

## ANSWERING THE CALL TO SUPPORT ELDERLY KINSHIP CAREGIVERS

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*As the number of children who need care from someone other than their parents increases, care provided by grandparents and other relatives is often a welcome alternative to foster care and adoption by strangers. In this note, Jeffrey C. Goelitz discusses the definitions and circumstances surrounding kinship care. While kinship care, or care by relatives or close friends, provides children with stability and familiarity during times of family flux, the relatives who take on the caregiver role face many challenges, including limited legal authority over the children, excessive government oversight, their own emotional stability and that of the child, and unforeseeable financial demands. Formal adoption or foster care resolve many of the challenges kinship caregivers face, but those options come with their own list of challenges, from an unwillingness to terminate the parental rights of a relative to the inability to meet the licensing standards required to become a foster or adoptive parent. Mr. Goelitz argues that the best interest of the child must come first, and therefore, Congress should pass pending bills that increase resources and information to kinship caregivers. He further argues that the statutory definition of kinship caregivers should expand to include close friends, rather than just family members, and that the licensing and criminal background check requirements for kinship caregivers should be relaxed and clarified, respectively. Mr. Goelitz puts the burden on Congress to make these changes and answer kinship caregivers' calls for help.*

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## I. Introduction

Thousands of elderly relatives throughout the United States are answering the call to fill in as primary caregivers for children in need of a home. As an Alabama child welfare investigator noted, “[a]lmost immediately when we talk to the children [who are being removed from their parents’ care], we ask them about grandma.”<sup>1</sup> These relative-as-caregiver relationships, often referred to as kinship care, occur in a variety of legal contexts and vary considerably in duration. Still, one fact about kinship care remains constant. Kinship care as a family concept has become dramatically more common in settings across all jurisdictions, racial and ethnic populations, and socioeconomic groups.<sup>2</sup>

Despite the stability this alternative provides, kinship care presents unique challenges to relative caregivers. Many children in kinship care live at or below the poverty line, in overcrowded households, with caregivers who are elderly, single, or poorly educated.<sup>3</sup> Moreover, because kinship caregivers are often not licensed foster parents or legal guardians, they lack the legal authority to obtain medical, financial, and educational services for the children under their care.<sup>4</sup> Services exist to support these families, including respite care for relative caregivers, free legal services, and welfare payments,<sup>5</sup> but “[o]ne of the main barriers that prevent[s] [kinship] caregivers from receiving needed services is knowledge. They simply do not know how to find or access community resources.”<sup>6</sup> Even where kinship caregivers are informed, they are often not entitled to the same financial assistance as foster parents or adoptive parents unless they meet the same licensing standards as nonrelative care-

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1. Karin Malm & Roseana Bess, *Identifying and Recruiting Kin to Act as Foster Parents*, in *KINSHIP CARE: MAKING THE MOST OF A VALUABLE RESOURCE* 25, 37 (Rob Geen ed., 2003).

2. Rob Geen, *In the Interest of Children: Rethinking Federal and State Policies Affecting Kinship Care*, *POL’Y & PRAC. PUB. HUM. SERVS.*, Mar. 2000, at 19, 21.

3. JENNIFER EHRLE ET AL., *THE URBAN INST., CHILDREN CARED FOR BY RELATIVES: WHO ARE THEY AND HOW ARE THEY FARING?* 2 (2001), available at [http://www.urban.org/UploadedPDF/anf\\_b28.pdf](http://www.urban.org/UploadedPDF/anf_b28.pdf).

4. Naomi Karp, *Kinship Care: Legal Problems of Grandparents and Other Relative Care Givers*, *NAT’L B. ASS’N MAG.*, Jan./Feb. 1994, at 10, 10.

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

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

givers, standards that may be inappropriate in a kinship setting.<sup>7</sup> Although many states took steps to address some of these issues,<sup>8</sup> federal legislation has yet to address the needs of kinship caregivers.

To meet many of the needs of kinship caregivers, this note argues that Congress should pass provisions similar to those in Senate Bill 985, the Kinship Caregiver Support Act (KCSA), and its companion House Bill 3380, the Guardianship Assistance Promotion and Kinship Support Act (GAP-KSA), both of which were considered in the 109th congressional session. Part II explores the prevalence and variety of kinship care arrangements and the challenges facing kinship caregivers. Part III outlines the provisions of each federal bill, as well as other attempts at federal legislation in the area of kinship care. This section also analyzes the effectiveness of each bill's major provisions to determine whether they sufficiently addressed the needs of kinship caregivers. Finally, Part IV identifies areas in which the bills were lacking and recommends provisions for future bills. Although many states already provide some of the supports available in each bill,<sup>9</sup> and although the bills do not address *all* the challenges of kinship caregiving, they can provide an important first step to establishing a federal program that gives kinship caregivers priority similar to that of foster and adoptive parents.

## II. Background

### A. What Is Kinship Care?

The term "kinship care" generally refers to situations in which a relative other than a parent lives with and becomes the primary caregiver of a child, typically because the child's parent is unable or unwilling to care for the child.<sup>10</sup> However, because the term continues to evolve in meaning,<sup>11</sup> exact definitions of "kinship care" vary from one context to another. Some definitions require "full-time

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7. See Note, *The Policy of Penalty in Kinship Care*, 112 HARV. L. REV. 1047, 1050–52 (1999) [hereinafter *Policy of Penalty*].

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

9. See, e.g., Geen, *supra* note 2, at 26.

10. S. 985 §§ 103(2)–(3); Karp, *supra* note 4.

11. MARIANNE TAKAS, *KINSHIP CARE AND FAMILY PRESERVATION: OPTIONS FOR STATES IN LEGAL AND POLICY DEVELOPMENT 2* (final rev. ed. 1994).

nurturing and protection,”<sup>12</sup> whereas others acknowledge that kinship care can occur on a part-time basis.<sup>13</sup> Similarly, the question of who qualifies as “kin” is subject to debate.<sup>14</sup> Under some definitions, a kinship caregiver must be related to the child,<sup>15</sup> but others include nonrelatives with close emotional or personal ties to the child, such as neighbors or godparents.<sup>16</sup> At least one organization recommends avoiding the term “kinship care” altogether, because it elicits a sterile response to an emotion-laden issue.<sup>17</sup>

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12. Shay Bilchik, President/CEO, Child Welfare League of Am., Statement for the Senate Briefing on Kinship Care and the Re-Introduction of the Kinship Caregivers Support Act, <http://www.cwla.org/newsevents/kinshipcare050118.htm> (last visited Oct. 1, 2006); Kinship Care Resource Ctr., About Kinship Care, <http://www.kinshipcare.net/about.html> (last visited Oct. 1, 2006).

13. TAKAS, *supra* note 11, at 3.

14. See GENERATIONS UNITED, GRANDPARENTS AND OTHER RELATIVES RAISING CHILDREN: THE SECOND INTERGENERATIONAL ACTION AGENDA 60 n.1 (2005), available at [http://ipath.gu.org/documents/A0/2004\\_Action\\_Agenda\\_Final.pdf](http://ipath.gu.org/documents/A0/2004_Action_Agenda_Final.pdf) (“The terms ‘kinship’ and ‘kinship care’ . . . generally mean grandparents and other relatives raising children. However, there is a lack of consensus on how these terms are defined, and, for that reason, more descriptive phrases such as ‘grandparents and other relatives raising children,’ ‘relative-headed households’ or ‘grandparent-headed households’ are used, depending on what is meant.”).

15. Karp, *supra* note 4; *Policy of Penalty*, *supra* note 7, at 1047.

16. N.M. Stat. Ann. § 40-10B-3(A), (C) (LexisNexis 2006); TAKAS, *supra* note 11, at 3; Noy Davis & Janet Chiancone, *The Kinship Care Option: Applying Research to Practice*, in WHAT I WISH I’D LEARNED IN LAW SCHOOL: SOCIAL SCIENCE RESEARCH FOR CHILDREN’S LAWYERS 103, 103 (1997); Sonia G. Rankin, Note, *Why They Won’t Take the Money: Black Grandparents and the Success of Informal Kinship Care*, 10 ELDER L.J. 153, 156 (2002); Bilchik, *supra* note 12 (defining kin as “relatives, members of their tribes, godparents, stepparents, or any adult who has a kinship bond with a child. This definition is designed to be inclusive and respectful of cultural values and ties of affection.”).

17. GENERATIONS UNITED, GRAND VOICES FOR AMERICA’S CHILDREN: NEW PERSPECTIVES ON GRANDPARENTS AND OTHER RELATIVES RAISING CHILDREN 25 (2005), available at [http://path.gu.org/Documents/A0/GU\\_Grandvoices.pdf](http://path.gu.org/Documents/A0/GU_Grandvoices.pdf) (“Although ‘kinship care’ has become popular shorthand for the more cumbersome phrase ‘grandparents and other relatives raising children,’ preliminary research suggests that it does not resonate with the public and, in some cases, with relative caregivers. In fact, focus group participants in this study generally shied away from any language using ‘kin’ or ‘kinship.’ One participant said that kinship care ‘sounds like a social service term.’ One of the New York City support group participants said, ‘It’s a redneck term.’ What’s the bottom line? Try not to use the term ‘kinship care’ when talking to members of the public or reporters who know little about the issue. It elicits a neutral reaction at best and does not win any friends to the cause. So what terms work? Generally speaking, focus group participants were drawn to more value-laden terminology—language that seems to embody and embrace the positive, emotional role that grandparents and other relative caregivers play in the lives of children. These terms included Families Raising Families, Grandfamilies, and Stay Together Families.”)

## B. Effect on Traditional Adoption, Foster Care, and Guardianship Arrangements

Because of a variety of circumstances, parents are sometimes unable or unwilling to care for their children. Usually, this occurs because the parents die, choose not to raise their child, neglect or abuse their child, or have physical or mental disabilities that prevent them from raising their child.<sup>18</sup> The increasing prevalence of parental incarceration, substance abuse, and HIV disease has left even more children requiring alternative care.<sup>19</sup> Under these circumstances, the typical legal options are foster care and, if a return to the child's parents is inappropriate, adoption or guardianship of the child.<sup>20</sup> Kinship care, though not a new type of placement option itself, overlaps with these legal options to create unique placement scenarios.

### 1. ADOPTION BY RELATIVES IS NOT KINSHIP CARE UNDER THE KCSA AND GAP-KSA

Adoption is the process of legally creating a new parent-child relationship.<sup>21</sup> Typically, the initial step in this process is the termination of the parental rights of the biological parents, a step that requires the parents' consent or a court order deeming the parent neglectful, abusive, or otherwise unfit.<sup>22</sup> Biological parents who irrevocably consent to relinquish their parental rights no longer hold any legal rights or obligations to the child.<sup>23</sup> The second step of the adoption process is the judicial grant of an adoption decree.<sup>24</sup> To grant such a decree, judges must determine whether a particular placement is in the best interests of the child.<sup>25</sup> Although the interests standard "requires a fact-specific inquiry and rests considerable discretion in the court,"<sup>26</sup> this determination *may* involve looking at the potential adoptive parents' financial status, criminal history, and

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18. See DOUGLAS E. ABRAMS & SARAH H. RAMSEY, CHILDREN AND THE LAW: DOCTRINE, POLICY AND PRACTICE 669 (2d ed. 2003).

19. Dorothy E. Roberts, *Kinship Care and the Price of State Support for Children*, 76 CHI.-KENT L. REV. 1619, 1623 (2001).

20. ABRAMS & RAMSEY, *supra* note 18, at 441.

21. 1 JOHN H. HOLLINGER ET AL., BENDER'S ADOPTION LAW AND PRACTICE 1-3 (2003).

22. ABRAMS & RAMSEY, *supra* note 18, at 671.

23. *Id.*

24. *Id.* at 666.

25. *Id.*

26. *Id.*

emotional attachment to the child.<sup>27</sup> A judge who concludes that a placement is in the child's best interests may enter an adoption decree, and the adoptive parents will permanently acquire all parental rights and obligations.<sup>28</sup>

Although recent estimates indicate that relatives and stepparents have adopted as many as half of all American-born babies placed for adoption,<sup>29</sup> these relatives and stepparents are not technically considered kinship caregivers under most definitions. For example, one requirement of a kinship caregiver under the KCSA and GAP-KSA is that the relative must be "the primary caregiver of the child because the biological or adoptive parent . . . is unable or unwilling to serve as the primary caregiver."<sup>30</sup> When a relative adopts, he or she is the adoptive parent, and therefore not a "kinship caregiver." Therefore, the concerns addressed by the KCSA and GAP-KSA do not apply to adoptions, even if a relative adopts the child.

## 2. KINSHIP CAREGIVING IN THE FOSTER CARE SYSTEM

*a. Brief Overview of Foster Care* Children are placed in foster care when their parents neglect or abuse them, or when they have been declared juvenile delinquents or "in need of supervision."<sup>31</sup> A child may also be voluntarily placed in foster care if the parents are unable to care for the child for a certain period of time, and the parents surrender their parental rights.<sup>32</sup> However, unlike adoptions, which are permanent, foster care is a temporary measure.<sup>33</sup> Whenever possible, courts and child welfare agencies reunite children in foster care with their biological parents.<sup>34</sup> Otherwise, foster care children

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27. See *id.* at 666–75 (discussing relevancy of placement with siblings, age of adoptive parents, blood relation of adoptive parents and child, disability of adoptive parents, placement with a single parent, and placement with gay or lesbian couples as factors in a best interest inquiry).

28. *Id.*

29. 1 HOLLINGER ET AL., *supra* note 21, at 3–8.

30. Kinship Caregiver Support Act, S. 985, 109th Cong. § 103(3)(B) (2005) (emphasis added).

31. N.Y. Office of Children & Family Servs., Foster Care Basics, Why Are Children Placed in Foster Care?, <http://www.ocfs.state.ny.us/main/fostercare/overview.asp> (last visited Oct. 1, 2006).

32. *Id.*

33. ABRAMS & RAMSEY, *supra* note 18, at 441.

34. *Id.*

are placed for adoption or in an alternative permanent placement, such as guardianship.<sup>35</sup>

To qualify as a foster parent, and thus receive foster care money from the state, applicants must obtain a license, a process that varies from state to state but generally entails criminal background checks and training.<sup>36</sup> Additionally, the child welfare agency investigates the potential foster parents to find such information as the size of their home, their income, and their transportation availability.<sup>37</sup> Whereas the only government funding available to nonfoster caregivers comes from Temporary Aid to Needy Families (TANF), food stamps, Medicaid, and supplemental security income,<sup>38</sup> licensed foster parents receive additional "foster care maintenance payments, respite child care, and other support services."<sup>39</sup>

*b. Kinship Foster Care* Kinship foster care is a type of kinship care in which "[c]hildren live with relatives because a child welfare agency removed them from their parents due to abuse or neglect, took them into state custody[,] and placed them in the care of a relative."<sup>40</sup> In these settings, the children technically remain within the state's custody; the kinship foster parents are essentially arms of the state.<sup>41</sup> When the current federal foster care law was passed, "it was almost unheard of for a child's relative to act as a foster parent,"<sup>42</sup> but the prevalence of such kinship foster care arrangements has increased dramatically during the past twenty years, especially in large metropolitan areas.<sup>43</sup> In 1997, more than 200,000 children lived with relatives acting as foster parents.<sup>44</sup> This number has almost certainly increased since then because in 1996, Congress amended Title

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35. *Id.*

36. CHILD WELFARE INFO. GATEWAY, KINSHIP CAREGIVERS AND THE CHILD WELFARE SYSTEM, WHAT TO EXPECT FROM THE CHILD WELFARE SYSTEM (2005), available at [http://www.childwelfare.gov/pubs/f\\_kinshi/f\\_kinshic.cfm](http://www.childwelfare.gov/pubs/f_kinshi/f_kinshic.cfm).

37. *Id.*

38. See EHRLE ET AL., *supra* note 3, at 3 tbl.2. Temporary Aid to Needy Families (TANF) replaced Aid to Families with Dependent Children (AFDC) under federal welfare laws.

39. SHELLEY W. BOOTS & ROB GEEN, THE URBAN INST., FAMILY CARE OR FOSTER CARE? HOW STATE POLICIES AFFECT KINSHIP CAREGIVERS 2 (1999), <http://www.urban.org/UploadedPDF/anf34.pdf>.

40. EHRLE ET AL., *supra* note 3.

41. ABRAMS & RAMSEY, *supra* note 18, at 534.

42. BOOTS & GEEN, *supra* note 39, at 1.

43. ABRAMS & RAMSEY, *supra* note 18, at 519.

44. EHRLE ET AL., *supra* note 3.

IV-E of the Social Security Act<sup>45</sup> to require states to “consider giving preference to an adult relative over a nonrelated caregiver when determining a placement for a child, provided that the relative caregiver meets all relevant State child protection standards.”<sup>46</sup> This amendment highlighted kinship care as a federal policy issue and reinforced the fact that kinship foster care caseloads have continued to increase in most states.<sup>47</sup>

States rely heavily on kinship foster care for many reasons. Such foster care arrangements “maintain children’s ties to their families[,] encourage long-term placements[,] meet federal standards of care[,] and] offset shortages of traditional foster homes.”<sup>48</sup> Because children are usually already familiar with their relatives, kinship foster care eases the trauma of separation and enables a continued sense of family identity.<sup>49</sup> Research indicates that children placed with relatives are more stable than those placed with nonrelatives, and they are more open to discussing their problems.<sup>50</sup>

The lack of clarity in federal regulations has allowed kinship foster care licensing and funding schemes to vary considerably from state to state.<sup>51</sup> Some states require relatives to meet the same licensing standards as unrelated foster parent candidates, while others waive certain requirements or have altogether separate standards for kin.<sup>52</sup> A few states allow “unlicensed kinship care,” allowing relatives with few or no licensing requirements to care for children.<sup>53</sup> Kinship foster parents who are fully licensed typically receive the same caseworker support and supervision as nonkin foster parents, whereas unlicensed kinship foster parents receive minimal supervision.<sup>54</sup> According to an Urban Institute study of all fifty states and the District of Columbia, forty-one of these jurisdictions offer pro-

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45. Pub. L. No. 104-193, 110 Stat. 2105 (1996) (codified as amended at 42 U.S.C. § 671(a)(19)).

46. 42 U.S.C. § 671(a)(19); 1 HOLLINGER ET AL., *supra* note 21, at 3–12.

47. BOOTS & GEEN, *supra* note 39, at 1.

48. ABRAMS & RAMSEY, *supra* note 18, at 519.

49. Rankin, *supra* note 16, at 160.

50. Ehrle & Geen, *supra* note 6.

51. BOOTS & GEEN, *supra* note 39, at 5 (discussing the policies of several states). For example, in New York, a family can apply for licensing and a foster care payment. *Id.*

52. *Id.* at 2.

53. *Id.* This “unlicensed kinship care” is essentially the same as “voluntary kinship care,” discussed *infra* Part II.C.

54. *Id.*



spective kinship foster parents at least one licensing option in addition to the standard nonrelative option.<sup>55</sup> Of the states that offer relaxed licensing options, about half continue to provide kinship foster parents with foster care maintenance payments.<sup>56</sup> The other states provide smaller payments to kinship foster parents, usually in the form of child-only TANF grants.<sup>57</sup>

### 3. GUARDIANSHIP AS AN ALTERNATIVE TO ADOPTION AND FOSTER CARE

*a. Brief Overview of Guardianship* Guardianship is a legal relationship between a child and a caretaker in which the caretaker assumes certain rights and responsibilities for a child.<sup>58</sup> Guardians are charged with the child's "protection, education, care[,] control[,] custody[,] and decisionmaking."<sup>59</sup> Petitions for guardianship may be initiated by any interested adult, by a foster care agency, or by the court.<sup>60</sup> If guardianship is appropriately granted, the guardian takes virtually all legal responsibilities for the child's day-to-day activities.<sup>61</sup>

A critical distinction between guardianship and adoption is that guardianship does not sever all of the biological parent's parental rights.<sup>62</sup> In guardianship arrangements, biological parents "retain the right to visit and consent to a child's adoption, and they have the duty to [pay child support]."<sup>63</sup> Additionally, biological parents maintain the ability to petition the court at any time to dissolve a guardianship.<sup>64</sup> Thus, guardianship relationships work well when it is not in the child's best interest to be in the custody of his or her

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55. *Id.* The remaining ten jurisdictions require relatives to meet the same foster care licensing standards as nonrelatives. *Id.*

56. *Id.* at 3.

57. BOOTS & GEEN, *supra* note 39, at 3.

58. ABRAMS & RAMSEY, *supra* note 18, at 536–37.

59. Cynthia Godsoe, *Subsidized Guardianship: A New Permanency Option*, CHILD. LEGAL RTS. J., Fall 2003, at 11, 12.

60. *Id.*

61. *See* ABRAMS & RAMSEY, *supra* note 18, at 536–37.

62. Godsoe, *supra* note 59, at 12. Though guardianship does not terminate parental rights, these rights may be surrendered or terminated prior to the guardianship. *Id.*

63. *Id.*

64. *Id.* at 13.

parents, but where continued visitation by the parents is appropriate.<sup>65</sup>

Guardianship is also an ideal alternative for the state because it does not require significant state involvement or funding.<sup>66</sup> Whereas foster care requires constant oversight by child welfare agencies, guardianship vests guardians with significant autonomy in making decisions for the welfare of the child.<sup>67</sup> Additionally, traditional guardianship statutes do not require states to provide financial incentives, as they do in adoption and foster care programs.<sup>68</sup> Although unfunded guardianships ease the strain on state budgets, “[t]he primary reason that guardianship is not widely used is the lack of a subsidy to support the children after they are discharged from foster care.”<sup>69</sup>

*b. Subsidized Guardianship* As many states have recognized,<sup>70</sup> subsidizing guardianship provides a strong incentive for foster parents, kin and nonkin alike, to leave the foster care system and enter guardianship relationships.<sup>71</sup> Similarly, subsidized guardianship may encourage private kinship caregivers to become guardians of children with whom they had no prior *legal* relationship.

The discrepancy between foster care maintenance payments and TANF child welfare payments drives home the importance of such a subsidy. In 1996, average monthly foster care payments ranged from \$356 to \$431 per child.<sup>72</sup> TANF payments, the only funding source for which unsubsidized guardians are automatically eligible,<sup>73</sup> averaged only \$207 per month that same year.<sup>74</sup> Moreover, whereas the foster care amounts are set at a flat per-child rate, TANF

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65. Meryl Schwartz, *Reinventing Guardianship: Subsidized Guardianship, Foster Care, and Child Welfare*, 22 N.Y.U. REV. L. & SOC. CHANGE 441, 456–58 (1996).

66. *See id.* at 467.

67. ABRAMS & RAMSEY, *supra* note 18, at 536–37.

68. *Id.* at 530.

69. *Id.* at 536; *see also* Godsoe, *supra* note 59, at 12 (recognizing that “guardianship has been underutilized[] largely because of the lack of a subsidy to support children with this goal”).

70. *See* Godsoe, *supra* note 59, at 16; GENERATIONS UNITED, GRANDFAMILIES: SUBSIDIZED GUARDIANSHIP PROGRAMS, <http://ipath.gu.org/documents/A0/GU-GeneralFactSheetJune.pdf> (last visited Oct. 1, 2006).

71. *See* ABRAMS & RAMSEY, *supra* note 18, at 537 n.2.

72. EHRLE ET AL., *supra* note 3, at 4.

73. *See id.* at 3 tbl.2.

74. *Id.* at 4.

payment amounts decline with each additional child in the household.<sup>75</sup> With such discrepancies, it is no wonder foster parents choose to continue receiving foster care maintenance payments rather than establish guardianship and rely only on TANF assistance. Subsidizing guardianship allows many adults to permanently care for children they could not otherwise afford.<sup>76</sup>

### C. Informal Kinship Care Arrangements

Though many children living with nonparental relatives do so under kinship foster care, more than 70% live with grandparents and other relatives in informal kinship care arrangements.<sup>77</sup> Also known as “private kinship care,” these arrangements exist when relatives care for children without the involvement of any public agencies.<sup>78</sup> As of 1997, an estimated 1.3 million children lived in private kinship care arrangements.<sup>79</sup>

A third form of kinship care, called “voluntary kinship care,” falls somewhere between kinship foster care and private kinship care. When child welfare agencies arrange for a relative to care for a child without going through formal state custody proceedings, children are in voluntary kinship care.<sup>80</sup> This informal arrangement requires minimal agency involvement and avoids opening a child welfare case, proceeding to court, and formally placing the child in state custody.<sup>81</sup>

While its frequency varies from state to state, voluntary kinship care is typically used in situations where the child is at enough risk to concern the child welfare agency but not at enough risk to warrant full-blown removal.<sup>82</sup> A good example of this is when a single parent enters a drug rehabilitation program or goes to jail and a grandparent agrees to care for the child. If a relative can provide adequate care and the child does not need to go into state custody, the result is a win-win situation for both the state and the child. In

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75. *Id.*

76. Godsoe, *supra* note 59, at 13.

77. EHRLE ET AL., *supra* note 3, at 1.

78. *Id.*

79. *Id.*

80. KARIN MALM & ROB GEEN, THE URBAN INST., WHEN CHILD WELFARE AGENCIES RELY ON VOLUNTARY KINSHIP PLACEMENTS 2 (2003), available at [http://www.urban.org/UploadedPDF/310772\\_A61.pdf](http://www.urban.org/UploadedPDF/310772_A61.pdf).

81. See Geen, *supra* note 2, at 26.

82. *Id.*

other cases, the police arrange for a relative to provide care for a child, and the child welfare agency simply assesses the safety of the child's new environment.<sup>83</sup>

Because voluntary kinship care placements vary so much among states, the families that use these arrangements may or may not receive child welfare services.<sup>84</sup> Additionally, the roughly 300,000 children in voluntary kinship care tend to face more risks to their development than children in either private kinship care or kinship foster care.<sup>85</sup> In one study, less than half of voluntary kinship caretakers had a high school degree, and 53% were unmarried.<sup>86</sup> The study also found that about one-third of the children in voluntary kinship care lived in poverty, and 32% lived in crowded homes.<sup>87</sup> Thirty percent of the children faced three or more risk factors at a time.<sup>88</sup>

#### D. Challenges Facing Kinship Caregivers

##### 1. LEGAL ISSUES

Perhaps the most commonly cited challenge for kinship caregivers is the precarious legal status of their relationship to the child. In typical private and voluntary kinship care arrangements, the caregiver has no legal connection to the child.<sup>89</sup> Because such caregivers are usually not legal guardians or custodians of the child, the caregivers have only limited legal authority to meet the needs of the child.<sup>90</sup> Common problems among kinship caregivers involve enrolling the child in school, consenting to the child's medical care, securing public assistance benefits for the child, and accessing school records.<sup>91</sup> Informal kinship caregivers also have no authority to plan for and direct the child's care after their own incapacity or death.<sup>92</sup> The need to implement legally enforceable alternative permanency

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83. MALM & GEEN, *supra* note 80, at 3.

84. EHRLE ET AL., *supra* note 3, at 3 tbl.2.

85. *Id.* at 2 tbl.1.

86. *Id.*

87. *Id.*

88. *Id.*

89. Elizabeth Barker Brandt, *De Facto Custodians: A Response to the Needs of Informal Kin Caregivers?*, 38 FAM. L.Q. 291, 291-92 (2004).

90. *Id.*

91. *Id.* at 294-96.

92. Anna Leonard, *Grandparent Kinship Caregivers*, 6 ELDER'S ADVISOR 149, 155-56 (2004).

plans for the child is even greater among elderly caregivers, for whom mortality and morbidity are relatively immediate concerns.<sup>93</sup>

Kinship foster parents face a different legal reality than private and voluntary kinship caregivers. Although kinship foster parents have sufficient legal rights to meet the child's needs, these rights are subject to constant oversight by the state's child welfare agency.<sup>94</sup> For example, a foster parent who fails to seek necessary medical care for the child faces the threat of the state removing the child.<sup>95</sup>

In addition to coping with the obtrusive oversight by the child welfare agency, many grandparent caregivers "reported that the most difficult aspect of dealing with the child welfare system was the court process."<sup>96</sup> These caregivers harbor fears that the state or the court system will have the children "snatched away" from them.<sup>97</sup> Because the child in question is a relative or close family friend, this constant uncertainty is likely to be especially acute. For many would-be kinship foster parents, subjecting themselves to "the system" is simply not acceptable, so they continue their informal kinship care arrangement without any legal rights to the child.<sup>98</sup>

Even though adoption of the child would eliminate all of the legal obstacles facing kinship caregivers, it may not seem to be a viable placement option in many situations. The main reason more children are not adopted by their relatives is the dramatic legal effect of adoption: relatives are often unwilling to force the biological parent to terminate his or her parental rights.<sup>99</sup> Additionally, kinship caregivers often believe the biological parent will, for instance, overcome a drug addiction or reform as a result of incarceration, maintaining the hope that the child will ultimately reunite with that parent.<sup>100</sup>

In some situations, practical barriers prevent willing relatives from taking in a foster child. For example, otherwise-willing kinship

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93. JOSEPH CRUMBLEY & ROBERT L. LITTLE, RELATIVES RAISING CHILDREN: AN OVERVIEW OF KINSHIP CARE 6 (1997).

94. Randi Mandelbaum, *Trying to Fit Square Pegs into Round Holes: The Need for a New Funding Scheme for Kinship Caregivers*, 22 FORDHAM URB. L.J. 907, 923 (1995).

95. *See id.*

96. Olga Osby, *Child-Rearing Perspectives of Grandparent Caregivers*, in KINSHIP CARE: IMPROVING PRACTICE THROUGH RESEARCH 215, 225 (James P. Gleeson & Creasie F. Hairston eds., 1999).

97. *Id.*

98. Rankin, *supra* note 16, at 173.

99. *Id.* at 175.

100. *Id.*

caregivers may never be informed that a relative child is being placed in foster care because they may be estranged from the parents and because there is no mandate requiring relatives to be informed.<sup>101</sup> In other cases, the relatives may be interested in fostering a child, but their age, health, or physical accommodations make it difficult to meet state licensing standards.<sup>102</sup> Although many states now provide flexibility in the licensing of kin, either through separate standards or through waivers, more than a dozen states still require relatives to meet the same licensing standards as nonkin foster parents.<sup>103</sup> Moreover, some states require the child's removal from the caregiver's home while the caregiver acquires a foster care license.<sup>104</sup> Rather than endure this period of separation, some would-be kinship foster parents may prefer to care for the child in a private kinship care arrangement outside the child welfare system.<sup>105</sup>

## 2. FINANCIAL ISSUES

In addition to legal instability and uncertainty, kinship caregivers tend to face significant financial barriers. Elderly kinship caregivers, such as grandparents, are particularly susceptible to financial difficulties. With a median household income of \$18,000 and 19% living below the poverty line, grandparent caregivers tend to be poorer than other kinship caregivers.<sup>106</sup> Additionally, retirees typically do not plan their savings and retirement investments around the need to take on full-time parenting responsibilities.<sup>107</sup> Such financial unpreparedness is often exacerbated by the immediate need to transition from grandparent to full-time caregiver.<sup>108</sup>

Moreover, even though kinship caregivers take on responsibilities equal to foster parents and adoptive parents, they rarely receive equal financial support from the state, compounding their financial woes.<sup>109</sup>

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101. Mandelbaum, *supra* note 94, at 920–21.

102. *See id.* at 921.

103. Rob Geen, *Kinship Foster Care: An Ongoing, Yet Largely Uninformed Debate*, in *KINSHIP CARE: MAKING THE MOST OF A VALUABLE RESOURCE*, *supra* note 1, at 1, 12.

104. Mandelbaum, *supra* note 94, at 922.

105. *See id.*

106. Leonard, *supra* note 92, at 155.

107. *See id.*

108. *See id.*

109. Geen, *supra* note 103, at 13.

While all kin who do not receive foster care payments from the child welfare agency are eligible to receive TANF assistance from an income assistance agency, many fail to receive either TANF or foster care payments. Similarly, many kin who are eligible for assistance fail to receive Medicaid health insurance coverage for the children in their care, food stamps, child care subsidies, or housing assistance.<sup>110</sup>

Kinship caregivers may fail to receive this public assistance because they are unaware of their eligibility or because the state agency mistakenly denies them assistance.<sup>111</sup> In other cases, kinship caregivers fail to apply for public assistance because they overlook outreach materials directed to “parents,” or because they wish to avoid the stigma of collecting welfare.<sup>112</sup>

### 3. INFORMATION GAPS AND INVISIBLE BARRIERS

Even where support networks are available, kinship caregivers may not know how to connect with these services or may feel guilty for doing so.<sup>113</sup> According to information released by the Washington State Department of Social and Health Services, “[t]he greatest issues facing kinship caregivers . . . include[] financial needs, legal and bureaucratic barriers, social service needs[,] and *information gaps*.”<sup>114</sup> In addition, kinship caregivers often face the invisible barrier of being vilified for seeking state financial support to raise their own relatives.<sup>115</sup> As one grandparent caregiver said, “I’m made to feel like I’m only looking at getting my grandkids because of the support. But I can’t afford to add three people to my household expenses if I don’t have extra to spend on them.”<sup>116</sup> Thus, although these barriers are not as obvious as the legal and financial obstacles, they are often critical impediments to otherwise viable kinship care arrangements.

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110. *Id.*

111. Rob Geen, *Kinship Care: Paradigm Shift or Just Another Magic Bullet?*, in KINSHIP CARE: MAKING THE MOST OF A VALUABLE RESOURCE, *supra* note 1, at 231, 255.

112. *Id.*

113. Kinship Caregiver Support Act, S. 985, 109th Cong. § 101(5)–(6) (2005).

114. Wash. State Dep’t of Soc. & Health Servs., Fact Sheet: Informal/Family Caregivers, <http://www.aasa.dshs.wa.gov/topics/caregiving/factsheet.htm> (last visited Oct. 1, 2006) (emphasis added).

115. See Caitlin Johnson, Connect for Kids, Relative Security: Kids in Kinship Care, <http://www.connectforkids.org/node/286> (last visited Oct. 1, 2006).

116. *Id.*

#### 4. PERSONAL DIFFICULTIES FOR ELDERLY KINSHIP CAREGIVERS

Kinship caregivers of all ages face these previously mentioned challenges, but elderly kinship caregivers, such as grandparents, must overcome additional obstacles. With an average age of fifty-five, grandparent caregivers have more health problems and less physical endurance than younger kinship caregivers.<sup>117</sup> The rigors of caring for a child exacerbate these physical challenges. Additionally, when elderly caregivers have the full responsibility of raising a child, they have less time to interact socially with their friends and peers.<sup>118</sup> While such a sacrifice is commonplace for parents, grandparents do not typically expect to make this sacrifice a second time.

In addition to physical challenges, grandparent caregivers face unique emotional stress. Children often arrive in kinship care situations because their parent—the grandparent's child—abused drugs, was incarcerated, or neglected them, and grandparents may feel that they themselves failed as parents.<sup>119</sup> Grandparents may also resent or be apprehensive about stepping in and being parents all over again.<sup>120</sup> Moreover, the difficult circumstances leading up to the child's placement in kinship care tend to create emotional or physical problems for the child.<sup>121</sup> This makes the grandparent caregiver's job all the more challenging, as the emotional stress of caring for such a needy child can be overwhelming.

### III. Analysis

To combat the many challenges facing kinship caregivers, two bills were presented in the 109th congressional session—S 985: The Kinship Caregiver Support Act, and HR 3380: Guardianship Assistance Promotion and Kinship Support Act. Each bill recognized the prevalence and importance of kinship care arrangements and addressed some of the unique challenges facing kinship caregivers.

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117. Leonard, *supra* note 92, at 154.

118. *Id.*

119. *Id.*

120. Geen, *supra* note 2, at 24.

121. Leonard, *supra* note 92, at 154.



**A. Recent Federal Proposals to Support Kinship Caregivers****1. SENATE BILL 985: THE KINSHIP CAREGIVER SUPPORT ACT (KCSA)**

On May 10, 2005, Senator Hillary Rodham Clinton (D-N.Y.) presented Senate Bill 985, the Kinship Caregiver Support Act, which sought to provide kinship caregivers with the necessary information,<sup>122</sup> support,<sup>123</sup> and financial wherewithal<sup>124</sup> to keep the children in their care out of the foster care system. To accomplish these goals, the KCSA included four critical provisions, each of which addressed the needs of kinship caregivers from a unique perspective. The bill would have (1) established a Kinship Navigator Program, (2) established a Kinship Guardianship Assistance Program, (3) required notice to relatives when children enter foster care, and (4) allowed states to use separate licensing requirements for kin and nonkin foster parents.<sup>125</sup>

The KCSA defined a kinship caregiver as “a grandparent or stepgrandparent of a child, or a relative of the child by blood, marriage, or adoption, who (A) lives with the child; (B) is the primary caregiver of the child . . . ; and (C) has a legal relationship to the child or is raising the child informally.”<sup>126</sup> Importantly, this definition required that kin be relatives, not merely neighbors or godparents with emotional ties to the child.<sup>127</sup> In fact, the KCSA’s definition of a *kinship* caregiver was virtually identical to the National Family Caregiver Support Program’s definition of a *relative* caregiver.<sup>128</sup> The bill did not explicitly distinguish between full-time and part-time

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122. 151 CONG. REC. S4871, S4872 (daily ed. May 10, 2005) (statement of Sen. Clinton) (“This proposal will provide relative caregivers with the information and assistance they need to thrive as non-traditional families.”); *see also* S. 985, 109th Cong. § 101(6) (2005).

123. S. 985 §§ 101(4)–(5), (7).

124. *Id.* § 101(7); Press Release, Sen. Olympia Snowe, Senators Snowe and Clinton Introduce Kinship Care Legislation (May 11, 2005), *available at* <http://snowe.senate.gov/pressap/record.cfm?id=237445> [hereinafter Snowe Press Release] (“States will have the option to use their Title IV-E funds to provide payments to grandparents and other relatives who have assumed legal guardianship of children they’ve cared for as foster parents.”).

125. CHILDREN’S DEF. FUND, THE KINSHIP CAREGIVER SUPPORT ACT (S. 985) OFFERS HELP TO CHILDREN RAISED BY RELATIVES (2005), *available at* [http://www.childrensdefense.org/site/DocServer/kcsa\\_2005\\_one\\_pager.pdf?docID=574](http://www.childrensdefense.org/site/DocServer/kcsa_2005_one_pager.pdf?docID=574) [hereinafter KCSA OFFERS HELP].

126. S. 985 § 103(3).

127. *Id.*

128. *Id.*

caregiving, but it required the caregiver to be a *primary* caregiver,<sup>129</sup> which implies that the commitment must be more than half-time. Finally, the bill recognized that kinship care may be formal or informal.<sup>130</sup>

*a. Kinship Navigator Program* The Kinship Navigator Program, inspired by similar state programs in New Jersey and Ohio,<sup>131</sup> would have provided federal funds for the creation of an information-and-support network to link kinship caregivers with necessary services.<sup>132</sup> The program would have provided appropriate state agencies, metropolitan agencies, and Indian tribal organizations with three-year grants to establish and maintain kinship care information-and-referral systems and promote partnerships among not-for-profit agencies to better assist kinship caregivers.<sup>133</sup> Additionally, the agencies could have used the grant money to establish a kinship care ombudsman, who would actively ensure that kinship caregivers receive necessary services, or to support any other activity designed to help kinship caregivers.<sup>134</sup> The Kinship Navigator Program would provide valuable information about countless issues, including support groups and respite care programs, housing and legal assistance, federal financial benefits, and special services for incarcerated parents.<sup>135</sup>

*b. Kinship Guardianship Assistance Program* The KCSA's second major provision would have created a federal Kinship Guardianship Assistance Program (KinGAP),<sup>136</sup> which would allow states to fund subsidized guardianship payments in much the same way they fund foster care and adoption assistance payments. Like programs al-

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129. *Id.* § 103(3)(B).

130. *Id.* § 103(3)(C).

131. CHILDREN'S DEF. FUND, QUESTIONS AND ANSWERS ABOUT THE KINSHIP CAREGIVER SUPPORT ACT (S. 985) 1 (2005), available at [http://campaign.childrensdefense.org/childwelfare/legislative/kcsa\\_2005\\_q&a.pdf](http://campaign.childrensdefense.org/childwelfare/legislative/kcsa_2005_q&a.pdf) [hereinafter QUESTIONS AND ANSWERS ABOUT KCSA].

132. 151 CONG. REC. S4872 (daily ed. May 10, 2005) (statement of Sen. Clinton); QUESTIONS AND ANSWERS ABOUT KCSA, *supra* note 131; Snowe Press Release, *supra* note 124.

133. S. 985, 109th Cong. §§ 106(b)(2), 107(b)(1)-(2) (2005).

134. *Id.* §§ 107(b)(3)-(4).

135. QUESTIONS AND ANSWERS ABOUT KCSA, *supra* note 131.

136. S. 985 § 201.

ready in place in thirty-five states and the District of Columbia,<sup>137</sup> KinGAP would encourage relatives to become permanent legal guardians of children who would otherwise linger in the foster care system.<sup>138</sup> Under the program, minor children who have been in foster care for at least twelve months<sup>139</sup> and who are eligible for Title IV-E foster care assistance payments may receive KinGAP payments “equal to the amount of the foster care maintenance payment for which the child would have been eligible if the child had remained in foster care.”<sup>140</sup> However, the state child welfare agency must first determine that adoption and reuniting the child with his or her mother are inappropriate permanency options.<sup>141</sup>

Where state governments elect not to provide these subsidized guardianship payments, metropolitan agencies or other approved entities in large metropolitan areas may conduct kinship guardianship demonstration projects.<sup>142</sup> These projects are essentially identical to the statewide programs, but they require an annual report by the administering agencies.<sup>143</sup> Thus, even in states that do not adopt KinGAP, there would be alternate routes to providing subsidized guardianship payments to kinship caregivers in large metropolitan areas, where kinship care is most prevalent.

*c. Notice to Relatives When Children Enter Foster Care* The KCSA's notice provision would have encouraged the use of kinship care arrangements by requiring relatives to be made aware whenever a child is placed in foster care.<sup>144</sup> This notice must be made in writing within sixty days of the child's removal from his or her parents' custody.<sup>145</sup> Except for relatives involved in family or domestic violence, all adult grandparents and other relatives, including those recom-

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137. KCSA OFFERS HELP, *supra* note 125.

138. Snowe Press Release, *supra* note 124.

139. The twelve-month requirement is meant to prevent the fraud of families passing the child from relative to relative to receive KinGAP payments, which exceed the TANF payments they may otherwise receive. *Id.*

140. S. 985 § 201(a).

141. *Id.*

142. *Id.* § 202; QUESTIONS AND ANSWERS ABOUT KCSA, *supra* note 131, at 5.

143. S. 985 § 202(c); QUESTIONS AND ANSWERS ABOUT KCSA, *supra* note 131, at 5.

144. S. 985 § 301(a)(3)(B); QUESTIONS AND ANSWERS ABOUT KCSA, *supra* note 131, at 5.

145. S. 985 § 301(a)(3)(B); QUESTIONS AND ANSWERS ABOUT KCSA, *supra* note 131, at 5.

mended by the child's parents, would be notified of their right to participate in the child's placement.<sup>146</sup> The relatives' legal options must also be included in the notice,<sup>147</sup> the details of which were left to the discretion of the state.<sup>148</sup>

*d. Separate Licensing Standards for Relative Foster Parents* Currently, states can receive federal foster care funds only on behalf of kinship caregivers who are licensed foster parents.<sup>149</sup> To assist those relatives who wish to participate as formal kinship foster parents, the KCSA's fourth provision allowed states to "establish and maintain separate standards for [kinship] foster family homes," as long as those standards ensured the safety of the child and provided for criminal background checks of the kinship foster parents.<sup>150</sup> In allowing separate standards, the KCSA recognized that while some licensing provisions, such as requiring a separate bedroom for every foster child, are appropriate in the context of nonkin foster families, they make less sense if the children and foster parents are already related.<sup>151</sup>

## 2. HOUSE BILL 3380: GUARDIANSHIP ASSISTANCE PROMOTION AND KINSHIP SUPPORT ACT (GAP-KSA)

On July 21, 2005, Representative Danny K. Davis (D-Ill.) introduced House Bill 3380, the Guardianship Assistance Promotion and Kinship Support Act, a companion bill to the Senate's KCSA.<sup>152</sup> As a companion bill, the GAP-KSA also provided for (1) a Kinship Navigator Program, (2) subsidized payments to assist legal guardians, (3) mandatory notice to relatives upon children being placed in foster care, and (4) separate licensing standards for relative foster par-

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146. S. 985 § 301(a)(3)(B)(i); QUESTIONS AND ANSWERS ABOUT KCSA, *supra* note 131, at 5.

147. S. 985 § 301(a)(3)(B)(ii); QUESTIONS AND ANSWERS ABOUT KCSA, *supra* note 131, at 5.

148. QUESTIONS AND ANSWERS ABOUT KCSA, *supra* note 131, at 5.

149. *Id.* at 6.

150. S. 985 § 302(a)(3)(B)(i).

151. KCSA OFFERS HELP, *supra* note 125.

152. The Library of Congress, THOMAS, H.R. 3380, <http://thomas.loc.gov/cgi-bin/bdquery/z?d109:HR03380:@@L&summ2=m&> (last visited Oct. 1, 2006).

ents.<sup>153</sup> However, the GAP-KSA also included additional provisions<sup>154</sup> and a different definition of “kinship caregiver.”<sup>155</sup>

*a. Guardianship Assistance Promotion* Title I of the GAP-KSA acknowledged that guardianship is an effective alternative to adoption or foster care,<sup>156</sup> and it specifically called for the federal government to subsidize Legal Guardianship Assistance Payments equal to that of foster parents.<sup>157</sup> Specifically, the bill would have amended the foster care provisions of Title IV-E of the Social Security Act to allow states to negotiate and enter into Legal Guardianship Assistance Agreements.<sup>158</sup> However, whereas the KCSA would provide guardianship subsidies only to “grandparents and other relatives,”<sup>159</sup> the GAP-KSA’s Legal Guardianship Assistance Agreements would be available to any “*individuals* who have assumed legal guardianship of children for whom they cared as foster parents,” provided they also fulfill certain enumerated requirements.<sup>160</sup> In addition to specifying the extra services available to the child and guardian, such an agreement would guarantee that the state will pay the legal costs of obtaining guardianship and guardianship assistance payments equal to the amount of the maintenance payments the child would have received if he or she had remained in foster care.<sup>161</sup> The GAP-KSA also required the child welfare agency to discuss with the foster parent the possibility of adoption prior to entering a guardianship assistance agreement, as well as to attempt to gain parental consent to the agreement.<sup>162</sup>

A child would be eligible for Legal Guardianship Assistance Payments only if the state agency determined that the child (1) had been in state care for at least a year, (2) was eligible for foster care maintenance payments, (3) should not be returned home or adopted, (4) had a strong mutual bond with the prospective guardian, and (5)

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153. *See generally* Guardianship Assistance Promotion and Kinship Support Act, H.R. 3380, 109th Cong. (2005).

154. *Id.* §§ 201, 202.

155. *Id.* § 302(3).

156. *Id.* § 101.

157. *Id.* § 102(a).

158. *Id.*

159. *Id.* § 201(a).

160. *Id.* § 102(a) (emphasis added).

161. *Id.*

162. *Id.* § 102(b).

had been consulted about the guardianship arrangement (if the child was at least fourteen years old).<sup>163</sup> Siblings of the child would also be eligible for placement with the same guardian and to receive equal guardianship assistance payments.<sup>164</sup>

*b. Kinship Navigator Program* The GAP-KSA's definition of a kinship caregiver mirrored that of the KCSA, with one notable exception.<sup>165</sup> Whereas the KCSA recognized as kinship caregivers only grandparents and other relatives by blood, marriage, or adoption, the GAP-KSA definition included "any other person who has strong emotional bonds with a child."<sup>166</sup> Aside from this definitional difference, the GAP-KSA's Title III provision for kinship navigator programs was identical to the KCSA's Title I.<sup>167</sup>

*c. Other GAP-KSA Provisions* The GAP-KSA and KCSA also shared similar provisions that set the standards for licensing relative foster parents<sup>168</sup> and required notifying relatives.<sup>169</sup> Section 203 of the GAP-KSA virtually mirrored section 302 of the KCSA, which allowed states the option of establishing and applying separate foster care licensing standards for relative caregivers.<sup>170</sup> In each bill, the minimum requirement was that any standards must "protect the safety of the child and provide for criminal records checks."<sup>171</sup> The GAP-KSA's section 204 requirement that relatives be notified of a child's removal from his or her biological parents was identical to section 301(a) of the KCSA.<sup>172</sup> These provisions would require all adult relatives of a child being placed in foster care to be notified and have their legal options clearly explained, unless the relative has a history of family violence or domestic violence.<sup>173</sup> Interestingly, whereas the two bills offered differing definitions of "kinship care-

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163. *Id.* § 102(a).

164. *Id.*

165. Compare *id.* § 302(3), with S. 985, 109th Cong. § 103(3) (2005).

166. H.R. 3380 § 302(3).

167. Compare H.R. 3380 tit. 3, with S. 985 tit. 1.

168. Compare H.R. 3380 § 203, with S. 985 § 302.

169. Compare H.R. 3380 § 204, with S. 985 § 301.

170. Compare H.R. 3380 § 203, with S. 985 § 302.

171. H.R. 3380 § 203; S. 985 § 302(a)(3).

172. Compare H.R. 3380 § 204, with S. 985 § 301(a).

173. H.R. 3380 § 204; S. 985 § 301(a).

givers,” the separate licensing standards and notice requirements applied only to “relatives.”<sup>174</sup>

Only two provisions were unique to the GAP-KSA. The first was a minor change to the Social Security Act, which would have redefined “family support services” to include “assist[ing] kinship caregivers or guardians in locating and accessing needed services.”<sup>175</sup> The effect of this change was that it allowed state grants dedicated to “family support services” to specifically be used to connect kinship caregivers with necessary support. To some degree, the new definition also recognized kinship care families as being on the same level as other families, including foster families and adopted families.<sup>176</sup> The second provision unique to the GAP-KSA expanded the Foster Care Independence Program so that children over the age of fourteen who leave foster care for guardianship would have access to funds intended to help them become self-sufficient adults.<sup>177</sup>

### 3. STATUS OF KCSA AND GAP-KSA

Another similarity between the KCSA and GAP-KSA is that they both were doomed to the same fate as Senate Bill 2706, the 2004 version of the Kinship Caregiver Support Act, which was referred to committee and never heard from again.<sup>178</sup> The latest KCSA was introduced, read twice into the record, and referred to the Senate Committee on Finance.<sup>179</sup> Except for the addition of ten new cosponsors, the KCSA was not addressed by the committee.<sup>180</sup> The GAP-KSA was likewise introduced, then referred both to the House Committee on Education and the Workforce and to the House Committee on Ways and Means, and subsequently referred to the Subcommittee on Human Resources.<sup>181</sup> Neither the committees nor the subcommittee

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174. H.R. 3380 §§ 203, 204(3); S. 985 §§ 301(a)(3), 302(a)(3).

175. H.R. 3380 § 202.

176. *See id.*

177. *Id.* § 201.

178. The Library of Congress, THOMAS, S. 2706, <http://thomas.loc.gov/cgi-bin/bdquery/z?d108:SN02706:@@L&summ2=m&> (last visited Oct. 1, 2006).

179. The Library of Congress, THOMAS, S. 985, <http://thomas.loc.gov/cgi-bin/bdquery/z?d109:SN00985:@@L&summ2=m&> (last visited Oct. 1, 2006).

180. *Id.*

181. The Library of Congress, THOMAS, H.R. 3380, <http://thomas.loc.gov/cgi-bin/bdquery/z?d109:HR03380:@@L&summ2=m&> (last visited Oct. 1, 2006).

took any action on the bill.<sup>182</sup> With the adjournment of the 109th Congress, Senate Bill 985 and House Bill 3380 were dead.

## **B. Assessing the KCSA and GAP-KSA**

As a policy matter, kinship care is a tricky area. While it is clear that kinship caregivers sometimes need financial and emotional support, there is less certainty about whether the government should be the source of such support.<sup>183</sup> The KCSA and GAP-KSA sought to establish a coherent federal policy on the funding and support available to kinship caregivers as well as the appropriate level of state involvement in kinship care arrangements. The provisions of each bill would have advanced the cause of kinship care to varying degrees, but neither addressed all the concerns of policymakers and kinship caregivers. This section discusses ways to address these concerns.

### **1. RETHINKING FOSTER CARE LICENSING FOR KINSHIP CAREGIVERS**

An effective policy would involve states examining their foster care licensing and waiver requirements to ensure that they guarantee the child's safety, while not unnecessarily excluding those individuals who could be effective caregivers.<sup>184</sup> Kinship care expert Rob Geen suggests that many of the current foster care licensing requirements are used simply because they are easy to measure, not because they reflect a safe, healthy home environment.<sup>185</sup> While Geen's suggestion applies broadly to the licensing of *all* foster parents, it is uniquely applicable in kinship foster care settings.

Particularly in kinship care situations, foster care licensing requirements are often inappropriate or unnecessary. Whereas "[c]hild protection and safety standards should be uniformly applied" to kin and nonkin alike, the Child Welfare League of America (CWLA), which has created standards of excellence for the licensure of kin foster parents, recommends that child welfare agencies "should allow flexibility for kinship caregivers . . . with regard to

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182. *Id.*

183. *See* Geen, *supra* note 103, at 13.

184. Geen, *supra* note 111, at 247–48; *see also* Mandelbaum, *supra* note 94, at 929.

185. Geen, *supra* note 111, at 237–38.



standards that are unrelated to protection and safety.”<sup>186</sup> Such flexibility would allow caseworkers to take into account the unique needs of the child and foster family when assessing the physical requirements of the foster home and the potential kinship caregiver’s age and health.<sup>187</sup>

Both the KCSA and GAP-KSA heeded this recommendation and explicitly allowed states to establish separate foster care licensing standards for relatives. However, this was an optional provision,<sup>188</sup> and states may not wish to allow differing standards for relative foster parents. Moreover, states that create separate standards for relatives may refuse to allow caseworkers the case-by-case flexibility advocated by Geen and the CWLA. Additionally, both bills required separate standards to, “at a minimum, protect the safety of the child and provide for criminal records checks.”<sup>189</sup> Though intended to ensure the safety of the children, such criminal records checks sometimes deter grandparents who fear that minor offenses from years ago will prevent them from keeping the children they are already raising.<sup>190</sup>

## 2. PROVIDING SERVICES AND SUPPORT FOR KINSHIP CAREGIVERS

A second common theme in Geen’s suggestions and in other literature on kinship care is the need to ensure that kin are aware of and receive the services and support structures available to them.<sup>191</sup> Although child welfare agencies should not intervene in informal kinship care arrangements absent the caregiver’s request or an indication that the child’s needs are not being met,<sup>192</sup> these agencies should readily provide information about support services to any kinship caregiver.<sup>193</sup> The CWLA Standards of Excellence recom-

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186. STANDARDS OF EXCELLENCE FOR KINSHIP CARE SERVICES § 2.35 (Child Welfare League of Am. 2000) [hereinafter CWLA STANDARDS].

187. *Id.* § 2.37 (recommending flexible requirements related to the size of the home and the number of bedrooms and furniture, as well as the caregiver’s “age, educational background, cultural identity and life experience”).

188. See H.R. 3380, 109th Cong. § 203 (2005); S. 985, 109th Cong. § 302(a) (2005).

189. H.R. 3380 § 203; S. 985 § 302(a).

190. Rankin, *supra* note 16, at 175–76.

191. Geen, *supra* note 111, at 248–51 (outlining policy recommendations to “educate kin on services available,” “[e]ducate [child welfare] workers on resources available to support kin foster parents,” and “determine if kin are being inadvertently denied services they may need”); see also CWLA STANDARDS, *supra* note 186, at 54.

192. CWLA STANDARDS, *supra* note 186, § 2.6.

193. *Id.* § 2.7.

mend that “[t]he child welfare agency should ensure that services are available to assist kinship networks to draw upon informal supports within their own communities that can assist them in their parenting role,” even for those children and caregivers who do not participate in the formal child welfare system.<sup>194</sup>

The Kinship Navigator Programs in both the KCSA and the GAP-KSA were designed specifically to connect kinship caregivers to a network of support services.<sup>195</sup> Each bill provided for federal grants to help states develop information dissemination and referral networks.<sup>196</sup> Equally important was making the grants available to metropolitan agencies and tribal organizations,<sup>197</sup> where kinship care is especially common.<sup>198</sup> Finally, the grants could have been used to establish a kinship care ombudsman whose job it would be to “help ensure . . . that kinship caregivers get the services they need and for which they are eligible.”<sup>199</sup>

Providing better information is necessary not only for caregivers, but also for their caseworkers.<sup>200</sup> According to Geen, many child welfare “[w]orkers admitted that they have limited knowledge of community resources and often rely on foster parents for information with which to advise kinship caregivers. Moreover, many workers appear confused about the eligibility criteria and the application process for a variety of public services for which kin should be eligible.”<sup>201</sup>

The KCSA and the GAP-KSA each addressed the need to provide more education to agencies and caseworkers. Specifically, the federal funds were to be used in part for “promoting partnerships between public and private not-for-profit agencies . . . to familiarize the agencies about the special needs of kinship care families, policies that affect their eligibility for a range of . . . services and benefits, and the means for making policies more supportive of kinship care

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194. *Id.* § 3.3.

195. S. 985, 109th Cong. § 102(1) (2005).

196. H.R. 3380 §§ 303, 306; S. 985 §§ 104, 107.

197. H.R. 3380 § 303(b); S. 985 § 104(b).

198. James P. Gleeson, *Kinship Care as a Child Welfare Service: What Do We Really Know?*, in KINSHIP CARE: IMPROVING PRACTICE THROUGH RESEARCH, *supra* note 96, at 3, 5.

199. H.R. 3380 § 306(b)(3); S. 985 § 107(b)(3).

200. H.R. 3380 § 306(b)(3); S. 985 § 107(b)(3); *see also* Sally J. Mason & James P. Gleeson, *Adoption and Subsidized Guardianship as Permanency Options in Kinship Foster Care: Barriers and Facilitating Conditions*, in KINSHIP CARE: IMPROVING PRACTICE THROUGH RESEARCH, *supra* note 96, at 85, 110–11.

201. Geen, *supra* note 111, at 250.

families.”<sup>202</sup> Through these initiatives, caseworkers would become better educated and would no longer need to rely on the kinship caregivers themselves for information. Educating agency caseworkers about the special needs of kinship care families should also make them more compassionate and thus better able to placate the fear of entering “the system” that potential kinship foster parents may harbor.<sup>203</sup>

### 3. SUBSIDIZING GUARDIANSHIP TO ENSURE LEGAL AUTHORITY FOR KINSHIP CAREGIVERS

One of the defining features of both bills—the provision of additional funding to individuals who become guardians—is potentially the most controversial. Guardianship is often the best way to provide kinship caregivers with the legal rights to appropriately care for a child.<sup>204</sup> Guardianship also avoids terminating the biological parents’ parental rights, a common problem in kinship care situations.<sup>205</sup> Although providing government subsidies further encourages kinship caregivers to become legal guardians, some commentators argue that the state should not pay an individual to care for a relative child because providing such care “is part of a family’s responsibility.”<sup>206</sup> On the other hand, where children are currently under state custody in the foster care system, placing them with kinship guardians results in lower administrative costs, as caseworkers no longer need to monitor those arrangements. Ultimately, the focus must be on ensuring that the needs of children are met.<sup>207</sup> Creating incentives that encourage stable and legal kinship care relationships is essential to meeting these needs, and the Guardianship Assistance Programs proposed by the KCSA and the GAP-KSA would have done just that.

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202. H.R. 3380 § 306(b)(2)(B); S. 985 § 107(b)(2)(B).

203. Geen, *supra* note 111, at 250–51.

204. See, e.g., Godsoe, *supra* note 59, at 12; Mandelbaum, *supra* note 94, at 930–31; Rankin, *supra* note 16, at 180; Schwartz, *supra* note 65, at 457–58; JACOB LEOS-URBEL ET AL., THE URBAN INST., STATE POLICIES FOR ASSESSING AND SUPPORTING KINSHIP FOSTER PARENTS, ASSESSING THE NEW FEDERALISM 47–48 tbl.6 (1999), available at <http://www.urban.org/UploadedPDF/discussion00-05.pdf>; U.S. DEP’T OF HEALTH & HUMAN SERVS., REPORT TO THE CONGRESS ON KINSHIP FOSTER CARE 50 (2000), available at <http://aspe.hhs.gov/hsp/kinr2c00/full.pdf>.

205. Godsoe, *supra* note 59, at 12.

206. Geen, *supra* note 103, at 14.

207. Geen, *supra* note 111, at 259–60.

#### **IV. Resolution and Recommendation**

Although the KCSA and the GAP-KSA adequately addressed many of the challenges facing kinship caregivers, both bills had critical shortcomings. In addition to the apparent difficulty in passing any federal kinship caregiver support legislation, the discrepancy between definitions of “kinship caregiver” remains unresolved, as does the issue of whether nonrelatives qualify for subsidized guardianships. Moreover, requiring criminal records checks may also deter otherwise willing kinship foster parents, and neither bill provided a solution to the immediate needs of a relative suddenly forced to care for a child.

##### **A. Passing Federal Legislation Is a Must**

The nature of kinship care makes passing relevant federal legislation difficult. Lack of public awareness of the special needs and circumstances of kinship caregivers prevents kinship care from becoming a national “hot-button issue.” Although many people have a general sense of what kinship care is, few recognize the daily crises facing many of these caregivers: the health problems of elderly caregivers, the lack of legal authority of private kinship caregivers, and the unique emotional issues among grandparent caregivers whose sons or daughters have neglected their own children. Adding to the problem is the view of kinship care as just another family responsibility, not a governmental concern. However, kinship caregivers are becoming increasingly important as the number of children lingering in foster care continues to grow. Passing a federal law that supports kinship caregivers would recognize their invaluable contribution and reinforce the nation’s commitment to providing for its children.

##### **B. Anyone with Close Emotional Ties?**

Passing federal legislation will require resolving the inconsistent definitions of “kinship caregiver” in the KCSA and the GAP-KSA. Whereas the KCSA considered only relatives as kinship caregivers, the GAP-KSA included any person with close emotional ties

to the child.<sup>208</sup> Similarly, the KCSA would offer subsidized guardianships only to relatives, but the GAP-KSA would offer them to anyone who assumes legal guardianship of a child.<sup>209</sup> However, under both bills, flexible foster care standards would apply only to relatives,<sup>210</sup> and only relatives would receive notice when a child enters foster care.<sup>211</sup> State policies indicate no overwhelming mandate on the issue: twenty-six states have kinship care policies that require relation by blood or marriage, twenty states include relatives *and* those with a close relationship in the definition of kinship caregiver, and four states have no formal definition.<sup>212</sup>

Based on the rationale of each bill, “kinship caregiver” should be defined broadly to include anyone with close emotional ties to the child.<sup>213</sup> This broad definition would also expand the scope of the sections providing for separate foster care licensing standards and for notice when a child enters foster care. Both bills limited these provisions to relatives, but they should apply to all kinship caregivers. As a policy matter, allowing for separate foster care licensing standards recognizes that the current standards are inappropriate for families fostering a child already familiar and comfortable with the foster family. This rationale also applies to potential caregivers who already have a close relationship with the child. Likewise, requiring relatives to be notified rests on the assumption that placing the child with a family with which he or she already has an emotional attachment is better than placing the child with an unfamiliar foster family. Again, the rationale also applies to nonrelatives with close emotional ties. The third major provision in each bill, the establishment of information and support networks for kinship caregivers, would require little additional cost to include godparents or other close family friends. Finally, the subsidized guardianship programs should not be limited only to relatives because the state

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208. See Kinship Caregiver Support Act, S. 985, 109th Cong. § 103(3) (2005); Guardianship Assistance Promotion and Kinship Support Act, H.R. 3380, 109th Cong. § 302(3) (2005).

209. Compare H.R. 3380 § 472A, with S. 985 § 472A.

210. H.R. 3380 § 301; S. 985 § 201.

211. H.R. 3380 § 204; S. 985 § 301.

212. BOOTS & GEEN, *supra* note 39.

213. Deciding exactly what constitutes “close emotional ties” or a “close relationship” for these purposes could best be accomplished by examining the policies of the twenty states that currently include such individuals in their definition of “kinship caregiver.”

should encourage guardianships, which require no state involvement, over foster care.

### C. Clarifying the Scope of Criminal Background Checks

The criminal records checks required by both the KCSA and the GAP-KSA in licensing kinship foster parents are necessary, but the scope of such checks should be publicly defined to mitigate the fears of would-be kinship foster parents. As Sonia Gipson Rankin points out, many kinship caregivers “are concerned that minor offenses from their youth might inhibit them from keeping children who are already in their care.”<sup>214</sup> Whether well-founded or not, these fears unnecessarily deter many guardians from becoming licensed foster parents. To alleviate these concerns, state agencies should publicly specify the offenses about which they are concerned and the timeframe they are considering. With this information, a private kinship caregiver who, for example, received a misdemeanor speeding ticket six years ago will know in advance whether such a record affects eligibility to become a licensed foster parent.

### D. Kinship Caregivers Who Are Suddenly Forced to Care for a Child

Because many kinship care arrangements arise due to a parent’s death, incarceration, or abuse, kinship caregivers are often unexpectedly thrust into a care-giving situation for which they are not financially prepared. Grandparent caregivers are particularly susceptible to this problem, as their retirement funds are not planned around becoming a parent all over again. Although the subsidized guardianship and flexible foster care licensing standards can provide long-term financial support to kinship caregivers, many of them need an immediate injection of money to provide the initial child-related necessities, such as cribs, toys, and car seats.<sup>215</sup> To solve this problem, federal legislation should include a provision for a one-time payment to help new kinship caregivers transition into their new parental roles.<sup>216</sup> Similar to emergency welfare payments at the

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214. Rankin, *supra* note 16, at 175.

215. Geen, *supra* note 2, at 24.

216. Geen, *supra* note 111, at 257.

beginning of each school year,<sup>217</sup> this kinship transition payment would be a temporary fix at a time when several necessary items must be purchased all at once.

## V. Conclusion

The defining questions in the debate over kinship care legislation are who qualifies as a kinship caregiver, what types of kinship care will the government support, and to what degree will the government provide such support. The answers to these questions are more than just political decisions; they reflect society's view of the validity and importance of the entire structure of kinship care. As the number of children lingering in foster care and hoping for adoption continues to increase, kinship care is the natural solution. However, to fully utilize the potential of kinship care, the federal government must answer the call and provide kinship caregivers the support and recognition they deserve.

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217. *Id.* (noting that many states offer increased welfare payments in September "to assist parents in meeting costs associated with children returning to school").