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## **A FAMILY RIGHT TO CARE: CHARTING THE LEGAL OBSTACLES**

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## A FAMILY RIGHT TO CARE: CHARTING THE LEGAL OBSTACLES

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*Policy Article*

**A Family Right to Care: Charting the  
Legal Obstacles**

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**Abstract**

Numerous state and federal laws govern kinship (non-parental/relative) care of children. Federal laws are mainly concerned with assistance to families and with child welfare. State laws implement federal law and provide more governance in these areas and also almost exclusively govern family custodial issues. Yet, together both federal or state bodies of law do not comprehensively address the range of legal issues that burden kinship families. States and federal laws still need to enact laws and regulations that provide more legal rights and assistance that will empower kinship families to successfully care for children. In this legal brief, the “rights” of kinship families are outlined. These rights divide into two core areas where kinship laws remain incomplete: 1) the opportunity to care for children, and 2) enabling caregivers to successfully care for children.

### Introduction

This article provides a framework for charting the legal obstacles faced by kinship families (grandfamilies). Numerous articles have reviewed many of the same issues, so these obstacles are not new territory (Cox, 2009; Letiecq, Bailey, & Porterfield, 2000; Generations United, 2015). However, here I hope to contribute to the discussion by contextualizing the identified legal issues as “family right to care” and then cataloging them as elements of this right.<sup>1</sup>

Numerous federal and state laws govern kinship (non-parental/relative/fictive) care of children in several distinct areas. Federal laws mainly are concerned with financial assistance and child welfare, but also impact aging, schooling, and immigration, as well as other systems. State laws implement federal law, providing statutory and regulatory governance in these areas, and almost exclusively govern family law custodial issues, as well as access to a wide range of services implemented with state dollars. Together they impact almost every element of caregiving. By identifying many of these laws, one may see how federal and state policies and laws can help or hinder caregiving, but also how a body of imperfect laws denies caregivers their right to care.

Starting with a brief description of kinship care, I then use the idea of a “right to care” to examine the laws, policies, and practices surrounding how kin become caregivers and how once kin are caregivers, what rights and assistance are available to them and how they differ depending upon the types of legal arrangements.

Kinship family rights are divided into two areas: 1) the opportunity to care, and 2) enabling full-time caregivers

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<sup>1</sup> The article relies on extensive legal citations to illustrate the many areas of law where kinship families face undue burdens. Many of the laws cited are from the author's home state of New York and are used here to typify the legal obstacles faced by kinship caregivers in many states.

to successfully care. Regarding the opportunity to care, we expand into three: 1) challenging parents for custody, 2) challenging the state, and 3) issues related to child welfare diversion. Diversion refers to local child welfare policies and practices that engage kin as caregivers for children at risk of foster care placements but that avoid licensing kin as foster parents.

Regarding full-time care, I “chart” the different legal arrangements, examining informal care (no court orders), legal custody, guardianship, foster care, and adoption, and how laws impact each arrangement's provision of recognition, authority, security, financial assistance and access to services.

Finally, I identify some emerging kinship issues and promising practices, and make recommendations related to a “right to care.” In sum, together both the federal or state bodies of law have yet to comprehensively address the range of legal issues that burden kinship families. Supportive federal and state policies and laws still need to be developed in order to provide comprehensive family rights and assistance that release kinship families from undue burdens and empower them to achieve the best outcomes possible for children in their care.

### **Informal Kinship Care**

Most kinship care is informal. As used here, informal kinship care refers to kinship families who are not certified or approved as foster families and therefore do not receive foster parent payments. This informal definition includes so-called “voluntary placements.” Unlike some informal definitions that exclude voluntary because the children remain in state custody and are considered part of the formal system, here the emphasis is on the perspective of caregivers and the obstacles they encounter. Therefore the lack of services aligns voluntary kinship, not with foster care, but with the greater informal population that is underserved or

unserved by child welfare. Informal kinship caregivers include grandparents, other relatives, and some unrelated family (fictive) kin. For this article, we will use the terms “relative care” and “kinship care” interchangeably.

Most caregivers are grandparents (Thus, the word “grandfamilies” has been coined to refer to kinship families). Because the U.S. Census surveys focus on grandparent-headed households, reliable statistics are only available for that population. According to the 2010 U.S. Census Bureau statistics, 7.8 million grandparents have grandchildren living with them, comprising 8% of all children in the United States (U.S. Census, 2010).<sup>2</sup> Of these families, 2.5 million grandparents are primarily responsible for food, clothing, and shelter of one or more of the grandchildren living with them. However, the grandparent proportion of kinship has slowly declined, currently comprising approximately 65% of all kinship care (Federal Interagency Forum on Child and Family Statistics, 2013 and 2014).

In addition to full-time care, grandparents and other relatives are the backbone of child care. Astonishingly, relatives regularly provide childcare to *almost half* of the more than 19 million preschoolers, according to tabulations released recently by the U.S. Census Bureau (2008). Among the 11.3 million children younger than 5 whose mothers were employed, 30% were cared for on a regular basis by a grandparent during their mother’s working hours (U.S. Census Bureau, 2008). A slightly greater percentage spent time in an organized care facility, such as a day care center, nursery, or preschool. Meanwhile, 25% received care from their fathers, 3% from siblings and 8% from other relatives when mothers went to work. Another 78,000 households in 2000 consisted of three generations: parent, child, and grandchild (U.S. Census Bureau, 2000). Many of these

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<sup>2</sup>There are 74.2 million children in the US, according to 2010 U.S. Census Data.

grandparents, who are part-time caregivers now, may become full-time caregivers in the future.

Statistics offer a snapshot of care, with children entering and leaving kinship care regularly. Accordingly, during childhood, an estimated one in five black children and one in eleven of all children will live with kin (Annie E. Casey Foundation [AECF], 2013).

### **Definition of Informal Kinship Care**

A U.S. Department of Health and Human Services (2000) report to Congress used the terms “private” and “public” kinship care. However, these terms have not been widely adopted, and this article uses the older terms, “informal” and “formal.” As mentioned, we define informal kinship care broadly as all non-foster kinship care. Informal care then would include non-licensed kin who are subject to child welfare proceedings and who may receive some special financial assistance and services or who may receive none.

### **Informal Kinship Care is an Informal Child Welfare System**

Informal kinship care is in actuality another child welfare system. Most often children come to live with relative caregivers because their parents abused, neglected, or abandoned them, or their parents are alcohol and/or substance abusers, are deceased, mentally ill or unable or unwilling to parent (Smithgall, Mason, Michels, LiCalsi & Goerge, 2006; Wallace & Lee, 2013; AECF, 2013).

The causes leading to kinship are similar to the causes that place children in foster care. However, this informal kinship system, which cares for over *10 times more* children than the “formal” system, and is a natural complement to the formal foster care system, is totally marginalized compared to foster care. It receives only a fraction of the attention afforded the public system from policy makers (AECF, 2012)

and, as noted by many commentators, does not have access to the services provided “formal” foster families.<sup>3</sup>

### **Facing Special Challenges**

Kinship families confront additional special challenges, which are unique to their intra-family relationships. Relative caregivers shoulder heavy and unanticipated burdens when they undertake the full-time task of raising children. They may have been working<sup>4</sup> or retired, living on fixed incomes such as Social Security or pensions,<sup>3</sup> and possibly living in restricted housing for the elderly or in their own homes or apartments. Many must leave their jobs in order to become full time caregivers—approximately 48% of all family caregivers were employed full time (National Alliance for Caregiving [NAC], 2004). They may be younger family friends or elderly great-grandparents. They often have disabilities (Fuller-Thomson & Minkler, 2003; U.S. Census Bureau, 2010).<sup>4</sup> Most have experienced debilitating family tragedies, either because of the death or incarceration of the child’s parents, or the consequences of substance abuse or disability of a family member (Gleeson et al, 2009). And some are raising children who were orphaned by catastrophes or the loss of a parent who was killed in the Iraq and Afghanistan wars (Gearon, 2008).

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<sup>3</sup>According to the Adoption and Foster Care Analysis and Reporting System (AFCARS), there were 402,378 children in foster care in 2014 (Children’s Bureau, 2015).

<sup>4</sup>1.4 million grandparent-caregivers are in the labor force (Children’s Bureau, 2015).

<sup>3</sup>According to the U.S. Census Bureau American Community Survey 2010-2014 Five Year Estimate (2015), 575,718 of the grandparents responsible for raising grandchildren are living below the poverty level.

<sup>4</sup> 673,588 of grandparents caring for children are living with a disability U.S. Census Bureau American Community Survey 2010-2014 Five Year Estimate (2015).



Kinship care is a subset of all family caregiving, and like all caregivers, many caregivers are themselves in poor health; studies show that approximately one-third of caregivers provide intensive levels of care although they are themselves in “fair to poor” physical health (Navaie-Waliser, et al., 2002; U.S. Department of Health and Human Services, 1998).

Kinship caregivers, especially grandmothers, are more prone to stress and depressive symptoms (Baker & Silverstein, 2008). Studies have found that caregivers may have increased blood pressure and insulin levels, may have impaired immune systems, and may be at increased risk for cardiovascular disease among other adverse health outcomes (Kiecolt-Glaser et al., 2003; Lee, Colditz, Berkman, & Kawachi, 2003). The caregivers are frequently older and ill-prepared to parent children with special needs.

The causes of kinship care are inherently challenging and kinship children face extraordinary psychological, social, and physical barriers. (Centers for Disease Control and Prevention, 2015, American College of Pediatrics, 2012). Informal kinship children have higher rates of developmental disabilities, emotional problems, physical and learning disabilities,<sup>5</sup> bereavement issues, attachment disorders, and parental alienation (Kinney, McGrew, & Nelson, 2003; Lai & Yuan, 1994; Gleeson et al., 2008).<sup>6</sup>

Most kinship families face another unique challenge—continuing parental contacts. The children’s parents are frequently still part of the family. Given that parents’ detrimental behavior is a common cause for kinship care, ongoing parental contacts can be incredibly disruptive

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<sup>5</sup>A study conducted in 1994 found that 70% of grandparents reported caring for a child with one or more medical, psychological or behavioral problems (Lai & Yuan, 1994).

<sup>6</sup> “Over a quarter of the caregivers (27.5%) indicated that the child had a disability” (Gleeson et al., 2008).

of family stability, placing enormous stressors on kinship families.

### **Benefits of Informal Kinship Care**

Despite the hurdles facing kinship families, children raised in kinship families generally have better outcomes than children in foster care (Rubin et al., 2008). Research indicates that kinship caregiving saves tax payers billions of dollars. Conservative estimates suggest that if even half of the 2 million children being raised by relatives without parents in the home were to enter the foster care system, it would cost taxpayers \$6.5 billion a year (Generations United Grandfamilies Fact sheet, referencing U.S. House Ways and Means Committee, 2000).<sup>7</sup>

### **Charting the Obstacles**

The special challenges faced by kinship families call for special solutions. Yet, kinship families in every state still face daunting obstacles to their caregiving (Sakai, Lin & Flores, 2011; Strong, Bean & Feinauer, 2010; Strozier, 2012; Letiecq et al., 2008). In spite of these considerable savings to government, and the even greater saving to society, relative caregivers are continually confronted daily with the unintended effects of inadequate social policies, poorly

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<sup>7</sup> For every child who enters foster care, a yearly computation of costs would include direct foster care payments plus administrative costs for foster care, plus reunification efforts cost, plus court proceedings costs (judge, court personnel, attorneys, experts), plus appeals, and plus additional services to the child. The final figure is difficult to estimate but clearly exceeds the cost of foster care payments plus roughly \$15,000 per year per child (in New York state for example). Therefore, the annual cost of one child in foster care is roughly at least \$20,000, with costs escalating if the child has special or extraordinary needs. Bottom line, 100 children in informal kinship care who enter foster care will cost \$2 million per year. In New York, \$2.5 million funds the statewide Kinship Navigator and up to 21 local kinship programs for FY 2016-17.

crafted public benefit provisions, and laws that were drafted with an incomplete understanding of informal kinship care.<sup>8</sup>

In attempting to understand the obstacles faced by kin who want to care for children, individuals and service providers are confronted with the inconsistencies of federal and state statutory, regulatory, and case law (as well as intra-state inconsistencies). Some generalizations can be made. All states protect parental autonomy; all states attempt to empower non-parents to care for children; and all states try to use kin to care for children who are abused, neglected or abandoned. Pursuant to federal law, states prefer placement of children with kin,<sup>9</sup> some states facilitate foster parent certification for kinship caregivers, and some offer other alternatives that are often funded by Temporary Assistance to Needy Families<sup>10</sup> (TANF, i.e., public assistance) federal block grants to states (AECF, 2013; Wallace, Hernandez, & Treinen, 2015).<sup>11</sup> However, how these policies are implemented in the real world is rife with incongruities, inequities, and ineffective practices.

### **A Family's Right to Care**

At Hunter College and at the NYS Kinship Navigator, a common question posed by grandparents and other family

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<sup>8</sup> In addition to the literature documenting kinship barriers, this article is based upon over 15,000 intakes by the author and staff, during the author's directorship of Hunter College's Grandparent Caregiver Law Center (1999-2005) and the NYS Kinship Navigator (2006 to present). In 2012, the NYS Kinship Navigator received one of seven national kinship navigator demonstration project grants, pursuant to the family connections/provision of the "Fostering Connections Act to Success and Increasing Adoptions Act," P.L. 110-351), and the research connected to the grant further informs the article.

<sup>9</sup> 42 U.S.C. §5106 (a)(4), "...The Secretary may award grants to public and private entities in not more than 10 States to assist such entities in developing or implementing procedures using adult relatives *as the preferred placement* for children removed from their home..."

<sup>10</sup> CFR Title 45, Subtitle B, Chapter II, Part 260, §§260.1-260.76.

<sup>11</sup> 42 U.S.C §603 et seq.

members was (and is), “What are my rights?” to care for children whom they perceive to be in abusive/neglectful parental homes. The short answer is that they have no right to care comparable to a parent's right to care, nor to the state's right to care. They have no right to become caregivers and no right to remain caregivers.

Regarding challenges to parental control of children, parents have a long established constitutionally-protected fundamental right to the care, custody, and upbringing of their own children. They are viewed as the natural guardians of their children. This parental right is judge-made law and one of the earliest rights developed by the U.S. Supreme Court.<sup>12</sup> As such, the governing standards are accorded significant deference by family and juvenile court judges. Other relatives can only proceed to seek visitation or custody under statutes or case law that provide a “right” to petition a court, not a right to visit or to custody. And in every instance of such a right to petition, parental rights mandate heightened protection. For instance, in visitation, most states have statutes that limit standing to grandparents and siblings and then add limitations on the circumstances when such petitions address the interests of children. In custodial challenges, most states’ case law governs, albeit a handful of states have statutes that describe when a private party may have standing to challenge a parent. Invariably, the private (third) party must show some extraordinary circumstances (like parental abuse, neglect, or abandonment). All states also have case law that permits third parties who are *already* caring for children to seek custody. A handful have “de

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<sup>12</sup>*Meyers v. Nebraska*, 262 U.S. 390, (1923), *Pierce v. Society of Sisters*, 268 U.S. 510, (1925), *Prince v. Massachusetts*, 321 U.S. 158 (1944), *Stanley v. Illinois*, 405 U.S. 645, 651 (1972), *Wisconsin v. Yoder*, 406 U.S. 205, 232 (1972), *Quilloin v. Walcott*, 434 U.S. 246, 255 (1978); *Parham v. J. R.*, 442 U.S. 584, 602 (1979), *Santosky v. Kramer*, 455 U.S. 745, 753(1982), *Troxel v. Granville*, 530 U.S. 57 (2000).

facto” custody laws that define a period of care justifying standing and diminished parental rights.

Another instance where kinship caregivers face significant disadvantages is parental access to the courts. For both visitation and custody, indigent parents are often provided free attorney representation, and courts will almost always provide some visitation, even with “problem” parents. Caregivers will often talk about the realities of children who are let down by parents who promise to visit and then don't, or who in countless other ways act detrimentally to the well-being of children. It is not uncommon to hear a caregiver complain that a child was finally sleeping thru the night, or not acting out in class, until a parent's intrusion undid the progress. Caregivers see courts forcing parental visitation upon them unreasonably because parental rights demand that the court assist parents in maintaining a relationship, unfortunately resulting in destabilizing kinship homes and negatively impacting fragile children.

Similarly, parents who are deprived of custody retain their parental rights, and courts will permit parents to drag custodial relatives back into court again and again. This process depletes families both economically and emotionally.

A special instance of visitation involves children of incarcerated parents, where kinship families often must follow court orders to visit parents in prisons and jails. These limitations place undue burdens on older caregivers who sometimes must travel long distances to visits at facilities under onerous conditions.<sup>13</sup>

Regarding state control of children, federal and state laws provide a statutory preference for kin to become caregivers of children who've been removed and are in state

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<sup>13</sup>A survey of 21 New York State OCFS kinship programs found almost 10% of their cases involved an incarcerated parent. Out of 2,982 kinship clients, 249 (8.35%) cases involved an incarcerated parent. Within an individual program, the percent of caseload with an incarcerated parent ranged from 2.4% to 19%, depending on the location and type of services offered (Osborne Association, 2010).

care, but there is no recognition of a family right to become caregivers for children. State control trumps non-parental family members, even if the relative is perfectly suitable. The result is that too often relatives are not given the chance to care for children, particularly when they come forward after placement in non-kinship foster home. While entrenched prejudices against kin are waning and kin are increasingly relied upon as a resource for children, based upon NYS Kinship Navigator intake data, it is a fact that kin still frequently confront frontline staff, judges, and local public agencies who are not supportive of their efforts to care for children.

### **Right of Access to Services**

In addition to the more traditional rights issue, this article posits that access to adequate services that are critical to the special challenges faced by kinship families should be viewed as part of their right to care. It is well-documented that kinship caregivers are older, poorer, and often at disadvantages in navigating systems of care (Goelitz, 2007; Ehrle, Geen, & Main, 2003). These circumstances warrant an adequate response from various service systems. But as scores of articles show, services are missing. For example, The TANF “child-only” grant is critical for kinship families. Studies show that infusion of dollars into impoverished families can have long-range impact on outcomes for children (Akee, Simeonova, Costello, & Copeland, 2015). Yet the grant is grievously underutilized (ACEF, 2012, Mauldon, Speigman, Sogar, & Stagner, 2012). Reasons for underutilization include insufficient outreach, under-inclusive and unreasonable eligibility rules, barriers to making successful application, and local practices resistant to the provision of services. Similarly, failures to address core needs occur in other service systems.

Another example, school enrollment, where McKinney Vento<sup>14</sup> keeps homeless children and Fostering Connections keeps foster children in their schools, but kinship children cannot remain in their home schools and even face barriers to enrollment in new school districts where their caregivers reside (Generations United, 2015).

In fact, the gaps in access or the total exclusion from services are problems constantly voiced by kinship families. While for over 20 years, many articles describe these situations, unfortunately barriers persist (for an extensive treatment of such issues in one state, *see* the four NYS Kinship Summit reports, available at <http://www.nysnavigator.org/kinship-policy/kinship-care-policy/>).

Child welfare placements provide particularly onerous examples of insufficiently supportive policies/practices. Until the Fostering Connections to Success Act of 2008,<sup>15</sup> in most states, child welfare laws usually did not mandate notification to grandparents that their grandchildren were the subjects of a judicial proceedings, and even now it is common to hear from caregivers that they are not provided with their “options” or are dissuaded from becoming foster parents by barriers to licensing (Beltran & Epstein, 2013). And child welfare laws still do not require that grandparents (or other relatives) who discover that related children are in state care have the opportunity to become their foster parents or that a child's placement in a kinship home should be presumed to be in the child's best interests. In sum, federal and state laws declare a “preference” for kin as caregivers but do not mandate the opportunity to care or establish a right to care.

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<sup>14</sup>McKinney-Vento Homeless Assistance Act (42 U.S.C. 11431 et seq.).

<sup>15</sup>Similar to the 2003 amendments to New York's Family Court Act Section 1017 that mandated information to contacted relatives, including all grandparents, the Fostering Connections Act mandated a due diligence search with a 30-day notification requirement.

A related issue is “diversion” where kin become a resource for children but do not become foster parents. While some kin may not choose foster care or not qualify, most see themselves deserving the same financial and service benefits as foster parents and, in countless interviews, complain that they are doing the same work for less.

### **Diversion**

A common story heard from caregivers is that a child welfare agency was involved with their assuming care but they did not subsequently become foster parents. How they became caregivers and why they did not become foster parents involves many different circumstances. Sometimes kin chose not to, sometimes they weren't informed, sometimes they could not qualify. All are referred to by the term diversion. Diversion refers to any situation where a child welfare agency engages kin as an alternative to foster care placements (AECF, 2013).

Based upon NYS interviews with caregivers and professionals, as well as two Child Welfare League of America conferences, we identify two types of diversion: 1. “temporary,” with no removals and no dependency proceeding (dependency proceedings) and little or no state involvement post-placement; or 2. “voluntary,” after removals and initiation of a dependency proceeding but with less state services than foster care and little or no state involvement post-placement (Wallace & Lee, 2013; CWLA, 2012). The extent of the practices may differ from state to state and even intrastate.

In both instances, foster care services aren't available, and children of diverted kinship households, along with their caregivers, receive less or no specialized services or supports. This lack of services occurs despite the fact that the reasons for placements are similar to those for children entering foster care.



Kinship diversion policy and practice impact a significant number of children and families who come to the attention of the child welfare system (AECF, 2013). However, in most of the literature, the discussion of kinship diversion has focused solely on “voluntary” placements. In this article, we posit that the total number of diverted kinship families is substantially under-reported, because diversions that are “temporary” —e.g., without removals and dependency proceedings—are only recorded in case notes, usually not in any child welfare database, and therefore, it is not possible to accurately estimate the total number of temporary diversions. Regardless of the circumstances, it is a fact that kinship care service providers report that many children are in informal kinship care because of temporary and voluntary diversion.<sup>16</sup>

### **Temporary Placements**

Temporary placements typically occur when Child Protective Services (CPS) investigates parents, then attempts to find a “temporary” placement in order to avoid a removal and/or to avoid initiating a dependency hearing. For example: a CPS worker is concerned that the mother's home is unsafe, but does not initiate a removal. Instead, the parent is asked if there is a relative who can care for the child(ren), a phone call is made—often by CPS or some other professional - and a relative is asked to assume care. In New York, this is often called a “safety plan.” No dependency proceeding is initiated.<sup>17</sup>

Since there are no formal proceedings and no official removal, these situations are not recorded in the Adoption

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<sup>16</sup> Some official and not so official terms for temporary placements include: official “temporary,” “alternative living arrangements,” and “parole,” or unofficial: “drive-bys,” and “drop and roll.”

<sup>17</sup> Localities use different placement terms, for instance: “temporary,” “drive-bys,” “alternative living arrangements,” “parole,” or (more pejoratively) “drop and roll.”

and Foster Care Analysis and Reporting System(AFCARS). Therefore, not only is there is no official statistical data, but also there is no data to determine whether the caregiver has successfully established a family situation supportive of stability and well-being or whether children have been able to thrive in their new household, or if children later enter foster care.

Whether kin are connected to services depends upon state and local policies and practices. Unfortunately, in our federal kinship navigator demonstration project, we identified that child welfare workers often did not know about benefits and services for informal kinship families or did not assist in connecting them to services. This finding reflects what we have heard from caregivers. In interviews over the years, a typical complaint was “CPS gave me my grandson eight year ago. This is the first time that I've found out about assistance.”

### **Voluntary Placements**

Voluntary placements occur when kin become caregivers for children who were removed and then subject to abuse/neglect/dependency proceedings.<sup>18</sup> Because there is a judicial proceeding, reunification efforts are ongoing and the local child welfare agency may seek to reunite children with parents despite the objections of caregivers. Voluntary placements are recorded in AFCARS, “more than 125,000 U.S. children live in out-of-home kinship care” (AFCARS, 2008).

As pointed out by articles on voluntary diversion, diverted kinship families may experience disruptive intrusions by parents, subsequent entries into foster care, other special challenges, or unjustified financial hardships (Geen, 2003).

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<sup>18</sup>The term “voluntary placements” is used differently depending upon jurisdictions; in New York State, it is referred to as “direct custody”

These two diversion practices may have value for child welfare agencies, especially related to costs, but for many kinship families the practices appear both arbitrary and unfair, and fail to serve their interests. With such disadvantages, diversion is another obstacle to a kinship family's right to care (CWLA, 2015).

### **The Opportunity to Care**

The absence of a meaningful family right to care leaves caregivers with a significant imbalance of power compared to parental and state rights to care. Once kin seek to become caregivers, they must attempt to remove children from the care and control of parents or from the state by first leveling the special barriers protecting parents or state agencies and then by addressing the "best interests" of children. Subservient to both a "parent's right to care" and the state's *parens patriae* power (the power of the state to care for its countrymen) is the "best interests of the child." Caregivers and many advocates see the elevation of children's rights as the answer, but in general courts, while voicing support for children, still only consider best interests when there are strong reasons to diminish parental and state powers.

Usually kin seek removal from parents because they are convinced that children are at risk of physical or emotional harm. In instances when child welfare authorities will not intervene in a problematic family situation, the protections afforded parents from state interference can create high hurdles for relatives who seek judicial assistance in removing a child. The fundamental liberty interest of parents is protected by statutes and case laws that erect formidable barriers. As mentioned, in many circumstances when children are in state care, there is no presumption that a child's interests are served by placement with family. Judges and child welfare officials have no legal obligation to place children with relatives—even relatives who are already

certified foster parents. Against parents, it is understandable that families have inferior rights, but against the state, the reasoning for inferiority conflicts with traditional family values.

### **Grandparent Visitation**

Visitation can be characterized as an “opportunity” to care. Starting in the late ‘90s, a national debate raged about grandparents’ rights, particularly visitation. All 50 states had grandparent visitation rights statutes on the books,<sup>19</sup> and a few have great-grandparent rights or relative rights

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<sup>19</sup>Ala. Code § 26-10A-30 (1992) Adoption Code; §30-3-4 Visitation Rights for Grandparents Repealed 1999, (1989 & 1994); Alaska Stat. § 20.065 (1995); Ariz. Rev. Stat. Ann. § 25.409 (1991 & 1994); Ark. Code Ann. § 9-13-103 (1993); Cal. Fam. Code §§ 3100, 3102-3104 (1994); Colo. Rev. Stat. § 19-1-117 (1990); Conn. Gen. Stat. § 46b-59 (1986); Del. Code Ann. tit. 10, § 1031 (1993 & 1994); Fla. Stat. Ann. ch. 752.01 (1995); Ga. Code Ann. § 19-7-3 (1994); Haw. Rev. Stat. Ann. § 571-46.3 (1994); Idaho Code § 32-719 (1994); 750 Ill. Comp. Stat. § 5/607 (1994); Ind. Code Ann. § 31-1-11.7-2 (1994); Iowa Code Ann. § 598.35 (1994); Kan. Stat. Ann. § 38-129 (1993); Ky. Rev. Stat. Ann. § 405.021 (1994); La. Rev. Stat. Ann. § 9:344 (1995); Me. Rev. Stat. Ann. tit. 59A, §1803; MD Code, Family Law, §9-102 (1994); Mass. Gen. Laws Ann. ch. 119, § 39D (1994); Mich. Comp. Laws Ann. § 722.27b (1993); Minn. Stat. Ann. § 259.622 (1992); Miss. Code Ann. § 93-16-3 (Law. Co-op. 1994); Mo. Ann. Stat. § 452.402 (1994); Mont. Code Ann. § 40-9-102 (1993); Neb. Rev. Stat. § 43-1802 (1993); Nev. Rev. Stat. Ann. § 125A.330 (1993); N.H. Rev. Stat. Ann. § 458:17-d (1992); N.J. Rev. Stat. Ann. § 9:2-7.1 (1994); N.M. Stat. Ann. § 40-9-2 (1994); N.Y. Dom. Rel. Law §72 (1993); N.C. Gen. Stat. §§ 50-13.2 to -13.2A (1987); N.D. Cent. Code § 14-09.05.1 (1993); Ohio Rev. Code Ann. §§ 3109.051, 3109.11-.12 (1994); Okla. Stat. Ann. tit. 10, § 5 (1995); Or. Rev. Stat. § 109.121 (1993); 23 Pa. Cons. Stat. Ann. §§ 5311-5313 (1991); R.I. Gen. Laws §§ 15-5-24.2 to -24.3 (1994); S.C. Code Ann. § 20-7-420 (1993); S.D. Codified Laws Ann. § 25-4-52 (1993); Tenn. Code Ann. § 36-6-301 (1991); Tex. Fam. Code Ann. § 14.03 (1986 & 1995); Utah Code Ann. § 30-3-5 (1994); Vt. Stat. Ann. tit. 15, §§ 1011-1012 (1989); Va. Code Ann. § 20-107.2 (1994); Wash. Rev. Code Ann. § 26.09.240 (1995); W. Va. Code §§ 48-2B-2, - 4, -6 (1994); Wis. Stat. Ann. §§ 767.245, 880.155 (1991); Wyo. Stat. § 20-7-101 (1994).

provisions.<sup>20</sup> Albeit in conformity with parental protections, there were and are threshold tests, statutory conditions, and sometimes entrenched judicial resistance. Only after hurdling such barriers does the language and intent of these statutes uniformly invoke a child's best interests.

At that juncture, the "best interests" standard remains the unchallenged *sine qua non* of family law. It says that what really matters is the child's interests, and there exists at most a rebuttable presumption that the parents know best. Justifying the threshold defenses is a long line of constitutional decisions establishing parental rights and the relationship between parent and child as constitutionally protected, in essence deriving from natural law. A court cannot intervene to usurp a parents' right to determine what is in their child's best interests absent from showing that the parent is unfit or that the visitation is clearly in the child's best interests.

Because the relationship between grandparent and grandchild is so important, all 50 states enacted statutes addressing grandparent visitation rights. These statutes, however, are far from uniform and many of them are poorly drafted, with some declared invalid by state courts. They often require a particular event to occur before grandparents

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<sup>20</sup> Arizona, Ariz. Rev. Stat. Ann. § 25.409, Alaska § 25.23.130. E.g., compare *Chavers v. Hammac*, 568 So.2d 1252 (Ala. Ct. Civ. App. 1990) (holding that great-grandparent lacked standing to seek visitation), and *People ex rel. Antonini v. Tracey L.*, 646 N.Y.S.2d 703 (N.Y. App. Div. 1996) (accord), with Alaska Stat. 25.24.150(a) (Michie 1996) (providing that "in an action for divorce or for legal separation or for placement of a child when one or both parents have died, the court may ... make ... an order for ... visitation with the minor child that may seem necessary or proper, including ... visitation by a grandparent or other person if that is in the best interests of the child") and *Hoff v. Berg*, 595 N.W.2d 285 (N.D. 1999) (holding unconstitutional 1993 amendment to statute requiring grandparents to be given visitation rights unless "visitation is not in the best interests of the minor," but upholding 1983 statute that gave great-grandparents standing to seek visitation).

are allowed to even file a petition for visitation rights. However, no state actually provided grandparents with a “right” to visit their grandchildren, with a few exceptions (Burns, 1991).<sup>21</sup>

The U.S. Supreme Court in *Troxel v. Granville*, 530 U.S. 57 (2000) took up the debate. Its decision put an end to the notion that grandparent had a right to visit, but did little to provide a standard for when their petitions for visitation should be heard. The Court ruled a Washington State visitation statute to be unconstitutional, because the statutory wording was held to be overly broad and did not accord sufficient deference to the parent’s normally overriding interest in childrearing decisions. In other words, it held the balance of interests favored the side of parental rights to the upbringing of children. However, the decision did not declare all grandparent visitation statutes to be unconstitutional—just the Washington State statute, which was not just a grandparent visitation statute. The plurality opinion declared that states may enact laws that permit grandparents to seek visitation, so long as “a parent's estimation of the child's best interest is accorded [sufficient] deference.”<sup>22</sup>

### **Special Weight vs. Harm**

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<sup>21</sup> At common law, grandparents had no legal right to visitation. If a parent decided the grandparent would not be allowed to see his or her grandchild, then the parent's decision would stand, regardless of the effect this decision had on the child. This was due to the fact that at common law, “[t]he right to determine the third parties who are to share in the custody and influence of and participate in the visitation privileges with the children should vest primarily with the parent who is charged with the daily responsibility of rearing the children.” *Chodzko v. Chodzko*, 360 N.E.2d 60, 63 (Ill. 1976). The right of a grandparent to visit with a grandchild was therefore considered a moral right, rather than a legal right. Edward M. Burns, *Grandparent Visitation Rights: Is It Time for the Pendulum to Fall?* 25 FAM. L.Q. 59 (1991); see also *Bronstein v. Bronstein*, 434 So. 2d 780 (Ala. 1983).

<sup>22</sup>530 U.S. 57, p. 66.

Notwithstanding a fit parent's right to the care and custody of their children, in *Troxel*, the Court held that a fit parent's estimation of what was in the child's best interests was to be accorded "special weight." *Troxel* kept a threshold test that protected parents and only applied a heightened standard to overruling a parent's choices regarding the upbringing of their children. It did void the Washington statute because that law permitted a court to overturn a parent's decisions and therefore incorrectly infringed on a parent's constitutional rights.

Many states post-*Troxel* have adopted revised standards extending stricter standards beyond *Troxel's* special weight suggestion. For example, in Massachusetts, it is required to prove grandparent visitation is "necessary to prevent significant harm" to the child. Such reasoning underlines many state court decisions that protect against the usurpment of parent's rights, unless there is a finding of abuse, abandonment, or neglect, in the interests of the child.

However, state courts are not bound to the "harm standard" and some states, like New York, have followed *Troxel's* "special weight" standard. In New York, Domestic Relations Law §72, originally enacted in 1966, has *always* provided that a grandparent has standing to seek visitation rights with a grandchild when the grandparent's child has died.<sup>23</sup>

But in another post-*Troxel* decision, a Maryland Court of Appeal held in *Koshko v. Haining*, 398 Md. 404, 921 A.2d 171 (Md. Jan 12, 2007) (NO. 35 SEPT.TERM 2006), *reconsideration denied* (Mar 09, 2007) and took a step backwards, holding that grandparents petitioning for visitation with their grandchildren under grandparent visitation statute are first required to show *prima facie*

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<sup>23</sup>NYS Family Ct Act § 651 [b]). (see also *Matter of Loretta D. v. Commissioner of Social Services of City of New York*, 177) A.D.2d 573, pp. 574-5 (2<sup>nd</sup> Dept. 1991)).

evidence of parental unfitness or exceptional circumstances demonstrating the current or future detriment to the child. This decision typifies the more restrictive judicial standards for grandparent visitation.

### Visitation Post Adoption

Many states clearly express legislative intent to extinguish post-adoption visitation rights in the interest of preserving adoptive family integrity and privacy, and where this is the case there are express codifications to that effect.<sup>24</sup> But a few expressly provide for post-adoption visitation.<sup>25</sup> In New York, statutory authority (DRL §72) and a well-established line of case law<sup>26</sup> in New York State affirms visitation, that post-adoption visitation rights by grandparents simply do survive, even over the objections of both parents.<sup>27</sup> Similarly, in contrast with many other states, parents may have post-adoption contact with children.<sup>28</sup>

One final note, seeking visitation via a court petition is no small matter and inherently, like all court proceedings, it involves unresolved conflict. Therefore, conflict between a grandparent and parent is not in itself a sufficient reason to preclude visitation.

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<sup>24</sup>Arizona, A.R.S. § 8-117(A), Massachusetts, Mass. Gen. Laws Ann. ch. 119, § 39D, Florida F.S.A. §752.01, Georgia Ga. Code Ann. § 19-7-3.

<sup>25</sup>Alabama, § 26-10A-05, Louisiana, LSA-Ch.C. Art. 1264 (1992), Arkansas, §9-9-215, New Jersey: *Mimkon v. Ford*, 332 A.2d 199, 204 (N.J. 1975). Colorado, 19-1-117 (when one parent has died), Connecticut, C.G.S.A § 46b-59.

<sup>26</sup>*People ex rel. Sibley on Behalf of Sheppard v. Sheppard*, 54 N.Y.2d 320, 429 N.E.2d 1049 (1981), *Moorhead v. Coss*, 17 A.D.3d 725, 792 N.Y.S.2d 709, Y.A.D. 3 Dept., 2005, *Layton v. Foster*, 95 A.D.2d 77, 466 N.Y.S.2d 723 N.Y.A.D. 3 Dept., 1983. July 21, 1983, *Matter of Custody and Guardianship of Netfa P.*, 115 A.D.2d 390, 496 N.Y.S.2d 21, N.Y.A.D. 1 Dept., 1985.

<sup>27</sup>*Ann M.C. v. Orange County Dept. of Social Services*, 250, A.D.2d 190, 682 N.Y.S.2d 62 (1998).

<sup>28</sup>McKinney's NY DRL §112-b.



### **Non-Parental Custody Rights - Against Parents**

The *Troxel* decision clearly permitted courts to continue to protect parents when non-parents seek visitation and custody. While for visitation a lesser standard such as special weight could protect parents, state family/juvenile courts have universally invoked the higher “harm” standard in custodial actions. Bottom line is that courts will not consider children's best interests unless there is first some “indicia of unfitness” that warrants breaching the protective wall afforded to parents. For example, citing the extended treatment in a Washington State case, *In the Matter of the Custody of Shields*, 157 Wash.2d 126, 136 P.3d 117, “[T]he ‘best interests of the child’ standard was unconstitutional as between a parent and a nonparent because it did not give the required deference to parental rights” (*Id.* at 646, 626 P.2d 16). The court explained that the best interests of the child standard is proper when determining custody between parents, but “between a parent and a nonparent, application of a more stringent balancing test is required to justify awarding custody to the nonparent. Great deference is accorded to parental rights, based upon constitutionally protected rights to privacy and the goal of protecting the family entity” (*Id.* at 645-46, 626 P.2d 16).

A term often used in these third-party custody cases is “extraordinary circumstances.” Extraordinary circumstance, such as unfitness, abandonment, mental illness, or a prolonged disruption of custody must first be proven before courts will consider whether custody (or guardianship) with a non-parent is in a child's best interests. And even when extraordinary circumstances are found, courts frequently still protect parents, by invoking a presumption that it is in the best interests of children to be in the care of their parents.

For a discussion of children already in the care of non-parents, see below section on de facto custody.

### Non-Parental Custody Rights - Against the State

When a child is not in the custody of their parents, and their parents are not parties to the custodial dispute, courts will commonly defer to the state actor (child welfare agency) in its custodial determinations. Relatives can start a custody action against the state, and while there are no parental rights issues, the state's power to determine custody will still be afforded deference, and no family right to care can be invoked. But when the child is living with kin, then there is a family right, albeit weakly enforced, when an agency seeks to remove a child from a kinship foster parent. Then, the intervening relative seeking to retain custody may be able to argue for preferential treatment based on his/her constitutional liberty interest in a relationship with the child.<sup>29,30</sup>

Similarly, a non-parent relative of the child does not have “a greater right to custody” than the child's foster parents.<sup>31</sup>

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<sup>29</sup>*A.C. v. Mattingly*, 2007 WL 894268 (S.D. N.Y. 2007) (in a suit in which infant plaintiffs allege that City's practices when removing children from kinship foster homes are unconstitutional, court concludes that plaintiffs possess constitutionally-protected liberty interest in integrity of kinship foster family unit).

<sup>30</sup>*Rivera v. Marcus*, 696 F.2d 1016 (1982). *Rivera v. Mattingly*, 2011 WL 4344422, (S.D.N.Y. Sep 12, 2011); *Osborne v. County of Riverside*, 385 F.Supp.2d 1048, 1054 (C.D.Cal. Sep 01, 2005); *Balbuena v. Mattingly*, 2007 WL 2845031, \*6+ (S.D.N.Y. Sep 28, 2007); *Johnson v. City of New York*, 2003 WL 1826122, \*6+ (S.D.N.Y. Apr 08, 2003); *Rodriguez v. McLoughlin*, 49 F.Supp.2d 186, 194+ (S.D.N.Y. Jan 08, 1999); *Cabrera v. Los Angeles County*, 644 F. Supp. 1352, 1354+ (C.D.Cal. Sep 03, 1986); *Bellet v. City of Buffalo*, 2009 WL 2930464, \*3+ (W.D.N.Y. Sep 11, 2009); *Johnson v. City of Cincinnati*, 310 F.3rd 484 (2002).

<sup>31</sup>*Matter of Gordon B.B.*, 30 A.D.3d 1005, 1006, 818 N.Y.S.2d 692; see also *Matter of Peter L.*, 59 N.Y.2d 513, 520, 466 N.Y.S.2d 251, 453 N.E.2d 480; *Matter of Violetta K. v. Mary K.*, 306 A.D.2d 480, 481, 761 N.Y.S.2d 514) see *Matthew E. v. Erie County Dept. of Social Services*, 41 A.D.3d 1240, 839 N.Y.S.2d 871 (4th Dep't 2007) (court improperly favored grandfather simply because of biological

In instances when children are in state care, there is a great distinction between seeking to become the custodian and when caregivers already are the custodians. For the former, there is no special right. For the latter, there is claim of a constitutional right. The seminal case here is *Moore v. City of East Cleveland*, 431 U.S. 494, 97 S. Ct. 1932(1977) (supporting sanctity of blood family relations and constitutionally protected substantive due process right of family to live together as a unit), where an East Cleveland grandmother was evicted from public housing because the local housing rules didn't permit certain relations to live with her in public housing. The Supreme Court found that when extended family members, especially grandparents, take on the duty of child rearing, they should be afforded the similar protections to those of parents. Unfortunately, courts have been very reluctant to extend rights to kin, and often conclude the existing laws already adequately safeguard kinship families.

### **Placement of Children in State Custody Across State Lines**

Another situation where state custody challenges families is when a relative in another state seeks to care for a child.<sup>32</sup> The relative can come to the home state and start a custody petition, which will be subject to the judicial deference afforded the local child welfare agency. Or when the agency wished to retain custody but to place with an out-

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connection to child and suitability as custodian). In fact, some states have statutes declaring a preference for foster parents.

<sup>32</sup> Parents and family members may lawfully “place” children in family homes across state lines. But when children are in state care, no amount of family assurances about the suitability of a relative caregiver will result in interstate placements prior to investigations that can keep children away from family care for substantial periods of time, in circumstances when children have suffered trauma, loss, and multiple stressors.

of-state relative, then the custodial transfers are governed by another state agency, the Interstate Compact on Children Office.

The Interstate Compact on Placement of Children's (ICPC) purpose is to provide protections to children in state care who are placed (moved from state to private care) across state lines for purposes of foster care and adoption. The interstate compact is supervised in each state-by-state administrators, who coordinate through the Association of Administrators of the Interstate Compact on the Placement of Children (ICPC).<sup>33</sup>

Under ICPC, the state that places a child in out-of-state foster care must retain jurisdiction sufficient to determine all matters in relation to custody, supervision, care, treatment, and disposition of child, until child is adopted, reaches age of majority, becomes self-supporting, or is discharged with concurrence of appropriate authority in the receiving state.<sup>34</sup> Under ICPC, the financial burden of achieving the goal of placing children out of state in a suitable environment and providing children with the most appropriate care available *remains with sending state*.

Before the child can be sent to the proposed placement for adoption or foster care, there must be an investigation to determine if that placement is a good setting in the best interests of the child. The home state's court is not going to allow the child to be sent somewhere that is not safe for the child. The purpose is to allow the "authorities in a state where a child is to be placed [to] have full opportunity to ascertain the circumstances of the proposed placement, thereby promoting full compliance with applicable requirements for the protection of the child." There are penalties for failure to comply with the requirements of the

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<sup>33</sup>(AAICPC) ([http://icpc.aphsa.org/Home/home\\_news.asp](http://icpc.aphsa.org/Home/home_news.asp)). The site has an easy-to-use index linking to each of the states' compact administrators' offices (<http://icpc.aphsa.org/Home/states.asp>).

<sup>34</sup>*Williams v. Glass*, 664 N.Y.S.2d 792, N.Y.App.Div.1.Dept.,1997.

ICPC's provisions.<sup>35</sup> Nevertheless, some judges ignore the requirements because they consider them to be onerous.<sup>36</sup>

The common complaint against the ICPC is that it takes too long to place children. The original court must first contact the administrator of the proposed state and arrange for a home visit and investigation of the proposed caregiver under the supervision of the other state's local court. The child will not be moved in the usual circumstance, unless the compact administrators first give the okay on the new caregiver and home. To speed up the process, the Safe and Timely Interstate Placement of Foster Children Act<sup>37</sup> provided a \$1,500 bonus to receiving states for each request for home studies returned to the sending state for approval within 30 days. The state in which a child from out of state would be placed (receiving state) then has 60 days to complete a home study. The state sending the child (sending state) has 14 days after receiving the home study to decide that the study is acceptable, or to decide that making a decision that relies on the report would be contrary to the welfare of the child. However, the cumbersome nature of the placement process survives, and caregivers continue to voice complaints that they are asked to become private custodians or are not considered as resources for interstate placements.

### **De Facto Custody**

One area of law which shows some promise for family rights is custodial actions where the petitioner is a caregiver who has already assumed the full-time care of

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<sup>35</sup>“Sending agency” which must comply with requirements of the Interstate Compact on the Placement of Children and may be penalized for illegal placement includes not only parent or entity which places the child, but the recipient of child if recipient causes child to be sent or brought across state lines. McKinney's Social Services Law § 374-a, subd. 1, Arts. III, IV, *Matter of Adoption of Male Infant A.*, 578 N.Y.S.2d 988.

<sup>36</sup>*In re Ryan R.*, 29 A.D.3d 806, 815 N.Y.S.2d 221 (2006).

<sup>37</sup>PL 109 239 Title IV\_E Foster and Adoptive Home Study Requirements.

children and who then petitions for custody or guardianship. In such instances, parents will be notified and action may go to trial not because of parental unfitness but because of the prolonged care by a third-party caregiver.

States differ significantly on what caregiving circumstances will lead to a best interests' test. Most states have a case law precedent where courts have declared what circumstances are necessary. Determinations about how the caregiver assumed care, whether the parent(s) has maintained their parental relationship, and the length of time for care are all part of thresholds hearings which are critical, as are other extenuating circumstances related to parental consent or its absence, parental opportunity to care (where parents aren't able to care, courts are less likely to entertain the petition), and quality of the caregiver/child relationship.<sup>38</sup>

An example is New York Law where a 1976 case<sup>39</sup> found an extraordinary circumstance where a family friend had become the full-time caregiver of a newborn for at least five years before the mother sought to regain care. Most of these determinations are made before courts will address best

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<sup>38</sup>*States with de facto parenting laws or recognition*: Arizona, Arkansas, Kentucky, Indiana, Minnesota, Delaware, District of Columbia, California, New Mexico, New Jersey, Oklahoma, Illinois (LGB), North Carolina (abolished family preferences in conservatorships), Connecticut (LGB), Iowa (LGB), New Hampshire (LGB), Kansas, Michigan (LGB), Mississippi, Montana, Nebraska, Nevada, New York (LGB), Ohio, Oregon, Pennsylvania, South Carolina, Tennessee (LGB), Texas, Utah (LGB), Vermont (LGB), Washington, West Virginia; *States not recognizing de facto parenting laws and no case laws*: Maryland, *Janice M. v. Margaret K.*, 404 Md. 661, 948 A.2d 73, 2008 Md. LEXIS 255 (Md. 2008), Alabama, Alaska, Florida, Georgia, Hawaii, Idaho, Louisiana, Missouri, North Dakota, South Dakota, Virginia, Wyoming; *States with judicial decisions recognizing de facto parenting*: Maine, Pennsylvania, Wisconsin *In re Custody of H.S.H.-K.*, 533 N.W.2d 419, 421-24, 435-37 (Wis. 1995), Massachusetts, *E.N.O. v. L.M.M.*, 429 Mass. 824 (1999).

<sup>39</sup>*Bennett v. Jeffreys*, 40 N.Y.2d 543 (1976), McKinney's Domestic Relations Law §72.

interests. In a handful of states, enacted laws provide standards for the length of time and what other circumstances warrant a best interests hearing. These thresholds standards often use the term “de facto” custody because the caregivers' care provides them with some level of custodial rights. Some states refer to the period of care as an “extraordinary circumstance” breaching parental protections

De facto custodian is typically defined as the primary caregiver and financial support of a child who has resided with that person for at least (1) six months if the child is under age 3; and (2) one year if the child is at least age 3. If the judge finds that the person is a de facto custodian, he or she has the same standing as a parent in the legal custody dispute. Custody is then determined based on the best interests of the child (Generations United, 2016).

Aside from the state statutes referenced here, there is another little-known family law provision that merits attention. The Uniform Child Custody Judicial Enforcement Act (UCCJEA) contains a provision that provides standing for full-time caregivers to become parties in custody actions. States are bound by Full Faith and Credit under federal law to respect the child custody decisions of other states.<sup>40</sup> For example, if a parent, grandparent or other non-parental caregivers has been given legal custody of a child in one state and travels from one jurisdiction to another, or if they send children to stay or visit with family members in other states, those other states are bound to observe those custody decisions equally in their own states as well. Since child custody is a state matter not regulated by federal law, to

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<sup>40</sup> 28 U.S.C. 1738A, Full faith and credit given to child custody determinations: “(a)The appropriate authorities of every State shall enforce according to its terms, and shall not modify except as provided in subsections (f), (g), and (h) of this section, any custody determination or visitation determination made consistently with the provisions of this section by a court of another State.”

facilitate this, all but four<sup>41</sup> states have adopted a Uniform Law,<sup>42</sup> the Uniform Child Custody Jurisdiction and Enforcement Act (UCCJEA). States are thus required to recognize and enforce, according to their terms and without modification, custody decrees made by courts situated in other states.

The court that first accepted jurisdiction in the home state where the child resided before transfer retains *exclusive, continuing jurisdiction* over the placement and financial responsibility for the child's care, right on up until they either reach adulthood at age 18, the court decides that the child retains no significant relationship with the state at all, or decides that none of the parents or persons acting as parents no longer live in the home state. In addition, if the courts decide that the jurisdiction in the home state court is an inconvenient one for a number of special reasons, under the new law, that jurisdiction can be transferred by mutual agreement.

As it relates to de facto custody, the law governing full faith and credit for child custody proceedings depends on

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<sup>41</sup> Missouri, Vermont, New Hampshire, Massachusetts have not enacted UCCJEA. The UCCJA was enacted in all 50 states, the District of Columbia and Puerto Rico in the early '80s.

<sup>42</sup> Uniform Laws are promulgated and advanced by an intergovernmental judicial commission, the Uniform Law Commission, or the National Conference of Commissioners on Uniform State Laws (NCCUSL), and are enacted by each state legislature. The need for Uniform Acts results in large part from the inherent nature of the American federal system. The United States Congress lacks authority under the U.S. Constitution to directly legislate in many areas, because all powers not explicitly granted to the federal government are reserved to state governments under the Tenth Amendment. At the same time, there is a desire to have laws across the states that are as similar as practicable. The widespread enactment of uniform state laws has reduced the preemption of state law by federal legislation. To date approximately 93 Uniform Laws have been drafted by NCCUSL, with approval from the American Bar Association (ABA), and enacted by various state legislatures.



one critical definition, “person acting as a parent.”<sup>43</sup> This is an important consideration regarding the opportunity to petition for custody. According to the UCCJEA:

“Person acting as a parent” means a person, other than a parent, who:<sup>44</sup>

(a) has physical custody of the child or has had physical custody for a period of six consecutive months, including any temporary absence, within one year immediately before the commencement of a child custody proceeding; and

(b) has been awarded legal custody by a court or claims a right to legal custody under the law of this state.

An individual who possesses *de facto* custody on the critical date (without the benefit of a court order) is deemed to be “a person acting as a parent.” The definition includes a collateral relative (such as a grandparent, aunt or sibling) or a non-relative who claims custody, perhaps based on “extraordinary circumstances.”

### **Enabling Relative Caregivers**

Informal kinship caregivers, grandparents, and other relatives, performing the task of caregiving outside the public foster care system (the “formal” system), essentially become new families facing significant barriers not faced by parental families. They are not fully “enabled” to care. The burdens caused by insufficient policies and laws still result in undue burdens (Geen, 2000). The chart below outlines the issues and obstacles caregivers face as they embark on the task of caregiving. It identifies five critical legal elements necessary for successful caregiving (recognition, authority, security, financial assistance, and resources) and compares them with

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<sup>43</sup>28 U.S.C.A. §1738A(b)(6).

<sup>44</sup> These rules have often sown great confusion, see e.g., *Matter of B.B.R.*, 566 A.2d 1032 (1989).

common caregiving arrangements (informal custody, legal custody, guardianship, kinship foster care, and adoption). In analyzing these categories, at least 18 of the 25 do not present clear, reasonable laws that empower kinship families. We identify each of the 25 categories with the word “inadequate” or “adequate” or a question mark “?”, where the question mark indicates that the law may or may not be adequate depending upon the jurisdiction (Leticq et al., 2008; Cox 2009).

**Table 1**

*Legal Barriers by Type of Child Custody Arrangement*

	Legal Barriers				
	Recognition	Authority	Security	Financial assistance	Resources
Type of Child Custody					
Informal Custody	Inadequate	?	Inadequate	Inadequate	Inadequate
Legal Custody	?	?	?	Inadequate	Inadequate
Legal Guardianship	Adequate	Adequate	?	Inadequate	Inadequate
Foster Care	?	Inadequate	Inadequate	?	Adequate
Adoption	Adequate	Adequate	Adequate	?	Adequate

Regarding the five kinship legal arrangements: 1) informal care, 2) legal custody,<sup>45</sup> 3) guardianship, 4) foster

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<sup>45</sup>Legal custody includes temporary and joint custody.

care, and 5) adoptions, we apply the law in five broad categories:

**Recognition:** Acknowledgement as a resource by governmental systems and agencies and statutory and regulatory identification of family members as lawful surrogates;

**Authority:** Authority to 1) consent to medical care for a child; 2) have responsibility for a child's education and to enroll a child in school; and 3) have access to a child's health, school, and other documentation;

**Security:** Assurance that a child will stay in the caregiver's home and can remain there indefinitely;

**Financial Assistance:** Access to benefits and sufficient financial assistance to care for children;

**Resources:** Resources and services that address kinship special challenges, such as respite care, childcare, parenting skills training, psychological counseling for loss and trauma, and legal services.

In general, all states use all of these legal arrangements, but with varying emphasis. For instance, some states place most of their foster care children with kin, while some states use guardianship much more than legal custody. But for all states, these legal arrangements describe the available forms of primary caregiving.

### **Informal Custodians**

No single term defines relative caregivers who are caring for children and who do not have court orders governing the care of those children. For this discussion, we call them "informal custodians" (the term "informal care" is also used herein to refer to all non-foster care kinship caregivers (private kinship care)(U.S. Department of Health and Human Services et al, 2000). To summarize, *informal custody* refers to all caregivers who are not foster parents and who do not have court ordered legal arrangements, *i.e.*, legal custody or guardianship orders.

Of the five categories, informal custodians, while having lawful custody, face the greatest obstacles in obtaining legal recognition, authority, security, financial assistance, and resources.

**Recognition.** Recognition refers to how laws identify and classify. Statutes mention *de facto* parents,<sup>46</sup> *in loco parentis*,<sup>47</sup> “person acting in parental relation to child,”<sup>48</sup> “person in parental relation to a child,”<sup>49</sup> “psychological parent,” “next friend,”<sup>50</sup> “fictive parent,” “lawful custodian,”

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<sup>46</sup> Known in common law as “*guardians de son tort*,” or a guardian by one’s own act, established merely if one voluntarily *undertakes* the role of guardian, and you *assume the duties* doing everything a guardian is required to do, you have established a right in common law, *Newburgh v. Bickerstaffe* (1684) 1 Vern 295, 23 Eng Reprint 478, similar to *In loco parentis*.

<sup>47</sup>*In loco parentis* refers to a person who has “fully put himself in the situation of a lawful parent by assuming all the obligations incident to the parental relationship and who actually discharges those obligations” (see, *Rutkowski v. Wasko*, supra, 286 App. Div. at 331, 143 N.Y.S.2d 1; see also, *Matter of Jamal B.*, 119 Misc.2d 808, 465 N.Y.S.2d 115).

<sup>48</sup> e.g., New York McKinney’s Public Health Law § 2504.

<sup>49</sup> Under New York Law, McKenny’s General Obligation Law §§5-1551 *et seq.* These laws extend only to a parent formally authorizing a designated person to make temporary educational (McKinney’s Education Law §§2, 3212) and medical decisions (McKinney’s Public Health Law §§2164, 2504) for the child for a specified period of time not to exceed six months. The term “person in parental relation to a child” shall mean and include his father or mother, by birth or adoption, his legally appointed guardian, or his custodian.

<sup>50</sup> The expression “next friend” has a definite and well-established meaning, namely, “one who, without being regularly appointed guardian, acts for the benefit of an infant, or other person *non sui juris*.” *Walter v. Walter*, 217 N.Y. 439, 111 N.E. 1081 (1916), and is frequently used interchangeably with “guardian *ad litem*.” A next friend for an infant party has a duty to bring \*240 those rights directly under the notice of the court. (5 Words & Phrases, First Series, 4797; *Leopold v. Meyer*, 10 Abb. Pr. 40.). Seminal *Whitmore v. Arkansas*, 495 U.S. 149 (1990) prescribes three tests for third party

and “person upon whom a child is dependent,” (Ibsen & Klobus, 1972). Depending upon the applicable laws, in any given state, a number of such terms may be used. Finding out what the laws say about informal custodians means seeking information separately on state health, education, benefits, insurance, and custody laws, as well as applicable federal laws. Because various systems may use different identifying terms, recognition of the rights and responsibilities of informal custodians can be a time-consuming and error-prone task. In no state is there a statutory definition that covers all the circumstances of informal custody.

This absence of consistent statutory definitions has further consequences. Statutory and regulatory references can be under-inclusive or exclusive—leaving out certain custodians, such as co-parenting caregivers or non-blood caregivers, or caregivers who cannot locate the parent(s) or creating uncertain standards, such as “assuming parental duties” or “dependent for care” (Miner & Wallace, 1998). The use of such terms plays out in our remaining categories, for instance, in determining who has authority to make school decisions for children, who has standing in court, who qualifies for financial assistance, who may apply for a social security card or passport or birth certificate, or who is eligible for program assistance (Foli, 2014).

**Authority.** Some informal custodians may lack sufficient authority to make necessary decisions regarding medical care and schooling, because laws do not include or expressly exclude them. In most states, this problem is overcome by using parental powers of attorney or by consent laws. Many states have enacted laws that permit parents to delegate responsibility for medical- and school-related

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standing as “next friend” in federal court: 1) reason why cannot represent self, 2) truly dedicated to best interests, 3) significant relationship.

decisions, albeit for only limited periods of time. In New York, a parent can designate a caregiver as a “person in parental relation to a child” for a limited period of time to make educational and some medical decisions.<sup>51</sup> These parental designations or parental powers of attorney specifically deal with routine decision-making for children and are not regular general powers of attorney, which deal mostly with financial matters. They are not health care proxies and usually do not include authority to make major medical decisions. Absent fulfilling the statutory requirements for a parental power of attorney, sometimes handwritten notes are accepted by an institution or provider, but that time-honored tradition of informal designations is waning and it is increasingly likely that an agency will want a written document from the parents that fulfills statutory requirements. Some states have consent laws that permit certain relatives to consent without parental signatures. Most times such laws require attestation (swearing) that the relative cannot locate the parents. Similar to informal parental notes, there is a tradition of permitting caregivers to make decisions. Commonly, pediatrician offices have consent forms where a “parent or guardian” may consent to routine care (but in reality, medical providers often accept the consent of legal custodians and informal custodians). Such willingness does not apply to major medical decisions where parental consent will be needed (Generations United, 2015).

School enrollment can be especially difficult. School districts will require evidence of children's local residency for the purpose of tuition-free enrollment. In many districts, residency requirements may require legal custody or guardianship before a child can be enrolled in school. For example, retired grandparents who were unwilling to seek legal custody in court, because the procedure might prove too stressful for their mentally disabled son, paid for nine years

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<sup>51</sup> McKinney's Public Health Law § 2504.

of private schooling for their grandchild. The school district would not enroll their granddaughter because the grandparents were not the legal custodians or guardians, and the grandparents had failed to learn of procedural mechanisms to challenge the local district's decision. Since tuition-free school enrollment ultimately depends upon proof that a child resides in the school district, informal caregivers need to learn what proof is legally acceptable. As with medical decisions, some states permit informal custodians to attest to the facts that they are the full-time caregivers and that the parents have consented to their care (parental attestations may also be necessary).

**Security.** Informal custodians face the obstacle of not knowing if a child is securely in their homes. Without a court order, a parent retains the right to the care and control of a child and can remove a child from a caregiver's home at will. Thus, informal caregivers constantly fear losing a child. Even when the custodial parent places a child in the home of a relative, the other parent can still demand custody of the child (Wallace, 2000).

In one well-known case involving a custodian who became a nationally activist for kinship rights, a mother separated from her husband was killed in a car accident caused by a drunk driver. The mother's five-year-old son was also injured in the accident. Both had lived with the grandmother for almost all of the child's life. Five days after the mother's burial, the grandmother received notice to appear in court on the next day. The absentee father, who had spent less than 25 hours with the child in the last five years and never provided support, demanded custody of the child. In court, the judge found the father to be a fit parent, and immediately placed the child in the father's custody despite the fact that the child had just lost his mother and he had suffered two broken arms in the care accident. There are countless instances where custodians fear angering parents

and risking loss of children who are now living in the only homes where they have ever been truly safe.

**Financial Assistance.** For informal custodians, like other informal kinship care families, financial support is limited to either public assistance or social security. Public assistance (welfare) is usually funded by the federal Temporary Assistance to Needy Families (TANF) program. Most kinship families, including most informal custodians, are eligible for “child-only” grants (Mauldon, Speigman, Sogar, & Stagner, 2012). Child-only grants are based exclusively on the income of the child without considering the caregiving relatives’ income and provide limited payments to relative caregivers for the care and boarding of a child. These grants should be very easy to obtain, but often-bureaucratic roadblocks and cumbersome application procedures, as well as silent policies meant to discourage applications,<sup>52</sup> can create barriers (Mullen, 2000).

Sometimes, the lack of information even happens inside the public assistance office. Caregivers may not know what name is used by the local office to identify the grant. It could be called a non-parent grant, a “kinship” grant, or some other phrase. Many caregivers are told that there is no such

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<sup>52</sup>*Debra VV. v. Johnson*, 26 A.D.3d 714, 811 N.Y.S.2d 457, N.Y.A.D. 3 Dept., 2006. CPLR Article 78 proceeding to review the decision of the Office of Children and Family Services denying an aunt’s application for kinship foster care payments. Caseworker informed aunt that “*there was no such thing*” as kinship foster care benefits. Petitioner then filed for custody, and county withdrew its application for the removal of the children. Family Court awarded custody to the aunt. The aunt then sought benefits. OCFS ruled that since the child was not placed in foster care, payments were not warranted. In this instance, the parent had identified the aunt as a resource and sought to have the children placed in foster care with the aunt, pursuant to Social Services Law 384-a(2)(h)(ii), wherein there is a statutory duty to assist the relative to become a foster parent. Despite affirmative duty, the department in a Family Court hearing declared, “*Albany County has never recognized kinship foster care.*”



grant, because they used the wrong name for the grant. Caregivers have an absolute right to apply for assistance but they are told that they must have legal custody or guardianship. So insisting on filling in an application is the first step in finding out if the grant really is available (Mauldon, et al., 2012). The second is appealing a denial.

Another issue that applies is the requirement to identify the parents' whereabouts so that the local agency can seek to collect support. While all states have "good cause" domestic violence exemptions, where a parent or caregiver may choose not to inform about parents and be exempt from penalties, to the author's knowledge, only New York permits caregivers to claim "good cause" when they can attest to the fear, emotional, or physical harm to themselves or the children in their care.<sup>53</sup> Lastly, kinship families can also apply for a state's normal public assistance where the income and resources of the entire family determine eligibility.

Unfortunately, the monthly payments for child-only public assistance grants are often insufficient for the first child and only even less supportive for additional children, where grants usually increase at a fraction of the first child's grant, unlike foster care payments, which are independently calculated for each foster child.

All kinship families, including informal custodians, should consider application for Social Security SSI<sup>54</sup> or SSD<sup>55</sup> where payments may be larger than state public assistance. Children whose parents are dead or disabled may be eligible for payments based on the lifetime earnings of the parent. And children with disabilities may qualify for their own SSI check, based on their disabilities. For grandparent

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<sup>53</sup>New York State Office of Temporary and Disability Assistance, Informational Letter 08-INF-16, Non-Parent Caregivers and Good Cause, September 24, 2008, Available at: <https://otda.ny.gov/policy/directives/2010/INF/10-INF-23.pdf>

<sup>54</sup> 42 U.S.C.A. § 1381

<sup>55</sup> 42 U.S.C.A. § 423 et seq.

caregivers, including informal custodians, Social Security provides payment to dependent grandchildren whose parents are dead or disabled. Payments must be arranged when a grandparent first becomes eligible for retirement benefits.<sup>56</sup> The limited circumstances described in the statute are under-inclusive, leaving out numerous circumstances when grandparents will be caregivers for the duration of a child's minority, i.e., incarceration, abandonment, alienation, and of course also leaving out aunts, uncles, and other non-grandparent caregivers.

Other tangential benefits related to financial assistance are available to most kinship families, but in some instances, eligibility rules do not provide special consideration for kinship families (Supplemental Nutrition, child care, WIC, etc.). Also, rarely there may be special "emergency" financial assistance via local programs.

**Resources.** In general, informal custodians are eligible for supportive services, even though they do not have court-ordered custody or guardianship. Unfortunately, as mentioned, services aren't widely available. General supportive services, like health care (Medicaid, Child Health Plus) and childcare, are available to all eligible caregivers including kinship families. But special programs, designed to serve the special challenges of kinship families, are not commonly available and where such programs are operating, they are substantially underfunded. Local public agencies, like Department of Social Services and Office for the Aging, may offer support groups and other services. Sometimes there are additional eligibility requirements, like court orders or "over [age] 55."

A program can be in a community but remain unknown to kinship families. Because kinship families are often found in marginalized segments of the community,

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<sup>56</sup>42 U.S.C.A. §§ 601–619.

outreach can present significant barriers to program access. Unlike the Supplemental Nutrition program, there are no federal dollars for outreach targeting the child-only grant.

Childcare may be provided, but long waiting periods make it practically unavailable; respite services for caregivers are virtually nonexistent; counseling services for caregivers or the children are equally difficult to obtain; and legal services to lower-income caregivers are invariably scarce or non-existent (Giannarelli & Barsimantov, 2000; McCallian, Janicki, Grant-Griffin, & Kolomer, 2000). Although some local TANF programs are using TANF dollars to tailor services to kinship caregivers, most states have yet to enact TANF-based legislation that comprehensively targets the needs of kinship caregivers (Geen, et al., 2001). Support groups may be available but not known. And while some states now have “navigator” programs, most have very limited funding with only a few staff and very few have statewide programs<sup>57</sup>

**Housing.** For the quarter of a million grandparent caregiver renters living below the poverty line, 60% were spending at least 30% of their household income on rent and three out of 10 were living in overcrowded conditions. Grandparent caregivers who are renters therefore represent a particularly vulnerable population.

Frequently, kinship advocates complain of the absence of specialized housing and the severe limitations on the use of senior housing for elderly residents who become caregivers of young children. Specialized grandparent family housing has been built, in Boston, New York, and Detroit

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<sup>57</sup>Starting with Ohio, Illinois, New Jersey and New York over the past 15 years, states have increasingly funded “kinship navigators.” Such programs follow a range of service models, and with completion of two rounds of federal kinship navigator demonstration projects, more states are exploring implementation of such programs (Child Welfare Information Gateway, 2013; CWLA, 2105).

(Estrin, 2007; Williams, 2005; Esparza, 2008). The Federal LEGACY Act of 2003 was promoted to provide the Secretary of Housing and Urban Development the authority to establish programs that serve intergenerational families. It was passed to address the critical housing needs of grandparent caregivers. The LEGACY Act created a \$10 million demonstration program, but funds have yet to be appropriated for the programs authorized in the bill.

### **Legal Custody**

Legal custodians are caregivers who were awarded legal custody of children by a court with competent jurisdiction. Often informal caregivers will say that they have “custody” of a child. They may have “physical” custody, which is a form of lawful custody and fits with the common usage of the word “custody,” but it is not legal custody. Only a court can award “legal custody.” Legal custody can be awarded to a parent or to a non-parent.

**Recognition.** For non-parent legal custodians (who, like guardians, do not have protected liberty interests afforded to parents), their legal rights are similar to legal guardians but not as complete. On a federal level and in most states, statutes do not provide adequate legal recognition, meaning that in many instances they are not included alongside guardians. For instance, a state statute may say that parents and guardians can make medical decisions. However, the ability for legal custodians to make such decisions may depend upon local practices that permit decision-making. And federal law only acknowledges guardianship as a permanency outcome, and the Free Application for Federal Student Aid (FAFSA) determines income differently for legal custodians than for legal guardians.

**Authority.** Because legal custodians may not have the statutory authority to make medical and school decisions,

judicial orders of legal custody should make special declarations awarding the necessary authority. Nevertheless, relatives may be better advised to petition the court for guardianship while leaving legal custody options to disputes between separating parents.

**Security.** Legal custody provides the security that a parent cannot remove a child at will. But in court disputes regarding custody, a strong preference for parental reunification places legal custodians at great disadvantage. As discussed in the Right to Care (above), depending upon state standards, a custody proceeding between a parent and non-parent, called a third-party custody dispute, will invariably require heightened levels of proof to show parental unfitness that must be proved before the court will consider the child's best interest. The law's focus remains on presumptions that parents act in their children's best interests. However, in most states, either by statute or case law, non-parent caregivers who have provided primary care for an extended period of time (usually at least six months) can get a court to consider the best interests of children in deciding custody or guardianship (Spiezia, 2013). However, unless a statute expressly defines the period of care that qualifies for trial, many judges will lean towards protecting parental rights over the best interests of children.

Courts grapple with questions concerning the circumstances that justify state intervention in parental care, the limits of parental authority, and the importance of certain conditions in considering the best interest of a child. The issue of security in its broadest sense is ripe for change, but the 2000 U. S. Supreme Court grandparent visitation decision, *Troxel v. Granville*, and some state high court decisions based on *Troxel*, have done little to clarify the conditions necessary for state intervention.

**Financial Assistance and Resources.** In general, the rules are the same as for informal custodians. But note that federal law regarding financial aid (FAFSA) requires kinship caregivers who are legal custodians to request a “dependency over-ride” so that financial assistance determinations are not based upon parents’ finances but the legal custodians’ finances.<sup>58</sup> This requirement is unlike guardianship, where the guardian's finances determine assistance.<sup>59</sup>

### **Legal Guardianship**

Guardians are the legal substitutes for parents who are deceased, disabled, or deemed permanently unsuitable caregivers. Most states have extensive laws enumerating the authority of guardians.

**Recognition.** Given the existence of probate statutes, legal guardians are well-represented in state statutes.

**Authority.** Dependent upon clear statutory authority, in general, the right of legal guardians is similar to parental authority. But as mentioned, often legal custodians are not included alongside guardians in federal and state statutes. Guardianship of children may be awarded in circumstances where they are considered “permanent.” Examples of different treatment include: on a federal level, passport law permits both parents or legal guardian to apply for a minor child under the age of 14,<sup>60</sup> exceptions permitted where the issuance of a passport is “warranted by special family circumstances”; Social Security law permits parents or

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<sup>58</sup> U.S. Department of Education, “The EFC Formula, 2014-2015,” pg. 3, viewed at <http://ifap.ed.gov/efcformulaguide/attachments/091913EFCFormulaGuide1415.pdf>; 20 U.S.C. 1087vv(D)(1).

<sup>59</sup> 20 USC 1087(d)(1)(I) (a dependency override must be requested each school year).

<sup>60</sup> Federal Code, 22 U.S.C. 213(a)(2), Issuance of Passports for Children Under Age 14.

guardians to apply,<sup>61</sup> but a wife, divorced wife, widow, surviving divorced wife, surviving divorced mother, surviving divorced father, husband, divorced husband, widower, surviving divorced husband, child, or parent who makes a showing in writing that his or her rights may be prejudiced by any decision the Commissioner of Social Security has rendered, or by “any such individual,”<sup>62</sup> may request an administrative hearing to review if the application is denied.

**Financial Assistance.** Legal custodians and legal guardians have access to financial assistance via TANF child-only grants, as long as state laws do not make them legally responsible to support a child (Mullen & Einhorn, 2000).

**Resources.** Legal custodians and legal guardians may have access to more resources or services than informal caregivers. Some states, where kinship care programs encourage non-foster care, will provide additional services and higher stipends when the caregivers can show that they've become the guardian because of abuse or neglect (Sawisza, 2001; Geen et al, 2001). Some programs require TANF eligibility or court orders. But in most instances, except for housing, legal guardianship, legal custody and informal custody should provide access to the same services.

**Security.** Standby Guardianship may offer added additional security regarding the future of children. Many states have standby guardianship laws that enable parents and guardians to name a successor who can act as a guardian in their stead upon their incapacity or death (Miner & Wallace, 1998). Only a few of these laws may allow legal custodians to name a standby, and presently only New York permits

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<sup>61</sup> Federal Code, 42 U.S.C. 405(c)(ii), Social Security Act.

<sup>62</sup> Federal Code, 42 U.S.C. 405(b)(1).

informal custodians who can show that the parent(s) cannot be found to name a standby guardian.

**Financial Assistance and Resources.** Kinship Guardianship: Legal guardians and legal custodians generally are eligible for child-only grants, but they face the same dollar inadequacies as informal custodians. In about 40 states subsidized guardianship is now offered. This subsidy is usually available only to kinship foster parents who are leaving the foster care program but who continue to maintain children in their homes (Miner & Wallace, 1998; Brooks, 2001; Generation United, 2015). In a few states, like New Jersey, even caregivers who are not foster parents can get the subsidy.

### **Kinship Foster Care**

Kinship foster care refers to the care of children who were placed in foster care with a relative caregiver serving as the foster parent, generally because of abuse, neglect, abandonment, or voluntary surrender of the children by the parents. Some studies comparing outcomes between foster care and kinship care show better results for children in kinship care (Winokur, Crawford, Longobardi, & Valentine, 2008). Children in kinship foster care had significantly fewer placements than did children in foster care, and they were less likely to still be in care, have a new allegation of institutional abuse or neglect, be involved with the juvenile justice system, and achieve reunification. Children placed into kinship care had fewer behavioral problems three years after placement than children who were placed into foster care (Rubin et al., 2008). Such findings support efforts to maximize placement of children with willing and available kin when they enter out-of-home care.

**Recognition.** All states recognize kin as a resource for children who are subject to abuse/neglect/dependency



proceedings. Many states provide full foster parent certification for kin who want to become foster parents and learn of their opportunity before taking over the care of a child. However, as discussed in *Diversion*, the chance to enter the kinship foster care system may not be completely offered to kin. In many states, policies support kin becoming legal custodians or guardians pursuant to the neglect proceedings but are not foster parents. And in some states, local practices deliberately misinform kin about the availability of kinship foster care. For example, a mentally ill woman gives birth; Child Protective Services may call and tell the grandmother to take the baby from the hospital or the child will enter foster care. Often, no mention is made to the grandmother that she could become a foster parent. The grandmother may take the child home, quit her job, and later be evicted because she can no longer afford her rent. She is an informal kinship caregiver, with no subsequent opportunity to become a kinship foster parent.

Another concern is “dissuasion” where local child welfare agencies place requirements for kinship foster care that cause kin to choose to become legal custodians or guardians. Examples include requirements that kin fulfill certification requirements before placements (kin will choose to assume control *now*, and forego certification). In contrast, an emerging practice is to place on an emergency basis with kin and facilitate certification. However, local agency determination regarding its payments responsibility for foster care stipends may preclude emergency placements with kin.

**Authority.** In states that facilitate kinship foster parent certification, the legal responsibility for the children remains with the state. Kin foster parents must follow decisions made by the foster care system and are not free to make parental decisions on their own. Other states release children into the legal custody or guardianship of relatives but maintain oversight privileges. Both these practices

conflict with the purported fundamental rights of non-parent relatives to raise children with similar fundamental protections afforded to parents.

**Security.** In all situations where the state retains legal custody and guardianship of children, kin are at higher risk of losing children than are parents because they are not afforded the same rights and protections that natural parents are. While there is federal case law declaring that kinship foster parents have fundamental rights and foster children have standing to assert constitutionally guaranteed liberty interests in an intact family unit, few states and agencies have implemented practices conforming to those decisions (*see* footnotes 33, 34).

**Financial Assistance.** In states that certify kin as foster parents, the same level of financial assistance is available to both kin and non-kin foster parents. In states that do not certify kinship foster parents, financial assistance can be limited to child-only TANF grants, which are usually significantly less than a foster care grant. Other states offer stipends that are higher than child-only TANF grants but less than foster parent stipends. A few states will adjudicate the dependency of children, and if the reason for non-parental care was abuse, neglect, or abandonment, they may order increased financial assistance, regardless of the circumstances surrounding the initial custody arrangement (Sawisza, 2001). As mentioned, in most states kin can exit foster care and continuing to receive a similar subsidy via the state's kinship guardianship program.

**Resources.** In most states, once a relative who rescued a child from an abusive or neglectful home, the relative no longer has the chance to become a foster parent because the informal care did not result from an abuse/neglect/dependency proceeding. Illustrative of this

“Catch 22,” a 73-year old grandmother confronted the residents of a crack house and pressured them into giving her three-year-old grandson to her. She brought the toddler home, knowing that her pension income would not support her new family. Child welfare would not help, even though in the past she was certified as a foster care parent for another child. The state reasoned that it would not intervene because this child was no longer abused or neglected and no neglect proceeding had been initiated. In most states, kin who want to become foster parents simply do not have a viable procedural recourse for applying to their child welfare agency.

### **Adoption**

In adoption, the natural parent is completely replaced by the adoptive parent. Recognition, authority, security, financial assistance, and resources are the same for adoptive parents as for natural parents.

**Financial Assistance.** Although adoption may be most advantageous (it conclusively ends parental interference), adoption may be detrimental to the financial stability of the family since the income of the adoptive parents will be deemed available for the support of the child, thereby eliminating the chance to receive a child-only TANF assistance grant. Adoptive parents, like natural parents, are eligible for public assistance only if their total family income falls below 185% of the poverty level (Mullen & Einhorn, 2000).

Adoptive parents are eligible to claim children on their Social Security benefits. For older retired caregivers, the payment is half of their usual Social Security retirement monthly payment, and it is paid out until the child turns 18 or graduates from high school, whichever is later.

Also, because adoptive parents' income and resources are deemed available to their children, higher education

financial aid packages may be significantly less for adoptive parents with income and resources greater than the birth parents.

### **Emerging Issues**

As stated in the introduction, this article attempts to establish a family's right to care by charting the many legal obstacles faced by informal kinship families and describing situations where kinship family should have rights similar to parental rights. Our premise is that kinship families, like other families, should be supported by laws and policies that comprehensively address their family legal issues.

However, the attention of federal and state policymakers will undoubtedly focus on addressing more specific obstacles. With that in mind, as the response to kinship grows, the following three areas are ripe for change:

### **De Facto Custody**

In terms of security, only a handful of states have enacted “de facto custodian” laws that set out a period of time in the care of a relative by the parents’ explicit designation—typically six months (for a child under 3 years of age) or one year or more (for a child over 3 years old)—after which a child will not be returned to a parent without a judicial determination that placement with the parent is in the child's best interest (Letiecq et al., 2008; Gibson, 2010, Spiezia, 2013; Generations United, 2015).

Since the rights of parents must be protected, it is critical that children in kinship families have standards that uniformly protect those rights but permit consideration of children’s best interests. Much of the legal development here is likely to be judge-made law. Legislative action is mostly driven by constituencies, and the kinship community is disadvantaged for a variety of reasons—for instance: lack of champions, inadequate resources to build coalitions and grassroots advocacy, and stronger more vocal parents’ rights

constituencies. Yet, judges face a steady stream of kinship “third party” cases, and they understand the realities of family life where so many children lack parents who can parent. So the hope is that judicial precedents will continue to expand extraordinary circumstances.

Already, widespread judicial consensus agrees that kin who are already caregivers should have the opportunity to reach custody determination based upon the best interests of children. The debate centers on whether a period of time alone is sufficient (and how long) or whether other circumstances are also necessary (voluntary or involuntary, incarceration, parental irresponsibility, etc.). Advancement won't be straightforward. Judges are invested in protecting parental rights, and similar to grandparent visitation, there are conflicting views. While the hope is that standards will continue to expand, with more decisions reaching best interests, there are still barriers to a judicial consensus. For instance, in New York, an appellate court recently invalidated its statutory two-year period (the case was reversed by New York's highest court<sup>63</sup>). Additionally, where kinship advocates can mount advocacy campaigns, gain support from legislative champions, and develop strong grassroots support, hope is increasing that more states will enact de facto custody laws.

### **Diversion**

For kin to become foster parents, it is critical that federal, state, and local policies support this goal by continuing to identify barriers and develop solutions. Already underway, the process is led by researchers and child welfare officials. The examination needs to go beyond licensing

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<sup>63</sup>*Suarez v. Williams*, New York Slip Op. 09231 (2015), Grandparents established their standing to seek custody of a child by demonstrating extraordinary circumstances, namely an extended disruption of the mother's custody; *Matter of Suarez v Williams* 2015 NY Slip Op 09231 Decided on December 16, 2015 Court of Appeals Stein, J.

standards, looking at how agencies inform kin (written information that's understandable), how they influence decision-making, what local child welfare staff's attitudes are towards kin, whether kin can be “emergency placements” prior to achieving certification, and what tools are used to assess who should become a foster parent and who should become an informal caregiver, etc. Illustrative of growing interest, this fall the University at Albany [New York] School of Social Welfare will host a symposium on this issue. Additionally, the Children's Bureau is developing guidance for state child welfare agencies, and the U. S. Senate may introduce legislation that would provide services to kinship children who are at “imminent” risk of entering foster care.<sup>64</sup>

### **Kinship Navigators**

Access to financial assistance, to existing services, and to more kinship-specialized services presents a wide range of obstacles for kinship families, many of which still need the development of more supportive policies and laws. All of them present an opportunity for cost-effective assistance by kinship navigator programs. These programs range from Web sites and help lines to case management with specific services. All involve assistance in obtaining the child-only grant and connecting to various systems of care.

Federal assistance and resources have only fitfully supported non-foster care relative caregivers. In the 2001 renewal of the Older Americans Act (Title 42, Chapter 35, USC), \$137 million was provided for relative caregiver programs, with 10% of this money targeted toward older relatives caring for children. But the 10% is discretionary and thus underutilized. The use of TANF surpluses is another source of support for relative caregivers. Already some of this funding is used for kinship navigators.

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<sup>64</sup>U.S. Senate fall 2015 draft bills: *Family Stability and Kinship Care Act of 2015* and *the Families First Act* (2015).

In 2008, the “Fostering Connections Act” included “family connection grants” for kinship navigator demonstration projects. Two rounds of awardees have completed their projects and their programs offer a range of models for kinship services (CWLA, 2015).

At time of publication, the U.S. Senate is considering the *Family Stability and Kinship Care Act of 2015* and the *Families First Act (2015)*: Amending parts B and E of Title IV of the Social Security Act, which would establish funding for services for kinship children who are at “imminent risk” of entering foster care.

At the state level, legislative interest should continue to grow, with the potential for state funding of kinship navigators. This article’s author is the director of the statewide NYS Kinship Navigator, a program that provides a help line and web site plus advocacy at the state and local levels. Also in New York, in most of the larger municipalities, the state funds local kinship services that provide case management. Together the two program offer a cost efficient model of kinship navigation services.

### **Recommendations<sup>65</sup>**

The growing interest in informal kinship care has produced a significant body of recommendations, many of which are contained in articles referenced herein. For instance, recommendations include kinship navigators, medical and school consent laws, de facto custody (family law), subsidized guardianship, and broader licensing requirements, that reflect ongoing state and federal reforms.

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<sup>65</sup>This article describes many but not all of the obstacles faced by kinship families. It touches upon financial assistance (TANF), Social Security, supplemental nutrition, immigration, aging, education, and family law. Some of the recommendations are based upon the 2011 National Kinship Summit, hosted by CWLA and the National Committee of Grandparents for Children's Rights. Its 34 recommendations are available at <http://www.nysnavigator.org/kinship-policy/kinship-care-policy/>

(Letiecq et al., 2008).<sup>66</sup>However, in considering kinship care as a family right to care and the many obstacles to care, it may be helpful to make a few specific recommendations.

### **Right to Care**

**Recommendation One:** Increasingly, policymakers understand what kinship advocates have long said, that kin are not only a resource but also more importantly are the caregivers of choice (Minkler, 2008). Accurate information about the obstacles faced by kinship caregivers is therefore critical to ensure that the government's responses successfully enable kinship caregivers to care for children. Research is needed on the scope and circumstance of informal kinship families. A federal initiative should survey the literature on informal kinship care and catalogue the entire range of obstacles, using data from diverse systems to identify statistical information about kinship families (child welfare, public assistance, Social Security, Medicaid, etc.). Numerous states have authorized studies and task forces to investigate these issues. But more needs to be done. Hopefully, based on such surveys, comprehensive solutions will be forthcoming.

**Recommendation Two:** A collaborative effort at the national, state, and local levels, including government and private agencies, should create an outreach campaign to locate kinship families and inform them of available resources. Led by the Children's Bureau, this effort should

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<sup>66</sup>Signed by President Bush on October 7, 2008, the "Fostering Connections to Success and Increasing Adoptions Act" (HR 6893, 110th Congress, 2nd Session) enacted child welfare practices recommended by many articles, including notice of removals to all grandparents, waivers from non-safety requirements for foster care certification, and mandated notice within 30 days, as well as subsidies for kin exiting foster care.



include a task force to comprehensively examine and make recommendations supporting informal kinship families.

**Recommendation Three:** Kinship families face barriers caused by under-inclusive laws and regulations that inhibit rights and access to services. At the federal and state level, a uniform definition is needed. Such a definition of kinship care should reference all five types of legal arrangements and define kin to include grandparents, other relatives (including non-blood), and certain unrelated fictive kin.

**Recommendation Four:** A core endeavor in support of kinship care is to promote their recognition. When policymakers understand the importance of these families, as part of our traditions and our child welfare system, they become supporters. One way to educate them is to ask for their help in issuing proclamations (no funding required!). Eight states and the U. S. Senate have passed resolutions declaring September as Kinship Care Month (proclamations and guidance available at <http://www.nysnavigator.org/kinship-policy/kinship-care-month/>).

### **Opportunity to Care**

**Recommendation Five:** Kinship families should not fear going to court to seek custody. Their rights as families need to be acknowledged and to receive the recognition that they deserve. Since custodial rights are mainly a state issue, courts and state legislatures need to consider how they can insure that parents are protected but kinship families are not discounted.

**Recommendation Six:** Regarding family rights against state child welfare agencies, it is intuitive to think that a family's right to care should trump the state's right to care

and control of children so long as the family is fit. But such a family fundamental rights area particularly difficult issue with courts unlikely to expand them. However, laws that declare that a state must have “compelling interest” before denying a fit and willing family member from assuming care, or that courts must presume that placement in the care of relative and not with a non-relative is in the best interests of children, do not seem to be unreasonable additions to family law.

### **Enabling Caregivers**

**Recommendation Seven:** Kinship Navigators should be implemented in every state. Kinship navigators should include statewide information and referral, self-advocacy tools, referrals to supplemental direct services, and to the extent possible, local direct services. Kinship navigators should collaborate with local departments of social services as part of a coordinated response by local departments (CWLA, 2015).

### **Conclusion**

The right of kinship families to *not* face undue burdens in caring for children invokes both our sense of fairness and our family values. It is simply a truism that family should not be hindered from taking care of family. Yet, in this article, I charted numerous obstacles to care that are illustrative of how marginalized kinship families still are. Researchers, advocates, and service providers have described the same problems. However, I posit a concept that encapsulates both the burdens and the solutions. That concept is a “Kinship Right to Care.” Recognizing that kinship families are true families with family rights that include common core elements—legal recognition, authority, security, financial assistance, and special services—will not only help in charting the obstacles but also in finding solutions to them.

Along with that hope comes a final thought. Kinship families are a national resource— protecting millions of vulnerable children. Like any national resource, kinship families need protection and cultivation. Their rights are already a part of our traditions. Their rights should become part of our laws.

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