Disclosure

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- Degree: J.D.
- I have no relationships with commercial companies to disclose.

Objectives

1. Develop an understanding of the sociological and legal bases for kincare arrangements

2. Know what legal authority a nonparent may exercise over a minor child.

3. Identify appropriate referrals to nonparents who are caring for minor children and are encountering obstacles to that care.

Texas RioGrande Legal Aid, Inc.

TRLA’s mission is to promote the dignity, self-sufficiency, safety and stability of low-income clients by providing high quality civil legal assistance and related educational services.

TRLA

- Legal service provider for 68 counties in SouthWest Texas.

- 15 branch offices plus 3 Medical-Legal partnerships (El Paso, San Antonio, Brownsville)

- Approximately 22,000 eligible clients for every 1 attorney.
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- Micro-Enterprises & Eco Dev’t
- Native American Law
- Torts & Civil Litigation
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- Homeless
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- Housing discrimination
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- Civil Rights
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- Education
- Foster Youth
- Human trafficking
- Immigration
- Juvenile Justice
- Special Education

What is Kincare?
Nonparents (usually family members) providing primary care for minor children in their home.

More than 240,000 Texas children are being raised by persons other than their parents.¹

Kincare law focuses on helping nonparent caregivers who encounter obstacles in providing for the minor children in their care.


Common reasons for kincare arrangements
- Parents who are minors or incapacitated
- Incarceration
- Parents are deceased/father may be unknown
- Substance abuse/abandonment/neglect
- Financial instability/homelessness
- Military parents

Where is CPS?
- CPS (usually) closes or does not initiate a case if there is no current risk or threat of abuse/neglect.
- Relatives who step up to care for children at risk of removal or foster care solve a problem for both parents and CPS.
- So what is the problem?

The legal supremacy of the parent-child relationship
Constitutionally protected liberty interest.²

The law assumes the existence and supremacy of that relationship. Parents are presumed fit and to act in the best interest of their children.³

Unless removed, restricted, or modified by a court, biological or adoptive parents have the exclusive rights and duties of care, custody and control of child.⁴

¹ U.S. Const. amend. XIV (Due Process Clause)
³ Tex. Fam. Code § 153.131
⁴ Tex. Fam. Code §§ 151.001, 153.131
When is a parent not the parent? Types of court orders that govern rights and duties over children:

1. Custody orders
2. Guardianship orders

The language of the orders will identify who can exercise what rights and duties.

Custody order: Final Decree of Divorce, Order in Suit Affecting Parent-Child Relationship or Child Support Order.

Rights and duties assigned to "conservators" –
- sole managing and possessory conservator
- joint managing conservators.

When a family court has found that it would significantly impair health and well-being of child for parents to be managing conservator, nonparent may be appointed conservator.

Final order subject to modification until child emancipates.

Guardianship order - probate court

Parents are the natural guardian of the person of their children except if the child inherits an estate.

If parent is dead or incapacitated (or "disqualified"), a probate court may appoint a nonparent legal guardian over a minor child.

Letters must be renewed every year.

Reasons a nonparent caregivers may not have custody or guardianship order.

1. Court order: a "permanent" solution to a temporary problem.
2. Expense – lawyers for applicant and absent parent; attorney ad litem for a child; filing fees; costs of service; cost of bond for a guardian.
3. Legal standards for obtaining custody/guardianship may not be met.
4. Custody orders usually require child support.

Common legal problems/caregiving issues for nonparent caregivers

- Enrolling children in school
- Adding children to lease in subsidized housing
- Obtaining public benefits (Medicaid or CHIPS/SNAP/TANF)
- Claiming children as dependents on taxes, adding to health insurance
- Authorizing medical treatment
- Stress that children will be removed and placed with parent or in foster care

Kincare and medical issues
LEGAL ISSUES FOR THE PHYSICIAN TREATING A CHILD IN A KINCARE ARRANGEMENT

- Identifying who has right to consent to medical treatment and who has right to access protected health information.
- Consent: Consent is legally required for medical treatment except in emergency cases.
- Privacy: Individuals have a constitutional and statutory right to privacy of medical information.

HIPAA

- PRIVACY RULE: generally restricts disclosure of protected health information to personal representatives of minor child or person authorized by law to consent to medical treatment.
- Defers to state law to define who those persons are.

Personal representatives for a minor child under Texas law

- Parent or legal guardian.
- Nonparent conservator.

What if a child presents with a nonparent who does not have a custody or guardianship order?

Is it an emergency?

Does the nonparent have an authorization agreement under Chapter 34 of the Family Code?

Does the nonparent have other express consent?

Is consent authorized under Chapter 32 of the Family Code?

CONSENT FOR EMERGENCY CARE. Consent for emergency care of an individual is not required if:

- the individual is a minor who is suffering from what reasonably appears to be a life-threatening injury or illness and whose parents, managing or possessory conservator, or guardian is not present.

WRITTEN CONSENT BY THE PARENT

Texas Family Code Chapter 34 Authorization Agreements
Other types of written consent/power of attorney
Verbal consent

Chapter 34 Authorization Agreement

Form provided by law (modeled after other types of POAs)

Agreement between parent and certain persons to authorize powers over a child

Person who relies upon it in good faith cannot be held civilly or criminally liable or subject to professional discipline if the agreement is completed as required by chapter

<table>
<thead>
<tr>
<th>Powers authorized by Ch. 34 Authorization Agreement</th>
</tr>
</thead>
<tbody>
<tr>
<td>Medical decisions (except abortion or emergency contraception)</td>
</tr>
<tr>
<td>Health insurance</td>
</tr>
<tr>
<td>School and day care enrollment</td>
</tr>
<tr>
<td>Extracurricular/athletic activities</td>
</tr>
</tbody>
</table>

Only applies to an agreement between a parent and one of these persons

- Grandparent
- Adult sibling
- Adult aunt or uncle
- Person who is party to a parental child safety placement agreement (CPS safety plan)

ADVANTAGES

- Disclosures for person signing and for agent
- Must be notarized
- May continue after death or incapacity of parent
- Can be found online for free.

DISADVANTAGES

- Only certain persons may be authorized
- If there is a court order, requires written approval by the court
- If only signed by one parent, void unless mailed to other parent within 10 days and if no response, another copy within 45 days [unless domestic violence]
- Revocation process is unclear
- If presented knowingly as a valid agreement when it is not, could be subject to a Class B misdemeanor

Chapter 34 authorization agreement is not exclusive way to consent – other types of possible consent:

- “Special power of attorney” – usually drafted by attorney; notarized or witnessed
- Written authorization/consent signed by parent/conservator/guardian
- HIPAA release
- Verbal consent

No rule on what consent must look like – use best judgment.
### WHEN CONSENT IS AUTHORIZED BY LAW—Texas Family Code chapter 32

**Minors**
- Abuse/neglect
- Certain persons where parents cannot be contacted

### When a minor may consent
- Active duty US military
- 16 or older, financially independent and living apart from parents
- Diagnosis and treatment of a condition that must be reported to DSHS or health officer
- Unmarried, pregnant, and treatment relates to pregnancy (not abortion)
- Unmarried parent with actual consent who consents to treatment for a child
- Suicide prevention or sexual, physical or emotional abuse

### Note about treating minors
- If minor consented to counseling and the parent/guardian/conservator did not consent, the parent/guardian/conservator is not obligated to compensate the counselor.
- Doctor has discretion to advise parents/conservator/guardian of the treatment with or without consent of the child.

### No consent required – Abuse or neglect
- Reasonable grounds to believe child’s physical or mental condition has been adversely affected by abuse or neglect
- May include X-rays, blood tests, photographs, penetration of tissues
- May not examine 16 year old who refuses consent, or where consent prohibited by court order

### Consent by nonparent authorized by law
- Applies to medical, dental, psychological and surgical treatment
- Parent, guardian, or conservator cannot be contacted and has not given actual notice to the contrary

### Form of consent
- In writing, signed, given to the doctor/hospital/medical facility
- Must include name of child;
- Name of one or both parents/conservator/guardian;
- Name of person giving consent and relationship;
- Nature of medical treatment; and
- Date treatment is to begin
Persons authorized to consent (no hierarchy)

- Grandparent
- Adult siblings
- Adult aunt or uncle
- Educational institution that has written authorization to consent from the person with the right to consent

Persons who have actual care, control, and possession of the child and have written authorization to consent from the person with the right to consent

- Court having jurisdiction over a child
- Adult with authority over child pursuant to a juvenile court
- Peace officer who has lawfully taken custody of minor

Additional rules for immunization

Person giving consent must provide sufficient and accurate health history and information for the minor (and minor’s family) so physician can determine risks and benefits and whether immunizations are advisable.

Child may consent to own immunization if the child is pregnant or the parent of a child and has actual custody and CDC recommends initial dose administered before age 7

15 Tex. Fam. Code § 32.101

Longer list for who may consent to immunization

- Grandparent
- Adult siblings
- Adult aunt or uncle
- Stepparent
- Educational institution that has written authorization to consent
- Adult with actual care, control, and possession and who has written authorization to consent

- Court of continuing jurisdiction
- Adult with authority from juvenile court
- An adult having actual care, control, and possession of the child as child’s primary caregiver.
- Person authorized under law of another state or court order to consent for child

When a nonparent may consent to immunization

- Parent/conservator/guardian is not available
- Parent/conservator/guardian has not expressly refused immunization or withdrawn written authorization for consent.

Nonparent consent must be documented for immunizations just as for other medical care

IMPLIRED CONSENT?
Relying upon “implied” or non-express consent
- Parent who is often accompanied by nonparent caregiver; may have provided express consent in the past; may not extend authorization to future treatment.
- Nonparent who has children on public benefits and has other indicia of primary caregiving (birth certificates, lease agreement, enrolled children in school) still must be a guardian/conservator, have express consent, or be permitted to consent under Chapter 32.
- What is the effect of providing nonurgent treatment to child or release information without consent of personal representative or as authorized by law?

Summary – hierarchy of consent
- 1. Parent
- 2. Conservator/guardian
- 3. Chapter 34 Authorization agreement or other consent of person authorized to consent
- 4. Chapter 32 consent (minor, abuse/neglect, certain nonparents when parent cannot be contacted)

Scenario 1
- First time visit of a 4 year old patient accompanied by her grandmother.
- Grandmother says child has been in her home since November 2013. Child was placed with grandmother by CPS after mother went to jail. No known father.
- Grandmother needs to have well child exam completed so she can enroll child in day care.
- No insurance for child.

Scenario 1 – Analysis and referrals
- Mother is personal representative unless there is a court order. Verify no court orders (probably none if no known father)
- Can grandmother obtain written consent from mother in jail? Did CPS provide any documentation?
- If no ability to contact mother – chapter 32 may apply.
- Referrals/resources: Should provide referral to obtain power of attorney. Grandmother should be encouraged to apply for Medicaid for child.
- Immunizations needed? Verify health history of child and mother.

Scenario 2
- First time visit from a 4 year old patient accompanied by older cousin.
- Cousin says child has lived with her since birth. Mother died in child birth; father is unknown.
- Child needs immunizations for school.
- Cousin has Medicaid for the child.
Scenario 2 – Analysis and referrals
- No parent/no court order.
- Court order not necessary to consent to immunizations. Cousin is person with actual care, custody, and possession as child’s caregiver. Authorized under chapter 32.
- May want to verify with child that cousin is primary caregiver. (That she has Medicaid is a good indicia she is.)
- Referral to attorney to consider whether guardianship may be possible/helpful and to anticipate roadblocks to enrollment.

Scenario 3 – Analysis and referrals
- Current patient: 16 year old child accompanied by 22 year old sister
- Parents are divorced. Sister has hand-written consent signed by mother: “I consent to 22 year old to provide medical care to my 16 year old.” Undated, no expiration, not notarized or witnessed.
- Child wants to start birth control.

Scenario 3 – Analysis and referrals
- Divorced means there is a court order that states who has right to consent. Mother may not be the person with right to consent. Also, written consent is not most reliable.
- Can child consent on her own? Determine whether she manages her own financial affairs and lives apart from parents. If not:
- Need to know who is managing conservator and attempt to contact for consent. Sister may consent under Chapter 32 only if conservator with right to consent to medical treatment cannot be contacted.

Scenario 4 – Analysis and referrals
- 10 year old accompanied by grandparent
- Grandparent does not know where parents are. Public benefits are in parents’ name.
- Grandparent says not able to get consent or custody because parents want to keep public benefits but parents are drug abusers.
- 10 year old has severe eczema. Untreated because grandmother cannot get Medicaid card.

Scenario 4
- Parents have rights to consent unless there is a court order.
- Chapter 32 applies; cannot reach parents.
- Referral to 211 to apply for public benefits
- CPS or attorney referral in case parents attempt to regain child or continue to refuse to turn over benefits

Scenario 5
- 4 year old child appears with grandparent.
- Child has ear infection.
- Grandparent has a chapter 34 Authorization Agreement that is signed by the mother and father but not notarized.
- Mother is in jail. Father could be reached by phone.
**Scenario 5 - Analysis and referrals**
- Not a valid authorization agreement (not notarized)
- However, may be able to obtain father’s verbal consent to treat ear infection. In alternative, Chapter 32 consent may be authorized.
- Refer to attorney for help with obtaining properly executed authorization agreement or power of attorney.

**Suggestions for practice**

**Background history/questions**

Family/social history – who are parents? Where are parents? Anyone else have a custody order or guardianship? Contact information for who can authorize consent/release?

How long has child been with the nonparent? Observe and document relationship between child and nonparent.

Does nonparent have insurance for the child? Medicaid or CHIPS? Other public benefits? (SNAP or TANF)

**Nonmedical issues for the child in a kincare arrangement**

With no written consent or court order, a nonparent caregiver may do the following:
- Enroll child in school
- Seek evaluation for educational disability
- Be representative payee for SSI
- Be authorized representative for public benefits (certain relatives)
- Claim child as dependent (certain relatives)
- Add child as health insurance (usually only for claimed dependents)
- Use FMLA leave
- May be able to add a child to the lease
- Any problems with enrolling child in school? Who is listed on school records as parent/guardian? How is child doing in school – any need for special education evaluation?
- Any other issues in obtaining services/needs for the child?
- Other caregivers?
Resources

- Texas Kincare Primer (Texas Legal Services Center)
  Guide to nonparents’ options under state law.

- Texas Law Help
  [www.texaslawhelp.org](http://www.texaslawhelp.org)
  Legal information. Forms.

- GrandFacts
  [http://www.aarp.org/content/dam/aarp/relationships/friends-family/grandfacts/grandfacts-texas.pdf](http://www.aarp.org/content/dam/aarp/relationships/friends-family/grandfacts/grandfacts-texas.pdf)
  Agency referrals by counties/municipalities.

Referrals - non-profit

- Texas RioGrande Legal Aid, Inc. – Telephone Access to Justice Hotline. 888-988-9996

- Medical Legal Assistance for Families - Pediatricians and TRLA staff jointly address legal problems that impair children’s health or prevent them from thriving. Priority areas include: rented housing, education, public benefits, and guardianship for young adults who lack the capacity to act as adults. 210-704-8730

- Texas Legal Services Center - Advice on health law, public benefits, and Chapter 34 Authorization Agreements. 866-979-4343

Private Bar

- State Bar of Texas Lawyer Referral Information Service - 800-252-9690

- San Antonio Bar Association - Lawyer Referral Service – 210-227-1853