

**WHY THEY WON'T TAKE THE MONEY:
BLACK GRANDPARENTS AND THE
SUCCESS OF INFORMAL KINSHIP CARE**

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In this note, Ms. Gipson Rankin discusses kinship care as an alternative to placing children into foster care. For generations, particularly in the Black community, grandparents and other older relatives have played a crucial role in raising the children of younger relatives when they have become unable or unwilling to raise the children themselves. This system, known as kinship care, has ensured that thousands of American children are cared for and raised by members of their own families. The note explores the history and nature of the kinship care system, and analyzes federal and state policies that impact the system. The author considers why many Black grandparents do not choose to enter into a legal relationship with the children whom they are raising and the legal ramifications of this decision. Ms. Gipson Rankin also provides nonintrusive alternatives that states could implement to encourage more grandparents to enter into a legal relationship with the children who are in their care.

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I. Introduction

Author Robert B. Hill remarked, "While child welfare agencies find it difficult to obtain permanent homes for 200,000 [B]lack children in foster care, the [B]lack extended family has succeeded in finding homes for 800,000 [B]lack children."¹ For centuries, Black parents have depended on their parents and older family members to help them effectively raise their children.² In recent years, this practice has extended outside of the Black community.³ Kinship care has become so significant that early 2000 Census returns show grandparents are solely raising 2.3 million children in America.⁴

The federal government acknowledged that children fare better when placed with family members, and the Adoption of Safe Families Act of 1997 (ASFA)⁵ encouraged states to place children into homes with relatives: a system often called *kinship foster care*.⁶ Although the number of children who are in kinship foster care is noteworthy, it does not compare to the number of children that are part of the informal foster care system, known as *private kinship care*.⁷

While the needs of foster kinship caregivers are in the public eye, the needs of the minority informal caregiver have been disregarded and pushed into the shadows of the issue.⁸ In fact, many informal arrangements are facing legal challenges from current federal and state policies.⁹ Despite several complications, there are still many compel-

1. ROBERT B. HILL, *THE STRENGTHS OF AFRICAN AMERICAN FAMILIES: TWENTY-FIVE YEARS LATER* 126 (2d ed. 1999) [hereinafter *TWENTY-FIVE YEARS LATER*].

2. U.S. DEP'T OF HEALTH & HUMAN SERVS., *REPORT TO THE CONGRESS ON KINSHIP FOSTER CARE* 5 (2000) [hereinafter *REPORT TO CONGRESS*].

3. Susan Besze Wallace, *U.S. Gets Glimpse of Those Raising Grandkids*, *DENVER POST*, Aug. 6, 2001, at A7.

4. *Id.*

5. 42 U.S.C. § 678 (1994).

6. See *infra* notes 87-93 and accompanying text (discussing the Personal Responsibility and Work Opportunity Reconciliation Act of 1996 (PRWORA)).

7. "Most kinship care takes place without the involvement or knowledge of child welfare officials." *REPORT TO CONGRESS*, *supra* note 2, at 5. In 1997, 1.3 million children were estimated to be in private kinship care. JACOB LEOS-URBEL ET AL., *THE URBAN INST., STATE POLICIES FOR ASSESSING AND SUPPORTING KINSHIP FOSTER PARENTS, ASSESSING THE NEW FEDERALISM*, 2 (1999) [hereinafter *STATE POLICIES*].

8. See *infra* Part III.B (discussing inadequacies of new federal policies).

9. See *infra* note 106 and accompanying text.

ling reasons why Black grandparents retain private kinship arrangements.¹⁰

Part II of this note explains kinship foster care and reviews the United States' disconcerting past as it relates to the Black kinship caregiver. Part III explains the new position of the federal government on kinship care and how it has affected state policies. Further, Part III reviews the legal repercussions Black grandparents face for not entering into any kind of legal relationship with their grandchildren and the reasons they continue the informal practice. Additionally, Part IV of this note provides alternatives that states should implement to encourage a legal relationship between grandparent caregivers and their charges, without changing the caregivers' way of life.

II. Background

In recent years, kinship care has become an active part of government policies, spawning extensive research and studies on the subject.¹¹ Despite America's newfound appreciation for the topic, kinship care has existed for many years, particularly in the Black community.¹² Although the Black American family has evolved, the informal kinship care system has remained stable and successful.¹³ Over the last twenty-five years the role of kinship caregivers in the child welfare system has changed, and statistics show that grandparent caregivers are on the rise in all cultures.¹⁴

A. What Is Kinship Care?

States varied when originally defining kinship care, thereby creating confusion as to what kinship care really is.¹⁵ Most people are familiar with the established foster care system, which is referred to in

10. See *infra* Part III (discussing reasons why grandparents continue private kinship arrangements).

11. See generally REPORT TO CONGRESS, *supra* note 2.

12. See *infra* Part II.B.1.A (discussing kinship care in slavery).

13. See TWENTY-FIVE YEARS LATER, *supra* note 1, at 123-34.

14. Kathleen M. Roe & Meredith Minkles, *Grandparents Raising Grandchildren: Challenges and Responses*, GENERATIONS, Dec. 22, 1998, 1998 WL16365335 [hereinafter *Challenges and Responses*].

15. See RELATIVES RAISING CHILDREN: AN OVERVIEW OF KINSHIP CARE 105 (Joseph Crumbley & Robert L. Little eds., 1997) [hereinafter RELATIVES RAISING CHILDREN] (describing various phrases used).

this note as *non-kin foster care*.¹⁶ According to a congressional report, “*Kinship care* is any living arrangement in which a relative or someone else emotionally close to the child takes primary responsibility for rearing the child.”¹⁷

Kinship care is commonly divided into two categories: kinship foster care and private kinship care. *Kinship foster care* occurs when relatives “act as foster parents for children in state custody.”¹⁸ This is also referred to as *public or formal kinship care*.¹⁹ Commonly, states define kinship foster care as a subset of foster care services,²⁰ often holding it to the same standards.²¹ *Private (or informal) kinship care* occurs when there is no state custody involved in relatives raising minor children.²² Some private kinship caregivers have legal custody through formal adoptions or guardianships, or decision-making authority through a power of attorney.²³

B. History of Kinship Care

1. HOW THE FOSTER CARE SYSTEM HAS SYSTEMATICALLY IGNORED THE BLACK GRANDPARENT

The Black family has evolved to adapt to America. Black Americans endured slavery, survived Jim Crow laws, and pressed forward during the Civil Rights movement, often without the help of government assistance.²⁴ Currently, the Black family is fulfilling new roles in

16. REPORT TO CONGRESS, *supra* note 2, at 4.

17. *Id.* at 5. Kinship care departs from the common practice of placing children with unrelated families. Donna D. Petras, *The Effect of Caregiver Preparation and Sense of Control on Adaptation of Kinship Caregivers*, in *KINSHIP CARE: IMPROVING PRACTICE THROUGH RESEARCH* 233, 234 (James P. Gleeson & Creasia Finney Hairston eds., 1999).

18. REPORT TO CONGRESS, *supra* note 2, at 5.

19. *Id.*

20. Petras, *supra* note 17, at 234.

21. REPORT TO CONGRESS, *supra* note 2, at 55.

22. *Id.* at 5. Caring for children using extended family commonly occurs through private, informal arrangements. See Petras, *supra* note 17, at 233.

23. REPORT TO CONGRESS, *supra* note 2, at 5–6.

24. See Gilbert A. Holmes, *The Extended Family System in the Black Community: A Child-Centered Model for Adoption Policy*, 68 *TEMP. L. REV.* 1649, 1659–60 (1995).

Sociologists have . . . studied the extended family experience in African-American communities because of the unique history of Africans in America, who have suffered through slavery, Jim Crow, de facto and de jure segregation, and discrimination in housing, employment, and education. These studies indicate that the complex family composition . . . in the Black [American] communities . . . significantly contributed to the survival and advancement of the children despite the social and political obstacles placed before them.

middle- and upper-class America.²⁵ Through these generations of change, the Black family has continued a tradition that originated in Africa—blurring the lines of the extended family’s role when it comes to raising children.²⁶

a. While Blacks Were Enslaved The elderly Black American has been called “the central stabilizing figur[e] in extended Black families.”²⁷ The Black American kinship care system developed its roots in pre-slavery Africa.²⁸ Kinship and community connections held the family together in Africa where the elderly raised “grandchildren, great-grandchildren, and the children of extended and fictive kin.”²⁹ In the West African extended family structure, “children retained knowledge of and access to their birth parents and kin.”³⁰ There was no desire to sever parental rights or access, and this practice went with the Africans to America.³¹ Author Robert Billingsley wrote, “The spirit of family and community bonds brought over from Africa were maintained during [slavery] despite efforts to stamp out all vestiges of family life and African culture.”³²

Before the Civil War, destitute-orphaned White children were located in almshouses or placed in indentured servitude, creating America’s child welfare system.³³ Black children were part of another American system, slavery. During slavery, the Black American family depended on its extended family and community to cope with parents

Id. at 1660.

25. See SUSAN D. TOLIVER, *BLACK FAMILIES IN CORPORATE AMERICA* 25 (1998).

26. Linda M. Burton & Peggye Dilworth-Anderson, *The Intergenerational Family Roles of Aged Black Americans*, in *FAMILIES: INTERGENERATIONAL AND GENERATIONAL CONNECTIONS* 311, 312 (Susan P. Pheifer & Marvin B. Sussman eds., 1991). “Grandparents—grandmothers in particular, have traditionally served as the cohesive force in African American families.” Charisse Nelson, *The New Nuclear Family: Grandparenting in the Nineties*, *BLACK CHILD*, July 31, 1997, at 9.

27. *Id.*

28. Joan M. Williams, *Kinship Foster-Care in New York State—An African-American Perspective*, in *FOSTERING KINSHIP: AN INTERNATIONAL PERSPECTIVE ON KINSHIP FOSTER CARE* 153, 153–54 (Roger Greeff ed., 1999).

29. Burton & Dilworth-Anderson, *supra* note 26, at 312.

30. Holmes, *supra* note 24, at 1663.

31. *Id.*

32. ANDREW BILLINGSLEY, *BLACK FAMILIES AND THE STRUGGLE FOR SURVIVAL* 50 (1974).

33. Zanita E. Fenton, *In a World Not Their Own: The Adoption of Black Children*, 10 *HARV. BLACKLETTER L.J.* 39, 41 (1993).

being sold away from their children.³⁴ In particular, the Black grandmother was the central figure of the fractured slave family.³⁵

During slavery the Negro grandmother occupied in many instances an important place in the plantation economy and was highly esteemed by both the slaves and the master. . . . The grandmother's prestige and importance were as great among the slaves on the plantation as among the whites in the master's house. . . . She took under her care the orphaned and abandoned children.³⁶

b. After Freedom

1) *The Substandard Child Welfare System for Black Children* After the Civil War, indentured service for White children ended with the Thirteenth Amendment,³⁷ and these children were moved into orphanages.³⁸ Black children—who were completely alone—were allowed into almshouses, but not orphanages.³⁹ Black American children were barred from White public and private sector child welfare programs.⁴⁰ There were some social services created specifically for Black children after slavery ended, but “racism and anti-populist budget cutting during [the] post-Reconstruction era” destroyed the system.⁴¹ “It was not until the late twentieth century that the child welfare system allowed participation of the Black community and its children in the range of services provided to the White community.”⁴²

34. Williams, *supra* note 28, at 154.

35. See TWENTY-FIVE YEARS LATER, *supra* note 1, at 124; see also Julia Danzy & Sondra M. Jackson, *Family Preservation and Support Services: A Missed Opportunity for Kinship Care*, 76-1 CHILD WELFARE 31, 31 (1997) [hereinafter *Missed Opportunity*] (discussing the history of the Black family).

36. TWENTY-FIVE YEARS LATER, *supra* note 1, at 124 (citations omitted).

37. “Neither slavery nor involuntary servitude . . . shall exist within the United States . . .” U.S. CONST. amend. XIII.

38. Fenton, *supra* note 33, at 41.

39. *Id.*

40. REPORT TO CONGRESS, *supra* note 2, at 11. “[B]ecause of the historic exclusion of Blacks from social welfare services, Blacks have had to develop their own informal networks for foster care and adoption.” ROBERT B. HILL, *INFORMAL ADOPTION AMONG BLACK FAMILIES 2* (1977).

41. Fenton, *supra* note 33, at 43.

42. *Id.* at 43. The three reasons the child welfare system became so inclusive are: the migration of Blacks to the urban North (concentrating the need), “public child welfare services have traditionally been utilized by poor people,” and the integration movement demanded that all services be available to all people. *Id.*

2) *Families Operating Outside of the Child Welfare System* In the post-Civil War era, Black extended families combined economic resources to combat Jim Crow.⁴³ Grandparents provided child care and finances to the family structure during this time of widespread racism and uncertainty.⁴⁴ During the “Great Migration” of Blacks from the rural south to the urban cities of the north and west, grandparents often cared for their grandchildren who waited, sometimes forever, for the children’s parents to retrieve their offspring.⁴⁵ Despite the separation, children did not lose contact with their parents.⁴⁶ Family members willingly assisted parents in raising their children, keeping the lines of communication open.⁴⁷ In fact, when the families were reunited in the urban Northern cities, many grandparents and other caregivers went north to continue raising the children.⁴⁸

2. THE DEVELOPMENT OF CHILD WELFARE POLICIES AS TO KINSHIP FOSTER CARE

At the creation of the federal foster care system, child welfare policies were able to disregard the role of kin caregivers, just as they had ignored Black Americans.⁴⁹ Kinship care was considered a practice among cultures of color only—a reason it was ignored for so long in federal policies.⁵⁰ Kin caregivers were considered to work in opposition to the underlying focus of the child welfare system: conducting a safe reunification of children with their biological parents.⁵¹ But, many factors soon changed this practice.⁵²

There are three main reasons for the significant growth of kinship foster care. First, there was a shrinking supply of foster homes

43. Andrew E. Scharlach et al., *Curriculum Module on Aging and Ethnicity*, at <http://socrates.berkeley.edu/~aging/ModuleMinority1.html#anchor238319> (last visited Jan. 28, 2002) [hereinafter *Curriculum Module*].

44. *Id.*

45. See Burton & Dilworth-Anderson, *supra* note 26, at 320. “When emancipation came, it was often the old grandmother who kept the generations together. . . . Thus, it has been the grandmother who has held the generations together when fathers and even mothers abandoned their off-spring.” TWENTY-FIVE YEARS LATER, *supra* note 1, at 124 (citations omitted).

46. Holmes, *supra* note 24, at 1668. The extended family living arrangement allowed for “contact between children and their birth parents.” *Id.*

47. TWENTY-FIVE YEARS LATER, *supra* note 1, at 124.

48. Holmes, *supra* note 24, at 1664.

49. REPORT TO CONGRESS, *supra* note 2, at 16.

50. Burton & Dilworth-Anderson, *supra* note 26, at 311–75.

51. REPORT TO CONGRESS, *supra* note 2, at 16.

52. See *Challenges and Responses*, *supra* note 14.

accompanied by a rise in demand for foster homes.⁵³ An “[i]ncreasingly negative public image of foster care, more working women, and high rates of burnout among foster parents” were some reasons for this problem.⁵⁴ Another major factor was the child welfare system’s effort to focus on family preservation in the early 1980s.⁵⁵ The decline of available foster care homes was directly related to the decline in the use of out-of-home care.⁵⁶ While these reduction efforts were occurring, there became a need for more children to be taken away from their parents.⁵⁷ Children were entering the system at an alarming rate with severe physical, emotional, and developmental needs,⁵⁸ and societal problems placed great pressure on the nuclear family.⁵⁹

Second, there has been a positive change of attitude about the effects of kinship care on children.⁶⁰ Advocates began to argue that children do “better in their own families and that kin should be given priority when children require placement.”⁶¹ Because of familiarity among relatives, there was less trauma and disruption in children placed with kin as opposed to children placed with non-kin.⁶² There was also evidence about the “sense of family identity, self-esteem, social status, community ties, and continuity of family relationships” in kinship arrangements.⁶³

Third, a number of courts and legislatures have acknowledged the benefits of relatives as foster parents.⁶⁴ For many years, relatives were told to care for their minor relatives by obtaining legal custody and to finance that care with welfare and community programs.⁶⁵ However, without access to the payments and services foster parents

53. See STATE POLICIES, *supra* note 7, at 2.

54. REPORT TO CONGRESS, *supra* note 2, at 9.

55. *Missed Opportunity*, *supra* note 35, at 31 (discussing how The Adoption Assistance and Child Welfare Act of 1980 affected the number of out-of-home care used).

56. *Id.* “[C]hild welfare systems actively encouraged the dismantling of out-of-home care services and directed funds to developing family preservation and family support services.” *Id.*

57. *Id.*

58. RELATIVES RAISING CHILDREN, *supra* note 15, at 99.

59. REPORT TO CONGRESS, *supra* note 2, at 9 (discussing family pressures).

60. STATE POLICIES, *supra* note 7, at 2.

61. REPORT TO CONGRESS, *supra* note 2, at 9.

62. *Id.*

63. *Id.* at 10.

64. STATE POLICIES, *supra* note 7, at 9.

65. RELATIVES RAISING CHILDREN, *supra* note 15, at 85–86.

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received, such as therapy, day care, and respite care, legal caregivers relied on low welfare amounts that did not adjust appropriately to their new responsibilities.⁶⁶

In 1979, the Supreme Court ruled in *Miller v. Youakim*⁶⁷ that kin are entitled to receive the same federal financial support for foster care as non-kin foster parents.⁶⁸ In order to receive the funds, the children must be Title IV-E⁶⁹ eligible, and the relatives must meet foster parent state licensing standards.⁷⁰ States have since expanded on this ruling. In 1989, the Ninth Circuit found that associating with kin was a constitutional right.⁷¹ A number of states have faced class-action lawsuits that addressed financial services available to public kinship caregivers.⁷² In the past two decades, legislation has generally softened the laws affecting kinship caregivers.⁷³ Despite the changes, states initially continued to place children with relatives through the established foster care system, using the standards and goals designed for non-kin foster parents.⁷⁴

C. Current Status of Kinship Care

1. GENERAL STATISTICS OF KINSHIP CARE

After states began to actively encourage kin to act as foster parents, the kinship foster care system increased considerably during the late 1980s and 1990s.⁷⁵ In 1998, about 2.13 million children in the United States were living in some type of kinship care arrangement.⁷⁶ In 1997, approximately 200,000 children were in kinship foster care.⁷⁷

66. *See id.* at 86 (noting relatives taking in additional children received a decreased amount for each additional child; non-kin caregivers received the same amount per child).

67. 440 U.S. 125 (1979).

68. *See id.* at 146.

69. 42 U.S.C. §§ 670–679 (1994).

70. REPORT TO CONGRESS, *supra* note 2, at 23.

71. *See id.* at 10. “[C]hildren have a constitutional right to associate with relatives and . . . States’ failure to use kin as foster parents denies them that right.” *Id.* (citation omitted).

72. *Id.* at 22.

73. *See id.* at 26 (discussing the legislative history of the Adoption Assistance of Child Welfare Act of 1980).

74. *Id.* at 17 (“[M]ost States used existing supervision and permanency planning standards designed for non-kin foster parents to assess and monitor kin caregivers.”).

75. *Id.* at 55.

76. *Id.* (includes kinship foster care children).

77. *Id.*

Most kinship care numbers are difficult to acquire because of the high number of private, informal arrangements and “the underreporting of formal placements by state and local government agencies.”⁷⁸ In 1997, however, roughly 1.6 million children were in private kinship care arrangements.⁷⁹

Grandparents are playing a heavy role in rearing young children. The 2000 Census results showed that 5.6 million grandparents live with their grandchildren.⁸⁰ In seventy-five percent of families where there was a grandparent in the home, the grandparent was the caretaker of the children.⁸¹ Early Census 2000 reports show that an estimated 2.35 million grandparents are solely raising their grandchildren.⁸² Forty-eight percent of grandparent caregivers are aged fifty to sixty-four and nineteen percent are sixty-five years or older.⁸³

2. HOW BLACK GRANDPARENTS AFFECT THE KINSHIP CARE STATISTICS

Elderly Black Americans account for a small percentage of the Black community, but they are a growing number in the elder community.⁸⁴ About two million Black Americans are sixty-five or older, accounting for roughly eight percent of the Black American population.⁸⁵ The Black elderly population growth is currently surpassing the general elderly population growth.⁸⁶

78. RELATIVES RAISING CHILDREN, *supra* note 15, at 97. In 1997, it was approximated that 27,000 children in the District of Columbia (accounting for a fourth of the children in the city) were in private kinship care. Juliet Bruce, *Kinship Families; Caring for Children Outside the Foster Care Arena*, WASH. POST, Apr. 22, 1997, at D05. States have not kept an accurate account of the relatives who volunteer to care for children known to the system, but are never taken into state custody. RELATIVES RAISING CHILDREN, *supra* note 15, at 97. However, this number was estimated at 284,000 in 1997. STATE POLICIES, *supra* note 7, at 2–6.

79. STATE POLICIES, *supra* note 7, at 2.

80. Wallace, *supra* note 3, at A-7.

81. KEN BRYSON & LYNNE M. CASPER, U.S. CENSUS BUREAU, CURRENT POPULATION REPORTS: CORESIDENT GRANDPARENTS AND GRANDCHILDREN 2 (1999).

82. Wallace, *supra* note 3, at A-7.

83. ADMIN. ON AGING, U.S. DEP'T OF HEALTH & HUMAN SERVS., GRANDPARENTS RAISING GRANDCHILDREN 1 (2000) at <http://www.aoa.gov/factsheets/grandparents.html>.

84. *Curriculum Module*, *supra* note 43.

85. *Id.* “The African American elderly population has been increasing at a rate almost twice that of the African American population as a whole. . . . It is estimated that, by the year 2050, the number of elderly African Americans could nearly quadruple to more than nine million persons, representing fifteen percent of all African Americans.” *Id.*

86. *Id.*

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Black Americans are disproportionately represented in the foster care system.⁸⁷ In addition, “kinship caregivers are far more likely than non-kin foster parents to be African American.”⁸⁸ In 1998, approximately thirty percent of Black American grandmothers and fourteen percent of Black American grandfathers reported acting as primary caregivers for a grandchild for at least six months.⁸⁹ In 1997, 1.4 million grandparents were raising grandchildren, and forty-six percent of those children were Black.⁹⁰

Most elderly Black American caregivers have limited resources.⁹¹ In 1997, the American Association of Retired Persons discovered that sixty-one percent of Black American grandparent caregivers were living on fixed incomes.⁹² Although many Black elders are kin caregivers, recent studies show the characteristic grandparent caregiver is “a white married woman living above the poverty line.”⁹³ This characterization likely explains the push for an increase in research and funding.

III. Analysis

Presently, child welfare policies are not meeting the needs of kin caregivers. “[I]f kinship placements were a dominant practice among Caucasian majority families, clear and concise federal and state policy guidance would have been articulated and implemented long ago.”⁹⁴ However, this is not the case, and many minority grandparents have been forced to bend and twist to the changing whims of federal policy. Elderly Black Americans functioned without the aid of government support for many years and only recently have begun to turn to

87. REPORT TO CONGRESS, *supra* note 2, at 36.

88. *Id.* “[O]lder blacks are twice as likely as older whites to act as parents.” Richard Whitmire, *Grandparents Rearing Kids Get No Welfare*, SALT LAKE TRIB., Sept. 9, 1994, at A1.

89. Esme Fuller-Thomsom & Meredith Minkler, *African American Grandparents Raising Grandchildren: A National Profile of Demographic and Health Characteristics*, 25-2 HEALTH & SOC. WORK 109, 109 (2000).

90. Nelson, *supra* note 26, at 9.

91. *See id.*

92. *Id.*

93. *Challenges and Responses*, *supra* note 14. “The grandparent caregivers were predominantly White (68%), female (60%), married (76%), and had a median age of 57.” Robin S. Goldberg-Glen & Roberta G. Sands, *Factors Associated with Stress Among Grandparents Raising Their Grandchildren*, 49-1 FAM. REL. 97, 97 (2000).

94. RELATIVES RAISING CHILDREN, *supra* note 15, at 97.

kinship foster care as a means of assistance.⁹⁵ Entering the kinship foster care system once meant the family had to relinquish some control of the family to the government.⁹⁶ But, now that relaxed state policies for kinship foster care are illegal, many Black Americans will have to decide if non-kin foster care is the right system for their needs.

A. Federal Policy Governing Kinship Foster Care

Two federal policy agencies govern kinship care: income assistance and the child welfare system.⁹⁷ Federal legislation over the past decade has developed significant changes in the kinship foster care system through the Personal Responsibility and Work Opportunity Reconciliation Act of 1996 (PRWORA)⁹⁸ and the Adoption and Safe Families Act of 1997 (ASFA).⁹⁹ Under PRWORA, relative caregivers are to be given preference for placement purposes, but to receive a Temporary Aid for Needy Families (TANF) grant, the relatives must abide by time limits and work requirements.¹⁰⁰

The ASFA “recognized kinship care as an appropriate permanent placement option” and allows states to waive certain requirements as to the termination of parental rights if there is a kinship care arrangement.¹⁰¹ Under the ASFA, a foster family home, regardless of familial ties, must be fully licensed by the state to receive federal funds.¹⁰² States are permitted to waive some licensing requirements

95. See *supra* note 42 and accompanying text.

96. See *infra* note 141 (discussing the relaxed standard for kinship foster care).

97. See SHELLEY WATERS BOOTS & ROB GREEN, *THE URBAN INST., FAMILY CARE OR FOSTER CARE? HOW STATE POLICIES AFFECT KINSHIP CAREGIVERS* 5 (1999) [hereinafter *FAMILY CARE*] (explaining effect of welfare reform acts on kinship caregivers).

98. 8 U.S.C. § 1613 (2001). PRWORA created the Temporary Assistance for Needy Families (TANF) program, which allowed relatives to include minor relatives in their custody when applying for assistance. *FAMILY CARE, supra* note 97, at 2113.

99. 42 U.S.C. § 622 (2001).

100. 8 U.S.C. § 1613 (adults cannot receive assistance for more than five years in their lifetime). PRWORA required kinship caregivers to participate in “work and community service, education, and training programs.” Note, *The Policy of Penalty in Kinship Care*, 112 HARV. L. REV. 1047, 1059 (1999) [hereinafter *Penalty in Kinship Care*].

101. REPORT TO CONGRESS, *supra* note 2, at 29.

102. See *id.* at 26. “[A] foster family home for children which is licensed by the State in which it is situated or has been approved, by the agency of such State having responsibility for licensing homes of this type, as meeting the standards established for such licensing.” *Id.* (citation omitted).

that are not relevant to child safety.¹⁰³ This impacted the states that use different standards for kinship homes, but provided full foster care payments, as discussed below.¹⁰⁴

B. State Policies Regarding Kinship Care

The needs of kinship foster care families were never properly measured, but the government continued to encourage kin caregivers to enter the system.¹⁰⁵ Because the federal government was also vague when developing kinship foster care regulations, many states designed an assortment of licensing standards that are now illegal.¹⁰⁶ In January 2000, the U.S. Department of Health and Human Services (HHS) explained the final rule of the ASFA, defining how states are to license and provide for kinship foster care homes.¹⁰⁷ States are not allowed to have different standards for licensing kin and non-kin foster parents.¹⁰⁸ States are also not permitted to waive requirements for kin as a group, though requirements may be waived on a case-by-case basis.¹⁰⁹ Moreover, safety requirements cannot be waived under any circumstance.¹¹⁰ The final rule from the HHS¹¹¹ does not stop states from using kinship caregivers who do not meet the foster care standard; they just cannot expect to use federal funds to do this.¹¹² Because of this standard, states may have to implement one set of rules for both kin and non-kin foster parents in order to receive federal funds.¹¹³

103. *Id.* Some waived requirements include the number of rooms in the house, overall square footage, and income limits, but these exceptions must be made on a case-by-case basis. *Id.*

104. “Most states conduct criminal background checks and a child abuse registry check of potential foster parents Some states allow exceptions to certain foster care requirements if kin otherwise meet established criteria.” *Id.*

105. See *id.* at 4. Children in kinship foster care are generally thriving, but the child welfare system was not designed to address the specific needs of kin caregivers. *Id.* at 34, 38.

106. See FAMILY CARE, *supra* note 97, at 5.

107. STATE POLICIES, *supra* note 7, at 7; see also Final Rule on the ASFA, 45 C.F.R. §§ 1355–1357 (2000).

108. STATE POLICIES, *supra* note 7, at 7 (describing final rule on state implementation of ASFA).

109. *Id.* at 7–8.

110. 45 C.F.R. §§ 1355–1357 (“[A]ll foster care licensing standards should provide equal protection in terms of safety, sanitation, civil rights, and admission policies for all children in care . . .”).

111. See REPORT TO CONGRESS, *supra* note 2, at 5.

112. STATE POLICIES, *supra* note 7, at 8, 56.

113. GERALD WALLACE, CHILDREN’S LAW INST., GRANDPARENTS PARENTING GRANDCHILDREN: A NEW FAMILY PARADIGM 212 (2000).

This final rule rocks the foundation of many states' separate kinship foster care systems, leaving kin caregivers with a difficult alternative—namely, non-kin foster care.

Research has demonstrated that children go into informal kinship care for many of the same reasons that they are put into foster care.¹¹⁴ There is a large discrepancy, however, in what informal kinship households receive as compared to licensed foster parents.¹¹⁵ If a kin caregiver was part of the kinship foster care system, the relative received foster care payments (depending on the state) and if a kin caregiver was part of an informal kinship arrangement, the relative received TANF grants.¹¹⁶ Depending on the state, TANF grants may be drastically less than foster care payments.¹¹⁷ This can be detrimental for private kinship homes. For example, when many siblings are in the same kinship home, TANF funds are distributed on a declining scale while foster care payments remain the same for each child, despite the number of children.¹¹⁸

In 1999, The Urban Institute surveyed all fifty states (and the District of Columbia) on their current kinship foster care practices.¹¹⁹ Their findings revealed the varying standards states had in place for kinship foster homes.¹²⁰ In forty states and the District of Columbia,¹²¹ families could apply for multiple assistance categories in the system depending on what they were eligible for and how much government intrusion they wanted to handle.¹²² There is no clear indicator that kinship caregivers were aware of the consequences of each choice.¹²³ Some states required kin to participate in training and become fully

114. Steve Christian, *Helping Kin Care for Kids*, 26-10 STATE LEGISLATURES 20, 20 (2000).

115. *Id.* (discussing the fact informal kinship households receive smaller payments and fewer services).

116. STATE POLICIES, *supra* note 7, at 7 (discussing assistance to kinship care families).

117. See FAMILY CARE, *supra* note 97, at 4, tbl.1 (showing differences in the fifty states between TANF grants and foster care payments).

118. STATE POLICIES, *supra* note 7, at 7; see also Malcolm Garcia, *Missouri Law Cuts Aid to Many Who Have Custody of Grandchildren*, KANSAS CITY STAR Aug. 13, 2001, at B1 (discussing foster care reductions for kinship households).

119. STATE POLICIES, *supra* note 7, at 8-52 (reviewing survey information from the states).

120. See *id.*

121. *Id.* at 34.

122. REPORT TO CONGRESS, *supra* note 2, at 20.

123. See STATE POLICIES, *supra* note 7, at 34.

licensed, while others had established separate legal statutes addressing kinship care.¹²⁴

1. EFFECT OF THE FINAL RULE FOR THE ASFA ON KINSHIP CAREGIVERS

The legislature intended for the final rule on the ASFA to balance the needs for safety and permanency with the benefits of kin foster care placements by implementing certain requirements.¹²⁵ States are prohibited from using different licensing standards for kin and non-kin foster families if they want to receive federal foster care reimbursement.¹²⁶ The regulations recognized that “the emphasis in ASFA on child safety, and the plain language of the statute with respect to licensing requirements,” required all foster care homes, regardless of familial ties, to be fully licensed by the state.¹²⁷ As of March 27, 2000, states had no more than six months to fully license all homes that were part of the system.¹²⁸

The final rule does acknowledge that there are “special situations [which] may arise with relative caretakers in individual cases where there are grounds for waiving certain [licensing] requirements.”¹²⁹ States, under special circumstances, may waive certain requirements for individual relatives on a case-by-case basis, but may not waive any safety-related standards under any condition.¹³⁰

All states have requirements for licensing non-kin foster care.¹³¹ States that do not provide foster care payments to kin under a kinship foster care standard are in compliance with ASFA requirements, but the kin caregivers are hurt because funds are significantly less.¹³²

Based on the Urban Institute’s survey in 1999, some states allowed a case-by-case analysis to be done for one or more of the foster care licensing standards for kinship caregivers, so “long as none of the

124. Jill Duerr Berrick, *When Children Cannot Remain Home: Foster Care and Kinship Care*, in 8-1 THE FUTURE OF CHILDREN: PROTECTING CHILDREN FROM ABUSE AND NEGLECT 73 (1998) [hereinafter THE FUTURE OF CHILDREN].

125. 45 C.F.R. §§ 1355–1357 (2000).

126. *Id.*; see also STATE POLICIES, *supra* note 7, at 27–28 (discussing repercussions of not being in compliance with ASFA requirements).

127. 45 C.F.R. §§ 1355–1357.

128. *Id.*

129. *Id.*

130. *Id.*

131. REPORT TO CONGRESS, *supra* note 2, at 19.

132. FAMILY CARE, *supra* note 97, at 4, tbl.1; STATE POLICIES, *supra* note 7, at 28.

modifications jeopardizes safety.”¹³³ Nine states waived or modified requirements for all kin as a group, in opposition to the final rule provided by the HHS.¹³⁴ Seven states applied waivers or modifications on a case-by-case basis.¹³⁵ Among the sixteen states that waived or modified requirements for kin as a group, eleven waived or modified training requirements; two followed the final rule from the ASFA.¹³⁶ Ten states waived or modified space requirements; five followed the final rule from the ASFA.¹³⁷

Some states had established a separate approval process for kinship caregivers into the foster care system.¹³⁸ The kin caregivers were not “required to attend training, comply with space or income requirements, or follow a vast array of other mandates.”¹³⁹ Thirty-one states and the District of Columbia offered kinship foster care.¹⁴⁰ Some states recognized the innate differences between kinship foster families and non-kin foster families by their differences in nonsafety requirements.¹⁴¹ For example, New York’s kinship care policy only requires a kinship home to have “sufficient sleeping arrangements and space.”¹⁴² By contrast, non-kin were required to have the following standards:

[n]ot more than three persons shall occupy any bedroom where children . . . sleep. Every sleeping room occupied by children . . . shall have good natural light and ventilation and . . . one or more windows opening directly to outside air. . . . No bed shall be located in any unfinished attic, basement, . . . or room commonly

133. REPORT TO CONGRESS, *supra* note 2, at 19.

134. STATE POLICIES, *supra* note 7, at 21.

135. *Id.*

136. *Id.* at 23, tbl.3. Only Texas and Washington waived or modified training requirements for kin on a case-by-case basis. *Id.*

137. *Id.* at 23, tbl.3. Only Mississippi, Nevada, New Mexico, Oregon, Texas, Washington, and West Virginia waived space requirements on a case-by-case basis. *Id.*

138. See, e.g., Judy Putnam, *Keeping It in the Family: Kinship Care Program Shoulders Foster Care Burden*, GRAND RAPIDS PRESS, Aug. 1, 1999, at A27 (describing Michigan’s inequity in funds that were available to kinship caregivers). Kinship caregivers received \$95 a month for a teen in their care, while foster parents would have received \$500 for the same teenager. *Id.* For a kinship caregiver to receive the same funds, they must follow all “state child-rearing policies, including a no-spanking rule.” *Id.*

139. REPORT TO CONGRESS, *supra* note 2, at 19. Examples of some licensing standards required are: adequate number of bedrooms, criminal and child abuse clearance, training. RELATIVES RAISING CHILDREN, *supra* note 15, at 87.

140. STATE POLICIES, *supra* note 7, at 24.

141. *Id.* at 4.

142. *Id.* at 24 (citing New York policy) (citation omitted).

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used for purposes other than sleeping. . . . Sleeping rooms shall provide at least 45 square feet of floor space for each bed.¹⁴³

If the state systems can show that the differences in requirements are being extended on a case-by-case basis and not just because they are kin caregivers, varying standards, such as New York's, should be able to remain in place.¹⁴⁴

2. NONCUSTODY PLACEMENTS AND INFORMAL KINSHIP CAREGIVERS

In some situations, the child welfare agency knows of problems in a family and recommends placement with relatives instead of taking the child into state custody and *then* placing them with relatives.¹⁴⁵ In 1999, thirty-nine states reported to the Urban Institute that they had helped place children into private kinship care arrangements.¹⁴⁶ Fewer than half reported to the Urban Institute that they had conducted background checks or home studies on the kin caregivers.¹⁴⁷ Nineteen states reported conducting criminal background checks or child abuse registry searches.¹⁴⁸ Sixteen states stated that they perform a home study on potential kinship caregivers.¹⁴⁹

Informal kinship caregivers "can apply for and receive public assistance for the children" in their care.¹⁵⁰ The relative caregiver need only show primary physical custody, which is a requirement caregivers and caseworkers sometimes misinterpret.¹⁵¹ Physical custody can be established by taking the children to applicable appointments "or by providing relevant documentation such as a letter from a parent . . . or another authority figure."¹⁵²

143. *Id.* at 25 (citing New York policy on non-kin foster homes) (citation omitted).

144. *Id.* at 55.

145. *Id.* at 26.

146. *Id.*

147. *Id.*

148. *Id.* This may be another reason many do not enter the kinship foster care system. See *infra* Part III.D.1.c.

149. See STATE POLICIES, *supra* note 7, at 26.

150. RELATIVES RAISING CHILDREN, *supra* note 15, at 74. Only the child's income, not the caregiver's, is to be considered for eligibility purposes. *Id.* at 75.

151. *Id.*

152. *Id.*

C. The Legal Repercussions Black Grandparents Face for Not Entering the Kinship Foster System

Before the changes in the implementation of the ASFA, the kinship foster care system, and by extension the foster care system, had several benefits and followers. Relatives, who lack legal custody, are customarily denied “insurance coverage, medical care, financial assistance, public housing, school enrollment, and job protection.”¹⁵³ By entering the kinship foster care system, however, grandparents did not have to worry about legal consent issues and gained government assistance, while often adhering to relaxed standards.¹⁵⁴ These legal advantages influenced many to join the system.¹⁵⁵

1. NO LEGAL AUTHORITY FOR EDUCATION AND MEDICAL DECISIONS

Private kinship arrangements have legal custody problems, which inhibit their ability to perform routine parent-child activities.¹⁵⁶ “[K]in lack the authority to take important actions such as enrolling a child in school, signing permission slips for field trips or other school activities, authorizing emergency medical care, or enrolling the child in their health insurance policy.”¹⁵⁷ Because of these inhibiting policies, Black children are forced to the fringe of society, using emergency room trips for general check-ups and relying on the leniency and understanding of school systems.¹⁵⁸

Some states have taken note of informal arrangements and allow adjustments to be made for consent.¹⁵⁹ In California, relatives may sign a notarized affidavit, affirming that they are the full-time caregivers of the child.¹⁶⁰ This allows the kin “caregiver to enroll the child

153. Bruce, *supra* note 78.

154. Berrick, *supra* note 124, at 74.

155. *See id.*

156. REPORT TO CONGRESS, *supra* note 2, at 34.

157. *Id.*

158. *Grandparents' Message to the New Administration: We Need Resources and Support to Raise Our Grandchildren*, PR NEWSWIRE, Aug. 3, 2000, at LEXIS [hereinafter *Grandparents' Message*]. Many relatives do not have the funds to afford to pay for basic checkups or doctor visits. *Id.*

159. *See infra* notes 160–66.

160. CAL. FAM. CODE § 6552 (West 1994 & Supp. 2001); RELATIVES RAISING CHILDREN, *supra* note 15, at 77 (discussing California's requirements).

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in school and to authorize general medical and dental care.”¹⁶¹ The affidavit, however, is only valid for one year.¹⁶²

The District of Columbia passed a Medical Consent Law.¹⁶³ This law enabled parents to designate an alternate person to make medical decisions for the child.¹⁶⁴ In the District of Columbia, a parent needs to sign a medical consent affidavit that does not need to be notarized.¹⁶⁵ There are some limitations. The caregiver is limited only to control over medical decisions, there are no provisions for school enrollment, and there are no provisions for missing parents.¹⁶⁶

Not every state has prepared consent measures for informal caregivers.¹⁶⁷ For instance, in New York, the Education and Public Health laws allow people statutorily described as guardians or custodians to be defined as having a “parental relationship.”¹⁶⁸ Because a negligent parent frequently lives in the community, but is not taking responsibility for the child, many informal relationships are not considered custodial.¹⁶⁹ Even if grandparent caregivers are seen to fit the definition of people in a parental relationship, they do not receive authority for all education needs,¹⁷⁰ and they can only make medical decisions about consenting to immunizations.¹⁷¹

2. NO GOVERNMENT ASSISTANCE FROM KINSHIP FOSTER CARE

A significant advantage kinship foster care gives over private kinship care is the “extensive network of support available.”¹⁷² Sev-

161. RELATIVES RAISING CHILDREN, *supra* note 15, at 77.

162. CAL. FAM. CODE § 6550(b).

163. D.C. CODE ANN. § 16-4901 (1981). The Medical Consent Law was the first in the country and in 1995, the superintendent’s office allowed children in kinship families to enroll in D.C. public schools. Bruce, *supra* note 78.

164. Bruce, *supra* note 78.

165. RELATIVES RAISING CHILDREN, *supra* note 15, at 77.

166. *Id.*

167. WALLACE, *supra* note 113, at 206–08 (describing New York’s policy on legal consent). New York does not have any medical consent forms available. *Id.*

168. *Id.* at 207. See generally N.Y. EDUC. LAW § 3212 (McKinney 2001) (education laws on consent); N.Y. PUB. HEALTH LAW § 2164 (McKinney 1993) (public health laws on consent).

169. WALLACE, *supra* note 113, at 207 n.11. The statute requires that the parent must have abandoned or deserted the children in order for the informal caregiver to be seen as a custodian. N.Y. EDUC. LAW § 3212(1).

170. WALLACE, *supra* note 113, at 208 n.11.

171. N.Y. PUB. HEALTH LAW § 2164.

172. RELATIVES RAISING CHILDREN, *supra* note 15, at 89.

eral states have established special resources for kinship caregivers.¹⁷³ During its 2000 General Assembly, the Kentucky legislature developed Kentucky's Kinship Care Program.¹⁷⁴ Relative caregivers, who are given custody through the courts, may receive up to \$500 for clothes, school supplies, and furniture, as well as \$300 for a monthly stipend.¹⁷⁵ The caregiver must allow a criminal record check and home evaluations, consent to pursuing child support from the child's parent, and consent to annual reviews.¹⁷⁶ Because the safety requirement will be fulfilled through the criminal record checks and home evaluations, this practice will likely not be considered in violation of the final rule on the ASFA.¹⁷⁷

Oregon's Administrative Rules provide special regulations for kinship care.¹⁷⁸ The rules define kinship care as a kinship foster care arrangement¹⁷⁹ and also state that kinship resources will only be provided to relatives who follow the Rules of Governing the Certification of Foster and Adoptive Homes.¹⁸⁰ In order to be certified, applicants must report all criminal charges, arrests or convictions, and all matters related to the crimes for every person living in the home.¹⁸¹ Applicants must also show they have sufficient income to "meet their needs and to ensure the stability and financial security of the family," not including any foster care money.¹⁸² There is also a requirement that applicants "provide the health history of every household member, and physical and mental health services and treatment received."¹⁸³

173. Sheryl Edelen, *GRANDPARENTS: New Law Gives Financial Aid to Some Caregivers. Program Limits Leave Many on Their Own*, COURIER-J. (Louisville, Ky.), May 7, 2000, at 13A.

174. *Id.*

175. *Id.*

176. *Id.* They must also agree to permanent custody if the court deems it necessary. *Id.*

177. 45 C.F.R. § 1356.30 (2000).

178. See OR. ADMIN. R. 413-200-0200, -0140, -0150 (2000).

179. *Id.* 413-200-0200(1) (Kinship foster care is defined as "the temporary placement of children under the custody and supervision of the State Office for Services to Children and Families with approved extended family members.").

180. *Id.* 413-200-0200(2), -0150(4) ("Kinship resources are to be assessed using these rules as guidelines."). Kinship resources are defined as "adults related to the child by blood, adoption or marriage." *Id.* 413-200-0140(21).

181. *Id.* 413-200-0150(1)(c)(E) (describing criminal charges).

182. *Id.* 413-200-0150(1)(c)(G) (describing financial requirements).

183. *Id.* 413-200-0150(3)(a) (describing health reports necessary). "The agency may require a medical statement from a physician verifying that no person suffers from a . . . disability which would interfere with the family's capability to care for the children. . . ." *Id.* 413-200-0150(3)(b).

This last requirement might be problematic for elderly caregivers who have health concerns.

Ohio requires that kinship care supportive services only be provided after a child is placed with a defined “relative” or “kin,”¹⁸⁴ the child is at risk of being removed from his or her home,¹⁸⁵ the kinship family cannot provide for the family without assistance,¹⁸⁶ and all other sources are completely unavailable or inadequate.¹⁸⁷ Kinship care family preservation supportive service in Ohio is time limited and is not to be considered an ongoing source of support.¹⁸⁸

D. If There Are Such Severe Repercussions, Why Do Black Grandparents Still Not Enter the System?

Legal authority and government assistance are important to kinship caregivers, but most Black grandparents prefer to raise their grandchildren without such assistance.¹⁸⁹ Sovereignty from the government, discomfort with the unwavering rules of the child welfare system, and success in their current practice leads many Black grandparents into continuing informal kinship arrangements.¹⁹⁰

1. *Autonomy from Government Intrusion*

a. *Black Culture and the Black Grandparent’s Reliance on It* Author Robert B. Hill, director of Morgan State University’s Institute for Urban Research, has spent decades studying the dynamics of the Black American family.¹⁹¹ Hill has specifically investigated the positive effect of strong kinship bonds in the Black family.¹⁹² In fact, research about the Black American community generated the term “kinship

184. *Id.* § 5101:2-39-073(A), (D) (defining “relative” and “kin”).

185. *Id.* § 5101:2-39-073(E)(2).

186. *Id.* § 5101:2-39-073(E)(3).

187. *Id.* § 5101:2-39-073(E)(4), (5). Ohio law requires that other financial options available for the kinship family must be exhausted first. *Id.*

188. *Id.* § 5101:2-39-073(G) (describing financial assistance available and pertinent time restrictions on them). This is despite the fact that many grandparent caregivers have physical custody of the children for significant lengths of time. See Susan Jaffe, *Grandparents Become Parents All Over Again; Ohioans Follow National Trend of Caring for Young Offspring*, PLAIN DEALER (Ohio), Aug. 13, 2001, at B1.

189. See *supra* notes 88–90 and accompanying text.

190. See *infra* notes 191–246 and accompanying text.

191. See TWENTY-FIVE YEARS LATER, *supra* note 1, at 126.

192. *Id.*

care.”¹⁹³ Hill believes social-welfare policies and family support programs must recognize the increased usage of Black kinship networks.¹⁹⁴ He documented that Black grandparents are used for a number of different roles in the Black community: day care, support to unwed mothers, informal adoption, and foster care.¹⁹⁵ Hill also noted that eighty percent of Black children in homes without their parents are in private kinship care arrangements, and twenty percent are in foster care.¹⁹⁶

Black families have been historically structured to involve at least three generations, with the grandparents responsible for the passing on of cultural traditions.¹⁹⁷ Older Blacks act as the “kinkeeper” in the family, whose roles normally include: “(1) passing on the history of the family; (2) living by and encouraging a family philosophy or theme, moral prescriptions, and general family ethos; (3) promoting family unity and confronting members who may disrupt it; and (4) helping with family responsibilities and encouraging others to do the same.”¹⁹⁸ Kinkeepers assume this role normally to the detriment of their own health; however, the task is so essential to the survival of the family, the needs of the children trump any other concern.¹⁹⁹

b. No Driving Reason to Change Their Kinship Arrangements In conjunction with the influence of Black culture, many kinship families do not want to embark on costly and agonizing custody proceedings.²⁰⁰ There are strong concerns about the child becoming a ward of the state and the government becoming “the controlling member of the family.”²⁰¹ Furthermore, there is apprehension amongst kinship care-

193. REPORT TO CONGRESS, *supra* note 2, at 5. “[T]he phrase ‘kinship care’ was coined . . . in work documenting the importance of kinship networks in the African American community.” *Id.*

194. Robert B. Hill, *Dispelling Myths and Building on Strengths: Supporting African American Families*, J. NAT’L RESOURCE CENTER FOR SPECIAL NEEDS ADOPTION 2 (1993), at <http://www.nysccc.org/T-Rarts/DispellingMyths.html> (last visited Oct. 8, 2001) [hereinafter *Dispelling Myths*].

195. TWENTY-FIVE YEARS LATER, *supra* note 1, at 125–27.

196. *Dispelling Myths*, *supra* note 194.

197. *Curriculum Module*, *supra* note 43.

198. Burton & Dilworth-Anderson, *supra* note 26, at 322.

199. *Id.* at 321.

200. Bruce, *supra* note 78. Adoptions proceedings can cost up to \$30,000. Karen S. Peterson, *Grandparents’ Labor of Love*, USA TODAY, Aug. 6, 2001, at 1D.

201. *Id.*

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givers about allowing caseworkers to intrude on their private lives during a period of “family crisis.”²⁰²

Because an adopted child is provided legal protection from their parents, some states encourage kinship adoptions.²⁰³ The states believe these protections provide a more secure setting.²⁰⁴ However, adopting minor relatives concerns many kin caregivers. There is not a driving force behind many grandparents (of all cultures) to make their grandchildren their legal responsibility.²⁰⁵ One expert argues this approach confuses the concerns of a child in non-kin foster care with those of a child in kinship foster care.²⁰⁶ Caregivers believe kinship children already have a permanent family; there is just no legal title.²⁰⁷ Others believe that eventually the wayward parent will be able to continue parenting responsibilities.²⁰⁸ There are reports that grandparent caregivers are generally misinformed about adoption procedures.²⁰⁹ However, there is evidence that even with an awareness of adoption subsidies, most choose not to formally adopt in an effort to not disturb the family structure.²¹⁰

c. Fear of Criminal Background Checks An intergenerational-programming consultant noted background checks keep some grandparents away from the system.²¹¹ Caregivers are concerned that minor offenses from their youth might inhibit them from keeping children who are already in their care.²¹² In Wisconsin, criminal background checks caught many caregivers off guard.²¹³ For example, the state threatened to cut off payments to a Milwaukee grandfather arrested

202. Nelson, *supra* note 26, at 9

203. RELATIVES RAISING CHILDREN, *supra* note 15, at 108.

204. *Id.*

205. *Id.*

206. *Id.*

207. *Id.*

208. STATE POLICIES, *supra* note 7, at 46.

209. See REPORT TO CONGRESS, *supra* note 2, at 49–50. Forty-nine states and the District of Columbia offer subsidized adoption for kinship caregivers who are caring for children with “special needs.” STATE POLICIES, *supra* note 7, at 46 (Alabama is the exception).

210. See Williams, *supra* note 28, at 160. There is concern among kinship caregivers that “adoption would disturb the biological family structure and cause conflict with the child’s parents.” REPORT TO CONGRESS, *supra* note 2, at 49.

211. See Edelen, *supra* note 173, at 13A.

212. *Id.*

213. *Lawmakers Criticize State Kinship Care Law as Too Rigid*, ASSOCIATED PRESS NEWSWIRES, Aug. 23, 1999, at LEXIS [hereinafter *Law Too Rigid*] (describing caregivers encounters with criminal background checks).

for disorderly conduct eighteen years earlier.²¹⁴ Additionally, current criminal record checks for Wisconsin day care providers and foster parents are less extensive than what is required of kinship caregivers, showing an inconsistency in the system.²¹⁵

2. **FOSTER CARE SYSTEM NOT DESIGNED FOR KIN CAREGIVERS, ESPECIALLY BLACK GRANDPARENTS**

Because Black grandchildren account for such a proportionately high number of kinship care children, some feel the system should be aware of the historical concept of the Black family and the needs of the people on a whole.²¹⁶ Research on grandparents raising grandchildren has increased, but there has been modest investigation on the Black grandparent.²¹⁷ Some argue child welfare services should promote enculturation instead of transculturation when defining kinship foster care standards.²¹⁸ The transcultural perspective is argued to “diminis[h] and dilut[e] the relevance of slavery and racial, cultural, and economic oppression in favour of . . . viewpoints . . . which portray [Blacks] as less intelligent, primitive, childlike and their families as dysfunctional and deficient.”²¹⁹ An enculturative approach to kinship care would develop a model that is sensitive to the cultural values of the people, which would promote “self-esteem, health, and the preservation of families for children.”²²⁰ Creating a system that appreciates the minority viewpoint will encourage kin caregivers to give their input into the system.

Many still argue that children should not be placed into foster care arrangements where kin are involved.²²¹ Some feel parents place their children into kinship foster care so the child will be entitled to

214. *Id.* The charges against the grandfather had been dismissed the day after his arrest. *Id.*

215. *Id.* The legislature was planning to reevaluate the list of crimes that restrict persons from receiving kinship payments. *Id.* “Although some offenses are extremely serious, such as rape and murder, others, such as retail theft, also threaten payments.” *Id.*

216. *See, e.g., Missed Opportunity, supra* note 35, at 31 (discussing the historical Black family).

217. Burton & Dilworth-Anderson, *supra* note 26, at 319.

218. Williams, *supra* note 28, at 158. Enculturation represents the belief that the cultural perspective of the consumer is the framework for providing services. *Id.* Transculturation implies “the consumer should adhere to the expectations of the ‘dominant’ culture.” *Id.*

219. *Id.*

220. *Id.*

221. RELATIVES RAISING CHILDREN, *supra* note 15, at 87.

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receive more resources from foster care than the parent can provide.²²² Because visitation requirements are more lax in the kinship care environment, the parents can see their children whenever they choose without having to make sure there is dinner on the table or clean clothes in the closet.²²³ Other social policy professionals believe the government should not intervene in the family structure, including the placement of minor relatives with grandparents.²²⁴ What follows from their argument is that relatives should not receive any government funding. They believe that a “‘good relative’ will care for the child without financial payment, compensation, or reimbursement, out of love for the child and a belief in strong family values.”²²⁵

These arguments do not “focu[s] on the value of kinship to children” and instead focus heavily on economic and administrative efficiencies.²²⁶ One author notes, “If government financial support for kinship caregivers is limited, the ability of the child welfare system to provide homes for children in need of out-of-home care may be called into question.”²²⁷ Nor do these arguments show compassion for children with physical or mental disabilities, and who are living with a caretaker through an informal arrangement.²²⁸ With attitudes such as these still in circulation, it is not difficult to imagine why some informal caregivers feel they are not even wanted in any child welfare system.

222. *Id.* (There are “financial disincentives to reunification that arise when relatives become kinship foster care providers, since a child’s parents would not be entitled to the higher foster care rates.”).

223. One expert has gone so far as to warn child welfare workers to be aware of families that are trying to stay in the system and find a way to get the children back home in order to get them off of the government payroll. Berrick, *supra* note 124, at 82.

224. RELATIVES RAISING CHILDREN, *supra* note 15, at 94.

225. *Id.*

226. *Id.* at 105. “Supporters of strong kinship care policy at the state level express concern that many states tend to design policies that serve the best interests of the bureaucracy, rather than those of children and families.” *Id.* at 107; *see also* Garcia, *supra* note 118, at B1 (discussing cuts in financial assistance to kinship caregivers).

227. Mark E. Courtney, *The Costs of Child Protection in the Context of Welfare Reform*, in 8-1 THE FUTURE OF CHILDREN, *supra* note 124, at 88, 100.

228. *See* RELATIVES RAISING CHILDREN, *supra* note 15, at 96.

3. **BLACK GRANDPARENTS ARE INSTINCTIVELY ACHIEVING THE THREE GOALS OF THE FOSTER CARE SYSTEM WITHOUT USING THE SYSTEM**

Years before there was a mandate from Congress or state requirements, kinship care addressed the three goals of the child welfare system. Black grandparents have informally accomplished the goals of the child welfare system for generations, without the rules or regulations of the system.

a. *Permanency in Children's Living Situations* Children in kinship foster care have fewer multiple placements²²⁹ and remain in care longer,²³⁰ which is in line with the permanency goals of the child welfare system. Recent analysis also shows children reunified with their parents after kinship care "are less likely to reenter the custody of the child welfare system."²³¹ The children retain closer ties with their parents, who are "more likely to call, write, or give gifts to their children" as compared to children in non-kin foster care.²³²

b. *Well-Being of Kinship Children* Although there is concern that the caregivers are not able to support their enlarged family,²³³ kinship care children are typically comfortable in their surroundings.²³⁴ The data shows children generally feel loved, safe, and connected in kinship care.²³⁵ In addition, kinship caregivers have a good understanding of the family dynamics the child was raised in and are aware of the typical needs of the child.²³⁶

Children in kinship care achieve a higher level of well-being. They have fewer educational or behavioral problems and are less likely to require special education.²³⁷ Moreover, they are more likely

229. See Sandra J. Altshuler, *The Well-Being of Children in Kinship Foster Care*, in KINSHIP CARE: IMPROVING PRACTICE THROUGH RESEARCH, *supra* note 17, at 117, 118.

230. See *id.*

231. Marian S. Harris, *Comparing Mothers of Children in Kinship Foster Care: Reunification vs. Remaining in Care*, in KINSHIP CARE: IMPROVING PRACTICE THROUGH RESEARCH, *supra* note 17, at 145 (citation omitted).

232. REPORT TO CONGRESS, *supra* note 2, at 44.

233. *Id.* at 41 (discussing resources lacking in kinship care arrangements).

234. See Berrick, *supra* note 124, at 80.

235. *Id.*

236. REPORT TO CONGRESS, *supra* note 2, at 34.

237. *Id.* at 39.

to do well with their grandparents.²³⁸ Kinship care children are more likely to maintain a closer connection with their siblings.²³⁹ This is likely because they are primarily placed with siblings in kinship care.²⁴⁰

c. Children's Safety Federal and state governments place child safety as the highest goal of the child welfare system.²⁴¹ One researcher stated relative caregivers generally have "safe and nurturing environments . . . equal to those provided by licensed, non-kin foster homes."²⁴² Some experts have argued that many abusive and neglectful parents were raised in similar circumstances and that kinship care arrangements may perpetuate an "intergenerational cycle of abuse."²⁴³ However, it appears that most children placed in kinship care are not there because of violent abuse, and few experts still support the theory.²⁴⁴ There is also an argument that some "foster parent home licensing criteria . . . are not related to safety or quality of care but instead reflect middle-class values regarding proper homes."²⁴⁵ Some authors argue that "a lack of understanding of family as defined by non-Western culture has created most of the current debate over what role, if any, kinship care should have in child welfare."²⁴⁶

E. Alternatives That States Are Implementing

States have recognized that many relative caregivers are firmly divided on the issue of formal and informal kinship care.²⁴⁷ Because

238. Kinship care children are less likely to have truancy or delinquency problems and are less likely to run away from their kinship care families. *Id.*

239. *Id.* at viii. "To the benefit of both foster children and the foster care system, relatives are more willing than other foster parents to care for large sibling groups." Marla Gottlieb Zwas, *Kinship Foster Care: A Relatively Permanent Solution*, 20 FORDHAM URB. L.J. 343, 354 (1993).

240. REPORT TO CONGRESS, *supra* note 2, at 44.

241. STATE POLICIES, *supra* note 7, at 55.

242. Christina A. Zawisza, *Protecting the Ties That Bind: Kinship Relative Care in Florida*, 23 NOVA L. REV. 455, 459 (1998).

243. REPORT TO CONGRESS, *supra* note 2, at 44.

244. *Id.* at 44.

245. *Id.* at 11.

246. *Id.*

247. See, e.g., Meryl Schwartz, *Reinventing Guardianship: Subsidized Guardianship, Foster Care and Child Welfare*, 22 N.Y.U. REV. L. & SOC. CHANGE 441, 454-56 (1996).

of this, some states are reviewing their current practice to make it more appropriate for relative caregivers.²⁴⁸

1. SUBSIDIZED GUARDIANSHIP

State legislators are recognizing that supporting relative caregivers is good for children and the state budget.²⁴⁹ One option available is guardianship. Simple guardianship is not necessarily the best solution for Black grandparent caregivers.²⁵⁰ However, when adoption and simple guardianship are not “appropriate goal[s],” subsidized guardianship is a viable option.²⁵¹

In guardianship, an appointed guardian has legal authority to make almost all decisions for the child, and parental rights are not terminated.²⁵² Many states use subsidized guardianship as an alternate solution for children in public kinship care.²⁵³ The court has flexibility in establishing the guardianship, allowing a visitation schedule or issuing orders of protection.²⁵⁴ Subsidized guardianship allows a legal relationship to be developed while not overstepping into cultural practices.²⁵⁵ Some argue subsidized guardianships would not be an appropriate substitute in situations where a child needs certain medical or psychological treatment only available through the foster care system.²⁵⁶ However, simple modifications could be made to account for these situations.²⁵⁷

Connecticut’s subsidized guardianship program is funded with only state money and has benefits such as a lump sum payment for one-time expenses, a medical subsidy, and a monthly subsidy which

248. See, e.g., Ovetta Wiggins, *Advocates Propose More Help for Givers of ‘Kinship Care’*, REC. N. N.J., Oct. 4, 2000, at A05 (for a discussion on proposals considered in New Jersey).

249. Christian, *supra* note 114, at 22.

250. Forty-two states and the District of Columbia offer unsubsidized guardianship. STATE POLICIES, *supra* note 7, at 49. Guardianship would automatically disqualify relatives, who would otherwise meet federal foster care eligibility requirements, from receiving federal foster care maintenance payments. *Id.* at 50.

251. Schwartz, *supra* note 247, at 457.

252. *Id.* at 457–58.

253. REPORT TO CONGRESS, *supra* note 2, at 50. Twenty-five states provide subsidized guardianship to kinship caregivers. STATE POLICIES, *supra* note 7, at 50, 47–48 tbl.6 (listing the states that provide subsidized guardianship).

254. Schwartz, *supra* note 247, at 458–59.

255. See *id.* at 459 (discussing the cultural traditions in the Black American, Latino, and Native American communities).

256. *Id.* at 461–62 (discussing occasions when a child will need foster care services).

257. See *infra* Part IV.C.

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is equal to the foster care rate.²⁵⁸ The child must be in state custody, “living with a relative caregiver, and have been in foster care for at least eighteen months.”²⁵⁹ Kinship families in Nebraska also have an extensive list of requirements to receive subsidized guardianship, but the benefits include monthly maintenance payments, medical payments, and money for psychiatric care.²⁶⁰

2. FLORIDA’S “RELATIVE CAREGIVER PROGRAM”

Florida legislators recently appropriated \$500,000 to create a Kinship Support Center, devoted to researching and assisting kinship families.²⁶¹ To participate in the program, the child must be a ward of the state, the relative must be approved through home studies and record checks, and there has to be a relatively close biological relationship with the child.²⁶² The relative caregiver receives TANF payments, Medicaid, child care, and money for clothing.²⁶³ There are no time limits on the payments and benefits, and it continues even if the relative becomes a legal guardian of the child.²⁶⁴ Grandparent advocates were hoping to achieve alterations to the state’s Relatives As Caregivers program, which currently gives, at a maximum, \$298 a month to kinship caregivers.²⁶⁵ Another major concern for caregivers is that the program is not open to siblings who only share one parent.²⁶⁶ Some grandparents are caring for three or more children who are all siblings, but “with different mothers or fathers.”²⁶⁷ To be a part of the system, relatives must go through home surveys by social workers and have the children placed through the dependency courts.²⁶⁸ Grandparents are uncomfortable with the state inspections and the convoluted court procedures.²⁶⁹

258. STATE POLICIES, *supra* note 7, at 51.

259. *Id.* at 50.

260. *Id.* at 51.

261. Diane C. Lade, *Grandparents Seek More Aid from the State Funds Needed to Raise Grandkids They Will Be Getting Guidance This Year*, SUN-SENTINEL (Ft. Lauderdale, Fla.), May 22, 2000, at 1B.

262. STATE POLICIES, *supra* note 7, at 32 (discussing Florida’s Relative Caregiver Program).

263. *Id.* TANF payments are seventy to eighty percent of foster care rates. *Id.*

264. *Id.*

265. See Lade, *supra* note 261.

266. *Id.* Half-siblings are not eligible under Florida’s current program. *Id.*

267. *Id.*

268. *Id.* (explaining requirements for joining Relatives as Caregivers payment). Some relatives have a problem because they do not have any legal proof they have

3. CALIFORNIA'S PLAN

California allows exemptions that help aged caregivers.²⁷⁰ Elderly caregivers are able to forego work and training requirements.²⁷¹ The statute does not define "advanced age," so the Social Service Department must use a case-by-case evaluation to determine who qualifies.²⁷² California is penalized by the federal government if it exempts more than twenty percent of its caseload, so it is possible that not all grandparent caregivers will be exempt from the work requirements.²⁷³ California's statute²⁷⁴ also does not define "beyond normal day-to-day parenting" which falls into the same concerns as the "advanced age" exemption concerns.²⁷⁵ The California legislature made a significant contribution to the kinship caregivers' cause by enacting a Kinship Support Services Program in 1997.²⁷⁶ The program allows eligible counties to support relative caregivers through "case management, housing, homemaker services, respite care, transportation, counseling, tutoring, and day care."²⁷⁷

IV. Recommendation

The previous analysis has shown that the new one-tiered system of foster care standards does not meet the needs of the Black grandparent. For all of the reasons Black grandparents were uncomfortable with kinship foster care, general foster care standards are not realistic for the Black community's needs. Because the foster care system is not designed to promote the proficiency of the informal caregiver, Black grandparents should look to other financial and support alternatives. There must be suitable alternatives available for all grand-

proper informal custody. See Deborah Sharp, *After a Lifetime of Work, a Second Family to Raise*, USA TODAY, Jul. 1, 1999, at 08D.

269. See Lade, *supra* note 261.

270. See *Penalty in Kinship Care*, *supra* note 100, at 1060 (discussing California's exemption policies).

271. See, e.g., CAL. WELF. & INST. CODE § 11320.3(b) (West Supp. 1998) (discussing requirements for kinship caregivers).

272. *Penalty in Kinship Care*, *supra* note 100, at 1060.

273. *Id.* However, new Census reports show a majority of grandparent caregivers work. Jaffe, *supra* note 188, at B1.

274. CAL. WELF. & INST. CODE § 11320.3(b)(4).

275. *Penalty in Kinship Care*, *supra* note 100, at 1060 (explaining the ramifications of the "day to day parenting" language).

276. Christian, *supra* note 114, at 20.

277. *Id.* The children must have been placed by the juvenile court or "are at risk of abuse or neglect or delinquency." *Id.*

parents that wish to retain their autonomy, while creating a healthy environment for the children in their care.

A. Black Families Should Continue to Rely on the Informal System That Has Survived Through the Years

For generations, Black families have generally survived without government assistance using the extended family. Under this informal system, children have thrived and become productive members of society. However, society has changed and the needs of grandparent caregivers have changed with it. The child welfare system must acknowledge that people are not requesting a handout, but a helping hand. Understanding this philosophy will guide the child welfare system to help informal caregivers without intruding into their family. If kinship care children are not receiving valuable resources and support from the child welfare system, the system will only be working to establish another generation that is deprived.

Forcing Black kinship caregivers to twist into a system not designed for them “negates a true appreciation for the historical roots of kinship networks in the African-American community.”²⁷⁸ This applies to all kinship caregivers. Many cultures besides the Black American culture thrive on the use of the extended family.²⁷⁹ The current child welfare system does not allow different cultures to feel that the system was designed to truly fit their needs.

B. Subsidized Guardianship Is a Viable Option

States should place more emphasis and research on subsidized guardianship. The subsidies will provide grandparent caregivers with the autonomy they require and the funds they need.²⁸⁰ As one author noted, “[K]inship foster parents . . . are acting at the request of the state to solve a state problem, not merely out of a sense of personal

278. Williams, *supra* note 28, at 182.

279. See generally FOSTERING KINSHIP: AN INTERNATIONAL PERSPECTIVE ON KINSHIP FOSTER CARE (Roger Greeff ed., 1999).

280. See Schwartz, *supra* note 247, at 454–56, for an excellent review of the benefits of subsidized guardianship.

obligation or choice.”²⁸¹ Subsidized guardianship may also be cost effective for the state in meeting long-term goals.²⁸²

C. The System Should Make More Resources Available for Everyone

All elderly kinship caregivers are in need of assistance.²⁸³ However, not every elderly grandparent caregiver is in need of financial assistance.²⁸⁴ Grandparent caregivers simply need a break.²⁸⁵ Support is needed for the elderly caregiver community so that there is a low burnout rate. Caregivers generally request services such as “legal assistance . . . assistance obtaining financial support, respite care, training, and support groups.”²⁸⁶ Brenda Shepherd-Vernon, a social worker in the District of Columbia, said, “They just need relief—safe respite care and some help to buy clothes and food that their meager salaries, retirement income, or disability payments can’t cover.”²⁸⁷ Those who are in the work force are in need of reasonable child care.²⁸⁸ Raising teenage grandchildren in this new era is catching many grandparents unprepared.²⁸⁹ Support groups are helping grandparent caregivers.²⁹⁰ Although extra funds are always appreciated, many simply need resources money cannot buy.²⁹¹ States should work to organize the wide array of educational and service organiza-

281. *Id.* at 465.

282. *Id.* at 467–70 (discussing cost benefits of subsidized guardianship). “If 1 million children, about half of those in relative-headed homes without parents present, were moved into the foster care system, it would cost taxpayers about \$4.5 billion each year.” Peterson, *supra* note 200, at 1D.

283. See *Grandparents’ Message*, *supra* note 158.

284. See Christian, *supra* note 114. Even for those who need financial assistance but do not want to enter the system, research shows that increases in welfare grants and support services are significantly less than formal foster care costs. *Id.*

285. *Id.*

286. Berrick, *supra* note 124, at 81. There is a need for resources such as camp or emergency care. See *Grandparents’ Message*, *supra* note 158.

287. Bruce, *supra* note 78, at D5 (discussing the concerns of the elderly caregiver).

288. *Grandparents’ Message*, *supra* note 158, at 2 (stating that elderly caregivers should be at the top of priority child care lists).

289. Christian, *supra* note 114, at 22 (“Without support . . . many grandparents find it next to impossible to raise their grandchildren . . . especially [those in] the difficult teenage years.”).

290. *Challenges and Responses*, *supra* note 14 (discussing support groups benefits for elderly caregivers).

291. Christian, *supra* note 114, at 22 (discussing needs of relative caregivers).

tions serving all of the people in kinship care.²⁹² It is simply a matter of educating grandparents of these options.²⁹³

V. Conclusion

One author pointedly remarked, "A child welfare system which is sensitive to the needs, historical background and culture of its consumers would have anticipated the kinship population explosion of the late 1980s."²⁹⁴ Kinship foster care programs were being designed to legitimate a private system that worked fairly well for centuries. However, the final rule on the ASFA will undoubtedly hold relatives to requirements their informal system was not designed to handle. The final rule further alienates the millions of grandparent caregivers who may have thought about entering the kinship foster care system. Because of the way the Black family conducts itself, Black grandparents should look to the many other remedies and resources available to help them raise healthy and well-adjusted children.

292. RELATIVES RAISING CHILDREN, *supra* note 15, at 107.

293. Nat'l Adoption Information Clearinghouse, *Keeping the Family Tree Intact Through Kinship Care*, at http://www.calib.com/naic/pubs/f_kinshi.htm (last modified Aug 2, 2000). "Child welfare experts believe that more families would take in their relatives' children if they were aware of services available to them, whether or not they are working with a social service agency." *Id.*

294. Williams, *supra* note 28, at 154.