

# Grandparent Kinship Caregivers

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## GRANDPARENT KINSHIP CAREGIVERS

Anna Leonard\*

The reconfiguration of the traditional family unit has brought together the legal fields of family and elder law and has left many grandparents as primary and secondary caregivers for their grandchildren.<sup>1</sup> While a grandparent caring for his or her grandchild is not an entirely new phenomenon, the number of current grandparent caregivers in need of financial assistance has become a dire concern. There appears to be an intricate connection between poverty and today's grandparent caregivers. Thus far, society has supported the idea of grandparent caregivers; however, support for their financial assistance has been slower coming. Unfortunately, society's assumption that caregiving is primarily a private matter<sup>2</sup> harms the positive influence on family preservation and autonomy that kinship care provides.

### GRANDPARENTS RAISING GRANDCHILDREN: THE GROWING PHENOMENON

Grandparents are more frequently acting as primary caregivers to their grandchildren. According to the 2000 U.S. Census, more than two million grandparents are responsible for the primary care of their grandchildren.<sup>3</sup> The number of children in grandparent-headed households has increased by 30% since 1990.<sup>4</sup>

While a combination of factors has contributed to this

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1. See Gerald Wallace, *Grandparents Parenting Grandchildren: A New Family Paradigm*, 185 PLI/CRIM 195, 201 (2000).

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

3. Tavia Simmons & Jane Lawler Dye, *Grandparents Living with Grandchildren: 2000*, Washington D.C.: U.S. Bureau of the Census, October 2003.

4. *Facts About Grandparents Raising Grandchildren*, AARP, at <http://www.aarp.org/confacts/grandparents/grandfacts.html> (last visited Oct. 19, 2004).

phenomenon, poverty is a theme that runs through them all. Many parents are unable to care for their children due to their own mental and physical health problems, as well as those of their children, and the financial ramifications of such care are severe.<sup>5</sup> The number of poorer children affected by HIV and AIDS has increased dramatically and will continue to do so over the coming decade as HIV infection increases among poorer populations, especially in African American and Latino women.<sup>6</sup>

Another cause for the increase in grandparent caregivers is mandatory reporting statutes, now implemented in all states, which have led to a significant increase in reported child abuse and neglect.<sup>7</sup> Statistics show reports of child abuse and neglect in this country rose from 4 in 1000 children in 1975 to 47 in 1000 children in 1994.<sup>8</sup> Reports of child abuse and neglect have been directly linked to poverty issues, such as substance abuse and lack of proper housing.<sup>9</sup> Finally, the rapid spread of substance abuse, especially the increased use of crack cocaine, and the subsequent dramatic rise in female incarceration rates has led to the resurgence in grandparent caregivers.<sup>10</sup> Currently, there are approximately 1.4 million people incarcerated, and these prisoners are parents to 1.5 million children.<sup>11</sup>

## THE EVOLUTION OF KINSHIP CARE

Grandparent primary caregivers illustrate a traditional form of kinship care. While the definition may vary, broadly speaking, kinship care is "any living arrangement in which a relative or someone else emotionally close to a child . . . takes primary

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5. Daphne Joslin, *Emotional Well-Being Among Grandparents Raising Children Affected and Orphaned by HIV Disease*, in GRANDPARENTS RAISING GRANDCHILDREN: THEORETICAL, EMPIRICAL, AND CLINICAL PERSPECTIVES 87, 87 (Bert Hayslip, Jr. & Robin Goldberg-Glen eds., 2000).

6. *Id.*

7. Gabrielle A. Paupeck, *When Grandma Becomes Mom: The Liberty Interests of Kinship Foster Parents*, 70 *FORDHAM L. REV.* 527, 532 (2001).

8. *Id.*

9. *Id.*

10. Roberts, *supra* note 2, at 1623.

11. Jeremy Travis & Michelle Waul, *Prisoners Once Removed: The Children and Families of Prisoners*, in PRISONERS ONCE REMOVED: THE IMPACT OF INCARCERATION AND REENTRY ON CHILDREN, FAMILIES, AND COMMUNITIES Ch. 1 (Travis & Waul eds., Jan. 2004), available at <http://www.urban.org/pubs/prisoners/chapter1.html> (last visited Oct. 19, 2004).

responsibility for rearing that child."<sup>12</sup> Sometimes the arrangement may be informal. Under this arrangement, the family privately decides the child will live with a relative, and the child welfare agency does not become involved.<sup>13</sup> Informal care provides the largest form of kinship care.<sup>14</sup> For instance, in 2002, roughly 1.8 million children were in some sort of private kinship care arrangement.<sup>15</sup> The arrangement may also be formal, meaning the child welfare agency retains legal custody of the child while a relative caregiver raises the child.<sup>16</sup> Also known as kinship foster care, the growing trend of using this arrangement is illustrated by an increase in the number of children placed with kin caregivers from 18% in 1986 to 31% in 1990.<sup>17</sup>

The history of kinship care shows a transformation from a relatively private practice to one that is largely public and institutionalized.<sup>18</sup> Historically, extended families have stepped in to care for younger members when their parents are unable to do so.<sup>19</sup> In fact, the term "kinship care" was generated in the Black American community beginning in the time of slavery when grandparents and extended families were left to privately care for children whose parents had been sold and continuing up through the late twentieth century when black children were still not allowed to participate in the child welfare system because of the historical segregation of blacks from social programs.<sup>20</sup>

The federal government first acknowledged the importance of kinship care by providing support to relative caregivers

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12. Jacob Leos-Urbel et al., *State Policies for Assessing and Supporting Kinship Foster Parents*, 2000 THE URB. INST. 1, available at [www.urban.org/UploadedPDF/discussion00-05.PDF](http://www.urban.org/UploadedPDF/discussion00-05.PDF) (last visited Oct. 19, 2004).

13. Sonia Gipson Rankin, *Why They Won't Take The Money: Black Grandparents and the Success of Informal Kinship Care*, 10 ELDER L.J. 153, 156 (2002).

14. Rob Geen, *Kinship Foster Care: An Ongoing, Yet Largely Uninformed Debate*, in PRISONERS ONCE REMOVED: THE IMPACT OF INCARCERATION AND REENTRY ON CHILDREN, FAMILIES, AND COMMUNITIES Ch. 1 (Rob Geen ed., Nov. 2003), available at [www.urban.org/pubs/KinshipCare/chapter1.html#n2](http://www.urban.org/pubs/KinshipCare/chapter1.html#n2).

15. *Id.*

16. *Id.*

17. *Id.*

18. See Roberts, *supra* note 2, at 1621.

19. Donna M. Butts, *Organizational Advocacy as a Factor in Public Policy Regarding Custodial Grandparenting*, in GRANDPARENTS RAISING GRANDCHILDREN: THEORETICAL, EMPIRICAL, AND CLINICAL PERSPECTIVES 341, 341 (Bert Hayslip, Jr. & Robin Goldberg-Glen eds., 2000).

20. See Rankin, *supra* note 13, at 158-59.

through income assistance programs.<sup>21</sup> Under the Social Security Act, a program called Aid to Families with Dependent Children (AFDC) was formed that provided federal income assistance to households with dependent children.<sup>22</sup> This assistance was available to "caretaker relatives" so long as the child was deprived of parental support.<sup>23</sup> Today, under the successor to AFDC, Temporary Assistance to Needy Families (TANF), there is no requirement that states provide assistance to kinship caregivers.<sup>24</sup> Nevertheless, all states provide some type of limited assistance to kinship caregivers who seek it, whether it is through child-only grants or caregiver payments.<sup>25</sup>

More recently, the federal government formed the National Family Caregiver Support Program, which provides supportive services to informal family caregivers.<sup>26</sup> While the majority of the funds under this program go to family caregivers providing care to an older relative with a serious chronic illness or disability, up to 10% of the funds are available to grandparents over the age of sixty acting as primary caregivers to their grandchildren.<sup>27</sup>

Unfortunately, federal support for kinship caregivers through the child welfare system has been slower coming. Kinship care was first acknowledged by the child welfare system in 1980 when the legislature enacted the Adoption Assistance and Child Welfare Act (Adoption Assistance Act).<sup>28</sup> The Adoption Assistance Act promoted kinship care by requiring states to find a more family-like setting when placing foster care children.<sup>29</sup> Also, in 1997, with the enactment of the Adoption and Safety Families Act (ASFA), the legislature further acknowledged the importance of kinship care and its potential for promoting placement in the child welfare system.<sup>30</sup> The

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21. Geen, *supra* note 14.

22. Mary C. Rudasill, *Grandparents Raising Grandchildren: Problems and Policy From An Illinois Perspective*, 3 ELDER L.J. 215, 269 (1995).

23. *Id.* at 270.

24. See Personal Responsibility and Work Opportunity Reconciliation Act of 1996, Pub. L. No. 104-93, 110 Stat. 2105 (codified at 42 U.S.C. § 601(b) (1997)).

25. See Wallace, *supra* note 1, at 217.

26. See 42 U.S.C.A. § 3030s-1 (West 2004).

27. See 42 U.S.C.A. § 3030s-1(g)(2)(C) (West 2004).

28. Adoption Assistance and Child Welfare Act of 1980, Pub. L. No. 96-272, 94 Stat. 500 (codified as amended at 42 U.S.C. §§ 620-628, 670-679 (1989)).

29. See *id.*

30. Adoption and Safety Families Act of 1997, Pub. L. No. 105-89, 111 Stat. 2115 (codified at 42 U.S.C. §§ 670-679 (1997)).

judiciary enthusiastically endorsed this legislative action in *Lilley v. Lilley*.<sup>31</sup> Because of the ASFA, relatives are now given notice of court reviews and provided the opportunity to be heard at such hearings.<sup>32</sup> Likewise, the child welfare agency must contact any relative who might be interested in providing permanent care.<sup>33</sup>

Despite the growing role kinship caregivers play in the child welfare system, the financial assistance and support available to kinship caregivers through the system remains unclear.<sup>34</sup> Through amendment to the Social Security Act in 1962, the federal government provided payments to licensed foster parents, but this did not include most kinship caregivers because they were not part of the child welfare system.<sup>35</sup> In 1979, for kinship foster parents eligible for foster care payments, the court in *Miller v. Youakim* held that such kinship caregivers were entitled to the same benefits as non-kinship caregivers.<sup>36</sup> However, this holding did not address children ineligible for federal foster care funds or kinship caregivers who did not meet certain state foster care licensing requirements. Finally, under ASFA, there continues to be a large disparity in the financial assistance available to kinship foster caregivers and the assistance available to non-kinship foster caregivers.<sup>37</sup> This controversy has arisen because of the state licensing and approval standards in kinship caregiver homes.<sup>38</sup>

## GRANDPARENTS AND KINSHIP CARE

The unique circumstances surrounding grandparent caregivers often leave grandparents to face problems not confronted by the more traditional family caregiver.<sup>39</sup> While most grandparent caregivers willingly care for their grandchildren and find great reward in doing so, such an arrangement frequently brings serious personal difficulties for the grandparent. First, these grandparents are generally older than the traditional child

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31. See *In re Lilley*, 719 A.2d 327, 332-35 (Pa. Super. Ct. 1998).

32. Catherine J. Ross & Naomi R. Cahn, *Subsidy for Caretaking in Families: Lessons Learned from Foster Care*, 8 AM. U. J. GENDER SOC. POL'Y & L. 55, 61 (1999).

33. *Id.*

34. See Geen, *supra* note 14.

35. *Id.*

36. See *Miller v. Youakim*, 440 U.S. 125, 145 (1979).

37. See Roberts, *supra* note 2, at 1627.

38. *Id.*

39. Rudasill, *supra* note 22, at 217.

caregiver. For instance, the average age of a grandparent caregiver is fifty-five, with many caring for grandchildren in their sixties and seventies.<sup>40</sup> With age comes health difficulties and a decrease in physical endurance.<sup>41</sup> As one grandmother caregiver noted "It's all the up and down, this and that, getting up in the night, never a break. These old bones are tired and so am I!"<sup>42</sup> Also, grandparent caregivers face increased emotional distress and difficulties. They have most likely lost a positive relationship with their own child and may question their failure as a parent. Likewise, raising grandchildren can have social costs and deprive the grandparent of positive social interaction with people of his or her own age group.<sup>43</sup>

Grandparent caregivers must also cope with their grandchildren's emotional and physical problems.<sup>44</sup> A grandchild usually comes to live with a grandparent caregiver when there are troubles in the parent's home. The grandchildren are likely to be emotionally damaged due to a parent's drug or alcohol abuse, the child's own abuse and neglect at the hands of a parent, or other emotionally taxing circumstances that have forced these grandparents to step in and care for the child.<sup>45</sup> Also, the physical disabilities a grandchild might have can range from low birth weight and respiratory ailments to hyperactivity, drug and alcohol addiction, and HIV or AIDS.<sup>46</sup>

Finally, grandparent caregivers must face a variety of legal issues and obstacles related to the care of a grandchild. While some grandparents may have legal authority over their grandchildren, such as through adoption, custody, or guardianship, many more are not legally recognized.<sup>47</sup> Even those relationships that are legally recognized face unfortunate discrimination through financial assistance and service support received.

A majority of grandparent caregivers are informally or

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40. Wallace, *supra* note 1, at 203.

41. Generations United, *Grandparents and Other Relatives Raising Children: An Intergenerational Action Agenda*, 13 (April 1998), available at <http://www.gu.org/Files/monograph%201-Final.pdf>.

42. *Id.*

43. *Id.*

44. Wallace, *supra* note 1, at 203.

45. Generations United, *supra* note 41.

46. *Id.*

47. See Geen, *supra* note 14.

privately raising their grandchildren outside of the child welfare system.<sup>48</sup> While there may be a variety of reasons for this, many grandparents choose to keep the childcare informal because of the relationship between the grandparent and the child's parent. Also, the grandparent simply may not want to tamper with the parent's parental rights in hopes that the parent will recover and return to the child. However, according to the 2000 U.S. Census, 39% of grandparent caregivers have been responsible for their grandchildren for five or more years.<sup>49</sup>

Many grandparent caregivers also face financial issues that make it impossible to obtain legal services or advice. Grandparent caregivers tend to be poorer than other relative caregivers, with a median household income of \$18,000.<sup>50</sup> In 1999, 19% of grandparent caregivers had incomes below the poverty level, while only 14% of relative caregivers other than grandparents were living in poverty.<sup>51</sup> Further, few grandparents anticipate becoming parents again. Due to the circumstances under which grandparents take on the role of primary caregiver of a grandchild, most grandparent caregivers take in their grandchildren with little or no notice at all.<sup>52</sup>

#### LEGAL OPTIONS AVAILABLE FOR GRANDPARENT CAREGIVERS

Grandparent caregivers may face many difficulties if they decide to raise their grandchildren with no legal status. Under such circumstances, the parent retains all rights regarding the child, and state and federal law provides greater deference to the parent based on his or her fundamental right to raise the child as he or she sees fit.<sup>53</sup> Because of this, for example, a parent can receive financial assistance for a child, such as social security benefits, which a grandparent may not be able to access. Also, without legal authority, a grandparent may have trouble making day-to-day decisions regarding a grandchild,<sup>54</sup> such as medical care and academic decisions.<sup>55</sup> Finally, having no legal authority over the child makes it difficult for the grandparent to plan for

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48. *Id.*

49. Simmons & Dye, *supra* note 3.

50. Rudasill, *supra* note 22, at 269.

51. Simmons & Dye, *supra* note 3.

52. *See* Geen, *supra* note 14.

53. *See* Wallace, *supra* note 1, at 204.

54. *See* Rudasill, *supra* note 22, at 217.

55. Wallace, *supra* note 1, at 202-03.

the child's care after the grandparent's own incapacity or death.<sup>56</sup>

If a grandparent caregiver decides to seek legal status regarding his or her grandchild, there are several options available including legal custody, guardianship, foster care, or adoption. For instance, a grandparent may seek legal custody of the child, which allows a non-parent to obtain legal physical possession of the child. However, legal custody may only be gained if the grandparent can overcome the high threshold of proving the child's parent is unfit.<sup>57</sup> Also, legal custody does not extend to control over the child's property or financial interests.<sup>58</sup>

Legal guardianship is another option. Guardianship gives the grandparent control over the grandchild, the grandchild's property, or both.<sup>59</sup> This is established by obtaining parental consent or by showing that the child's parent is unfit. However, guardianship does not necessarily terminate the parent's parental rights.<sup>60</sup> Thus, while the grandparent may have custody and control over the grandchild, the parent may still have the right to visitation and to be heard by the court. This could play a significant role in how much control the grandparent actually has over the grandchild.

A grandparent may also become a foster care parent for a grandchild. Foster care is generally used when a child lacks a suitable primary caregiver.<sup>61</sup> Today, state child welfare agencies increasingly consider relatives as the first placement choice when foster care is needed.<sup>62</sup> However, once the foster care system becomes involved, the legal custody of the child remains with the state child welfare agency.<sup>63</sup> Also, foster care parents must meet and maintain certain training and licensing requirements deemed appropriate by each state regardless of family status.<sup>64</sup>

Finally, a grandparent may gain legal authority over a grandchild through adoption. Adoption permits the

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56. *Id.*

57. Raymond Albert, *Legal Issues for Custodial Grandparents*, in GRANDPARENTS RAISING GRANDCHILDREN: THEORETICAL, EMPIRICAL, AND CLINICAL PERSPECTIVES 327, 331 (Bert Hayslip, Jr. & Robin Goldberg-Glen eds., 2000).

58. *Id.*

59. *Id.*

60. *Id.*

61. Paupeck, *supra* note 7, at 528.

62. See Leos-Urbel et al., *supra* note 12, at 11.

63. Roberts, *supra* note 2, at 1629.

64. *Id.*

grandparent to step into the parent's shoes in regards to the child and retain all parental rights.<sup>65</sup> However, the parent's parental rights must first be severed. In order to do this, generally, either the child's parent must voluntarily terminate his or her parental rights or a showing of abandonment, neglect, abuse, or mental illness must be made, which can be difficult and unpleasant to prove.<sup>66</sup> Once the parent's rights are terminated, the grandparent must show that he or she is the best caregiver for the child.<sup>67</sup> This may pose a variety of concerns that may be difficult for a grandparent to overcome, such as poverty. Also, while the age of an adopting parent cannot be the sole basis for denial of adoption, it is still taken into consideration.<sup>68</sup>

### FINANCIAL RAMIFICATIONS FOR GRANDPARENT CAREGIVERS

The financial burdens grandparent caregivers encounter frequently determine whether the grandparent or the state retains legal authority over the grandchild.<sup>69</sup> While a grandparent raising a grandchild is not a new occurrence, the dramatic growth in the number of children in kinship care and the resources it demands is new.<sup>70</sup> Policy in the United States has traditionally assumed that caregiving is primarily a private matter.<sup>71</sup> Many people believe that parents and those responsible for raising children should bear the costs alone,<sup>72</sup> and the amount of financial support available to grandparent caregivers through current social programs stems from this belief.

While the federal government has acknowledged that

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65. Albert, *supra* note 57, at 332.

66. Melinda Perez-Porter & Margaret M. Flint, *Grandparent Caregiving: Legal Status Issues and State Policy*, in *TO GRANDMOTHER'S HOUSE WE GO AND STAY: PERSPECTIVES ON CUSTODIAL GRANDPARENTS* 132, 146 (Carole B. Cox ed., 2000).

67. *See id.*

68. *See In re Adoption of Michelle Lee T.*, 117 Cal. Rptr. 856, 862 (Cal. Ct. App. 1975).

69. Roberts, *supra* note 2, at 1621.

70. Jennifer Ehrle & Rob Geen, *Children Cared for by Relatives: What Services Do They Need?*, (New Federalism: National Survey of America's Families, Series No. B-47, June 26, 2002), available at <http://www.urban.org/template.cfm?Template=/TaggedContent/ViewPublication.cfm&PublicationID=7772&NavMenuID=95> (last visited Sept., 2004).

71. *See* Roberts, *supra* note 2, at 1619.

72. *Id.*

kinship care plays an important role in child welfare,<sup>73</sup> funds providing financial and support services for grandparent caregivers remain limited.<sup>74</sup> Similarly, the limited public benefits available to grandparent caregivers may vary dramatically from state to state. Generally, grandparent caregivers must be eligible to apply for public assistance benefits on behalf of the children they are raising.<sup>75</sup> Eligibility depends largely on whether the grandparent holds custody of the child and whether the grandparent meets the income limitations.<sup>76</sup>

Once eligible, the public services a grandparent may receive include financial assistance, medical insurance, and supportive services.<sup>77</sup> Under current federal policy, states may provide financial assistance to relative caregivers through Temporary Assistance to Needy Families ("TANF") grants.<sup>78</sup> TANF provides financial assistance to very low-income caregivers or dependent children.<sup>79</sup> The amount varies from state to state, with the average being about \$238 per month.<sup>80</sup> A grandparent may apply for a "child only" grant on behalf of a dependent grandchild; however, the payment amount is prorated for each additional child.<sup>81</sup> A grandparent may also apply for his or her own personal assistance,<sup>82</sup> which has its own set of limiting requirements. For instance, the grandparent can only receive this assistance for a lifetime limit of five years.<sup>83</sup> A grandparent, thus, risks depleting this allotment to receive support for raising grandchildren in his or her care.<sup>84</sup> Likewise, after two years of assistance, the grandparent must be gainfully employed in order to receive the aid.<sup>85</sup> This may be very difficult for a grandparent who is older and past the age of employment or experiencing physical difficulties to do. While there are waivers available for

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73. Rankin, *supra* note 13, at 154.

74. See Ehrle & Geen, *supra* note 70.

75. See Faith Mullen, *Grandparents and Welfare Reform*, in *TO GRANDMOTHER'S HOUSE WE GO AND STAY: PERSPECTIVES ON CUSTODIAL GRANDPARENTS* 113, 113 (Carole B. Cox ed., 2000).

76. See *id.* at 115.

77. See *id.* at 113.

78. Geen, *supra* note 14.

79. See Generations United, *supra* note 41.

80. Ehrle & Geen, *supra* note 70.

81. *Id.*

82. See Generations United, *supra* note 41.

83. Roberts, *supra* note 2, at 1628.

84. *Id.*

85. *Id.*

the work requirement, they vary from state to state, and no state is required to provide such a waiver.<sup>86</sup>

A grandparent may also seek various other forms of public assistance, such as food stamps, Medicaid, Supplemental Security Income, and services from the new National Family Caregiver Support Program. Like TANF, a grandparent is eligible to receive these benefits on behalf of his or her grandchildren without legal custody of the children; however, each program has eligibility requirements and limitations of its own. For instance, Supplemental Security Income ("SSI") provides financial assistance to a low-income child if he or she is disabled.<sup>87</sup> A low-income grandparent over the age of sixty-five may also be eligible for and receive assistance through SSI.<sup>88</sup> However, a person cannot simultaneously receive SSI and TANF assistance.<sup>89</sup>

Food stamps are another choice of assistance available to grandparents in low-income households.<sup>90</sup> The amount received in food stamps varies and will depend on the number of members in the grandparent's household, including the grandchild.<sup>91</sup> Likewise, Medicaid provides medical assistance to income-eligible persons.<sup>92</sup> These services may include doctor visits, prescriptions, and hospital costs.<sup>93</sup> Because Medicaid is established and maintained by the states, the requirements may vary depending on where the grandparent and grandchild reside. Finally, a grandparent over the age of sixty and acting as primary caregiver to a grandchild may be eligible for supportive services from local Area Agencies on Aging to the National Family Caregiver Support Program (NFCSP).<sup>94</sup> Various types of support services are available from the NFCSP, including information about services, assistance in gaining services, counseling, respite care, and limited supplemental services.<sup>95</sup>

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86. See Mullen, *supra* note 75, at 118-19.

87. Generations United, *supra* note 41.

88. 42 U.S.C.A. § 1381 (West 2004).

89. Mullen, *supra* note 75, at 118.

90. *Id.* at 125.

91. *Id.*

92. See *id.* at 120-21.

93. *Id.*

94. *The National Family Caregiver Support Program: Compassion in Action*, U.S. Dep't of Health & Human Services Admin. on Aging, (Sept. 2003), at [http://www.aoa.gov/prof/aoaprogram/caregiver/overview/NFCSP\\_Exec\\_Summary\\_FU\\_LL\\_03.pdf](http://www.aoa.gov/prof/aoaprogram/caregiver/overview/NFCSP_Exec_Summary_FU_LL_03.pdf) (last visited Oct. 28 2004).

95. *Id.*

*GRANDPARENTS AND KINSHIP FOSTER CARE*

Due to welfare reform and limited public assistance, many grandparent caregivers have turned to the foster care system for support in raising grandchildren. In fact, the number of children in kinship foster care increased substantially in the late 1980s and early 1990s.<sup>96</sup> This increase is a result of the higher benefits provided by the foster care system than by public income assistance programs.<sup>97</sup> For instance, in 1996, a Californian foster parent caring for two siblings received a foster care stipend of \$859, compared to the \$479 available through AFDC benefits.<sup>98</sup> Foster parents can also receive other assistance such as Medicaid and payments for clothing and school supplies.<sup>99</sup> However, grandparents are eligible for these advantages only by subjecting themselves and their grandchildren to the child welfare system.<sup>100</sup>

In becoming a foster parent, a grandparent must first relinquish legal custody of his or her grandchild to the state child welfare agency.<sup>101</sup> This occurs when either the grandparent seeks assistance from the child welfare agency or the agency seeks out the grandparent to provide foster care because the child has been removed from the parent's home.<sup>102</sup> Either way, this has a dramatic impact on the grandparent-grandchild relationship and the relationship between the family and the state.<sup>103</sup>

Also, intervention by the state child welfare agency places a grandparent caregiver's family autonomy rights at risk. The grandparent caregiver is suddenly subject to regulation by the child welfare agency. This may include such actions as complying with agency rules, allowing periodic visits by caseworkers, and providing the agency with personal information.<sup>104</sup> The family is suddenly transformed from a natural family to a foster family.<sup>105</sup> Family autonomy and

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96. Geen, *supra* note 14.

97. Roberts, *supra* note 2, at 1626.

98. *Id.*

99. See Albert, *supra* note 57, at 332.

100. *See id.*

101. Roberts, *supra* note 2, at 1629.

102. *Id.*

103. *Id.*

104. *Id.* at 1632.

105. *Id.* at 1629.

interests in the child dramatically change. A natural, extended family holds the fundamental right of family privacy.<sup>106</sup> However, a foster family faces significant limits on family privacy because the origin of the foster family is in state and contract law.<sup>107</sup>

Foster families also face denial of family privacy interests because of the lack of a biological relationship with the foster child.<sup>108</sup> While there might be precedent for a court to find a family privacy interest in a kinship foster family because of the biological connection,<sup>109</sup> thus far no court has decided the issue.<sup>110</sup> Regarding liberty interests of kinship foster parents, only one case, *Rivera v. Marcus*,<sup>111</sup> has taken on the issue. While the case did grant a liberty interest to the kinship foster parent, a half-sister of the foster children, the decision has little history or subsequent support.<sup>112</sup> This may be because the case entailed "an extremely intense kind of kinship relationship" in which the foster mother acted as the primary caregiver from the time of the children's births.<sup>113</sup> Thus, the only rights kinship foster families may strongly assert are those procedural rights provided to them by the state, such as the right to notice and a pre-removal hearing.

Finally, when a grandparent becomes a foster parent, he or she must meet the child welfare agency's licensing requirements regarding personal issues such as age and criminal history, and living circumstances such as square footage of the home, the number of rooms in the home, and sleeping arrangements.<sup>114</sup> However, states vary dramatically in requirements for kinship foster parents. Some states require kinship foster parents to meet the same training and licensing requirements as non-kinship foster parents.<sup>115</sup> Other states provide a waiver of certain requirements for kinship foster parents.<sup>116</sup> This may mean a waiver of training requirements, like in Tennessee,

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106. See *Moore v. City of E. Cleveland, Ohio*, 431 U.S. 494, 504-06 (1977).

107. *Smith v. Org. of Foster Families For Equal. and Reform*, 431 U.S. 816, 845 (1977).

108. See *Rodriguez v. McLoughlin*, 214 F.3d 328, 337 (2d Cir. 2000).

109. *Id.*

110. Paupeck, *supra* note 7, at 550.

111. 696 F.2d 1016, 1022-26 (2d Cir. 1982).

112. Paupeck, *supra* note 7, at 548.

113. *Id.*

114. Elizabeth Killackey, *Kinship Foster Care*, 26 FAM. L.Q. 211, 217 (1992).

115. *Id.*

116. *Id.*

where the state waives a ten week long foster parent training requirement for kinship caregivers.<sup>117</sup> A waiver may also involve the physical space requirements in a foster family home. For instance, Massachusetts modified the fifty square foot per child requirement to a range of thirty-five to fifty square feet for kinship caregivers.<sup>118</sup> States may also waive caregiver specific requirements, such as age. In Kentucky, non-kinship foster parents must be under the age of sixty-five, but this requirement is waived for kinship caregivers.<sup>119</sup> Finally, a few states have developed an approval process especially for kinship caregivers.<sup>120</sup> While these special standards are usually less stringent when dealing with training and space requirements, all states require criminal background checks and a check of child abuse and neglect history.<sup>121</sup>

The financial support a state provides to a kinship foster parent is directly linked to the way the relative is licensed.<sup>122</sup> At the very least, states may not exclude kinship foster care parents from foster care benefits as long as they meet the state's licensing requirements.<sup>123</sup> However, states are allowed to provide funds to non-relative foster parents that are not provided to relative foster parents.<sup>124</sup> In fact, under the ASFA, the federal government will not subsidize a state's foster care program if kinship foster parents do not meet the same licensing requirements as non-kinship foster parents.<sup>125</sup> Because many states provide varying requirement standards to kinship foster parents, the federal government may not reimburse a particular state for payments made to kinship foster parents that fail to meet the same licensing requirements as non-kinship foster parents. Thus, state foster care benefits are usually not available, or are severely reduced, to kinship foster parents.<sup>126</sup>

Unlike the federal government, many states have

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117. Leos-Urbel et al., *supra* note 12, at 21.

118. *Id.*

119. Amy Jantz, et al., *The Continuing Evolution of State Kinship Care Policies*, Dec. 2002 THE URB. INST. 12-13 available at [http://www.urban.org/UploadedPDF/310597\\_state\\_kinship\\_care.pdf](http://www.urban.org/UploadedPDF/310597_state_kinship_care.pdf) (last visited Oct. 29, 2004).

120. Killackey, *supra* note 114.

121. See Jantz, et al., *supra* note 119, at 14.

122. Roberts, *supra* note 2, at 1626.

123. See *Miller v. Youakim*, 440 U.S. 125, 126 (1979).

124. See *Lipscomb v. Simmons*, 962 F.2d 1374, 1376 (9th Cir. 1992).

125. Rankin, *supra* note 13, at 167.

126. See Rudasill, *supra* note 22, at 271.

recognized the unique circumstances kinship foster parents must tackle and have adjusted licensing requirements accordingly. Many kinship caregivers are not prepared to take in relative children and are likely to be unable to meet the full standards of foster care in a short period of time.<sup>127</sup> For example, the federal government supports minimum square footage requirements in a foster care home in an attempt to assure the foster child's privacy. However, because many kinship caregivers are taking in family members without notice, such a requirement may be hard to meet. Under such circumstances the need for privacy may not be necessary or even practical.<sup>128</sup> Thus, currently, many states are struggling with the desire to provide needed leeway to kinship caregivers, while continuing to honor the safety concerns addressed under ASFA.

A number of states have also sought intermediate alternatives to the foster care system in order to help kinship caregivers. For instance, several states have implemented "subsidized guardianship" arrangements for kinship caregivers.<sup>129</sup> Under this arrangement, a state provides a limited legal relationship to the kinship caregiver, allowing the caregiver to make decisions for the child, such as medical and academic decisions.<sup>130</sup> Also, states provide financial and supportive assistance to kinship caregivers without meeting the same criteria as a traditional foster parent.<sup>131</sup> This can be useful for a grandparent caregiver who needs financial assistance but who feels foster care or adoption are not appropriate options.<sup>132</sup>

## CONCLUSION

While the federal government has acknowledged the important, positive role kinship care plays in society, lawmakers have been reluctant to provide the support kinship caregivers need to make kinship care work. Most grandparent caregivers face severe financial pressures. Unfortunately, federal income assistance programs, such as TANF, provide very limited financial assistance, and accessing foster care payments can be

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127. See Jantz, et al., *supra* note 119, at 18.

128. Killackey, *supra* note 114.

129. Roberts, *supra* note 2, at 1627.

130. See Rankin, *supra* note 13, at 180.

131. *Id.*

132. *Id.*

terribly problematic. Gaining financial assistance through the foster care system requires a grandparent to place the grandchild in state custody and to meet strict state licensing standards. This intense state supervision harms the very reason the government supports kinship care. Kinship care promotes the type of family stability the government wishes to achieve in that it provides permanency in the child's life and preserves the family unit.<sup>133</sup> The current federal policy punishes poor families, who are in desperate need of public support, by forcing them give up family autonomy and privacy.

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133. See Roberts, *supra* note 2, at 1622.