

**Testimony before the District of Columbia Council  
Public Roundtable, Committee on Human Services  
Adrien Fenty, Chairperson**

**Re: "Permanent Guardianship for Grandparent Caregivers  
Pilot Program Establishment Act of 2005,"  
Bill 16-180**

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***Introduction***

On behalf of the Legal Aid Society of the District of Columbia, I testify here today in strong support of the concept underlying the "Permanent Guardianship for Grandparent Caregivers Pilot Program Establishment Act of 2005," but in equally strong opposition to the way the bill is currently drafted. I say that we strongly support the concept because we strongly support providing a subsidy to low-income grandparents (and great-aunts and great-uncles) who are raising children on their own. The opposition stems from the way the bill is drafted: as drafted, the bill likely is unconstitutional and undoubtedly will have unintended negative consequences on family stability (and family law jurisprudence) in the District of Columbia. Notably, these profound problems are unnecessary to what is the stated goal of the legislation, to expand the financial benefits of the permanent guardianship program to grandparent guardians.

The Legal Aid Society stands willing and able to work with the Council in the days and weeks to come to create alternative language that will create a workable subsidy program, without running the risk of wreaking havoc on family relations (and domestic relations law) in the District. We urge the Committee to continue to work with Legal Aid – and other experts in family law in the District of Columbia – before passing a well-intentioned statute that could have these types of substantial negative consequences to DC's low-income community.

***We Support a Subsidy for Grandparents who are Caring for Grandchildren***

Throughout Washington, Grandparents are stepping in to care for their grandchildren. According to the AARP, the District has the highest percentage of children living in grandparent-headed households of any state. The AARP estimates that more than 8,000 DC grandparents

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<sup>1</sup> The Legal Aid Society was formed in 1932 to "provide legal aid and counsel to indigent persons in civil law matters and to encourage measures by which the law may better protect and serve their needs." Legal Aid is both the oldest and largest general civil legal services program in the District of Columbia. Over the last 70 plus years, tens of thousands of the District's neediest residents have been served by Legal Aid staff and volunteers.

provide primary care of their children; there are likely hundreds of additional great-aunts and great-uncles also performing this service to their families and their community. These committed adults have come forward to care for children whose own parents are currently unable or unwilling to do so, due to problems ranging from substance abuse, domestic violence, and incarceration to debilitating illnesses such as HIV and AIDS. Through their dedication, these grandparents (and great-aunts and great-uncles) offer shelter, care, family, and love to children who otherwise would be without the support they need to grow and thrive.

Kinship caregivers in DC have in the past faced a number of barriers to obtaining assistance for the children under their care. Historically, caregivers have had difficulty obtaining benefits on behalf of the children and enrolling them in school. In recent years, however, Legal Aid and other social service agencies have been working closely with DC agencies on eliminating these barriers to services. Likewise, we have worked closely with the Council and the DC Public Schools to assist kinship caregivers in their efforts to enroll children in their care in the school system, without needlessly requiring the caregivers to access the court system.

The new proposed subsidy would enable grandparents (and great-aunts and great-uncles) who are already taking care of DC children to obtain a much-needed subsidy to help make ends meet, without requiring them to attempt to terminate the parent-child relationship, as would ordinarily be required in the abuse and neglect system. The concept underlying the legislation is therefore very important.

***The Bill as Profoundly Re-Writes DC Family Law Far Beyond what is Necessary to Create the Subsidy Program***

The statute is inadvertently something of a Trojan Horse. Under the guise of a subsidy program, it dramatically re-writes the District's Family Law. If the Council wishes to examine the Family Code, it should do so, but not make dramatic changes through this pilot program.

As written – although intended as a pilot subsidy program – the bill in fact creates a new type of guardianship proceeding without any apparent supports or protections for biological parents.<sup>2</sup> Although the subsidy will help less than 200 children, it will cast a much broader net, leading to possibly hundreds of cases that are brought not to obtain the subsidy, but instead to end run the existing custody law. This will cause family instability to hundreds of additional families, as grandparents unnecessarily flock to the courthouse in a misguided attempt to obtain this subsidy.

Some of the problems with the wording of the statute include:

- As drafted, the guardianship is not limited to those obtaining the subsidy, so a new type of legal family relationship is being created within the abuse and neglect statute without any sustained analysis of whether such a new legal entity makes sense;

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<sup>2</sup> Legal Aid received the current version of this bill on the Friday afternoon before this Monday Roundtable; this testimony is therefore somewhat less detailed than it might otherwise have been.

- As drafted, the guardianship is not limited to consent situations, thereby creating a new system for contested custody cases in the abuse and neglect statute, without any protections (like a right to counsel) or supports or social services for parents;
- As drafted, there is no special provision for a fit parent to move to change or terminate the guardianship arrangement, meaning, presumably, that the only applicable modification or termination provision is the one for ordinary abuse and neglect proceedings even though the parents implicated by this guardianship have not been found to have abused or neglected a child.
- As drafted, in this new grandparent guardianship, reunification with parents would not be the goal, nor would parents have a right to counsel or any of the other services ordinarily accompanying an abuse and neglect proceeding.
- As drafted, there is ambiguity as to whether grandparents with current custody orders need to go to court to obtain the subsidy, potentially inducing hundreds of families, even those with stable custody orders in place, to rush unnecessarily to court and unnecessarily unsettle family relationships.

### ***The Bill As Written Unnecessarily Forces Families into Court***

While everyday the Superior Court resolves family disputes, it should be the forum of last resort. This subsidy program should not force grandparents to sue their children to get the benefit.

The circumstances necessitating grandparent care giving are almost as varied as the number of families who find themselves with a grandparent caregiver. In some cases, the parent abandons the child or is unable to care for the child because of involvement with drugs or the criminal justice system. These circumstances, while the stereotype, do not, by a long stretch, represent everyone. In some cases, the parent lives in poverty and cannot secure adequate affordable housing, in others, the parent might leave the District for a period of time to find work, but does not want to disrupt the child's schooling. In some cases, the parent might be in the military.

The mechanism created by this bill forces parents and grandparents to be opposing parties in a lawsuit and forces a parent to fight in court to get their child back. While there may be circumstances in which a parent's unfitness should affect the return of custody, there has been no showing that this applies to all cases in which the subsidy might be applied.

### ***The Bill as Written is Unconstitutional***

The Supreme Court has made it clear that parents have a fundamental right to make decisions regarding the care, custody, and control of their children. Indeed, in the plurality opinion in *Troxel v. Granville*, 530 U.S. 57 (2000), a case involving a suit against the mother for visitation by the paternal grandparents after the father's death, Justice O'Connor (for Chief Justice Rehnquist and Justices Ginsburg and Breyer) reaffirmed that "the interest of parents in the care,

custody, and control of their children – is perhaps the oldest of the fundamental liberty interests recognized by [the Supreme] Court.” Id. at 65. We should not legislate regarding this most fundamental of liberty interests without careful deliberation and sustained analysis.

Although created from the best of motives, the current version of this proposed legislation appears to fail to take parental fundamental liberty interests into consideration in *any* way. For one, as drafted, there is no requirement that a parent be found unfit before this type of guardianship is created, likely rendering the provision facially unconstitutional.

### ***Conclusion***

In sum, as currently drafted, this bill is a misguided attempt at the worthy goal of putting additional dollars into the pockets of grandparent caregivers. We applaud your efforts to provide additional funding for grandparent caregivers. However, we urge you not to do so with the current statutory structure. We (and others in the family law bar) are ready to work with you and your staff to create fixes that will not cause the unintended consequences described above. We have provided statutory language to your staff in the past and stand ready to work with you and your staff in the days and weeks to come.