Kinship Care, Public Policy, and the Best Interests of Children
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I. Introduction

Kinship care is any living arrangement in which a relative or someone else emotionally close to a child takes primary responsibility for rearing the child. Such living arrangements exist within and outside of the formal child welfare system, raising questions about the roles and responsibilities of both government and family. The concept of "child welfare," a system supported by the government, has increasingly narrowed in recent years, while extended family burdens have expanded.

Since 1979, federal policies have applied to kinship families, giving them access to subsidies within the foster care system, the same as non-kin foster care families. Critics are concerned that subsidizing kinship care in this manner tacitly encourages biological parents to leave their children with relatives, undermining the social responsibility of families to sacrifice, when necessary, for their children and grandchildren. Nonetheless, in light of a severe nationwide shortage of foster care homes, along with recent federal policies that have encouraged states to consider giving preference to relatives when placing a child in foster care, the number of kinship foster families has substantially increased, accounting for 200,000 (29%) of all foster children in 1997.

The vast majority of kinship care arrangements, however, are private, occurring without any involvement from the child welfare system. As of 1998, nearly two (2) million children were living in private kinship care. However, because these families are outside the foster care

3 See Miller v. Youakim, 440 U.S. 125 (1979) (holding that the lack of federal language under AFDC-Foster Care Program (now Title IV-E of the Social Security Act) excluding relatives barred the state from implementing such an exclusionary policy).
5 See Report to Congress, Part I, supra note 1, at vi.
7 See Report to Congress, Part I, supra note 1, at vi. Another 3.27 million children live in relative-headed
system, they do not have access to the same services as those within the system. Thus, when extended family members take on the responsibility of caring for their kin before parental care reaches the level of abuse and neglect, there is little or no financial assistance or social support services available to them.

Through the enactment of barriers to assistance, child welfare policies often discourage informal family caretaking. While relatives and family friends are often willing to step in, many are prevented from doing so due to lack of financial and other resources. Policies and practices that do not encourage the responsible actions of those who come forward to take care of the children of kin, result in the children being either left at risk of neglect and/or abuse in the hands of their parents, or at risk of entering the foster care system. Restricting financial assistance and services is, thus, short sighted. It is estimated that if even half of these children were to enter the foster care system, it would overwhelm the system and cost taxpayers a $4.5 billion. The challenge is to bring resources to the informal helping system, by strengthening and supporting kinship families.

This article characterizes kinship care arrangements, surveys the problems with which kinship caregivers contend, and considers the advantages and disadvantages of kinship care. In addition, it examines federal statutes that have implications for kinship relationships, analyzes them in light of the best interests of children, and weighs the relative rights of states, parents, children, and kinship caregivers. Various state measures to implement these policies and to develop kinship care programs are canvassed throughout the article. It concludes with an exploration of legislative and legal alternatives available to assist kinship families, followed by the author’s recommendations.


11 Calculated on a $373 monthly payment - the national average for basic maintenance payments to foster parents for a nine year old. See Challenges of Caring for the Second Family, supra note 8, at 1.

II. Kinship Care

Definition & Prevalence of Kinship Care

In this article, unless otherwise specified, kinship care refers to relationships among non-parent caregivers and children, including caregivers who may not fit the definition of "kin" for the provision of federal public assistance or other support programs.\(^\text{13}\) Twenty three (23) states and the District of Columbia define kinship more narrowly to include only those related by blood, marriage, or adoption.\(^\text{14}\) Twenty one (21) states have broader definitions that include family friends, neighbors, or godparents.\(^\text{15}\) However, reliable statistics on non-relatives providing kinship care are very limited; therefore, much of the following characterization of kinship care arrangements is based on data from relative kinship families.

In 1998, an estimated 5.4 million children were living in households headed by a relative other than a parent.\(^\text{16}\) Of these children, 39% (2.13 million) lived in households in which neither parent was present.\(^\text{17}\) Furthermore, two-thirds (1.4 million) of the children in relative-maintained households, were being raised by their grandparents.\(^\text{18}\) These households account for 6.7% of all families with children under eighteen (18).\(^\text{19}\) Other relatives, such as aunts and uncles, raise an additional 730,000 children.\(^\text{20}\)

While there are approximately 2.3 million children living in two-generation households with one or both of the children's parents present, the greatest growth in kinship care arrangements has been in grandparent-headed households in which no parent is present.\(^\text{21}\) In

\(^\text{13}\) To be eligible for federal public assistance (TANF) funds for dependent children, for example, kin is limited to grandparents, siblings, step-sibling, aunts and uncles. See 42 USC § 601-608 (1994).

\(^\text{14}\) See LEOS-URBEL, BESS, & GEEN, supra note 6, at vi.

\(^\text{15}\) See id.


\(^\text{17}\) Thus, just under 3% of all children live in some kind of kinship arrangement. See id.

\(^\text{18}\) See id.


1970, 2.2 million children lived in households maintained by a grandparent.\textsuperscript{22} There was little change during the 1980s.\textsuperscript{23} The dramatic increase occurred between 1990 and 1998 when the number of grandparent-headed households, with no parent present, increased 51.5%.\textsuperscript{24}

\textit{The Rise in Number of Kinship Families}

It is not possible to pinpoint the cause of the increase in kinship care arrangements. It is attributable to multiple, deeply rooted, societal issues that are complex and interwoven. The contributing problems include: poverty; substance abuse and limited access to treatment; child abuse and/or neglect; abandonment; the HIV/AIDS epidemic; incarceration as an effect of sentencing legislation; and the rising incarceration rates for women; domestic violence; teenage pregnancy; mental health problems; physical illness; death of parent; divorce; single-parent households; crime; unemployment; homelessness; racism; welfare reform; and further marginalization of low-income communities.\textsuperscript{25}

For example, it is twenty two (22) times more likely that abuse or neglect will occur in families with incomes less than $15,000 per year than in families with incomes greater than $30,000 per year.\textsuperscript{26} However, poverty interacts with a series of other variables, such as racism. Parental rights of African Americans are terminated sooner than those of Caucasians.\textsuperscript{27} Similarly, physicians miss child abuse in Caucasian children at a rate of 40%, while for African American children the rate is 20%.\textsuperscript{28} Likewise, there is evidence of race and class bias in the system of detecting and reporting drug use during pregnancy, which can lead to removal of newborns from the custody of the mother.\textsuperscript{29} Such issues are not easily separable. Substance abuse, for instance, may appear more dangerous when combined with the hazardous conditions of poverty and

\textsuperscript{22} See Census Bureau, supra note 16.


\textsuperscript{24} See Census Bureau, supra note 16.

\textsuperscript{25} See Census Bureau, supra note 16. See also Harvey, supra, note 9 at 1; Challenges of Caring for the Second Family, supra note 8, at 1; Shelley Waters Boots & Rob Geen, Family Care or Foster Care? How State Policies Affect Kinship Caregivers, 1, in Assessing the New Federalism (Urban Inst., No. A-34, 1999).

\textsuperscript{26} See Naomi R. Cahn, Children's Interests in a Familial Context: Poverty, Foster Care and Adoption, 60 Ohio St. L.J. 1189, 1198 (1999).


\textsuperscript{28} See Cahn, supra note 26, at 1199.

\textsuperscript{29} See Dorothy Roberts, The Challenge of Substance Abuse for Family Preservation Policy, 3 J. Health Care L. & Pol'y 72, 85 (1999) [hereinafter Roberts, The Challenge of Substance Abuse].
inadequate housing.\textsuperscript{30} Thus, many factors individually, and in combination, can play a significant role in weakening families.

\textit{Characteristics of Kinship Care}

Private kinship care includes situations in which family members decide that a child will live with a selected relative and no child welfare agency is involved. In addition, it includes situations in which there is agency involvement initially, but the State does not assume legal custody.\textsuperscript{31} These families generally do not receive subsidies, and are able to access only limited medical, social, and other services. Even when there is initial involvement of the child welfare agency, rarely do caseworkers discuss with caregivers what problems might be encountered as the child grows older, if the caregiver becomes ill or dies, if the relative caregiver's family or economic situation changes, or other situations arise.\textsuperscript{32} Moreover, if legal action is not taken, decision-making authority remains with the child's parents.

In public kinship arrangements, the caregiving relationship is referred to as "kinship foster care" or "relative foster care." These are families who receive federal foster care payments while the State retains custody. They are also eligible for long-term federal adoption assistance. Children cared for by relatives account for almost one-third of the entire foster care population.\textsuperscript{33} Public kinship caregivers are less likely than non-kin foster families to receive services from child welfare agencies.\textsuperscript{34} Nonetheless, they are far more likely to receive some help than are private kinship caregivers. Thus, interpreting general data about kinship care requires caution, taking into consideration the similarities and differences between private and public kinship arrangements.

There is considerable overlap in several characteristics of private and public kinship arrangements. In both groups, most of the caregivers are grandparents, who receive little, if any,
preparation for their new role.\textsuperscript{35} Another area of commonality, compared with non-kin foster care families, kinship caregivers are more likely to have a special interest in the well-being of the child, and to provide the child with a sense of family support.\textsuperscript{36} Additionally, in all kinship situations, siblings are more likely to live together.\textsuperscript{37} Furthermore, birth parents are more likely to visit, call, write, or give gifts to children residing with kin.\textsuperscript{38}

There are some important differences between public kinship foster families and non-kin foster families. In all likelihood, the findings applicable to public kinship foster families would apply to private kinship families as well. One such difference is that the well-being of kinship caregivers is generally lower than that of non-kin foster parents, as measured by economic, health, and emotional difficulties.\textsuperscript{39} In contrast, the well-being of children in kinship foster families is significantly higher than in non-kin foster families.\textsuperscript{40} These children have fewer physical and mental health problems; they are less likely to have behavioral problems (e.g., truancy, delinquency, and running away); and they are less likely to need to repeat a grade in school or need special education.\textsuperscript{41} In addition, the children in foster kinship care are less likely to have multiple placements, and more likely to have stronger community ties.\textsuperscript{42} On the other hand, children in kinship foster care tend to remain in the child care system longer, and are less likely to be reunified.\textsuperscript{43} This finding may be related to the fact that the parents of children in public kinship care are more likely to have a drug or alcohol problems.\textsuperscript{44} However, in cases in which reunification is achieved, children in kinship care are less likely to reenter foster care than those from non-kin foster placements.\textsuperscript{45}

As previously noted, whether a child is in private or public kinship care, he or she is most likely to reside with at least one grandparent; therefore, examination of data pertaining to grandparents who raise their grandchildren is particularly enlightening. For instance, despite the
popular stereotype of the poor, undereducated, non-employed, single, African-American grandmother raising her grandchildren in the inner city, the data show that kinship care arrangements transcend all socioeconomic groups, geographic areas, and ethnicities.\textsuperscript{46} In 1998, 43.8\% of all children living in grandparent-maintained families were Caucasian; 34.5\% were African-American; and 17.5\% were Hispanic.\textsuperscript{47} Although grandmother headed households, are the fastest growing type of kinship care arrangements, they are not the most prevalent type. Only 669,000 children in kinship care live with only their grandmother with no parent present.\textsuperscript{48} In 1997, slightly over one-half of grandparent maintained households included both grandparents.\textsuperscript{49} Households maintained by a grandmother alone accounted for 43\%, while those maintained by a grandfather accounted for only 6\%.\textsuperscript{50} However, grandchildren living with grandmothers only are more likely to be African-American and to live in a central city of a metropolitan area.\textsuperscript{51} Moreover, research conducted 1986 showed that among households headed by a grandmother only, without a parent present, 84\% received public assistance.\textsuperscript{52}

The majority of both grandfather (72\%) and grandmother (56\%) kinship caregivers are employed.\textsuperscript{53} Age data shows that 64.6\% of kinship caregiving grandparents are between ages 45-64, 14.9\% are under 45, and 20.5\% are over age 65. Studies restricted to kinship care in the public arena, comparing kinship foster families to non-kin foster care, show that kinship caregivers tend to be older, more likely to be single, more likely to be African American, and more likely to have less education, lower incomes, and to receive public benefits.\textsuperscript{54} Furthermore, both public and private kinship caregivers are much more likely than non-kin foster parents to receive public benefits based on their own economic status.

While the children in the kinship foster families tend to be younger than those in non-kin foster families, children in private kinship families tend to be older than those in non-kin foster

\textsuperscript{46} See CHALLENGES OF CARING FOR THE SECOND FAMILY, supra note 8, at 1.
\textsuperscript{47} See id.
\textsuperscript{48} See CASPER AND BRYSON: WORKING PAPER, supra note 19, at 9.
\textsuperscript{49} Includes homes with parents present. See id. at 6.
\textsuperscript{50} Includes homes with parents present. See id.
\textsuperscript{51} See CASPER & BRYSON: WORKING PAPER, supra note 19, at 9.
\textsuperscript{52} See Ken BRYSON & LyNne M. CASPER, CENSUS BUREAU, ECON. AND STAT. ADMIN., U.S. DEP’T OF COM., CURRENT POPULATION REP. – SPECIAL STUDIES, Coresident Grandparents and Grandchildren, 9 (May 1999) [hereinafter BRYSON & CASPER: SPECIAL STUDIES].
\textsuperscript{53} See U.S. DEP’T OF COM. NEWS, supra note 21, at 2.
\textsuperscript{54} See Report to Congress: Part 1, supra note 1, at 33-39.
Among children cared for by their grandparents, 46% are under six (6), 30.9% are between six (6) and eleven (11), and 23.1% are between twelve (12) and seventeen (17).\textsuperscript{56} Twenty seven percent (27\%) of these children are poor, and one-third do not have health insurance.\textsuperscript{57} Overall, 52\% of children in kinship care live in households that received public assistance compared with 36\% of all children under eighteen (18).\textsuperscript{58}

Some children fare better than others depending on the type of kinship family structure. Various types of kinship family structures afford different advantages, and some structures are at increased risk for economic hardship.\textsuperscript{59} For example, when both grandparents and a parent is living in the household, the average family income is $61,632.\textsuperscript{60} In contrast, the average income of a family in a household in which the grandmother is the sole adult raising the child or children is $19,750.\textsuperscript{61} This result stems from multiple factors, including that there is no spouse or parent to help provide care and financial support. In addition, the earning potential and labor force participation of grandmothers relative to grandfathers is considerably lower.\textsuperscript{62} The combination of such factors leaves grandchildren residing solely with their grandmothers much more likely to be in poverty. African-American grandmothers are more commonly found in living arrangements without a spouse present.\textsuperscript{63}

\textit{The Challenges of Kinship Care}

Relative caregivers face a myriad of problems. There may be the difficulty of dealing with birthparents who abuse alcohol or drugs, or who have mental health problems, causing them to become disruptive.\textsuperscript{64} Both the child and grandparent may struggle with their relationships to the parent.\textsuperscript{65} Some relatives fear they may end up caring for the birthparents as well as the

\begin{footnotesize}
\footnotesize{\textsuperscript{55} See \textit{Report to Congress Part I}, supra note 1, at 35.}
\footnotesize{\textsuperscript{56} See \textit{Bryson \& Casper: Special Studies}, supra note 52, at 6.}
\footnotesize{\textsuperscript{57} See \textit{U.S. Dep't Com. News}, supra note 21, at 2.}
\footnotesize{\textsuperscript{58} See \textit{Census Bureau}, supra note 16.}
\footnotesize{\textsuperscript{59} See \textit{Bryson \& Casper: Special Studies}, supra note 52, at 7-9.}
\footnotesize{\textsuperscript{60} See \textit{Casper \& Bryson: Working Paper}, supra note 19, at 9.}
\footnotesize{\textsuperscript{61} See \textit{id.}}
\footnotesize{\textsuperscript{62} See \textit{id.} at 14.}
\footnotesize{\textsuperscript{63} See \textit{Bryson \& Casper: Special Studies}, supra note 52, at 5.}
\footnotesize{\textsuperscript{64} See \textit{Hochman}, supra note 10, at 20.}
\footnotesize{\textsuperscript{65} See \textit{Harvey}, supra note 9, at 1.}
\end{footnotesize}
children. That is, the family situations that characterize the children's transition to kinship care may create emotional problems for the child as well as the caregivers. Furthermore, research indicates that relative caregivers often suffer from stress-related illnesses such as diabetes, heart disease, digestive problems, and high blood pressure. Caregivers often fail to attend to their own health needs in favor of caring for the children's needs.

People who are suddenly thrust into the role of a kinship caregiver face situations for which they did not plan. For example, their residence may be too small, or the presence of additional children may violate a private lease agreement. Grandparent caregivers may find a lack of affordable housing in which they can live with children, and those living in senior housing may face eviction if children are disallowed. Or, the caregiver may be unprepared to cope with the variety of physical and mental health problems of children who are affected by prenatal drug or alcohol exposure. In addition, many grandparent caregivers have difficulty helping children learn because of their own lack of education, thus making it problematic, if not impossible, to fulfill their "parental" responsibility of ensuring that their grandchildren make adequate progress in school.

Private kinship caregivers who have not established a "legal relationship" (i.e., adoption or guardianship), are especially at a disadvantage. For instance, the children can be removed from the caregiver at any time, against their wishes, by the birthparents. Additionally, medical, psychological, and dental care for children is difficult to access when the caregivers do not have legal custody or guardianship. Kinship caregivers often cannot secure private health insurance without legal custody. Likewise, it is difficult, and sometimes impossible, to obtain educational services and financial assistance for the children in their care. Private kinship caregivers may

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66 See HOCHMAN, supra note 10, at 20.
67 See CHALLENGES OF CARING FOR THE SECOND FAMILY, supra note 8, at 2.
68 See id.
69 See id.
71 See id.
72 See CHALLENGES OF CARING FOR THE SECOND FAMILY, supra note 8, at 2.
73 See BRYSON & CASPER: SPECIAL STUDIES, supra 52, at 9.
74 See HOCHMAN, supra note 10, at 4.
75 See CHALLENGES OF CARING FOR THE SECOND FAMILY, supra note 8, at 2.
76 See BRYSON & CASPER: SPECIAL STUDIES, supra 52, at 8.
77 See CHALLENGES OF CARING FOR THE SECOND FAMILY, supra note 8, at 2.
not be able to enroll children in school without proof of guardianship or legal custody. \(^{78}\) Similarly, without legal custody, they may not be able to obtain the necessary immunizations to enroll the children. \(^{79}\) Even when they are able to enroll the children, education may still present a challenge if the children need to obtain special education services. Without formal custody, the kinship caregiver may experience difficulty being included as a participant in the Individual Education Plan (IEP) process for children with disabilities. \(^{80}\) Likewise, caregivers without guardianship or legal custody may have difficulty being included in other school activities that parents are usually included in, such as parent-teacher meetings. \(^{81}\)

However, establishing a "legal relationship" also taxes the private kinship caregiver. Legal resources may be unknown and are often unaffordable. \(^{82}\) Adopting or becoming a legal guardian can be "expensive, time-consuming, and emotionally exhausting." \(^{83}\) Kinship caregivers may fear a legal action would cause problems in their relationships with the child's birthparents. \(^{84}\) For example, it may antagonize and provoke parents who were otherwise uninterested in removing the child from kinship care. \(^{85}\)

**Advantages & Disadvantages of Kinship Care**

Aside from filling the void created by the nationwide shortage of foster homes, most states acknowledge the potential benefits of kinship care in their policies addressing children in state custody. Forty eight (48) states and the District of Columbia give preference to kin when seeking foster care. \(^{86}\) Many advocates and professionals consider kinship care a more humane way to deal with a child's separation from his or her parents. \(^{87}\) It is easier on children when they


\(^{79}\) See id.

\(^{80}\) See id. at 2.

\(^{81}\) See id.

\(^{82}\) See Challenges of Caring for the Second Family, supra note 8, at 2.


\(^{85}\) See Harvey, supra note 9, at 3.

\(^{86}\) See, supra note 6, at 11.

are placed with a known caregiver with whom the child has already established a positive connection. Children placed in kinship care generally show less protest, despair, and detachment in response to the separation from the parent.\textsuperscript{88} Additionally, kinship caregivers usually know more about the child's history, and they are often willing to care for sibling groups.\textsuperscript{89} Kinship care also provides for a better chance of staying in touch with parents who are able to participate in raising their children.\textsuperscript{90} Permitting a stronger connection with parents and siblings can help the child develop a sense of family identity.\textsuperscript{91} Likewise, kinship care allows the child to remain connected to the community. In addition, the child benefits from a caregiving relationship that is less stigmatizing than foster care.\textsuperscript{92}

Well-functioning informal systems can aid children in ways that the formal child welfare system rarely can.\textsuperscript{93} For example, family privacy is more likely to be protected. Moreover, the help that is offered is more likely to be relevant to the family, community and culture of the person needing assistance.\textsuperscript{94} In kinship networks, the family or person in need of help is defined by the family and the person involved.\textsuperscript{95} In contrast, the formal child welfare system is largely influenced by "mainstream" societal values; therefore, it is less likely to respond to families in ways that are unique to their customs and culture.\textsuperscript{96} Compared with non-kin caregiving situations, kinship care offers a better chance for stability and continuity.\textsuperscript{97}

Some state regulations, relying on research of intergenerational cycles of abuse, reflect the concern that kinship care perpetuates a child's involvement with those who raised the abusive or neglectful parents in the first place.\textsuperscript{98} A related concern is that some families may have difficulty in setting boundaries with the birthparents, allowing unsupervised contact which puts


\textsuperscript{89} See Hochman, supra note 10, at 3.

\textsuperscript{90} See id.


\textsuperscript{93} See Bonecutter & Gleeson, supra note 12, at 12.

\textsuperscript{94} See id.

\textsuperscript{95} See id.

\textsuperscript{96} See id.

\textsuperscript{97} See id.

\textsuperscript{98} See Is Kinship Care a Road to Permanence?, supra note 87.
the child at risk. However, despite these concerns, most states (39) help place maltreated children with kin without seeking state custody in at least some instances. The Child Protective Services caseworker may even suggest a kinship arrangement as way to avoid foster care placement and an abuse or neglect proceeding. Given that both parent and relative know that the alternative may be a court action by the state to gain custody, and that the child may be placed into foster care, they are often readily agree to kinship care.

III. Federal Statutes & Kinship Care

Acts of Congress Affecting Kinship Care Arrangements

Social Security Act

Although family law is generally considered a matter of state authority, state statutes must comply with federal funding policies. The federal policies that guide government involvement in kinship care have the most direct impact on relative foster placements through state child welfare agencies. The 1962 amendments to the Social Security Act authorized federal reimbursement for children in licensed foster homes, without prohibiting relatives from becoming licensed foster parents and receiving such funds for the care of a child placed in their home by the child welfare system. Nonetheless, some state policies restricted support of relative foster families until the U.S. Supreme Court decided Miller v. Youakim in 1979, holding that relatives are entitled to the same federal foster care benefits received by non-relative foster parents if the placement is eligible for federal reimbursement under the Social Security Act.

Two titles of the Social Security Act are especially relevant to kinship care. Title IV-E creates the federal funding scheme for reimbursement to the states for foster care maintenance and adoption assistance payments. This is an unlimited entitlement: Congress is authorized to appropriate "such sums as may be necessary" to reimburse states for expenditures made on

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99 See Megan M. O'Laughlin, A Theory of Relativity: Kinship Foster Care May Be the Key to Stopping the Pendulum of Terminations vs. Reunification, 51 Vand. L. Rev. 1427, 1452 (1998).
100 See LEOS-URBEL, BESS & GEEN, supra note 6, at 26.
102 Id.
103 See id. at 4.
behalf of children placed in foster care. In contrast, under Title IV-B of the Act, funding for "establishing, extending, and strengthening child welfare services" to enable children to avoid entering the foster care system altogether, is a capped expenditure rather than an entitlement.

**Indian Child Welfare Act**

The 1978 Indian Child Welfare Act (ICWA) encourages the use of kinship care as a child welfare service. The Act calls for the preservation of the ethnic heritage of Native American children in foster care through a number of protections, including extended family placements. ICWA emphasizes the importance of family and cultural continuity by requiring that placement with a relative be given consideration before any other placement option when children of Native American heritage are removed from their biological parents.

**Adoption Assistance and Child Welfare Act**

The Adoption Assistance and Child Welfare Act (AACWA) was enacted in 1980 with the intent of preserving families by preventing unnecessary removal of children from their homes, and ensuring that children return home or are placed in an alternative permanent home in the shortest time period. Prior to this time, states did not have a financial incentive to develop reunification, rehabilitation, prevention, or adoption programs. Unlike the Indian Child Welfare Act, however, AACWA did not require that children be placed with relatives. Instead, it specified that children should be placed in the least restrictive, most family-like setting available, in close proximity to the parent's home, consistent with the best interests and special needs of the child. Most states interpreted this mandate as a preference for placement with relatives.

Although AACWA was intended to improve the foster care system, it ultimately created a system where nearly half a million children resided. The text of the statute emphasizes the

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106 Id. at § 670.
109 Id. at § 1915.
110 Id.
principle that children suffer when separated from their parents and community, and family preservation efforts are important. However, whether there was adequate funding and programs to succeed with preserving the families involved remains controversial. Critics contend that Congress never delivered on its promise to support poor families, thus leading to the failure of family preservation and to the increase in the number of children in foster care. As one author put it, "[h]ow can agencies expect to solve problems arising from any combination of deplorable conditions — chronic poverty, dangerous neighborhoods, shoddy housing, poor health, drug addiction, profound depression, lack of childcare — with a three month parenting course on ephemeral crisis intervention." 

Multiethnic Placement Act

In 1994 Congress passed the Multiethnic Placement Act (MEPA) prohibiting agencies receiving federal funding from enforcing "race-matching" policies that sought to place minority children, especially African American children, exclusively with adoptive families of the same race. The purpose of MEPA was to decrease the length of time a child waits to be adopted; to prevent discrimination in foster care and adoption; and to promote recruitment of ethnic and minority families that reflect the children in the public child welfare system. Section 553 of MEPA continued to permit states to consider the cultural, ethnic, or racial background of the child and the capacity of the prospective foster or adoptive parent to meet the needs of a child of such background, as one of several factors in making a placement. Congress also added a requirement to Title IV-B plans mandating states to make diligent efforts to recruit prospective foster and adoptive parents who reflect the racial and ethnic diversity of the children in the state for whom foster and adoptive homes are needed. Overall, this policy change reflects weakening support for the traditional view that if children cannot be kept with their families of origin, they should be kept with their communities of origin.

Two years later, through section 1808, "Removal of Barriers to Interethnic Adoptions" (IEP) of the Small Business Job Protection Act, Congress repealed section 553 of MEPA.
Members of Congress believed the "permissible consideration" language was being used to obfuscate the intent of MEPA. Section 1808 of Public Law 104-188 amended Title IV-E of the Social Security Act by adding section 671(a)(18) prohibiting "the delay or denial of a foster or adoptive placement based on the race, color, or national origin of the prospective foster parent, adoptive parent, or child involved." The statute and implementing regulations also dictate a penalty structure and corrective action for any state in violation. Thus, through the 1994 and 1996 actions involving the Multiethnic Placement Act (MEPA) and the Interethnic Adoption Provisions (IEP), Congress essentially prohibited agencies receiving federal funding from placing children according to race, or even from taking race into account in placement decisions.

Significantly, the statutes pertaining to the removal of barriers to interethnic adoptions explicitly do not include placements of children to whom the Indian Child Welfare Act applies. That is, ICWA continues to protect Tribes and families with important powers (e.g., tribal jurisdiction, powerful preferences, and a beyond a reasonable doubt standard for termination of parental rights) for holding on to their Native American children. No other racial, ethnic, or cultural group receives similar statutory protection. In practice, child welfare organizations may still look to racial, ethnic, and cultural considerations in making case-by-case placement decisions based on the child's best interest. Under a particular child's circumstance, it may still be argued that race matters. Some state regulations reflect the position that MEPA, as amended, could be read to allow some use of race, so long as race was not used to delay or deny placement. For instance, child-placement agencies in Oklahoma, whether government or private,

shall make special efforts to recruit foster placements...from families of the same minority or racial or ethnic heritage; provided, however, no child shall be delayed in being placed or removed from any placement in order to place the child in a family of the same minority racial or

See Title IV-E Foster Care Eligibility Reviews 65 Fed. Reg. at 4020.
42 § 671(a)(18) (1994 & Supp. 1998); Id.
minority ethnic heritage, unless it is determined to be in the best interests of the child.129

Supporters of MEPA, as amended, complain that kinship care is one form of resistance to the policy because it keeps children within the extended family group, and, therefore, it keeps children within the same racial group as well.130 This side argues that “race matching harms society morally and spiritually by reiterating the baneful notion that people from different races should not be permitted to disregard distinctions when creating families.”131 On the other side is the belief that adoption law has historically tracked the market for children, serving the interests of adults seeking to adopt more than the interest of children needing stable homes.132 Here, there is concern that the rhetoric in transracial adoption policies promotes the “disruption of poor minority families by depicting adoptive homes and communities as superior to children’s existing family and community relationships.”133 From a social justice perspective, these policies “inevitably impact entire ethnic communities in ways that reinforce social hierarchies and benefit the most privileged members of society.”134

Personal Work Responsibility and Opportunity Act &
Temporary Assistance to Needy Families

Corresponding to public disparagement of poor mothers receiving long-term public assistance, Congress passed the Personal Responsibility and Work Opportunity Act of 1996 (PWROWA) which ended the federal guarantee of cash assistance to children, and allowed states to implement extensive welfare reform programs.135 For the first time in the nation’s history, “states have a federal mandate to protect children from abuse and neglect but no corresponding mandate to provide basic economic support to poor families.”136 PWROWA leaves federal funds for foster care and adoption assistance as an uncapped entitlement, while reducing and capping federal funds for cash assistance to families and for child protective services that support

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130 See BARTHOLET, supra not 128, at 137.
131 Id. at 139.
133 See id. at 137.
134 See id. at 140.
135 Pub. Law No. 104 P.L. 193, 110 Stat 2105 (1996); see also id. at 140.
families. Thus, welfare reform may ultimately result in an increase in the number of children in foster care.

PWRORA solidified the role of kinship care as a federal policy issue by officially encouraging states to give relatives first priority in providing care for foster children, and authorizing grandparents, siblings, step-siblings, aunts and uncles to receive Temporary Assistance to Needy Families (TANF) for the care of dependent children. "Child-only" payments became available to relatives because federal legislation recognized that some caregivers were not legally required to support a child. Congress authorized states to choose whether to exempt kinship child-only welfare grants from work and other requirements. As of January 2000, all states had chosen to provide kinship caregivers with child-only payments and to exempt caregivers who receive such payments from family caps, work requirements, time limits, and residency requirements. Some states stretch beyond this minimal payment and use TANF funds to subsidize private kinship families at a higher rate. For example, California's Kin-GAP program, combining TANF funds with state and county funds, allows adjudicated children to participate regardless of their IV-E eligibility. Congress reasoned that if states provide assistance to kin through income assistance programs (e.g., TANF funds), that would keep them out of the more costly child welfare services and payment systems.

Adoption and Safe Families Act

The Adoption and Safe Families Act (ASFA) of 1997, amending the Adoption Assistance and Child Welfare Act, expresses congressional concerns about the achievement of permanency in child welfare generally, and in kinship foster care in particular. The Act attempts to correct the incentives of AACWA which inadvertently rewarded states with more money if they kept children in foster care. ASFA features adoption incentives for states to reduce their foster care

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138 Id.
139 See Report to Congress: Part I, supra note 1, at 16.
140 However, if the kinship caregivers themselves receive benefits, they must meet all requirements. See id. at 28.
141 See id.
142 For example, Florida, California, and Wisconsin. See id.
144 See Report to Congress: Part I, supra note 1, at 16.
146 See Negrau, supra note 112, at 5.
caseload, including children in kinship foster care. Generally, ASFA weakens federal commitment to family preservation of AACWA by narrowing the definition of “reasonable efforts” of reunification, mandating aggressive timelines for the achievement of permanency, and establishing adoption as the preferred means of reducing the foster care population.\footnote{42 U.S.C. § 673(b) (1994 & Supp. 1998).}

In enacting ASFA, Congress recognized the importance of kinship bonds: “termination of parental rights may not be in the best interests of a child who is being safely cared for by a relative under state supervision.”\footnote{H.R. REP. No. 105-77, pt. 2 at 12 (1997), reprinted in 1997 U.S.C.C.A.N. 2739, 2744.} Section 671(19) of ASFA provides that the State shall consider giving preference to an adult relative over a non-related caregiver when determining placement for a child, provided that the relative caregiver meets all relevant state child protection standards.\footnote{42 U.S.C. § 671(19).} Prior to ASFA, if a child was residing with a relative caregiver between the time the child lived with his or her custodial parent and when the child entered foster care, policy required that the child be physically removed from the relative’s home, thus creating a disincentive for relative placements.\footnote{See Title IV-E Foster Care Eligibility Reviews 65 Fed. Reg. at 4062 (2000).} ASFA permits the removal of the child from the home in these circumstances to be a “constructive” removal, as long as the child had lived with the parent within six months prior to the state’s petition for removal and the relatives meet state licensing requirements as foster care providers.\footnote{See 42 U.S.C. § 672(a).}

Furthermore, ASFA allows states to exempt children in kinship foster care from the requirement for filing a termination of parental rights (TPR) petition once the child has been in foster care fifteen (15) of the previous twenty two (22) months.\footnote{42 U.S.C. § 675f1).} In addition, ASFA encourages the use of relative placements as an option for ensuring that the child achieves permanency, and not only as a temporary placement.\footnote{See Title IV-E Foster Care Eligibility Reviews 65 Fed. Reg. at 4060.} The Act identifies, among the permanency option, being “placed permanently with a fit and willing relative”.\footnote{42 U.S.C. § 675(1).} This does not mean, however, that Congress intended that relative placements should preclude formal recognition of legal permanent placement through adoption or legal guardianship, thereby relieving the state of custody.\footnote{See Title IV-E Foster Care Eligibility Reviews 65 Fed. Reg. at 4060.}
Congressional uncertainty about kinship care is expressed in the mandate that the Secretary of Health and Human Services submit reports on the achievement of child welfare outcomes in the use of kinship foster care.\(^{156}\) The Department of Health and Human Services (DHHS) Report recommends that timelines for permanency for children in kinship care be the same as for other children in foster care.\(^{157}\) Although the recommendation has not yet been implemented by Congress, it indicates a concern that kinship foster care may be used to undermine the primary protective function of the child welfare system by providing support for relatives, rather than protection for children.\(^{158}\) This concern was evident at the time ASFA was being considered by Congress, when critics referred to it as “Aid to Relatives with Dependent Kids,” expressing disapproval of the notion of “paying relatives to care for kids.”\(^ {159}\)

A recommendation from the DHHS report that is partially included in the Act is that the same licensing standards for caregivers of Title IV-E funded children should be the same, regardless of relatedness.\(^ {160}\) The final rules, however, indicate some flexibility, requiring that the same safety requirements are met, while allowing other licensing requirements (e.g., square footage) to be waived.\(^ {161}\) Licensing provisions do not directly affect private kinship care. That is, the final rule does not prohibit states from placing children with relatives who do not meet licensing standards, as the provision is related to title IV-E eligibility only.\(^ {162}\)

While speaking in support of ASFA, Representative Kennelly of Connecticut, acknowledged that “at this point in time we could not do a perfect piece of legislation....”\(^ {163}\) Like all legislation, the statutes related to kinship care discussed herein were subjected to compromises of the political process. Promoting adoption is a politically attractive policy choice, consistent with the Congressional agenda of 1990’s calling for more modest and time-limited assistance programs.\(^ {164}\) In 1997, for instance, Congress considered and rejected proposals to

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\(^ {158}\) See id.

\(^ {159}\) Clair Sandt, ASFA: From Policy to Practice, CHILD LAW PRACTICE, 58 (2000).


\(^ {161}\) See Title IV-E Foster Care Eligibility Reviews 65 Fed. Reg. at 4033 (2000).

\(^ {162}\) See LEOS-URBEL, BESS, & GEEN, supra note 6, at 8.


\(^ {164}\) See Martin Guggenheim, supra note 2, at 1732.
expand both reunification and drug treatment services. Perhaps this and similar decisions by Congress reflect the belief that such programs do not work, that they are not in the best interest of children, or that government does not have a substantial responsibility to help troubled families solve the problems that lead to abuse and neglect. There are positive aspects of the current policies affecting kinship care that have the potential to make a significant impact on the lives of many children. At the same time, there is cause for concern about the harm they may bring to children, families, and communities. As noted in the DHHS Secretary's Report to Congress, June 2000, formal "recognition of kinship care as an appropriate permanent placement option "could have a significant impact on both private and public kinship care families."

IV. The Best Interest of Children

Ensuring safety is central in the legislation intended to be in the best interest of children. This congressional commitment led to a narrowing the definition of "foster family home" in ASFA to those that are licensed. Specific concerns around safety in kinship care are that caregivers may themselves be abusive parents; that kin may not prevent abusive birth parents from continuing to abuse their children; and that kin may not have knowledge or resources to provide a safe living environment. In fact, although kin generally have fewer financial resources, most kinship homes are safe. The available research suggests that most children are at least as safe in relative care as they are in foster care. In addition, children in kinship care report feeling as safe and protected as those in traditional foster homes. Nonetheless, the concern that kinship care might jeopardize the safety of children is borne out in legislation affecting both public and private kinship arrangements. The DHHS Report to Congress acknowledges that "relatives should be viewed as potential resources in achieving

166 See Report to Congress: Part I, supra note 1, at 29.
169 See Report to Congress: Part I, supra note 1, at 44.
170 See id. at 46.
172 See Report to Congress: Part I, supra note 1, at 46.
safety, permanence, and well-being for children," but cautions that a case-by-case assessment is necessary to determine if they are the most effective caregiver to advance the goals of a particular child. 173

Despite concerns, kinship care continues to be the fastest growing segment of out-of-home placements, and is promoted as a positive familial response to troubles within one’s family and/or community. 174 It is unlikely that the expanded use of public kinship foster care is entirely a response to the inadequate supply of traditional foster and adoptive homes. 175 Instead, support of kinship care reflects recognition of value in respecting the relationships, and building on the strengths of the relations of children to their parents, siblings, extended family, and community. 176 Thus, ASFA’s “relative preference” and permissible timeline extensions infer that such placements are in the best interest of the child; however, courts make these determinations on a case-by-case basis. 177 The court considers ASFA presumptions in light of other factors, such as the caregiver’s willingness to provide care for the child’s siblings if needed; the child’s need to maintain family and cultural connections; the extent and type of parental contact that is appropriate; and whether the caregiver is able and willing to provide long-term care.

The growth of private kinship care arrangements also rests, in part, on a presumption about children’s best interests. However, in these situations it is the family, not the court, who balances such factors as the child’s safety, physical and mental health, and the ability of the caregiver to support the child. The child welfare agency or court is not usually involved in making a best interest determination in the sphere of private kinship care. Public policy, nevertheless, influences these private family decisions. Under current policies, if a child is placed in the state foster care system, the risk of termination of parental rights and separation from the family is considerable 178 Grandparents and other relatives often step in as the last line of defense for these children. 179 They are afraid for the child’s destiny in a system that is “confused, understaffed, and overburdened, and where life-threatening decisions about children’s lives are often made in half second moments, and where the clock is always running." 180 The threat

174 See Naomi R. Cahn, supra note 30, at 1212-1223.
175 See LEOS-URBEL, BESS & GEEN, supra note 6, at 2.
176 See id.
179 See id.
180 Monica Drinane, Foster Care & Adoption Reform Legislation: Implementing the Adoption and Safe Families Act
inherent in federal policies may be an impetus to the formation of kinship arrangements for some families. For many, the prospect of a TPR proceeding is very much comparable to the death penalty in that it can become the death penalty for a family.\(^\text{181}\)

Thus, in both public kinship foster care and private kinship care, public policy and its underlying presumptions, are significant factors in decisions about placement. Although the Washington Post applauded ASFA for putting “a new and welcome emphasis on children,”\(^\text{182}\) it is not that simple. That is, because of other factors, especially political and monetary, it is not entirely clear whose interests are most served by the statutes affecting family and living arrangements of children. Of particular concern are policies emphasizing adoption as the preferred means of permanency; policies de-emphasizing race, ethnicity, and culture in child placement decisions; and policies that do not adequately consider how the best interest of children may differ at various developmental stages.

**Permanency & Adoption**

While public policy has vacillated between emphasizing child protection and emphasizing family preservation, the goal of permanency has remained constant.\(^\text{183}\) In the child welfare system, “permanency means securing a stable living arrangement as quickly as possible for children who must be permanently removed from their parents’ homes.”\(^\text{184}\) There is virtual unanimity among child psychologists regarding the significance of permanency to a child’s development.\(^\text{185}\) However, there is considerable disagreement about the best means for achieving it. For instance, although child development experts agree that there are good reasons to terminate parental custody, they do not agree about the necessity of TPR in order to promote healthy emotional development.\(^\text{186}\) From the child’s perspective, permanency is met when the

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\(^\text{181}\) See id. at 443.
\(^\text{183}\) See Roberts, The Challenge of Substance Abuse, supra note 29, at 72.
\(^\text{184}\) LEOS-URBEL, BESS, & GEEN, supra note 6, at 45.
\(^\text{185}\) See In re J.J.B., 390 N.W.2d 274, 279 (Minn. 1986); see also In re R.H.N., 710 P.2d 482, 486 (Colo. 1985) (recognizing court may consider child’s emotional ties to third party in terminating parental rights); In re J.M.P., 528 So. 2d 1002, 1014 (La. 1988) (noting “little disagreement within the profession of child psychology as to the existence of the phenomenon of the child-psychological parent relationship and its importance to the development of the child.”); In re Samantha D., 740 P.2d 1168, 1171 (N.M. Ct. App. 1987) (listing as factor to consider in terminating parental rights, existence of psychological parent-child relationship between child and substitute family).
\(^\text{186}\) See Schwartz, supra note 4.
child has adults in his or her life who have made a commitment to raise the child to the age of majority.\footnote{See Bonecutter & Gleeson, supra note 12, at 9.} Under ASFA, children attain permanency when legal responsibility for a child is transferred from the child welfare system to the permanent caregiver, whether the caregiver is the biological parent, adoptive parent, or legal guardian.\footnote{42 U.S.C. § 675(1)(E) (1994 & Supp 1998).}

Despite the strong argument that a child’s need for permanency includes a need to keep hold of the past,\footnote{See Schwartz, supra note 4.} federal policy has shifted its efforts toward the creation of new families for children in foster care by emphasizing adoption in particular.\footnote{See Cahn, supra note 30, at 1189.} Such public policy presents parents and their children with an all-or-nothing proposition: either the parent will be capable generally within one year and the child will be returned, or the parent will not become capable and the child will be “freed” for adoption.\footnote{See Schwartz, supra note 4.} It may be, instead, that the best way to achieve permanency in instances in which a parent cannot care for the child, is “to engage that parent in a positive way and to work toward an arrangement in which the parent surrenders permanent custody with the understanding that some level of continued contact with the child will be permitted.”\footnote{Susan L. Brooks, Permanency Through the Eyes of a Child: A Critique of the Adoption and Safe Families Act, CHILDREN’S LEGAL RTS. J., Spring 1999 at 4.}

The shorter timelines for TPR under ASFA do not necessarily ensure permanency for children in state custody, given that the pool of adoptive families is not large enough to accommodate all of these children, and that preparation of adoptive parents and post-adoption services are inadequate.\footnote{See Gordoo, supra note 165, at 659.} Mary Bissell, senior staff attorney at the Child Welfare and Mental Health Division of the Children’s Defense Fund, noted that “[w]hen ASFA was introduced, adoption was viewed as ‘a be-all end-all option...’ We didn’t think about post-adoptive services, or the pressures on parents who are adopting.”\footnote{Clair Sandt, supra note 159, at 58.} Adoptive families need to understand and to be ready to meet the special needs of the children whose physical, mental health and developmental status may be compromised, who may have significant medical problems (e.g., those associated with prenatal alcohol and drug exposure or HIV infection), who may have histories of significant
abuse or neglect, or who may be members of sibling groups.\textsuperscript{195} Section 674 of ASFA provides for training of prospective adoptive parents on a short-term basis.\textsuperscript{196} However, without long-term post-adoption services, it can be expected that many of these adoptions will be disrupted as problems arise during the child’s later development.\textsuperscript{197} It is distressing to consider the impact on children of quick termination of parental rights without ensuring the availability of permanent placements.

Some see kinship care is incompatible with permanency planning, since, although kin are committed to the child’s long-term stability, kinship caregivers often do not want to adopt.\textsuperscript{198} However, children are less concerned about their legal relationship with their caregivers, than with feeling secure, and knowing where they will live and who will be raising them in the future.\textsuperscript{199} By offering financial incentives to states to move more children into adoptive homes, the philosophy behind ASFA seems to be that the foster care problem stems from barriers to adoption.\textsuperscript{200} Significantly, there is no corresponding incentive for successful family reunification or for kinship arrangements where there is no adoption.\textsuperscript{201} It might make more sense, in the pursuit of permanency for children, for public policy incentives to aim toward reducing the need for adoption by increasing the caregiving capacity of extended family.\textsuperscript{202}

\textit{Race, Ethnicity, Class, \& Culture}

Race, culture, and class issues are intertwined with federal welfare programs, child welfare, and kinship care policies and practices.\textsuperscript{203} The race disparity among children in foster care is astounding: In 1998, African American children made up 45% of the foster care population while comprising only 15% of the general population under eighteen (18).\textsuperscript{204} The racial disparity is even greater in urban centers throughout the U.S.\textsuperscript{205} The disproportionate

\textsuperscript{197} See Freundlich, supra note 195, at 110.
\textsuperscript{198} \textit{Is Kinship Care a Road to Permanence}, supra note 87 at 4.
\textsuperscript{199} See Brooks, supra note 192, at 2.
\textsuperscript{200} See Roberts, \textit{Is There Justice in Children's Rights}, supra note 27, at 119.
\textsuperscript{201} See Cahn, supra note 26, at 1205.
\textsuperscript{203} See Report to Congress: Part I, supra note 1, at 11.
\textsuperscript{205} See Roberts, \textit{Is There Justice in Children's Rights}, supra note 31, at 125.
representation of poor and African American children in the abuse and neglect system indicates that "something other than the need for permanency is wrong with the system."206 A social justice approach recognizes that "poor minority children are hurt by a system that disrespects their family bonds and, more broadly, devalues the group to which they belong."207

Protection of family privacy and integrity depends on the class of the family. Wealthy families have always received more protection for their familial based decision making.208 The State often intrudes on poor families, especially if those families do not share cultural values that the agents of the State deems worthy.209 Limiting state intervention in the family generally is important. However, it is particularly worrisome that State intervention disproportionately affects the families of the least powerful groups in the society.210 Similarly, "transferring large numbers of children from relatively victimized groups to more privileged groups" is disturbing.211 As social justice advocates point out, it is not fair to children if their bonds with their parents are unnecessarily broken, especially if this occurs in part because of their race and socio-economic status.212 From this point of view, quick disruption of relationships with their families does not benefit children. If taken to the extreme, such policy would permit the State to a redistribute the entire minor population among the "worthier members of the community."213

It is significant that the enactment of ASFA corresponded with recently amended federal policy on transracial adoption, removing barriers to Caucasian middle class couples' ability to adopt children of color.214 It is responsive to the fact that African American children are less likely than Caucasian children to be adopted.215 By hastening TPR proceedings and abolishing race-matching policies, supporters seem to be claiming that the foster care problem could be solved by moving more children of color permanently from their parents into Caucasian adoptive homes.216 A strong advocate of this position is Elizabeth Bartholet, a Harvard faculty member

206 Cahn, supra note 26, at 1212.
207 Roberts, The Challenge of Substance Abuse, supra note 29, at 87.
208 See Cahn, supra note 26, at 1210.
210 Tho.
211 See Cahn, supra note 26, at 1210.
212 See Roberts, The Challenge of Substance Abuse, supra note 29, at 87.
213 See BARTHOLET, supra note 128, at 236.
215 See id. at 120.
who regards herself as an attorney “committed to racial and social justice,” and one who has “devoted most of her life to civil rights work.” She advances the notion that the foster care problem is a result of “a system that looks to a very narrow segment of the larger community for potential adoptive parents.”

A critic of the child welfare’s system’s reliance on kinship foster care, Professor Bartholet, recognizing that children in foster care are overwhelmingly from poor families and racial minority groups, advocates a solution that includes abolishing all barriers to the adoption of children of color by Caucasian couples. She claims that because kinship foster care keeps the child in a family and community out of which child maltreatment grows, it serves the child no better than keeping him or her with the maltreating parent: “we should be willing to face up to the fact the child maltreatment is only rarely aberrational.” This view takes virtually no account of the complexities of adopting a foster child, or the challenges of transracial adoption. Furthermore, it seems to advance the permanent destruction of communities of color.

When expressing his support of ASFA, Representative Rangel stated that the Act presents “a more reasonable and practical approach than was taken in the Multiethnic Placement Act, as amended.” He noted that the provision in ASFA deliberately does not mirror the language of the Multiethnic Placement Act which “calls for States to follow a first come, first served approach to adoptions, turning a blind eye to race and ethnicity....”

Mr. Rangel’s comments imply that placement decisions are left in the hands of professionals. States may, without violating MEPA, as amended, implement special recruitment efforts for minority foster and adoptive parents; use relative placement preferences; and follow ICWA requirements. However, practitioners are warned against using “culture as a proxy for race, color, or national
As an adult, she came to appreciate that her parents realized they “are on another track,” and “need to look to black parents to help... raise a black child.”

Knowing why one’s parents adopted transracially is crucial. Adoptees said they placed great importance on their parents’ answers to their questions of “why” at every stage of their lives. They questioned their parents as to “what were they hoping to prove? to accomplish? to turn you into a white person?... or a strong person of color to liberate their people or race?”

As one woman pointed out, there is an underlying pathology in expressions of altruism as to the reason for transracial adoption. The “great white hope” notion is racism, she noted. While filling a need in the community is a good thing, she explained, adoptive parents need to be connected to the child’s culture.

These examples are not presented as an argument against transracial adoption. To the contrary, there are many potentially positive aspects of transracial adoption:

[Facing common and unique hurts and blessings together] facing our differences and laughing deeply at our funny, unheard-of everyday adventures; repairing our mistakes with one another, sharing the pain of our various losses; being there for each other when interactions feel overwhelming – all of this builds a sense of common identity and common purpose that offers our society its best model for living harmoniously with great diversity.

However, as adoptees themselves make clear, transracial adoption involves more than the “recognition that parenting is more about bonding than about blood,” and then simply matching available children of color with the “more than 2,000,000 married infertile couples who want to be parents.”245 As one adoptive mother noted, “it is the adults who have to change, not the children.”246 Parents, she explained, “have to be committed to both cultures.”247 Thus, for children to develop self-esteem along with their own racial and ethnic identities, adoptive parents need to understand, at every stage of their child’s life, that dealing with rejection of themselves or their culture is a very painful process. There is no provision in federal policy requiring screening of adoptive parents to ensure they are up to this challenge, much less to provide follow-up and assistance to transracial families throughout the child’s life. This is a very strong argument in favor of kinship care where no “cultural training” is needed, and where the children, who are already more likely to have special needs, will not have to struggle with racial and ethnic identity issues as well.

244 GAIL STEINBERG & BETH HALL, INSIDER’S GUIDE TO TRANSRACIAL ADOPTION, 427 (1998).
245 BARTHOLET, supra note 128, at 242-243.

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Developmental Issues

Just as the amount of consideration that should be given to race, ethnicity, and culture is controversial, the extent to which the age of a child should matter in kinship care placement decisions is debatable. Professor Barthalet’s position urges taking steps early to ensure more children becoming available for adoption when they are younger and more likely to be adopted.248 Forty percent of children currently in foster care are under five (5) years of age, and the average age of children coming into foster care is now six (6) months.249 Her proposal for revamping child welfare policies includes eliminating relative placement preferences and implementing coercive measures, such as mandatory home visitation/surveillance during gestation and early infancy.250 In this scheme, adoption outside the family is preferable to kinship care, especially for the youngest of children. Indeed, placement decisions commonly consider the strength of attachment between parent and child and the likelihood of adoption, recognizing that both variables are probably related to age.251 That is, it usually makes more sense to TPR in the case of abandoned infants than in the case of teens, especially those who have maintained contact with their parents.252 However, when infants are not abandoned, but the parents are unable to care for them, controversy arises over the significance of developmental age.

Federal public policy essentially treats children of all ages the same.253 In enacting ASFA, Congress considered and rejected proposals to recognize age differences.254 One reason may have been that the legislators felt the relevant line is too difficult to draw.255 In response to ASFA timelines, some practitioners express concern that for the youngest children, especially infants, the wait will often be too long.256 Moreover, the timelines for older children may be too fast if they are strongly attached to their biological parents and do not want to be adopted.257

247 Id.
248 See BARTHOLET, supra note 128, at 242.
249 See Drinane, supra note 180, at 442.
250 See BARTHOLET, supra note 128, at 238-243.
251 See Roberts, Is There Justice in Children’s Rights, supra note 27, at 121.
252 See id.
254 See Gordon, supra note 165, at 670-671.
255 See id. at 670.
256 Due to the acquisition of language and its role as a coping tool. See id. at 667.
257 See id. at 668.
origin." A 1997 Administration on Children, Youth and Families Guidance interpreting the IEP amendment to MEPA, indicates that any use of "cultural assessments" would be suspect if it had the effect of circumventing the law's prohibition against routine consideration of race, color, or national origin.

In certain cultures, grandparents, other relatives, or neighbors traditionally have taken on the responsibility of raising children whose parents are unable or unwilling to care for them. In African American, Latino, and Native American communities where informal adoption and extended family networks for rearing children have been relied on for generations, relatives shun formal adoption because it disrupts customary kinship norms. The legal status afforded by adoption has little relevance or meaning in Native American communities. Many Native Americans consider adoption, under any circumstance, completely inconsistent with their tradition. The responsibility to assume care of relatives' children is reportedly both implied and expressly stated in the oral traditions and spiritual teachings of most tribes. Hawaiians and Eskimos reject anything other than an informal, open adoption. Significantly, none of these cultural traditions require alienating the biological parent, and all promote maintenance of the community and ethnic identity of the child.

Despite rhetoric to the contrary, federal policies governing children in need of alternative care arrangements are not supportive of cultural differences. The House Report on ASFA states that "[if] States and localities can develop their own solutions tailored to their own traditions and practices and thereby increase adoption rates, they will receive financial rewards." Clearly, this coercive policy is in direct conflict with many cultural "traditions and practices" that do not permit or value adoption. The lack of any attempt to incorporate other preferences, and a heightened standard of review.


See id. at 13. See also Schwartz, supra note 4, and Roberts, Is There Justice in Children's Rights, supra note 27, at 122.

See Report to Congress: Part 1, supra note 1, at 11.

See Schwartz, supra note 4.

See Report to Congress: Part 1, supra note 1, at 11.

See Schwartz, supra note 4.

See Schwartz, supra note 4.

traditions is glaringly absent in the language of the statute and implementing regulations.\textsuperscript{237} For example, on its face, the protections of ICWA are directly applicable to state action under ASFA: "nothing in this regulation supersedes ICWA requirements"\textsuperscript{238} Yet, Indian tribes cannot access title IV-E funds on behalf of IV-E eligible children unless they enter into agreements with state agencies and follow the parameters of a state plan in which the same regulations apply to all children, regardless of racial, ethnic, or cultural affiliation.\textsuperscript{239}

Professor Bartholet contends that focussing on the family and community being destroyed does not serve children’s interests.\textsuperscript{240} In her recent book she states, "[s]ocial scientists published a succession of studies demonstrating that children placed with other-race parents did just as well in all measurable respects as children placed with same-race parents."\textsuperscript{241} However, her citations for this claim are few, and, they lack specificity in regard to the populations studied and the factors measured.\textsuperscript{242} In fact, there is a significant absence of research measuring the long-term effect of transracial adoption among varying populations of adoptees, especially as it impacts the development of racial and ethnic identity. However, anecdotal data can be very revealing. Adults adopted as children into multiracial families shared their perspectives and experiences on videotape:\textsuperscript{243}

- A biracial man was raised to be a "human being," but not taught he was African American. Other children made it clear he was not Caucasian, but he did not identify himself as African American until college when he was around other African Americans. Growing up he felt alone: "in a vacuum."

- While in his stroller during a visit to the zoo, an African American child, adopted into a Caucasian family and community, saw another African American child in stroller and asked his parents what kind of "animal" the child was. This was the first time his parents realized that he did not know he was different.

- A woman of color recalled sitting at the piano with her adoptive mother, looking at their hands. She asked about her color. Her mother responded, "I’m white and your father is white; therefore you are white."

- Upon seeing a book in the house on "how to raise a black child," initially an adoptee wondered why her parents needed a manual to raise her that they did not need to have for raising their other children.

\textsuperscript{238} 65 FR 4029 (2000).
\textsuperscript{239} See id.
\textsuperscript{240} See generally BARTHOLET, supra note 128.
\textsuperscript{241} Id. at 126.
\textsuperscript{242} Id.
Older children, may benefit from a longer timeline to lessen the trauma of separation. Thus, from this point of view, the law should treat children differently at different ages to assure that young children do not suffer psychologically or lose adoption opportunities due to needless delays, and that older children do not suffer terminations for which they are not ready and from which they may not benefit.

Among child development experts, many argue that children's different developmental timelines matter. Some experts, for instance, say age three is often a critical point at which children become more able to handle longer periods of separation from their parents. Traumatic disruptions of the parent-child relationship may cause lasting psychological harm as well as immediate disturbance. Older children who know their parents, frequently resist adoption in order to retain the relationship with their biological families. When a child has already established a strong attachment to the parent, and when visits are sufficient in frequency and quality to contribute to the child's continuing normal development, this contact is of great value. These children have an interest in maintaining a bond with their parents and other family members, and they are injured when this bond is disrupted. States espousing the view that developmental timelines matter have implemented programs accordingly. For instance, in Colorado several counties are using concurrent planning as a central component to their initiative to expedite planning for children under six (6).

Studies of the changing structure of families in the United States suggest that a variety of parenting arrangements can provide the feelings of permanency, security, and emotional constancy necessary for normal development. Pediatricians, psychologists, psychiatrists, and other professionals agree that successful parenting is based on a healthy, respectful, and long-lasting relationship with the child. That is, "optimal child development occurs when a

258 See id. at 669.
259 See id. at 695.
260 See id.; But see Schor et al., supra note 91, at 1007-1009.
261 See Warzynski, supra note 213, at 764.
262 See Schwarz, supra note 4.
263 See Schor et al., supra note 91, 1007-1009.
264 See Roberts, Is There Justice in Children's Rights, supra note 27, at 117.
266 See Schor et al., supra note 91, 1007-1009.
267 See id.
A child develops attachments to those who provide day-to-day attention to his or her needs for physical care, nourishment, comfort, affection, and stimulation. In many cases in which the parents are unable to meet their needs, children can often be safely placed in the long-term care of relatives or neighbors with parental visitation, leaving open the possibility of parents regaining custody if circumstances improve.

However, this does not resolve the disagreement as to whether such arrangements are the best permanency plan, especially for infants and young children. No matter how young the infant is when separated from the mother, there will be adjustment difficulties. That is, even when an infant is adopted at birth into a good home, the infant must adjust to the separation from the biological mother by "unlearning" familiar voice and movement patterns. Nonetheless, there is little argument that if a child must be separated from the parent, the adjustment will be easier the earlier the child is given a secure and permanent home. Dr. Andrew Hsi, an advocate of kinship care arrangements, admits that in regard to infants there is not a significant case to be made for kinship rather than non-kinship adoptive placements based solely on developmental criteria. However, he has found that it is virtually impossible in his caseload of women who have abused substances to predict which parents will turn their lives around to care for their babies, and which will end up neglecting them. Furthermore, Dr. Hsi is convinced that the policies promoting removal of infants from their extended families and communities do not adequately address the long-term consequences of ignoring racial and ethnic identity. More important than family identity, Dr. Hsi believes, is ethnic identity.

Thus, the concerns addressed herein related to race, ethnicity, culture, and developmental age, cast doubt on the wisdom of policies emphasizing adoption as the preferred means of permanency. The best interests of children will be better served by seriously considering the

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268 Id.
269 See id.
270 See Roberts, Is There Justice in Children's Rights, supra note 27, at 120.
271 Interview with Dr. Andrew Hsi, Director of Division of Pediatrics, University of New Mexico School of Medicine, in Albuquerque, N.M. (November 15, 2000).
272 Id.
273 Telephone interview with Dr. Andrew Hsi, Director of Division of Pediatrics, University of New Mexico School of Medicine (November 3, 2000).
274 Id.
275 Id.
276 Interview with Dr. Andrew Hsi, supra note 276.
relationship between such factors and long term outcomes. For many children, kinship care arrangements may ultimately be superior to adoption outside their families and communities.

V. Rights of the State, Parents, Children, & Kinship Caregivers

Adding to the uncertainty of what is really in children’s best interest, when placement and parental authority decisions are brought to court, the evidence pertaining to permanency, race, ethnicity, poverty, and child development seem to become less important than the legal rights of the state, parent, child, and caregiver. Thus, under ASFA, for instance, a child’s right to be safe may be placed at odds with parent’s right to custody of their children. The adversarial process requires this sort of positioning. The court decides how much weight should be given to each party’s rights, and determines the legal protections warranted based on the nature of the rights involved (e.g., the right to representation, and the standard of proof required). The rights of parents, children, and third-parties are largely defined by constitutional interpretation. In the course of this interpretation, the boundaries of the State’s right to interfere are delineated.

Parental Rights

There is a long tradition behind making parental rights pre-eminent in society. This tradition rests on the assumption that family is the foundation of society, and “any movement that weakens that foundation will necessarily weaken the social fabric.” The due process clause of the constitution requires that a state show parental unfitness before its interests in caring for the child are more than de minimis. The state’s parens patriae power permits intervention and protection of children primarily in cases of abandonment, abuse, or neglect.

The Supreme Court has read parental rights into the "liberty" interest set forth in the Fourteenth Amendment. In both Meyer v. Nebraska and Pierce v. Society of Sisters, the U.S.

278 See Cahn, supra note 26, at 1206-1210.
280 See Quillon v. Walcott, 434 U.S. at 255 (1977) (“we have recognized on numerous occasions that the relationship between parent and child is constitutionally protected.”).
281 See Parham v. J.R., 442 U.S. at 603 (1979) (affirming the state action is permissible when a child’s physical or mental health is in jeopardy); Price v. Massachusetts, 321 U.S. 158, 166-167 (1944) (explaining the state may intervene to prevent neglect of a child’s health).
282 Meyer v. Nebraska, 262 U.S. 390, 399-400 (1923) (determining that a statute prohibiting foreign language instructions in schools unreasonably encroached upon a parent’s 14th Amendment rights); Pierce v. Society of
Supreme Court framed their decisions in terms of the state's power versus the rights of parents to raise children in a particular way. These decisions reflect the traditional reluctance of the Court to intrude into the private realm of family. Prince v. Massachusetts, where the Court found the parents responsible for the care, custody, and nurturance of the child, the Court also noted that those rights were not beyond limitation. However, in general, U.S. Constitutional law upholds the rights of parents to care for their children until they are declared unfit. Once the parent is declared unfit, the conflict becomes one of parent versus child. This position was explicit in Stanley v. Illinois: The Court interpreted the Constitution to mandate a hearing determining "fitness" before a negative determination could be made about a parent, and before a child could be taken from the custody of a parent. Wisconsin v. Yoder added additional support to the parental rights doctrine with respect to decision making, even to the extent of refusing to consider the child's wishes.

In the landmark case, Santosky v. Kramer, the Court reaffirmed that parental interest in the care, custody and management of their child is a "fundamental liberty interest," requiring that courts exercise a presumption in favor of the parents. In Santosky, the Court viewed the due process requirements in termination proceedings from the parent's perspective, and pronounced that action to terminate parental rights may be taken only if the state can prove parental unfitness by a clear and convincing standard. The implications of this case extend beyond termination proceedings, indicating that courts should subject state intervention to heightened scrutiny whenever the state infringes upon parental rights. For example, even before Santosky, in Sisters, 268 U.S. 510 (1925) (indicating that the State's responsibility to educate children yielded to parental interest in the upbringing of children).

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283 Id.
284 See id.
285 321 U.S. 158, 166 (1994) (commenting that the rights of parents are not beyond limitation).
286 See Negrau, supra note 112, at 12.
287 405 U.S. 645, 651, 658 (1972) (recognizing the importance of rights to raise children).
288 406 U.S. 205, 213-215 (1972) (explaining that the Free Exercise Clause grants parental rights which are superior to the State's interest in universal education).
290 Id. at 758-61 (explaining that fundamental parental interests warrant this heightened protection).
291 Id.
292 445 U.S. 745
Parham v. J.R., the Court required that the state prove its interests were significantly compelling to permit intervention into parental discretion. Thus, to overcome parental rights, the State must prove parental unfitness and a compelling State interest by a clear and convincing standard.

Children's rights

In comparison to parents or the state, children possess limited constitutional rights. Children's rights have been broadened in some respects, such as a minors right to free speech, privacy, due process, and protection against double jeopardy and a "beyond a reasonable doubt" standard in juvenile delinquency proceedings. For example, the In re Gault Court extended constitutional protection to children in delinquency proceedings with regard to "the essentials of due process and fair treatment." However, for the most part, children's rights tend to be indirectly defined. Furthermore, even though the plurality deciding Bellotti v. Baird reaffirmed a child's right to privacy, the decision also confirmed that the constitutional rights of children cannot be equated with those of adults. In Bellotti, the plurality justified its decision for withholding the full rights of children on the basis of their "peculiar vulnerability," their inability to make critical decisions in a mature manner, and the importance of the parental role in child rearing.

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293 442 U.S. 584, 603 (1979) (allowing state intervention where the child's physical or mental health was at issue).
295 See e.g., Planned Parenthood v Danforth, 428 U.S. 52, 74 (1976) (striking down a statute requiring parental consent before a minor could obtain an abortion); Carey v. Population Servs. Int'l, 431 U.S. 678, 691-99 (1977) (determining that the State could not prevent a minor's access to contraceptives). But see Planned Parenthood v Casey, 505 U.S. 833, 899-900 (1992) (allowing for a parental consent provision for a minor's abortion as long as the option for judicial override is available).
298 387, U.S. 1, 30 (1967) (determining a minor was entitled to notice of charges filed against him, notice of his right to counsel, and the right to cross-exam the complainant in delinquency proceedings that might result in commitment to an institution).
300 443 U.S. 622, 634 (1979) (deciding on the issue of a minor's right to an abortion, but also noting that the Constitution did not give minors the same level of protection accorded adults).
301 Id. at 634.
Thus, in court proceedings, these vague and tenuous constitutional rights of children are weighed against the parents' "fundamental liberty interest in the care, custody and management of their child."302

**Caregiver/3rd Party Rights**

The US Supreme Court has not directly addressed the rights of the parties in parental authority disputes involving biological parents and kinship caregivers, or other third parties. In general, parental preference is applied when parental authority is contested.303 However, this is not always the case. For example, in *Smith v. Organization of Foster Families for Equality and Reform*, the Supreme Court comments that "the importance of the familial relationship...stems from the emotional attachments that derive from the intimacy of daily association...as well as from the fact of blood relationship."304 Since then, the Court has recognized in other cases as well that constitutional rights are not to be granted to parents merely because of the biological connection, indicating that the quality of the emotional relationship between the child and the adult should be taken into account.305

In a dispute between third party caregivers and biological parents, the State cannot simply rely on a "best interest" standard for, as the Supreme Court pointed out recently in *Troxel v. Granville*, "this would be the logical equivalent to asserting that the state has the authority to break up stable families and redistribute its infant population to provide each child with the 'best family'."306 Considering *Yoder*, among other earlier cases, the *Troxel* Court noted that there usually must be harm to the child before the state may interfere with the right to parenting; however, the plurality did not decide whether such a finding is required for the limited purpose of granting visitation.307 Thus, the earlier decisions still hold in regard to finding harm. In contests for parental authority between the biological parent and a kinship caregiver, presumably

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303 See *Schwartz, supra* note 4.
305 See e.g., *Quillon v. Wallcott*, 434 U.S. at 248 (1977) (holding in favor of an adoptive father, and refusing to provide the biological father with the traditional constitutional protection on the ground that he had never had nor sought actual or legal custody of his child); *Lehr v. Robinson*, 563 U.S. 248 (1983) (declining constitutional protection to the biological father who never supported and had rarely seen the child since birth).
307 *Id. at* 2060, 2064.
the latter must prove detriment to the child, as well as show that kinship care is both in the child’s best interest, and necessary to avert harm to the child.308

VI. Legislative & Legal Alternatives

Federal-level Intervention

When fashioning policies to ameliorate difficulties faced by many children and families, the legislative and legal system should consider more than the rights of children, parents, caregivers, and the state. “What is needed is not a wholesale reversal of reasonable efforts [to reunify families] or of the view that government has a responsibility to help troubled families solve the problems that lead to child abuse or neglect.”309 Although current federal legislation pertaining to child welfare programs falls short, the provisions for kinship care under ASFA indicate an attempt to provide a middle ground between promoting reunification at all costs and the rapid timeline-determined TPR requirements.310 The development of federal kinship care policies in the public sphere indicates that, while health and safety of a child is always of the utmost importance, a child’s connection to family and his or her psychological development is important.311 In this view, kinship care is a step toward the goal of “build[ing] an America...where every child has the opportunity to live in a safe, a stable, a loving, and a permanent home.”312

Legislation falls short of congressional intent to help troubled families in part because of considerations about the incentives and disincentives created by funding initiatives. Concerns about this balance are particularly acute in the debate over kinship foster care. The government is concerned that kinship foster care may create an incentive for parents to abandon their children so that kin can get foster care payments that are much higher than TANF payments.313 A concern of potentially greater magnitude is that higher foster care payments may provide an incentive for private kinship caregivers to become part of the public child welfare system, applying for

308 See Harvey, supra note 9, at 3.
310 See O’Laughlin, supra note 99, at 1456.
certification as foster parents.\textsuperscript{314} Some private kinship caregivers may have valid service access and monetary concerns that might reasonably motivate them to become licensed foster care providers. As foster parents, they can find and fund services that are otherwise beyond their means to access, such as counseling for the abused and neglected children in their care. But there is no evidence to suggest such decisions are being made on a large scale. Furthermore, trying to limit the number of foster care families by not providing any assistance to private kinship families seems illogical.

ASFA expressly recognizes that guardianship, for children in kinship care and other types of care arrangements, may be an appropriate permanency option for some children.\textsuperscript{315} However, under this Act, guardianships do not qualify for incentive payments, or for federal matching funds available for most special needs adoptive placements in the public child welfare system.\textsuperscript{316} Although the ASFA funded nine Assisted Guardianship/Kinship Permanence demonstration projects, the federal government is wary of such programs.\textsuperscript{317} Federal policy reflects the fear that guardianship will supplant adoptions as the preferred permanency option for children who cannot return home, and that guardianships are not as safe and stable as adoptions.\textsuperscript{318} These fears have not been borne out by actual practice in states that have had large subsidized guardianship programs for many years, such as Illinois.\textsuperscript{319} Nonetheless, guardianship continues to be a permanency goal that is second to adoption under federal policy.\textsuperscript{320} The Secretary's Report to Congress recommends delaying expansion of subsidized kinship guardianship until the results of these demonstration projects are available.\textsuperscript{321} According to the DHHS, relatives should be encouraged to adopt the children in their care if reunification is ruled out (presumably regardless of cultural and personal preferences).\textsuperscript{322}

Federal (IV-E) funding policies require that adoption and reunion with the biological parents be ruled out prior to permitting participation in the Assisted Guardianship/Kinship

\begin{footnotes}
\item[314] See Report to Congress: Part 1, supra note 1, at 21-22.
\item[316] See id.
\item[318] See Nat'l Conf. of St. Legis., supra note 315.
\item[319] See id.
\end{footnotes}
Permanence demonstration projects. Some projects are reserved for children above a certain age, and all are of limited duration. Interestingly, although ASFA makes adoption the priority, and MEPA, as amended, provides that programs receiving federal funding may not consider race and ethnicity when seeking adoptive and foster parents, at least one Assisted Guardianship/Kinship Permanence demonstration project is intended to be a “cultural correction.” This project provides assisted guardianships for some children in Tribal custody since some tribes are reluctant to terminate parental rights, and for cultural reasons, limit the availability of adoption. However, it does not appear that the federal government is inclined to grant any additional waivers that would be used primarily to fund subsidized guardianships.

State-level Interventions

Despite the influence of federal policy on kinship care, federalist tradition intentionally “tries to avoid impinging on states’ discretion in setting up their child welfare systems.” Accordingly, federal child welfare policy and guidance is vague, presumably giving states latitude in determining how and when to support kinship caregiving. States may, for instance, create programs to involve kin before a family is in crisis and a child must be removed from the home. Of course, the problem for states, especially those with disproportionately high poverty rates, is that they often do not have the financial resources for programs without supplementation from the federal government. State legislators are left the onerous task of creating solutions that meet the needs of private kinship families that are not costly. Thus, states also must look to self-sustaining programs and legal remedies. As reflected by the abundance of new and recently revised state statutes affecting kinship care, both state legislatures and state judicial systems are
actively pursuing alternative approaches to improve the situations of children living in kinship care.

Adoption

As noted previously, adoption is not an acceptable option to most kinship caregivers for personal or cultural reasons. Kinship caregivers often carry the hope that someday the parent will be able to care for the child.331 Most believe adoption is unnecessary because they are already members of the same family.332 Children over ten years of age will often not consent to adoption by kinship caregivers when they already have established relationships with both the caregivers and their parents. States have tried to respond to the needs of kinship families by creating new adoption laws. Usually, only by adopting can the kinship family receive subsidies for children with special needs. States are trying to make adoption more palatable for kinship families by promoting more flexible adoption agreements, such as those that allow parents to visit, call, or write, even though legal custody is transferred irrevocably to the kinship caregiver.333

Kinship Care Programs

State child welfare policies regarding supervision and support of kinship placements for those children not taken into custody vary considerably.334 In some states, there is no formal assessment process or support for non-custody caregivers, and fewer than one-half conduct background checks on kin or perform a homestudy.335 Some state child welfare agencies are reluctant to reach out to private kinship families out of fear that their service needs may be too great.336 Thus, private kinship caregivers, who are not involved with the state child welfare agency, may be in dire need of affordable legal assistance, respite care, and special medical, psychological or other services for the children in their homes.337

Only few states have formalized programs available to private kinship families.338 For instance, Illinois has a state funded “Extended Family Support Program” that provides families

331 See Report to Congress: Part I, supra note 1, at 49. See also Schwartz, supra note 4.
332 See id. See also Hochman, supra note 10, at 13.
333 See Debra Ratterman Baker, Kinship Care and Permanency Planning, CHILDREN'S LEGAL RTS. J., Summer/Fall 1995, at 33.
334 See LEOS-URBEL, BESS, & GEEN, supra note 6, at 26.
335 See id.
336 See LEOS-URBEL, BESS, & GEEN, supra note 6, at 10.
338 See LEOS-URBEL, BESS, & GEEN, supra note 6, at 32.
with a caseworker for three months, assistance in getting aid, assistance in attaining 
guardianship, and access to limited funding for basic needs. Participants of Florida's "Relative 
Caregiver Program" are eligible for payments from TANF, as well as Medicaid, child care, and a 
clothing allowance, provided that they are approved through a homestudy and record check.
Wisconsin's "Kinship Care Program," primarily providing financial assistance, is not limited to 
children whose placement has been arranged by a court or other public agency; instead eligibility 
is determined by statutory criteria indicating the child meets or is at risk for receiving protective 
services.

**Consent Affidavits & Standby Guardianship**

Recognizing that parents should not be able to hold up medical care or educational 
decisions because they disagree with the primary caregiver or because they cannot be located, 
many states have enacted legislation to establish alternative legal relationships between the 
kinship caregiver and child. Several states have enacted medical and/or educational consent 
laws. Most of these laws require parental consent, although some states, such as in California 
and Delaware, include a provision stating that if reasonable efforts are made to locate the parent, 
the signature of the parent is not required on the affidavits. In addition, a growing number of 
states have enacted "standby guardianship" laws, which may apply to kinship care arrangements 
when the parent consents to kinship guardianship in the event of a specified future triggering 
event, such as incapacity.

**Custody**

In custody disputes between divorcing parents, the child’s relationship with the 
noncustodial parent is considered a positive factor in the child’s development that should be

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339 See id.
341 See Leos-Urbel, Bess, & G een, supra note 6, at 32.
342 See Schwartz, supra note 4.
345 See id.
encouraged and facilitated. If applied to kinship caregiving situations, one would expect the same presumption to apply. That is, judges would issue similar orders requiring visitation by the parents even when doing so creates inconvenience and instability for the caregivers, parents, and children. In fact, many states permit third party intervention in custody disputes under certain circumstances. In these cases, the court may transfer custody to the caregivers, while the parent retains residual rights such as being recognized as the legal parent of the child, the right to visitation, the right to consent to adoption, and the duty to pay support. Private actions for custody recognize that "parental unfitness does not necessarily negate children's bonds with their parents, and therefore does not conclusively determine children's interests in maintaining contact with their biological parents."

A recent innovation in custody law is "de facto custodianship." De facto custodianship laws have been enacted in Kentucky and Indiana, and the Michigan legislature is currently considering a similar statute. These laws do not require a finding of parental unfitness per se. Instead, they define specific objective criteria that must be proved by clear and convincing evidence for the de facto custodianship to be legally recognized. De facto custodianship laws essentially give legal recognition to already established caregiving arrangements. In disputes between a parent and a de facto custodian, the child's best interest controls. A parent may regain custody or share it with the de facto custodian, so long as it is in the child's best interest.

Like other custody laws, de facto custodianship laws are directly applicable in paternity and divorce actions. In both Kentucky and Indiana, a judge may appoint a guardian ad litem in these cases depending on the facts of the case; however, a homestudy and counseling report is always required in Indiana. The law in Kentucky was enacted as a response to numerous

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346 See id. at 129-130.
347 Baker, supra note 333, at 33.
348 See Roberts, Is There Justice in Children's Rights, supra note 27, at 130.
350 The criteria require the potential de facto custodian to have "been the primary caregiver for, and financial support of, a child who has resided with the person for at least: (1) six months if the child is less than three years of age; or (2) one year if the child is at least three years of age." IND. CODE § 31-9-2-35.5 (1999); KY. REV. STAT. ANN. § 403.270 (Michie, 1998).
351 IND. CODE § 31-9-2-35.5 (1999); KY. REV. STAT. ANN. § 403.270 (Michie, 1998).
352 Telephone interview with Michael Davidson, Chair-Elect Family Law Section, Kentucky Bar Association (November 27, 2000); Telephone interview with Laurie A. Lazrick Bigsby, Chair Family and Juvenile Law Section, Indiana State Bar Association (December 7, 2000); KY. REV. STAT. ANN. § 403.270 (Michie, 1998); IND. CODE § 31-9-2-35.5 (1999).
353 Id.
children being left with grandparents.\textsuperscript{354} In Kentucky, de facto custodianship provides the
caregiver with greater powers and protection than does the state's guardianship law, putting the
de facto custodian on "equal footing with the parent."\textsuperscript{355} In Indiana, an action for de facto
custodianship must be in connection with a divorce or paternity action. However, in practice the
criteria for de facto custodianship are, nonetheless, applied ("bootstrapped") in a guardianship
context to show "unfitness" or general neglect.\textsuperscript{356} Although a parent can regain custody under
either custodianship or guardianship in Indiana, the de facto custodian/guardian has considerable
protection in that the court looks beyond a change in parental circumstances at the moment, to
the quality of the relationship between the parent and child throughout their history, in making a
determination on the best interest of the child.\textsuperscript{357}

\textit{Private Guardianship}

Traditional guardianship laws in every state allow for consensual guardianships, usually
applied in the case of parental death, and most have provisions for guardianship in the case of
incapacity of an adult.\textsuperscript{358} Uncontested guardianships need only be necessary and convenient, and
in the best interest of the child.\textsuperscript{359} Guardianships may be created through an agreement with the
parents or through the court; however such voluntary arrangements can be revoked by the
parents if they withdraw their consent.\textsuperscript{360} The difficulty with traditional guardianship laws is that
they do not explicitly address the situation of private kinship caregivers who are caring for
children whose parents are still alive, but unavailable.\textsuperscript{361}

This limitation of traditional guardianship statutes is particularly problematic in
circumstances where the parent objects, despite being unable or unwilling to provide care to the
child. While there is a provision in the Uniform Probate Code, adopted in most states, that
permits the court to assign guardianship in cases where parental rights are "suspended by
circumstances," the phrase is too vague to be consistently applied.\textsuperscript{362} Some state courts are

\textsuperscript{354} Telephone interview with Michael Davidson, Chair-Elect Family Law Section, Kentucky Bar Association
(November 27, 2000).
\textsuperscript{355} Id.
\textsuperscript{356} Telephone interview with Laurie A. Lazrick Bigsby, Chair Family and Juvenile Law Section, Indiana State Bar
Association (December 7, 2000).
\textsuperscript{357} Id.
\textsuperscript{358} UNIF. PROB. CODE §§ 5-203-204, 5-301-304, 8 U.L.A. 171 (Supp. 1995).
\textsuperscript{359} See Harvey, supra note 8, at 3.
\textsuperscript{360} See Baker, Kinship Care and Permanency Planning, supra note 333, at 33.
\textsuperscript{361} UNIF. PROB. CODE §§ 5-203-204, 5-301-304, 8 U.L.A. 171.
\textsuperscript{362} Id.
reluctant to apply this poorly defined ground for guardianship at all.\textsuperscript{363} However, other state courts have defined “suspended by circumstances” through caselaw.\textsuperscript{364}

When guardianship law is applied to kinship care, it can be a flexible alternative, allowing the court to sometimes limit parental rights, sometimes suspend them for the duration of the guardianship, or allow for co-guardianship between the caregiver and the parent when doing so is in the best interest of the child.\textsuperscript{365} Thus, a caregiver who becomes a child’s guardian does not necessarily displace the parent. For instance, a grandmother may care for her grandchild without having to replace her daughter as the child’s mother, or cause the biological mother to lose the chance to care for the child again. When the premise of the traditional family has failed, it is important to respond to the child’s need for continuity in intimate relationships and provide the opportunity to maintain important familial relationships with more than one parent or set of parents.\textsuperscript{366} Guardianship recognizes the possibility that children can benefit from having more than one adult play a role in their upbringing.\textsuperscript{367} Furthermore, guardianship gives legal recognition to family patterns common within African American, Latino, and Native American cultures — cultures which are heavily represented within the nation’s foster care system.\textsuperscript{368}

\textit{State Subsidized Guardianship}

The availability of state-subsidizing guardianships is growing in those states that are able to fund them. At least sixteen (16) states have created subsidized guardianship programs serving kinship families of children taken into state custody.\textsuperscript{369} State guardianship subsidies are generally funded with TANF funds, and other funds provided by the states.\textsuperscript{370} States using TANF funds have to carefully define the eligible population and be prepared to use state funds to continue supporting kinship guardians should welfare caseloads increase, or should Congress decide to reduce TANF funding to the states.\textsuperscript{371} The state costs involved in these programs include the

\begin{footnotesize}
\begin{itemize}
\item \textsuperscript{363} See e.g., In the Guardianship of Sabrina Mae D., 114 NM 133, 835 P.2d 849, 855 (1992)
\item \textsuperscript{364} See e.g., In re the Guardianship of Kristopher Copenhagen and Lindsee Nelson, 124 Idaho 888, 893, 865 P.2d. 979, 984 (1993).
\item \textsuperscript{365} See Schwartz, supra note 4.
\item \textsuperscript{366} See Katharine T. Bartlett, \textit{Rethinking Parenthood as an Exclusive Status: The Need for Legal Alternatives When the Premise of the Nuclear Family has Failed}, V A. L. REV. 879, 881, 1984.
\item \textsuperscript{367} See Schwartz, supra note 4.
\item \textsuperscript{368} See id.
\item \textsuperscript{369} Ak, AZ, CA, CT, FL, HI, MA, MN, MO, NE, RI, SD, UT, WA, WV, & WI. See GENERATIONS UNITED, GRANDPARENTS AND OTHER RELATIVES RAISING CHILDREN: SUBSIDIZED GUARDIANSHIP PROGRAMS, 1-4 (2000).
\item \textsuperscript{370} See Nat’l Conf. of St. Legisl., supra note 315.
\item \textsuperscript{371} See id.
\end{itemize}
\end{footnotesize}
monthly maintenance payment (which is either in between the foster care rate and TANF child-
only grants, or equal to the full foster care rate), and administrative costs.\footnote{372} State funds allow the
greatest degree of flexibility for subsidizing guardianships, but many states are reluctant to make
such a long-term financial commitment.\footnote{373}

The vast majority of state subsidized guardianship programs are not available to private
kinship caregivers. Only two states, Louisiana and Missouri, have subsidy programs for kinship
caregivers that do not require that the child to have been in state custody.\footnote{374} Making greater use
of subsidized guardianship and support services for these families could reduce the numbers of
children in foster care and offset the greater administrative costs of that program.\footnote{375}

\begin{center}
\textit{Programs for Grandparent Caregivers}
\end{center}

Grandparents and advocacy groups are making strides to help older kinship caregivers.
Over 700 neighborhood-based organizations of grandparents nationwide have organized to
provide support and to lobby for expanded rights and financial support for grandparent
caregivers.\footnote{376} The National Family Caregiver Support Program, a section of the Older Americans
Act Amendments of 2000, signed by the president on November 13, 2000, will also aid older
kinship caregivers.\footnote{377} This added section includes language making grandparents and other older
relative caregivers eligible to receive supportive services, including respite care. On a state level,
the Illinois Department of Aging is developing two programs that will benefit older relative
caregivers: 1) a collaborative program with Illinois Department of Children and Family Services
and the Loyola University - Chicago Child/Law Center to provide confidential mediation to help
parents and grandparents develop a care and protection plan for the children; and 2) a model
legal assistance program in partnership with the local county clerks' office and a non-profit
organization.\footnote{378}

\begin{footnotes}
\item[372] See Nat'l Conf. of St. Legis., supra note 315.
\item[373] See id.
\item[374] See "Kinship Care Subsidy Program," LA STAT ANN 46:237 (West 1992, & Supp 2000); "Grandparents as
\item[375] See Schwartz, supra note 4.
\item[376] See Lynette Clemenson, NEWSWEEK, June 12, 2000, at 60, 60. A database is maintained by AARP Grandparent
\item[378] Generations United: Legislation & Programs, supra note 344.
\end{footnotes}
VII. Conclusions & Recommendations

In enacting child welfare legislation, Congress has said "that the child's interests are paramount." Yet, in 1997, one year after welfare reform was enacted, 400,000 more children were living below one-half of the poverty line than in 1995. Between 1996 and 1998, approximately 643,000 children lost Medicaid coverage. "Congress's (sic) deed would be true to its words if the child welfare system actually put children first." Children need "an aggressive, pro-active policy that supports families in crisis with preventative services that will enable children to remain in their homes under the care of their parents." At the very least, the child welfare system should take steps to avoid disrupting children's ties to extended family members, communities, and culture.

Parental "failures" often reflect systemic injustices, most especially the pressures of poverty, which available services do nothing to reduce. In the case of the poor in particular, "we tolerate permanent separation of children from their families even though we have not seriously considered making meaningful efforts to ameliorate the conditions that precipitated their placement in the first place." Noting how large and pervasive the problem of poverty is, Harvard Professor Elisabeth Bartholet advocates a position which, she admits, does not address the root causes of child maltreatment. In Forgotten Children she explains:

[W]e can predict that profound social and economic reform is not on the horizon and we can also predict that our society will continue to scrimp on the support services that it makes available to poor people, including those at risk for child maltreatment.... Therefore "we should instead use coercive measures...to shield children...and give them the opportunity to grow up in nurturing homes."

379 See Gordon, supra note 165, at 669.
382 See Gordon, supra note 165, at 669.
383 See Negrau, supra note 112, at 17.
384 See Gordon, supra note 165, at 700.
385 See Guggenheim, supra note 2, at 1744.
386 BARTHOLET, supra note 128, at 235.
387 Id. at 238.
388 Id. at 238-239.
Although Professor Bartholet's pessimistic view may be accurate in today's political climate, we are still a nation that values freedom; therefore we must be cautious in the use of coercive tactics, even when meant to advance the well-being of children. There are more reasonable and less drastic alternatives.

Consideration for safety of children and the relative rights of the parties involved is certainly important. However, we must also give significant weight to the well-being of children over time. While there is currently no research on the long-term health and well-being of children placed outside the home in various living arrangements, there are some indications that variables such as permanence, race, ethnicity, culture, and developmental age have long-term consequences. Until there are better outcome studies, we need to use generally available information and common sense in making policy and designing programs. Taken together, these factors indicate that children would benefit from policies that assist willing kinship caregivers in providing good care.

State assistance for health care, day care, respite care, and other needs should be made available to families who are doing more than their fair share to raise society's children. We need to expand the scope of those who receive services beyond the category of "unfit families." Caregivers, the children, and society would all benefit if policies and programs intended to help traditional parent-child families in times of need could be extended to private kinship families. In addition, child welfare agencies working with relatives caring for children, need laws that will aid in supporting these caregivers. Moreover, specific policies, programs, and services supportive of private kinship families are needed to serve the best short- and long-term interests of children.

As is beginning to be seen through state legislative and legal innovations, we can address the needs of kinship care families in a cost-effective manner. Kinship care, both private and public, is an extremely important tool for sustaining and enhancing the well-being of children who cannot be cared for by their parents. Even if there were enough non-kin adoptive parents and foster care homes, kinship care has the potential of providing much more in terms of connection to one's family and community. It is premature to implement policies that break these

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389 See Report to Congress: Part I, supra note 1, at 41.
390 See id. at 27-29.
391 Guggenheim, supra note 2, at 1748.
connections without evidence that doing so is truly in the best interest of children over time. In order to fairly compare options, it is essential that kinship care families receive support similar to other families. The only reasonable solutions lie in continuing to develop alternative interventions, while also using resources of the formal child welfare system to strengthen and support, not replace, the informal caregiving system.\textsuperscript{393}

\textsuperscript{393} See Guggenheim, supra note 2, 1748-1750