RELATIVES CARING FOR CHILDREN: CHARTING THE LEGAL OBSTACLES

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INTRODUCTION

Numerous state and federal laws govern kinship (non-parental or relative) care of children. Federal laws are mainly concerned with assistance to families and with child welfare. State laws provide more governance in these areas and also almost exclusively govern family custodial issues. Yet, together both the federal or state bodies of law do not comprehensively address the range of legal issues that burden kinship families. States and federal laws still need to enact laws that provide more legal rights and assistance that will empower kinship families to successfully care for children.

In this article, we attempt to outline the "rights" of kinship families. These rights divide into two core areas where kinship laws remain incomplete: 1) the opportunity to care, and 2) enabling caregivers to successfully care for children.

Most kinship caregivers are grandparents. According to the last U.S. Census Bureau statistics, there are 6.1 million grandparents whose grandchildren are living with them, comprising 8% of all children in the United States. [2, 3] Of these families, 2.5 million grandparents are primarily responsible for food, clothing and shelter of one or more of the grandchildren living with them (*op. cit*).

In addition to full time care, grandparents and other relatives are the backbone of child care. Astonishingly, relatives regularly provide childcare to ***almost half*** of the more than 19 million preschoolers, according to tabulations released recently by the U.S. Census Bureau.[4] Among the 11.3 million children younger than 5 whose mothers were employed, 30 percent were cared for on a regular basis by a grandparent during their mother's working hours.[5] A slightly greater percentage spent time in an organized care facility, such as a day care center, nursery or preschool. Meanwhile, 25 percent received care from their fathers, 3 percent from siblings and 8 percent from other relatives when mothers went to work. Another 78,000 households in 2000 consisted of three generations: parent, child and grandchild.[6] Many of these grandparents, who are part time caregivers now, may become full time caregivers in the future.

Relative caregivers, particularly grandparents, are shouldering unanticipated burdens when they undertake the full time task of raising children.[7] These caregivers may be working[8] or retired, living on fixed incomes such as social

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[1] The author acknowledges that this article is often rooted in New York State laws. However, references to other state laws are numerous and generalizations are based on surveys of laws from many if not all states, augmented with references to federal laws that are universally applicable.

[2] There are 74 Million children in the US, 2008 Census Data.

[3] Source: AARP Fact Sheet, http://www.grandfactsheets.org/state_fact_sheets.cfm

[4] U.S. Census Bureau News, press release CB08-31, February 28, 2008, Nearly Half of Preschoolers Receive Child Care from Relatives, at http://www.census.gov/Press-Release/www/releases/archives/children/011574.html

[5] Ibid.

[6] U.S. Census 2000, "Multigenerational Households for the United States, States, and for Puerto Rico: 2000" (PHC-T-17), http://www.census.gov/population/www/cen2000/briefs/phc-t17/index.html.

[7] Source: "Grandparents raising grandchildren requires personal sacrifice (StreetWise, USA)" Ben Cook, Streetwise news service, at http://www.streetnewsservice.org/index.php?page=archive_detail&articleID=2467: "There are a number of factors that lead to grandparents and other relatives providing care for children, often with little or no warning or preparation. These include: Alcohol and Drug Abuse, Neglect, Abuse, and Abandonment, Death of a Parent, HIV/AIDS, Divorce, Unemployment/Poverty, Parental Incarceration, Teen

security or pensions;[9] they may live in restricted housing for the elderly or in their own homes or apartments;[10] they may be young or elderly, or live with a disability.[11] Most have experienced debilitating family tragedies, either because of the death or incarceration of the child's parents,[12] or the consequences of substance abuse or disability of a family member. Many must leave their jobs in order to become full time caregivers - approximately 48% of all family caregivers were employed full time.[13] Additionally, many grandparents and fathers were the primary sources of childcare when mothers went to work.[14] And some are raising children who were orphaned by catastrophes or the loss of a parent who was killed in the Iraq and Afghanistan wars.[15]

Most often, children come to live with relative caregivers because their parents abused, neglected or abandoned them, or their parents are alcohol and/or substance abusers, are deceased, mentally ill or unable or unwilling to parent.[16] Many kinship children face special challenges including higher rates of developmental disabilities,[17] emotional problems,[16] physical and learning disabilities,[18] bereavement issues, attachment disorders and parental alienation.[19]

Although the causes leading to kincare are similar to the causes that place children in foster care, most of the caregivers are not foster parents and therefore do not receive the services that a "formal" foster family would receive. This informal system, which cares for *ten to fifteen times more* children than the "formal" system, is a natural complement to the formal foster care system, yet it receives a fraction of the attention afforded the public system.[20]

Kinship families also confront special circumstances that are unique to their family dynamics. The children's parents frequently remain involved either directly or peripherally with the children, although not in a parental role. The children themselves face extraordinary psychological, social and physical barriers. The caregivers are frequently older and ill-prepared to parent children with special needs. These special challenges need special solutions. However, kinship families in every state face a range of problems in obtaining services to meet their challenges.

Yet, despite the mountain of hurdles facing kinship families, children raised in kinship families generally have better outcomes than children in foster care.[21] Research indicates that kinship caregiving saves taxpayers billions of dol-

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Pregnancy, Welfare Reform…"

[8] 1.4 million grandparent-caregivers are in the labor force, op cit.

[9] According to the census bureau, 477,000 of the grandparents responsible for raising grandchildren are living at or below the poverty level. The median household income in a grandparent-caregiver household when a parent is present in these homes is $42,111, and falls to $31,405 when a parent is not present.

[10] Source: The Gerontologist, "Housing Issues and Realities Facing Grandparent Caregivers Who Are Renters", Esme Fuller-Thomson, PhD[1,] and Meredith Minkler, DrPH, (2003), http://gerontologist.gerontologyjournals.org/cgi/content/abstract/43/1/92

[11] 730,000 of grandparents caring for children are living with a disability, US. Census Bureau, op cit.

[12] See, The Compassionate Friends website, at http://www.compassionatefriends.org/

[13] National Alliance for Caregiving and AARP. Caregiving in the U.S. Bethesda: National Alliance for Caregiving, and Washington, DC: AARP, 2004.

[14] Source: "Who's Minding the Kids?" Child Care Arrangements: Spring 2005 <http://www.census.gov/Press-Release/www/releases/archives/children/011574.html>

[15] Source: AARP.org, "Help for Grandparents Raising Orphans of War", Christopher J. Gearon, May 2008, at http://www.aarp.org/family/caregiving/articles/iraq_vets_benefits_change.html, estimated to be around 249.

[16] Smithgall, C., Mason, S.. Michels, S., LiCalsi, C., & Goerge, R. (2006). *Caring for their children's children: Assessing the mental health needs and service experiences of grandparent caregiver families*. Chapin Hall, University of Chicago.

[17] Kinney, J., McGrew, K., Nelson, I. (2003). *Grandparent Caregivers to Children with Developmental Disabilities: Added Challenges*. New York: Springer Publishing Company.

[18] A study conducted in 1994 found that 70 percent of grandparents reported caring for a child with one or more medical, psychological or behavioral problems. Lai, D. & Yuan, S. (1994). Grandparenting in Cuyahoga County: A report of survey findings. Cleveland, OH: Cuyahoga County Community Office of Aging.

[19] "Over a quarter of the caregivers (27.5%) indicated that the child had a disability." Gleeson et al. (2008). Individual and social protective factors for children in informal kinship care. Jane Addams College of Social Work, University of Illinois at Chicago.

[20] In 2006,NYS upstate counties averaged 4.4 percent children in kinship foster care; NYC averaged 28 percent. *See* Office of Court Administration's "The Child in Child Welfare" for county percentages of children in foster care in Appendix F and in graphs of p.12. The NYS 2008-09 Executive Budget increases general funding for child welfare by $153.7 million to 619.3 million. Gross program costs for preventive services alone in 2008-09 will exceed $1 billion. FY 2008-09 Budget Highlights, NYSOCFS, Jan. 21, 2008.

[21] Journal of Pediatric and Adolescent Medicine, June 2008.

lars. Conservative estimates suggest that if even half of the two million children being raised by relatives without parents in the home were to enter the foster care system, it would cost taxpayers $6.5 billion a year.[22, 23]

In spite of these considerable savings to government, and the even greater saving to society, relative caregivers are continually confronted daily with the unintended effects of inadequate social policies, poorly crafted public benefit regulations, and laws that were never designed to accommodate caregivers who are raising children in the absence of the children's parents.

In addition to the special challenges faced by children in kinship families, adult caregivers, especially grandmothers, are more prone to stress and depressive symptoms than non-caregivers, according to the latest research of Ohio grandmothers by Case Western Reserve University's Frances Payne Bolton School of Nursing,[24] sponsored by NIH. Studies have found that caregivers may have increased blood pressure and insulin levels, may have impaired immune systems,[25] and may be at increased risk for cardiovascular disease[26] among other adverse health outcomes. Kinship care is a subset of all family caregiving and like all caregivers, many caregivers are themselves in poor health; studies show that approximately one-third of caregivers provide intensive levels of care although they are themselves in "fair to poor" physical health.[27, 28]

CHARTING THE OBSTACLES

Based on interviews with over five thousand relative caregivers and with numerous professionals in the public assistance, child welfare, and legal systems, we have identified legal obstacles to the care of children by relatives – obstacles that interfere with affording relatives the opportunity to care and enabling them to care.

In attempting to understand the obstacles faced by kin who want to care for children, individuals and service providers are confronted with the inconsistencies of state statutory, regulatory, and case law (as well as intra-state inconsistencies).

Some generalizations are possible. All states protect parental autonomy; all states attempt to empower non-parents to care for children; and all states try to use kin to care for children who are abused, neglected or abandoned. Pursuant to federal law, states prefer placement of children with kin;[29] some states facilitate foster parent certification for kinship caregivers; some offer other alternatives that are often funded by Temporary Assistance to Needy Families[30] (TANF, i.e., public assistance) Federal block grants to states.[31] However, how these policies are implemented in the

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[22] 2000 Green Book, Committee on Ways and Means, U.S. House of Representatives.

[23] For every child who enters foster care, a yearly computation of costs would include direct foster care payments plus administrative costs for foster care, plus reunification efforts cost, plus court proceedings costs (judge, court personnel, attorneys, experts), plus appeals, and plus additional services to the child. The final figure is difficult to estimate but is clearly exceeds the cost of foster care payments plus roughly $15,000 per year per child (in NYS for example). Therefore the cost of one child in foster care is roughly at least $20,000, with costs escalating if the child has special or extraordinary needs. Bottom line, 100 children in informal kinship care who enter foster care will cost two million dollars per year.

[24] Source, "Grandmothers Caring for Grandchildren Prone to Stress, Depression", in Senior Journal.com, at http://seniorjournal.com/NEWS/Grandparents/4-11-12GrandmotherStress.htm (2004)

[25] Kiecolt Glaser, Ja., and R. Glaser. Chronic Stress and Age-Related Increases in the Proinflammatory Cytokine IL-6. In proceedings of the National Academy of Sciences, 2003.

[26] Lee, S, G.A. Colditz, L. Berkman, and I. Kawachi. 2003. Caregiving and Risk of Coronary Heart Disease in U.S. Women: A Prospective Study. American Journal of Preventive Medicine 24: 113-119.

[27] Navaie-Waliser, M., P.H. Feldman, D.A. Gould, C.L. Levine, A.N. Kuerbis, and K. Donelan. 2002. When the Caregiver Needs Care: The Plight of Vulnerable Caregivers. American Journal of Public Health 92:409-413

[28] Health and Human Services. Informal Caregiving: Compassion in Action. Washington, DC: Department of Health and Human Services. Based on data from the National Survey of Families and Households (NSFH), 1998.

[29] 42 U.S.C. §5106 (a)(4), "…The Secretary may award grants to public and private entities in not more than 10 States to assist such entities in developing or implementing procedures using adult relatives ***as the preferred placement*** for children removed from their home,…"

[30] CFR Title 45, Subtitle B, Chapter II, Part 260, §§260.1-260.76.

[31] 42 U.S.C §603 et seq.

real world is rife with incongruities, inequities, and ineffective practices. [32]

A FAMILY RIGHT TO CARE

Parents have a long established constitutionally protected (natural) fundamental right to the care, custody and upbringing of their own children. [33] Other relatives can only proceed to seek visitation or custody under statutes that declare the "right" to petition a court, and in every instance of such a statutory right, the protection of parental rights mandates special protection. For instance, in visitation, most states limit standing to grandparents and siblings and then add limitations on the circumstances when such petitions address the interests of children.

Regarding state control of children, despite state preferences, a systemic lack of acknowledgement that relatives have a right to care for children when parents cannot contributes to the reality that too often relatives are not given the chance to care for children. While entrenched prejudices against kin are waning, kin must still confront frontline staff, judges, and local public agencies that do not support their efforts to care for children.[34]

Official policies are insufficiently vigorous in support of kin. For example, when a child is removed from the parental home because of parental abuse, neglect or abandonment, until recent federal enactments, child welfare laws usually did not mandate notification to grandparents that their grandchildren were the subjects of a judicial proceeding. Child welfare laws did not require that a grandparent who discovers that a grandchild is being placed in foster care be informed that within a relatively short period of time after placement, the child will be eligible for adoption by the foster parents. Critically, in comparison to the state agency, kin have an inferior right to children who are in state care. Placement is entirely at the discretion of governmental authorities. On the other hand, child welfare officials do enlist relatives to care for a child but often fail to inform those relatives that they could become foster parents and thus obtain foster care payments to help them care for the child. In sum, federal and state laws declare a "preference" for kin as caregivers, but do not mandate the opportunity to care or establish a right to care.[35] And despite recent mandates about notice to kin, in many jurisdictions there are still widespread de facto policies to dissuade kin from becoming foster parents.

THE OPPORTUNITY TO CARE

Subservient to a "parent's right to care" or the state's *parens patriae* power is the "best interests of the child." Kin who seek to become caregivers must attempt to remove children from the care and control of parents or from the state by first leveling the special barriers protecting parents or state agencies and then addressing the "best interests" of children.

Usually kin seek removal from parents because they are convinced that children are at risk of physical or emotional

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[32] Signed by President Bush on October 7th, 2008, the "Fostering Connections to Success and Improving Adoptions Act" (HR 6893, 110th Congress, 2nd Session) enacts many state child welfare practices, including notice of removals to all grandparents, waivers from non-safety requirements for foster care certification, and mandated notice within thirty days, and subsidies for kin exiting foster care. See Center for Law and Social Policy http://www.clasp.org/publications/FINAL-FCSAIAAct1-pager.pdf for discussion of federal laws.

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

[34] In a recent New York AARP study, the "Cost of legal services is considered by nearly half of respondents as the greatest barrier keeping kin caregivers from accessing legal and judicial systems for minors in their care.… More than nine in ten say that providing legal representation to low-income caregivers would have the greatest effect on increasing access. More than eight in ten suggest that training for judges and court personnel on kin care issues would greatly reduce legal and judicial barriers.", see "Grandparents Face Obstacles in Raising Grandchildren", Senior Journal.com, at http://seniorjournal.com/NEWS/Grandparents/4-11-16GrandparentObstacles.htm

[35] 'Debbie Burkart, Vice President of Supportive Housing for National Equity Fund, Inc. (NEF), which funds affordable housing, believes that "grandparents are falling between the cracks. *You can't do a seniors' building with any resident children. You can't get the grandparents food stamps because they aren't legal guardians, and if they become legal guardians they have another set of rules to contend with.* We are dealing with the homeless youth of America, and we don't recognize our greatest resource."' From "Grandfamilies, An Unsupported Safety Net", By Bobbi Pinkert, at Next American City (online magazine), at http://americancity.org/magazine/article/grandfamilies-pinkert/

harm. In instances when child welfare authorities will not intervene in a problematic family situation, the protections afforded parents from state interference can create high hurdles for relatives who seek judicial assistance in removing a child from a dysfunctional home. The fundamental liberty interest of parents is protected by statutes and case laws that erect formidable barriers. In many circumstances when children are in state care, there is no presumption that a child's interests are served by placement with family; thus, there is no family right to care. Judges and child welfare officials have no legal obligation to place children with relatives - even relatives who are already certified foster parents. Against parents, it is understandable that families have inferior rights, but against the state the reasoning for inferiority disappears.

GRANDPARENT VISITATION

Another situation that can be characterized as an "opportunity" to care is grandparent visitation. All 50 states have grandparent visitation rights statutes on the books,[36] and a few have great-grandparent rights or relative rights provisions. [37] Albeit in conformity with parental protections, there are threshold tests, statutory conditions, and entrenched resistance. Only after hurdling such barriers does the language and intent of these statutes uniformly invoke a child's best interests.

At that juncture, the "best interests" standard remains the unchallenged *sine qua non* of family law. It says that what really matters is the child's interests, and there exists at most a rebuttable presumption that the parents know best.

Justifying the threshold defenses is a long line of constitutional decisions establishing parental rights and the relationship between parent and child as constitutionally protected, in essence deriving from natural law.[38] A court cannot intervene to usurp a parents' right to determine what is in their child's best interests absent from showing that the parent is unfit or that the visitation is clearly in the child's best interests.

Because the relationship between grandparent and grandchild is so important, all fifty states now have statutes addressing grandparent visitation rights. These statutes, however, are far from uniform and many of them are poorly drafted. They often require a particular event to occur before grandparents are allowed to even file a petition for visitation rights. However, no state actually provides grandparents with a "right" to visit their grandchildren, with a few

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

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

[38] see fn 33.

exceptions.[39]

In June 2000, the U. S. Supreme Court in *Troxel v. Granville,* 530 U.S. 57 (2000) declared a Washington State visitation statute to be unconstitutional, because the wording was held to be overly broad and did not accord sufficient deference to the parent's normally overriding interest in childrearing decisions. In other words, it held the balance of interests favored the side of parental rights to the upbringing of children. However, the decision did not declare all grandparent visitation statutes to be unconstitutional - just the Washington State statute, which was not just a grandparent visitation statute. The opinion declared that states may enact laws that permit grandparents to seek visitation, so long as "a parent's estimation of the child's best interest is accorded [sufficient] deference."[40]

Notwithstanding a fit parent's right to the care and custody of their children, courts have always retained the power to usurp a parent's rights, in cases, for example, of child abuse, abandonment or neglect, in the interests of the child. Indeed, in *Prince*, and in *Quillon* the Court did just that. In most of the state statutes, numerous factors are specified to guide state courts on what elements should be considered in granting grandparent visitation, such as length and strength of the relationship, whether the grandparent's influence would undermine the family or not, and so forth.

In *Troxel*, the Court held that a fit parent's estimation of what was in the child's best interests was to be accorded "special weight." *Troxel* did not facially vitiate the child's best interest standard. It only applied a heightened standard to overruling a parent's choices regarding the upbringing of their children. It held that the discretion of a court to overturn a parent's decisions in *Troxel* was "virtually unbounded," and therefore incorrectly infringed on a parent's constitutional rights. Thus in many states these statutes have been ruled unconstitutional as applied. But in many states in which courts have ruled them unconstitutional post-*Troxel*, legislatures have not seen fit to revise or repeal provisions that are viewed as remaining *facially valid.* In others they are pre-empted by revisions.

Nevertheless, many states post-*Troxel* have adopted revised standards extending stricter standards beyond *Troxel* favoring parents to rebut the presumption of a fit parent's judgment concerning grandparent visitation, and in some, for example as Massachusetts, it is required to prove grandparent visitation is "necessary to prevent significant harm" to the child.

In New York, Domestic Relations Law §72, originally enacted in 1966, has *always* provided that a grandparent has standing to seek visitation rights with a grandchild when the grandparent's child has died *(see also,* Family Ct Act § 651 [b]). (*see also Matter of Loretta D. v. Commissioner of Social Services of City of New York*, 177 A.D.2d 573, 574-5 (2nd Dept. 1991)).

In enacting DRL 72, the New York legislature clearly supported a "special role" for grandparent visitation (DRL 72. L.2003, c. 657, § 1):

> "The legislature hereby finds that…grandparents play a special role in the lives of their grandchildren and are increasingly functioning as care givers in their grandchildren's lives. In recognition of this critical role that many grandparents play in the lives of their grandchildren, the legislature finds it necessary to provide guidance regarding the ability of grandparents to obtain standing in custody proceedings involving their grandchildren…"

Ruling in *Matter of E.S. v. P.D,* 8 N.Y.3d 150 (2007), the Court viewed the *Troxel* decision as holding that constitutional considerations bar states from placing upon a parent the burden of disproving that grandparent visitation would be in the best interests of the child. Agreeing with an earlier decision from the Appellate Division, Second Depart-

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

[40] 530 U.S. 57, at 66

ment in *Matter of Hertz v. Hertz*, 291 A.D.2d 91 (2d Dept. 2002); (see also *Matter of Boden v. Jackson-Silver*, 291 A.D.2d 812 (4th Dept. 2002)), the Court of Appeals stated that, while the New York statute does not expressly require that courts give deference to a parent's decision not to permit grandparent visitation, the statute can be, and has been, interpreted to accord such deference. The Court of Appeals concluded that *Troxel* does not prohibit judicial intervention when a fit parent refuses grandparent visitation; *Troxel* requires only that the court give special weight to the parent's determination when deciding whether judicial intervention is appropriate. The Court held that, on the facts presented in *E.S. v. P.D.*, there was no constitutional violation, as the trial court did not presuppose that grandparent visitation was warranted as the jumping-off point for fact-finding and best-interest analysis.

Grandparents have been held to have standing to pursue visitation in New York under DRL §72, even in situations where a natural parent has lost their parental rights[41], or where the child has been adopted.[42]

Not all states have reacted as quickly to expand grandparent visitation rights into other situations. Moreover, the statutes differ widely on how to analyze a grandparent's visitation petition if the statute does give the grandparent standing. The majority of the statutes look to whether visitation is "in the best interests of the child," but the statutes never articulate what criteria should be used in determining if it is. Currently, only six states[43] have specific guidelines to guide the court in determining whether visitation is in the child's best interests. [44] As a result, there is much room for judicial discretion in determining whether visitation is appropriate in a given case, because an appropriate standard to determine whether visitation is in the best interests of the child usually is missing.

Even if grandparents are successful in their attempt to win visitation, they still face another major obstacle. Because grandparent visitation statutes vary from state to state, a grant of visitation in one state is not given full faith and credit in any other state. As a result, if a grandparent wins rights to visitation and the child's family moves across state borders, the grandparent's visitation rights will not be honored. Instead, the grandparent will have to try to establish standing to petition for visitation rights in the new state (which may be impossible, depending on the new state's statute and on the status of the child's family). If the grandparent is able to petition the court for visitation rights, he or she then will have to attempt to convince another court that visitation is in the child's best interests, expending even more time and money in the process.[45]

In *Hawk v. Hawk,* 855 S.W.2d 573, 575 (Tenn. 1993), the Tennessee Supreme Court ruled on a petition for visitation by paternal grandparents whose grandchild was in an intact family. Although Tennessee's statute is worded so that any grandparent may be granted reasonable visitation if it is in the child's best interests,[46] the court decided that this should not be applied to intact families.[47] The court ruled that granting visitation to a grandchild whose parents were married and fit violated the state's constitutional right to privacy in parenting decisions. (*Id.*) Although the court did not directly address the issue, in a footnote the court declared that the "state has a stronger argument for court intervention to protect the extended family when the nuclear family has been dissolved." (*Id.*) The court did not state why this was so.

Emmanuel[48] set out the standards in New York for court analysis when assessing whether an equitable situation exists that would justify state intervention: (1) the strength of the family and the nature and bias of the parents' objec-

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[41] *Ann M.C. v. Orange County Dept. of Social Services,* 250, A.D.2d 190, 682 N.Y.S.2d 62 (1998)

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

[43] FLA. STAT. ANN. ch. 752.01 (West Supp. 1995); NEV. REV. STAT. ANN. § 125A.330 (Michie 1993); N.H. REV. STAT. ANN. § 458:17-d (Butterworth 1992); N.J. REV. STAT. § 9:2-7.1 (West Supp. 1994); N.M. STAT. ANN. § 40-9-2 (Michie 1994); OHIO REV. CODE ANN. §§ 3109.051, 3109.11-.12 (Anderson Supp. 1994).

[44] *Grandparents Rights: Preserving Generational Bonds: Hearing Before the Subcomm. on Human Services of the House Select Comm. on Aging*, 102d Cong., 1st Sess. 14 (1991)

[45] see fn 36, at 149.

[46] TENN. CODE ANN. § 36-6-301 (Michie 1991)

[47] *Hawk*, 855 S.W.2d at 577.

[48] *Emmanuel S. v. Joseph E.*, 78 N.Y.2d 178 (1991).

tion to visitation, (2) the nature and extent of the grandparent-grandchild relationship, (3) whether the grandparents have a "sufficient existing relationship with the child (*or have at least made a sufficient effort to establish one)*. *Animosity is not enough;* it must be coupled with "family dysfunction."" (*Gloria R. v. Alfred R.* 618 N.Y.S.2d 24 (App. Div. 1994), *Coulter v. Barbara,* 632 N.Y.S.2d 270 (App. Div. 3rd Dep't) 1995)). If there is a long lapse in grandparent-child contact, the visitation may be denied (*Matter of Amanda Sherman v. Eleanor Hughes*, 32 A.D.3d 959 (2nd Dept., 2006)) [a seven year lapse between ages 3 and 10].

POST-ADOPTION VISITATION RIGHTS OF GRANDPARENTS

Many states clearly express legislative intent to extinguish post-adoption visitation rights in the interest of preserving adoptive family integrity and privacy, and where this is the case there are express codifications to that effect. [49] Many expressly provide for post-adoption visitation. [50] *But New York does not do either*, and no such statute can be found in New York. In fact, statutory authority (DRL §72) and a well-established line of case law[51] in New York State affirms just the opposite, that post-adoption visitation rights by grandparents simply do survive, even over the objections of both parents.[52] And New York is one of the states that have liberally expressed a clear legislative determination that grandparents can play an important role,[53] in contrast with many other states, to have post-adoption contact with children. [54] In addition, New York and other states provide standing by case law[55] and statute[56] for grandparents who have been denied an opportunity to establish a relationship with the child, if they have made significant efforts to do so. In line with this regime, it is commonly held by legislative findings to be in a child's best interests to establish a relationship with a grandparent or other family member other than a parent.

Many states have secondary statutes for post-adoption grandparent visitation, and there is complete lack of uniformity between the states concerning this, in presuming an adopted child's best interests as determined by his or her adopted family.

BEST INTERESTS OF CHILD GRANDPARENT RELATIONSHIPS

While visitation isn't full time caregiving, it does involve "caring" time and is fundamentally a family rights issue.[57] Grandparent-grandchild relationships are often an essential and natural part of nurturing childhood experience that fosters "best interests":

> "Nobody can do for little children what grandparents can. Grandparents sort of sprinkle stardust on the lives of little children." Alex Haley (1992)
>
> "Without contact with grandparents, a child loses a vital and natural way to see and understand that he is part of a continuum, that he has roots, that he is the future and the hope of all those who

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[49] Arizona, A.R.S. § 8-117(A), Massachusetts, Mass. Gen. Laws Ann. ch. 119, § 39D, Florida F.S.A. §752.01, Georgia Ga. Code Ann. § 19-7-3,

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

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

[52] *In the Matter of Emmanuel S. v. Joseph E.*, 78 N.Y.2d 178 (1991)

[53] "The legislature hereby finds that…**grandparents play a special role in the lives of their grandchildren** and are increasingly functioning as care givers in their grandchildren's lives. In recognition of **this critical role that many grandparents play in the lives of their grandchildren**, the legislature finds it necessary to provide guidance regarding the ability of grandparents to obtain standing in custody proceedings involving their grandchildren….," (emph added) DRL §72. L.2003, c. 657, § 1

[54] McKinney's NY DRL §112-b

[55] *Emmanuel*, at 182.

[56] Alaska §25.20.065(a)(1).

[57] See Washington Post op-ed column in Appendix A.

preceded him.[58] Grandparents play a special role in the life of a child." [59]

> "If a grandparent is physically, mentally, and morally fit, then a grandchild almost always will benefit from contact with the grandparent. Grandparents and grandchildren often form a very special bond, each benefiting from contact with the other. From their grandparents, children learn respect, gain a sense of responsibility, and feel genuine love. Similarly, grandparents are invigorated by the exposure to youth, gain an insight into today's changing society, and avoid the loneliness which is often a part of an aging parent's life." *King v. King,* 828 S.W.2d 630, 632 (Ky. 1992).

Dramatically, grandparents who were full time caregivers may find that once children are returned to parental care, they may have difficulty seeking visitation with their grandchildren.[60] This unfortunate circumstance sometimes occurs when a single mother or a mother and her boyfriend view the grandparent as meddlesome.[61]

In one recent New York case, a maternal grandmother whose daughter surrendered her parental rights of her five grandchildren was denied a petition for return of their custody from DSS, due to lack of standing.[62] Of course, such views are often not based on actual meddling but on the emotional tumult between generations that sometimes accompanies parent and grandparent care of children. But the mere existence of conflict alone is not sufficient cause to deter grandparent visitation, because if there were no conflict there would be no need for the law. [a certain degree of animosity between the parties must be presumed by the very fact that a visitation schedule could not be worked out voluntarily, and this fact alone cannot be used to thwart the visitation contemplated by the statute].[63]

In *Lehrer v. Davis,* 571 A.2d 691 (Conn. 1990), the plaintiffs sued for the right to visit their grandchildren who were living in an intact family. The Connecticut Supreme Court concluded that the custodial rights of an intact family did not automatically preclude the granting of visitation rights to the grandparents and decided that the validity of the state statute was "not ripe for adjudication on the present record." (*Id.* at 695) Before setting the issue aside, however, the court commented on whether it was appropriate to base grandparent visitation orders on the status of the child's parents: (*Id.* at 694-95.)

> The fact that a family is intact does not guarantee the absence of child abuse. Even absent child abuse, there is no compelling constitutional requirement that the legislature must defer, in every instance, to the child-rearing preferences of the nuclear family. "To assert that, as a matter of law, a widowed, divorced, remarried, or unmarried parent is subject to greater [s]tate interference than a married parent would be to assert that the former is less fit than the latter to raise his or her own child." ... [T]he legislature may choose to recognize a public interest in affording a child access to those outside the nuclear family who manifest a deep concern for his or her growth and development.

The Connecticut Supreme Court had not yet revisited the issue of whether grandparents may petition for visitation of a grandchild in an intact family. However, the Florida Supreme Court disagreed with *Lehrer*, in another pre-*Troxel* decision, *Beagle v. Beagle*, 678 So.2d 1271, 21 Fla. L. Weekly S340, stating, "[The] [S]tate does not have [a] compelling interest in imposing grandparental visitation rights in [an] intact family over [the] objection of at least one parent, and thus, statute allowing such visitation to be imposed violated fundamental right of parents under State Constitution to raise their children except in cases where child is threatened with harm."

The Kentucky Supreme Court, on the other hand, made a conclusive determination on the issue. In *King v. King*, 828

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[58] Chairman of Subcomm. on Human Services, House Select Comm. on Aging, 102d Cong., 2d Sess., Grandparents Rights: A Resource Manual (Comm. Print 1992) [hereinafter Resource Manual].

[59] quoting 3 Elder L.J. 143, Christine Davik-Galbraith, "GRANDMA, GRANDPA, WHERE ARE YOU?"--PUTTING THE FOCUS OF GRANDPARENT VISITATION STATUTES ON THE BEST INTERESTS OF THE CHILD, Elder Law Journal, Spring 1995.

[60] *see E.S. v. P.D.*, 8 N.Y.3d 150 (2007)

[61] see *Emmanuel S. v. Joseph E.*, 78 N.Y.2d 178 (1991) *Matter of Johansen v Lanphear*, 95 AD2d 973)., quoting *Layton*, at 79

[62] see *Moorhead v. Coss*, 17 A.D.3d 725 (2005)

[63] *Lo Presti v Lo Presti, supra*, p 526

S.W.2d 630, 630 (Ky. 1992), the plaintiff petitioned for visitation rights to his grandchild, whose parents were married and living together. The Kentucky grandparent visitation statute provided that reasonable visitation rights could be granted to either the paternal or maternal grandparents of a child if it were in the best interests of the child to do so. [64] The court found that not only was the statute constitutional, but a grant of visitation was appropriate (*King*, 828 S.W.2d at 632-33). In ruling on the statute's constitutionality, the court stated that although the U.S. Constitution recognizes the right to rear children without undue governmental interference, that right is not inviolate (*Id.* at 631). The court went on to say that it is not unreasonable for the state to say that the development of a loving relationship between family members is desirable, and that the arbitrariness of the statute is obviated by the requirement that visitation be granted by a court only after finding that it is in the best interests of the child. *Id.* at 632.

Subsequently, in New York, the Court of Appeals has held that New York's grandparent visitation statute, Domestic Relations Law Section 72, passes constitutional muster. Ruling in *Matter of E.S. v. P.D,* 8 N.Y.3d 150, 831 N.Y.S.2d 96, 863 N.E.2d 100 (2007), the Court viewed the *Troxel* decision as holding that constitutional considerations bar states from placing upon a parent the burden of disproving that grandparent visitation would be in the best interests of the child.

Agreeing with an earlier decision from the Appellate Division, Second Department in *Matter of Hertz v. Hertz*, 291 A.D.2d 91, 738 N.Y.S.2d 62 (2d Dept. 2002); see also *Matter of Boden v. Jackson-Silver*, 291 A.D.2d 812, 737 N.Y.S.2d 462 (4th Dept. 2002), the Court of Appeals stated that, while the New York statute does not expressly require that courts give deference to a parent's decision not to permit grandparent visitation, the statute can be, and has been, interpreted to accord such deference. The Court of Appeals concluded that *Troxel* does not prohibit judicial intervention when a fit parent refuses grandparent visitation; *Troxel* requires only that the court give special weight to the parent's determination when deciding whether judicial intervention is appropriate. The Court held that, on the facts presented in *E.S. v. P.D.*, there was no constitutional violation, as the trial court did not pre-suppose that grandparent visitation was warranted as the jumping-off point for fact-finding and best-interest analysis.

In another recent post-*Troxel* decision, a Maryland Court of Appeal held in *Koshko v. Haining*, 398 Md. 404, 921 A.2d 171 (Md. Jan 12, 2007) (NO. 35 SEPT.TERM 2006), *reconsideration denied* (Mar 09, 2007) and took a step backwards, holding that grandparents petitioning for visitation with their grandchildren under grandparent visitation statute are first required to show *prima facie* evidence of parental unfitness or exceptional circumstances demonstrating the current or future detriment to the child, absent visitation from his or her grandparents, before a trial court applies the best interest of the child standard. It essentially reasserted the historic common law rule that held that "Grandparents do not enjoy a constitutionally recognized liberty interest in visitation with their grandchildren; rather, whatever right they may have to such visitation is solely of statutory origin implemented through judicial order."

NON-PARENTAL CUSTODY RIGHTS - AGAINST PARENTS

Citing the extended treatment in a Washington State case, *In the Matter of the Custody of Shields,* 157 Wash.2d 126, 136 P.3d 117, "[T]he "best interests of the child" standard was unconstitutional as between a parent and a nonparent because it did not give the required deference to parental rights." *Id.* at 646, 626 P.2d 16. The court explained that the best interests of the child standard is proper when determining custody between parents, but "between a parent and a nonparent, application of a more stringent balancing test is required to justify awarding custody to the nonparent. Great deference is accorded to parental rights, based upon constitutionally protected rights to privacy and the goal of protecting the family entity." *Id.* at 645-46, 626 P.2d 16. "Parental rights are balanced by the State's interest as *parens patriae* in the child's welfare and parents' rights may be outweighed when these interests come into conflict." *Id.* at 646, 626 P.2d 16. The court stated that:

> "Although the family structure is a fundamental institution of our society, and parental prerogatives are entitled to considerable legal deference, they are not absolute and must yield to fundamental

[64] KY. REV. STAT. ANN. § 405.021 (Michie Supp. 1994).

> rights of the child or important interests of the State."

Id. (quoting *State v. Koome,* 84 Wash.2d 901, 907, 530 P.2d 260 (1975)). The court in *Allen* found that the State may interfere with a parent's constitutional rights in only two instances:

> First, parental rights may be outweighed when a parent is unfit. *Id.* at 646, 626 P.2d 16. If a parent's actions threaten the child's welfare, the State's interest in protecting children takes precedence. *Id.* An unfit parent generally cannot meet a child's basic needs and, in such cases, the State is justified in removing the child from the home and, in certain cases, permanently terminating parental rights. *Id.* (examples of unfitness include the fault or omission by the parent seriously affecting the welfare of a child, preserving of the child's right to freedom from physical harm, illness or death, or the child's right to an education). [65] Second, parental rights may also be outweighed in custody determinations when actual detriment to the child's growth and development would result from placement with an otherwise fit parent. *Id.* [66]

NON-PARENTAL CUSTODY RIGHTS - AGAINST THE STATE

When a child is not in the custody of their parents, and their parents are not parties to the custodial dispute, but instead the dispute is between a non-custodial relative and a state agency or foster parents, the constitutionally protected natural rights to custody of the child have not played a significant role.

There is a family right, albeit weakly enforced, when an agency prefers that the child reside with an unrelated foster family, but the relative is a foster parent. Then, the intervening relative seeking to retain custody may be able to argue for preferential treatment based on his/her constitutional liberty interest in a relationship with the child. *A.C. v. Mattingly*, 2007 WL 894268 (S.D. N.Y. 2007) (in a suit in which infant plaintiffs allege that City's practices when removing children from kinship foster homes are unconstitutional, court concludes that plaintiffs possess constitutionally-protected liberty interest in integrity of kinship foster family unit; however, Fourth Amendment is not implicated when State, having legal custody of child, makes change in child's physical custody); *In re G.B.*, 7 Misc. 3d 1022(A), 2005 WL 1124261 (N.Y. Fam. Ct. 2005) (while granting custody of children to great-aunt and grandmother during course of termination proceeding, court notes that a blood relative's constitutional liberty interest in a child might allow him/her to prevail against an unrelated foster parent even when the standard best interests test would lead to a different result). *See also, Moore v. City of East Cleveland*, 431 U.S. 494, 97 S.Ct. 1932 (1977) (supporting sanctity of blood family relations and constitutionally protected substantive due process right of family to live together as a unit).

A nonparent relative of the child does not have "a greater right to custody" than the child's foster parents (*Matter of Gordon B.B.,* 30 A.D.3d 1005, 1006, 818 N.Y.S.2d 692; *see also Matter of Peter L.,* 59 N.Y.2d 513, 520, 466 N.Y.S.2d 251, 453 N.E.2d 480; *Matter of Violetta K. v. Mary K.,* 306 A.D.2d 480, 481, 761 N.Y.S.2d 514) see *Matthew E. v. Erie County Dept. of Social Services*, 41 A.D.3d 1240, 839 N.Y.S.2d 871 (4th Dep't 2007) (court improperly favored grandfather simply because of biological connection to child and suitability as custodian).

UNIFORM FEDERAL RULES FOR INTERSTATE CUSTODY TRANSFERS

States are bound by Full Faith and Credit under federal law to respect the child custody decisions of other states.[67]

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[65] *See, e.g.,* ch. 13.34 RCW (Juvenile Court Act--Dependency and Termination of Parent-Child Relationship); RCW 26.44.010 (in instances of nonaccidental injury, neglect, death, sexual abuse, and cruelty to children by their parents the State is justified in emergency intervention).

[66] The court noted that a custody determination is a less drastic limitation on parental rights than the dependency or abuse and neglect situations involving parental unfitness determinations. *Allen,* 28 Wash.App. at 647 n. 7, 626 P.2d 16.

[67] 28 U.S.C. 1738A, Full faith and credit given to child custody determinations: "(a) The appropriate authorities of every State shall enforce according to its terms, and shall not modify except as provided in subsections (f), (g), and (h) of this section, any custody determination or visitation determination made consistently with the provisions of this section by a court of another State."

For example, if a parent, grandparent or other non-parental caregivers has been given legal custody of a child in one state and travels from one jurisdiction to another, or if they send children to stay or visit with family members in other states, those other states are bound to observe those custody decisions equally in their own states as well. Since child custody is a state matter not regulated by federal law, to facilitate this, all but four[68] states have adopted a Uniform Law,[69] the Uniform Child Custody Jurisdiction and Enforcement Act (UCCJEA). In New York, this law is codified under Article 5A of the Domestic Relations Law.[70] States are thus required to recognize and enforce, according to their terms and without modification, custody decrees made by courts situated in other states.

The UCCJEA, enacted in New York with minor modifications as Domestic Relations Law Article 5-A, superseded and replaced the former Uniform Child Custody Jurisdiction Act (UCCJA). [71]

These laws were enacted over the last thirty years to replace what a committee of experts had described in 1968 as a 'confused legal situation' that had allowed 'self-help and the rule of 'seize-and-run'' to prevail. Historically, child custody jurisdiction had been indeterminate. Since custody decisions are never final, the issue could be relitigated before any court and in any state that might obtain long-arm personal jurisdiction. Full faith and credit was unavailable and comity was rarely granted. [72] Since jurisdiction could be predicated upon mere physical presence, interstate child snatching had become rampant.[73]

In addition, UCCJA was drafted in response to the growing public concern that thousands of children were being "shifted from state to state and from one family to another every year while their divorcing parents or other persons battled over their custody . . ." in various state courts.[74] The drafters were troubled by the lasting psychological trauma of children devastated by custody battles between their hostile and scattered family members: "a child who has never been given the chance to develop a sense of belonging and whose personal attachments when beginning to form are cruelly disrupted, may well be crippled for life, to his own lasting detriment and the detriment of society." However, the drafters also felt the need to balance children's stability with the need for certainty in custody decisions.[75]

As the titles suggest, UCCJA and UCCJEA are similar. However, the UCCJEA incorporates several new innovative provisions. Unlike its predecessor, it is also fully compatible with the Federal Parental Kidnapping Prevention Act (PKPA)[67], aligns child custody jurisdiction mechanisms with the Uniform Interstate Family Support Act (UIFSA) enforcing child support orders across state lines, [76] covers international custody disputes, [77] and provides greatly en-

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[68] Missouri, Vermont, New Hampshire, Massachusetts have not enacted UCCJEA. The UCCJA was enacted in all fifty states, the District of Columbia and Puerto Rico, in the early '80s.

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

[70] McKinney's Domestic Relations Law §§76 *et seq.*

[71] Unif. Child Custody Jurisdiction Act (1968), 9 U.L.A. Part I pp. 115-331 (1988) [hereinafter UCCJA]

[72] *People of State of N.Y. Ex Rel. Halvey v. Halvey,* 330 U.S. 610, 614-15 (1947)

[73] …leading Justice Jackson to cryptically remark that the rule of "seize and run" rendered child possession nine-tenths of the law (*May v. Anderson*, 345 U.S. 528, 542 (1953), Jackson, J., dissenting). The New York courts were caught in the web of jurisdictional anarchy, tempered only occasionally by invoking the principle of *forum non-conveniens* (see, for example, *Bachman v. Mejias*, 1 N.Y.2d 575, 154 N.Y.S.2d 903, 136 N.E.2d 866 (1956) where the Court of Appeals declined to grant full faith and credit or comity to a Puerto Rican decree)

[74] National Conference of Commissioners on Uniform State Laws, Uniform Child Custody Jurisdiction Act, Prefatory Note (1968), *Miller-Jenkins v. Miller-Jenkins,* 180 Vt. 441, 912 A.2d 951 (2006)

[75] *Ibid.*

[76] In New York, UIFSA is enacted in McKinney's Family Court Act, Art. 5B, §§580-101 thru 580-905. In federal law, it is supported by the Full Faith and Credit for Child Support Orders Act (FFCCSOA), 28 U.S.C.A. §1738B: "(a) The appropriate authorities of each State--(1) shall enforce according to its terms a child support order made consistently with this section by a court of another State; and (2) shall not seek or make a modification of such an order…"

hanced enforcement mechanisms. [78]

The court that first accepted jurisdiction in the home state where the child resided before transfer retains *exclusive, continuing jurisdiction* over the placement and financial responsibility for the child's care, right on up until they either reach adulthood at age 18, the court decides that the child retains no significant relationship with the state at all, or decides that none of the parents or persons acting as parents any longer live in the home state. [79] In addition, if the courts decide that the jurisdiction in the home state court is an inconvenient one for a number of special reasons, under the new law that jurisdiction can be transferred by mutual agreement.[80]

The federal law governing full faith and credit for child custody proceedings depends on one critical definition, "person acting as a parent". [81] This is important for our purposes involving grandparents and other non-parent custodians.

> "Person acting as a parent" means a person, other than a parent, who:[82]
> (a) has physical custody of the child or has had physical custody for a period of six consecutive months, including any temporary absence, within one year immediately before the commencement of a child custody proceeding; and
> (b) has been awarded legal custody by a court or claims a right to legal custody under the law of this state.

Hence a person who has been awarded custody by a court, but does not presently have actual custody and has not had actual custody for the requisite six months, does not fit the definition (for example, a person who has legal custody but has voluntarily relinquished actual custody).

On the other hand, an individual who possesses *de facto* custody on the critical date (without the benefit of a court order) is deemed to be "a person acting as a parent." The definition includes a collateral relative (such as a grandparent, aunt or sibling) or a non-relative who claims custody, perhaps based on "extraordinary circumstances." [83]

One critical aspect of any out-of-state custody decree under both the federal and the Uniform Acts is the degree to which the rendering court complied with the provisions of the UCCJA and PKPA, particularly the jurisdictional provisions. [84] It does not apply to children that have reached the age of 18 years old. It also has been held by the Supreme Court that a dispute between parents under PKPA may not create an implied private cause of action in federal court for declaratory relief to resolve disputed competing state custody determinations. [85]

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[77] McKinney's Domestic Relations Act §77-a, "Enforcement Under Hague Convention". "…a court of this state may enforce an order for the return of the child made under the Hague Convention on the Civil Aspects of International Child Abduction as if it were a child custody determination." This situation becomes confused however by "country of habitual residence" definition, when the parents move back and forth between two countries. *Gitter v. Gitter*, 396 F.3d 124 (2d Cir. 2005)

[78] One key provision: even if did not have principal jurisdiction to modify another state's child custody determination, under the new law, a New York court may under McKinney's Domestic Relations Act §77-c issue a *temporary* order in New York *enforcing*: [78] a) a visitation schedule made by a court of another state; or b) the visitation provisions of a child custody determination of another state that does not provide for a specific visitation schedule, valid while the interested party has time to get an order from the home state. The child custody order from the home state must be registered in the new state (§77-d), entitled parties must be noticed (§75-g). *See also,* McKinney's Domestic Relations Law §§77 to 77-p.

[79] McKinney's Domestic Relations Law §76-a

[80] McKinney's Domestic Relations Law §76-f

[81] 28 U.S.C.A. §1738A(b)(6)

[82] These rules have often sown great confusion, see e.g., *Matter of B.B.R.*, 566 A.2d 1032 (1989)

[83] see *Bennett v. Jeffreys*, 40 N.Y.2d 543 (1976), McKinney's Domestic Relations Law §72

[84] Thus it was held, in *Williams v Williams*, 110 NC App 406, 430 SE2d 277, 40 ALR5th 881(1993) that an original Indiana custody decree was not entitled to full faith and credit in North Carolina, because the rendering court could not have exercised jurisdiction to determine custody of one child who had never lived outside of North Carolina, or custody of another child without determining that it had subject matter jurisdiction.

[85] *Thompson v. Thompson*, 484 U.S. 174, 108 S.Ct. 513 (1988)

Adoption falls under the jurisdictional dictates of both the UCCJA and the PKPA.[86] If a biological parent seeks to regain custody before the adoption is final, custody of the child may be returned to him or her.

Children associated with Indian Tribes also are exempt from this law. The tribal counsel is treated under many laws as governing *another state* for purposes of child custody.

PLACEMENT OF CHILDREN IN STATE CUSTODY FOR ADOPTION OR FOSTER CARE ACROSS STATE LINES

To assist in coordinating the safe transfer of children who are currently in family or foster custody to relatives or caregivers in other states, sometimes, a child in foster care may be sent to live with a relative such as an aunt, grandparent or sibling in another state. Most states have also enacted the Interstate Compact on Placement of Children (ICPC).[87] The purpose of the ICPC is to provide protections to children in state care who are placed (moved from state to private care) across state lines for purposes of foster care and adoption. This interstate compact is supervised in each state-by-state administrators, who coordinate through the Association of Administrators of the Interstate Compact on the Placement of Children (AAICPC) which provides public information online at http://icpc.aphsa.org/Home/home_news.asp. This is a good place to start for anyone who is going to be involved in out-of-state placements. It has an easy to use index linking to each of the states' compact administrators' offices: (http://icpc.aphsa.org/Home/states.asp).

Under ICPC, [88] the state that places a child in out-of-state foster care must retain jurisdiction sufficient to determine all matters in relation to custody, supervision, care, treatment, and disposition of child, until child is adopted, reaches age of majority, becomes self-supporting, or is discharged with concurrence of appropriate authority of receiving state.[89] Under ICPC, the financial burden of achieving goal of placing children out of state in suitable environment and providing children with most appropriate care available *remains with sending state*.[90, 91]

Before the child can be sent to the proposed placement for adoption or foster care, there must be an investigation to determine if that placement is a good setting in the best interests of the child. The home state's court is not going to allow the child to be sent somewhere that is not safe for the child.[92] The purpose is to allow the "authorities in a state where a child is to be placed may have full opportunity to ascertain the circumstances of the proposed placement, thereby promoting full compliance with applicable requirements for the protection of the child."[93] There are penalties for failure to comply with the requirements of the ICPC's provisions.[94] Nevertheless, some judges ignore the requirements judging them to be onerous.[95]

The ICPC has many limits. ICPC is inapplicable to any case in which the child is being transferred from natural par-

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[86] 9 U.L.A. at 133. See In re Clausen, 502 N.W.2d 649, 656 (Mich. 1993) ("[a]n adoption proceeding is included in the definition of a custody proceeding under the UCCJA"); E.E.B. v. D.A., 446 A.2d 871, 878 (N.J. 1982), cert. denied sub nom. Angle v. Bowen, 459 U.S. 1210 (1983) (The UCCJA is broad enough to include a dispute between natural parents and adoptive parents.); Bosse v. Superior Court for Santa Clara County, 152 Cal. Rptr. 665, 668 (Cal. Ct. App. 1979) (In a child custody proceeding, such as adoption, "question of clean hands" should be subordinated to the best interests inquiry.). See also Brigitte Bodenheimer & Janet Neeley-Kvarme, Jurisdiction over Child Custody and Adoption after Shaffer and Kulko, 12 U.C. DAVIS L. REV. 229, 232 (1979).

[87] Codified in New York as McKinney's Social Services Law §374-a.

[88] McKinney's Social Services Law §374-a.

[89] *Williams v. Glass*, 664 N.Y.S.2d 792, N.Y.App.Div.1.Dept.,1997

[90] McKinney's Social Services Law § 374-a, subd. 1, Art. V(a)

[91] *Matter of H./M. Children*, 634 N.Y.S.2d 675, N.Y.App.Div.1.Dept.,1995

[92] McKinney's Social Services Law §374-a, Article III(a), (Conditions for Placement)

[93] McKinney's Social Services Law §374-a, Article I(b) (Purpose and policy)

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

[95] *In re Ryan R.,* 29 A.D.3d 806, 815 N.Y.S.2d 221 (2006)

ent to court-appointed guardian, either temporary or otherwise[96] or by private placements by parents. With parental consent, children can be placed across state lines with anyone, so long as the child is not placed at risk of significant harm. It is also limited by the application of UCCJEA. It does not apply to: [97]

> (a) The sending or bringing of a child into a receiving state by his *parent, step-parent, grandparent, adult brother or sister, adult uncle or aunt, or his guardian and leaving the child with any such relative or non-agency guardian in the receiving state.*[98]
>
> (b) Any placement, sending or bringing of a child into a receiving state pursuant to any other interstate compact to which both the state from which the child is sent or brought and the receiving state are party, or to any other agreement between said states which has the force of law.

In other words, nothing stops a custodial parent or other close relative as described here from taking their child with them anywhere they want to go as long as there is no court order denying them custody.

To do this, the original court contacts the administrator of the proposed state and arranges for a home visit and investigation of the proposed caregiver, under the supervision of the other state's local court. The child will not be moved, in the usual circumstance, unless the compact administrators first give the okay on the new caregiver and home. Unfortunately, this can take a while, although recent public attention on this problem has focused on shortening the time necessary while children may unnecessarily languish in state care awaiting transfer.

SAFE AND TIMELY INTERSTATE PLACEMENT OF FOSTER CHILDREN ACT (2008)

To address the growing problem of foster children waiting for unnecessarily long periods of time, often up to a year or more, in their home state custody for approval of the compact administrators' and the receiving state's home study for the proposed relative or adoption placement, the Safe and Timely Interstate Placement of Foster Children Act,[99] was drafted which proposes among other things to amend Subchapter IV, Part E of the Social Security Act, [100] to pay a $1,500 bonus to receiving states for each request for home studies returned to the sending state for approval within 30 days. The state in which a child from out of state would be placed (receiving state) has 60 days to complete a home study. The state sending the child (sending state) has 14 days after receiving the home study to decide that the study is acceptable, or to decide that making a decision that relies on the report would be contrary to the welfare of the child. The bill has other provisions such as requiring a caseworker to visit a child every six months in the placement, rather than a year as before. The bill went into effect on October 1, 2006.

CRITICISM OF UCCJEA INFRINGING ON NON-PARENTS' RIGHTS

There is cause for grave concern among grandparents and the numerous other non-parents who visit minor children or sometimes have their custody. Many of these adults maintain important and mutually beneficial relationships with these children. Non-parent visitors and erstwhile custodians often include grandparents, and sometimes include also step-grandparents, great-grandparents, adult siblings, aunts, uncles, cousins, former stepparents, former foster parents, former heterosexual and homosexual partners, and others. [101]

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[96] McKinney's Surrogate Court Procedure Act §1725; McKinney's Family Court Act §661. Matter of *Adoption of Baby Boy, O.G.*, 547 N.Y.S.2d 806 (1989).

[97] McKinney's Social Services Law §374-a, Article VIII (a), (b) (Limitations)

[98] McKinney's Domestic Relations Law §77-a

[99] PL 109 239 Title IV_E Foster and Adoptive Home Study Requirements

[100] more specifically 42 U.S.C. 673b

[101] See, e.g., *Bruner v. Tadlock*, 991 S.W.2d 600 (Ark. 1999) (grandparents' visitation); *Young v. Smith*, 964 S.W.2d 784 (Ark. 1998) (stepparent's visitation); *E.N.O. v. L.M.M.*, 711 N.E.2d 886 (Mass. 1999) (visitation by mother's former lesbian partner); *Youmans v. Ramos*, 711 N.E.2d 165 (Mass. 1999) (aunt's visitation); *Olson v. Olson*, 534 N.W.2d 547 (Minn. 1995) (grandmother's visitation); *Settle v. Galloway*, 682 So.2d 1032 (Miss. 1998) (grandparents' visitation); *Farrell v. Denson*, 821 S.W.2d 547 (Mo. Ct. App. 1991) (grandmother's visitation); *Watkins v. Nelson*, 729 A.2d 484 (N.J. App. Div. 1999) (grandparents' custody); *In re E.A.R.*, 1999 WL 30206 (Wash. Ct. App.) (unpub-

The Uniform Child Custody Jurisdiction and Enforcement Act (UCCJEA), [102] contains provisions that on their face allow custodial parents in many cases to prevent or end such contacts with their children unilaterally, by relocating from one state to another. These provisions also invite virtually endless litigation and conflicting decrees in different states.

Until the new UCCJEA was promulgated, the state and federal laws adopted in the last few decades placed jurisdiction to resolve custody and visitation disputes usually in the state with the strongest interest in the matter, and with the best opportunity to hear all the interested parties and to evaluate all the relevant evidence. Those laws did not reward self-help, because an adult could not create immediate jurisdiction in a new state just by moving there with the child. The laws limited relitigation of such disputes, because they permitted joinder of all interested parties in a single proceeding, so the resulting decisions bound all those parties.

In contrast with these statutes, the new UCCJEA provides that the state where children had their home ceases to have jurisdiction as soon as a parent moves them to another state, unless a parent remains there, or unless a non-parent who recently lived with the children for a specified length of time continues to live there. Furthermore, under the new Uniform Act, jurisdiction sometimes arises in the children's new state the very day they arrive there, and it becomes exclusive of jurisdiction elsewhere either immediately or, in some cases, after a year or so.

In addition, under the new UCCJEA, non-parental visitors or recent custodians often need not even be joined as parties in the proceeding in the new state, nor notified of it and given an opportunity to be heard. They sometimes are denied these rights even if they have visitation or, remarkably, custody rights under a valid decree of the state from which the parent just fled. Since they cannot participate in the proceeding, they are not bound by its outcome, so they can bring further lawsuits and obtain conflicting decrees in other states. Obviously, promulgation of the new Uniform Act should disturb grandparents and other non-parents who live with or visit minor children. In addition, the UCCJEA should worry everyone who is aware of the merits of current custody jurisdiction law, which has deterred adults from seeking jurisdictional advantages in litigation through self-help and forum-shopping, and from disrupting their children's lives with prolonged litigation and inconsistent judgments.

DE FACTO CUSTODY AND GUARDIANSHIP RIGHTS

One area of law which remains unsettled is whether non-parental relatives who find themselves with caregiving responsibilities, such as grandparents, aunts, uncles and siblings, have sufficiently enforceable parental rights that qualify as "natural guardians" that would enable them to request a change of name for a minor or an abandoned child. In some states, this status can be achieved by applying in probate for guardian ad litem standing. It is long established in common law that these caregivers are "de facto guardians" or "guardians *de son tort*" (by one's own act) who become guardians merely by voluntarily assuming the necessary duties, but there is little codification of such rules. [103]

ENABLING RELATIVE CAREGIVERS

When grandparents and other relatives become caregivers, most often they perform the task of caregiving outside the public foster care system (the "formal" system). Indeed, "informal" care, commonly called private kinship care is the much larger child welfare system.[104] Kinship care as a family concept has become dramatically more common in

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lished opinion), petition for cert. filed, 67 U.S.L.W.3008 (U.S. June 21, 1999) (No. 98-2047) (custody by father of child's half-sibling). Visitation of minor children by persons other than parents, which this article refers to as visitation by 'non-parents,' is sometimes referred to as 'third-party' visitation.

[102] Unif. Child Custody Jurisdiction And Enforcement Act (1997), 9 U.L.A. Part I pp. 257-94 (1999 Supp. Pamphlet) [hereinafter UCCJEA]

[103] See for example, in Arizona, *In re Harris' Guardianship*, (*Wupperman v. Lyon*) 17 Ariz. 405, 153 P. 422, (1915). *Miske v. Habay*, 1 N.J. 368, 63 A.2d 883 (1949) [A "guardian de facto" or "de son tort" is one who assumes to act as guardian without right or lawful authority, and it is immaterial whether, as in case of a de facto guardian, there is color of authority for exercise of the power.]

[104] 15 Elder L.J. 233, Jeffrey C. Goelitz, Elder Law Journal, ANSWERING THE CALL TO SUPPORT ELDERLY KINSHIP CAREGIVERS (2007)

settings across all jurisdictions, racial and ethnic populations, and socioeconomic groups.[105]

The chart below outlines the obstacles caregivers face as they embark on the task of caregiving. It identifies five critical legal elements necessary for successful caregiving (recognition, authority, security, financial assistance, and resources) and compares them with the common caregiving arrangements (informal custody, legal custody, guardianship, kinship foster care, and adoption). In analyzing these categories, at least eighteen of the twenty-five do not present clear, reasonable laws that work for kinship families.

	BURDENS				
FORM OF CUSTODY	RECOGNITION	AUTHORITY	SECURITY	FINANCIAL ASSISTANCE	RESOURCES
INFORMAL CUSTODY	INADEQUATE	?	INADEQUATE	INADEQUATE	INADEQUATE
LEGAL CUSTODY	?	?	INADEQUATE	INADEQUATE	INADEQUATE
LEGAL GUARDIANSHIP	ADEQUATE	ADEQUATE	?	INADEQUATE	INADEQUATE
FOSTER CARE	?	INADEQUATE	INADEQUATE	?	ADEQUATE
ADOPTION	ADEQUATE	ADEQUATE	ADEQUATE	INADEQUATE	ADEQUATE

Table 1. Relatives' Burdens Caring for Children vs. Type of Custody
(?= May be Inadequate)

Recognition – Acknowledgement of relatives as a resource by governmental systems and agencies and identification of family members as appropriate surrogates in statutes and regulations;

Authority – Authority for caregivers to consent to medical care for a child; to have responsibility for a child's education; to enroll a child in school; and to have access to a child's health and school records;

Security – Assurance that a child will stay in the caregiver's home and that adequate means will be available to provide for the child's future care;

Financial Assistance – Sufficient financial assistance and efficient access to public benefits;

Resources – Resources and services for caregivers that address the special challenges of unanticipated caregiving, such as respite care, childcare, parenting skills training, psychological counseling, and legal services.

In general, all states use these legal arrangements, but with varying emphasis. For instance, some states place most of their foster care children with relatives, some states use guardianship much more than legal custody; in other states the opposite can be true. But for all states, these legal arrangements describe the available forms of primary caregiving.

I will discuss each of these types of arrangements and their particular obstacles in turn.

INFORMAL CUSTODY

No common term describes relative caregivers who are caring for children but do not have court orders governing the care of those children. For this discussion, we are calling them "informal custodians." The word "informal" is also

[105] Rob Geen, In the Interest of Children: Rethinking Federal and State Policies Affecting Kinship Care, Pol'y & Prac. Pub. Hum. Servs., Mar. 2000, at 19, 21.

used by child welfare workers to refer to all non-foster care kin caregivers (private kinship care).[106] But for our purposes, *informal custody* refers to all relatives who are not foster parents and who do not have court ordered legal arrangements.

These informal custodians have the greatest difficulty obtaining legal recognition, authority, security, financial assistance, and resources. The report uses the term "private kinship care" for kin who are not in the child welfare system and "public kinship care" for child welfare kinship foster parents. Neither term has gathered widespread use.

Recognition – Statutes talk about de facto parents,[107] in loco parentis,[108] "person acting in parental relation to child",[109] "person in parental relation to a child,"[110] "psychological parent," "next friend,"[111] "guardian ad litem,"[112] "fictive parent,"[113] "person acting as a parent,"[114] "alternate standby guardian," "legal custodian", and others. Finding out what the laws say about such informal caregivers means seeking the information on state health, education, benefits, insurance, and custody laws as well as applicable federal laws. For instance, passport law permits both parents or legal guardian to apply for a minor child under the age of 14,[115] exceptions permitted where the issuance of a passport is "warranted by special family circumstances"; social security law permits parents or guardians to apply,[116] but a wife, divorced wife, widow, surviving divorced wife, surviving divorced mother, surviving divorced father, husband, divorced husband, widower, surviving divorced husband, child, or parent who makes a showing in writing that his or her rights may be prejudiced by any decision the Commissioner of Social Security has rendered, or by "any such individual",[117] may request an administrative hearing to review if denied. This specification fails to list a guardian or foster parent or *de facto guardian* and thus fails to define who exactly qualifies as a "parent", but appears to leave wide latitude to discretion and due process.

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[106] U. S. Department of Health and Human Services Administration for Children and Families, Administration on Children, Youth and Families, Children's Bureau. (2000, June*). Report to the congress on kinship foster care.* Washington, DC.

[107] Known in common law as *"guardians de son tort"*, or a guardian by one's own act, established merely if one voluntarily *undertakse* the role of guardian, and you *assume the duties* doing everything a guardian is required to do, you have established a right in common law, *Newburgh v. Bickerstaffe* (1684) 1 Vern 295, 23 Eng Reprint 478, similar to *In loco parentis*.

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

[109] e.g., New York McKinney's Public Health Law § 2504

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

[111] The expression "next friend" has a definite and well established meaning, namely, "one who, without being regularly appointed guardian, acts for the benefit of an infant, or other person *non sui juris*." *Walter v. Walter*, 217 N.Y. 439, 111 N.E. 1081 (1916), and is frequently used interchangeably with "guardian *ad litem*". A next friend for an infant party has a duty to bring *240 those rights directly under the notice of the court. (5 Words & Phrases, First Series, 4797; *Leopold v. Meyer*, 10 Abb. Pr. 40.). Seminal *Whitmore v. Arkansas*, 495 U.S. 149 (1990) prescribes three tests for third party standing as "next friend" in federal court: 1) reason why cannot represent self, 2) truly dedicated to best interests, 3) significant relationship

[112] A guardian ad litem is one who is appointed by a court for the sole purpose of protecting an incapacitated third party's legal rights for one proceeding only, usually a relative or parent or one with a significant relationship, truly dedicated to the child's best interests.

[113] See "Fictive Kin Term Use and Social Relationships, Alternative Interpretations", by Charles A. Ibsen, and Patricia Klobus, *Journal of Marriage and the Family*, Vol. 34, No. 4 (Nov., 1972), pp. 615-620.

[114] Under federal law (28 U.S.C.A. §1738A(b)(6)) for example, "Person acting as a parent" means a person, other than a parent, who:(a) has physical custody of the child or has had physical custody for a period of six consecutive months, including any temporary absence, within one year immediately before the commencement of a child custody proceeding; and (b) has been awarded legal custody by a court or claims a right to legal custody under the law of this state. Hence a person who has been awarded custody by a court, but does not presently have actual custody and has not had actual custody for the requisite six months, does not fit the definition (for example, a person who has legal custody but has voluntarily relinquished actual custody). These rules have often sown great confusion, see e.g.**,** *Matter of B.B.R.*, 566 A.2d 1032 (1989), On the other hand, an individual who possesses *de facto* custody on the critical date (without the benefit of a court order) is deemed to be "a person acting as a parent."

[115] Federal Code, 22 U.S.C. 213(a)(2), Issuance of Passports for Children Under Age 14

[116] Federal Code, 42 U.S.C. 405(c)(ii), Social Security Act

[117] Federal Code, 42 U.S.C. 405(b)(1)

For state laws, various systems may use different identifiers, making recognition of the rights and responsibilities of informal caregivers a very time-consuming and error-prone task.

In sum, the lack of recognition means the absence of statutory definitions or uniform nomenclature regarding their status as caregivers in both state and federal laws. Moreover, where references do exist, they can be detrimental rather than supportive of relative caregivers - excluding certain kinship caregivers, such as co-parenting caregivers or non-blood caregivers, or caregivers who cannot locate the parent(s).[118]

Authority – Informal caregivers often lack sufficient authority to make necessary decisions regarding medical care and schooling. Many states have enacted laws that permit parents to delegate responsibility for medical and school related decisions, albeit for only limited periods of time. In New York, a parent can designate a caregiver as "person in parental relation to a child"[119] for a limited period of time to make educational and some medical decisions.[120] These parental designations are often called parental powers of attorney; they specifically deal with routine decision making for children and are not regular general powers of attorney, which deal mostly with financial matters, nor are they health care proxies. Absent fulfilling the statutory requirements, a handwritten note may be accepted by an agency but that time honored tradition of informal designations is waning and it is increasingly likely that an agency will want a written document from the parents that fulfills statutory requirements. Only a handful of states permit certain relatives to possess such authority and usually only when they can attest to their inability to locate the parent(s).

School enrollment can be especially difficult, because local school systems require evidence of local residency for the purpose of tuition free enrollment. In many districts, residency requirements may require legal custody or guardianship before a child can be enrolled in school. For example, retired grandparents who were unwilling to seek legal custody in court, because the procedure might prove too stressful for their mentally disabled son, paid for nine years of private schooling for their grandchild. The school district would not enroll their granddaughter because the grandparents were not the legal custodians or guardians and the grandparents had failed to learn of procedural mechanisms to challenge the local district's decision. Since tuition free school enrollment ultimately depends upon proof that a child resides in the school district, informal caregivers need to learn what proof is legally acceptable.

Security – Informal custodians are not "secure" in knowing their legal chances of keeping a child in their home. Because without a court order, a parent retains the right to the care and control of a child and can remove a child from a caregiver's home at will. Thus, informal caregivers constantly fear losing a child. Even when the custodial parent places a child in the home of a relative, the other parent can still demand custody of the child.[121]

In one case, a young mother separated from her husband was killed in a car accident caused by a drunken driver. The mother's five-year-old son was also injured in the accident. Both had lived with the grandmother for almost all of the child's life. Five days after the young mother's burial, the grandmother received notice to appear in court on the next day. The absentee father, who had spent less than twenty-five hours with the child in the last five years and never provided support, demanded custody of the child. In court, the judge found the father to be a fit parent, and immediately placed the child in the father's custody.

Financial Assistance – For informal caregivers, financial support is limited to either public assistance or social security. Public assistance (welfare) is partially funded by the federal Temporary Assistance to Needy Families (TANF) program. All kinship families are eligible for "child only" grants. Child-only grants are based exclusively on the income of the child without considering the caregiving relatives' income and provide limited payments to relative caregivers for the care and boarding of a child. These grants are often very easy to obtain, but often-bureaucratic road-

[118] Miner, M. & Wallace, G. (1998, April). *The Dilemma of kinship care: grandparents as guardians, custodians, and caregivers*. Albany, NY: Albany Law School, The Government Law Center.
[119] *See* fn 65.
[120] McKinney's Public Health Law § 2504.
[121] Wallace, G. (2000, Summer). The big legal picture: Grandparents parenting grandchildren: A new family paradigm. *Elder Law Attorney,* New York State Bar Association, Special Issue on Grandparents Rights, 10(3) pp.10-22.

blocks and cumbersome application procedures, as well as silent policies meant to discourage applications, [122] can create barriers.[123]

A story illustrates the obstacles to financial assistance. A grandmother takes her daughter's two young girls into her home. Later, the grandmother becomes the legal custodian. She has never been told about child-only TANF grants. For two years she suffered severe financial hardships. No one, not the courts nor other public agency officials told her about this grant.

Sometimes, the lack of information even happens inside the public assistance office. Caregivers may not know what name is used by the local office to identify the grant. It could be called a non-parent grant, a "kinship" grant, or some other phrase. Many caregivers are told that there is no such grant, because they used the wrong name for the grant. Caregivers have an absolute right to apply for assistance. So, insisting on filling in an application is the first step in finding out if the grant really is available.

Unfortunately, the dollar amounts of these grants are often negligible, and the addition of a second child will increase the grant only fractionally. Unlike foster care payments, there is no doubling of the grant.

Kinship caregivers should also consider applying for social security payments. Children whose parents are dead or disabled may be eligible for payments based on the lifetime earnings of the parent (or the grandparent). And children with disabilities may qualify for their own SSI check, based on their disabilities.

Resources – In general, informal kinship caregivers are eligible for supportive services. Unfortunately, once again these services are usually very limited. General supportive services, like Medicaid and childcare, are available to all eligible caregivers including kinship families. Special programs, designed to serve the special challenges of kinship families, are not commonly available and where such programs are operating, they are substantially under-funded. Local public agencies, like social services and aging, may have support groups and other services. Additionally, many states are beginning to fund some special services, beginning with "kinship navigators" which direct kinship families to information and resources.

A program can be in a community but unknown to kinship families. Because kinship families are often found in marginalized segments of the community, outreach can present significant barriers to program access.

In summary, childcare may be provided, but long waiting periods make it practically unavailable;[124] respite services for caregivers are virtually nonexistent; counseling services for caregivers or the children are equally difficult to obtain; and legal services to lower income caregivers are invariably scarce or non-existent.[125] Although some local TANF programs are using TANF dollars to tailor services to kinship caregivers, most states have yet to enact TANF based legislation that comprehensively targets the needs of kinship caregivers.[126] Support groups may be available but not known. And while many states now have "navigator" programs, most have very limited funding with only a few staff.

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

[123] Mullen, F. & Einhorn, M. (2000, November). *The effect of state tanf choices on grandparent-headed households.* Washington, DC: Public Policy Institute.

[124] Giannarelli, L. & Barsimantov, J. (2000, December*). Child care expenses of America's families.* Washington, DC: The Urban Institute.

[125] McCallion, P., Janicki, M., Grant-Griffin, L.,& Kolomer, S. (2000). Grandparent carers II: Service needs and service provisions issues. *Journal of Gerontological Social Work, 33(3)*, pp.57-84.

[126] Geen, R., Holcomb, P., Jantz, A., Koralek, R., Leos-Urbel, J., & Malm, K. (2001). *On their own terms: Supporting kinship care outside of TANF and foster care.* Washington, DC: The Urban Institute.

Housing. For the quarter of a million grandparent caregiver renters living below the poverty line, 60% were spending at least 30% of their household income on rent and 3 of 10 were living in overcrowded conditions. Grandparent caregivers who are renters therefore represent a particularly vulnerable population.

Frequently, kinship advocates complain of the absence of specialized housing and the severe limitations on the use of senior housing for elderly residents who become caregivers of young children.[127] Specialized Grandparent family housing has been built, in Boston,[128] New York,[129] and Detroit.[130] The Federal LEGACY Act of 2003 was promoted to provide the Secretary of Housing and Urban Development the authority to establish programs that serve intergenerational families. It was passed to address the critical housing needs of grandparent caregivers. The LEGACY Act creates a $10 million demonstration program to develop intergenerational housing specifically for households headed by an elderly grandparent, provides specialized training to HUD workers on the importance of this demographic, and calls for a national study of the housing needs of grandparent-headed families. At the moment, the LEGACY Act's passage is a symbolic victory: funds have yet to be appropriated for the programs authorized in the bill. If current projects are any indication, the burden for relief will rest in the hands of creative organizations backed by forward-thinking city and state governments. Note that specialized housing, while desirable, cannot be built on a large scale and thus federal vouchers underwriting the cost of renting are needed (i.e., section 8 housing).

LEGAL CUSTODY

Legal custodians are caregivers who were awarded legal custody of children by a court with competent jurisdiction. Often informal caregivers will say that they have "custody" of a child. In the common meaning of the word "custody" this is true, but it is not true in its legal meaning. Only a court can award "legal custody." Legal custody can be awarded to a parent or to a non-parent.

Recognition – For non-parent legal custodians (who do not have the natural rights that parents have), some states provide them with the same recognition and authority conferred on legal guardians. Other states award legal custody to non-parents, but statutes do not provide the necessary authority to perform all guardianship functions. For instance, a state statute may say that parents and guardians can make medical decisions. However, the ability for legal custodians to make such decisions may depend upon local practices that permit decision-making.

Authority – Because legal custodians may not have the statutory authority to make medical and school decisions, judicial orders of legal custody must make special declarations awarding the necessary authority. Nevertheless, relatives may be better advised to petition the court for guardianship while leaving legal custody options to disputes between separating parents.

Security – Legal custody provides the security that a parent cannot remove a child at will. But in court disputes regarding custody, a strong preference for parental reunification places legal custodians at great disadvantage. Depending upon the state, a custody proceeding between a parent and non-parent, called a third party custody dispute, may require heightened levels of proof to show parental unfitness that must be shown before the court will consider

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[127] See fn 33.

[128] "Grandparents Raising Grandkids Find a Home in Boston", by Robin Estrin, August 17, 2007, Los Angeles Times, at http://articles.latimes.com/1997/aug/17/local/me-23440. ""Grandfamilies House," a complex of 26 apartments, will be handicapped accessible for the elders and toddler-proof for the youngsters."

[129] See, New York Times. "A Home for Grandparent-Grandchild Families.A Place for Grandparents Who Are Parents Again" By Timothy Williams, (2005). "The $12.8 million project was financed by Presbyterian Senior Services, the West Side Federation for Senior and Supportive Housing and the city's Housing Authority." in the South Bronx, available at http://www.grandparenting.org/Article%20Bronx%20grandparent%20-grandchild%20home.%20NY%20Times.htm, *also* http://www.pssusa.org/grandparent_apartments.html

[130] "New Housing Targets Grandparents Raising Grandchildren", by Santiago Esparza, Detroit Free Press, November 8, 2008 at http://www.detnews.com/apps/pbcs.dll/article?AID=/20081108/METRO/811080422, "The $6.1 million Springwells Townhomes project has 24 units and is being marketed toward "grand families," and will have resources, including staff to help find healthcare programs and baby-sitters, for them. The development, near Springwells and West Vernor, will be the first in the city and is believed to be the first in the state,…."

the child's best interest. The law's focus remains on presumptions that parents act in their children's best interests. However, in most states, either by statute or case law, non-parent caregivers who have provided primary care for a an extended period of time (usually at least six months) can get a court to consider the best interests of children in deciding custody or guardianship. However, unless a statute expressly defines the period of care that qualifies for trial, many judges will lean towards protecting parental rights over the best interests of children.

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

LEGAL GUARDIANSHIP

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

Financial Assistance – Legal custodians and legal guardians have access to financial assistance via TANF child only grants, as long as state laws do not make them legally responsible to support a child.[131] In some states higher kinship payments are also available.

Resources – Legal custodians and legal guardians may have access to more resources or services than informal caregivers in states where kinship care programs encourage non-foster care by providing additional services and higher stipends when the caregivers can show that they assumed care and control of the child because of abuse or neglect.[132, 133] In most instances, except for housing, legal custody and informal custody should provide access to the same services.

Security – In states where legal custodians do not possess sufficient authority to make necessary decisions for children, guardianship is the more appropriate caregiving arrangement, and state law may place higher upon parental rights than legal custody, even though parents may still be able to reassert their rights.

Guardianship may offer added additional security regarding the future of children. Many states have standby guardianship laws that enable parents and guardians to name a successor who can act as a guardian in their stead upon their incapacity or death.[134] Only a few of these laws may allow legal custodians to name a standby, and presently only New York permits informal custodians who can show that the parent(s) cannot be found to name a standby guardian.

In 2008, the New York Legislature recognized these problems by passing Chapter Law 404, (LEGAL POWERS OF CUSTODIANS AND GUARDIANS OF CHILDREN) effective November 2008, which among other things permitted a ward to voluntarily consent to extend guardianship after the age of 18, until age 21, and allowing a "permanent guardian" to be appointed who is not the child's parent, granting the same powers, to enroll him in school and to enroll him in their employer based health insurance plan, consents to medical care, physical custody, and consent to the adoption of the child.[135]

[131] Mullen, F. & Einhorn, M. (2000, November). *The effect of state tanf choices on grandparent-headed households.* Washington, DC: Public Policy Institute.

[132] Sawisza, C. (2001, July). *Relative caregiving: The need for policy development.* Fort Lauderdale, Florida. Nova Southeastern University, Children First Project.

[133] Geen, R., Holcomb, P., Jantz, A., Koralek, R., Leos-Urbel, J., & Malm, K. (2001). *On their own terms: Supporting kinship care outside of TANF and foster care.* Washington, DC: The Urban Institute.

[134] Miner, M. & Wallace, G. (1998, April). *The Dilemma of kinship care: grandparents as guardians, custodians, and caregiver*s. Albany, NY: Albany Law School, The Government Law Center.

[135] N.Y. Surr. Ct. Proc. §§1702 et seq

This measure was enacted to provide needed clarity regarding the authority of the court to grant guardianships for older youth with their consent, and the authority of guardians and custodians to enroll their wards in school and obtain health insurance for them. The measure further adds a new category of "permanent guardian" for children freed for adoption or for those whose birth parents are deceased--an option where adoption is not feasible, often because the youth will not consent.

It also improved the opportunity for guardianship by passing New York Chapter Law 519.

Financial Assistance and Resources – Legal guardians and legal custodians generally face the same inadequacies as informal custodians, except that in about forty states subsidized guardianship is now offered. This subsidy is usually available only to kinship foster parents who are leaving the foster care program but who continue to maintain children in their homes.[136] In a few states, like New Jersey, even caregivers who were not foster parents can get the subsidy.

KINSHIP FOSTER CARE

Kinship foster care, more recently termed public kinship care, refers to the care of children who were placed in foster care with a relative caregiver serving as the foster parent, generally because of abuse, neglect, abandonment or voluntary surrender of the children by their parents. A recent study comparing outcomes between foster care and kinship care has shown better results for children in kinship care.[137] Children in kinship care had significantly fewer placements than did children in foster care, and they were less likely to still be in care, have a new allegation of institutional abuse or neglect, be involved with the juvenile justice system, and achieve reunification. Children placed into kinship care had fewer behavioral problems 3 years after placement than children who were placed into foster care. [138] This finding supports efforts to maximize placement of children with willing and available kin when they enter out-of-home care.

Recognition – In all states, kin are recognized as a resource for children who are abused or neglected. Some states provide full foster parent certification for kin who want to become foster parents and learn of their opportunity before taking over the care of a child. However, the chance to enter the kinship foster care system may not be offered to kin. In many states, kin become legal custodians or guardians pursuant to the neglect proceedings but are not foster parents. And in some states, actual practices deliberately misinform kin about the availability of kinship foster care. For example, a mentally ill woman gives birth; Child Protective Services may call and tell the grandmother to take the baby from the hospital or the child will enter foster care. Often, no mention is made to the grandmother that she could become a foster parent. The grandmother may take the child home, quit her job, and later be evicted because she can no longer afford her rent.

Authority – In states that provide for foster parent certification, the legal responsibility for the children remains with the state. Kin foster parents must follow decisions made by the foster care system and are not free to make parental decisions on their own. Other states release children into the legal custody or guardianship of relatives but maintain oversight privileges. Both these practices conflict with the fundamental rights of non-parent relatives to raise children with similar fundamental protections afforded to parents.

Security – In all situations where the state retains legal custody and guardianship of children, kin are at higher risk of losing children than are parents because they are not afforded the same rights and protections that natural parents are. While there is some case law declaring that kinship foster parents have fundamental rights and foster children have standing to assert constitutionally guaranteed liberty interests in an intact family unit, few states and agencies

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[136] Brooks, S. L. (2001, January). The case for adoption alternatives. *Family Court Review,* 39(1), pp. 43-57.
[137] "Matched Comparison of Children in Kinship Care and Foster Care on Child Welfare Outcomes"
July-September 2008 (vol. 89. No. 3) Alliance's Family in Society: The Journal of Contemporary Social Services
[138] "Impact of Kinship Care on Behavioral Well-being for Children in Out-of-Home Care", David M. Rubin; Kevin J. Downes; Amanda L. R. O'Reilly; Robin Mekonnen; Xianqun Luan; Russell Localio, *Arch Pediatr Adolesc Med.* 2008;162(6):550-556. Published online June 2, 2008

have implemented practices conforming to that decision, see *Rivera v. Marcus*, 696 F.2d 1016 (2d Cir.1982), [infant plaintiffs have shown that they possess a constitutionally-protected liberty interest in the integrity of their kinship foster family unit]. (*See also A.C. v. Mattingly*, Slip Copy, 2007 WL 894268 (S.D.N.Y.), [citing *Rivera* upholding foster children standing to assert a constitutionally-protected liberty interest in the integrity of their foster family unit as based on factors in U.S. Supreme Court, *Smith v. Organization of Foster Families*, 431 U.S. 816 (1977)])[139]

Financial Assistance – In states that certify kin as foster parents, the same level of financial assistance is available to both kin and non-kin foster parents. In states that do not certify kinship foster parents, financial assistance can be limited to child-only TANF grants, which are usually significantly less than a foster care grant would have been. Other states offer stipends that are higher than child-only TANF grants but less than foster parent stipends. A few states will adjudicate the dependency of children, and if the reason for non-parental care was abuse, neglect, or abandonment, they may order increased financial assistance, regardless of the circumstances surrounding the initial custody arrangement.[140]

Resources -- In most states, where no adjudication for a relative who rescued a child from an abusive or neglectful home exists, the relative no longer has the chance to become a foster parent once the child is in a safe, stable home. Illustrative of this "Catch 22," a seventy-three year old grandmother confronted the residents of a crack house and pressured them into giving her three-year-old grandson to her. She brought the toddler home, knowing that her pension income would not support her new family. Child welfare would not help, even though in the past she was certified as a foster care parent for another child. The state reasoned that it would not intervene because this child was no longer abused or neglected.

Many children in kinship care live at or below the poverty line, in overcrowded households, with caregivers who are elderly, single, or poorly educated.[141] Moreover, because kinship caregivers are often not licensed foster parents or legal guardians, they frequently lack the legal authority to obtain medical, financial, and educational services for the children in their care.[142] Services exist to support these families, including respite care for relative caregivers, free legal services, and welfare payments,[143] but "[o]ne of the main barriers that prevent[s] [kinship] caregivers from receiving needed services is knowledge. They simply do not know how to find or access community resources."[144] Even where kinship caregivers are informed, they are often not entitled to the same financial assistance as foster parents or adoptive parents unless they meet the same licensing standards as non-relative caregivers. These are standards that may be inappropriate in a kinship setting.[145] Although many states took steps to address some of these issues,[146] federal legislation has yet to address the needs of kinship caregivers.[147]

Kin families are eligible for many services outside child welfare, yet they receive relatively few. With regard to income assistance, kin families not receiving foster care payments can receive child-only AFDC, now Temporary Assistance to Needy Families (TANF), payments each month….In 1996, despite their eligibility, only 28 percent of children living with relatives were receiving AFDC (now TANF) payments (table 3). Significantly more children in voluntary care families (52 percent) were receiving payments, however, compared with children in private kinship families (24 percent) and children in kinship foster families (19 percent). The higher percentage of voluntary families receiving payments may be due to their links to the child welfare system. Social workers may refer these families to AFDC for

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139 See previous discussion, page 22

140 Sawisza, C. (2001, July). *Relative caregiving: The need for policy development.* Fort Lauderdale, Florida. Nova Southeastern University, Children First Project.

141 Jennifer Ehrle et al., The Urban Inst., Children Cared for by Relatives: Who Are They and How Are They Faring? 2 (2001), available at http:// www.urban.org/UploadedPDF/anf_b28.pdf.

142 Naomi Karp, Kinship Care: Legal Problems of Grandparents and Other Relative Care Givers, Nat'l B. Ass'n Mag., Jan./Feb. 1994, at 10, 10.

143 Kinship Caregiver Support Act, S. 985, 109th Cong. § 101 (2005).

144 Jennifer Ehrle & Rob Geen, Connect for Kids, Services for Kinship Care (May 24, 2004), http://www.connectforkids.org/node/575

145 See Note, The Policy of Penalty in Kinship Care, 112 Harv. L. Rev. 1047, 1050-52 (1999) [hereinafter Policy of Penalty

146 Generations United, Grandfamilies State Fact Sheets, http:// www.gu.org/factsheets.asp (last visited Oct. 1, 2006) for a state-by-state overview of current kinship care laws.

147 1950 Social Security Act, citation needed here

financial assistance. Private kinship providers, however, do not appear to have this contact and may not be aware that they are eligible for assistance. The lower receipt of income assistance among kinship foster families may be a function of their already receiving foster care payments, which makes them ineligible for a child-only AFDC payment."[148]

Financial assistance for kinship foster parents who are assuming permanent care of a child and who are leaving the child welfare system can be substantially better than child-only TANF grants. All states offer subsidies to kinship foster parents who adopt. Many now offer similar subsidies to kin who are willing to become the "permanent" guardians. In states without subsidized guardianship, kin who will not adopt are forced to leave the child welfare system and become either legal custodians or legal guardians, usually with child-only TANF grants or some other formula of decreased financial assistance.[149]

Kinship families who are part of the child welfare system may be eligible for considerably more services than privately arranged kinship care, but services may still be inadequate to address the unique obstacles accompanying unanticipated caregiving by relatives.[150] However, studies have found that services provided by kin are less extensive than those provided by traditional foster parents, perhaps because foster parents are being provided greater access to information by social workers about which services are available and how to qualify for them.[151]

In the last ten years, child welfare agencies have increasingly resorted to "diversion" in order to maintain control over kinship families whose children are subject to child welfare jurisdiction, and to avoid providing foster care payments and services to these families. The attorney should inquire whether a local agency is placing children in non-foster care kinship homes pursuant to neglect proceedings. Understanding the legal rights of these families and what assistance is available to them is an important issue that will be addressed in future editions of this article.

ADOPTION

In adoption, the natural parent is completely replaced by the adoptive parent. Recognition, authority, security, financial assistance, and resources are the same for adoptive parents as for natural parents. In at least one state, New York, grandparents retain their right to seek visitation with grandchildren, even when the adoptive parents are not related to the grandparents. The new adoptive parents may view the grandparent as violative of their new family privacy, but New York courts have held that grandparent visitation rights under NY DRL §72 may even survive adoption when in the child's best interests (*Layton v. Fost*er, 95 A.D.2d 77 (1983), *People ex rel. Sibley v Sheppard*, 54 N.Y.2d 320, (1981). *Matter of Nefta P.,* 115 AD2d 390 (1985)).

Financial Assistance –Although adoption may be most advantageous, adoption may be detrimental to the financial stability of the family since the income of the adoptive parents will be deemed available for the support of the child, thereby eliminating the chance to receive a child-only TANF assistance grant. Adoptive parents, like natural parents, are eligible for public assistance only if their total family income falls below 185% of the poverty level.[152]

Also, because adoptive parents' income and resources are deemed available to their children, higher education financial aid packages may be significantly less for adoptive parents with income and resources greater than the birth parents.

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[148] from "Children Cared for by Relatives, Who Are They and How Are They Faring?", Jennifer Ehrle Macomber, Rob Geen, Rebecca L. Clark, Urban Institute, at http://www.urban.org/publications/310270.html

[149] Brooks, S. L. (2001, January). The case for adoption alternatives. *Family Court Review,* 39(1), pp. 43-57.

[150] Malm, K., Bess, R., Leos-Urbel, J., Geen, R., & Markowitz, T. (2001, October*). Running To Keep In Place: The continuing evolution of our nation's child welfare system.* Washington, DC: The Urban Institute.

[151] Kinship Care and Foster Care: A Comparison of Characteristics and Outcomes, Maria Scannapieco, Rebecca L. Hegar, & Catherine McAlpine, *Families in Society*, 1997, v. 78, no. 5, page(s) 480-488

[152] Mullen, F. & Einhorn, M. (2000, November). *The effect of state TANF choices on grandparent-headed households.* Washington, DC: Public Policy Institute.

EMERGING TRENDS

STATE AND FEDERAL INITIATIVES

At the federal level, the 1997 Adoption and Safe Families Act (ASFA) increased state interest in kinship foster care but also inadvertently created disincentives for such care by placing a premium on rapid adoptions. In order to increase the number of foster parents, states prefer foster parents as adoptive parents to kin who did not assume caregiving immediately after placement of a child in the child welfare system. The goal of permanency placement via adoption overrides the interests of family members who wish to adopt or become guardians. In inter-state placements, kin who are seeking to bring a child into their state from another state's child welfare system face similar problems caused by bureaucratic delays in processing a child's transfer out of state. Recent federal enactments may increase the pace of interstate placements but do not offer relatives any right to become the foster parent.

Recently, federal assistance and resources have increased for non-foster care relative caregivers. The 2001 renewal of the Older Americans Act (Title 42, Chapter 35, USC) provided 137 million dollars for relative caregiver programs, with ten percent of this money targeted toward older relatives caring for children. The use of TANF surpluses is another source of support for relative caregivers. Some states are creating special programs for kinship caregivers. As mentioned, examples include: statewide "navigator programs" designed to offer information and referral to relative caregivers; local assistance programs that tailor services to kinship caregivers; and larger multi-county projects aimed at eventually instituting statewide programs specifically targeting kinship caregivers.[153]

And in 2008, the House and Senate have both passed their versions of the "Fostering Connections to Success and Increasing Adoptions Act", signed into law on October 7th. (H.R. 6893/P.L. 110-351) This Act includes a major overhaul of the foster care system, which provides funds to states for assistance payments to children for kinship guardianship and adoption assistance, kinship navigation programs, and other family support measures intended to divert children in danger of entering the foster care system into appropriate relative care, with "family connection grants". The payments are funded by federal contributions for 75% for the first two years and 50% thereafter. It requires notification to relatives of foster care placements. It also has the unique feature of allowing children who have "aged out" of the foster care system at age 18 to voluntarily remain in that status, under certain circumstances, such as continuing to complete secondary education, and to require reasonable efforts for siblings to be placed together.

In terms of security, only a handful of states have enacted "de facto custodian" laws[154] that set out a period of time in the care of a relative by the parents explicit designation - typically six months (for a child under three years of age) or one year or more (for a child over three years old) – after which a child will not be returned to a parent without a judicial determination that placement with the parent is in the child's best interest.

Increasingly, state policy makers understand that kin are not only a resource but more importantly, are the caregivers of choice.[155] The availability of accurate information about the obstacles faced by kinship caregivers is therefore critical to ensure that government's responses successfully enable relatives, especially grandparents, to care for children. Numerous states have authorized studies and task forces to investigate these issues. Hopefully, based on such surveys, comprehensive solutions will soon be forthcoming.

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[153] State of Tennessee Department of Children's Services. (2002, January). *Report to the Tennessee general assembly: Relative caregiver program*. Nashville, TN.

[154] In New York, the term "person in parental relation to a child" is used, *see* fn 65. In other jurisdictions, the term "standby guardian" may be used. (27 Carmody-Wait 2d § 155:121, "Standby Guardian for an Infant", Written Designation of Standby Guardian, by Christine M. Gimeno,, in the event that the parent, (1) becomes incapacitated; (2) becomes debilitated and consents to the commencement of the standby guardian's authority; or (3) died prior to the commencement of a judicial proceeding to appoint a guardian of the person and/or property of an infant.

[155] Minkler, M. (2001). *Grandparents & other relatives raising children: Characteristics, needs, best practices, & implications for the aging network.* Washington, DC: Lewin Group & U. S. Administration on Aging.

JUDICIAL DIRECTIONS

Rights of Children. A hopeful line of state court cases centers on further developing the lagging rights of children, which courts have been slow to realize. These were previously hinted by the U. S. Supreme Court in recognizing the child's own natural liberty interest in an intact family (*Santosky v. Kramer,* 455 U.S. 745, 102 S.Ct. 1388 (1982)). "The child loses the right of support and maintenance, for which he may thereafter be dependent upon society; the right to inherit; and all other rights inherent in the legal parent-child relationship, not just for [a limited] period ..., but forever." *In re K.S.,* 33 Colo.App. 72, 76, 515 P.2d 130, 133 (1973). A 2001 New York Family Court decision, *Webster v. Ryan,* [156] where the court reasoned without citation of authority that a child has an "independent, constitutionally guaranteed right to maintain contact with a person with whom the child has developed a parent-like relationship" (reversed on appeal for other reasons, *Harriet II v. Alex LL*, 292 A.D.2d 92, 740 N.Y.S.2d 162, N.Y.A.D. 3 Dept., 2002), and this precise issue has not been revisited (*rev.*, *Ryan v. Department of Social Services of Albany County*, 16 Misc.3d 1134(A), N.Y.Sup.,2007.). Among other things, the *Ryan* court considered the problem that, if such rights existed, the child's rights could not be asserted vicariously by his parents, failing third-party standing requirements. (*see also Folsom v. Swan*, 41 A.D.3d 899, 836 N.Y.S.2d 738, N.Y.A.D. 3 Dept., 2007. [father has no standing to assert his claim regarding alleged violation of son's rights]). *Ryan*, unfortunately, failed to reach the merits of the *Webster* Court's reasonable holding that, given standing, such rights would hypothetically be held to exist.

However, in a significant 2006 Washington case concurring decision citing *Webster*, *In re Custody of Shields*, 157 Wash.2d 126, 130, Wash., 2006. (Bridge, J, concurring) the presumed child's essential rights were affirmed with compelling logic.[157]

In another earlier decision, *Smith v. Organization of Foster Families For Equality and Reform*, 431 U.S. 816, 97 S.Ct. 2094, U.S.N.Y., 1977, the U. S. Supreme Court decision implied in dicta that children have the right to maintain parent-like relationships. However, the judicial acceptance of children's rights still has a long road to travel.

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[156] *Webster v. Ryan.* 189 Misc.2d 86, 729 N.Y.S.2d 315, N.Y.Fam.Ct.,2001

[157] "This court has recognized as much in the context of paternity disputes. "It would be ironic to find issues of parent-child ties are of constitutional dimension, when the parents' rights are involved but not when the child's are at stake." *State v. Santos,* 104 Wash.2d 142, 143-44, 702 P.2d 1179 (1985). I see no reason why this concern for the constitutional right of the child should be implicated in a paternity proceeding, and not in other proceedings affecting the placement and care of a child…Consideration of rights *the child* holds is of paramount importance because, regardless of the family constellation from which the child comes, in any placement dispute it is *the child* who is the most vulnerable and the most voiceless. Indeed, many practitioners and scholars have long advocated for a more child-centered focus in the resolution of disputes in our family courts. Melinda A. Roberts, *Parent and Child In Conflict: Between Liberty and Responsibility,* 10 NOTRE DAME J.L. ETHICS & PUB. POL'Y 485, 485- 505 (1996); Annie G. Steinberg, Barbara Bennett Woodhouse & Alyssa Burrell Cowah, *Child-Centered, Vertically Structured, and Interdisciplinary: An Integrative Approach to Children's Policy, Practice, and Research,* 40 FAM. CT. REV. 116, 121 (2002).