

**KINSHIP CARE: 2018  
SPECIAL CHALLENGES  
RIGHTS  
ASSISTANCE  
RESOURCES**

**For Legal Professionals as part of CLE trainings on kinship care legal issues. This guide is accompanied by a power point.**

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## Contents

Contents .....	iii
Table of Authorities.....	v
<b>I. INTRODUCTION - SCOPE AND CAUSES OF KINSHIP CARE.....</b>	<b>1</b>
1. Definition of Kinship Care.....	1
2. Statistics on Kinship Care in New York State .....	2
3. Causes of Kinship Care .....	3
4. Kinship Children Face Special Challenges.....	3
5. Yonkers Grandmother: “Are you kidding! All our kids are special needs” .....	3
6. Social Benefit - Excerpt from Appendix: "Benefits of Kinship Care" .....	4
7. 2011 KinCare Summit Report - Appendix J. SUMMARY OF COST BENEFIT CALCULATIONS .....	5
<b>II. RESOURCES FOR KINSHIP FAMILIES.....</b>	<b>6</b>
<b>III. OPPORTUNITY TO BECOME A KINSHIP CAREGIVER .....</b>	<b>6</b>
1. Parents Will Consent .....	6
2. Parent Will Not or Cannot Consent.....	7
3. Domestic Relations Law Section 72.....	8
4. Tolbert v. Scott, 2 <sup>nd</sup> Dept., 15 A.D.3d 493, 790 N.Y.S. 2d 495 (2005) .....	8
5. <i>Bevins v. Witherbee</i> , Third Dept, 20 A.D.3d 718 (2005) .....	9
6. Diversion from Foster Care.....	9
7. Child Protective Services or Police Request Relatives to Assist – Before Removal .....	10
8. Child Protective Services Request Relatives to Assist – After Removal .....	10
9. 18 NYCRR 430.11(c)(4).....	10
10. Relatives Seeking to Become Foster Parents of Children Placed with Non-Relative Foster Parents.....	14
11. Relative Seeking to Become Foster Parents When They are Caregivers .....	15
12. Relatives Seeking Custody or Guardianship Post Termination .....	17
13. Incarcerated Parents and Termination of Parental Rights – Special Exemption .....	18
14. Parents Can Regain their Rights – After Termination.....	18
15. Children’s Visits to Incarcerated Parents.....	18
<b>IV. Custodial Arrangements .....</b>	<b>19</b>
1. Informal Custody.....	19
2. “Person in Parental Relation” .....	19
3. Written Designations by Parents .....	20
4. Education .....	21
5. School Enrollment .....	21
6. Court order not required .....	21
7. Medical Care .....	22
8. Emergency Care .....	22
9. What Else May Informal Custodians Do? .....	22
10. Laws Are Not Always Followed .....	22

11.	What Financial Assistance and Services Do Informal Custodians Qualify For?.....	22
12.	Advantages of Legal Custody or Guardianship .....	23
<b>V.</b>	Emerging Issues.....	32
1.	Expansion of DRL §72 to other relatives .....	32
2.	Engagement of Child Welfare Agencies: .....	32
3.	Four KinCare Summit reports (Legal Assistance Recommendations):.....	33
4.	Federal Recommendations ( <i>See</i> recommendations in National Kinship Summit Report, available at www.grandparents for children and www.nysnavigaor.org and www.cwla.org) .....	33
<b>VI.</b>	Rights, Legal Issues, and Legal Assistance .....	33
1.	Grandparent Visitation and Kinship Caregiver Rights .....	33
2.	Kinship Caregiver Rights.....	36
<b>VII.</b>	Legal Assistance.....	37
1.	Legal Specialists in Kinship Care .....	37
2.	New York State KinCare 2011 Summit Legal Assistance Recommendations.....	39

## Table of Authorities

### State Cases

<i>Ann M.C. v. Orange County Department of Social Services</i> , 682 N.Y.S.2d 62 (App. Div. 2d Dep't 1998).....	36
<i>Balbuena v. Mattingly</i> , 2007 WL 2845031, *6+ (S.D.N.Y. Sep 28, 2007) .....	36
<i>Bellet v. City of Buffalo</i> , 2009 WL 2930464, *3+ (W.D.N.Y. Sep 11, 2009) .....	36
<i>Bennett v. Jeffreys</i> , 40 N.Y.2d 543 (1976).....	7, 9
<i>Bevins v. Witherbee</i> , 20 A.D.3d 718, 798 N.Y.S.2d 245 (2005) .....	7, 9
<i>Coulter v. Barbara</i> , 632 N.Y.S.2d 270 (App. Div. 3rd Dep't 1995) .....	36
<i>Debra VV. v. Johnson</i> , 2 <sup>nd</sup> Dept; 26 A.D.3d 714 (2006) .....	16
<i>E.S. v. P.D.</i> , 8 N.Y.3d 150 (2007).....	33, 35, 36
<i>Emmanuel S. v. Joseph E.</i> , 78 N.Y.2d 178 (1991).....	36
<i>Gloria R. v. Alfred R.</i> 618 N.Y.S.2d 24 (App. Div. 1994).....	36
<i>Guinta v. Doxtator</i> , Fourth Dept. April 29, 2005; 20 A.D.3d 47 .....	23, 30
<i>Hertz v. Hertz</i> , 738 N.Y.S.2d 62 (2nd Dept. 2002).....	36
<i>In re Haylee RR.</i> (3 Dept. 2008) 47 A.D.3d 1093, 849 N.Y.S.2d 359 .....	14
<i>In re Jermaine H., a Child Found to be Neglected. Lisa H., Respondent.</i> 26 Misc. 3d 891, 892 N.Y.S.2d 738, 2009 N.Y. Misc. LEXIS 3338, 2009 NY Slip Op 29506 .....	16
<i>In re John C.</i> , 718 NYS2d 314 (1st Dept. 2000) .....	17
<i>In re Joseph P.</i> (1990, Fam Ct) 148 Misc 2d 25, 559 NYS2d 623. ....	16
<i>In re Seth Z.</i> (3 Dept. 2007) 45 A.D.3d 1208, 846 N.Y.S.2d 729 .....	14
<i>Johnson v. City of New York</i> , 2003 WL 1826122, *6+ (S.D.N.Y. Apr 08, 2003).....	36
<i>Karr v. Black</i> , 55 A.D.3d 82, 84-85, 863 N.Y.S.2d 26, 28-29 (2008) .....	35
<i>Matter of Emanuel S.</i> , 78 N.Y.2d at 182, 573 N.Y.S.2d 36, 577 N.E.2d 27 .....	35
<i>Matter of G. B.</i> , 801, NYS.2d. 233.....	17

<i>Matter of Gray v. Chambers</i> , 222 A. D.2d 753 (1995) .....	7
<i>Matter of Loretta D. v. Commissioner of Social Services of City of New York</i> , 177 A.D.2d 573, 574-5 (2 <sup>nd</sup> Dept. 1991) .....	33
<i>Matter of Randi NN. v Joseph MM.</i> (2009, 3d Dept) 68 App Div 3d 1458, 891 NYS2d 521 .....	15
<i>Matter of Suarez v Williams</i> , 2015 NY Slip Op 09231 (NYS Ct. Appeals, Dec. 2015), trial court decision affirmed by 4 <sup>th</sup> dep’t, December 31, 2015 .....	9
<i>Moorhead v Coss</i> , 17 AD3d 725, 792 NYS2d 709 (3 <sup>rd</sup> Dept. 2005) .....	17
<i>Morgan v. Grzesik</i> , 732 N.Y.S.2d (4th Dep’t 2001).....	36
<i>Rivera v. Mattingly</i> , 2011 WL 4344422, (S.D.N.Y. Sep 12, 2011).....	36
<i>Rodriguez v. McLoughlin</i> , 49 F.Supp.2d 186, 194+ (S.D.N.Y. Jan 08, 1999) .....	36
<i>Suarez v. Williams</i> , 134 A.D. 3d, 1479 (2015) .....	9
<i>Trell v. Tyrell</i> , 67 A.D.2d 247 (1979).....	7

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Pub. L. No. 105-17 (1997).....	20
11-OCFS-ADM-7 .....	18
18 NYCRR §443.1 .....	28
18 NYCRR §430.10(b) (2) .....	10
18 NYCRR §430.11(c )(4).....	10
Chapter 113, New York Laws of 2010.....	30
CPLR Art78 .....	15
Domestic Relations Law (DRL) §72(2) .....	7
DRL §115-c.....	24
DRL §72 .....	32
DRL §72(2) .....	7
DRL §72(2)(b) .....	9
DRL §112-b .....	31
DRL §72 .....	8, 32
DRL §240(1)(a-1)(3) .....	26
Family Court Act (FCA) §1017(1).....	10
FCA §661(b) .....	24

FCA §614(1)(e).....	17
FCA §635-637.....	31
FCA §1017.....	11
FCA §1028-a.....	14
FCA §664.....	26
FCA §1055-a.....	31
N.Y. CIV. PRAC. L. & R. § 1201.....	20
N.Y. DOM. REL. § 71 (McKinney 1989).....	20
N.Y. DOM. REL. § 75-e (McKinney 2001).....	20
N.Y. EDUC. LAW § 3202 (McKinney 2004) .....	21
N.Y. EDUC. LAW § 3222 (McKinney 1971) .....	20
N.Y. EDUC. LAW § 4106 (McKinney 1947) .....	20
N.Y. EDUC. LAW § 4111 (McKinney 1947) .....	20
N.Y. EDUC. LAW § 4402 (McKinney 2006) .....	20
N.Y. EDUC. LAW § 562 (McKinney 1972) .....	20
N.Y. EDUC. LAW § 912-a (McKinney 2004) .....	20
N.Y. GEN. OBLIG. LAW § 5-1502I (McKinney 1963) .....	20
N.Y. GEN. OBLIG. LAW ART. 5 (McKinney 2005).....	20
N.Y. PUB. HEALTH LAW § 2164 (McKinney 2004) .....	20
PHL 2164.....	19
Pub. L. No. 101-476 (1990).....	20
Public Health Law 2504(4).....	21
Public Health Law Section 2504(2) .....	19
Social Services Law (SSL) 453.....	31
Social Services Law § 383(3) .....	14
Social Services Law § 384-a.....	10
Social Services Law § 384-b (3)(L)(i).....	16
Social Services Law § 458-a-f .....	29
Social Services Law § 384-b.....	17
Social Services Law § 383-c.....	31
Surrogate’s Court Procedure Act § 1702(2) .....	24

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Archives of Pediatrics & Adolescent Medicine, June of 2008 .....	4
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<i>Cabrales v. Los Angeles County</i> , 644 F. Supp. 1352, 1354+ (C.D.Cal. Sep 03, 1986). ....	36
<i>Cote v. Brown</i> , 299 A.D.2d 876, 2002. ....	7
<i>Johnson v. City of Cincinnati</i> , 310 F.3 <sup>rd</sup> 484 (2002). ....	36
<i>Moore v. City of East Cleveland</i> , 431 U.S. 494, 97 S.Ct. 1932 (1977) ....	35
<i>Organization of Foster Parents</i> , 431 U.S. 816d (1977) ....	18
<i>Osborne v. County of Riverside</i> , 385 F.Supp.2d 1048, 1054 (C.D.Cal. Sep 01, 2005) ....	36
<i>Rivera v. Marcus</i> , 696 F.2d 1016 (1982) ....	36
<i>Smith v. Organization of Foster Families</i> , 431 U.S. 86, 97 S. Ct. 2094; 53 L.Ed.2d 14 (1977) ....	14
<i>Tolbert v Scott</i> , 15 AD3d 493, (2004). ....	7
<i>Tolbert v. Scott</i> , 2 <sup>nd</sup> Dept., 42 A.D.3d 548 (2005) ....	8
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Stepping Up For Kids: What Government and Communities Should Do to Support Kinship Families, Annie E. Casey Foundation, Policy Report Kids Count, May 2011 ....	42
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## **I. INTRODUCTION - SCOPE AND CAUSES OF KINSHIP CARE**

### **1. Definition of Kinship Care<sup>1</sup>**

Kinship care is a living arrangement in which a relative or another person who is emotionally close to a child takes on primary responsibility for raising that child.<sup>2</sup> According to the 2009 U.S. Census, nationally there are 7.8 million children under the age of 18 living in grandparent-maintained households,<sup>3</sup> and another 632,000 children under 18 living in other relative-maintained households.<sup>4</sup>

Several types of kinship care arrangements exist: formal kinship care, informal kinship care, and quasi-formal arrangements (formal (abuse/neglect proceeding initiated by state) but kin are not foster parents). Children placed into formal kinship care are under the supervision of a child welfare agency. The relative that cares for the child in formal care is a licensed foster parent, and can receive the same oversight and compensation as a foster parent caring for non-kin children. Some states utilize kin much more heavily than others and, therefore, an estimate of the number of children placed in the care of relatives varies across locale. Based on AFCARS data for 2014, approximately 29 percent of children entering foster care were placed in the homes of relatives.<sup>5</sup> (The AFCARS REPORT, Preliminary FY1 2014 Estimates as of July 2015 □ p. 1, No. 22, U.S. Department of Health and Human Services, Administration for Children and Families, Administration on Children, Youth and Families, Children's Bureau, <http://www.acf.hhs.gov/programs/cb>.)

However, in some states, such as California, Massachusetts, and Illinois, the proportion of children placed with kin is markedly high; various estimates near or exceed 50 percent.<sup>6</sup> In New York State, 2015 state admissions data shows close to 30% of foster care placements with kin in New York City but less than 8% for the rest of the state.

Many more children are placed in the home of a relative informally. In this case, the relative caregiver takes on primary care for the child outside of the auspices of the child welfare system.<sup>7</sup> According to the National Survey of American Families (NSAF), the number of informal kinship care placements is approximately one and a half times greater than the number of formalized kin care placements.<sup>8</sup> These families are not subject to the same supervision as those in the formal foster care system; they are also not eligible for the same monetary compensation and services that formal kinship caregivers receive.

An increasingly popular option for kinship care families is legal guardianship, wherein a relative becomes the legal guardian of the relative child in their care.<sup>9</sup> It has often been reported that kinship caregivers are reluctant to obtain guardianship because of the confusion that it might cause for a child in kinship care, the conflict that might arise with the child's

biological parent(s), and a feeling that blood ties already existent in the relationship make legal bonds unnecessary.<sup>10</sup> However, new federal and state policies make this a more viable option for kinship caregivers.<sup>11</sup> Monetary compensation or subsidized guardianship for caregivers obtaining legal guardianship, legal services available to assist kin in completing necessary paperwork, and agency support systems where kin can see others who have obtained guardianship have promoted this option among kin caregivers. As a result, the number of caregivers obtaining legal guardianship has been increasing.<sup>12</sup>

Kinship care is sometimes called kincare, or non-parent care. Another term is grandfamilies. Sometimes in order to distinguish between foster care and non-foster, kinship care is generally divided into:

- private (also called informal kinship care, “kincare”, or non-foster kinship care),
- public (also called formal kinship care, “kinship”, or kinship foster care).

We’ll use the term kinship care to mean both private and public. We’ll talk about laws that apply to both, and laws that apply only to private (non-foster) or only to public (foster) kinship care.

## **2. Statistics on Kinship Care in New York State**

New York has the third largest population of grandparent caregivers in the United States. In May 2011, based on Census data, the Annie E. Casey Foundation (AEC) reported there are 153,000 in kinship care (Non-parent custodial arrangements for New York’s children). Approximately 60% of these arrangements involved grandparents.<sup>13</sup>

In September 2010, the Pew Research Center published data showing a national five percent increase in grandparent care during one year, from 2007 to 2008.

The 2009 American Community Survey shows 141,157 New York grandparents as primary caregivers. 21.7% had income below the poverty level. 54,305 were sixty years of age or older. Grandparent caregivers are split almost evenly between the greater New York City area and the rest of the state.<sup>14</sup>

Of the 141,157 grandparents:

- 46% are Caucasian,
- 29.4% Afro-American,
- 27.7% Hispanic.

Regarding children:

- 48.9% were under six years of age,
- 29.3% from six to eleven years,
- 21.85% were from twelve to seventeen years old.

According to AEC, one of five Afro-American children and one in eleven of all children will live with kin during their childhood.

In contrast, less than 5,000 children are in kinship foster care in New York State.

### **3. Causes of Kinship Care**

Children enter kinship care because of parental:

- Abuse, neglect or abandonment
- Alcohol and/or substance abuse <sup>15</sup>
- Death, mental illness
- Inability or unwillingness to parent
- Incarceration<sup>16</sup>
- Military deployment<sup>17</sup>
- Mathematics (2-1-1=0)

### **4. Kinship Children Face Special Challenges**

Children in kinship care face many special challenges, ranging from the loss of their parents, possible abuse/neglect by their parents, physical disabilities, mental health issues, poverty, developmental delays, and others.

Although children in both formal and informal kinship care are less likely to be mentally ill than those in foster care, they face more serious mental health challenges than children who are cared for by their biological or adoptive parents. All children and adolescents in kinship care have experienced significant stress and loss due to separation from their biological parents, and many have additional mental health problems. <https://www.aap.org/en-us/advocacy-and-policy/aap-health-initiatives/healthy-foster-care-america/Documents/Guide.pdf>.

Some suffer the effects of having been born to drug addicted mothers. Some have fetal alcohol syndrome, which can impair brain functioning. Some have experienced physical and/or sexual abuse, and many have been neglected. This population has high prevalence of post-traumatic stress disorder, attachment disorder, substance abuse, and various developmental disabilities, including Asperger syndrome and other autistic spectrum disorders.

### **5. Yonkers Grandmother: “Are you kidding! All our kids are special needs”**

*See* 2010 summit report, “Kinship Care in New York: Keeping Families Together,” on NYS Kinship Navigator web site. *Also see* emerging issues section.

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

## **6. Social Benefit - Excerpt from Appendix: "Benefits of Kinship Care"**

Archives of Pediatrics & Adolescent Medicine, June of 2008, demonstrates for the first time on a nationally representative sample of children from the National Survey of Child & Adolescent Well-Being that children in kinship care are not only more likely to attain early stability in out-of-home care than children in general foster care, but are also less likely to have behavioral problems than children in foster care three years later. Nevertheless, while children in kinship care had fewer behavioral problems than children in foster care, their problems still exceeded the rates described for other children living in poverty.

Such work provides compelling evidence to support prompt access of children to kin - when appropriate and available - following entry into out-of-home care. This would require systems to be aggressive in their identification of appropriate kin who have a relationship with the child, and should encourage a reconsideration of licensing requirements for kinship parents to ensure that their inherent availability to improve outcomes for children entering the system is taken advantage of. At the same time, the significant behavioral needs of these children will require systems to provide access to needed services for kinship families, by promoting better guardianship options, as well as access to the navigator programs that will help link them to services, particularly after they depart the system.

- Rubin DM, Downes KJ, O'Reilly A, Mekonnen R, Luan X, Localio AR (June, 2008). The impact of kinship care on behavioral well-being for children in out-of-home care, Archives of Pediatrics & Adolescent Medicine.
- "When it is necessary to remove a child from his or her family because of abuse or neglect, research shows foster placements with relatives are good for children. They

are less likely to change schools and more likely to be placed with their other siblings.”

- Kids Are Waiting: Fix Foster Care Now. (2008, April). *Strengthening families through guardianship*. (Issue Brief). Washington, DC: Author.

## **7. 2011 KinCare Summit Report - Appendix J. SUMMARY OF COST BENEFIT CALCULATIONS**

### **a. Fiscal Year 2011-12 Savings**

According to the KinCare Summit report 2011:

If the OCFS Kinship Programs are not funded:

- If **60** children enter all foster placements, the cost will equal the entire \$3 million for full funding of the OCFS Kinship Program.
- If **200** children enter regular foster care, the cost will equal the entire \$3 million for full funding of the OCFS Kinship Program;
- Without these programs, an estimated **475** children will leave informal kinship care and enter foster care during FY2011-12. At an increased cost between **\$23,545,750** (foster care placements minus informal cost) and **\$7,146,375** (regular foster parent care minus informal cost).

### **b. Average Cost of (Formal) Kinship Foster Care**

- Annual overall costs of foster care = **\$1,376,000,000** (OCFS foster care budget).
- Number of children in all foster care placements = **24,541**.
- Average cost of *all* foster care placements (institutional, special and exceptional needs foster parents, etc., plus administrative costs); = **\$56,060** per year.
- Average cost of one child placed in *regular* foster care (basic foster parent payment plus administrative cost) = **\$21,535 per year**.

### **c. Average Cost of Informal Kinship Care**

- Annual cost of one child in an OCFS kinship program (\$140,000 per program, over 300 children served per year per program) = **\$466**.
- Annual average cost of public assistance per child (OTDA payment plus administrative costs) = **\$6,024**.
- Total cost per child of informal kinship care = **\$6,490**.<sup>18</sup>

### **d. Average Difference in Cost**

- Difference between average cost of children in all formal foster care placements (\$54,060) and the cost for children in informal kinship care (\$6,490 - including a public assistance grant) = **\$49,570**.

- Difference for a child placed in regular foster care with a foster parent = **\$15,045**.

## II. RESOURCES FOR KINSHIP FAMILIES

In addition to legal rights issues, kin have a need for general and specialized services, specialized supports, and information on successfully raising children. For listings of relevant resources including local services, please visit the NYS Kinship Navigator at [www.nysnavigator.org](http://www.nysnavigator.org). Information includes specialized kinship programs, the KinCare Coalition, extensive legal fact sheets, and links to important information authored by other kinship organizations (for instance, MFY guide to education planning, Empire Justice Center's guide to summer camp fees). In 2016, New York increased funding for kinship services, and currently the Office of Children and Family Services administers 22 local kinship programs and the statewide Kinship Navigator. See [www.nysnavigator.org](http://www.nysnavigator.org), and also accompanying power point.

One key resource for kinship caregivers is the opportunity to receive public assistance based upon solely on the income and resources of the children in their care. Called a "non-parent" grant, almost all kinship children are eligible. See extensive information and guide book about public assistance at the Kinship Navigator [www.nysnavigator.org](http://www.nysnavigator.org)

The Kinship Navigator also contains information on national resources: For instance:

- Child Welfare Information Gateway, U.S. Department of Health and Human Services, Administration for Children and Families, <https://www.childwelfare.gov/>
- National Kinship Alliance for Children <http://kinshipalliance.org/>
- Generations United <http://www2.gu.org/OURWORK/Grandfamilies.aspx>
- National Resource Center for Permanency and Family Connections <http://www.nrcpfc.org/>
- Child Welfare League of America <http://cwla.org/>
- Annie E. Casey Foundation, <http://www.aecf.org/>
- Advocates for Families First <http://advocatesforfamiliesfirst.org/>

## III. OPPORTUNITY TO BECOME A KINSHIP CAREGIVER

### 1. Parents Will Consent

When parents are willing to consent to guardianship or custody, then grandparents, relatives, and other kin are not subject to any barriers to becoming caregivers. However, even in those instances, courts will usually want to review their background, ordering a home study, criminal background check, and a child abuse registry check. When a child welfare agency is involved, this check may extend beyond New York State to the entire nation.

## 2. Parent Will Not or Cannot Consent

If parents are unwilling to consent, the relative will have to petition family court via a guardianship or custody petition. The petitioner will have to prove an extraordinary circumstance at a fact-finding hearing. Extraordinary circumstances are very similar to the reasons that children come in kinship care. Essentially, they are situations where parents are unfit or unable to care for children.

Once the court finds that extraordinary circumstances exist, then the court must hold a trial on the best interests of the child. Trials involving a parent and a non-parent caregiver happen frequently, and there is a large number of cases that supply precedents for these proceedings. Seminal Case is *Bennett v. Jeffreys*, 40 N.Y.2d 543, 356 N.E.2d 277 (1976).

In *Bennett*, the New York State Court of Appeals expanded the circumstances whereupon a trial court must decide custody based upon the best interests of children. The Court's decision specifically added a new circumstance – “an extended disruption of custody.” Since then, numerous courts have decided such circumstances exist. See for instances, *Tyrell v. Tyrell*, 67 A.D.2d 247, 415 N.Y.S.2d 723 (1979), *Gray v. Chambers*, 222 A. D.2d 753, 634 N.Y.S.2d 864 (1995), *Golden v. Golden*, 91 A.D.3d 1042, 938 N.Y.S.2d 207 (2012), *Penny K. v. Alesha T.*, 39 A.D.3d 1232, 834 N.Y.S.2d 760 (2007), *McDevitt v. Stimpson*, 281 A.D.2d 860, 722 N.Y.2d 615 (2003).

An extended disruption of custody means that a child had lived with the caregiver for an extended period of time. Courts have found periods as short as six months to be long enough.

In *Bennet*, the caregiver was *not* a relative.

Importantly, courts consistently find that an extended disruption of custody, when accompanied by evidence that the non-parent had a close relationship with the children and the failure of the parent to make efforts to resume their parental role, is an extraordinary circumstance. *McDevitt*, 281 A.D.2d 860 at 862, *Matter of Cote v. Brown*, 299 A.D.2d 876, 750 N.Y.S.2d 254 (2002).

Often petitions for custody by third parties are filed after the parents have regained informal custody. Such circumstances do not necessarily stop courts from finding that an extended disruption of custody is an extraordinary circumstance. *Bevins v. Witherbee*, 20 A.D.3d 718, 798 N.Y.S.2d 245 (2005), also *Matter of Arlene Y. v Warren Cnty. Dept. of Soc. Servs.*, 76 A.D.3d 720, 906 N.Y.S.2d 645 (2010), 1-13 NY Civil Practice: Family Court Proceedings § 13.12.

Grandparents also have a special statute about extraordinary circumstances. Domestic Relations Law (DRL) §72(2) specifically states that an extended disruption of custody for



twenty-four months or more is an extraordinary circumstance in a custodial contest with an “absent” parent. Grandparents have some special statutory protections in disputes with absent parents. DRL §72(2), specifically states that an extended disruption of custody for twenty-four months or more is an extraordinary circumstance in a custodial contest with an “absent” parent. See also *Tolbert v Scott*, 15 AD3d 493, (2004). (But affirmed denial on remand from appeal because parents were present in home with grandmother and family was not unfit, at *Matter of Tolbert v. Scott*, 42 A.D.3d 548 (N.Y. App. Div. 2d Dep’t 2007)).

### **3. Domestic Relations Law Section 72**

2. (a) Where a grandparent or the grandparents of a minor child, residing within this state, can demonstrate to the satisfaction of the court the existence of extraordinary circumstances, such grandparent or grandparents of such child may apply to the supreme court by commencing a special proceeding or for a writ of habeas corpus to have such child brought before such court, or may apply to family court pursuant to subdivision (b) of section six hundred fifty-one of the Family Court Act; and on the return thereof, the court, by order, after due notice to the parent or any other person or party having the care, custody, and control of such child, to be given in such manner as the court shall prescribe, may make such directions as the best interests of the child may require, for custody rights for such grandparent or grandparents in respect to such child. An extended disruption of custody, as such term is defined in this section, shall constitute an extraordinary circumstance.

(b) For the purposes of this section "extended disruption of custody" shall include, but not be limited to, a prolonged separation of the respondent parent and the child for at least twenty-four continuous months during which the parent voluntarily relinquished care and control of the child and the child resided in the household of the petitioner grandparent or grandparents, provided, however, that the court may find that extraordinary circumstances exist should the prolonged separation have lasted for less than twenty-four months.

(c) Nothing in this section shall limit the ability of parties to enter into consensual custody agreements absent the existence of extraordinary circumstances.

Courts have viewed DRL 72 as codification of *Bennett*:

### **4. Tolbert v. Scott, 2<sup>nd</sup> Dept., 15 A.D.3d 493, 790 N.Y.S. 2d 495 (2005)**

Without a hearing, family court, Queens County, determined that “extraordinary circumstances” existed and proceeded to a fact-finding hearing in order to determine the best interests of the child. Reversed on the law along with the award of physical custody to grandmother with joint custody with parent. But pending an evidentiary hearing, the second



department awarded temporary physical custody to the grandmother. The trial court failed to hold required evidentiary hearing.

Amendments to Domestic Relations law were applied retroactively. The proceedings were pending when the amendments became effective. However since the amendments are “remedial” in nature, retroactive application is permissible.

The court also found that the new amendments “do not significantly alter the pre-existing law pursuant to the *Matter of Bennett v. Jeffreys*, 40 NY 2d 543. Remitted for an evidentiary hearing to determine the existence of ‘extraordinary circumstances.’”

### **5. *Bevins v. Witherbee*, Third Dept, 20 A.D.3d 718 (2005)**

A child was placed voluntarily with grandmother, where the child lived from seven months to four years. The parent took child on a camping trip and refused to return the child. He also denied visitation to the grandparent. Eleven months later the grandmother regained custody via an Essex County Family Court order of temporary custody. Subsequently, the family court found “extraordinary circumstances” and awarded sole custody to the grandmother.

The child had resided with her grandmother for “approximately 53 of the first 74 weeks of her life at respondent’s initial request and with his continued acquiescence.” This constituted an extraordinary circumstance. But the trial court declined to invoke DRL §72(2)(b) because the statute describes a continuous period of 24 months, and the father disputed the fact that the child continually resided with her grandmother.

But at the end of 2015, the NYS Court of Appeals decided that DRL 72(2) stated clearly that for grandparent caregivers an extended disruption of custody as defined in the statute was an extraordinary circumstances. *Matter of Suarez v Williams*, 2015 NY Slip Op 09231 (NYS Ct. Appeals, Dec. 2015), trial court decision affirmed by 4<sup>th</sup> dep’t, December 31, 2015; *Suarez v. Williams*, 134 A.D. 3d, 1479 (2015). See section VIII for *Suarez* update.

### **Diversion from Foster Care**

Diversion refers to engaging kin as a placement resource for children who cannot remain in their parents' home, but where kin do not become foster parents. Diversion appears to be most prevalent in some counties outside the City of New York.

Diversion exemplifies the tension between child welfare policies that promote the use of kin as foster parents and practices that utilize kin for non-foster care placements, in contrast with the federal and state statutory scheme that promotes kinship foster care placements (a mandated requirement for relative guardianship assistance - KinGAP). In general, diversion happens in one of two circumstances: prior to removals or post removals.

## **6. Child Protective Services or Police or Parents Request Relatives to Assist – Before Removal**

Grandparents and relatives are sometimes contacted by a child protective worker or a law enforcement official or a parent who has interactions with these authorities and asked to care for children, although the children are not in LDSS custody because there has not been a formal legal proceeding to remove the child. Such requests are legally valid. However, once the relative agrees and takes a child into their home, they are truly on their own. It is unlikely that they'll be given the chance to become a foster parent. Visit the NYS Kinship Navigator for more information on informal placements.

The regulations of the Office of Children and Family Services provide that:

the district shall . . . attempt prior to the placement of a child in foster care to locate adequate *alternative living arrangements* with a relative or family friend which would enable the child to avoid foster care placement, unless the child is placed as a result of a court order or surrender agreement. . . . 18 NYCRR § 430.10(b)(2) (OCFS – Necessity of placement)

Upon arrest, parents should immediately make plans for their children. Some police officials will provide them with a handout that tells how to arrange care. This handout provides a simple parental designation and a list of resources. It's available at <http://www.nycourts.gov/ip/justiceforchildren/NewContent/12-incarcerated%20Parent%20Flyer-Options.pdf> or by contacting the NYS Kinship Navigator.

## **7. Child Protective Services Request Relatives to Assist – After Removal Notification**

Once a child is removed from a parent's home by Child Protective Services, the Department of Social Services (DSS) must **search for "suitable relatives"** and offer them the opportunity to become foster parents. In New York, since 2004, the extent of the search was no longer completely discretionary with the Department of Social Services. DSS must attempt to locate "all the grandparents." Any contacted relative must be told that they can ask to become a foster parent or to assume care via "direct" custody or Article Six private custody and that if the family does not assume care, there is a likelihood of adoption by the foster parents. Relatives who choose to become foster parents must meet standards similar to non-relative foster parents, with exceptions for non-safety standards. Family Court Act § 1017(1) and Social Services Law § 384-a.

## **8. 18 NYCRR 430.11(c)(4)**

(4) Within 30 days after the removal of a child from the custody of the child's parent or parents, or earlier where directed by the court, or as required by section 384-a of the

Social Services Law, the social services district must exercise due diligence in identifying all of the child's grandparents and other adult relatives, including adult relatives suggested by the child's parent or parents and, with the exception of grandparents and/or other identified relatives with a history of family or domestic violence. The social services district must provide the child's grandparents and other identified relatives with notification that the child has been or is being removed from the child's parents and which explains the options under which the grandparents or other relatives may provide care of the child, either through foster care or direct legal custody or guardianship, and any options that may be lost by the failure to respond to such notification in a timely manner. The identification and notification efforts made in accordance with this paragraph must be recorded in the child's uniform case record as required by section 428.5(c)(10)(viii) of this Title.

In practice, however, while practices have improved and relatives are usually notified about removal of children from their parents, it is generally acknowledged that there are still incidences where kin are not informed about their option to become foster parents.

As mentioned, FCA §1017 has been continually amended in order to reach more relatives and better inform them. Currently, pursuant to state laws enacted in response to the federal Fostering Connections to Success and Improving Adoptions Act (P.L. 1010-351, Oct. 2008), DSS's must act with "due diligence" and complete the search for relatives, including all grandparents, within thirty days. Moreover, according to 11-OCFS-ADM-03, booklets advising relatives of their options, they must provide each contacted relative with the booklets:

"OCFS requires that relatives be given a copy of *Having a Voice and a Choice: New York State Handbook for Relatives Raising Children*, if the relative is considering becoming the child's caregiver (see 09 OCFS-ADM-04). As an option, OCFS also developed a brochure *Know Your Options: Relatives Caring for Children* (see 10 OCFS-INF-03). Those policies remain in place...."

A publication, entitled *Know Your Permanency Options: The Kinship Guardianship Assistance Program (KinGAP)* must accompany the handbook in situations where the handbook is required, per 09 OCFS-ADM-04. The publication can be found at [www.ocfs.state.ny.us/kinship/](http://www.ocfs.state.ny.us/kinship/)

The use of private custody (FCA Article Six) as an option also differs from county to county. The legislative response to these local practices has been to frequently amend FCA §1017, which governs both types of placements and notice to relatives. In addition to this discussion, *see also* Notification.

In placements governed by FCA § 1017, relatives who seek children have three options: private custody, direct custody, and foster care. *See* boldfaced text.

§ 1017. Placement of children. 1. In any proceeding under this article, when the court determines that a child must be removed from his or her home, pursuant to part two of this article, or placed, pursuant to section one thousand fifty-five of this article, the court shall direct the local commissioner of social services to conduct an immediate investigation to locate any non-respondent parent of the child and any relatives of the child, including all of the child's grandparents, all suitable relatives identified by any respondent parent or any non-respondent parent and any relative identified by a child over the age of five as a relative who plays or has played a significant positive role in his or her life, and inform them of the pendency of the proceeding and of the opportunity for becoming foster parents or for seeking custody or care of the child, and that the child may be adopted by foster parents if attempts at reunification with the birth parent are not required or are unsuccessful. The local commissioner of social services shall record the results of such investigation, including, but not limited to, the name, last known address, social security number, employer's address and any other identifying information to the extent known regarding any non-respondent parent, in the uniform case record maintained pursuant to section four hundred nine-f of the social services law. For the purpose of this section, "non-respondent parent" shall include a person entitled to notice of the pendency of the proceeding and of the right to intervene as an interested party pursuant to subdivision (d) of section one thousand thirty-five of this article, and a non-custodial parent entitled to notice and the right to enforce visitation rights pursuant to subdivision (e) of section one thousand thirty-five of this article. The court shall determine:

(a) whether there is a suitable non-respondent parent or other person related to the child with whom such child may appropriately reside; and

(b) in the case of a relative, whether such relative seeks approval as a foster parent pursuant to the social services law for the purposes of providing care for such child, or wishes to provide free care and custody for the child during the pendency of any orders pursuant to this article.

2. The court shall, upon receipt of the report of the investigation ordered pursuant to subdivision one of this section:

(a) where the court determines that the child may reside with a suitable non-respondent parent or other relative or other suitable person, either:

(i) grant an order of custody or guardianship to such non-respondent parent, other relative or other suitable person pursuant to section one thousand fifty-five-b of this article; or

(ii) place the child directly in the custody of such non-respondent parent, other relative or other suitable person pursuant to this article during the pendency of the proceeding or until further order of the court, whichever is earlier and conduct such other and further investigations as the court deems necessary; or

(iii) remand or place the child, as applicable, with the local commissioner of social services and direct such commissioner to have the child reside with such relative or other suitable person and further direct such commissioner pursuant to regulations of the Office of Children and Family Services, to commence an investigation of the home of such relative or other suitable person within twenty-four hours and thereafter approve such relative or other suitable person, if qualified, as a foster parent. If such home is found to be unqualified for approval, the local commissioner shall report such fact to the court forthwith.

(b) where the court determines that a suitable non-respondent parent or other person related to the child cannot be located, remand or place the child with a suitable person, pursuant to subdivision (b) of section one thousand twenty-seven or subdivision (a) of section one thousand fifty-five of this article, or remand or place the child in the custody of the local commissioner of social services pursuant to subdivision (b) of section one thousand twenty-seven or subdivision (a) of section one thousand fifty-five of this article. The court in its discretion may direct that such commissioner have the child reside in a specific certified foster home where the court determines that such placement is in furtherance of the child's best interests.

3. An order placing a child with a relative or other suitable person pursuant to this section may not be granted unless the relative or other suitable person consents to the jurisdiction of the court. The court may place the person with whom the child has been directly placed under supervision during the pendency of the proceeding. Such supervision shall be provided by a child protective agency, social services official or duly authorized agency. The court also may issue a temporary order of protection under subdivision (f) of section one thousand twenty-two, section one thousand twenty-three or section one thousand twenty-nine of this article. An order of supervision issued pursuant to this subdivision shall set forth the terms and conditions that the relative or suitable person must meet and the actions that the child protective agency, social services official or duly authorized agency must take to exercise such supervision.

4. Nothing in this section shall be deemed to limit, impair or restrict the ability of the court to remove a child from his or her home as authorized by law, or the right of a party to a hearing pursuant to section ten hundred twenty-eight of this article.

Placements pursuant to (ii), are usually called “direct custody” (i.e., “directly”). They are sometimes referred to as “N” docket or “1017” placements. Upstate, there is extensive use of such placements.

## **9. Relatives Seeking to Become Foster Parents of Children Placed with Non-Relative Foster Parents**

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If relatives seek to become the primary caregivers of a child already in foster care with a non-relative foster family, DSS will process an application (18 NYCRR 443.2), however, there is no “right” to become the foster parent for a kinship child and DSS may choose to continue placement with the foster family. Foster parents have limited protections from removals, including access to a fair hearing (removal rights and process are set forth in 18 NYCRR 443.5) and they have no fundamental right to care for children. *Smith v. Organization of Foster Families for Equal. & Reform*, 431 U.S. 816, 97 S. Ct. 2094; 53 L.Ed.2d 14 (1977). “[A]ny such authorized agency may in its discretion remove such child from the home where the child was placed or boarded.”

However, Social Services Law §383(3) permits foster parents who have been in continuous care of a child for twelve months to intervene in “any custody proceeding.” *Also see* FCA §641 and 1089.

In such situations, the relative may petition for custody or guardianship or use FCA §1028-a to seek to become a foster parent, or FCA §1061.

### **FCA §1028-a**

While FCA §1028-a has been in effect since March 2006, there are few reported appellate decisions, both affirmed the denial of relative foster care to appellants.

*In re Haylee RR.* 47 A.D.3d 1093, 849 N.Y.S.2d 359 (2008). Aunt did not apply within one-year period required, and had only visited child four times, whereas foster parents were able to show a genuine relationship. Child was freed for adoption as new goal.

*In re Seth Z.* 45 A.D.3d 1208, 846 N.Y.S.2d 729 (2007). Aunt and uncle had a statutory right to a hearing concerning the custody of child.

§ 1028-a. Application of a relative to become a foster parent.

(a) Upon the application of a relative to become a foster parent of a child **in foster care**, the court shall, subject to the provisions of this subdivision, hold a hearing to determine whether the child should be placed with a relative in foster care. Such hearing shall only be held if:

- (i) The relative is related within the **third degree of consanguinity** to either parent;
- (ii) The child has been temporarily removed under this part, or placed pursuant to section one thousand fifty-five of this article, and placed in non-relative foster care;

(iii) The relative indicates a willingness to become the foster parent for such child and has not refused previously to be considered as a foster parent or custodian of the child, provided, however, that an inability to provide immediate care for the child due to a lack of resources or inadequate housing, educational or other arrangements necessary to care appropriately for the child shall not constitute a previous refusal;

(iv) The local social services district has refused to place the child with the relative for reasons other than the relative's failure to qualify as a foster parent pursuant to the regulations of the office of children and family services; and

(v) The application is brought within six months from the date the relative received notice that the child was being removed or had been removed from his or her home and no later than twelve months from the date that the child was removed.

(b) The court shall give due consideration to such application and shall make the determination as to whether the child should be placed in foster care with the relative based on the best interests of the child.

(c) After such hearing, if the court determines that placement in foster care with the relative is in the best interests of the child, the court shall direct the local commissioner of social services, pursuant to regulations of the Office of Children and Family Services, to commence an investigation of the home of the relative within twenty-four hours and thereafter expedite approval or certification of such relative, if qualified, as a foster parent. No child, however, shall be placed with a relative prior to final approval or certification of such relative as a foster parent.

### **FCA §1061**

The trial court erred in denying a grandmother's New York Family Court Act § 1061 motion to terminate the pre-adoptive placement of her grandchild because the department failed to comply with former New York Family Court Act § 1017, by failing to ask the grandmother if she was interested in acting as a foster parent or wanted grandparent visitation. The grandmother was confused as to her options with regard to foster placement and the department failed in its statutory duty to explain the options and make clear to the grandmother that her inaction could ultimately lead to the foster parents obtaining custody of the child. The Department's failure to properly explain to the grandmother her options potentially deprived the child of a placement with a suitable relative. The grandmother was able to demonstrate prejudice to both herself and the child arising from the failure of the department to comply with § 1017 and good cause existed to vacate the placement order.

## **10. Relative Seeking to Become Foster Parents When They are Caregivers**

Relatives who are caregivers often complain that they want to be foster parents and that there is no court procedure to force DSS to make them foster parents. They can ask DSS and



occasionally DSS will agree. However, the usual reply is that they must transfer custody and then hope DSS places with them. Inevitably, relatives choose not to transfer. This situation is often caused by DSS interventions and “informal” placements. See Diversion and Notification. In a few instances, relatives have sought to become foster parents:

*Debra VV. v. Johnson*, 2<sup>nd</sup> Dept; 26 A.D.3d 714, 811 N.Y.S.2d 457 (N.Y. App. Div. 2006), also 1-8 LN Answer Guide NY Family Court Proceedings § 8.35

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.” Appellate court found that successfully placing a child with a relative does not relieve the state of its affirmative duty to provide foster placement.” Annulled and remitted.

*In re Jermaine H.*, 79 AD3d 1720 (4<sup>th</sup> Dept 2010). “What is at stake here is money - i.e., whether the Monroe County Department of Human Services (“DHS”) must pay foster care money for ‘emergency kinship foster care’ to the friend of the family it has chosen and approved to care for the subject child in this neglect proceeding and who is willing to be a foster parent, just as if she were a stranger certified to provide foster care to this same child.” County resisted certification of caregiver, court ordered county to follow regulatory scheme. County did not have discretion to follow regulations. While *Jermaine* was reversed on appeal on the basis that DHS is not required to certify the person with whom the child is placed as an emergency foster parent, but is required only to certify the person with whom the child is placed as a foster parent if the person is qualified, it does highlight tension in upstate New York, between using kin as foster parents and policies of diversion.

Order placing neglected child with maternal aunt and uncle, pursuant to their agreement under Family Ct Act § 1017(1) to “provide free care and custody,” did not constitute irreversible election and would be modified in best interest of child to alter status of aunt and uncle to that of foster care parents, thereby making available to them necessary financial support and assistance. *In re Joseph P.* (1990, Fam Ct) 148 Misc 2d 25, 559 NYS2d 623.



## 11. Relatives Seeking Custody or Guardianship Post Termination

Custody petitions may not survive post termination. In petitions started before termination of parental rights, relatives may prevail. But if the relative loses, upon appeal, one appellate court has declared that it lacks jurisdiction over a custody appeal that would be decided subsequent to termination.

When petitions for custody or guardianship are filed **after termination**, petitions are frequently denied.

*In re John C. Jr.*, 278 A.D.2d 123, 718 NYS2d 314 (2000)

Grandmother filed for custody of child in foster care, lost case and while custody petition was on appeal, child was freed for adoption; custody petition must be dismissed now - grandmother could seek to adopt.

*Moorhead v. Coss*, 17 A.D.3d 725, 792 N.Y.S.2d 709 (2005)

Children had been in care for over three years when both parents surrendered, grandmother then filed for custody but agency wanted children to be adopted - App Div says no error for court to have dismissed custody petition as grandmother had no standing to seek custody of children who had been surrendered for adoption.

The growing acknowledgement about the outcome benefits for children who are living with kinship families may signal that relatives will be viewed more favorably for placements post termination. One court has declared that it may be in the best interests of children to be placed with relatives rather than to be adopted by foster parents, *In re G.B.*, 7 Misc. 3d 1022(A) 801, N.Y.S.2d 233 (Fam. Ct. 2005), cited by *Matter of D. Children v. Geneva D.*, 25 Misc. 3d 1208(A) (N.Y. Fam. Ct. 2009), *Matter of Wanda P. v. Monroe County Dept. of Human Servs.*, 10 Misc. 3d 1076(A) (N.Y. Fam. Ct. 2006). Petition by Monroe County Department of Social Services to terminate parental rights due to permanent neglect pursuant to Social Services Law Section 384-b. Mother consented to a finding of permanent neglect. Dispositional hearing was lengthy due to relatives contesting with county.

Family Court Act §614(1)(e) states that one of the elements in determining the disposition is that “the best interests of the child require that the guardianship and custody of the child be committed to the authorized agency or to a foster parent authorized to originate this proceeding...” Family court dismissed termination proceeding, finding that it was in the best interests of the two children to be placed with their extended family.

The court found that the contest was actually between placement with relatives or with the state. A grandmother and a paternal aunt had come forward via Article Six custody petitions to become caregivers. Their petitions need not claim an extraordinary circumstance because the children are in the care and custody of the state not the parents.

Court noted in dicta that a claim of a constitutionally protected family substantive due process right to raise children over non-relatives had not yet come before the court, and that the court would have welcomed the opportunity to consider the existence of a fundamental family right.

Moreover the statutory scheme supports placement with relatives whenever possible. It is the department's duty to locate relatives not the relatives' duty to locate children. In this instance, the county failed to adequately search for relatives. Citing *Smith v. Organization of Foster Parents*, 431 U.S. 816d, 97 S.Ct. 2094, 53 L.E.2d 14 (1977), the court also found that foster parents should not be placed on an equal footing with family (relatives).

## **12. Incarcerated Parents and Termination of Parental Rights – Special Exemption**

New York has a special law that can help parents to keep their parental rights while they are incarcerated. The state agency is not required to file for termination when children are in foster care for 15 of the most recent 22 months, if on a case-by-case basis it determines that an incarcerated parent has played a “meaningful role” in the child's life and there is no documented reason why the agency must terminate. Social Services Law 384-b (3)(L)(i). *See* also 11-OCFS-ADM-7.

## **13. Parents Can Regain their Rights – After Termination**

In situations where children in foster care are not yet adopted, parents whose rights have been terminated may petition for restoration of their rights. FCA 635, also see 11-OCFS-INF-02. This law can assist parents to regain parental rights. The petition contains a number of conditions:

- The child is 14 years of age or older;
- At least two years have elapsed since the issuance of the order transferring guardianship and custody of the child (the termination order);
- The original adjudication terminating parental rights was not based upon severe or repeated child abuse; and
- The child is under the jurisdiction of the family court, has not been adopted, and has a permanency goal other than adoption.

## **14. Children's Visits to Incarcerated Parents**

For children who are in kinship foster care, the DSS worker has an obligation to assist in finding an incarcerated parent and in arranging visits. The Department of Corrections website offers a guide, “Handbook for the Families and Friends of NYS DOCS Inmates” that contains information about visitation. Additionally, each correctional facility, county jail, and other secure facility have their own rules about visitation. Most importantly, kinship caregivers will

need court orders or a notarized statement from a parent in order to bring children into a secure facility. Visit [www.docs.state.ny.us](http://www.docs.state.ny.us) and look at the services listed in the left column or contact the Division of Ministerial, Family & Volunteer Services, NYS Dept. of Correctional Services, Harriman State Campus – Building 2, 1220 Washington Avenue, Albany, NY 12225-2050 (518-402-1700).

## **IV. Custodial Arrangements**

In New York State there are several custodial options for grandparents and other relatives who are raising children. Grandparents and relatives can become the lawful caregivers of children via:

- Informal custody
- Legal custody
- Guardianship
- Foster care
- Adoption

### **1. Informal Custody**

Informal custody does not involve a court petition, court hearings, or court orders. It is privately arranged. Informal custody can happen when parents are not able or willing to care or when parents are deceased, cannot be found, are incarcerated, or for any other reason are not capable of providing for their children. Informal caregivers have limited authority to make decisions for children. In general, most informal custodians fit the definition of a “person in parental relation,” and the informal custodian has authority to immunize and to take charge of schooling (and to enroll children). If they have a written designation from the parent, they may also have authority to make other medical decisions. Informal custodians are also a resource for undocumented parents facing deportation. Persons in parental relation and parental designation offer mechanisms to name a potential caregiver without a court procedure.

### **2. “Person in Parental Relation”**

New York’s public health law and education law (PHL 2164, 2504, EDL 02 & 3212) contain a technical definition of a person in parental relation. The definition includes some but not all informal custodians. Person in parental relation includes custodians who have:

assumed the charge and care of the child because the parents or legally appointed guardian of the minor have died, are imprisoned, are mentally ill, or have been committed to an institution, or because they have abandoned or deserted such child or are living outside the state or their whereabouts are unknown, or have designated the person pursuant to title fifteen-A of article five of the general obligations law as a person in parental relation to the child.

In addition, another law permits any grandparent, adult brother or sister, adult aunt or uncle who has assumed care to consent to immunizations (Public Health Law 2504(5)).

### **3. Written Designations by Parents**

New York permits parents to designate someone to make the same decisions that any “person in parental relationship” can make, as well as to make major medical decisions. There are two kinds of written notes authorized by New York Law. The simpler one is valid for up to one month from the day of writing. It does not need to be notarized. The notarized note is valid for up to six months. Both are renewable.

Parents have a legal right to care for their children. They can consent to informal custody and they can revoke their consent at any time. Upon revocation, an informal custodian will have no right to continue caring unless they get the assistance of a court or Child Protective Services.

Informal custodians who have a written designation can make routine medical decisions for a child. The Public Health Law §2504(2) says that a person authorized by a parental designation:

may consent to any medical, dental, health and hospital services for such child for which consent is otherwise required which are not: (a) major medical treatment as defined in subdivision (a) of section 80.03 of the mental hygiene law; (b) electroconvulsive therapy; or (c) the withdrawal or discontinuance of medical treatment which is sustaining life functions.

No informal custodian, even those with written designation, has the right to consent to surgery or other major medical decisions. For more information about “persons in parental relationship” consult an attorney or visit the NYS Kinship Navigator website’s legal fact sheets.

Thirty Day and Six Month written designation forms are available from the NYS Kinship Navigator.<sup>19</sup> See section VIII for update on 2018 amendment and also describing springing power.

Persons in parental relationship include: parents, guardians, step-parents, “custodians” (any person caring for children because the parents are deceased, mentally ill, incarcerated, have been committed to an institution, or have abandoned or deserted the children), and – since September 2005 – persons who are designated in writing by the parent.<sup>20</sup>

The statutory provision allowing parents to designate parental authority marks a departure from traditional power of attorney designations.<sup>21</sup> Although the New York statutory general power of attorney permits, among other things, the delegation of powers related to “personal

relationships and affairs,” the standard power of attorney is not designed for delegating parental powers over children. A parental designation section in the general obligations law permits parents to designate many of these powers, as shown below.<sup>22</sup>

#### **4. Education**

Persons in parental relations can enroll a child in school and be responsible for most schooling activities, *e.g.*, provide birth certificates for enrollment, receive report cards, and consent to class trips. They do not get all the powers of a parent, just those listed in approximately twenty statutes in the education law that empower a person in parental relation.

Any person who is responsible for a child’s education may participate in planning the Individualized Education Plan for children who have disabilities.<sup>23</sup>

#### **5. School Enrollment**

Even if children are living with persons in a parental relationship (including parental designees), they need to fulfill other criteria in order to qualify for free tuition.<sup>24</sup> School districts have often demanded proof of legal custody or guardianship as a requirement for school admission or as documentation of responsibility and residency, but a 2015 regulation, Department of Education regulation 8 NYCRR 100.2 (y)(3)Section 100.2(y), Determination of student residency and age, expressly states that persons in parental relation are not required to be legal guardians or custodians as a condition of school enrollment. Rather caregivers must prove residency and assumption of care and control. *See* section VIII for update on school enrollment.

#### **6. Court order not required**

The new regulation affirms case law. Court orders are not required under the Education Law.<sup>25</sup> A district may require a sworn affidavit from the child’s parents acknowledging their transfer of custody and control.<sup>26</sup> Students must prove by an examination of the totality of the circumstances that they are permanent residents of the school district and intend to remain permanently in that district.<sup>27</sup> Because grandparents can show that the child is residing with the intent to remain, they do not need legal custody or guardianship to get children accepted (tuition-free) for public school in the districts where they reside.<sup>28</sup> However, FCA 657 & DRL 74 expressly state that guardianship and custody orders establish enrollment eligibility. Some school districts flipped this requirement, demanding guardianship or custody orders, but the new regulation should eliminate such requirements. Education law does not preclude persons in parental relationship and other caregivers without court orders from establishing enrollment eligibility by a totality of the circumstances.

## **7. Medical Care**

A person in parental relation can consent to (or refuse) immunization and designees can consent to routine medical care, including prescription medications, dental work, and mental health therapies. The law does not permit designees to consent to certain medical procedures, including major medical treatment as described in §80.03 of the Mental Hygiene Law, electroconvulsive therapy, and the withdrawal of life sustaining medical care. In sum, a designee cannot consent to elective major medical procedures, which require the consent of the parent(s) or legal guardian.

## **8. Emergency Care**

Public Health Law §2504(4) makes sure that children can receive medical care in an emergency. There is no requirement that someone be a “custodian,” a “person in parental relation,” or have legal orders of custody or guardianship. Anyone can help a child to get care when it is an emergency. The law says:

Medical, dental, health and hospital services may be rendered to persons of any age without the consent of a parent or legal guardian when, in the physician's judgment an emergency exists and the person is in immediate need of medical attention and an attempt to secure consent would result in delay of treatment which would increase the risk to the person's life or health.

## **9. What Else May Informal Custodians Do?**

Laws regarding access to birth certificates, medical records, school records, court records, and other documents are all different. Check with the local agency, an attorney, or visit the NYS Kinship Navigator.

## **10. Laws Are Not Always Followed**

While the law declares who can make medical decisions, the reality is that often medical providers accept the authority of grandparents and other relative caregivers, and never inquire about court orders or parental designations. Sometimes, a statement from the caregiver, or the parent, or from a social worker, which shows the caregiver’s relationship to the grandchild, is enough to get medical care for a child.

## **11. What Financial Assistance and Services Do Informal Custodians Qualify For?**

All informal caregivers who have assumed the care and control of children who are living with them are eligible for financial assistance and other services. See section on financial assistance and services.

## **12. Advantages of Legal Custody or Guardianship**

Informal custodians have limited authority. For more authority, they should consider going to court to get orders of custody, guardianship or adoption.

For instance, if a relative caregiver needs to make major medical decisions, then it may be necessary to obtain legal guardianship or legal custody. Most importantly, without court orders, there is no legal right for informal custodians to keep children from their parents. Unless parental rights have been terminated or a court order prohibits the parent from taking a child, parents have the right to care for their children. Informal custodians may also face local school district opposition to school enrollment.

### **a. Legal Custody**

Legal custody is a legal arrangement that is ordered by a family court. A relative or other non-parent caregiver should seek legal custody when he/she wants clear legal authority to care for the child, especially to insure that a parent must go to court before regaining custody. However, legal custody does not include medical decision making authority unless expressly declared in the court order. It is important to note that legal custody is never really permanent because under certain circumstances, parents can petition the court to regain custody. Also, a judge may limit the authority of a custodian or award a joint custody with a parent.

In custodial proceedings, parents who cannot afford representation usually will have an attorney assigned to represent them. FCA §262(a)(v); *See Ryan v. Alexander*, 133 AD3d 065 (2<sup>nd</sup> Dept 1995); *Moiseeva v. Sichkin*, 129 AD3d 974 (2<sup>nd</sup> Dept 2015). A lawyer (called an attorney for the child) will be appointed to represent the child.

In custody or guardianship orders based upon parental consent, a parent can regain custody by going to court and revoking their consent. The judge will not hold a trial to decide custody unless the caregiver then claims an extraordinary circumstance, such as an extended disruption of custody. If in a preliminary hearing, the judge finds that there are extraordinary circumstances, then the judge will hold a trial to decide whose custody is in the best interests of the child. For the caregiver of children with an imprisoned parent, extraordinary circumstances aren't necessary, because the parent will usually consent. However, absent consent, the imprisonment and subsequent inability of the parent to provide a home for a child is itself an extraordinary circumstance.

For all future custodial disputes, a finding of extraordinary circumstances is very important. No longer can parents just revoke their consent. Instead, they must show a "change in circumstances" before a judge will hear their petition to regain custody.



All departments follow *Guinta v. Doxtator*, 20 A.D.3d 47, 794 N.Y.S.2d 516 (2005). Subsequent to an order of custody based on a finding of an extraordinary circumstance, the sole consideration for trial is whether either party established a “change of circumstances which reflects a real need for change to ensure the best interests of the child.” See also followed by *Matter of Metcalf v. Odums*, 35 A.D.3d 865 (N.Y. App. Div. 2d Dep’t 2006), *Matter of Katherine D. v. Lawrence D.*, 32 A.D.3d 1350 (N.Y. App. Div. 4th Dep’t 2006), cited by *Hudson v. Jones*, 122 Nev. 708 (Nev. Sup. Ct. 2006)

Petitions for legal custody can be obtained from the local family court or from the official site of the New York Court Administration, available at <http://www.nycourts.gov/forms/familycourt/pdfs/gf-17.pdf>

## **b. Guardianship**

Guardianship is a legal arrangement granted to a non-parent by either a family or surrogate’s court. Guardianship provides the legal authority similar to parental authority. In New York State, there are two types of guardianship: 1) guardianship of the person - whereby the guardian has the legal authority to make all daily decisions concerning a child including his/her education, medical care, and where he/she will live, and 2) guardianship of the property - whereby the guardian is placed in charge of a child's property and finances.

There is also a special guardianship called “permanent guardianship”, available when parents are deceased or their rights have been terminated. Permanent guardianship is similar to adoption, but a child’s name does not have to be changed and the caregiver does not become the parent. Special forms for permanent guardianship as well as other court forms are available at [www.nycourts.gov/forms/familycourt](http://www.nycourts.gov/forms/familycourt)

### **i) Permanent guardian:**

A “permanent guardian” may be appointed, pursuant to Family Court Act §661(b) and Surrogate’s Court Procedure Act §1702(2), if the Court finds that it is in the best interests of a person under the age of 21, who has been committed to an authorized agency through termination of parental rights or surrender or whose birth parents or other persons entitled to notice of, or to consent to, adoption are deceased. Persons over the age of 18 must consent to such an appointment, which may last until the person reaches the age of 21. A person may be appointed as both a permanent and a subsidized kinship guardian. This guardian makes decisions regarding the child as if he or she is the child’s parent.

Other types of guardian are:



## **ii) Temporary guardian:**

This guardianship includes all the rights of a permanent guardian, but these rights are on a temporary basis. If the child does not currently have acting parents and is the subject of an adoption proceeding, then pursuant to Domestic Relations Law §115-c, in any case where custody of a child is transferred from the child's parent or guardian to another person or persons for the purposes of adoption and a consent to the adoption of such child has been executed pursuant to §115-b of DRL, the adoptive parents can file a petition for temporary guardianship within ten days of taking physical custody. *See* SCPA §1725, and form: <https://www.nycourts.gov/forms/familycourt/pdfs/adop21-a.pdf>.

## **iii) Guardianship of the Person:**

A guardian of the person is a legal guardian who has been appointed by the court to decide everything about a child's health, education, and welfare if the child does not have parents capable of being the guardians. This means that the guardian of the person makes decisions about where the child lives, where the child goes to school, what health care the child needs and gets, and other important things in the child's life. The family court has similar jurisdiction and authority as the county and surrogate court regarding the guardianship of the person of a minor (a child 17 years or younger). Normally, guardianship of the person of a minor is filed in the family court. The surrogate and/or the county court has the power over the property of an infant and is authorized and empowered to appoint a guardian of the person or of the property or of the person and property.

## **iv) Guardian of the Property:**

As opposed to a guardian of the person, this kind of legal guardian handles the child's money, investments and savings, as directed by the judge for the child's benefit. The judge may require a guardian of the property to post a bond to ensure that he or she follows the Court's rules and laws about investment of a child's assets. A guardian of the property of a child is not necessarily the guardian of the person as well.

*See also* sections on Standby Guardian and Kinship Guardian (KinGAP).

## **v) Standby Guardianship**

Standby Guardians are persons who can step in to become the guardians of children when parents, *guardians, legal custodians, and caretakers* who cannot locate the parents become debilitated, incapacitated, or die.

The Standby Guardianship statute, Surrogate's Court Procedure Act Section 1726, has two very different ways to name a successor guardian:

Option One: If the principal (parent, guardian, legal custodian or other authorized informal caregiver) is chronically ill or dying, they can go to court with the person chosen to be the standby guardian and ask the court to appoint that person as the standby guardian. Upon incapacity or death, the standby guardian becomes an active guardian, but he/she must go to court within ninety days for confirmation of the appointment.

When the principal goes to court to have the court appoint the standby guardian, they are taking steps to make sure that the person chosen as standby guardian will be appointed by the court to act as the child's guardian when they die or are no longer able to take care for a child, but they do not give up their current right to make decisions for the child.

Option Two: The principal can designate a standby guardian by writing and signing a document in front of two witnesses who are at least 18 years old that states:

- The principal's name;
- The name, address, and telephone number of the proposed standby guardian;
- Whether the authority of the standby guardian will be to make decisions for the daily needs of the child, the child's finances and property, or both; and
- Whether the authority or the power of the standby guardian should begin when the principal becomes debilitated, incapacitated, or dies.
- When a principal designates a standby guardian in writing, they are recommending a person to be the child's guardian. If the court agrees, the court will appoint or name that person as the child's guardian. When a principal makes such a designation, he/she does not give up their current exclusive right to make decisions for the child. Upon debilitation, incapacity, or death, the standby guardian must go to court within sixty days and petition for appointment. The suggested standby guardian form is below:

The standby guardian designation form is available at the NYS Kinship Navigator web site.

### **c. Similarities between Guardianship and Legal Custody**

Generally speaking, judges follow the same standards of review for both guardianship of the person and legal custody. However, there are some important differences. All guardianship proceedings will include a child abuse registry check and a criminal record check for all members of the household. Such investigations are not mandatory in custody proceedings. However, sex offender registry checks are mandatory. DRL §240(1)(a-1)(3).; Also SSL 424-a. Guardianship is not mentioned in DRL §72(2).

In both types of proceedings, judges may choose to interview children in their chambers. This interview is called an in-camera interview. It is mandatory that there be a stenographic record of the interview. FCA §664.

The practical effect of guardianship and legal custody are often the same, but sometimes differences do occur, though not frequently. While a legislative memo and dicta in one appellate case declare that the two are substantively the same, there are differences. Assembly Mem. in Support, Bill Jacket, L. 2008, ch. 404). *Allen v. Fiedler*, 96 A.D.3d 1682, 1684, 947 N.Y.S.2d 863, 866 (App. Div. 4th Dep’t 2012).

Numerous statutes grant "parents and guardians" certain minor powers over children, for instance, guardians and parents have full authority to apply for government records and documents. Legal custodians do not. Parents and guardians always have the authority to make major medical decisions, but legal custodians may not have their authority accepted by some medical providers. While usually no one questions the authority of legal custodians, to avoid uncertainty, court administrations may want to advise judges to expressly include the power in custodial orders (A October 25, 2016 memo by Magavern, Magavern, Grimm, LLP, Erie County, recounts the law and suggests a template for custodial orders).

Absent terminations or adoptions, the responsibility and rights of the parents remain intact. Parents are still responsible for the financial support of the child. If the court orders it, they may also be allowed to visit their child. And in both cases, the parent still has the right to petition the court to regain control of their child.

While both family court and surrogate's court may appoint a guardian, some counties prefer to hear petitions for guardianship of the person by family members in family court.

A few statutes state that guardians and legal custodians have the same authority. DRL §74 and FCA §657 state that both guardians and legal custodians can enroll children in school and can place children on a caregiver’s health insurance. However, FCA §657 also states that guardians may make medical decisions, and is silent regarding legal custodians. The standby guardianship statute (below) includes both guardians and legal custodians.

#### **d. Foster Care**

Children who are abused, neglected, or abandoned by their parents (or when parents are arrested or imprisoned) are often placed in the legal custody of the Commissioner of Social Services after a court has decided that their parents cannot care for them. This proceeding is governed by Article Ten; permanency hearings are governed by Article Ten-A of the Family Court Act. Once a removal occurs, Article Ten’s Section 1017 mandates that relatives, including all grandparents, are notified of their options. In practice, many relatives report that they are not fully informed. For a discussion of how relatives should be informed and what are their options, *see* above section “How Kin Become Caregivers.”

Children who are removed from their homes are placed in a foster family home, a group home, a child care institution, or in a relative foster home. Relative placements may be used as “emergency placements” in which case the relative can later qualify as a foster parent. However, not all counties choose to make such placements. If any child welfare official requests a relative to take care of a child, they must provide the relative with two booklets (Having a Voice and a Choice and Know Your Permanency Options) that explain their options.

It is important for caregivers to know that once a child is living in their home, it is probably too late for them to become foster parents. Grandparents and other relative caregivers who want to become foster parents should make sure that the child is first placed in the care and control of LDSS. They can then ask to become the kinship foster parent. In most instances, the court will place the child with them.

#### **i) Reunification with Parent - State Obligation**

The goal of foster care is to find a permanent home for the child. The Commissioner of Social Services, through the child welfare agency, will try first to reunite the parent and child. If this cannot happen, the agency may go to court to request that the rights of the parent be terminated so that a permanent home can be found for the child. The agency will then want to find a permanent home for the child.

For relative foster parents, if both return to parent and adoption are ruled out, then caregivers can apply for KinGAP (relative guardianship subsidies). *See* Section below.

#### **ii) Kinship Foster Care** **Article Ten: Who Are Relatives**

18 NYCRR §443.1

*(i) Relative within the second or third degree. A relative within the second or third degree to the parent(s) or stepparent(s) of a child refers to those relatives who are related to the parent(s) or stepparent(s) through blood or marriage either in the first, second or third degree in the kinship line. A relative within the second or third degree of a parent includes the following:*

- (1) Grandparents of the child;*
- (2) Great-grandparents of the child;*
- (3) Aunts and uncles of the child, including the spouses of the aunts or uncles;*
- (4) Siblings of the child;*
- (5) Great-aunts and great-uncles of the child, including the spouses of the great-aunts or great-uncles;*

- (6) First cousins of the child, including the spouses of the first cousins;
- (7) Great-great grandparents of the child; and
- (8) An unrelated person where placement with such person allows half-siblings to remain together in an approved foster home, and the parents or stepparents of one of the half-siblings is related to such person in the second or third degree.

Kinship foster care is foster care granted to a grandparent or another relative of a child until the parent and child are reunited or until a permanent home is found for the child. A kinship foster care parent has temporary physical custody of the child, not legal custody. Legal custody of that child remains with the Department of Social Services (DSS). This means that the kinship foster care parent takes care of the child's daily needs but cannot make any legal or major decisions regarding the child without first obtaining the consent of DSS. An advantage of kinship foster care is that foster care payments are paid and other forms of assistance are available. *See* OCFS website for list of services. Services may include family services, payment of special expenses, assistance with visitation, and educational assistance for the child. As with certified non-relative foster parents, kin must be approved or certified after completing a foster parent course and submitting to an investigation. Unlike certified foster parents, the agency can waive non-safety requirements in relation to approved relative foster parents.

Some relatives are awarded temporary custody, often called “direct” or “N docket” custody. The relative is subject to court oversight and the continued involvement of the department. They are not approved or certified as foster parents and do not qualify for foster parent payments. In this situation, the department will continue efforts to reunite the parents with their children, and eventually the parents may regain custody. Direct custodians have a right to be heard in Article Ten proceedings but not a right to become a party.

Many relatives choose not to become kinship foster parents, nor to become temporary custodians, because they prefer to take care of the child without the department of social services supervision and involvement in their home. These relatives can petition for legal custody. Courts may want to wait for efforts at reunification to be exhausted before granting private custody.

#### **e. Kinship Guardianship Subsidies Program (KinGAP)**

##### **iii) Subsidized Kinship Guardians Available Only To Kinship Foster Care**

With the enactment of the 2008 Fostering Connections Act, federal foster dollars (Title IV-E) became available to all states that enacted a subsidized kinship guardianship program pursuant to the federal law and rules. Starting on April 1, 2011, New York has a subsidized guardianship program, called "KinGAP". Chapter Law 58 of the 2009 Laws of New York, effective April 1, 2011. *See* Social Services Law 458-a-f.

KinGAP permits kinship foster parents (approved or certified) to apply to the local department of social services to qualify for the program. The eligibility requirement is that adoption and return to parent(s) must be ruled out and acceptance into the program in the best interests of children.

KinGAP permits relatives who are foster parents to leave foster care and continue to receive the same financial assistance. Assistance payments must be at same rate as the local department's payment for an adoption subsidy, and must be based on the foster care maintenance rate that the guardian received while the child was in foster care.

### **Requirements**

Kinship foster parents are eligible when:

- the child has been in foster care and placed with the relative who is fully certified or approved foster parent for at least six previous consecutive months;
- the agency has determined that the permanency goals for child are not return to the parents' home or to be adopted (This is the "rule out" requirement);
- the child and relative guardian demonstrate a strong attachment; and
- the relative demonstrates a strong commitment to permanently care for child.

More thorough explanations about KinGAP are found at the Office of Children and Family Services web site and at [www.nysnavigator.org](http://www.nysnavigator.org). The Court Administration has also published court forms in a very focused effort for this program to succeed.

Also see "Kinship Guardianship Assistance Program", 11-OCFS-ADM-03.

Kinship advocates have expressed concerns that KinGAP will not reach all eligible caregivers because of continuing notification issues. They also are concerned that kin may not qualify for subsidies because the "rule out" of adoption condition is not met.

Even for those kin who do qualify, there is a question about permanency. FCA §§ 661(c), 1055-b and 1089-a provide an opportunity for findings of "extraordinary circumstances" that would offer limited protections, at least more than guardianship orders based upon parental consent. Importantly, all departments follow *Guinta v. Doxtator*, 20 A.D.3d 47, 794 N.Y.S.2d 516 (2005). The Onondaga Family Court had reconsidered its initial finding of extraordinary circumstance in a subsequent proceeding for custody between a parent and a paternal aunt and uncle. *The appellate court reversed. Subsequent to an order of custody based on a finding of an extraordinary circumstance, the sole consideration for trial is whether either party established a "change of circumstances which reflects a real need for change to ensure the best interests of the child."* Prior to the instant proceeding, the trial court had found that the parent had not seen child for a period of one year, which constituted an abdication of parental responsibility. But in the proceeding on appeal, the court did not consider the best interests of

the child. Instead, it awarded custody to the parent based on a finding that the extraordinary circumstance no longer existed.

Amendments to KinGAP that permit the caregiver guardian to name a successor who may continue to receive the subsidy upon the incapacity or death of the original guardian have diminished uncertainties but not eliminated the potential for parents to challenge the guardianship.

#### **iv) Reasons Not To Use KinGAP**

The most important reason not to seek a relative guardianship relates to the level of care needed for children and to the need for absolute permanency. Relatives should discuss what services will not be continued when relatives become guardians under KinGAP and whether they wish to insure permanency by adopting. *See Know Your Permanency Options.*

#### **v) Waiver to the Filing of a Termination of Parental Rights (TPR) Petition**

New York permits a case-by-case determination by the local district to make an exception to the rule that parental rights must be terminated after a child is in foster care for fifteen of the last twenty-two months. Given that it is also permissible to waive the filing when a child is in kinship foster care, there are very good reasons to rule out adoption. If parents are not coming home soon, KinGAP is a suitable permanency goal.

For incarcerated parents, there is another provision permitting a waiver when parents have maintained a "meaningful" relationship. Chapter 113, New York Laws of 2010.

### **f. Adoption**

Adoption replaces the birth parents with adoptive parents, who assume the full rights and responsibilities of parents. In general, adoption ends the birth parents' involvement with the child. But there are exceptions. Parents can agree to surrenders and to adoptions with certain enforceable conditions related to continuing contact with their children and/or the designation of the adoptive parent. DRL §112-b; FCA §1055-a; SSL §383-c.

Caregivers who adopt a child assume legal and financial responsibility for the child's care, education, and support. This means that the child cannot receive a public assistance grant based solely on the child's income and resources. *See the section on Financial Assistance below.*

For parents whose rights have been terminated, a recent law permits them to seek to regain their parental rights when children are still in foster care for more than two years and the child is over 14 years of age, so long as the child has not been adopted and does not have the goal of adoption. FCA §635-63



### **g. Adoption Subsidies Program**

Relative and non-relative foster parents may receive an adoption subsidy that is similar to their foster care payments. Adoption subsidies are available for all foster adopted children who are “handicapped” or “hard to place.” Social Services Law (SSL) 453.

Adoption subsidies are available for children adopted through kinship foster care if the child has special needs or is considered “hard to place.” Most foster children are considered hard to place. Additionally, in order to be eligible for an adoption subsidy, the child must be in the legal custody of the Department of Social Services and the kinship relative must be a certified foster parent, an approved foster parent, or approved adoptive parent. Another special feature to adoption of kinship foster children is the chance for the birth parents to make an enforceable agreement indicating who may adopt the child or what contacts the surrendering parent may have with the child.

Children subject to Article Ten proceedings are subject to requirements relating to the filing of a TPR petition under that timeframe with specified exceptions within 22 months of placement when there are compelling reasons for termination. However, there is an exception from initiating the termination when children are placed with relatives. Additionally, NYS has a special exception from terminations for incarcerated parents. *See* above section “Waiver of Termination for Incarcerated Parents.” The agency on a case by case basis may choose not to terminate if it is determined that the parent has acted in good faith to maintain a parental relationship with their children.

In New York State, adoption is sought at the family court in the jurisdiction where the child resides or in the county Surrogate’s Court.

## **V. Emerging Issues**

### **1. Expansion of DRL §72 to Other Relatives**

### **2. Engagement of Child Welfare Agencies, Addressing Diversion:**

**NYSB Task Force on Family Court: *Recommendation No. 20*** - There is a need to achieve more uniform availability of kinship guardianship and kinship foster care throughout the state.

- *Private Kinship Care: An Underutilized Child Welfare Resource*, Congressional Hearing submission of the National Committee of Grandparents for Children's Rights (NCGCR) and the Empire Justice Center, June 2011.
- *National Kinship Summit Report*, NCCR/CWLA, December, 2012.
- *The Kinship Diversion Debate: Policy and Practice Implications for Children, Families and Child Welfare Agencies*, Annie E. Casey Foundation (2014).



- Wallace, G. & Lee, E. (2013). Diversion and Kinship Care: A Collaborative Approach Between Child Welfare Services and NYS's Kinship Navigator, *Journal of Family Social Work*, 16:5, 418-430.

### **3. Four KinCare Summit reports (Legal Assistance Recommendations):**

- NYS KinCare Summit - 2014 Recommendations
- Kinship Care in New York: Keeping Families Together (2011)
- Kinship Care in New York: A Five Year Framework for Action (2008)
- Enabling Kin caregivers to Raise Children (2005)
- (Available at: <http://www.nysnavigator.org/pubsforpros/aarpsummit.php>)
- FCA § 262: article six part four respondents; constitutional right to counsel.

**Federal Recommendations (See recommendations in National Kinship Summit Report, available at [www.grandparentsforchildren.org](http://www.grandparentsforchildren.org) and [www.nysnavigator.org](http://www.nysnavigator.org) and [www.cwla.org](http://www.cwla.org))**

## **VI. Rights, Legal Issues, and Legal Assistance**

### **1. Grandparent Visitation and Kinship Caregiver Rights**

#### **a. Grandparent Visitation**

Grandparents have special statutes that govern their right to see visitation of children living with their parents or in state care. DRL §72 (visitation with parents); FCA §§1081 & 1083 (visitation of children in foster care). *See E.S. v. P.D.*, 8 N.Y.3d 150, 863 N.E.2d 100 (2007), *also, Loretta D. v. Commissioner of Social Services of City of New York*, 177 A.D.2d 573, 574-5, 576 N.Y.S.2d 194 (1991). In general, grandparents have a right to seek visitation in court, but no legal right to visit.

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 Loretta D. v. Commissioner of Social Services of City of New York*, 177 A.D.2d 573, 574-5, 576 N.Y.S.2d 194 (1991)). *See also* FCA §§1081 & 1083, visitation of children in foster care.

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...”

Under Domestic Relations Law §72, grandparents have a right to petition for visitation with grandchildren. Grandparents do not have a right to visitation.

If the parent or parents will not permit visitation, grandparents (not step- or great-grandparents) have the right to petition for court ordered visitation. Also, if a grandchild is under the care and control of the department of social services, grandparents have the same right to petition for court ordered visitation. If they already have a visitation order, they have a right to its enforcement.

If one of the parents is deceased then they have standing to proceed in court. If both parents are alive, then standing is not automatic. The petition for visitation must show that certain circumstances exist. For example, a relationship with your grandchild, or attempts to have a relationship that were thwarted by the parents.

Once standing is established, courts can order a trial to decide whether visitation is in the best interests of your grandchild.

DRL §72 permits grandparents to seek visitation **when one or both of the parents has died or when "equity would see fit to intervene."** Courts have interpreted “equity” to give standing to grandparents who have had a relationship with their grandchildren or been thwarted by the parents from having such a relationship. Grandparents may seek visitation via DRL § 72 even when both parents are united in opposition.

### **i) Two-Tiered Test**

*Emmanuel* sets out the standards 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' objection to visitation, (2) the nature and extent of the grandparent-grandchild relationship, and (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." In other words, just because the parents don't like the grandparent, that doesn't mean they can succeed in winning in court. The statute exists because of animosity between parents and grandparents, and more must be shown in order to justify the denial of visitation.

**Termination of parental rights** of a grandparent to her child does not act as an absolute bar to seeking visitation with a grandchild.

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." 530 U.S. 57, at 66.

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.

**ii) *E.S. v. P.D.*, 8 N.Y.3d 150 (2007)**

The Court of Appeals held that grandmother was entitled to visitation with child, notwithstanding father's objection; grandparent visitation statute was not facially unconstitutional; and statute was not unconstitutional as applied. Court found that *Troxel v. Granville* test was met by DRL §72(1).

Since *E.S.*, there has not been any significant changes in NYS case law regarding visitation.

**iii) *Karr v. Black*, 55 A.D.3d 82, 84-85, 863 N.Y.S.2d 26, 28-29 (2008)**

Supreme Court properly found that petitioner lacks standing to seek visitation (Domestic Relations Law § 72). The child is in the care of an intact family, the record establishes that respondents have a sound basis for their objection to visitation, and petitioner has no existing relationship with the child or the family (*see Matter of Emanuel S.*, 78 N.Y.2d at 182, 573 N.Y.S.2d 36, 577 N.E.2d 27).

## 2. Kinship Caregiver Rights

### i) ***Moore v. City of East Cleveland*, 431 U.S. 494, 97 S.Ct. 1932 (1977).**

Homeowner was convicted in Ohio court of violating East Cleveland housing ordinance which limits occupancy of a dwelling unit to members of a single family and recognizes as a “family” only a few categories of related individuals. The Court of Appeals of Ohio, Cuyahoga County, affirmed, and homeowner appealed. The Supreme Court, Mr. Justice Powell, held that the ordinance in question, under which it was crime for homeowner to have living with her a son and grandson plus second grandson who was cousin of first grandson, violated due process. When city undertakes intrusive regulation of the family, usual judicial deference to the legislature is inappropriate, as freedom of personal choice in matters of marriage and family life is one of the liberties protected by due process, and thus when government intrudes on choices concerning family living arrangements, the Supreme Court must examine carefully the importance of the governmental interests advanced and the extent to which they are served by the challenged regulation.

### ii) ***Rivera v. Marcus*, 696 F.2d 1016 (1982).**

Half sister, who had liberty interest in preserving familial relationship with her half brother and sister, did not waive any of her constitutional rights by entering into foster care agreement with state welfare department, even though agreement authorized state to remove children from foster home at any time, where there was no evidence that half sister intentionally and intelligently waived her due process rights when she signed the agreement or that state informed her of legal implications of her decision.

### iii) ***Rivera v. Mattingly*, 2011 WL 4344422, (S.D.N.Y. Sep 12, 2011)**

Procedural due process right of biologically related foster parents, but not substantive right, dismissed federal claims of great-aunt and great-uncle against ACS, finding that due process was not violated.

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### iv) **Visitation Citations:**

*Emanuel S. v. Joseph E.*, 78 N.Y.2d 178, 577 N.E.2d 27 (1991).

*Gloria R. v. Alfred R.* 209 A.D.2d 179, 618 N.Y.S.2d 24 (1994). See also *Coulter v. Barbara*, 632 N.Y.S.2d 270 (App. Div. 3rd Dep't 1995).

- *Ann M.C. v. Orange County Department of Social Services*, 250 A.D.2d 190, 682 N.Y.S.2d 62 (App. Div. 2d Dep't 1998).
- *Troxel v. Granville*, 530 U.S. 57, 120 S.Ct. 2054, 146 L.Ed.2d 49 (2000).
- *E.S. v. P.D.*, 8 N.Y.3d 150, 863 N.E.2d 100 (2007) ; see also *Morgan v. Grzesik*, 287 A/D/2d 150, 732 N.Y.S.2d 733 (2001); *Hertz v. Hertz*, 291 A.D.2d 91, 738 N.Y.S.2d 62 (2nd Dept. 2002)

**v) Rights Citations:**

- *Osborne v. County of Riverside*, 385 F.Supp.2d 1048, 1054 (C.D.Cal. Sep 01, 2005)

**vi) Kinship Rights Citations:**

- *Balbuena v. Mattingly*, 2007 WL 2845031, \*6+ (S.D.N.Y. Sep 28, 2007)
- *Johnson v. City of New York*, 2003 WL 1826122, \*6+ (S.D.N.Y. Apr 08, 2003)
- *Rodriguez v. McLoughlin*, 49 F.Supp.2d 186, 194+ (S.D.N.Y. Jan 08, 1999)
- *Cabrales v. Los Angeles County*, 644 F. Supp. 1352, 1354+ (C.D.Cal. Sep 03, 1986)
- *Bellet v. City of Buffalo*, 2009 WL 2930464, \*3+ (W.D.N.Y. Sep 11, 2009)
- *Johnson v. City of Cincinnati*, 310 F.3<sup>rd</sup> 484 (2002).

## **VII. Legal Assistance**

Legal assistance is sometimes available. Some family court probation departments will help in filling out forms. In a few counties, judges will assign legal counsel to caregivers who are unable to pay for legal representation. A few legal services organizations and kinship service providers offer consultations and limited legal representation. And in some counties, there are “help desks” at family court where volunteer attorneys or local legal service providers offer limited assistance. To find out about legal assistance, contact the NYS Kinship Navigator.

### **1. Legal Specialists in Kinship Care**

#### **a. Rural Law Center**

The Rural Law Center of New York, Inc. is a not-for-profit legal assistance organization which was incorporated in 1996 with the generous support of the IOLA (Interest on Lawyer Accounts) Fund and the New York Bar Foundation. The Rural Law Center of New York, Inc. is committed to focusing attention through our legal system and government institutions on the needs of low-income, rural New Yorkers.

#### **b. Empire Justice**

Empire Justice Center is a not-for-profit law program that provides legal assistance and advocacy to low-income families regarding civil issues, childcare, public benefits, and more. The organization currently has offices in Albany, Rochester, and White Plains, NY. Their website provides great detail and legislative updates on twelve common social issues that they provide advocacy and legal assistance with: child care, child support, civil league services, civil rights, consumer and community development, disability benefits, domestic violence, education, health, housing, immigrant rights and public benefits.

In addition to providing these services, the organization also provides accredited training for advocates representing clients on each issue, as well as an online resource center stating case law and precedents with which to assist advocates as they work with clients. The website is user friendly and informative for both caregivers and agencies.

**c. MFY Legal Services**

MFY Legal Services (Mobilization for Youth) is a Manhattan-based organization that provides advocacy and representation for low-income clients. Its Pro Bono Family Law Project aims to serve kinship caregivers seeking guardianship, custody and adoption. Telephone intake hours for this program are Monday and Wednesday 10:00am - 4:00pm. Although the offices for this program are physically located in Manhattan, there is a helpful link redirecting visitors to another website ([www.lawhelp.org](http://www.lawhelp.org)) to find representation and legal advice in any other part of the country.

**d. Neighborhood Legal Services**

Buffalo-based legal assistance program serving kinship families for over ten years. They provide a Help Desk in family court.

**e. LIFT – New York City**

In family court, few people are entitled to receive free court-appointed legal representation, and because the majority of court users are low-income, most cannot afford to retain counsel on their own. Thus, families typically carry the burden of representing themselves as they attempt to address matters fundamental to the well-being of children, such as custody, visitation, adoption and domestic violence.

Without an understanding of their legal rights and responsibilities and without a roadmap to the system, families lose what little opportunity they have to secure a prompt and appropriate legal response to their problems. Moreover, the feelings of helplessness, alienation, and anger evoked by these conditions compound the stresses that propelled many families into Court in the first place, setting the stage for additional family crises and poor outcomes for children.

All of LIFT's programs empower families to address these challenges and secure positive outcomes for themselves and their children.

**f. Volunteer Lawyers Project of Onondaga County, Inc.**

Every Wednesday from noon to 3:00 p.m., Volunteer attorneys provide assistance with completing pro se petitions and advice and information regarding to family court process to drop-in clients. Attorneys assist any client who is at or below 200% of the federal poverty

guideline with custody, visitation, paternity and child support matters. Kin caregivers are welcome and encouraged to seek assistance at this clinic.

## **2. Need for Additional Legal Assistance**

While beyond the scope of this manual, the kinship community recognizes the need for more assistance for kinship caregivers, particularly in family court. A discussion, including recommendations, is available at the policy section of the Kinship Navigator.

## **VIII**

### **VIII. 2018 Update<sup>1</sup>**

#### **Written Designations by Parents**

An advantage of the parental designation form is the ability to designate that the caregiver's authority to act begins either from a specific date, or "springs" from a specified event. For example, if a parent wants the caregiver to have authority only in the event the parent is deported, the parent can state that the designation commences upon "date of deportation", and the caregiver's authority to act would begin upon the date of deportation and last for either thirty days or six months from the date the parent is deported.

In 2018, the period of time in which a designation can last was extended from up to six months to up to twelve months.

#### **Deportation of Parents and the Care of Children**

NYS Kinship Navigator provides resources on its website for people who become caregivers of children remaining in the United States due to the parents' deportation or detention by immigration authorities. These resources include fact sheets describing the types of custody and basic procedure for becoming custodians; parental designation forms; caregivers' rights with respect to obtaining children's vital documents; OCFS policies on children of deported or

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<sup>1</sup> This manual and update were revised on September 1, 2018. The information is not legal advice. It is not a substitute for consulting an attorney. Up-to-date legal advice and legal information can only be obtained by consulting with an attorney. Any opinions, legal opinions, findings, conclusions or recommendations expressed in this publication or on the NYS Kinship Navigator website or by any person or entity to whom you may be referred are those of the Kinship Navigator, Catholic Family Center and/or the person or entity you are referred to and do not necessarily represent the official views, opinions, legal opinions or policy of the State of New York and/or the New York State Office of Children and Family Services (OCFS). NYS Kinship Navigator is a Catholic Family Center program, funded by the New York State Office of Children and Family Services. Catholic Family Center is the only agency authorized by New York State to provide a statewide information and referral service to kinship caregivers. The information herein is published by the NYS Kinship Navigator and is not endorsed by OCFS.



detained parents; and an emergency plan in case of the detention or deportation of family members.

Both the standby guardianship statute (discussed hereinabove) and the parental designation statute have been recently expanded to protect families facing separation due to immigration issues. The standby guardianship language was expanded in 2018 to include “administrative separation” (the term used to describe detention or incarceration due to immigration violations) as grounds on which a parent can appoint a standby guardian for their children.

## **School Enrollment**

Persons in parental relation can enroll children in school and be responsible for most schooling activities, provide birth certificates for enrollment, receive report cards, and consent to class trips. They do not get all the powers of a parent, just those listed in approximately twenty statutes in the Education Law that empower a person in parental relation.

Any person who is responsible for a child’s education may participate in planning the Individualized Education Plan for children who have disabilities. Even if children are living with persons in a parental relationship (including parental designees), they need to fulfill other criteria in order to qualify for free tuition. School districts have often demanded proof of legal custody or guardianship as a requirement for school admission or as documentation of responsibility and residency. A 2015 regulation (Department of Education regulation 8 NYCRR 100.2(y)(3) § 100.2(y)) expressly states that persons in parental relation are not required to be legal guardians or custodians as a condition of school enrollment. Rather, caregivers must prove residency and assumption of care and control.

The new regulation affirms the case law which holds that court orders are not required under the Education Law. A district may require a sworn affidavit from the child’s parents acknowledging their transfer of custody and control. Students must prove by an examination of the totality of the circumstances that they are permanent residents of the school district and intend to remain permanently in that district. Because grandparents can show that the child is residing with the intent to remain, they don’t need legal custody or guardianship to get children accepted (tuition-free) for public school in the districts in which they reside. However, FCA § 657 and DRL § 74 expressly state that guardianship and custody orders establish enrollment eligibility. Some school districts flipped this requirement, demanding guardianship or custody orders, but the new regulation should eliminate such requirements. Education law does not preclude persons in parental relationship and other caregivers without court orders from establishing enrollment eligibility by a totality of the circumstances.

## **Legal Custody - Nonparents**

In 2015, the New York State Court of Appeals decided *Matter of Suarez v. Williams*, 2015 NY Slip Op 09231 (NYS Ct. Appeals, Dec. 2015), which held that an extended disruption of



custody constituted an extraordinary circumstance, despite the parent’s regular presence in the child’s life. This case makes it easier for grandparents who have had custody of a child for an extended period of time to meet the first prong of the two-step analysis established under *Bennett v Jeffreys* for determining whether a nonparent may obtain custody against a parent. DRL § 72[2][a] defines an “extended disruption of custody” to “include, but not be limited to, a prolonged separation of the respondent parent and the child for at least twenty-four continuous months during which the parent voluntarily relinquished care and control of the child and the child resided in the household of the petitioner grandparent or grandparents, provided, however, that the court may find that extraordinary circumstances exist should the prolonged separation have lasted for less than twenty-four months”. Once the non-parent has established standing based on extraordinary circumstances, the court will proceed to make a determination of custody based on the best interest of the child.

The definition of a “parent” is ever expanding. In the landmark decision of *Brooke S.B. v. Elizabeth A.C.C.*, 28 N.Y.3d 1 (2016), the Court of Appeals held that where a partner shows by clear and convincing evidence that the parties agreed to conceive a child and to raise the child together, the non-biological, non-adoptive partner has standing, as a parent, to seek visitation and custody, without having to first prove extraordinary circumstances.

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## ENDNOTES

<sup>1</sup> Kinship Care, AIA National Abandoned Infants Resource Center, May 2004, available at [http://aia.berkeley.edu/media/pdf/kinship\\_care\\_factsheet\\_2004.pdf](http://aia.berkeley.edu/media/pdf/kinship_care_factsheet_2004.pdf)

<sup>2</sup> Leos-Urbel, J., Bess, R., & Geen, R. (1999). State policies for assessing and supporting kinship foster parents. Washington DC: The Urban Institute.

<sup>3</sup> [www.census.gov/newsroom/releases/archives/children/cb11-117.html](http://www.census.gov/newsroom/releases/archives/children/cb11-117.html)

<sup>4</sup> [www.census.gov/prod/2011pubs/p70-126.pdf](http://www.census.gov/prod/2011pubs/p70-126.pdf)

<sup>5</sup> The AFCARS REPORT, Preliminary FY1 2014 Estimates as of July 2015 □ p. 1, No. 22, U.S. Department of Health and Human Services, Administration for Children and Families, Administration on Children, Youth and Families, Children's Bureau, <http://www.acf.hhs.gov/programs/cb>.

<sup>6</sup> Geen, R., & Berrick, J.D. (2002). Kinship care: An evolving service delivery option. *Children and Youth Services Review*, 24(1/2), 1-14., see also Meyer, B.S. & Link, M.K. (1990). Kinship foster care: The double-edged dilemma. Rochester, NY: Task Force on Permanency Planning for Foster Children.

<sup>7</sup> Harden, A.W., Clark, R.L., & Maguire, K. (1997). Formal and informal kinship care: Executive summary. Office of the Assistant Secretary for Planning and Evaluation, United States Department of Health and Human Services. Washington DC: DHHS.

<sup>8</sup> Ehrle, J. & Geen, R. (2002). Kin and non-kin foster care – Findings from a national survey. *Children and Youth Services Review*, 24(1/2), 15-35. Ehrle, J., Geen, R., & Clark, R.L. (2001). Children cared for by relatives: Who are they and how are they faring? Washington, DC: Urban Institute.

<sup>9</sup> Testa, M.F. (2001). Kinship care and permanency. *Journal of social services research*, 28(1), 25-43.

<sup>10</sup> Barth, R.P., Courtney, M., Berrick, J.D., & Albert, V. (1994). From child abuse to permanency planning: Child welfare services, pathways and placements. Hawthorne, NY: Aldine de Gruyter. Thornton, J.L. (1991). Special report: Permanency planning for children in kinship foster homes. *Child welfare*, 70(5), 593-601.

<sup>11</sup> Test, op cit.

<sup>12</sup> Ibid.

<sup>13</sup> "Stepping Up For Kids: What Government and Communities Should Do to Support Kinship Families", Annie E. Casey Foundation, Policy Report Kids Count, May 2011.

<sup>14</sup> Ibid.

<sup>15</sup> Kinship care and parental substance abuse are closely intertwined. According to recent research, the primary reason for a child's separation from a parent and placement with a relative is substance abuse by a biological parent Cohon, D., Hines, L., Cooper, B.A., Packman, W., & Siggins, E. (2000). Stuart foundation kin caregiver study: Final report. San Francisco, CA: Edgewood Center for Children and Families. Various studies have also reported substance abuse as a current concern for between 25 and 80 percent of mothers whose children have been placed in kinship foster care (Benedict, Zuravin, & Stallings, 1996; Gleeson, O'Donnell, & Bonecutter, 1997). Benedict, M.I., Zuravin, S., & Stallings, R.Y. (1994). A comparison of kinship foster homes and foster homes: Implications for kinship foster care as family preservation. *Children and Youth Services Review*, 16(1-2), 33-64.

<sup>16</sup> According to a 2000 report from the Bureau of Justice Statistics, over 75 percent of mothers and about 18 percent of fathers incarcerated in state prisons in 1997 reported that their children were being cared for by a grandparent or other relative. The incarceration of a parent is often traumatic on a variety of levels for children, and living with family members can provide some measure of stability. Mumola, C. Bureau of Justice Statistics Special Report: Incarcerated Parents and Their Children. (Washington, D.C.: U.S. Department of Justice, Office of Justice Programs, 2000). See "Is Kinship Care Good for Kids?" Center for Law and Policy, by Tiffany Conway and Rutledge Q. Hutson, March 2, 2007, at <http://www.clasp.org/admin/site/publications/files/0347.pdf>

<sup>17</sup> See e.g., "A Profile of Grandparents Raising Grandchildren as a Result of Parental Military Deployment," by Shelia Grant Buncha, Brenda J. Eastmanb & Robin Rene, *Journal of Human Behavior in the Social Environment*, Volume 15, Issue 4, 2007.

<sup>18</sup> Not all informal kinship families receive these grants. However, for simplicity the calculation assumes that they do.

<sup>19</sup> Also available in English and Spanish at the NYS Permanent Commission on Justice for Children website: <http://www.courts.state.ny.us/ip/justiceforchildren/publications.shtml>

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<sup>20</sup> N.Y. EDUC. LAW § 3212(2) (McKinney 1947). *See also* N.Y. EDUC. LAW § 4111 (McKinney 1947) (Indian child truant returned to person in parental relation; schooling record, issuance, person in parental relation); N.Y. EDUC. LAW § 3222 (McKinney 1971) (school records); N.Y. EDUC. LAW § 4402 (McKinney 2006) (Committee on Special Education can deal with person in parental relationship); N.Y. EDUC. LAW § 4107 (McKinney 1947) (person in parental relation to an Indian child can be held criminally responsible for attendance); N.Y. EDUC. LAW § 4106 (McKinney 1947) (duties of person in parental relation to Indian Children). Parents and guardians, however, retain exclusive powers for some school situations. Only parents and guardians can consent to school drug testing, N.Y. EDUC. LAW § 912-a (McKinney 2004), receive tuition reimbursement, N.Y. EDUC. LAW § 562 (McKinney 1972), consent for employment certificates, N.Y. EDUC. LAW § 3217 (McKinney 1971), consent for farm work permits, N.Y. EDUC. LAW § 3226 (McKinney 1966), and children may be absent due to attendance conflicts with religion of parents or guardian, N.Y. EDUC. LAW § 3204(5) (McKinney 1986). *See also* N.Y. PUB. HEALTH LAW § 2164 (McKinney 2004); N.Y. GEN. OBLIG. LAW ART. 5 (McKinney 2005).

<sup>21</sup> The arrangements that parents and grandparents have created without state involvement exist apart from lawful custody as it is defined in the Domestic Relations Law. They are, however, a form of “custody,” and in practice Family Courts recognize the person who has informal custody and provide notice to “a party having care, custody, and control,” N.Y. DOM. REL. § 71 (McKinney 1989) and “any person who has physical custody,” N.Y. DOM. REL. § 75-e (McKinney 2001). *But see* N.Y. CIV. PRAC. L. & R. § 1201.

<sup>22</sup> N.Y. GEN. OBLIG. LAW § 5-1502I (McKinney 1963), “Personal Relationships and Affairs” provides that the agent may be appointed “to do any other act or acts, which the principal can do through an agency, for the welfare of the spouse, children, or dependents of the principal or for the preservation and maintenance of the other personal relationships of the principal to parents, relatives, friends and organizations.” While it can be argued that this authority includes education and healthcare, in practice it has been used exclusively for financial needs. This subdivision specifically refers to real and personal property. N.Y. GEN. OBLIG. LAW § 5-1502I (McKinney 1963).

<sup>23</sup> *See* amendments to The Individuals with Disabilities Education Act, Pub. L. No. 105-17 (1997). *See also* Pub. L. No. 101-476 (1990).

<sup>24</sup> N.Y. EDUC. LAW § 3202 (McKinney 2004) (stating that residence in the school district is required for free tuition).

<sup>25</sup> *See Catlin v. Sobol*, 569 N.Y.S.2d 353 (1991), reversed by *Catlin v. Sobol*, 93 F.3d 1112 (2d Cir. N.Y. 1996), on remand, summary judgment granted by, complaint dismissed by *Catlin v. Sobol*, 988 F. Supp. 85 (N.D.N.Y. 1997), but followed by e.g., *Shirley D. v. Carl D.*, 224 A.D.2d 60 (N.Y. App. Div. 2d Dep’t 1996), *Connor v. Deer Park Union Free Sch. Dist.*, 195 A.D.2d 216 (N.Y. App. Div. 3d Dep’t 1994), harmonized by *Quiala v. Laufer*, 180 A.D.2d 31 (N.Y. App. Div. 1st Dep’t 1992), cited by *Board of Educ. of the Garrison Union Free School Dist. v Greek Archdiocese Inst. of St. Basil*, 18 N.Y.3d 355 (N.Y. 2012)

<sup>26</sup> *See Appeal of Pernell*, 30 Ed. Dep’t Rep. 380, Decision No. 12,502.

<sup>27</sup> *See Matter of Moncrieffe*, 121 Misc. 2d 395 (Sur. Ct. Nassau County 1983).

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