterized as paid care, or occasional care.<sup>25</sup>

Second, Minnesota law already allows an interested third party to become a *de facto* custodian, just like a grandparent, if they meet certain requirements. First, the child cannot be placed with the interested third party through a custody consent decree, a court order or voluntary placement under section 260C, or through an adoption proceeding. *Minn. Stat. § 257C.01, subd. 3 (2008)*. The interested third party must also prove that at least one of the factors in section 257C.03, subdivision 7, paragraph (a), is met.<sup>26</sup>

Third, the definition of relative must be limited in order for it to have an effective meaning. In Oklahoma, the definition is very limited; consent can be gained by an adult relative related to the child within the third degree. *Okla. Stat. tit. 10 § 21.6 (2008)*. In

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<sup>25</sup> “Family, Friend and Neighbor Caregivers: Results of the 2004 Minnesota statewide child care survey,” <http://edocs.dhs.state.mn.us/lfserver/Legacy/DHS-4516-ENG>.

<sup>26</sup> Subd. 7. **Interested third party; burden of proof; factors.** (a) To establish that an individual is an interested third party, the individual must:

- (1) show by clear and convincing evidence that one of the following factors exist:
    - (i) the parent has abandoned, neglected, or otherwise exhibited disregard for the child's well-being to the extent that the child will be harmed by living with the parent;
    - (ii) placement of the child with the individual takes priority over preserving the day-to-day parent-child relationship because of the presence of physical or emotional danger to the child, or both; or
    - (iii) other extraordinary circumstances;
  - (2) prove by a preponderance of the evidence that it is in the best interests of the child to be in the custody of the interested third party; and
  - (3) show by clear and convincing evidence that granting the petition would not violate section 518.179, subdivision 1a.
- (b) The following factors must be considered by the court in determining an interested third party's petition:
- (1) the amount of involvement the interested third party had with the child during the parent's absence or during the child's lifetime;
  - (2) the amount of involvement the parent had with the child during the parent's absence;
  - (3) the presence or involvement of other interested third parties;
  - (4) the facts and circumstances of the parent's absence;
  - (5) the parent's refusal to comply with conditions for retaining custody set forth in previous court orders;
  - (6) whether the parent now seeking custody was previously prevented from doing so as a result of domestic violence;
  - (7) whether a sibling of the child is already in the care of the interested third party; and
  - (8) the existence of a standby custody designation under chapter 257B.
- (c) In determining the best interests of the child, the court must apply the standards in section 257C.04.

New Mexico, the definition is quite broad; a “qualified relative” includes godparents, a member of the child’s tribe or clan, an adult with whom the child has a significant bond, or any person denoted by the prefix “grand” or “great.” *N.M. Stat. §40-10B-15, subd. J (2008)*. Proponents of this relative caregiver authorization bill may want to consider how such legislation could meet the needs of non-relative indigenous Americans in Minnesota who care for children not their own.

This paper proposes legislation that specifically addresses the concerns of grandparents and relatives in Minnesota caring for children. It is not limited to grandparents, because there are 14,008 children in Minnesota being raised by relatives other than grandparents.<sup>27</sup>

The specific definition of relative caregiver used in this proposed legislation is derived from the definition of caregiver as found in the Minnesota Family Investment Program (MFIP) statutes. *Minn. Stat. 256J.08, subd. 11 (2008)*. A relative caregiver is any of the following individuals, if adults, who live with and provide care and support to a minor child when the minor child's natural or adoptive parent or parents or stepparents do not reside in the same home. This can include a grandfather, grandmother, brother, sister, half-brother, half-sister, stepbrother, stepsister, uncle, aunt, first cousin or first cousin once removed, nephew, niece, person of preceding generation as denoted by prefixes of "great," "great-great," or "great-great-great," or a spouse of any person named in the above groups even after the marriage ends by death or divorce.

## **2. To what care, treatment or service can the relative caregiver consent?**

While each state differs, the following encompass the care, treatment and services to which the caregiver may consent: school enrollment, school-related medical care (including immunizations necessary for enrollment), medical, dental, and psychological care. New Mexico and Ohio law provide consent authorization for all of these. The model legislation presented below contains authority for the relative caregiver to consent to all. Some state authorization affidavits allow the caregiver to decide the level of consent authority, ranging from only the authority to consent to enrollment in school to

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<sup>27</sup> “Grandfacts: A State Fact Sheet for Grandparents and Other Relatives Raising Children; Minnesota, September 2007.”  
<http://www.grandfactsheets.org/doc/Minnesota%2007%20New%Template.pdf>.

the authority to consent to all of the above care. The model consent authorization affidavit provides for consent authorization for enrollment of a child in school and school-related medical care and consent authorization for other medical, dental or psychological care.

Several states specifically list items to which the caregiver may not consent. These include HIV or controlled substance testing, *Del. Code 13 §707(a)(2) (2008)*, and abortion, *La. Rev. Stat. §9:975(A)(3) (2008)*. The model legislation presented below contains similar preclusions as well as “any other testing for which separate court order or informed consent as provided by law is required.”

### **3. “Upon the advice of a professional...”**

The purpose of consent authorization legislation is to provide the caregiver the authority to act as though they are a parent in a few limited but important medical and educational areas in the life of a child. Several states allow a caregiver to consent to care, provided that the action is carried out “upon the advice” of a professional of some type. *DC ST § 16-4901(a)*; *MS ST §41-41-3*; *MA ST § 69*. State law varies as to what type of professional must give this advice. In Mississippi, consent to medical or surgical treatment is granted only when a licensed physician has directed the treatment. *MS ST §41-41-3*. The District of Columbia allows direction from any of the following: physician, nurse, dentist, or mental health professional licensed in the state. *DC ST § 16-4901(a)*. Massachusetts adds health care professional to D.C.’s list. *MA ST § 69*. All of these, however, are within the context of emergency, reactive consent laws, not proactive consent authorization laws. None of the eight states that have consent authorization laws contain “upon the advice” language.

Often, the caregiver needs to consent because a professional suggests certain actions. There are, however, legitimate times when a caregiver needs to act even if not “upon the advice of a professional.” The first visit to the doctor is often done prior to any advice by a doctor; an illness at school may involve advice from someone other than professional. There may also be occasions when the caretaker does not agree with the advice of the professional. Furthermore, the caretaker may need to consent to action that is not ordinarily taken at the advice of a professional, such as enrolling a child in school

or attending routine medical or dental checkups. Consequently, the proposed legislation in this paper does not articulate the requirement that consent action be preceded by the advice of a professional.

#### **4. Failure/Refusal of Parent Sufficiently Documented**

In Montana, in order for the caretaker relative to gain consent, the caretaker must attempt to make contact with the parent. If the child was voluntarily left with the relative caregiver and the caregiver is unable to contact the parent, the caregiver can pursue consent. If the child was not voluntarily left with the caregiver or the parent refuses to regain custody, the caregiver must show that they made a written request to the parent asking the parent to regain custody. *Mont. Code § 40-6-502 (2007)*. In Oklahoma, the caregiver must make a similar written request. *Okla. Stat. tit. 10 § 21.6(B) (2008)*. The model legislation and model consent authorization affidavit presented below contain language very similar to Montana.

#### **5. Why the child is living with this caregiver?**

In Maryland, consent is granted if a caregiver provides for the care of a child due to a serious family hardship. *Md. Code, Health – Gen. § 20-105(a)(4) (2007)*.<sup>28</sup> The Maryland affidavit requires that one or more of these hardships be marked as a reason for the informal relative care. The model legislation does not require a description of why the child is living with the kin caregiver.

#### **6. Health Care Coverage**

Half of the current consent authorization laws state that the consent authority granted does not confer dependency for health care coverage purposes. The model

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<sup>28</sup> “Serious family hardship” means:

- i) Death of a parent or legal guardian of the child;
- ii) Serious illness of a parent or legal guardian of the child;
- iii) Drug addiction of a parent or legal guardian of the child;
- iv) Incarceration of a parent or legal guardian of the child;
- v) Abandonment by a parent or legal guardian of the child; or
- vi) Assignment of a parent or legal guardian to active military duty.

authorization affidavit below includes this provision primarily so that unnecessary opposition does not delay the passage of this bill.

### **7. How is the Authority to Consent Actually Created?**

All states that have consent legislation require that an affidavit be completed and signed to grant a relative or grandparent authority to consent. Only Delaware does not provide an affidavit form. Delaware does, nevertheless, require particular information to be included, and the affidavit must be notarized. *Del. Code 13 § 708 (2008)*.

Two states require the affidavit be filed with a state agency. In Ohio, the affidavit must be filed with the juvenile court of the county in which the grandparent resides not later than five days after the date it is executed. *Ohio Rev. Code § 3109.74 (2008)*. Maryland requires the affidavit to be submitted to the Department of Human Resources. *Md. Code, Health - Gen. § 20-105 (2007)*. In New Mexico, Civil Forms 4-981 to 4-992 NMRA can be used in the district courts by relatives who are representing themselves in uncontested kinship guardianship proceedings.<sup>29</sup>

Proponents of this relative caregiver authorization bill may want to consider the implications in Minnesota of filing a consent authorization affidavit with the juvenile court or DHS. For the sake of the caregiver's convenience, the proposed legislation does not require that an affidavit be filed with any agency. The following could be used if filing an affidavit were deemed important: "The relative who executed this affidavit must file it with [the Department of Human Services *and/or* the juvenile court of the county in which the relative resides or any other court that has jurisdiction over the child under a previously filed motion or proceeding] not later than ten days after the date it is executed."

### **8. Using Consent to Shop for Better School?**

One concern is that the Consent Authorization will be used to improperly enroll a student in a favorable district. By using the caregiver's residence as the "enrolling residence" of the child, it is feared that consent authority will be used to "forum" shop for

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<sup>29</sup> These and other helpful court forms are available at the New Mexico Grandparents United website: <http://www.grandparentsforchildrentx.org/Newmexico.html>.

a desirable school. The California Education Code has adopted Section 48204 which provides that the Caregiver's Authorization Affidavit "constitutes a sufficient basis for a determination of residency of a minor" without the requirement of guardianship or other custody order, unless the school district determines from actual facts that the minor is not living with the caregiver. *Cal. Educ. Code. 48204(4)*. The Ohio Caretaker Authorization Affidavit allows a school district to require additional evidence that the grandparent lives at the address provided in the affidavit. *Ohio Rev. Code § 3109.66 (2008)*. In Minnesota, this is not a concern due to open enrollment. *Minn. Stat. § 124D.03 (2008)*. The model consent authorization affidavit below contains language that takes into account the Minnesota enrollment options statute.

### **9. Time Limits and Revocation of Authorization.**

Most consent laws allow the authorization affidavit to be in effect for 6 months or 1 year. Several states terminate the authorization upon other conditions including; the child ceases to reside with the grandparent (California, Delaware, Louisiana, Montana, New Mexico, Ohio), the parent, guardian, or custodian acts to negate, reverse, or disapprove of the caregiver's actions (Delaware, Montana, Ohio), the affidavit is terminated by court order (Ohio), the death of the child (Ohio), or the death of the relative who executed the affidavit (Ohio). The proposed legislation below uses similar language to Ohio's law.

All states except Maryland require the caregiver to notify providers of services if the authorization affidavit has been terminated. As this is not unreasonably burdensome for the caregiver, the proposed legislation below contains such a provision.

## **Appendix A Example Legislation**

### **§ 1. Relative Consent Authorization Legislation**

1. A relative caretaker of a child who has voluntarily been given custody of the child by a parent or legal custodian of the child has the same authority as a custodial parent of the child to exercise care, physical custody, and control of the child including authority to enroll the child in school, to discuss with the school district the child's educational progress, to consent to all school-related matters regarding the child, and to consent to medical, dental, or psychological treatment for the child if:
  - a) the child is residing with the kin caregiver on a full-time basis;
  - b) the kin caregiver is unable to contact the parent following the voluntary leaving of the child with the relative or the parent refuses to regain custody of the child after a written request by the relative to do so;
  - c) no adequate provision, such as the appointment of a guardian ad litem or execution of a delegation of power, has otherwise been made for the care of the child, and
  - d) the relative caregiver authorization affidavit is completed in compliance with this section.
2. In this section the following words have the meaning indicated.
  - a) "Qualified Relative" means an adult related to the child by blood or marriage including a grandfather, grandmother, brother, sister, half-brother, half-sister, stepbrother, stepsister, uncle, aunt, first cousin or first cousin once removed, nephew, niece, person of preceding generation as denoted by prefixes of "great," "great-great," or "great-great-great," or a spouse of any person named in the above groups even after the marriage ends by death or divorce.
  - b) "school-related medical care" means medical care that is required by the state or local government authority as a condition for school enrollment.
3. This declaration does not affect the rights of the minor's parents or legal guardian regarding the care, custody, and control of the minor, and does not mean that the caregiver has legal custody of the minor.
4. The decision of a relative caregiver to consent to or refuse medical, dental or psychological health care or educational services for a child shall be superceded by any contravening decision of a parent or a person having legal custody of the child, provided the decision of the legal custodian does not jeopardize the life, health, safety, or welfare of the child.
5. A parent, guardian, or custodian may negate, reverse, or disapprove a caregiver's action or decision only by delivering written notice of negation, reversal, or disapproval to the caregiver and the person responding to the caregiver's action or decision in reliance on the authorization affidavit. The act to negate, reverse, or disapprove the action or decision, regardless of whether it is effective, terminates the authorization affidavit.
6. An executed relative caregiver authorization affidavit shall terminate on the occurrence of whichever of the following comes first:
  - a) One year elapses following the date the affidavit is notarized,
  - b) The child ceased to reside with the relative

- c) The parent, guardian, or custodian of the child who is the subject of the affidavit acts, in accordance with this statute, to negate, reverse, or otherwise disapprove an action or decision of the relative who signed the affidavit with respect to the child,
  - d) The affidavit is terminated by court order,
  - e) The death of the child who is the subject of the affidavit, or
  - f) The death of the relative who executed the affidavit.
7. When the relative caregiver authorization affidavit terminates pursuant to any of the above conditions, the relative shall notify, in writing, the school district in which the child attends school, the child's health care providers, and any other person or entity that has an ongoing relationship with the child or relative such that the person or entity would reasonably rely on the affidavit unless notified of its termination. The relative shall make the notification not later than one week after the date the affidavit terminates.
  8. No person who acts in good faith reliance on a properly executed relative caregiver's authorization affidavit, having no actual knowledge of facts contrary to those stated in the affidavit, shall be subject to criminal prosecution or civil liability, or to professional disciplinary action, for any action which would have been proper if the facts had been as he/she believed them to be. This Paragraph shall apply even if medical or educational services are rendered to a child in contravention of the wishes of the parent or legal custodian of that child. However, the person rendering the services must not have actual knowledge of the wishes of the parent or legal custodian.
  9. This does not provide immunity from civil liability or criminal prosecution, or to professional disciplinary action to any person for actions that are wanton, reckless, or inconsistent with the ordinary standard of care required by anyone acting in the same capacity as the person.
  10. A person who relies upon a relative caregiver's authorization affidavit is under no duty to make further inquiry or investigation.
  11. Nothing in this Section shall apply to, or give authority for, HIV/AIDS testing and controlled substance testing or any other testing for which separate court order or informed consent as provided by law is required.
  12. Nothing in the Section shall grant authority to the relative caregiver to consent to the marriage or adoption of the child.
  13. The Relative Caregiver Consent Authorization Affidavit is effective only if the caregiver relative, under oath, before a Minnesota notary public, signs it. A clear photographic copy of the affidavit complete in compliance with this section is sufficient in any instance in which an educational or health care provider requires an original.
  14. The Relative Caregiver Consent Authorization Affidavit shall be invalid unless it contains, in not less than ten-point boldface types, the following warning statement: "WARNING: Do not sign this form if any of the statements above are incorrect, or you will be committing a crime punishable by a fine, imprisonment, or both."
  15. The Relative Caregiver Consent Authorization Affidavit shall be in substantially the following form:

**Appendix B**

**§ 2. Relative Caretaker Consent Authorization Affidavit**

Completion, signing and notarization of this affidavit is sufficient to authorize the relative signing to exercise care, physical custody, and control of the child who is its subject, including authority to enroll the child in school, to discuss with the school district the child’s educational progress, to consent to all school-related matters regarding the child, and to consent to medical, dental, or psychological treatment for the child.

**CARETAKER AUTHORIZATION AFFIDAVIT**

The child named below lives in my home and I am 18 years of age or older.

1. Name of child:
2. Child’s date and year of birth:
3. Child’s social security number: (optional)
4. My name:
5. My home address:
6.  I am a qualified relative of the child (see below for a definition of “qualified relative”).
7. My date and year of birth:
8. My Minnesota driver’s license number or identification card number:
9. Check the following if true (all must be checked for this affidavit to apply):
  - The child is now residing with me on a full-time basis.
  - I am unable to locate or contact the parent of the child at this time to notify that parent of my intended authorization, or the parent refuses to regain custody of the child even though I have asked in writing that the parent do so.
  - No adequate provision, such as appointment of a guardian ad litem or delegation of power, has been made for the care of the child.

**WARNING: Do not sign this form if any of the statements above are incorrect, or you will be committing a crime punishable by a fine, imprisonment, or both.**

I declare under penalty of perjury under the laws of the State of Minnesota that the foregoing is true and correct.

Dated: \_\_\_\_\_

Signed: \_\_\_\_\_

\_\_\_\_\_  
(Signature and seal of notary public)

**NOTICES:**

1. This declaration does not affect the rights of the minor’s parents or legal guardian regarding the care, custody, and control of the minor, and does not mean that the caregiver has legal custody of the minor.
2. This affidavit is executed when it is completed, signed by a relative, and notarized by a Minnesota notary public.

3. No person who acts in good faith reliance on a properly executed relative caregiver's authorization affidavit, having no actual knowledge of facts contrary to those stated in the affidavit, shall be subject to criminal prosecution or civil liability, or to professional disciplinary action, for any action which would have been proper if the facts had been as he/she believed them to be. This Paragraph shall apply even if medical or educational services are rendered to a child in contravention of the wishes of the parent or legal custodian of that child. However, the person rendering the services must not have actual knowledge of the wishes of the parent or legal custodian.
4. This does not provide immunity from civil liability or criminal prosecution, or to professional disciplinary action to any person for actions that are wanton, reckless, or inconsistent with the ordinary standard of care required by anyone acting in the same capacity as the person.
5. A person who relies upon a relative caregiver's authorization affidavit is under no duty to make further inquiry or investigation.
6. An executed relative caregiver authorization affidavit shall terminate on the occurrence of whichever of the following comes first:
  - a. One year elapses following the date the affidavit is notarized,
  - b. The child ceased to reside with the relative
  - c. The parent, guardian, or custodian of the child who is the subject of the affidavit acts, in accordance with this statute, to negate, reverse, or otherwise disapprove an action or decision of the relative who signed the affidavit with respect to the child,
  - d. The affidavit is terminated by court order,
  - e. The death of the child who is the subject of the affidavit, or
  - f. The death of the relative who executed the affidavit.
7. The decision of a relative caregiver to consent to or refuse medical, dental or psychological health care or educational services for a child shall be superceded by any contravening decision of a parent or a person having legal custody of the child, provided the decision of the legal custodian does not jeopardize the life, health, safety, or welfare of the child. A parent, guardian, or custodian may negate, reverse, or disapprove a caregiver's action or decision only by delivering written notice of negation, reversal, or disapproval to the caregiver and the person responding to the caregiver's action or decision in reliance on the authorization affidavit. The act to negate, reverse, or disapprove the action or decision, regardless of whether it is effective, terminates the authorization affidavit.

**TO CAREGIVERS:**

1. "Qualified Relative" means an adult related to the child by blood or marriage including a grandfather, grandmother, brother, sister, half-brother, half-sister, stepbrother, stepsister, uncle, aunt, first cousin or first cousin once removed, nephew, niece, person of preceding generation as denoted by prefixes of "great," "great-great," or "great-great-great," or a spouse of any person named in the above groups even after the marriage ends by death or divorce.

2. When the relative caregiver authorization affidavit terminates pursuant to any of the above conditions, the relative shall notify, in writing, the school district in which the child attends school, the child's health care providers, and any other person or entity that has an ongoing relationship with the child or relative such that the person or entity would reasonably rely on the affidavit unless notified of its termination. The relative shall make the notification not later than one week after the date the affidavit terminates.

**TO SCHOOL OFFICIALS:**

1. Subject to Minn. Stat. § 124D.03 Enrollment Options Program, this affidavit. Properly completed and notarized, authorizes the child to attend school in the district in which the relative who signed this affidavit resides and the relative is authorized to provide consent in all school-related matters and to discuss with the school district the child's educational progress.
2. This affidavit does not preclude the parent, guardian, or custodian of the child from having access to all school records pertinent to the child.

**TO HEALTH CARE PROVIDERS:**

1. No person who acts in good faith reliance on a properly executed relative caregiver's authorization affidavit, having no actual knowledge of facts contrary to those stated in the affidavit, shall be subject to criminal prosecution or civil liability, or to professional disciplinary action, for any action which would have been proper if the facts had been as he/she believed them to be. This Paragraph shall apply even if medical services are rendered to a child in contravention of the wishes of the parent or legal custodian of that child. However, the person rendering the services must not have actual knowledge of the wishes of the parent or legal custodian.
2. This does not provide immunity from civil liability or criminal prosecution, or to professional disciplinary action to any person for actions that are wanton, reckless, or inconsistent with the ordinary standard of care required by anyone acting in the same capacity as the person.
3. A person who relies upon a relative caregiver's authorization affidavit is under no duty to make further inquiry or investigation.
4. This affidavit does not confer dependency for health care coverage purposes for which the child was not already eligible.