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# Promoting Permanency and Human Rights

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## **Promoting Permanency and Human Rights**

**By Lauren E. Bartlett<sup>1</sup>**

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<sup>1</sup> Director of Legal Clinics and Associate Professor of Law at Ohio Northern University Claude W. Pettit College of Law. For Collins and Sheila Phillips. Thank you to Martha Davis, Margaret Johnson, and Sabrina Balamwala for helpful comments on earlier drafts of this article. I would also like to thank all of the participants at both the Developing Ideas Conference at the University of Kentucky College of Law in May 2017 and my Works in Progress Presentation at the American Association of Law Schools 2018 Annual Clinical Conference, for their helpful suggestions and critique. Thank you to Erica Bishop, Christopher Calpin, Dustin Green, Margaret Kimmel, and Kristopher Lowe for research assistance.

### **Abstract**

*An increasing number of children are being cared for exclusively by grandparents or extended family. The majority of these caregivers are raising children outside of the foster care system without a formal legal status. In fact, kinship diversion, placing children whose parents cannot or will not care for them with family or friends outside of the foster care system, is encouraged by state and federal law. Informal kinship caregivers face many obstacles to providing care for children and they are more likely to be unemployed, receive government benefits, and be less educated, as compared with parents raising their own children. In addition, the majority of these caregivers live in poverty, and few receive adequate subsidies or other support for the children in their care. When an informal kinship caregiver living in poverty wishes to move for permanency, through adoption or permanent guardianship proceedings, the out-of-pocket expenses are an obstacle—the costs of a private adoption or permanent guardianship proceeding top \$3,000, not including attorney's fees. While adoptions and permanent guardianships are at least partially subsidized when the children are in foster care, the subsidies for these legal proceedings for informal kinship caregivers living in poverty are inadequate in many states. In those states, informal kinship caregivers living in poverty who wish to move for permanency for the children in their care are barred from doing so for lack of funds. Using a human rights lens to analyze the applicable law, regulations, and practices of all fifty states and the federal government, this article argues for the subsidization of private adoptions and permanent guardianships for kinship caregivers living in poverty.*

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## I. Introduction

*Sharon Gurley<sup>2</sup> came to the Ohio Northern University Legal Clinic for legal assistance to adopt her nine year old granddaughter, Kaylan. Kaylan had been living with Sharon since she was a baby. Kaylan's father had never been in the picture. Kaylan's mother, Cathy, was unable to care for Kaylan as a baby, maybe due to addiction issues, and left her in Sharon's care. Cathy was in and out of their lives until recently when Cathy was convicted of murder and sent to prison for twenty-five years. Sharon had never sought legal custody or guardianship of Kaylan and instead relied on a Caregivers Affidavit for authorization to enroll Kaylan in school and to bring her to the doctor. Children's services had never been involved. Our students explained to Sharon that while we could provide free legal representation for the adoption proceedings, Sharon would have to come up with the funds to pay for the court costs, a home study, parenting classes, a fire marshal's certificate, background checks, and more, all of which were required by the court to complete an adoption. The students explained that these costs would add up to more than \$3,000. Sharon would have to pay these costs in advance, with no hope of a waiver or a payment schedule. Sharon worked part time and was living below the poverty line. She said she thought that she might be able to get the money together after her tax refunds came in. She said that she would get back in touch with us soon. We never heard from Sharon again.*

Across the U.S., more and more children whose parents are unable or unwilling to care for them are increasingly relying on grandparents, like Sharon, as well as aunts, uncles, and family friends for care. Many of these caregivers step forward to care for the

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<sup>2</sup> This story represents a combination of client and potential client cases at the Ohio Northern University Legal Clinic, where the author of this article supervises law students who litigate civil cases on behalf of individuals in poverty. Names and details of cases have been changed for confidentiality purposes.

children as a result of a child welfare investigation.<sup>3</sup> Informal or voluntary kinship caregiving arrangements are also often made without the knowledge or involvement of child welfare officials, as a preventative measure to avoid possible abuse or neglect.<sup>4</sup>

While the number of children in foster care has remained fairly consistent since the 1990s,<sup>5</sup> the number of children in kinship care<sup>6</sup> has grown significantly in the same period of time.<sup>7</sup> Today, estimates indicate that there are over 2.6 million children living apart from their biological parents in private kinship care, as compared with 428,000 children in foster care across the U.S.<sup>8</sup> Not only has the number of children in kinship

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<sup>3</sup> See Jessica Dixon Weaver, *Grandma in the White House: Legal Support for Intergenerational Caregiving*, 43 SETON HALL L. REV. 1, 12 (2013); Sacha M. Coupet, "Ain't I a Parent?": *The Exclusion of Kinship Caregivers from the Debate over Expansions of Parenthood*, 34 N.Y.U. REV. L. & SOC. CHANGE 595, 603 (2010); Sonia Gipson Rankin, *Why They Won't Take the Money: Black Grandparents and the Success of Informal Kinship Care*, 10 ELDER L.J. 153, 154-55 (2002). In fact, child welfare officials are required to notify "all adult grandparents and other adult relatives of the child....that the child has been or is being removed from the custody of the parent or parents of the child...and explains the options the relative has...to participate in the care and placement of the child." The Fostering Connections to Success and Increasing Adoptions Act of 2008, Pub. L. No. 110-351, 122 Stat. 3949 (codified as amended in sections of 42 U.S.C.).

<sup>4</sup> See *id.*

<sup>5</sup> Child Trends Data Bank (2014), [https://www.childtrends.org/wp-content/uploads/2014/07/12\\_fig1.jpg](https://www.childtrends.org/wp-content/uploads/2014/07/12_fig1.jpg) (showing 427,000 children were in foster care in 1992).

<sup>6</sup> The Anne E. Casey Foundation, Kids Count (2015), <http://datacenter.kidscount.org/> ("Children are considered to be in kinship care when all of the following conditions are true: a parent is not present in the household; the child is not a foster child to the householder; the child is not a housemate/roommate/border with no relatives in the household; the child is not a householder; and the child is not a spouse or unmarried partner of the householder.") The caregivers taking care of the children in kinship care are often called "kinship caregivers." See *e.g.*, Coupet, *supra* note 3; Rankin, *supra* note 3 at 155-84.

<sup>7</sup> Rankin, *supra* note 3 at 154 ("In 1997, 1.3 million children were estimated to be in private kinship care."). See also, Kids Count, *id.* (the number of children in foster care has grown by 30,000 since 2010).

<sup>8</sup> See Kids Count, *supra* note 6. Some children are placed with grandparents or non-relatives with whom they have a relationship through the foster care system. This is called kinship foster care and is distinguished from private kinship care due to the involvement of the state child welfare system. See Rankin, *supra* note 3 at 154. In addition to the 428,000 children in private kinship care, almost 128,000 or approximately 30% of children in the formal foster care system live with relatives. See U.S. DEPARTMENT OF HEALTH AND HUMAN SERVICES, ADMINISTRATION FOR CHILDREN AND FAMILIES, ADMINISTRATION ON CHILDREN, YOUTH AND FAMILIES, CHILDREN'S BUREAU, THE AFCARS REPORT: PRELIMINARY FY 2015 ESTIMATES AS OF JUNE 2016, No. 23 (2016), <https://www.acf.hhs.gov/cb/research-data-technology/statistics-research/afcars>.

care increased steadily, but kinship adoptions<sup>9</sup> and permanent guardianships<sup>10</sup> are also on the rise.<sup>11</sup>

Scholars have identified a universe of potential causes for the increasing number of children in kinship care, including: the opioid epidemic;<sup>12</sup> fallout from the financial crisis of 2008;<sup>13</sup> mass incarceration;<sup>14</sup> lack of affordable childcare;<sup>15</sup> rise in the number

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<sup>9</sup> The term kinship adoption has been used to describe children adopted by relatives or non-relative close family friends who had been kinship caregivers. See e.g., CHILD FOCUS AND THE NORTH AMERICAN COUNCIL ON ADOPTABLE CHILDREN, KINSHIP ADOPTION: MEETING THE UNIQUE NEEDS OF A GROWING POPULATION (2010), [http://childfocuspartners.com/wp-content/uploads/CF\\_Kinship\\_Adoption\\_Report\\_v5.pdf](http://childfocuspartners.com/wp-content/uploads/CF_Kinship_Adoption_Report_v5.pdf). In the past, adoptions required the termination of biological parental rights and of all relationships between biological parent and child. Today, children can be adopted and still have court-enforceable rights to visit with biological parents, and children in at least one U.S. state can be adopted without terminating biological parents' rights. See Josh Gupta-Kagan, *The New Permanency*, 19 UC DAVIS J. JUV. L. & POL'Y 1, 5-6 (2015).

<sup>10</sup> Permanent guardianship, also called 'permanent custody' in some jurisdictions, provides a permanent family for children who cannot return home and for whom termination of parental rights is not an appropriate option. Oftentimes the kinship caregiver and/or the child has strong emotional ties to the children's biological parents and may not feel it would be in the best interest of the children to terminate parental rights as required by adoption. In other cases, biological parents may have a physical or mental disability that prevents them caring safely for a child and termination of parental rights is inappropriate. See THE CHILDREN'S DEFENSE FUND, USING SUBSIDIZED GUARDIANSHIP TO IMPROVE OUTCOMES FOR CHILDREN: KEY QUESTIONS TO CONSIDER 9 (2004), <http://cdf.childrensdefense.org/site/News2?page=NewsArticle&id=6624>. The legal procedure for obtaining permanent guardianship is different state by state and is described more thoroughly in Part II.D., *infra*.

<sup>11</sup> See Jamel Rowe, *Paths to Permanence: Kin Guardianship and Adoption*, 59 ADOPTION ADVOCATE 2-8 (May 2013); KINSHIP ADOPTION, *supra* note 9. This article does not take an opinion on whether adoption or permanent guardianship is a "better" or more permanent option for children in kinship care. Instead, this article focuses on the subsidization of both permanent guardianships and adoption when the kinship caregiver family is living in poverty.

<sup>12</sup> Katharine Q. Seelye, *Children of Heroin Crisis Find Refuge in Grandparents' Arms*, N.Y. TIMES (May 21, 2016), [https://www.nytimes.com/interactive/2016/05/05/us/grandparents-heroin-impact-kids.html?\\_r=0](https://www.nytimes.com/interactive/2016/05/05/us/grandparents-heroin-impact-kids.html?_r=0). Historically children have been put in the care of relatives and the foster care system due to dependency issues. See e.g., Leslie Kaufman, *Foster Children at Risk and an Opportunity Lost*, N.Y. TIMES (Nov. 5, 2007), <http://www.nytimes.com/2007/11/05/nyregion/05foster.html> ("The tensions only worsened in the late 1980s and early '90s as the crack epidemic sent tens of thousands of additional children into foster care, nearly all of them black or Latino. Overwhelmed, the foster care system began to fail.").

<sup>13</sup> Amy Goyer, *More Grandparents Raising Grandchildren*, AMERICAN ASSOCIATION OF RETIRED PERSONS (AARP) (2010), <http://www.aarp.org/relationships/grandparenting/info-12-2010/more-grandparents-raising-grandchildren.html>.

<sup>14</sup> See Allison E. Korn, *Detoxing the Child Welfare System*, 23 VA. J. SOC. POL'Y & L. 293, 309 (2016); THE SENTENCING PROJECT, INCARCERATED PARENTS AND THEIR CHILDREN: TRENDS 1991-2007 (2009), <http://www.sentencingproject.org/publications/incarcerated-parents-and-their-children-trends-1991-2007/>.

<sup>15</sup> See Weaver, *supra* note 3 at 4. In 31 states and the District of Columbia, center-based childcare for an infant is more expensive than public college tuition. See CHILDREN'S DEFENSE FUND, THE STATE OF

of jobs requiring travel or relocation;<sup>16</sup> rise in rates of single parenthood;<sup>17</sup> recent increases in the number of deportations of immigrant parents;<sup>18</sup> and more.<sup>19</sup>

Moreover, scholars and advocacy groups have pointed out that there is also a strong financial incentive for the prioritization of informal kinship care over foster care: child welfare agencies avoid paying costly foster care subsidies to informal kinship caregivers.<sup>20</sup> Often informal kinship placements are not licensed foster homes, and the state or local government often does not have to pay foster care subsidies to the kinship caregivers. This policy of kinship diversion<sup>21</sup> is now commonplace, and encouraged, even incentivized, by federal and state law.<sup>22</sup> In addition, child welfare agencies are

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AMERICA'S CHILDREN 7 (2017), <https://www.childrensdefense.org/wp-content/uploads/2018/06/2017-soac.pdf>.

<sup>16</sup> See Weaver, *supra* note 3 at 4.

<sup>17</sup> URSULA ADLER FALK & GERHARD FALK, GRANDPARENTS: A NEW LOOK AT THE SUPPORTING GENERATION 25 (2002) ("After the 1950s things changed so dramatically in American social life that the role of grandparents also changed from that of occasional visitor to that of backup parent to the millions of children born to single mothers each year.").

<sup>18</sup> See Weaver, *supra* note 3 at 4.

<sup>19</sup> Some scholars have also argued that the rise of kinship care is part and parcel of a trend reintegrating elders into the nuclear family and a reframing of the legal understanding of caregiving by a network of people, including parents, extended family members, friends, neighbors, and paid caregivers. See e.g., Weaver, *supra* note 3 at 5-6; Melissa Murray, *The Networked Family: Reframing the Legal Understanding of Caregiving and Caregivers*, 94 VA. L. REV. 385, 436-38 (2008). The rise in the number of children in kinship care can also likely be attributed to the requirement put in place in 2008 that child welfare officials notify kin that the child is being removed from the care of parents. See The Fostering Connections to Success and Increasing Adoptions Act of 2008, *supra* note 3. Interdisciplinary and law-specific scholarship, research, and advocacy in the area of kinship care is strong, though sporadic, in terms of law review articles. See e.g., Rankin, *supra* note 3 (for a discussion of why kinship care has not gotten more attention); CHILDREN DEFENSE FUND, FINANCIAL ASSISTANCE FOR GRANDPARENTS AND OTHER RELATIVES RAISING CHILDREN (2004), <http://cdf.childrensdefense.org/site/DocServer/financialassistance.pdf?docID=468> (discussing the need for additional subsidies and resources for kinship caregivers); THE ANNIE E. CASEY FOUNDATION, THE KINSHIP DIVERSION DEBATE (2013), <https://www.aecf.org/resources/the-kinship-diversion-debate/> (discussing whether foster care with relatives should be preferred over foster care placements with non-relatives); Coupet, *supra* note 3 at 609; USING SUBSIDIZED GUARDIANSHIP, *supra* note 10 (Discussing whether permanent guardianship or adoption, or both, should be promoted as permanency options). Children's advocacy groups such as the Children's Defense Fund, the Annie E. Casey Foundation, Grandparents Raising Grandchildren, and Children's Rights have all published reports on these issues as well. See *id.*

<sup>20</sup> This is sometimes referred to as kinship diversion. See KINSHIP DIVERSION DEBATE, *id.*

<sup>21</sup> See *id.*

<sup>22</sup> See Section II, *infra*. See also, Weaver, *supra* note 3 at 5-6; Rankin, *supra* note 3 at 154-55; CHILDREN'S DEFENSE FUND, ET AL., MAKING IT WORK: USING THE GUARDIANSHIP ASSISTANCE PROGRAM (GAP) TO CLOSE THE PERMANENCY GAP FOR CHILDREN IN FOSTER CARE (2012),



increasingly required by law and policy to prioritize kinship care over foster care, and must first seek out family members before placing children in foster care.<sup>23</sup> Kinship diversion saves the state and federal government millions of dollars over time, but this cost savings is likely short lived, as explained further in Section IV.A.1. below.<sup>24</sup>

The trend in kinship care is also not surprising from a social science research and evidence-based perspective. Kinship care is more often than not the best option for children who should not or cannot live with their biological parents. Social science research shows that children living with kin have better outcomes, including increased permanency,<sup>25</sup> than do children placed with non-relatives.<sup>26</sup> Social science research shows that the benefits of kinship care are many and include: minimized trauma;<sup>27</sup> improved child well-being;<sup>28</sup> increased permanency;<sup>29</sup> improved behavioral and mental health outcomes;<sup>30</sup> improved sibling ties;<sup>31</sup> and better preserved cultural identity and

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<https://www.childrensdefense.org/reports/2012/making-it-work-using-the-guardianship-assistance-program-gap-to-close-the-permanency-gap-for-children-in-foster-care-2012-full-report/>; KINSHIP DIVERSION DEBATE, *supra* note 19; USING SUBSIDIZED GUARDIANSHIP, *supra* note 10.

<sup>23</sup> See U.S. DEPARTMENT OF HEALTH AND HUMAN SERVICES, CHILD WELFARE INFORMATION GATEWAY, PLACEMENT OF CHILDREN WITH RELATIVES 2 (2013), <https://www.childwelfare.gov/topics/systemwide/laws-policies/statutes/placement/>; The Fostering Connections to Success and Increasing Adoptions Act of 2008, *supra* note 3.

<sup>24</sup> See *id.*

<sup>25</sup> See Gupta-Kagan, *supra* note 9 at 3.

<sup>26</sup> American Bar Association, Center on Children and the Law, *Kinship Care is Better for Children and Families*, 36 CHILD LAW PRACTICE TODAY 2 (July/August 2017),

[https://www.americanbar.org/groups/child\\_law/resources/child\\_law\\_practiceonline/child\\_law\\_practice/vol-36/july-aug-2017/kinship-care-is-better-for-children-and-families.html](https://www.americanbar.org/groups/child_law/resources/child_law_practiceonline/child_law_practice/vol-36/july-aug-2017/kinship-care-is-better-for-children-and-families.html).

<sup>27</sup> Wilson, D. B., & Chipungu, S. S., *Special edition: Kinship care*, 75 CHILD WELFARE 387–395 (1996).

<sup>28</sup> Tessa Bell and Elisa Romano, *Permanency and Safety Among Children in Foster Family and Kinship Care: A Scoping Review*, 18 TRAUMA, VIOLENCE, AND ABUSE 268-286 (2017) (examining 54 studies that examined permanency and safety among children in foster family and kinship care around the world and concluding that children in kinship care experienced greater permanency, yet lower rates of adoption and reunification with biological parents).

<sup>29</sup> See *id.*

<sup>30</sup> Marc A. Winokur, Amy Holtan, and Keri E. Batchelder, *Systematic Review of Kinship Care Effects on Safety, Permanency, and Well-Being Outcomes*, 28 RESEARCH ON SOCIAL WORK PRACTICE 19-32 (2018) (“[A]s compared to children in foster care, children in kinship care experience fewer behavioral problems and mental health disorders, better well-being, less placement disruption, fewer mental health services, and similar reunification rates.”)

<sup>31</sup> Wulczyn, F. & Zimmerman, E., *Sibling placements in longitudinal perspective*, 27 CHILDREN AND YOUTH SERVICES REVIEW, 27, 741-763 (2005).

community connections.<sup>32</sup> The fact that the law and policy promoting kinship placements has followed these social science research results is largely due to the advocacy of groups like the American Association of Retired Persons (AARP),<sup>33</sup> Grandparents Raising Grandchildren,<sup>34</sup> The Children's Defense Fund,<sup>35</sup> and others.

Despite the clear policies supporting kinship diversion in the child welfare system and social science research strongly backing the continuation of this trend, resources for kinship caregivers are still significantly lacking. In addition, the obstacles faced by kinship caregivers are many. Kinship caregivers are far more likely to be unemployed, to receive government benefits, and to be less educated, as compared with biological parents raising their own children.<sup>36</sup> Many kinship caregivers are elderly and have fixed incomes.<sup>37</sup> In addition, at least 20% of kinship caregivers live in poverty,<sup>38</sup> and few receive subsidies or other financial support from the state or federal government to cover the needs of children in their care.<sup>39</sup> Moreover, kinship caregivers may face costly custody disputes with the children's parents, when and if the biological parents are present in the children's life.<sup>40</sup> Kinship caregivers without a formal legal status or power

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<sup>32</sup> Center on Children and the Law, *supra* note 26 at 2-4; Bell and Romano, *supra* note 28 at 2. *See also*, James A. Rosenthal and Rebecca L. Hegar, *Kinship Guardianship, Adoption, and Foster Care: Outcomes from a U.S. National Sample*, 10 JOURNAL OF PUBLIC CHILD WELFARE 237-254 (2016), <http://dx.doi.org/10.1080/15548732.2016.1176610>.

<sup>33</sup> *See* AARP, FAMILY CAREGIVING, <https://www.aarp.org/caregiving/>.

<sup>34</sup> *See* GRANDPARENTS RAISING GRANDCHILDREN, <http://www.raisingyourgrandchildren.com/>.

<sup>35</sup> *See* CHILDREN'S DEFENSE FUND, KINSHIP CARE (2016), <http://www.childrensdefense.org/policy/welfare/kinship-care.html>.

<sup>36</sup> *See Id.* at 129-30; AARP, GRANDFACTS SHEETS, NATIONAL (2015), <https://www.aarp.org/relationships/friends-family/grandfacts-sheets/.html>.

<sup>37</sup> Rankin, *supra* note 3 at 162.

<sup>38</sup> *See id.*

<sup>39</sup> *See* Kids Count, *supra* note 6.

<sup>40</sup> *See* Coupet, *supra* note 3 at 609-10.

of attorney may also face an inability to make key educational and healthcare decisions on behalf of the children in their care.<sup>41</sup>

When kinship caregivers seek a formal legal status, such as temporary custody, permanent guardianship, or adoption, they face additional obstacles. Available federal subsidies for both adoptions and permanent guardianship proceedings favor children in licensed foster care.<sup>42</sup> Kinship foster care providers in all fifty U.S. states can receive federal subsidies to adopt the children in their care.<sup>43</sup> Foster parents receive subsidies to cover court costs and fees related to the legal proceedings, including court costs, attorney's fees, home study fees, etc.<sup>44</sup> The costs and fees related to these proceedings can be substantial and the foster parents often receive the subsidies regardless of their ability to pay.<sup>45</sup> Yet, no federal subsidies are directed at private kinship adoptions.<sup>46</sup> In addition, in thirty-seven U.S. states, foster care providers can receive subsidies to establish a permanent guardianship for the children in their care.<sup>47</sup> Again, no such subsidies exist for the costs related to private kinship guardianship proceedings.<sup>48</sup>

In the 1980s, the federal government made an affirmative decision to focus on subsidies for adoptions out of foster care.<sup>49</sup> Decades later, in 2008, subsidies for permanent guardianships out of foster care were made available, after child advocates

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<sup>41</sup> See e.g., Coupet, *supra* note 3 at 604; Kathleen Meara, *What's in a name? Defining and granting a legal status to grandparents who are informal primary caregivers of their grandchildren*, 52 FAM. CT. REV. 128, 129 (2014) (discussing grandparents' legal status).

<sup>42</sup> See Section III.3., *infra*.

<sup>43</sup> *Miller v. Youakim*, 440 U.S. 125 (1979).

<sup>44</sup> See Section III.D.3., *infra*. However, the subsidies available in many states do not cover the entirety of the costs and fees related to the legal proceedings. In addition, the subsidies are often available in the form of a reimbursement payment, meaning the foster parents must come up with the funds upfront and wait to be reimbursed on the back end, which is impossible for some. See *id.* These subsidies in form and amount are also not sufficient for many foster caregivers living in poverty.

<sup>45</sup> *Id.*

<sup>46</sup> Gupta-Kagan, *supra* note 9 at 14.

<sup>47</sup> *Id.*

<sup>48</sup> *Id.*

<sup>49</sup> See Adoption Assistance and Child Welfare Act of 1980 (P.L. 96-272).

and policymakers voiced concerns regarding the phenomenon of more and more children in the care of kinship caregivers who refused to move to terminate parental rights.<sup>50</sup> However, the federal government continues to refuse to provide subsidies to informal kinship caregivers for the costs of adoptions or permanent guardianships.<sup>51</sup> This is true whether or not the kinship caregiver family is living in poverty, or receives public benefits such as Medicaid and Food Stamps.

In most U.S. states the lack of federal subsidies for the legal costs and fees is less of a problem, because waivers are available for at least some of the court costs and additional nonrecurring costs of adoptions and permanent guardianships<sup>52</sup> for kinship caregivers living in poverty.<sup>53</sup> In addition, in thirty-nine U.S. states and the District of Columbia, statutes provide for a waiver of a home study requirement or a waiver for the home study fee for kin.<sup>54</sup>

However, several U.S. states require the upfront payment of these costs and fees, with no exceptions, regardless of kinship or poverty status. Court costs for kinship

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<sup>50</sup> See Fostering Connections to Success and Increasing Adoptions Act of 2008, *supra* note 3; Mark F. Testa and Jennifer Miller, *Evolution of Private Guardianship as a Child Welfare Resource*, CHILD WELFARE FOR THE TWENTY-FIRST CENTURY: A HANDBOOK OF PRACTICES, POLICIES, AND PROGRAMS 407 (2005); Gupta-Kagan, *supra* note 9 at 14.

<sup>51</sup> See *Glanowski v. N.Y.*, 225 F. Supp. 2d 292 (W.D. N.Y. 2002).

<sup>52</sup> Nonrecurring costs of kinship adoptions and permanent guardianships include home study costs, criminal background check costs, etc. Also termed nonrecurring expenses, nonrecurring fees. See The Adoption Assistance Act and The Fostering Connections Act, *supra* notes 49-50.

<sup>53</sup> See Section III.F., *infra*.

<sup>54</sup> Alabama, Alaska, Arizona, Arkansas, California, Colorado, Connecticut, Delaware, Florida, Idaho, Illinois, Iowa, Kansas, Kentucky, Louisiana, Maine, Michigan, Mississippi, Missouri, Montana, Nebraska, Nevada, New Hampshire, New Jersey, New Mexico, North Carolina, North Dakota, Ohio, Oklahoma, Oregon, Rhode Island, South Carolina, South Dakota, Tennessee, Utah, Vermont, Virginia, Washington, Wyoming, and the District of Columbia. See U.S. DEPARTMENT OF HEALTH AND HUMAN SERVICES, ADMINISTRATION FOR CHILDREN AND FAMILIES, CHILD WELFARE INFORMATION GATEWAY, HOME STUDY REQUIREMENTS FOR PROSPECTIVE PARENTS IN DOMESTIC ADOPTIONS (2015), [https://www.childwelfare.gov/pubPDFs/homestudyreqs\\_adoption.pdf](https://www.childwelfare.gov/pubPDFs/homestudyreqs_adoption.pdf). In Massachusetts, there is no waiver, but there is a fund to cover the home study fees for indigent litigants. See Commonwealth of Massachusetts, Indigency (waiver of court fees) (2018), <https://www.mass.gov/indigency-waiver-of-court-fees>. The author of this article also completed a fifty state survey of the laws, regulations, and practices related to waivers of court costs, home study requirements and fees, and criminal background check requirements and fees for private kinship adoptions and permanent guardianships. This information is on file with the author.

adoptions and permanent guardianships are not guaranteed to be waived in Alabama,<sup>55</sup> Iowa,<sup>56</sup> Kansas,<sup>57</sup> Ohio, and Wyoming,<sup>58</sup> regardless of whether or not the caregiver is living in poverty. The state of Ohio stands alone as the only state that affirmatively refuses to subsidize any of these costs or fees or provide a waiver for kinship caregivers living in poverty who seek to adopt or establish a permanent guardianship for the children in their care.

With kinship diversion on the rise,<sup>59</sup> this lack of subsidization for informal kinship caregivers living in poverty is a huge and growing problem; more than 224,000 children in kinship care have already been affected.<sup>60</sup> Entrenched state and federal policies divert children away from foster care to kinship care, and at the same time limit adoption and guardianship subsidies to children in foster care. While the system of kinship diversion helps child welfare agencies avoid costs associated with foster care, this cost avoidance is only temporary and comes at the detriment of the children the agencies are meant to serve and protect.<sup>61</sup> Without the subsidization or waiver of court costs and associated fees, kinship caregivers living in poverty, like Sharon Gurley, the client described above, cannot access courts to achieve a permanent legal status for the children in their care.

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<sup>55</sup> See ALABAMA FOSTER AND ADOPTIVE PARENT ASSOCIATION, ADOPTION SUBSIDIES, <https://afapa.org/2016/05/12/adoption-subsidy/>. See also Code of Ala. 26-10-A-27 & 26-10A-28.

<sup>56</sup> See e.g., IOWA JUDICIAL BRANCH, COURT FORMS, <http://www.iowacourts.gov/for-the-public/court-forms/>.

<sup>57</sup> See e.g., KANSAS JUDICIAL COUNCIL, LEGAL FORMS, <http://www.kansasjudicialcouncil.org/legal-forms>.

<sup>58</sup> See Wyoming Title XIV; Email on file with the author from an attorney in Wyoming regarding waivers of court costs for kinship caregivers living in poverty.

<sup>59</sup> See e.g., Weaver, *supra* note 3 at 5-6; Rankin, *supra* note 3 at 154-55. See also CHILDREN'S DEFENSE FUND, ET AL., MAKING IT WORK, *supra* note 22; KINSHIP DIVERSION DEBATE, *supra* note 19; USING SUBSIDIZED GUARDIANSHIP, *supra* note 10.

<sup>60</sup> In 2018, there were 67,000 children in kinship care in Alabama, 20,000 children in kinship care in Iowa, 20,000 children in kinship care in Kansas, 113,000 children in kinship care in Ohio, and 4,000 children in kinship care in Wyoming. See Kids Count, *supra* note 6.

<sup>61</sup> See Section IV.A.1., *infra*.

Kinship caregivers should not have to choose between education, healthcare, adequate housing, food, and permanency options, for the children in their care. Moreover, children should not miss out on an opportunity for permanent care because the state or local government is trying to avoid costs. In the long term, the child welfare agencies, and thus the state and federal governments, will bear the burden of additional costs when the children faced increased disruption in care, achieve permanency less often, receive fewer services, experience more trauma, and end up back in the child welfare system or otherwise involved with the justice system.<sup>62</sup>

This article focuses on the refusal of U.S. states and the federal government to subsidize the nonrecurring costs of private kinship adoptions and permanent guardianships for kinship caregivers living in poverty.<sup>63</sup> When kinship caregivers are living in poverty and cannot afford the out-of-pocket costs of adoption or guardianship proceedings for children in their care, the state and federal government should provide subsidies or waivers of the costs. The subsidization or waiver of the nonrecurring costs of adoption and permanent guardianship proceedings would achieve the stated purposes of the child welfare system—prevention and permanency<sup>64</sup>—and would do so in a more cost effective manner, respecting the human rights of kinship caregivers living in poverty and the children in their care.

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<sup>62</sup> See Gupta-Kagan, *supra* note 9. See also Section IV.A.1., *infra*.

<sup>63</sup> There are children's rights advocates who argue that adoption when biological parents are living is never a better idea than permanent guardianship, including when biological parents give affirmative consent for the adoption. See *e.g.*, MAKING IT WORK, *supra* note 22. There are also those who continue to advocate for adoptions as the best option, as opposed to permanent guardianships, for children who cannot be reunited with their biological parents. See *e.g.*, NAT'L COUNCIL OF JUVENILE AND FAMILY COURT JUDGES, FOREVER FAMILIES: IMPROVING OUTCOMES BY ACHIEVING PERMANENCY FOR LEGAL ORPHANS 18 (2013), [http://www.ncjfcj.org/sites/default/files/LOTAB\\_3\\_25\\_13\\_newcover.pdf](http://www.ncjfcj.org/sites/default/files/LOTAB_3_25_13_newcover.pdf). Again, this article does not argue whether kinship adoptions or permanent guardianships are best for children whose parents are unable or unwilling to care for them. This article instead examines the barriers that exist when kinship caregivers living in poverty wish to adopt or move for permanent guardianship of the children in their care.

<sup>64</sup> See 42 USC *et seq.*

Part II of this article examines the pathways to permanency that are available to kinship caregivers, including informal kinship care, caregiver affidavits and powers of attorney, foster care, permanent guardianship, and adoption. Part III of this article discusses state and federal subsidies and waivers available for the nonrecurring costs of adoptions and permanent guardianships for kinship caregivers living in poverty. Part IV of this article analyzes the available subsidies and waivers, both for cost-effectiveness and congruence with human rights standards, and argues for waiver of the nonrecurring costs associated with kinship adoptions and permanent guardianships for kinship caregivers living in poverty. Part V concludes with specific policy recommendations to promote permanency and human rights for hundreds of thousands of children and their kinship caregivers across the U.S.

## **II. Pathways to Permanency**

Permanency is central to child welfare law.<sup>65</sup> Ideally a child is permanently in the care and custody of his or her parents. Constitutional family law principles make the parental relationship with a child paramount, and require a parent to direct the care, custody, and control of their children.<sup>66</sup> Under these principles, only parents may make important decisions on behalf of their children, such as consent to health care and enrollment in a particular school.<sup>67</sup> Parental decision-making must be given deferential treatment unless the parent's conduct does not meet the minimum standards of

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<sup>65</sup> See Gupta-Kagan, *supra* note 9 at 5 (“Permanency is a pillar of child welfare law.”).

<sup>66</sup> *Troxel v. Granville*, 540 U.S. 57 (2000); Elizabeth Barker Brandt, *DeFacto Custodians: A Response to the Needs of Informal Kin Caregivers?*, 38 FAM. L.Q. 291, 295 (2004) (citing to *Troxel v. Granville*, *id.*).

<sup>67</sup> See *id.*

parenting.<sup>68</sup> Further, the state may not uphold the substitution of a third party's judgment for that of a fit parent.<sup>69</sup>

When a state child welfare agency determines that children cannot safely remain in the care of their parents due to abuse, neglect, or dependency, the agency will remove the children from the custody of their parents and place the children in a substitute care setting.<sup>70</sup> At times children placed in the care of foster parents.<sup>71</sup> At other times children are voluntarily placed by their parents with a caretaker.<sup>72</sup> The caregiver sometimes chooses to seek a formal legal status from a court, such as temporary custody or a permanent guardianship, as described below.<sup>73</sup> Other caregivers obtain a power of attorney granted by a biological parent, which allows them to make key health and educational decisions regarding the children in their care.<sup>74</sup> The majority of kinship caregivers are raising the children in their care without any sort of formal legal status.<sup>75</sup> The living arrangement is an informal, private agreement between the parents and caregivers.<sup>76</sup>

Child welfare law in the U.S. recognizes that children “generally do better with legally permanent caretakers”<sup>77</sup> and promotes various pathways to permanency,

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<sup>68</sup> *Id.*

<sup>69</sup> See *Parham v. J.R.*, 442 U.S. 584, 602 (1979). The U.S. Supreme Court has stated that “[t]he fundamental liberty interest of natural parents in the care, custody, and management of their child does not evaporate simply because they have not been model parents or have lost temporary custody of their child to the State.” *Santosky v. Kramer*, 455 U.S. 745, 753 (1982).

<sup>70</sup> See e.g., J. BART KLIKA AND JON R. CONTE, *THE ASPAC HANDBOOK ON CHILD MALTREATMENT* 222 (4<sup>th</sup> Ed. 2017). See e.g., OHIO DEPARTMENT OF JOB AND FAMILY SERVICES, FOSTER CARE LICENSING, <https://jfs.ohio.gov/ocf/fostercarelicensing.stm>.

<sup>71</sup> See Weaver, *supra* note 3; Rankin, *supra* note 3; Coupet, *supra* note 3.

<sup>72</sup> For a discussion of why children are increasingly placed with kinship caregivers, see Section I, *supra*.

<sup>73</sup> See Section II, *infra*.

<sup>74</sup> See e.g. Ohio Caretakers Affidavit,

<https://www.supremecourt.ohio.gov/JCS/CFC/DRForms/caretakerAuthAff.pdf>.

<sup>75</sup> See e.g., Coupet, *supra* note 3 at 604; Meara, *supra* note 41 at 129 (discussing grandparents' legal status).

<sup>76</sup> *Id.*

<sup>77</sup> Gupta-Kagan, *supra* note 9 at 5.



including reunification with biological parents, as well as adoption and permanent guardianships. Foster care is treated as a temporary status and is supposed to be limited in duration.<sup>78</sup>

This section of the article examines the pathways to permanency available to kinship caregivers, including informal kinship care, affidavits and powers of attorney, foster care, permanent guardianship, and adoption. Each permanency pathway is defined, a brief history of the pathway is provided, and the legal procedure and the constraints on children and caregivers in each pathway are analyzed. The subsidization schemes available for kinship caregivers for each of these permanency pathways are discussed in the following section, Section III, below.

#### **A. Informal Kinship Care**

The majority of children in kinship care do not have a court-recognized or legal relationship with their kinship caregiver.<sup>79</sup> Most are in informal kinship care, which means the kinship caregiver has no legal status in relation to, and absolutely no legal decision-making authority regarding, the children in their care.<sup>80</sup> The lack of legal decision-making authority causes problems when, for example, the kinship caregiver wishes to enroll the child in school or consent to medical treatment for the child.<sup>81</sup> In addition, “the lack of clarity about a caregiver’s legal status likely undermines the stability of the caregiver-child relationship”.<sup>82</sup>

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<sup>78</sup> *Id.*

<sup>79</sup> See Kids Count, *supra* note 6.

<sup>80</sup> See e.g., Coupet, *supra* note 3 at 604; Meara, *supra* note 41 at 129.

<sup>81</sup> *Id.*

<sup>82</sup> *Id.*

Informal kinship care has a long history in the U.S. and abroad.<sup>83</sup> Children from impoverished families were placed out as indentured servants in the eighteenth and nineteenth centuries, sometimes by local authorities and sometimes by their own parents.<sup>84</sup> In particular, the tradition of kinship care has been and remains prevalent in low-income communities and communities of color.<sup>85</sup> Today there are approximately 2.6 million children in informal kinship care in the U.S.<sup>86</sup> This means that there are five times more children in private kinship care than children in foster care in the U.S.<sup>87</sup>

### **B. Caregiver Affidavit or Power of Attorney**

Biological parents are sometimes willing and able to provide authority and consent to kinship caregivers to make medical, educational, and other important decisions regarding the children in their care. Many states formally recognize a grant of authority from a legal parent to a kinship caregiver through a written affidavit or power of attorney.<sup>88</sup> These relatively new legal documents are readily available at very low cost

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<sup>83</sup> See Tim Hacsí, *From Indenture to Family Foster Care: A Brief History of Child Placing*, 74 CHILD WELFARE 162 (1995) (“Throughout American history, some children from impoverished families have always been reared in the homes of other people...”); Weaver, *supra* note 3 at 14-15; Coupet, *supra* note 3 at 605 (“The rearing of another’s child is among the oldest literary themes”). Kinship care has also long been popularized in literature and other popular culture. For example, in *A Secret Garden*, newly orphaned Mary Lennox is sent to live with her uncle. See FRANCES HODGSON BURNET, *A SECRET GARDEN* (1911).

<sup>84</sup> See *id.* Indentured servitude of children has been popularized in books, movies, etc. For example, Cinderella is forced to be a maid to her stepmother and stepsisters after her father dies. See *CINDERELLA* (Walt Disney, 1950).

<sup>85</sup> See Weaver, *supra* note 3 at 15-16; Coupet, *supra* note 3 at 597.

<sup>86</sup> See Kids Count, *supra* note 6.

<sup>87</sup> See *id.*

<sup>88</sup> See e.g., Cal. Fam. Code §6552 (Caregiver’s Authorization Affidavit authorizes enrollment of a minor in school and school-related medical care); Del. Code. Ann Tit. 14 §202 (Caregivers School Authorization confirms caregiver’s authority to enroll a child in school. Listed conditions must be met including that the parent or guardian is incarcerated, unavailable due to natural disaster, and more); Ga.Code Ann. §19-9-122 (Power of Attorney for the Care of a Minor Child allows a parent to delegate caregiving authority to a relative or nonrelative to enroll child in school, consent to medical treatment, etc); Ohio Rev. Code Ann. § 3313.64 (Caretaker Affidavit or Residential Grandparent Power of Attorney allows grandparents to enroll children in their care in school and consent to medical treatment). However, some states do not allow parents to grant authority to caretakers for consent for medical treatment for children. See e.g., Cal. Fam. Code §6552; Del. Code. Ann Tit. 14 §202; Haw. Rev. Stat. Ann. §302A-482.

to parents and caregivers.<sup>89</sup> The power of attorney or caregiver affidavit forms can be found at local children's agencies or online. The forms must be signed by the parent and caregiver, usually must be notarized, and are often filed with the appropriate court in the jurisdiction where the caregiver resides.<sup>90</sup> Reliance by kinship caregivers on the decision making authority granted through an affidavit or power of attorney is problematic, however. These documents usually provide for temporary authority<sup>91</sup> and the parent can rescind the document at any time.<sup>92</sup> In addition, most private health insurance providers require a court order for a third party to add a child to a health insurance plan.<sup>93</sup>

Moreover, quite a few states do not have laws recognizing kinship caregiver's authority to consent to health care or educational placement on behalf of a child in their care, regardless of any affidavit or power of attorney granted by the legal parent.<sup>94</sup> In these states, sometimes local policies dictate whether or not a caregiver may provide consent for a child without approval from the parent.<sup>95</sup> In other states, a court order is

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<sup>89</sup> The first Caregiver Affidavit statutes were passed in the 1970s and more are still being enacted today. See *e.g.*, Idaho Code Ann. §15-5-104, as added by 1971, ch. 111, § 1, p. 233; Ga. Code Ann. §19-9-122 with new section added by Ga. L. 2018, p. 19, § 2-2/HB 159.

<sup>90</sup> See *e.g.*, Kentucky Caregiver Affidavit, [http://kyyouth.org/wp-content/uploads/2014/10/CaregiverAffidavit\\_Model\\_10.28.14.pdf](http://kyyouth.org/wp-content/uploads/2014/10/CaregiverAffidavit_Model_10.28.14.pdf); Ohio Caretaker Authorization Affidavit Form, <https://www.supremecourt.ohio.gov/JCS/CFC/DRForms/caretakerAuthAff.pdf>; Montana Caretaker Affidavit, <http://www.montanagrandparents.org/documents/caretakerrelativeeduaff-1.pdf>.

<sup>91</sup> See *e.g.*, Idaho Code. Ann. §15-5-104 (Power of Attorney assigned to anyone not a grandparent or sibling of the child is only valid for up to six months); Ohio Rev. Code §3313.64(F)(4) (Caregiver Affidavit good for up to twelve months for school enrollment purposes).

<sup>92</sup> Meara, *supra* note 41 at 130; Carole B. Cox, *Policy and Custodial Grandparents*, 11 MARQ. ELDER'S ADVISOR 281, 282-283 (2010).

<sup>93</sup> See *id.*; Brandt, *supra* note 66 at 295-6.

<sup>94</sup> See AMERICAN BAR ASSOCIATION, EDUCATIONAL CONSENT AND/OR SCHOOL ENROLLMENT LAW CHART, [http://www.americanbar.org/content/dam/aba/migrated/child/PublicDocuments/educational\\_consent\\_authcheckdam.pdf](http://www.americanbar.org/content/dam/aba/migrated/child/PublicDocuments/educational_consent_authcheckdam.pdf) (Alabama, Alaska, Arizona, Arkansas, Colorado, Florida, Georgia, Illinois, Kansas, Kentucky, Maine, Massachusetts, Michigan, Minnesota, Mississippi, Montana, Nebraska, Nevada, New Hampshire, North Dakota, Oregon, Pennsylvania, South Dakota, Tennessee, Texas, Virginia, Washington, West Virginia, and Wisconsin, all do not have laws recognizing a kinship caregiver's authority to consent to healthcare or educational placement on behalf of a child in their care).

<sup>95</sup> See Meara, *supra* note 41 at 131; American Bar Association, *id.*

required for the kinship caregiver to make medical and/or educational decisions on behalf of the children in their care.<sup>96</sup>

In addition to these decision-making limitations, kinship caregivers with caregiver affidavits or powers of attorney may experience problems applying for government benefits on behalf of children in their care. Individual states take different approaches to this issue.<sup>97</sup>

The ease of the process and access to caregiver affidavits or powers of attorney make these ideal for many caregivers, especially in exigent situations where the longer term and higher cost—but more permanent—legal options described below are not immediately available. However, given the temporary, unpredictable nature of the caregiver affidavit or power of attorney, these options are likely not adequate for most kinship caregivers even in the short term.

### **C. Foster Care**

Foster care is temporary, out of home care, provided by a state-approved family, group home, or other residential care facility.<sup>98</sup> Before placing children with non-kin, or a facility, the agency is required to first try to place the children with family members or close family friends in kinship care.<sup>99</sup> Sometimes these kinship caregivers are licensed

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<sup>96</sup> See e.g., Wyo. Stat. Ann. § 3-2-302.

<sup>97</sup> States participate in a Federal block grant program in which they establish their own eligibility criteria for benefits. See The Professional Responsibility and Work Reorganization Act of 1997, Pub. Law 104-193, 110 Stat. 2105, 2112-29 (1996).

<sup>98</sup> See U.S. DEPARTMENT OF HEALTH & HUMAN SERVICES, ADMINISTRATION FOR CHILDREN & FAMILIES, CHILD WELFARE INFORMATION GATEWAY, FOSTER CARE, <https://www.childwelfare.gov/topics/outofhome/foster-care/>. A “foster family home” is defined as “the home of an individual or family licensed or approved as meeting the standards established by the State licensing or approval authority(ies) or with respect to foster family homes on or near Indian reservations, by the tribal licensing or approval authority(ies)), that provides 24-hour out-of-home care for children” 45 CFR § 1355.20

<sup>99</sup> 48 states, Puerto Rico and the District of Columbia require preference or priority for relative placements. See PLACEMENT OF CHILDREN WITH RELATIVES, *supra* note 23 at 2. In addition, the federal

as foster care providers and sometimes not.<sup>100</sup> If kinship care is not an option, then the agency will try to place the children with a licensed foster family who are non-kin.<sup>101</sup>

The foster care provider is responsible for providing shelter, food, clothing, supervision, education and meeting the other needs of the children placed in their care.<sup>102</sup> In addition, the foster care provider must promote the safety, permanency, and well-being of the children in their care.<sup>103</sup> The goal of foster care is to safely return the children to their biological parents or, when that is not possible, “to move the children into an adoptive or permanent home.”<sup>104</sup> The foster care provider cares for children until a court decides that the children can return home safely or that they should be placed with adoptive parents or permanent guardians.<sup>105</sup>

While in foster care, children remain in the legal custody of the state child welfare agency, which has the ultimate decision-making authority over the children, including regarding medical care, education, and decisions whether or not to keep the children in the foster family home and/or to move for permanent custody.<sup>106</sup> The foster care provider has daily responsibilities for the care of the children, but does not have legal authority.<sup>107</sup>

Foster care has a long history in North America. The first child was purportedly placed in foster care in 1636, only thirty years after the founding of the Jamestown

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government requires that kin be given notice that a child has been removed. See The Fostering Connections to Success and Increasing Adoptions Act of 2008, *supra* note 3.

<sup>100</sup> See *id.* For example, in Kansas 2,202 children were living in foster care with relatives and 3,642 were living in foster care with non-relatives in 2016. See Kids Count, *supra* note 6.

<sup>101</sup> See *id.*

<sup>102</sup> See e.g., INDIANA DEPARTMENT OF CHILD SERVICES, FOSTER PARENT PROVIDER MANUAL 3 (2013), <https://www.in.gov/dcs/2985.htm>.

<sup>103</sup> See *id.*; U.S. DEPARTMENT OF HEALTH AND HUMAN SERVICES, ADMINISTRATION OF CHILDREN AND FAMILIES, CHILDREN'S BUREAU, WHAT WE DO (2018), <https://www.acf.hhs.gov/cb/about/what-we-do>.

<sup>104</sup> See *id.*

<sup>105</sup> FOSTER CARE LICENSING, *supra* note 70.

<sup>106</sup> See FOSTER CARE, *supra* note 99.

<sup>107</sup> See *id.*

Colony.<sup>108</sup> Pennsylvania became the first U.S. state to require a foster care license in 1885, and most states followed shortly thereafter with regulations requiring state supervision of foster parents.<sup>109</sup> Subsidization of foster care by U.S. states also has a long history,<sup>110</sup> yet the federal government began subsidizing foster care much more recently.<sup>111</sup> In 1961, Title IV-A of the Social Security Act made federal matching funds available to states to cover the costs associated with children placed in foster care by a court order.<sup>112</sup> Wide expansion of the foster care system followed federal subsidization, with over 100,000 children in foster care by 1976.<sup>113</sup> Approximately 428,000 children are in foster care across the U.S. today.<sup>114</sup>

Approximately 50% of children in foster care are reunified with their biological parent(s) after being placed in foster care.<sup>115</sup> Between 22-25% of children are adopted out of foster care and 10-15% are placed in permanent guardianships.<sup>116</sup> The remaining 5-10% of children remain in foster care until they age out or are emancipated.<sup>117</sup>

#### **D. Guardianship**

Guardianship, sometimes referred to as custody, is a legal vehicle by which a caregiver can obtain legal custodial rights to the children in their care.<sup>118</sup> Permanent

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<sup>108</sup> See Hacsí, *supra* note 83; Christina Dugger Sommer, *Empowering Children: Granting Foster Children the Right to Initiate Parental Rights Termination Proceedings*, 79 CORNELL L. REV. 1200 (1994) (citing to NATIONAL ACTION FOR FOSTER CHILDREN: A SURVEY OF ACTIVITIES BASED ON REPORTS SUBMITTED BY STATES AND COMMITTEES, November 1974-December 1975, at 121, 122 (1975)).

<sup>109</sup> See THE NATIONAL FOSTER PARENT ASSOCIATION, HISTORY OF FOSTER CARE IN THE UNITED STATES, <https://nfpaonline.org/page-1105741>; DEBORAH SCHILLING WOLFE, ET AL, FOSTER CARE: CHILD WELFARE'S RESPONSIBILITY AND CHALLENGE (2013), <https://fieldcenteratpenn.org/wp-content/uploads/2013/05/2018.05.31-APSAC-Foster-Care-Child-Welfares-Responsibility.pdf>.

<sup>110</sup> Massachusetts was the first state to subsidize foster families in 1885. See WOLFE, *id.*

<sup>111</sup> See Hacsí, *supra* note 83.

<sup>112</sup> See *id.* For more on subsidization of foster care, see Section III.B., *infra*.

<sup>113</sup> *Id.*

<sup>114</sup> See Kids Count, *supra* note 6.

<sup>115</sup> AFCARS, *supra* note 8 at 3.

<sup>116</sup> *Id.*

<sup>117</sup> *Id.*

<sup>118</sup> See Gupta-Kagan, *supra* note 9 at 5.

guardianship grants legal custody to a non-parent—such as a kinship caregiver—for an indefinite term without terminating the legal relationship between the parents and child.<sup>119</sup> Temporary guardianship grants legal custody to a non-parent for a specific temporary period of time.<sup>120</sup>

In the U.S., guardianships have a longer legal history than adoption and have been an option in child welfare cases since at least the 1930s.<sup>121</sup> Yet, guardianships were infrequently used until the 1990s within the child welfare system.<sup>122</sup> Until recently, child welfare law continued to focus on a “binary approach”<sup>123</sup>—reunification with biological parents or termination of parental rights and adoption by new parents.<sup>124</sup> Today, approximately 9-10% of children exiting foster care in the U.S. are entering into guardianships.<sup>125</sup> As of 2013, at least 33,015 children were in permanent guardianships across the U.S.<sup>126</sup>

States vary widely in terms of statutes and common law regarding permanent guardianships and child custody in general. Some states allow temporary guardianship for a period of ninety days, with possible renewal periods.<sup>127</sup> Others allow a temporary guardianship to continue much longer or indefinitely. Practices also vary regarding the

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<sup>119</sup> See Raymond C. O'Brien, *Reasonable Efforts and Parent-Child Reunification*, 2013 MICH. ST. L. REV. 1029 (2013); Glenna Goldis, *When Family Courts Shun Adversarialism*, 18 UC DAVIS J. JUV. L. & POL'Y 195, 209 (2014); Gupta-Kagan, *supra* note 9 at 13.

<sup>120</sup> See *e.g.*, Mass. Gen. Laws ch. 190B, § 5-204(b)(2012).

<sup>121</sup> Gupta-Kagan, *supra* note 9 at 12.

<sup>122</sup> *Id.*

<sup>123</sup> *Id.* at 5.

<sup>124</sup> *Id.*

<sup>125</sup> See U.S. DEPARTMENT OF HEALTH AND HUMAN SERVICES ADMINISTRATION FOR CHILDREN AND FAMILIES ADMINISTRATION ON CHILDREN, YOUTH AND FAMILIES CHILDREN'S BUREAU, CHILD WELFARE OUTCOMES 2010-2014: A REPORT TO CONGRESS (2014), [https://www.acf.hhs.gov/sites/default/files/cb/cwo10\\_14.pdf#page=38](https://www.acf.hhs.gov/sites/default/files/cb/cwo10_14.pdf#page=38);

<sup>126</sup> This was the number of children receiving GAP assistance in 2013. See CHILDREN'S DEFENSE FUND, THE TITLE IV-E GUARDIANSHIP ASSISTANCE PROGRAM (GAP): AN UPDATE ON IMPLEMENTATION AND MOVING GAP FORWARD 7 (Sept. 2015), <http://www.grandfamilies.org/Portals/0/Title%20IV-E%20GAP%20Update.pdf>.

<sup>127</sup> See *e.g.*, Mass Gen. Laws, *supra* note 120.

petition required for guardianship, proof of facts required, and whether or not a hearing is required.<sup>128</sup> In Ohio, for example, a kinship caregiver can petition the court and receive temporary custody of children almost immediately via an ex parte motion, without a hearing, in the case of an emergency.<sup>129</sup> All states require that the child is already living with the caregiver petitioning for temporary guardianship.<sup>130</sup> All guardianships are available only by court order and not through any non-legal avenue. Some states require that the petitioner for guardianship provide clear and convincing evidence that the parents are unfit.<sup>131</sup>

The legal status of guardianship is granted by a court of law via a court order giving physical custody of the child and decision-making powers to someone other than the child's legal parents.<sup>132</sup> A guardianship does not terminate the child's parents' rights. The former parents are given the status of non-custodial parents, and the rights and obligations of the parents are detailed in the court order.<sup>133</sup> The parents typically retain visitation rights, as well as other ancillary rights such as the right to choose the religious education of the child.<sup>134</sup> The former parents also have the right to petition the court to terminate or modify the guardianship later on, yet the guardianship is ongoing until the child ages out.<sup>135</sup> The number of children in permanent guardianships is difficult to track. However, at least 33,000 children received guardianship assistance in

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<sup>128</sup> Glenna Goldis, *supra* note 119 at 210. *See also* Brandt, *supra* note 66 at 300-312 (discussing Defacto Custodian Statutes that have been enacted across the U.S. and provide a clear process for caregivers who seek a court ordered legal status with regard to the children in their care).

<sup>129</sup> The author of this article has an ex parte motion and judge's decision on file reflecting this procedure.

<sup>130</sup> *Id.*

<sup>131</sup> *Id.*

<sup>132</sup> *Id.*

<sup>133</sup> *Id.*

<sup>134</sup> Gupta-Kagan, *supra* note 9 at 13.

<sup>135</sup> *See e.g.*, D.C. Code §16-2395(a) ("Any party may move the court to modify, terminate, or enforce a guardianship order ..."); D.C. Code §16-2395(d) (2001) (requiring proof of "a substantial and material change in the child's circumstances ... and that it is in the child's best interests to modify or terminate the guardianship order"). *See also*, Gupta-Kagan, *supra* note 9 at 13.



2013 and that the total number of children in kinship guardianships is much higher as not all are eligible for assistance.<sup>136</sup>

Unlike foster care and caregiver affidavits, guardianships require a kinship caregiver to petition a court of law, pay court costs, attorney's fees, and more, and navigate the legal process. While some caregivers may be savvy enough to find an attorney or pro se forms online, many will not. The court process also takes time: time away from work and time away from the children in their care.<sup>137</sup> The upfront out-of-pocket costs are also a huge obstacle for many kinship caregivers, especially those living in poverty.<sup>138</sup>

Permanent guardianship is an increasingly popular alternative to adoption.<sup>139</sup> Research has shown that ongoing relationships with parents benefit children immensely throughout life, regardless of the parents' circumstances and even if there is a history of abuse, neglect, and dependency.<sup>140</sup> Moreover, "guardianships provide permanency that is just as secure, lasting, and safe for children as adoption."<sup>141</sup> However, while parents may readily agree to a temporary guardianship, especially in exigent circumstances, they may be more reluctant to agree to a permanent guardianship, and the burden of evidence required by courts to establish a permanent guardianship is usually higher than a temporary guardianship making the court proceedings more contentious. All of

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<sup>136</sup> See Section III.C.3., *infra*.

<sup>137</sup> Court hearings often require caregivers to find child care as children are not allowed in the courtroom. See *e.g.*, Gupta-Kagan, *supra* note 9 at 14; Testa and Miller, *supra* note 50.

<sup>138</sup> Other scholars and practitioners point out that many caregivers may be uncomfortable with initiating adversarial proceedings against the parents, in addition to these other identified obstacles. See *e.g.*, *id.*

<sup>139</sup> See Gupta-Kagan, *supra* note 9 at 5.

<sup>140</sup> See *id.* See also Eliza Patten, *The Subordination of Subsidized Guardianship in Child Welfare Proceedings*, 29 N.Y.U. REV. L. & SOC. CHANGE 237, 257 (2004).

<sup>141</sup> Gupta-Kagan, *supra* note 9 at 13.

this will weigh heavily upon the shoulders of a kinship caregiver who may be struggling to get by as it is.<sup>142</sup>

### **E. Adoption**

Kinship adoption, or the adoption of family members by non-parent relatives or family friends, may be as old as “human society itself”,<sup>143</sup> yet adoption practices have dramatically shifted over time.<sup>144</sup> Adoptions in ancient times were focused on the rights of inheritance, the right to take the adoptive parents’ name, and the termination of biological parents’ rights.<sup>145</sup> Ancient law did not permit women, persons with children of their own, or persons of reproductive age to adopt.<sup>146</sup> In addition, the adoption of minors was prohibited.<sup>147</sup> The Code of Hammurabi and the Napoleonic Code both provided for the adoption of children and granted adoptive children equal inheritance rights with birth children, but both codes also prohibited adoptions without the consent of the child’s biological parents.<sup>148</sup>

In the 18<sup>th</sup> century, adoptions largely faded from the legal framework.<sup>149</sup> In corollary, orphanages, children placed into indentured servitude, and work houses for

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<sup>142</sup> See also Coupet, *supra* note 3 at 609 (“Currently, the only means for kinship caregivers to attain permanent, legally-protected parental status is formal adoption. However, the adoption process usually involves adversarial legal proceedings that pit kinship caregivers against another relative, often their own adult child, in order to gain some measure of security in their relationship with the children they are raising. These proceedings are usually lengthy and emotionally difficult for everyone involved. Not surprisingly, the process of litigating these issues, as well as the outcomes, can seriously strain family relationships rather than strengthen or support them.”).

<sup>143</sup> The practice of child adoption is present in the bible: Moses was adopted by Emperor Octavian Augustus. See Exodus 2:10. See also U.N. Secretariat, Department of Economic and Social Affairs, *Child Adoption: Trends and Policies* 5 (2009),

<http://www.un.org/en/development/desa/population/publications/policy/adoptation-trends.shtml>.

<sup>144</sup> *Id.* at 5.

<sup>145</sup> *Id.*

<sup>146</sup> *Id.*

<sup>147</sup> *Id.*

<sup>148</sup> *The Code of Hammurabi King of Babylon* 71 (Robert F. Harper trans., 1904); *The Code Napoleon; or, The French Civil Code* 96-97 (William Benning 1867); U.N. Secretariat, *supra* note 145 at 5.

<sup>149</sup> U.N. Secretariat, *supra* note 143 at 5.

children all became popular.<sup>150</sup> It was not until the late 19<sup>th</sup> century that the law began to focus on the family as the most appropriate setting for raising a child.<sup>151</sup>

The first “modern” adoption law, focusing on the best interests of the child, was enacted in 1851 in Massachusetts.<sup>152</sup> The Massachusetts law gave the judge the authority to assess whether the adoptive parents had “sufficient ability” to care for and educate the child.<sup>153</sup> This was a dramatic departure from previous adoption laws.<sup>154</sup> This child welfare approach to adoption law did not truly take root across the U.S. and around the world until the 1940s.<sup>155</sup> In addition, many “developing countries” did not pass adoption laws with this child welfare approach in mind until the 1980s and 1990s.<sup>156</sup>

Today, over 30% of the more than 50,000 total annual adoptions in the U.S. occur between kinship caregivers and children in their care.<sup>157</sup> Adoptions offer kinship caregivers a permanent solution to legal status and decision making challenges. If an adoption is approved, the court order is permanent and cannot be modified or terminated easily. The biological parents’ rights and responsibilities are permanently terminated and the adopted child is treated as an equal with any birth children of the adoptive parents for inheritance, decision-making, and all other purposes. While many

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<sup>150</sup> U.N. Secretariat, *supra* note 143 at 11. *See also* William K. Yost, *Adoption Laws of Ohio: A Critical and Comparative Study*, 21 CLEV. ST. L. REV. 1 (1972).

<sup>151</sup> U.N. Secretariat, *supra* note 143 at 17. *But see* WILLIAM H. SLINGERHAND, CHILD-PLACING IN FAMILIES 19 (Russell Sage Foundation 1918), <https://www.russellsage.org/child-placing-families> (discussing ancient Jewish laws and customs placing children lacking parental care with members of the households of other relatives).

<sup>152</sup> *See* Mass. Adoption of Children Act 1851; U.N. Secretariat, *supra* note 143 at 13.

<sup>153</sup> *Id.*

<sup>154</sup> U.N. Secretariat, *supra* note 143 at 13.

<sup>155</sup> *Id.* at 14.

<sup>156</sup> *Id.*

<sup>157</sup> *See* U.S. DEPARTMENT OF HEALTH AND HUMAN SERVICES, ADMINISTRATION FOR CHILDREN AND FAMILIES, DISTRIBUTION OF THE ADOPTIVE PARENT(S) RELATIONSHIP TO THEIR ADOPTED CHILD DURING FY 2014 (2014) [https://www.acf.hhs.gov/sites/default/files/cb/prior\\_relation2014.pdf](https://www.acf.hhs.gov/sites/default/files/cb/prior_relation2014.pdf).

adoptions are open, and adopted children are able to maintain contact with their biological parents, the majority of biological parents lose the rights to communication and visitation after the adoption order is in place.<sup>158</sup>

Because adoptions are permanent and parents' rights to the care, custody, and control of children are fundamental under U.S. law, adoption proceedings are lengthy, time-consuming, and costly.<sup>159</sup> This is true even if the biological parents agree to the adoption. The fees and the costs associated with adoption proceedings are high,<sup>160</sup> especially for families living in poverty. What is more, all of the court costs and additional fees associated with the adoption must often be paid up front.

In 35 states, when a parent places the child directly with a relative, the laws provide for a streamlined adoption process, such as not requiring a preplacement assessment or home study unless specifically ordered by the court. All states require background checks of criminal history and child abuse central registries for the adopting relatives and other adults in the household.<sup>161</sup>

In Sharon Gurley's case, she would have been required to pay over \$3,000.00 up front for a home study, background checks, a fire marshal certificate, court costs, and more, before the court would move forward with her petition to adopt her

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<sup>158</sup> Solangel Maldonado, *Permanency v. Biology: Making the Case for Post-Adoption Contact*, 37 CAP. U. L. REV. 321, 324 (2008) ("For most of the twentieth century, parents who voluntarily relinquished a child for adoption or whose parental rights were involuntarily terminated had no right to contact or information about their children"). See also Gupta-Kagan, *supra* note 9 at 23 ("Almost 40 percent of all non-kinship adoptive parents report that their child had some postadoption contact with birth families").

<sup>159</sup> U.S. DEPARTMENT OF HEALTH AND HUMAN SERVICES, ADMINISTRATION FOR CHILDREN AND FAMILIES, CHILDREN'S BUREAU, CHILD WELFARE INFORMATION GATEWAY, PLANNING FOR ADOPTION: KNOWING THE COSTS AND RESOURCES 3 (2016), [https://www.childwelfare.gov/pubpdfs/s\\_costs.pdf](https://www.childwelfare.gov/pubpdfs/s_costs.pdf) (discussing adoption costs and noting that home study fees alone can cost between \$1,500-4,000). But see Jack Darcher, *Market Forces in Domestic Adoptions: Advocating a Quantitative Limit on Private Agency Adoption Fees*, 8 SEATTLE J. SOC. JUST. 729, 735 (2010) ("The only costs to adoptive parents in public adoption usually come from legal fees, which are minimal and are often reimbursed by the state.").

<sup>160</sup> *Id.*

<sup>161</sup> PLACEMENT OF CHILDREN WITH RELATIVES, *supra* note 23 at 4.

granddaughter. None of those fees could be waived via a poverty affidavit or similar procedure and none of the fees could be paid via a payment schedule. No government agency provides subsidies for these fees for informal kinship caregivers living in poverty. To top it all off, if Sharon had not been lucky enough to obtain free legal assistance from the law clinic, she would have had to pay attorney's fees.<sup>162</sup>

While adoptions might be a terrific permanency option for children in the care of kinship caregivers, the legal process is costly, time consuming, and difficult to navigate, which is a barrier or at least an obstacle, for many, if not all, kinship caregivers living in poverty and means that adoption is not currently a true option for many children in informal kinship care. Section III, below, discusses the subsidization schemes available for kinship caregivers for each of these permanency pathways.

### **III. Current Subsidization Schemes**

Caring for children is expensive. Children need healthy food, clean clothes and new shoes that fit properly, safe housing in an adequate school district or private school fees, healthcare, dental care, child care, books, toys, tutors, sports and music classes, and more. Children living with special needs may require additional supports, including service animals, special school fees, specialized caregivers, counseling and therapy, electronic and other supportive devices, and more, all of which require additional expenditures.<sup>163</sup> Subsidies are given to foster care families, and to kinship caregivers in certain circumstances, to cover the long list of child-related expenses that would

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<sup>162</sup> Many prospective adoptive parents living in poverty will not be able to find free legal assistance, as free legal services are limited. A recent study in Boston found that 80% of perspective clients with family law issues were turned away from civil legal aid organizations due to lack of resources within those organizations. See LEGAL SERVICES CORPORATION, 2016 BUDGET REQUEST (2016), <http://www.lsc.gov/media-center/publications/fy-2016-budget-request>.

<sup>163</sup> See e.g., MARY L. GAVIN, KIDS WITH SPECIAL NEEDS, <https://kidshealth.org/en/kids/special-needs.html>.

otherwise be paid by the children's biological parents.<sup>164</sup> When adoption or permanent guardianship are options for foster children, the state or federal government subsidizes at least some of the fees related to the legal proceedings as well. In addition, some subsidies also include post-adoption or post-guardianship payments for children that had been in foster care.

In 2016, the federal government spent approximately \$9.73 billion, or .25% of the total federal budget, on the child welfare system, including expenditures to cover these subsidization programs.<sup>165</sup> State by state, expenditures on child welfare programs vary. The state of California spends a total of \$21.04 - \$26.27 per day per child in foster care and state of Missouri spends \$9.27 - \$12.23.<sup>166</sup> These are huge expenditures for both the state and federal government, and yet the details of these subsidization programs relatively unknown to the general public.

The current subsidization schemes discussed below arise out of a complicated interaction between state and federal law.<sup>167</sup> States provide payments to adoptive families and permanent guardians based on established eligibility criteria, and then the states are reimbursed by the federal government for those payments under Title IV-E of the Social Security Act.<sup>168</sup> The federal criteria centers on confusing language defining children with "special needs" in the Social Security Act,<sup>169</sup> rendered even more confusing

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<sup>164</sup> Sometimes the biological parents are paying child support to the state, which in turn uses the child support to cover at least part of the foster care or permanent guardianship payments.

<sup>165</sup> See FIRST FOCUS, CHILDREN'S BUDGET 2016 (2016), <https://firstfocus.org/resources/report/childrens-budget-2016/>.

<sup>166</sup> See KERRY VOOGHT, ET AL, CHILD TRENDS, FAMILY FOSTER CARE REIMBURSEMENT RATES IN THE U.S. (2012), <https://www.childtrends.org/wp-content/uploads/2013/04/Foster-Care-Payment-Rate-Report.pdf> (demonstrating that difference in daily cost of child care is partially dependent on whether or not the child has special needs).

<sup>167</sup> See 42 USC 673.

<sup>168</sup> See 42 USC 673 (a)(3), (6) and 42 USC 673(d). The majority of states do not contribute state funds for the adoption and guardianship subsidies.

<sup>169</sup> See 42 USC 673 (c).

by various interpretations by state courts<sup>170</sup> and guidance provided by the U.S. Health and Human Services Department.<sup>171</sup> The eligibility criteria are clearer for permanent guardianship subsidies than for adoptions,<sup>172</sup> but most states have limited the availability of these guardianship subsidies.<sup>173</sup> Overall, the state and federal subsidies focus on adoptions out of foster care, then permanent guardianships, and lastly on other permanency pathways, including informal or private kinship care.

This section of the article discusses the state and federal government subsidization schemes, as well as the limits of the subsidies, currently in place for each of the permanency pathways described above, including informal kinship care, foster care, permanent guardianship, and adoptions. This section also discusses state waivers of the nonrecurring costs related to legal proceedings for adoptions and permanent guardianships. To further explain each of the subsidization schemes discussed, two charts are available in Appendices A and B.

#### **A. Informal Kinship Care Subsidies**

Informal kinship caregivers living in poverty may be eligible for limited types of financial assistance and other services for the children in their care. For example, informal kinship caregivers and the children in their care can receive monthly cash assistance through the Temporary Assistance to Needy Families (TANF) benefit program.<sup>174</sup> In order to be eligible for TANF, the kinship caregiver must be related by blood or marriage to, or have legal custody or guardianship over, the children in their

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<sup>170</sup> See e.g., *Glanowski*, *supra* note 51; *In re SHRG ex rel. Northstar Adoption Assistance*, 2018 Minn App. LEXIS 121 (2018).

<sup>171</sup> U.S. DEPARTMENT OF HEALTH AND HUMAN SERVICES, ADMINISTRATION FOR CHILDREN & FAMILIES, CHILDREN'S BUREAU, CHILD WELFARE POLICY MANUAL (2017), [https://www.acf.hhs.gov/cwpm/public\\_html/programs/cb/laws\\_policies/laws/cwpm/index.jsp](https://www.acf.hhs.gov/cwpm/public_html/programs/cb/laws_policies/laws/cwpm/index.jsp).

<sup>172</sup> See 42 USC 673(d).

<sup>173</sup> See Section III.C., *infra*.

<sup>174</sup> The Temporary Assistance to Needy Families (TANF) program is commonly known as "welfare" and was established by the 1996 welfare law (P.L. 104-193).

care.<sup>175</sup> The kinship caregiver must also meet the other eligibility requirements of TANF, including low income and other financial resource caps.<sup>176</sup> TANF payments are typically significantly lower than the foster care and guardianship payments discussed in Sections III B. and C. below.<sup>177</sup>

Informal kinship caregivers living in poverty may be eligible to receive benefits for the children in their care from the Supplemental Nutrition Assistance Program (SNAP -formerly known as Food Stamps)<sup>178</sup> and Medicaid or the Children's Health Insurance Program (CHIP),<sup>179</sup> as well as child support payments from the legal parents when available.<sup>180</sup> Informal kinship caregivers may also be able to claim the children in their care as dependents for tax purposes, if they meet the applicable qualifying relative and residency tests, among other requirements.<sup>181</sup>

In addition, 29 states have Kinship Navigator Programs, which help provide specialized service referrals to kinship caregivers, as well as other services such as support groups for kinship caregivers and some legal services as well.<sup>182</sup> The children's

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<sup>175</sup> See P.L. 104-193. See also <https://www.gpo.gov/fdsys/pkg/CFR-2013-title45-vol2/pdf/CFR-2013-title45-vol2-part260.pdf>. Until the mid-1970s, when the Supreme Court decided otherwise, states either refused to provide any financial assistance to kinship caregivers or refused to provide the same level of financial assistance as to non-kinship caregivers. See *Youakim, supra* note 43 at 126-28.

<sup>176</sup> See *id.*

<sup>177</sup> See Note: *The Policy of Penalty in Kinship Care*, 112 HARV. L. REV. 1047, FN 21 (1999) ("The program was originally designed to provide support to the children of divorced or widowed women so that these mothers could remain in the home with their children").

<sup>178</sup> See U.S. DEPARTMENT OF AGRICULTURE, SUPPLEMENTAL NUTRITION ASSISTANCE PROGRAM, <https://www.fns.usda.gov/snap/supplemental-nutrition-assistance-program-snap>.

<sup>179</sup> See MEDICAID & CHIP, HEALTHCARE.GOV, <https://www.healthcare.gov/medicaid-chip/childrens-health-insurance-program/>. See OHIO DEPARTMENT OF JOB AND FAMILY SERVICES, OHIO RESOURCE GUIDE FOR RELATIVES CARING FOR CHILDREN 24-26 (2018).

<sup>180</sup> For example, in Ohio, a child must live with the caregiver full time and the amount of the child support order will depend on the parents' ability to pay and the needs of the child. If the caregiver receives TANF benefits and the parents pay child support, the child support will be intercepted by the county or state. See *id.* But see 1-13 Anderson's OH Domestic Relations Practice Manual § 13.07.

<sup>181</sup> INTERNAL REVENUE SERVICE (IRS), PUBLICATION 501, EXEMPTIONS, STANDARD DEDUCTION, AND FILING INFORMATION (2017), [https://www.irs.gov/publications/p501#en\\_US\\_2017\\_publink1000220942](https://www.irs.gov/publications/p501#en_US_2017_publink1000220942).

<sup>182</sup> The State must decide what definition to use for "kinship caregiver", for eligibility purposes. See GRANDFAMILIES.ORG, LIST OF KINSHIP NAVIGATOR PROGRAMS (April 2018), <https://www.grandfamilies.org/Topics/Kinship-Navigator-Programs/Kinship-Navigator-Programs->



services agency contracts with the Kinship Navigator Program's community support specialists to assist kinship caregivers to find and apply for needed services.<sup>183</sup> These Kinship Navigator Programs are available to both informal kinship caregivers and caregivers with formal legal statuses, as described below.<sup>184</sup>

Most of these subsidies for kinship caregivers are relatively new and are welcomed by caregivers and children's service agencies alike.<sup>185</sup> The cost of these minimal subsidies pales in comparison to the more than \$7 billion per year that it would cost if the 2.6 million children in kinship care entered into foster care.<sup>186</sup>

When informal kinship caregivers living in poverty seek to adopt or move for permanent guardianship for the children in their care, they face significant barriers. While foster parents are usually eligible to receive funding to cover at least some of the fees related to the legal proceedings, as well as to receive post-adoption payments and tax breaks, informal kinship caregivers are too often ineligible to receive funds upfront or a reimbursement of costs.<sup>187</sup> These barriers exist whether or not the informal kinship caregiver is living in poverty and are at the center of this article, as discussed further in Section IV below.

## **B. Foster Care Subsidies**

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[Summary-Analysis](#). These Kinship Navigator Programs were established as part of The 2008 Fostering Connections to Success and Increasing Adoptions Act as part of a three-year pilot program. *See id.* As of 2018, the federal government provides a dedicated stream of funding for Kinship Navigator Programs. *See* Children's Defense Fund, Family First Prevention Services Act of 2018, <https://www.childrensdefense.org/wp-content/uploads/2018/08/ffpsa-pages-from-law-language.pdf>.<sup>183</sup> *See generally* Sutphin, S. T., *Using Kinship Navigators to Assess the Needs of Kinship Caregivers*, THE CONTEMPORARY JOURNAL OF RESEARCH, PRACTICE AND POLICY 50 (2015), <http://scholarworks.wmich.edu/grandfamilies/vol2/iss1/3>.

<sup>184</sup> *See id.*

<sup>185</sup> *See id.*

<sup>186</sup> *See* Coupet, *supra* note 3 at 607 ("Conservative estimates suggest that if even half of the two million children being raised informally or privately by relatives without parents in the home were to enter the foster care system, it would cost taxpayers \$6.5 billion a year.") Please note that this article was written in 2004, and these numbers are likely higher now.

<sup>187</sup> *See* Section III.D.2., *infra*. Informal caregivers adopting children in their care would be eligible to receive adoption tax credits, but these are not applicable for people living in poverty.

Licensed foster care providers are eligible for a multitude of payments and support services. Foster care providers can collect per diem financial assistance payments, receive reimbursement for other costs, as well as services for children in their care.<sup>188</sup> Foster care providers can also claim foster children in their care for tax purposes as dependents, if they meet the applicable residency test, among other requirements.<sup>189</sup> Additionally, foster care providers may be eligible for additional subsidies if they decide to move for permanent guardianship or adoption, as described in Section III D. and E. below.

State by state, and county by county, the amount of per diem financial assistance payments available to foster care providers varies greatly.<sup>190</sup> Foster care payment rates also may differ within a county based on the age of the child in care and the scope of the child's needs.<sup>191</sup> States also vary widely in how they fund the child welfare system, including how funding is allocated for foster care payments and reimbursements. Some states, such as Louisiana,<sup>192</sup> rely heavily on federal reimbursement of foster care payments through the Title IV-E Foster Care Program. Other states lean heavily on state funding to support their child welfare system.<sup>193</sup>

To be eligible for federal reimbursement of the foster care payments through the Title IV-E Foster Care Program, states must follow the federal guidelines regarding

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<sup>188</sup> See 42 U.S.C. 672. See also FAMILY FOSTER CARE REIMBURSEMENT RATES, *supra* note 166 at 4. Other reimbursable expenses include for clothing, hygiene, daycare, educational, and medical costs.

<sup>189</sup> IRS, *supra* note 181.

<sup>190</sup> FAMILY FOSTER CARE REIMBURSEMENT RATES, *supra* note 166.

<sup>191</sup> *Id.*

<sup>192</sup> See CHILD TRENDS, CHILD WELFARE FINANCING SURVEY (2016),

<https://www.childtrends.org/research/research-by-topic/child-welfare-financing-survey-sfy-2016>.

<sup>193</sup> See, e.g., SHELLEY WATER BOOTS ET AL, THE URBAN INSTITUTE, STATE CHILD WELFARE SPENDING AT A GLANCE: A SUPPLEMENTAL REPORT TO THE COST OF PROTECTING VULNERABLE CHILDREN 10 (1999),

<https://www.urban.org/research/publication/state-child-welfare-spending-glance>. (Alaska got 78% of its funding for child welfare from the state government in 1999, 0% from local governments).

monthly financial assistance payments for foster care.<sup>194</sup> For example, the guidelines require that the placement of the child in foster care must have occurred pursuant to a voluntary placement agreement or a judicial determination.<sup>195</sup> This means that the children's services agency must have been officially involved in the foster care placement, which rules out children placed via kinship diversion programs. In addition, the child must have been eligible to receive Aid to Families with Dependent Children (AFDC), based on the income and resources of his or her parents or legal guardian before the removal occurred.<sup>196</sup> The child must also be placed with a licensed foster care provider that meets safety requirements.<sup>197</sup>

For many years, states refused to provide subsidies to support relatives in foster care placements.<sup>198</sup> That practice was found to be unconstitutional by the U.S. Supreme Court in 1979.<sup>199</sup> The federal government now requires states to provide equal payments to relatives and non-relatives in foster care placements that qualify for Title I-E payments.<sup>200</sup> However, state-funded foster care payments are not required to be given at equal rates for relatives and non-relatives<sup>201</sup> and this remains a problem for relative foster parents in many states.

In addition to payments and reimbursements, foster care providers have access to information, training, and additional services provided by the caseworkers and other staff at the children's services agency that placed the children in their care, as well as the

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<sup>194</sup> See 42 U.S.C. 672.

<sup>195</sup> See 42 U.S.C. 672 (2)(A).

<sup>196</sup> See 42 U.S.C. 672 (3). Please note that the foster care provider's income prior to or during the placement is not part of the eligibility requirement.

<sup>197</sup> See 42 U.S.C. 672 (b). There are some—temporary—exceptions for the licensing requirement listed under 42 U.S.C. 672 (i).

<sup>198</sup> See Note, *supra* note 178 at 1050.

<sup>199</sup> See *Youakim*, *supra* note 43 at 126-28.

<sup>200</sup> *Lipscomb v. Simmons*, 962 F.2d 1374 (1992) (citing *Youakim*, *id.*).

<sup>201</sup> See *e.g.*, *id.*

agency that licensed the foster care provider.<sup>202</sup> The information and services provided by the children's services agency can be extensive, including connections to education and health service providers, local attorneys, public benefits, and more.<sup>203</sup> Because the caseworker and other children's services staff must be in almost constant contact with the foster care provider, this flow of resources and information is free-flowing. Informal kinship caregivers do not have such ready access to these programs, due, at least in part, to a lack of communication with caseworkers and the children's services agency.

When foster care providers wish to move for permanent guardianship or to adopt the children in their care, at least some of the costs and fees of the adoption are paid for upfront by the state and federal government.<sup>204</sup> Foster care providers who adopt or become permanent guardians of the children in their care are also eligible for tax credits, post-adoption per diem payments, and more.<sup>205</sup>

### **C. Kinship Guardianship Subsidies**

While guardianships have long been an option in child welfare cases,<sup>206</sup> the subsidization of kinship guardianships is relatively new. As mentioned in Section II.D. above, kinship guardianships were used infrequently until the 1990s, at least partly due to the lack of subsidies available to guardians.<sup>207</sup> With more children living with kinship caregivers—many of whom resisted adoption—states began offering permanent guardianship subsidies to kinship caregivers without federal assistance with the end

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<sup>202</sup> See e.g., SAFY OF OHIO, WHAT WE DO, <https://www.safy.org/ohio/>.

<sup>203</sup> See *Lipscomb*, *supra* note 200.

<sup>204</sup> See Section III.D., *infra*.

<sup>205</sup> See *id.*

<sup>206</sup> Gupta-Kagan, *supra* note 9 at 13.

<sup>207</sup> *Id.*

goal of increasing the number of children achieving permanency.<sup>208</sup> The number of states providing subsidies to permanent guardians increased from six in 1996 to more than thirty in 2004.<sup>209</sup> Today, at least thirty seven states plus the District of Columbia provide subsidies for permanent guardianships.<sup>210</sup>

In 2008, Congress passed the Fostering Connections to Success and Increasing Adoptions Act and established the Title-IV Guardianship Assistance Program (GAP).<sup>211</sup> GAP requires states to invest in permanent guardianships by requiring states to match federal funds with state dollars.<sup>212</sup> GAP was meant to both incentivize the use of permanent guardianships in child welfare cases and to shape state' guardianship policies by placing conditions on the use of federal Title IV-E funds for guardianships.<sup>213</sup>

GAP includes eligibility requirements for the guardian and child at issue.<sup>214</sup> GAP requires that the guardian be: 1) a relative of the child (legislation allows states to define "relative"); 2) licensed as a foster care provider, and pass criminal record and child abuse registry checks; and 3) caring for the child in a licensed foster care home for at least six consecutive months before moving for guardianship.<sup>215</sup>

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<sup>208</sup> *Id.* at 14. See also William Veneski et al, *An Analysis of State Law and Policy Regarding Subsidized Guardianship for Children: Innovations in Permanency*, 21 UC DAVIS J. JUV. L. & POL'Y 27, 35 (2017).

<sup>209</sup> Gupta-Kagan, *supra* note 9 at 14.

<sup>210</sup> *Id.* Children's rights advocates, including Professor Gupta-Kagan, have pointed out that the number of guardianships and the ratio of guardianships to adoptions have not increased despite the federal GAP program, and argue that additional reforms are needed. See Gupta-Kagan, *supra* note 9 at 68-82. See also, MAKING IT WORK, *supra* note 22.

<sup>211</sup> The Fostering Connections to Success and Increasing Adoptions Act of 2008, *supra* note 3.

<sup>212</sup> Veneski, *supra* note 208 at 33-34.

<sup>213</sup> *Id.* at 33. See also Gupta-Kagan, *supra* note 9 at 14. In addition, in 2018, Congress passed the Family First Prevention Services Act, as part of Division E in the Bipartisan Budget Act of 2018 (H.R. 1892). Section 50761 of that act reauthorized the Adoption and Legal Guardianship Incentive Payment program. See CHILDREN'S DEFENSE FUND, FAMILY FIRST PREVENTION SERVICES ACT, <https://www.childrensdefense.org/wp-content/uploads/2018/08/family-first-detailed-summary.pdf>.

That program "allows states to receive award payments based on improvements the state makes in increasing exits from foster care to adoption or guardianship". See *id.*

<sup>214</sup> See 42 U.S.C. 672 (d). See Veneski, *supra* note 208 at 33.

<sup>215</sup> See 42 U.S.C. 672 (d)(1)(a)(i).

In addition, the child must have: 1) previously been in foster care;<sup>216</sup> 2) met the “special needs” eligibility for Title IV-E funding;<sup>217</sup> 3) already had the possibility of reunification with legal parents and adoption ruled out; and 4) been consulted regarding the kinship guardianship arrangement, if age 14 years or older.<sup>218</sup> The requirement that the child meets the “special needs” definition in effect means GAP is only available to children whose foster care providers moved for permanent guardianship out of foster care, again leaving out the majority of kinship caregivers.

The subsidies available through GAP include a monthly maintenance payment as well as a one-time payment of up to \$2,000 to cover nonrecurring expenses associated with establishing the guardianship,<sup>219</sup> such as court costs, attorney’s fees, home study fees, and more.<sup>220</sup> GAP requires that the monthly maintenance payment may “not exceed the foster care maintenance payment which would have been paid on behalf of the child if the child had remained in a foster family home.”<sup>221</sup> The majority of states set the monthly GAP payment equal to 100 percent of the foster care payment and four states set the monthly payment rate below 100 percent.<sup>222</sup>

Children in permanent guardianships in thirty-four states may also receive additional social and mental health services.<sup>223</sup> Guardians may also receive family support assistance and counseling,<sup>224</sup> and access to the Kinship Navigator Programs

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<sup>216</sup> *Id.* at (d)(3). These subsidies are not available to informal kinship caregivers who want to enter into a guardianship for a child they are caring for. The child must first have been removed and placed into foster care by the children’s services agency.

<sup>217</sup> *Id.* See also Section III.D., *infra*.

<sup>218</sup> *Id.* See also Veneski, *supra* note 208 at 33; MAKING IT WORK, *supra* note 22 at 20.

<sup>219</sup> See 42 U.S.C. 672 (d)(1)(B)(iv).

<sup>220</sup> See Veneski, *supra* note 208 at 348. Yet, only 28 states have statutory or policy language that appears to provide for this reimbursement payment. *Id.* at 49.

<sup>221</sup> 42 U.S.C. 673(d)(2). See also Section III.E., *infra* (discussing on subsidies for nonrecurring expenses).

<sup>222</sup> Veneski, *supra* note 208 at 48-49.

<sup>223</sup> *Id.* at 51-52.

<sup>224</sup> See e.g., Ohio Rev. Code Ann. §5101.852; Fla. Stat. Ann. §39.5085(2)(f).

described in Section III.A., above. Tax deductions are also available to kinship guardians, if they meet the applicable qualifying relative and residency tests, among other requirements.<sup>225</sup>

#### **D. Adoption Subsidies**

The federal government has been subsidizing adoptions for over sixty years.<sup>226</sup> The focus of federal adoption subsidies has been to promote the adoption of children with “special needs” from foster care.<sup>227</sup> Nationally, at least 88% of children adopted from foster care receive an adoption subsidy.<sup>228</sup>

Adoption subsidies arise out of a complicated interaction between state and federal law. The federal government provides grants to state governments, which administer the federal funds.<sup>229</sup> The states may also choose to provide additional state funds to adoptive parents.<sup>230</sup> The federal funding for adoptions focuses on supporting

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<sup>225</sup> IRS, *supra* note 181. At times permanent guardians may seek to adopt children in their care for inheritance purposes or otherwise. However, permanent guardianships are supposed to offer a permanent placement alternative to adoption and there are currently no subsidies available for permanent guardians wishing to adopt. Professor Josh Gupta-Kagan, among others, has argued that adoption and guardianship should be treated as equal permanency options; Adoption and guardianship are equally permanent in terms of a child’s legal relationship to a caregiver. Therefore, there should be no desire to move from guardianship to adoption, and no need to subsidize adoptions from guardianships. This would require double legal fees, including court costs and attorney’s fees, to pay for the change in relationship status. It does not seem desirable to subsidize these fees twice with subsidies, nor to incentivize the move from guardianship to adoption. *See* Gupta-Kagan, *supra* note 9 at 6. *See also* Veneski, *supra* note 208 at 34.

<sup>226</sup> *See* Tim Hacsí, *supra* note 83 at 175.

<sup>227</sup> *See* 42 USC 673. Yet, since 2003, a big chunk of the federal adoption related subsidies are directed at private and foreign adoptions through IRS income tax credits. *See* IRS, *supra* note 181 at 9 (\$251 million in 2015 was spent to support private and foreign adoptions through IRS tax credits). *See also* Section III.D.2., *infra*.

<sup>228</sup> CHILDREN’S RIGHTS, ENDING THE FOSTER CARE LIFE SENTENCE: THE CRITICAL NEED FOR ADOPTION SUBSIDIES 3 (2006), [https://www.childrensrights.org/wp-content/uploads/2008/06/ending\\_the\\_foster\\_care\\_life\\_sentence\\_july\\_2006.pdf](https://www.childrensrights.org/wp-content/uploads/2008/06/ending_the_foster_care_life_sentence_july_2006.pdf). In a survey of families who adopted foster care children in the 1980s, 84% of children met state’s definition of children with special needs. NORTH AMERICAN COUNCIL ON ADOPTABLE CHILDREN, THE VALUE OF ADOPTION SUBSIDIES: HELPING CHILDREN FIND PERMANENT FAMILIES 1 (2008), <https://www.nacac.org/resource/the-value-of-adoption-subsidies-helping-children-find-permanent-families/>.

<sup>229</sup> *See* 42 U.S.C. 670.

<sup>230</sup> *See* 42 U.S.C. 673; Youakim, *supra* note 43.

children with “special needs”,<sup>231</sup> as defined by Section 473(c) of the Social Security Act.<sup>232</sup>

The definition of “special needs” under the Act is complicated, and open to interpretation.<sup>233</sup> “[S]pecial needs” under the Act has little to do with disability. Instead, the statute requires the state to through a complicated set of eligibility criteria. First, the statute divides children into two categories: 1) children that have reached a designated age (e.g. at least four years old in 2016); and 2) children younger than four years old.<sup>234</sup> If the child has not reached the designated age, then the child does not have “special needs” and cannot receive subsidies unless the state determines that it is reasonable to conclude that the child cannot be placed without adoption subsidies.<sup>235</sup> If the child being adopted is at least the designated age, then the state, or rather the child welfare agency, must make additional determinations.<sup>236</sup>

There are two pathways available to states to make these additional determinations.<sup>237</sup> In the first pathway, the state must determine that the child cannot or should not be returned home.<sup>238</sup> Then, the state must also determine that that the child’s ethnic background, membership in a sibling group, medical conditions, physical

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<sup>231</sup> See 42 USC 673.

<sup>232</sup> 42 USC 673(c).

<sup>233</sup> See e.g., *Glanowski*, *supra* note 51; *Northstar Adoption Assistance*, *supra* note 170.

<sup>234</sup> See 42 U.S.C. 673(a)(2)(A).

<sup>235</sup> See *id.*

<sup>236</sup> See *id.*

<sup>237</sup> The state establishes its own criteria for adoption subsidies and defines “special needs”. The state can include additional criterion such as the income level of the adoptive parents and/or birth parents. See 42 U.S.C. 673(c)(1)(A). It is important to note here that in terms of income, the states’ eligibility criteria for adoption subsidies are often focused on the birth families’ income level, not the eligibility of the adoptive family. In Ohio, adoption subsidies are available regardless of the adoptive family’s income. Therefore, even if the adoptive family can easily pay the fees out of pocket—they could be millionaires adopting a child out of foster care, for example—they are still eligible for subsidies if the child’s birth family’s income is low enough to qualify. According to a local adoption agency caseworker who spoke to the author of this article in 2017, this promised reimbursement of fees and post adoption payments regardless of the adoptive family’s income level helps recruit additional adoptive families to adopt children out of foster care.

<sup>238</sup> 42 U.S.C. 673(c)(1)(A).



or mental disabilities, or otherwise, make it “reasonable to conclude that such child cannot be placed” without adoption subsidies.<sup>239</sup> The second pathway is for the state to determine both that: 1) the child qualifies for Supplemental Security Income;<sup>240</sup> and 2) except where the state determines it is against the best interest of the child, a reasonable but unsuccessful effort has been made to place the child without adoption assistance.<sup>241</sup>

It is important to note that neither the language in the Act, nor the legislative history is clear as to whether or not these federal adoption subsidies are available for private adoptions (as opposed to public adoptions of children out of foster care) of children with “special needs”, as defined under the Act.<sup>242</sup> A few courts have interpreted the “special needs” provision of the Act with regard to subsidies for private adoptions and these courts have concluded that federal law does not preempt any state law that limits the subsidies to public adoptions.<sup>243</sup> Therefore, these courts have held, if the state legislature defines “children with special needs” as children in custody of the children’s services agency, then the subsidies will not be available in that state for private adoptions.<sup>244</sup> The bottom line is that it is very difficult, if not impossible, for

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<sup>239</sup> 42 U.S.C. 673(c)(1)(B).

<sup>240</sup> 42 U.S.C. 1381 et seq.

<sup>241</sup> 42 U.S.C. 673(c)(2).

<sup>242</sup> See *Glanowski*, *supra* note 51 at 302; 42 U.S.C. 673.

<sup>243</sup> See e.g., *Northstar Adoption Assistance*, *supra* note 170 (holding that federal law did not preempt Minnesota law from excluding children subject to direct-adoptive placements from receiving adoption assistance and had no claim against the state for denying them benefits under the statute); *Glanowski*, *supra* note 51 (holding that plaintiffs who privately adopted their disabled children did not qualify for adoption assistance under the federal statute); *C.B. ex rel. R.R.M. v. Dep’t of Pub. Welfare*, 567 Pa. 141, 786 A.2d 176, 183 (Pa. 2001) (stating that nothing in the Act or its legislative history suggests that it was intended to require states to provide assistance to facilitate private adoptions of special needs children); *Becker v. Iowa Dep’t of Human Servs.*, 661 N.W.2d 125, 127-29 (Iowa 2003) (holding that federal law did not preempt Iowa law limiting adoption assistance to children “under the guardianship of the state, county, or a licensed child-placing agency immediately prior to the adoption”).

<sup>244</sup> See *Glanowski*, *supra* note 51 at 302.

adoptive parents to receive federal and state subsidies unless the child is being adopted out of foster care.<sup>245</sup>

The types of post-adoption subsidies in the U.S. fall into three categories, including: 1) reimbursement of nonrecurring expenses; 2) post-adoption ‘per diem’ payments; and 3) tax credits. The per diem payments and the tax credits for adoptions are discussed in detail in Sections III. D. 1. and 2., below, and the nonrecurring expense subsidies are discussed in Section III.E.

### **1. Post-adoption Subsidies**

Adoptive families are at times eligible to receive monthly payments to support the costs of care and services for children post-adoption.<sup>246</sup> These post-adoption subsidies are funded through a combination of federal, state, and/or local funds.<sup>247</sup>

Under the Social Security Act, eligibility for the federally-funded post-adoption subsidies centers on whether the adopted child falls under the definition of “special

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<sup>245</sup> However, the U.S. Department of Health and Human Services Children’s Bureau publishes a Child Welfare Manual that, until recently, had guidance indicating that the Title IV-E adoption subsidies could apply not only to public adoptions, but also to private and international adoptions. See CHILD WELFARE POLICY MANUAL, supra note 171. That guidance was deleted from the Manual as of October 2017. See U.S. DEPARTMENT OF HEALTH AND HUMAN SERVICES, ADMINISTRATION FOR CHILDREN & FAMILIES, CHILDREN’S BUREAU, DELETIONS TO MANUAL, 8.2B.5 TITLE IV-E, Adoption Assistance Program, Independent Adoptions, [https://www.acf.hhs.gov/cwpm/public\\_html/programs/cb/laws\\_policies/laws/cwpm/updates\\_delete.js.p](https://www.acf.hhs.gov/cwpm/public_html/programs/cb/laws_policies/laws/cwpm/updates_delete.js.p). (“Deleted October 25, 2017”). The Manual now states that “[i]t is highly improbable that a child who is adopted through an independent adoption will be eligible for title IV-E adoption assistance.” *Id.* at 8.2.B.5. Yet, in another section of the Manual, it states

The only eligibility criterion to be applied for reimbursement of the nonrecurring expenses of adoption is that the title IV-E agency determine that the child meets the definition of special needs, in accordance with section 473 (c) of the Act. A child does not have to be eligible for Aid to Families with Dependent Children, title IV-E foster care, or Supplemental Security Income in order for the adoptive parents to receive reimbursement for their nonrecurring adoption expenses. Nor does the child have to be under the responsibility for placement and care of the title IV-E agency in order for the adoptive parents to be reimbursed for the nonrecurring expenses of adoption.

*Id.* at 8.2.D.3. This new language from the Manual as of yet has not been reviewed by a court and it is unclear how it would withstand interpretation.

<sup>246</sup> 42 USC 673 (a).

<sup>247</sup> See EVAN B. DONALDSON ADOPTION INSTITUTE, NORTH AMERICAN COUNCIL ON ADOPTABLE CHILDREN, AND ADOPTION SUPPORT AND PRESERVATION, THE VITAL OF ADOPTION SUBSIDIES 2 (2012), <https://adoptioninstitute.org/old/advocacy/subsidies.pdf>.

needs”<sup>248</sup> in the Act.<sup>249</sup> Some states also have state-funded post-adoption assistance subsidies and these states usually follow the same general eligibility criteria, but the state programs also typically take into account the income level and resources available to the adoptive family.<sup>250</sup>

The amount of the monthly post-adoption payments is determined through agreement between the adoptive parents and the children’s services agency before the adoption is finalized, and can be readjusted periodically.<sup>251</sup> However, the payments cannot exceed the foster care payment that would have been paid for the child if the child were residing with a foster family.<sup>252</sup> Therefore, if the child’s foster family were to be eligible to receive \$800 per month, then the adoptive family could receive \$800 or less per month as a post-adoption payment.

Additional funding is available to pay for services to address the child’s physical or mental needs, such as psychological or psychiatric care, counseling, speech therapy, customized physical devices, medical supplies, rehabilitative services, and surgical costs.<sup>253</sup> This additional post-adoption funding is capped per family per year, typically at \$10,000 or less.<sup>254</sup> Additional state- and locally-funded adoption subsidies may also be available to adoptive families. No reimbursement is provided by the federal government for these additional subsidies and these benefits take different forms in different states.<sup>255</sup> Because these post-adoption subsidies are only available for children

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<sup>248</sup> See 42 US 673(a)(2)(ii)(II). See also Section III.D., *supra*.

<sup>249</sup> “[A]t the time of initiation of adoption proceedings was in the care of a public or licensed private child placement agency or Indian tribal organization...” 42 USC 673 (a)(2)(ii)(I)(aa).

<sup>250</sup> See e.g., THE NORTH AMERICAN COUNCIL ON ADOPTABLE CHILDREN, STATE ADOPTION ASSISTANCE PROGRAMS, (2018), [www.nacac.org/help/adoption-assistance-us/state-programs/](http://www.nacac.org/help/adoption-assistance-us/state-programs/).

<sup>251</sup> 42 U.S.C. 673 (a) (3).

<sup>252</sup> *Id.*

<sup>253</sup> See e.g., NORTH AMERICAN COUNCIL, *supra* note 250.

<sup>254</sup> See e.g., *id.*

<sup>255</sup> See also ADOPTION INSTITUTE, *supra* note 247 at 2.

that were in the care of a public children's service agency at the time of the adoption, they are not relevant to private kinship adoptions.

## 2. Tax Credits

Adoption tax credits help adoptive parents offset the nonrecurring expenses related to adoption proceedings.<sup>256</sup> The federal adoption tax credit is available for almost all adoptions, the main exception being stepparent adoptions, which are excluded.<sup>257</sup> Adoptive parents can claim qualifying expenses relating to the adoption of a child under the age of 18 years old, as well as the adoption of older individuals who are physically or mentally incapable of taking care of themselves.<sup>258</sup> For the tax year 2017, taxpayers could reduce their federal income tax liability by claiming up to \$13,810 in qualifying expenses.<sup>259</sup> Many states also offer state tax credits for adoption expenses.<sup>260</sup>

Adoption tax credits are of limited use to low income adoptive families, however. Families with very low incomes typically do not have high enough tax liability to benefit from these subsidies.<sup>261</sup> Rather, the majority of the adoption tax credits are claimed by and benefit taxpayers making between \$100-200,000 per year.<sup>262</sup> In addition, while tax credits may help reduce tax liability for some higher income taxpayers, they are not

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<sup>256</sup> CONGRESSIONAL RESEARCH SERVICE, ADOPTION TAX BENEFITS: AN OVERVIEW 3 (2018), <https://fas.org/sgp/crs/misc/R44745.pdf>.

<sup>257</sup> *Id.*

<sup>258</sup> *Id.*

<sup>259</sup> *Id.* The IRS defines qualifying expenses of an adoption to include reasonable and related adoption fees, court costs, attorney fees, travelling expenses, and other expenses directly related to the adoption. See IRS, *supra* note 181. The IRS also specifically mentions home studies when defining "other expenses directly related". *Id.*

<sup>260</sup> State adoption tax benefits are not discussed at length in this article. For state by state information on state adoption tax benefits. See STATE ADOPTION ASSISTANCE PROGRAMS, *supra* note 250.

<sup>261</sup> See *id.* at 9 (zero taxpayers with incomes under \$30k per year claimed the adoption tax credit in 2015).

<sup>262</sup> See *id.*

refundable<sup>263</sup> and cannot help kinship caregivers living in poverty to overcome the barrier of having to pay burdensome adoption costs upfront.

### **E. Nonrecurring Expense Subsidies**

Kinship caregivers living in poverty require ongoing financial and other support for the children in their care, yet often the greatest financial obstacle to forming a permanent legal relationship outside of the foster care system are the nonrecurring court costs and other fees required to be paid for the legal proceedings establishing the adoption or permanent guardianship. It is the subsidization of these nonrecurring expenses for kinship caregivers that is at the heart of this article.

The nonrecurring expenses related to adoptions and permanent guardianships may include court filing fees, attorney's fees, home studies, criminal background checks, health and psychological evaluations, other adoption agency fees, training expenses, travel expenses, and more.<sup>264</sup> The highest fees related to the legal proceedings are court costs, home study fees, and attorney's fees.<sup>265</sup> These fees usually must be paid up front<sup>266</sup> and in some states, these fees cannot be waived or reduced for people living in poverty.<sup>267</sup> However, at times, states and the federal government provide reimbursement of these fees, as explained further below.

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<sup>263</sup> See *id* at 4.

<sup>264</sup> The Title IV-E program requires all prospective foster and adoptive parents to undergo criminal background checks. In addition, in 31 states, DC, Guam, the Northern Mariana Islands, and Puerto Rico, all adult members of the household are required to undergo a criminal background check. Child abuse and neglect central registry checks are also required. See PLACEMENT OF CHILDREN WITH RELATIVES, *supra* note 23 at 3.

<sup>265</sup> See *e.g.*, STATE ADOPTION ASSISTANCE PROGRAMS, *supra* note 250. See also U.S. DEPARTMENT OF HEALTH & HUMAN SERVICES, ADMINISTRATION FOR CHILDREN & FAMILIES, CHILD INFORMATION GATEWAY, THE ADOPTION HOMESTUDY PROCESS 6-7 (2015), [https://www.childwelfare.gov/pubpdfs/f\\_homstu.pdf](https://www.childwelfare.gov/pubpdfs/f_homstu.pdf).

<sup>266</sup> Meaning, the fees must be paid upfront before the proceeding can begin, as opposed to allowing for payment after the proceeding or a payment schedule.

<sup>267</sup> See Section III.F., *infra*. For example, in Ohio there is no statute or rule of court providing for waiver or reduced fees for people living in poverty for these costs. *Id.*

The U.S. Department of Health and Human Services estimates that the nonrecurring fees for an adoption out of foster care cost up to between \$0-2,500, the nonrecurring fees for private adoptions can cost between \$15-45,000, and the nonrecurring fees for foreign adoptions can cost between \$20-50,000.<sup>268</sup> Each state has its own rules (and monetary caps) regarding available reimbursements for nonrecurring adoption and permanent guardianship expenses.<sup>269</sup> The federal government may provide states with matching funds for the reimbursement of these fees, if the state follows rules and regulations provided within the Social Security Act.<sup>270</sup>

Most states cap the reimbursement of nonrecurring expenses at \$1-2,000, though the cap is much lower in some states. Massachusetts and California both cap the reimbursement at \$400 and Nevada caps reimbursement of nonrecurring expenses at \$250.<sup>271</sup> Some of the expenses not covered by this reimbursement may also be offset by the federal tax credit for adoptions, described in Section III.D.1. above, depending on the income level of the taxpayer. As mentioned in Section III.C. above, the federal government caps the reimbursement of the nonrecurring expenses of guardianship proceedings at \$2,000, though state by state the cap may be set lower. Given the total fees are much higher than the nonrecurring expense caps in most states, these fees continue to be a obstacle for many low income kinship caregivers.

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<sup>268</sup> IRS, *supra* note 181 at 3; STATE ADOPTION ASSISTANCE PROGRAMS, *supra* note 250. Home studies alone cost between \$500-3,000 depending on the jurisdiction and type of proceeding. *See id.* Court costs range between \$250 and more than \$1000. *See id.*

<sup>269</sup> *See e.g.*, U.S. DEPARTMENT OF HEALTH AND HUMAN SERVICES, ADMINISTRATION FOR CHILDREN AND FAMILIES, CHILD WELFARE INFORMATION GATEWAY, ADOPTION ASSISTANCE BY STATE, <https://www.childwelfare.gov/topics/adoption/adopt-assistance/>.

<sup>270</sup> U.S. DEPARTMENT OF HEALTH AND HUMAN SERVICES, ADMINISTRATION FOR CHILDREN AND FAMILIES, CHILDREN'S BUREAU, TITLE IV-E FOSTER CARE (May 17, 2012), <https://www.acf.hhs.gov/cb/resource/title-ive-foster-care>.

<sup>271</sup> *See* ADOPTION ASSISTANCE BY STATE, *supra* note 269.

Under the Social Security Act, to be reimbursed for nonrecurring adoption expenses, adoptive parents must: 1) enter into an adoption assistance agreement with a local children's services agency prior to the finalization of the legal proceeding; and 2) the child must meet the definition of "special needs" under Section 473(c) of the Act. The vast majority of adoptions that meet this requirement are coming out of foster care. Due to the definition of "special needs" under the Act, the children in care must currently be in foster care or were in foster care. Therefore, this reimbursement is not useful to the majority of kinship caregivers looking to adopt or move for permanent guardianship outside of the foster care system.<sup>272</sup>

These one-time reimbursements of the nonrecurring fees related to adoptions and permanent guardianships can be crucial for adoptive parents and permanent guardians. Without these reimbursements, or the waivers described below in Section III.F., they may have to make the difficult decision to forego other needs—including food or services such as therapy, healthcare, education, extracurricular activities, and more—for the child in their care or for themselves.<sup>273</sup>

For kinship caregivers living in poverty, the reimbursement of the nonrecurring fees is not a good subsidy strategy. Very low income families cannot come up with the funds to pay upfront court costs, attorney's fees, and other required fees. Reimbursement does not help on the backend if you cannot make the upfront payment. Waivers, as described in Section III.F., below, are a better choice for kinship caregivers living in poverty who wish to adopt or move for permanent guardianship.

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<sup>272</sup> *But see* MANUAL, *supra* note 246 at 8.2.D.3.

<sup>273</sup> *See e.g.*, LEGAL SERVICES, *supra* note 163.

## F. Waivers for Nonrecurring Expenses

Instead of providing reimbursements for the nonrecurring expenses related to adoptions and permanent guardianships, many jurisdictions choose instead to waive or provide funds to cover the upfront costs of the adoption and permanent guardianship legal proceedings for kinship caregivers living in poverty.<sup>274</sup> These waivers, in effect, remove the barrier to access to justice for kinship caregivers living in poverty. This section of the article reviews the state by state practices regarding waivers of court costs and home study fees, which tend to be the most costly portions of the legal proceedings besides attorney's fees.<sup>275</sup> This section concludes that there are only a handful of jurisdictions across the U.S. that choose not to provide waivers for the fees related to adoptions and permanent guardianship proceedings.

Across the U.S. there are only four U.S. states that refuse to waive the prepayment of court filing fees for private kinship adoptions when the adoptive family is living in poverty. Those states are Alabama, Iowa, Kansas, and Ohio.<sup>276</sup> All other states and the District of Columbia provide for the waiver of court filing fees for kinship adoptions for adoptive families living in poverty.

In all but seven states, the home study is either waived altogether or the fee for the home study is waived for adoptions when the kinship caregivers are living in poverty. The seven states that refuse to provide a waiver for the home study for kinship caregivers living in poverty are Georgia, Hawaii, Louisiana, Missouri, Ohio, South

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<sup>274</sup> For example, Massachusetts has a fund for indigent litigants to cover court costs and associated fees such as home studies and background checks. See Commonwealth of Massachusetts, *supra* note 54. Anecdotal evidence points to some legal services offices setting up private funds to help cover these kinds of expenses for their clients, in states where allowed.

<sup>275</sup> See PLANNING FOR ADOPTION: KNOWING THE COSTS AND RESOURCES, *supra* note 160; THE ADOPTION HOMESTUDY PROCESS, *supra* note 265.

<sup>276</sup> See Alabama, <https://afapa.org/2016/05/12/adoption-subsidy/>; Iowa, <https://www.iowacourts.gov/for-the-public/court-forms/>; Kansas, <http://www.kansasjudicialcouncil.org/legal-forms>.



Dakota, and Texas.<sup>277</sup> Ohio holds the honor of being the only state in the U.S. that refuses to provide a waiver of court costs and refuses to waive the home study when the kinship caregiver is living in poverty.

In Sharon Gurley's case, the requirement that the court costs and home study fee be paid upfront were the main obstacles that prevented Ms. Gurley from achieving access to justice and being able to adopt her granddaughter. She could not come up with the more than \$3,000 that would it take to pay for these nonrecurring expenses required for her granddaughter's adoption case. If waivers of these costs had been available, there is little doubt that Ms. Gurley would have been able to adopt her granddaughter.

#### **IV. Arguments for the Subsidization or Waiver of Nonrecurring Expenses**

The full subsidization or waiver of the nonrecurring expenses of adoptions and permanent guardianships for kinship caregivers living in poverty would allow hundreds of thousands<sup>278</sup> of children to obtain permanency. Without achieving permanency, these children could otherwise face disruption of family and home, school, sibling sets, health and other supportive services, and more.<sup>279</sup> Many states in the U.S. have figured out how important the kinship caregiver is to permanency, and there are only a handful

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<sup>277</sup> See HOME STUDY REQUIREMENTS FOR PROSPECTIVE PARENTS, *supra* note 54. See e.g., Georgia, <https://www.adoptionadvocatesofga.org/> (Home study fee is \$1200 and no mention of waiver or subsidy for families living in poverty); Hawaii, <https://www.adoptuskids.org/adoption-and-foster-care/how-to-adopt-and-foster/state-information/hawaii> (home study fees apply to families seeking to adopt outside of the foster care system); Missouri, <https://ago.mo.gov/docs/default-source/publications/adoption-welcomehome.pdf?sfvrsn=4> (home study fees apply to private and independent adoptions); Ohio, <https://www.adoptuskids.org/adoption-and-foster-care/how-to-adopt-and-foster/getting-approved/home-study>; Texas, <https://adoptionanswersinc.com/texas-home-study-services/pricing-and-fees/> (Grandparent home study costs \$550).

<sup>278</sup> See Section II.A., *supra*.

<sup>279</sup> See *supra* at note 28.

of states that do not choose to subsidize or waive the nonrecurring expenses for adoptions and permanent guardianships for kinship caregivers living in poverty.<sup>280</sup>

The state and federal governments have taken steps in recent years to address the problem of lack of resources and disparate treatment of kinship caregivers.<sup>281</sup> The vast majority of states have chosen to provide some subsidy or waiver off the costs and fees related to the legal proceedings for adoptions and permanent guardianships for kinship caregivers.<sup>282</sup> However, the subsidies and waivers for kinship caregivers remain inadequate in many states and other states still do not provide any subsidy or waiver whatsoever.<sup>283</sup>

The reasons why these states have not prioritized access to adoptions and permanent guardianships for kinship caregivers are unclear. Many of the positive changes to address the needs of kinship caregivers have come in the last decade when states and the federal government has been struggling with budget crises due to the recession. While kinship caregivers may remain a priority, the state and federal governments may simply not have had the funds to make these changes. It may also be the case that this issue has not been a focus of lobbying groups and others, as there are so many difficult issues within the child welfare system that need to be dealt with. Regardless of why, subsidies and waivers for the costs and fees of adoptions and permanent guardianships for kinship caregivers living in poverty should be a priority for policymakers across the U.S.

This section of the article provides arguments in support of the subsidization or waiver of the nonrecurring expenses of adoption and permanent guardianship

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<sup>280</sup> See Sections III.E.-F., *supra*.

<sup>281</sup> See Section III., *supra*.

<sup>282</sup> See Section III.B.-C., *supra*.

<sup>283</sup> See Section III, *supra*.

proceedings for kinship caregivers living in poverty. This section includes arguments based in U.S. law and policy, and arguments based in human rights law and policy. Section IV.A. details cost-benefit and due process arguments for the subsidization or waiver of these nonrecurring expenses. Section IV.B. argues for the subsidization or waiver of these expenses based on the human rights to access to justice, the right to family and adoption, and economic rights.

### **A. Cost-Benefit and Due Process Arguments**

#### **1. Cost-Benefit Analysis**

Kinship diversion is overwhelmingly the policy adopted by child welfare agencies across the country.<sup>284</sup> Not only are child welfare agencies required by law to prioritize placements with kin over strangers, they are also required to seek out family members before placing children in foster care.<sup>285</sup> These policies divert children away from subsidized foster care into informal, unsubsidized kinship care. As noted in Section III.A., sometimes kinship caregivers receive cash and other assistance to the children in their care, but those benefits are often far less than the foster care subsidies and other support services that the caregivers would receive if they were licensed foster care providers. When kinship caregivers seek permanency options for the children in their care, including adoption or permanent guardianship, they are not eligible for subsidies or waivers for the nonrecurring expenses related to the legal proceedings in several states.<sup>286</sup> Furthermore, even in the states that do provide subsidies or waivers, not all of

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<sup>284</sup> See KINSHIP DIVERSION DEBATE, *supra* note 19.

<sup>285</sup> See PLACEMENT OF CHILDREN WITH RELATIVES, *supra* note 23 at 2.

<sup>286</sup> See Section III.E.-F., *supra*.

the fees are covered and these fees often remain an obstacle for kinship caregivers living in poverty.<sup>287</sup>

Overall the policy of kinship diversion saves the state and federal governments a combined total of more than \$3 billion per year that they would otherwise be spending on foster care and other subsidies.<sup>288</sup> Yet, this cost savings is likely short lived. Children in informal kinship care have less successful outcome measures than children in permanent relationships with their kinship caregivers, such as adoption or permanent guardianship.<sup>289</sup> Children without permanency are even more likely to end up involved with the justice system, and more likely to end up in foster care at a later date.<sup>290</sup> The state will more likely bear a greater cost burden for these children in the future, either through the justice system, through Medicaid and other social programs related to physical and mental health issues that can result from trauma or abuse, and/or due to less tax earnings.<sup>291</sup>

Historically it made sense to incentivize and prioritize adoptions and guardianships out of foster care, especially adoptions and guardianships for children

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<sup>287</sup> See *id.*

<sup>288</sup> This calculation assumes 400,000 children are diverted from state custody to live with informal kinship caregivers each year. See KINSHIP DIVERSION DEBATE, *supra* note 19 at 9 (At a single point in time 400,000 children were diverted from state custody to live with kin). Foster care payments are assumed to be \$25/day as an average for each child, paid for 365 days per year. Foster care alone totals \$3 billion with additional subsidies saved on post-adoption payments and subsidies for nonrecurring expenses. See FAMILY FOSTER CARE REIMBURSEMENT RATES, *supra* note 166 at 27-32. Total child welfare spending in the U.S. topped over \$28 billion in 2012. KRISTINA ROSINSKY AND DANA CONNELLY, CHILD TRENDS, CASEY FAMILY PROGRAMS, AND THE ANNIE E. CASEY FOUNDATION, CHILD WELFARE FINANCING IN SFY 2014: A SURVEY OF FEDERAL, STATE, AND LOCAL EXPENDITURES 11 (2016), <https://www.childtrends.org/publications/child-welfare-financing-sfy-2014-a-survey-of-federal-state-and-local-expenditures/>.

<sup>289</sup> See *e.g.*, Mark Testa, *Kinship Care and Permanency*, 28 JOURNAL OF SOCIAL SERVICE RESEARCH 25 (2002) (kin placements are more stable than non-kin placements but that the advantage diminishes with lengthier durations of care).

<sup>290</sup> See *id.*

<sup>291</sup> See *e.g.*, EXECUTIVE OFFICE OF THE PRESIDENT OF THE UNITED STATES, ECONOMIC PERSPECTIVES ON INCARCERATION AND THE CRIMINAL JUSTICE SYSTEM 9 (2016), [https://www.prisonpolicy.org/scans/20160423\\_cea\\_incarceration\\_criminal\\_justice.pdf](https://www.prisonpolicy.org/scans/20160423_cea_incarceration_criminal_justice.pdf).

with special needs.<sup>292</sup> But now that so many children are being diverted outside of the system due to kinship diversion policies, the incentivization scheme has gone awry. Foster care providers are given many services and financial incentives to make the relationship with the children in their care permanent, whereas the services and incentives available to informal kinship caregivers are limited.<sup>293</sup> Foster care providers also receive reimbursement of all fees related to adoption or permanent guardianship proceedings for children in their care, as well as maintenance payments post-adoption, all of which is not available to informal kinship caregivers.<sup>294</sup> Foster care providers can also claim tax credits and tax deductions, which given the higher average income of foster parents, are more of a burden on the state and federal government than those tax benefits provided to kinship caregivers who tend to have lower incomes.<sup>295</sup> Moreover, all of these benefits to foster parents are available regardless of the socioeconomic status of the foster care providers. Informal kinship caregivers, who step up to care for children to keep them out of the custody of the children's service agency and likely have very limited incomes, are left out in the dark.

Taken together, the merely temporary savings of kinship diversion and the lack of incentives for kinship caregivers to move for permanency, indicate that the system is broken. No longer is the child welfare system promoting permanency. The bottom line is that adoption and guardianships save the state and federal government a great deal of money over time. If the system of kinship diversion is going to continue, indefinitely, as

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<sup>292</sup> See e.g., Mary Eschelbach Hansen, *Using Subsidies to Promote the Adoption of Children from Foster Care*, 28 J. FAM. ECON. ISSUES 377–393 (2007), <https://www.ncbi.nlm.nih.gov/pmc/articles/PMC2646856/>.

<sup>293</sup> See Section III.A.-B., *supra*.

<sup>294</sup> *Id.*

<sup>295</sup> *Id.* at III.D.

it seems it will, kinship adoptions and guardianships should be subsidized, especially for kinship caregivers living in poverty, if permanency is going to continue to be promoted.

Subsidizing the nonrecurring expenses related to adoption or permanent guardianship proceedings for kinship caregivers living in poverty would not only save the states and federal government billions of dollars in the end, but also would support the end goal of promoting permanency.

## **2. Due Process**

On top of the cost-benefit analysis, the fundamental right to due process under the U.S. Constitution supports waiving court costs for kinship caregivers living in poverty. Another way for Ms. Gurley and Kaylan to get access to adoption or permanent guardianship court proceedings would be to contest the probate court's refusal to waive the required court costs and other fees on the basis of a denial of due process under the Fourteenth Amendment of the U.S. Constitution.<sup>296</sup>

The right to due process under the Fourteenth Amendment requires the waiver of the prepayment of court filing fees when litigants are indigent, fundamental rights are at issue, and the only way of guaranteeing or accessing those fundamental rights is through the court system.<sup>297</sup> Due Process should therefore require the waiver of the prepayment of court filing fees, if not additional nonrecurring expenses such as home study fees, for adoption and permanent guardianship proceedings for kinship caregivers living in poverty.

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<sup>296</sup> U.S. Const. amend. XIV §1 (“No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws”).

<sup>297</sup> See *Boddie v. Connecticut*, 404 U.S. 371, 382-3 (1971). But see *Lyng v. Internatl. Union*, 485 U.S. 360, 368, 108 S.Ct. 1184, 99 L.Ed.2d 380 (1988) (holding that a legislature's decision not to subsidize the exercise of a fundamental right does not infringe the right).

U.S. courts have held that it is a denial of due process to refuse to waive the prepayment of filing fees for indigent litigants in some cases, including in divorce cases.<sup>298</sup> The U.S. Supreme Court required the waiver of the prepayment of filing fees in *Boddie v. Connecticut* in 1971.<sup>299</sup> The Supreme Court stated in that case “the right to due process reflects a fundamental value in our American constitutional system”.<sup>300</sup> The Court went on to hold that Connecticut’s refusal to allow impoverished litigants to get a divorce without prepayment of court filing fees was the “equivalent of denying them an opportunity to be heard upon their claimed right” and “a denial of due process.”<sup>301</sup> The Court recognized marriage as a fundamental right, as well as the dissolution of marriage as a fundamental right in the U.S.<sup>302</sup> The Court in *Boddie* also pointed out that the sole means in Connecticut for obtaining a divorce was through the courts.<sup>303</sup>

In addition to requiring the waiver of the prepayment of filing fees for divorce, the U.S. Supreme Court has also required the waiver of payment of transcript fees on appeal in criminal cases<sup>304</sup> and transcript fees in termination of parental rights cases for persons living in poverty.<sup>305</sup> However, the Supreme Court refused to require the waiver of prepayment of filing fees for bankruptcy cases in *U.S. v. Kras*, holding that unlike a

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<sup>298</sup> *See id.*

<sup>299</sup> *Id.*

<sup>300</sup> *Id.* at 374.

<sup>301</sup> *Id.* at 380-1.

<sup>302</sup> *Id.* at 383.

<sup>303</sup> *Id.* at 380-1.

<sup>304</sup> *Griffin v. Illinois*, 352 U.S. 12 (1956); *Mayer v. City of Chicago*, 404 U.S. 96 (1971).

<sup>305</sup> *M.L.B. v. S.L.J.*, 519 U.S. 102 (1996) (holding that Mississippi could not withhold a transcript from a parent wishing to appeal a termination of parental rights judgment due to indigency and the inability to pay for the transcript.)

divorce, which can only be executed via court process, bankruptcy was not the only way the impoverished litigant could unburden debt.<sup>306</sup>

The U.S. Supreme Court has not decided the issue of whether the waiver of the prepayment of court filing fees for adoption or guardianship is required for indigent litigants, and just a few reported court opinions exist on this issue. The Florida Supreme Court has dealt with this issue and held that indigent persons should not be denied access to the courts in adoption proceedings due to an inability to pay publication costs.<sup>307</sup> In its decision to require the waiver of the prepayment of court costs in adoption cases for people living in poverty, the Florida Supreme Court stated that "[t]he fundamental right to have children either through procreation or adoption is so basic as to be inseparable from the rights to 'enjoy and defend life and liberty, (and) to pursue happiness...'"<sup>308</sup> However, other courts that have dealt with this issue refused to require the waiver of costs related to adoption proceedings for persons living in poverty.<sup>309</sup>

Waivers are also easier and cleaner than subsidies, bureaucratically speaking. Waivers do not require reimbursement, and therefore require less staff time for processing applications, copying and reviewing receipts, issuing checks for reimbursement, etc. The burden of waiving court costs, both monetarily and practically, falls on the court, as opposed to involving other agencies. Courts are already used to

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<sup>306</sup> 409 U.S. 434 (1973).

<sup>307</sup> *Grissom v Dade County*, 293 So.2d 59 (Fla.1974).

<sup>308</sup> *Id.*

<sup>309</sup> See e.g., *In re: R*, 415 N.Y.S.2d 613 (1979) (court held that the petitioner had alternate means of adopting the child through the department of human services and therefore was not deprived of access to the courts by her inability to pay publication costs); *In re Easley Adoption*, 1973 Pa. Dist. & Cnty. Dec. LEXIS 453 (1973) (the waiver of the prepayment of court costs for a stepfather living in poverty who wished to adopt his stepdaughter was denied by this Pennsylvania court).



processing *informa pauperis* applications<sup>310</sup> and have a process in place for waiving of court costs for people living in poverty.<sup>311</sup> It would not be a heavy lift to add adoption proceedings and permanent guardianships to the list of proceedings where the clerk of court must accept a valid *informa pauperis* application and waive the prepayment of court costs.

Given the precedent, Ms. Gurley may succeed in a court contest regarding the probate court's refusal to waive the prepayment of court filing fees. The "bona fides"<sup>312</sup> of Ms. Gurley's indigency and desire for adoption are present here. Furthermore, the U.S. Supreme Court has recognized that the interest of parents in their relationship with their children is a fundamental right.<sup>313</sup> In addition, at least one other court has recognized that adoption and guardianship are pure legal constructs, non-existent at common law and cannot be effectuated outside of a court.<sup>314</sup> Therefore, it appears that the three factors laid out by the Supreme Court in *Boddie*<sup>315</sup> are present here.

However, even if Ms. Gurley were to succeed in getting a waiver of the prepayment of court filing fees, she is very unlikely to get a court to waive the ancillary costs, including the home study fee and other related nonrecurring expenses. While the court costs may total approximately \$300, the home study will cost upwards of \$1500<sup>316</sup> and the prepayment of the home study cost would be a substantial obstacle for Ms.

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<sup>310</sup> Also known as a 'poverty affidavit'.

<sup>311</sup> The U.S. Supreme Court requires courts to waive the prepayment of court costs for indigent litigants in divorce cases, for example, so this process must be in place. *See Boddie, supra* note 298.

<sup>312</sup> *See Boddie, supra* note 298 at 382 ("[T]he *bona fides* of both appellants' indigency and desire for divorce are here beyond dispute").

<sup>313</sup> *Santosky, supra* note 69 at 774 ("[T]he interest of parents in their relationship with their children is sufficiently fundamental to come within the finite class of liberty interests protected by the Fourteenth Amendment"). *See also Troxel, supra* note 66 (discussing parents' fundamental right to make decisions concerning the care, custody, and control of their children).

<sup>314</sup> *See Easley, supra* note 310.

<sup>315</sup> *See Boddie, supra* note 298.

<sup>316</sup> *See e.g.,* CARING FOR KIDS, INC., FEE SCHEDULE (2016), <https://cfkadopt.org/wp-content/uploads/2015/03/CFK-FEE-SCHEDULE-for-clients-2015-rev.pdf>.

Gurley. U.S. Courts have overwhelmingly refused to extend the requirement of waiver of the prepayment of court costs to publication fees, let alone home study costs.<sup>317</sup> U.S. courts are loathe to recognize economic rights of any sort to litigants, lack of access to justice notwithstanding.<sup>318</sup>

Beyond requesting a waiver of the prepayment of costs, Ms. Gurley could attempt to make a good faith argument that the court should waive the requirement of the home study altogether. Only nine U.S. states require home studies in adoption and guardianship proceedings when the caregiver is related to the child by blood and already has physical custody of the child.<sup>319</sup> Ms. Gurley is closely related to Kaylan, as her grandmother, and she has had physical custody of her for several years. Moreover, the children's services agency that performs the home study is used to waiving fees for home studies for adoptions and guardianships out of foster care, so they should easily be able to use the same waiver system for kinship caregivers living in poverty.

The court may refuse her request to waive the home study requirement, however. There are good reasons to require home studies and some courts may be unwilling to waive that requirement without statutory support.<sup>320</sup> In the end, without direct precedent or statutory support, Ms. Gurley's request for a waiver of the home study fee is far from guaranteed.

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<sup>317</sup> See e.g., *Lyng*, *supra* note 298 at 369 (“[T]his Court has explicitly stated that even where the Constitution prohibits coercive governmental interference with specific individual rights, it ‘does not confer an entitlement to such funds as may be necessary to realize all the advantages of that freedom.’”); *Regan v. Taxation With Representation of Washington*, 461 U.S. 540, 545, 103 S. Ct. 1997, 2001, 76 L. Ed. 2d 129 (1983) (“This Court has never held that the Court must grant a benefit . . . to a person who wishes to exercise a constitutional right.”).

<sup>318</sup> See *id.*

<sup>319</sup> Only 9 states do not waive the home study requirement for kinship caregivers. See HOME STUDY REQUIREMENTS, *supra* note 286.

<sup>320</sup> See e.g., Thomas Crea et al, *Home Study Methods for Evaluating Prospective Resource Families: History, Current Challenges, and Promising Approaches*, 86 CHILD WELFARE 141-159 (Mar/Apr 2007).

In terms of Kaylan's due process rights and waiver, the cases mentioned so far in this section have focused on analyzing the due process rights of kinship caregivers under the U.S. Constitution and not the child's due process rights. This is because the U.S. Supreme Court has refused to recognize independent due process rights of children outside juvenile delinquency proceedings and instead has required children to rely on the due process rights of the children's parent or parent-substitute.<sup>321</sup> While some states recognize specific due process rights for children, including the right to counsel in abuse and neglect proceedings,<sup>322</sup> there are no such recognized rights at the federal level that would help in the case of the high costs of guardianship and adoption proceedings for kinship caregivers and children in their care living in poverty.

### **B. Human Rights Arguments**

In addition to the cost-benefit and due process arguments presented above, there are additional human rights arguments that are implicated by the plight of kinship caregivers living in poverty seeking to adopt or move for permanent guardianship for the children in their care. Some of the specific human rights at issue include the right to access to justice, rights to family and adoption, and economic rights.

U.S. courts and policymakers can and should look to human rights law, not as controlling, but for guidance, not unlike how courts look to case law or legislation from

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<sup>321</sup> See e.g., *In re Gault*, 387 U.S. 1 (1967) (holding children must be afforded the right to counsel in juvenile delinquency proceedings); *Smith v. Organization of Foster Families for Equality and Reform [OFFER]*, 431 U.S. 816 (1977) (refusing to recognize a foster child's right to a hearing because the foster parents could request one); *Kenny A ex rel. Winn v. Perdue*, 356 F. Supp.2d 1353 (N.D. Ga 2005) (refusing to recognize a child's right to counsel in protection proceedings); *In re Jamie TT*, 599 N.Y.S.2d 892 (App. Div. 1993) (refusing to recognize a child's right to counsel in protection proceedings). See also Marty Guggenheim, *The Right to Be Represented But Not Heard: Reflections on Legal Representation for Children*, 59 N.Y.U.L. REV. 76, 119 (1984) (arguing that a constitutional right to counsel for children in custody cases cannot be inferred from *Gault*).

<sup>322</sup> See CHILD'S ADVOCACY INSTITUTE, A CHILD'S RIGHT TO COUNSEL – A NATIONAL REPORT CARD ON LEGAL REPRESENTATION FOR ABUSED & NEGLECTED CHILDREN (3d Ed. 2012), [http://www.caichildlaw.org/Misc/3rd\\_Ed\\_Childs\\_Right\\_to\\_Counsel.pdf](http://www.caichildlaw.org/Misc/3rd_Ed_Childs_Right_to_Counsel.pdf) (61% of states provide counsel for abused or neglected children).

sister states for guidance.<sup>323</sup> Human rights law may be a source of persuasive arguments for courts and policy makers, and may offer precedent and models that are more on point than anything in the state or federal systems in the U.S.<sup>324</sup> Moreover, states, the federal government, and local governments, all have a formal obligation to comply with human rights law,<sup>325</sup> and to not defeat the object and purpose of any human rights treaty signed by the U.S.<sup>326</sup> These obligations may not be enforceable in U.S. courts,<sup>327</sup> but that does not mean making human rights arguments in U.S. courts and before policymakers in the U.S. is futile. Human rights arguments, like those discussed below, can be used to bolster strong arguments based in U.S. law and policy. Here, the human rights framework has much to offer regarding the human rights to

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<sup>323</sup> See *Roper v. Simmons*, 125 S. Ct. 1183, 1200 (2005) (“Where domestic Constitutional or statutory law is vague, courts have looked to treaties and international law for interpretive guidance...The opinion of the world community, while not controlling our outcome, does provide respected and significant confirmation for our own conclusions.”) See also, e.g., *State v. Wilder*, 748 A.2d 444 (Me. 2000) (looking to European common law to support its finding of the fundamental right of parents to control the upbringing of their children); Martha Davis, *The Spirit of Our Times: State Constitutions and International Human Rights*, 30 N.Y.U. REV. L. & SOC. CHANGE 359, 360 (2006) (“The United States Constitution, which textually focuses on limiting government action, may yield no guidance to state courts asked to interpret, for example, the substantive meaning of positive rights to ‘health,’ ‘education,’ ‘welfare.’ In such an instance, international norms articulated in transnational law may be a singularly important guide to the substantive content of the provisions”) (citations removed).

<sup>324</sup> See Risa E. Kaufman, *By Some Other Means: Considering the Executive's Role in Fostering Subnational Human Rights Compliance*, 33 CARDOZO L. REV. 1971 (2012). See also LOCAL HUMAN RIGHTS LAWYERING PROJECT, HUMAN RIGHTS IN THE U.S.: A HANDBOOK FOR LEGAL AID ATTORNEYS 7–8 (July 21, 2014), <https://www.wcl.american.edu/index.cfm?LinkServID=B1E62E62-A5A0-D585-2D87C971D50AAE18>.

<sup>325</sup> See U.S. Const. Art. IV §2. See also *Id.*; Davis, *supra* note 324 at 359.

<sup>326</sup> Vienna Convention on the Law of Treaties, May 23, 1969, art. 18, 1155 U.N.T.S. 331, 8 I.L.M. 679 (1969). While the U.S. is not a party to the Vienna Convention, the U.S. recognizes that many of the Convention’s provisions have become customary international law. See, e.g., Maria Frankowska, *The Vienna Convention on the Law of Treaties Before U.S. Courts*, 28 VA. J. INT’L L. 281, 299-300 (1988) (discussing how the U.S. has demonstrated that it considers itself bound by the provisions of the Vienna Convention).

<sup>327</sup> See, e.g., Handbook, *supra* note 325 at 18–19 (providing a brief explanation of reservations, understandings, and declarations assigned by the U.S. government when ratifying human rights treaties, including reservations against a private right of action); MARTHA F. DAVIS, JOHANNA KALB, AND RISA E. KAUFMAN, HUMAN RIGHTS ADVOCACY IN THE UNITED STATES 153–75, 232–65 (2d 2018) (discussing the difficulties of enforcing human rights treaties in U.S. courts); COLUMBIA LAW SCHOOL HUMAN RIGHTS INSTITUTE, HUMAN RIGHTS, SOCIAL JUSTICE, AND STATE LAW: A MANUAL FOR CREATIVE LAWYERING 7-8 (2008), <http://www.law.columbia.edu/sites/default/files/microsites/human-rights-institute/files/hr%20state%20law%20advocacy.pdf> (discussing the relationship between state law and transnational law).

access to justice, rights to family and adoption, and economic rights, and the waiver of the prepayment of the nonrecurring expenses for adoption proceedings and permanent guardianships by kinship caregivers living in poverty.<sup>328</sup>

### 1. The Right to Access to Justice

The right to access to justice is clear under human rights law.<sup>329</sup> The Universal Declaration of Human Rights, the foundational human rights document, explicitly discusses the human rights related to access to justice.<sup>330</sup> The U.S. is a party to two international treaties that discuss the right to access to justice—the International Covenant on Civil and Political Rights (ICCPR) and the International Convention on the Elimination of Racial Discrimination (CERD).<sup>331</sup> Under human rights law, Sharon Gurley’s right to access to justice is guaranteed and her poverty should not be an obstacle to adopting her granddaughter Kaylan.

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<sup>328</sup> There is plenty of scholarship, as well as manuals, available on the topic of how to use human rights arguments before U.S. courts and policymakers. *See e.g.*, Lauren E. Bartlett, *Local Human Rights Lawyering*, 62 ST. LOUIS U. L.J. 887 (2018); Handbook, *supra* note 325; National Juvenile Defender Center, INTERNATIONAL HUMAN RIGHTS: LAW & RESOURCES FOR DEFENDERS & ADVOCATES (2012), <http://njdc.info/wp-content/uploads/2013/11/International-Human-Rights-Law-and-Resources-for-Juvenile-Defenders-and-Advocates.pdf>; MANUAL FOR CREATIVE LAWYERING, *supra id.* In addition, the Bringing Human Rights Home Lawyers’ Network (“BHRH Lawyers’ Network”) at Columbia Law School’s Human Rights Institute, houses a U.S. Human Rights Online Library, which serves as an online clearinghouse for domestic human rights resources, including sample briefs, pleadings, and other materials that BHRH Lawyers’ Network members can use to assist with human rights advocacy in the U.S. *See* BHRH Lawyers’ Network website, <http://www.law.columbia.edu/human-rights-institute/bhrh-lawyers-network>.

<sup>329</sup> *See, e.g.*, S.R. Extreme Poverty and Human Rights, Report to the U.N. General Assembly U.N. Doc. A/67/278 (2012); Access to Justice as a Guarantee of Economic, Social and Cultural Rights, Inter-American Commission on Human Rights, <https://www.cidh.oas.org/countryrep/AccessoDESC07eng/Accessodesci-ii.eng.htm>.

<sup>330</sup> *See* Universal Declaration of Human Rights (UDHR), arts. 7-10-, G.A. Res. 217A (III), U.N. Doc. A/810 (1948). Eleanor Roosevelt led the drafting and campaign to adopt the Universal Declaration of Human Rights. *See* Richard N. Gardner, *Eleanor Roosevelt’s Legacy: Human Rights*, N.Y.T. (1988), <https://www.nytimes.com/1988/12/10/opinion/eleanor-roosevelt-s-legacy-human-rights.html>.

<sup>331</sup> International Covenant on Civil and Political Rights (ICCPR), Dec. 16, 1966, 999 U.N.T.S. 171; S. Exec. Doc. E, 95-2 (1978); S. Treaty Doc. 95-20, 6 I.L.M. 368 (1967); International Convention on the Elimination of All Forms of Racial Discrimination (CERD), art. 5, Dec. 21, 1965, S. Exec. Doc. C, 95-2 (1978); S. Treaty Doc. 95-18; 660 U.N.T.S. 195, 212, *ratified by the U.S.* Nov. 20, 1994.

The right to access to justice encompasses several interconnected and interdependent<sup>332</sup> procedural rights, including the: 1) right to a fair and public hearing by a fair and impartial tribunal for a determination of rights and obligations;<sup>333</sup> 2) right to an effective remedy;<sup>334</sup> 3) equality and fairness before the courts;<sup>335</sup> 4) right to equal protection of the law;<sup>336</sup> and 5) right to counsel.<sup>337</sup>

Interpretation of these rights is much broader under human rights law than U.S. federal law.<sup>338</sup> For example, interpretations of the human rights to non-discrimination and to equal protection require that people living in poverty be considered a protected class and discrimination based on socioeconomic status is prohibited.<sup>339</sup> Under the

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<sup>332</sup> See Martha F. Davis, *Human Rights and the Model Rules of Professional Conduct: Intersection and Integration*, 42 COLUM. HUM. RTS. L. REV. 157, 178 (2010) (discussing the recognition of the interrelationships between the full range of human rights); S.R. Extreme Poverty and Human Rights, *supra* note 329 at ¶4.

<sup>333</sup> See e.g., UDHR, *supra* note 331 at art. 10; ICCPR, *supra* note 332 at art. 2(3)(a); United Nations Convention on the Rights of the Child (CRC), art. 12, opened for signature Nov. 20, 1989, 1577 U.N.T.S. 3 (entered into force Sept. 2, 1990). The European Court of Human Rights has considered whether fees imposed prior to the institution of civil proceedings infringe on the human right to access to a court and has found that high fees infringe on the human rights of applicants living in poverty and unable to pay. See e.g., *Tolstoy Miloslavsky v. the United Kingdom*, Judgment § 63 (Application No. 18139/91, ECHR 1993); *Kreuz v. Poland*, Judgment §§ 60-67 (Application no. 28249/95, ECHR 2001); *Podbielski and PPU Polpure v. Poland*, Judgment §§ 65-66 (Application no. 39199/98, ECHR 2005); *Georgel and Georgeta Stoicescu v. Romania*, Judgment §§ 69-70 (Application no. 9718/03, ECHR 2011).

<sup>334</sup> See e.g., UDHR, *supra* note 331 at art. 9; ICCPR, *supra* note 332 at art. 2(3)(a).

<sup>335</sup> See e.g., ICCPR, *supra* note 332 at art. 14.

<sup>336</sup> See e.g., UDHR, *supra* note 331 at art. 7; ICCPR, *supra* note 332 at art. 26.

<sup>337</sup> See Martha F. Davis, *In the Interests of Justice: Human Rights and the Right to Counsel in Civil Cases*, 25 TOURO L. REV. 147 (2009).

<sup>338</sup> See e.g., CERD, *supra* note 332 at art. 2, (mandating States Parties to “amend, rescind or nullify any laws and regulations which have the effect of creating or perpetuating racial discrimination wherever it exists”).

<sup>339</sup> For example, article 26 of the ICCPR has been interpreted to prevent discrimination on the basis of socioeconomic status. Article 26 of the ICCPR recites the following list “race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth or other status”. ICCPR, *supra* note 332 at art. 26. See also, U.N. Human Rights Committee, General Comment No. 18, Non-Discrimination (1989); S.R. Extreme Poverty and Human Rights, *supra* note 329 at ¶10; *Mellet v. Ireland*, U.N. Human Rights Committee, U.N. Doc. CCPR/C/116/D/2324/2013 (2016) (The Committee determined that Article 26, which provides for the right to equality before the law, had been violated and stated that the State “failed to adequately take into account her [Ms. Mellet’s] medical needs and socio-economic circumstances and did not meet the requirements of reasonableness, objectivity and legitimacy of purpose”. The Committee identified two prohibited grounds for finding a violation of Article 26: discrimination on grounds of socio-economic status and gender discrimination). The American Convention on Human Rights specifically mentions economic status in article 1. American Convention on Human Rights, art. 1, Nov. 21, 1969, O.A.S. T.S. No. 36; 1144 U.N.T.S. 143; S. Treaty Doc. No. 95-21, 9

human rights framework, children are also specifically protected from discrimination on the basis of socioeconomic status and have guaranteed rights to access to justice.<sup>340</sup>

The U.N. Special Rapporteur on Extreme Poverty and Human Rights, an independent expert appointed by the U.N. Human Rights Council to address extreme poverty using the human rights framework, has stated that

Around the world, persons living in poverty face a range of obstacles in claiming and enforcing, or contesting violations of, their rights. Such obstacles not only imply violations of their rights to a remedy and due process, but also undermine their ability to enjoy other human rights equally and without discrimination. States, therefore, are under an obligation to eliminate obstacles which frustrate the efforts of the poorest and most vulnerable to access justice.<sup>341</sup>

Applying the human right to access to justice to kinship adoptions and guardianships for people living in poverty, it is clear that kinship caregivers and the children in their care have fundamental right to access to justice to complete adoption or guardianship proceedings. In addition, children living with kinship caregivers in poverty have an interdependent and interconnected fundamental right to family and to form and maintain a permanent relationship with their caregiver, through legal proceedings in court, such as adoption or permanent guardianship, as discussed in Section IV.B.2. below. The fact of the children's poverty, or the poverty of the kinship caregiver, should not be an obstacle that bars them from access to justice.

Because adoptions and permanent guardianships are legal constructs,<sup>342</sup> there is no way for kinship caregivers and the children in their care to achieve permanency

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I.L.M. 99, *entered into force* July 18, 1978 ("The States Parties to this Convention undertake to respect the rights and freedoms recognized herein and to ensure to all persons subject to their jurisdiction the free and full exercise of those rights and freedoms, without any discrimination for reasons of race, color, sex, language, religion, political or other opinion, national or social origin, economic status, birth, or any other social condition.").

<sup>340</sup> See e.g., CRC, art. 3(2), 12, *supra* note 334.

<sup>341</sup> S.R. Extreme Poverty and Human Rights, *supra* note 329 at ¶15.

<sup>342</sup> There is no recognized adoption or guardianship at common law and no religious pathway to establish an adoption or guardianship. See *Easley*, *supra* note 310.

without access to a court of law in the U.S. Therefore, the right to access to court and the right to a remedy under the human rights framework requires kinship adoptions and permanent guardianship proceedings initiated by persons living in poverty to proceed without the impossible obstacle of the requirement of prepayment of court costs and other related fees.<sup>343</sup>

It is the responsibility the federal government, state governments, and the local governments to ensure that the human rights of kinship caregivers living in poverty are not infringed upon and that they are not barred from access to justice due to their socioeconomic status. Moreover, without access to justice, kinship caregivers and the children in their care are unable to enjoy other human rights, including rights to family and adoption, as discussed in Section B.2., below.

## **2. The Rights to Family and Adoption**

In addition to the right to access to justice, there is an interconnected, interdependent, and fundamental human right to family which shows up frequently in human rights law.<sup>344</sup> The right to family is often used by human rights advocates in the

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<sup>343</sup> See e.g., *Case of Airey v. Ireland*, §31-33 (ECHR Application no. 6289/73, 1979) (a woman successfully argued that her human rights to a fair trial and rights to privacy and family life had been violated because she was unable to pay the high cost of hiring an attorney to get a divorce. The Court held that art. 6 right to a fair trial sometimes requires the state to pay for the assistance of an attorney, when a litigant cannot otherwise pay, when such a assistance proves indispensable for an effective access to court).

<sup>344</sup> See e.g., *id.* (“Although the object of Article 8 [(right to respect for private and family life)] is essentially that of protecting the individual against arbitrary interference by the public authorities, it does not merely compel the State to abstain from such interference: in addition to this primarily negative undertaking, there may be positive obligations inherent in an effective respect for private or family life...Effective respect for private or family life obliges Ireland to make this means of protection effectively accessible...”); UDHR, *supra* note 331 at art. 16(3); ICCPR, *supra* note 332 at art. 23(1); International Convention on the Protection of the Rights of All Migrant Workers and Members of Their Families, art. 44(1), Dec. 18, 1990, 2220 U.N.T.S. 93; American Convention on Human Rights, art. 17(1), Nov. 22, 1969, 1144 U.N.T.S. 146; International Covenant on Economic, Social, and Cultural Rights (ICESCR), art. 10(1), Dec. 16, 1966, 993 U.N.T.S. 3; CRC, Preamble & arts. 7(1), 8(1), and 9(1), *supra* note 334; African Charter on the Rights and Welfare of the Child, arts. 4(1), 19(1), July 11, 1990, OAU Doc. CAB/LEG/24.9/49); The European Convention on Human Rights (ECHR), art. 8, European Convention for the Protection of Human Rights and Fundamental Freedoms, art. 8(1), Nov. 4, 1950, Europ.T.S. No. 5, 213 U.N.T.S. 221 (1950). The European Court of Human Rights has found violations of the right to family life in cases



context of family planning, to include the right to bear children and the right to abortion, but it also covers children and family life.<sup>345</sup> The right to family also shows up in human rights law in the context of family separation, including in child welfare cases,<sup>346</sup> as well as in the immigration law context.<sup>347</sup> The right to family includes the underlying principles of the family as the natural and fundamental unit of society and that maintaining a family unit is in the best interests of the child.<sup>348</sup>

There is also an argument under human rights law that the governments must uphold the right to adoption. Though specific language referring to the right to adoption is not found in any human rights treaty, the right to adoption has been discussed and promoted by some scholars<sup>349</sup> as interconnected to and interdependent with the right to family for children whose parents are not available to care for them. As Paolo Barrozo has stated, “to give the unparented access to an adoptive family is a human rights-imposed duty, binding individuals, society, and public and private

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dealing with foster care and adoption cases. See e.g., *Moretti and Benedetti v. Italy*, Judgment § 48 (Application no. 16318/07 ECHR 2010); *Kopf and Liberda v. Austria*, Judgment § 37 (Application no. 1598/06, ECHR).

<sup>345</sup> See UDHR, *supra* note 331 at art. 12; ICCPR, *supra* note 332 at art. 17 (“no one shall be subjected to arbitrary interference with his privacy, family, home or correspondence, nor to attacks upon his honour and reputation” and that “everyone has the right to protection of the law against such interference or attacks”); CRC, *supra* note 334 at art. 18(2) (“States Parties shall render appropriate assistance to parents and legal guardians in the performance of their child-rearing responsibilities and shall ensure the development of institutions, facilities and services for the care of children.”). See also Fact Sheet – Parental Rights, European Court of Human Rights (Sept. 2018), [https://www.echr.coe.int/Documents/FS\\_Parental\\_ENG.pdf](https://www.echr.coe.int/Documents/FS_Parental_ENG.pdf) (provides a list of cases concerning parental rights raise issues mainly under Article 8 (right to respect for private and family life); Elizabeth Bartholet, *International Adoption: Thoughts on the Human Rights Issue*, 13 BUFF. HUM. RTS. L. REV. 151 (2007); Sonja Starr and Lea Brilmayer, *Family Separation as a Violation of International Law*, 21 BERKELEY J. INT’L L. 213 (2003).

<sup>346</sup> See e.g., Jean Koh Peters, *How Children Are Heard in Child Protective Proceedings, in the United States and Around the World in 2005: Survey Findings, Initial Observations, and Areas for Further Study*, 6 NEV. L.J. 966 (2005).

<sup>347</sup> See e.g., Ryan Mrazik and Andrew I. Schoenholtz, *Protecting and Promoting the Human Right to Respect for Family Life: Treaty-based Reform and Domestic Advocacy*, 24 GEO. IMMIGR. L.J. 651 (2010).

<sup>348</sup> See *id.* at 652.

<sup>349</sup> See e.g., Bartholet, *supra* note 346; Paolo Barrozo, *Finding Home in the World: A Deontological Theory of the Right to be Adopted*, 55 N.Y.L. SCH. L. REV. 701 (2010).

institutions.”<sup>350</sup> In addition, Elizabeth Bartholet has argued that “human rights principles give children the right to true family care...they have the right to be liberated from the conditions characterizing orphanages, street life, and most foster care.”<sup>351</sup>

Moreover, children’s rights are much broader under the human rights framework. For example, the U.N. Convention on the Rights of the Child emphasizes that children are the bearers of rights and specifically requires States to take “all appropriate legislative and administrative measures” to ensure the child such protection and care as is necessary for his or her well-being.<sup>352</sup> These measures should include the administrative measures necessary to provide children like Kaylan with permanency, including permanent guardianship proceedings or adoption.

For kinship caregivers and the children in their care,<sup>353</sup> the human rights to family and adoption are infringed upon when they are barred from permanency options, including moving from informal kinship care to adoption or permanent guardianship due to their poverty and for want of the ability to pay the nonrecurring costs of these proceedings upfront. Ms. Gurley’s granddaughter Kaylan cannot rely on her parents for care. Her father has never been a part of her life, and her mother has been unable to care for her for her entire life. In addition, her mother has now been sentenced to prison for murder and will not be released until Kaylan has reached the age of majority. She should have a right to avoid “orphanages, street life, and foster care.” In addition,

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<sup>350</sup> See Barrozo, *id.* at 704.

<sup>351</sup> *Id.* The US is the only country in the world that has not ratified the Convention on the Rights of the child, which protects the rights of children. See S.R. Extreme Poverty and Human Rights, Report on his mission to the United States of America, U.N. Doc. A/HRC/38/33/Add. 1 (May 4, 2018).

<sup>352</sup> See CRC, *supra* note 334. See also, Soo Jee Lee, Note: *A Child’s Voice vs. A Parent’s Control: Resolving a Tension Between the Convention on the Rights of the Child and U.S. Law*, 117 COLUM. L. REV. 687, 718 (2017) (“Chief among the CRC’s base principles is the idea that children are rights-bearing individuals...”).

<sup>353</sup> For the purposes of this argument, Kaylan and other children in the care of kinship caregivers would fall into the category of ‘unparented’, as defined by Paolo Barrozo. Barrozo, *supra* note 350.

she has a grandmother who wants to care for her forever, and wants to adopt her as her own daughter. Kaylan has a right to a forever family and her grandmother's poverty absolutely should not bar her rights to family and adoption from being fulfilled.

### 3. Economic Rights

The U.S. generally takes a dim view of economic rights, as well as protections against discrimination on the basis of socioeconomic status if those protections come with economic rights or guarantees.<sup>354</sup> This view has played out recently in the U.S. regarding recent right to healthcare discussions, for example.<sup>355</sup> On the contrary, human rights law has a robust history of supporting the progressive realization of economic rights.<sup>356</sup>

Economic rights recognized under the human rights framework include, and are not limited to, the right to social protection for those in need,<sup>357</sup> the right to healthcare, the right to education, the right to work with dignity, and the right to housing and an

<sup>354</sup> See Martha F. Davis et al, *supra* note 328 at 442-450. *But see Goldberg v. Kelley*, 397 U.S. 254 (1970).

<sup>355</sup> See e.g., Andrea S. Christopher, MD and Dominic Caruso, *Promoting Health as a Human Right in the Post-ACA United States*, AMA JOURNAL ETHICS (Oct. 2015), <https://journalofethics.ama-assn.org/article/promoting-health-human-right-post-aca-united-states/2015-10>; James Teufel et al., *Legal Aid Inequities Predict Health Disparities*, 38 HAMLINE L. REV. 329, 337 (2015) ("Socioeconomic status has been strongly linked to health in the US and abroad. Overall health is associated with a relevant social status gradient [i.e., level on the socioeconomic ladder]. Those people who are closer to the top of the social gradient have better health outcomes than those closer to the bottom.").

<sup>356</sup> The International Covenant on Economic, Social and Cultural Rights (ICESCR) is the principal human rights treaty regarding economic and social rights. The ICESCR protects the equal rights of men and women to housing, work, social security, the highest attainable standard of health, and the continuous improvement of living conditions. See ICESCR, *supra* note 345. The U.S. is not a party to the ICESCR, yet the U.S. has signed the treaty. See United Nations Treaty Collection, International Covenant on Economic, Social and Cultural Rights, [https://treaties.un.org/pages/ViewDetails.aspx?src=IND&mtdsg\\_no=IV-3&chapter=4&clang=en](https://treaties.un.org/pages/ViewDetails.aspx?src=IND&mtdsg_no=IV-3&chapter=4&clang=en). There are currently 71 signatories and 169 state parties to the ICESCR. *Id.* The ICESCR represents an international consensus on economic rights, otherwise known as positive human rights. See Davis et al, *supra* note 328. See also Maastricht Guidelines on Violations of Economic, Social, and Cultural Rights, Maastricht, January 22-26, 1997. *But see* Samuel Moyn, *Human Rights Are Not Enough*, *The Nation* (Mar. 16, 2018) (arguing that there has been a fundamental failure by human rights movements to address economic inequality, advocate for redistributive policies, and that this has helped "prettify neoliberalism").

<sup>357</sup> See Report on his mission to the United States of America, *supra* note 351.

adequate standard of living.<sup>358</sup> These economic rights are found in the Universal Declaration of Human Rights,<sup>359</sup> as well as in several human rights treaties.<sup>360</sup> The United Nations Human Rights Council has appointed a Rapporteur on extreme poverty and human rights,<sup>361</sup> who is an independent expert charged with making observations and recommendations to member states regarding these rights in the context of extreme poverty. The Rapporteur on extreme poverty and human rights has stated that

from a human rights perspective, society has an obligation towards its poorest and most vulnerable members, whose well-being must be protected and promoted, not as a matter of charity but as a matter of right.<sup>362</sup>

Human rights principles require states and federal government to work towards progressive realization of economic rights.<sup>363</sup> This means that the U.S. should steadily work towards ensuring all people in poverty have access to an adequate standard of living and healthcare, and have social protections, among other economic rights. Full realization of these rights does not have to happen right away, but policy should be moving in that direction, with that end goal.<sup>364</sup>

Under the doctrine for the rights to social protection for those in need, not only should the nonrecurring expenses for adoption and permanent guardianships for people living in poverty be waived or subsidized, but the federal, state, and local governments should work together to go above and beyond and provide additional financial and other

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<sup>358</sup> See *id.*; ICESCR, *supra* note 345.

<sup>359</sup> See *e.g.*, UDHR, *supra* note 331 at art. 22, 23(3), and 25(1).

<sup>360</sup> See *e.g.*, ICESCR, *supra* note 345 at art. 9, 11(1), and 12; CRC, art. 24(1) and 26(1), *supra* note 334; International Convention on the Protection and Promotion of the Rights and Dignity of Persons with Disabilities (CRPD), art. 25, 28(1,2), Mar. 30, 2007, G.A. Res. 61/106, Annex I, U.N. GAOR, 61st Sess., Supp. No. 49, at 65, U.N. Doc. A/61/49 (2006), 46 I.L.M. 433 (2007), entered into force May 3, 2008; Convention on the Elimination of Discrimination Against Women (CEDAW), art. 11(1), Sept. 3, 1981, G.A. res. 34/180, 34 U.N. GAOR Supp. (No. 46) at 193, U.N. Doc. A/34/46, entered into force Sept. 3, 1981.

<sup>361</sup> See *id.*

<sup>362</sup> S.R. on Extreme Poverty and Human Rights, Report of the Special Rapporteur on extreme poverty and human rights on his mission to the United States of America, E/CN.4/2006/43/Add.1 (Mar. 27, 2006).

<sup>363</sup> See Martha F. Davis et al, *supra* note 328 at 440-1.

<sup>364</sup> See *id.*

support to kinship caregivers living in poverty. The U.S. should work toward providing post-permanency per diem payments, not unlike the post-adoption payments available to foster care providers, well as additional subsidies and support to ensure that all children and their kinship caregivers have access to adequate healthcare, education, housing, and food, regardless of their socioeconomic status.<sup>365</sup>

For kinship caregivers like Ms. Gurley, who live in poverty, the first step would be to provide waivers for the nonrecurring expenses of adoption and permanent guardianships. The per diem post-adoption payments can be left as a goal for later down the road. Providing waivers of the nonrecurring expenses would be a huge step toward the progressive realization of the economic rights of kinship caregivers living in poverty, including Ms. Gurley and Kaylan.

## **V. Conclusion**

Kinship diversion is now entrenched policy under state and federal law in the U.S., temporarily saving federal, state, and local governments millions of dollars per year. It does not appear that the kinship diversion policies are going anywhere soon and are more likely to expand in coming years. It is also clear that a large number of kinship caregivers will continue to live in poverty.

While foster care providers receive subsidies for adoptions or permanent guardianships for children in their care, informal kinship caregivers receive far fewer benefits for the children in their care. There are more than five times the number of children in informal kinship care as there are in foster care, and so many of the children in informal kinship care are left without the option of permanency because of the

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<sup>365</sup> The federal, state, and local governments can collaborate to provide these subsidies for low income kinship caregivers and the children in their care, as they do for GAP guardianship assistance and post-adoption payments for children with “special needs”. See Section III.B, *supra*.

socioeconomic status of their caregivers and their inability to pay for court proceedings. The goal of the child welfare system is to promote the safety, permanency, and well-being of children,<sup>366</sup> yet the state and federal governments are missing the mark by refusing to adequately support adoptions and permanent guardianships by kinship caregivers living in poverty.

These financial barriers to permanency should be removed without delay to allow for a more cost-effective child welfare system that respects children's and kinship caregiver's rights to due process, access to justice, right to family, and economic rights. To start with, all fifty U.S. states and the federal government should waive and/or subsidize the nonrecurring expenses associated with kinship adoptions and permanent guardianships, including specifically court costs and home studies, for kinship caregivers living in poverty.

First, the four states, Alabama, Iowa, Kansas, and Ohio,<sup>367</sup> that refuse to waive court costs for adoptions and permanent guardianships for people living in poverty should do so immediately and by statute. Second, the seven states, Georgia, Hawaii, Louisiana, Missouri, Ohio, South Dakota, and Texas<sup>368</sup> that refuse to provide a waiver of the home study fee for kinship caregivers living in poverty should do so immediately and by statute. If these steps were taken, this would remove the biggest obstacles to adoptions and permanent guardianships for kinship caregivers living in poverty.

The federal government should also ensure that the nonrecurring expenses associated with adoptions and permanent guardianships for kinship caregivers living in poverty are subsidized at the same level as foster care providers. One way to do this

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<sup>366</sup> See CHILDREN'S BUREAU, WHAT WE DO, *supra* note 103.

<sup>367</sup> See Section III.F., *supra*.

<sup>368</sup> See *id.*

would be for Congress to amend the definition of children with “special needs” under the Social Security Act 42 U.S.C. §473(c). The definition should be expanded to include children in the care of kinship caregivers living at or below the federal poverty line.<sup>369</sup> This would help ensure that kinship caregivers living in poverty would be eligible for per diem payments and other supportive services, as well as reimbursement of the nonrecurring expenses related to adoptions without requiring the child welfare agency to first have custody of the children. Amending the definition of “special needs” under the Act would also mean that the Title-IV Guardianship Assistance Program<sup>370</sup> would apply to all children in the care of kinship caregivers living in poverty, not just children who were or are in foster care. This would allow kinship caregivers living in poverty to receive reimbursements up to \$2,000 in nonrecurring expenses for establishing permanent guardianships as well.<sup>371</sup>

The federal government could also choose to apply some of the new dedicated stream of funding for Kinship Navigator Programs<sup>372</sup> to cover the nonrecurring expenses related to adoptions and permanent guardianships for kinship caregivers. That stream of funding is already being used to provide legal services to kinship caregivers.<sup>373</sup> Therefore, it is not much of a stretch to create a pot of money within that

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<sup>369</sup> Optimally the definition should be expanded to include kinship caregivers living up to 125% of the federal poverty line. This would be in line with income level requirements for most legal aid programs. See LEGAL SERVICES CORPORATION, QUICK FACTS (2017), <https://www.lsc.gov/quick-facts>.

<sup>370</sup> See The Fostering Connections to Success and Increasing Adoptions Act of 2008, *supra* note 3.

<sup>371</sup> In addition to subsidizing or waiving the nonrecurring costs of adoptions and permanent guardianships for kinship caregivers living in poverty, Congress should be sure to provide adequate funding to the Legal Services Corporation to provide free legal counsel to kinship caregivers living in poverty who wish to adopt or move for permanent guardianship. See LEGAL SERVICES CORPORATION, *supra* note 370 (The Legal Services Corporation is a nonprofit established by Congress in 1974 to provide financial support for civil legal aid to low-income Americans). This would help to guarantee the rights of due process and access to justice for kinship caregivers living in poverty.

<sup>372</sup> See Section III.A., *supra*.

<sup>373</sup> See CASEY FAMILY PROGRAMS, WHAT ARE KINSHIP NAVIGATOR PROGRAMS (2018), <https://www.casey.org/what-are-kinship-navigators/>.

stream that is dedicated to covering the nonrecurring expenses of legal proceedings related to permanency for children in the care of kinship caregivers living in poverty.

None of these options come at low cost to states and the federal government. However, these options would save the state and federal governments tremendous amounts of money over the long term that would otherwise be paid into the child welfare and criminal justice systems, or lost in tax earnings. Moreover, these recommended waivers and subsidies would promote permanency and protect the human rights of the hundreds of thousands children in the care of kinship caregivers across the U.S.



## Appendix A: Current Subsidization Schemes for Kinship Care

Type of Pathway to Permanency	Subsidies Available	Avg. \$\$ (Monthly) <sup>374</sup>	Requirements to Receive Subsidy
<b>Informal Kinship Care</b> <sup>375</sup>	<ul style="list-style-type: none"> <li>✓ TANF</li> <li>□ Per Diem payments</li> <li>□ GAP Payments</li> <li>□ Other monthly payments</li> <li>✓ Child support</li> <li>✓ SNAP</li> <li>✓ Medicaid/CHIP</li> <li>✓ Tax deductions</li> <li>✓ Kinship navigator program</li> <li>□ Case worker</li> <li>□ Training</li> <li>□ Additional services</li> <li>□ Reimbursement of nonrecurring expenses</li> </ul>	\$531 – \$1,805	<ul style="list-style-type: none"> <li>- Caregiver must be related by blood or marriage for TANF; meet low income &amp; resource limits for TANF, SNAP and Medicaid/CHIP; meet state definition of “kinship caregiver” for navigator program.</li> <li>- Child must meet residency requirements for tax purposes.</li> </ul>
<b>Kinship Foster Care</b> <sup>376</sup>	<ul style="list-style-type: none"> <li>✓ TANF</li> <li>✓ Per Diem Payments</li> <li>□ GAP Payments</li> <li>□ Other monthly payments</li> <li>□ Child support</li> <li>✓ SNAP</li> <li>✓ Medicaid/CHIP</li> <li>✓ Tax deductions</li> <li>✓ Kinship navigator program</li> <li>✓ Case worker</li> <li>✓ Training</li> <li>✓ Additional services</li> <li>✓ Reimbursement of nonrecurring expenses</li> </ul>	\$773 – \$6,000	<ul style="list-style-type: none"> <li>- Caregiver must be licensed foster care provider for per diem financial assistance, services, and case worker; and meet low income &amp; resource limits for TANF, SNAP and Medicaid/CHIP.</li> <li>- Child support is collected by state, if available</li> <li>- Some states provide less financial assistance for kin than for non-kin.</li> <li>- Child must meet residency requirement for tax purposes.</li> </ul>
<b>Kinship Guardianship</b> <sup>377</sup> (these subsidies only available in 35 States and DC)	<ul style="list-style-type: none"> <li>✓ TANF</li> <li>□ Per Diem payments</li> <li>✓ GAP payments</li> <li>□ Other monthly payments</li> <li>□ Child support</li> <li>✓ SNAP</li> <li>✓ Medicaid/CHIP</li> <li>✓ Tax deductions</li> <li>✓ Kinship navigator program</li> <li>□ Case worker</li> <li>□ Training</li> </ul>	\$773 – \$2,000	<ul style="list-style-type: none"> <li>- Caregiver must be “relative” of child; licensed foster care provider; and care for child in foster home at least 6 mos before moving for guardianship.</li> <li>- Child must have “special needs” under Title IV-E; reunification with parents ruled out; and been consulted regarding guardianship if 14yrs old.</li> </ul>

<sup>374</sup> The Average \$\$ Monthly column represents an estimated average of the cash assistance and food stamps available for kinship care family of one adult and two children with other income below 100% of the Federal Poverty Line and limited additional resources. See Appendix B, *infra*, for an explanation of where these numbers came from. See also e.g., CENTER ON BUDGET AND POLICY PRIORITIES, FAMILY INCOME SUPPORT, <https://www.cbpp.org/topics/family-income-support>. The numbers vary dramatically due to differing state policies regarding eligibility criteria for TANF, SNAP, Medicaid, CHIP, as well as foster care, guardianship and post-adoption financial assistance. See Section III, *supra*. For comparison, in 2019 the Federal Poverty Line for a family of three is \$1770 per month. See <https://aspe.hhs.gov/poverty-guidelines>.

<sup>375</sup> See Section III.A., *supra*.

<sup>376</sup> See Section III.B., *supra*.

<sup>377</sup> See Section III.C., *supra*.

	<ul style="list-style-type: none"> <li>✓ Additional services</li> <li>✓ Reimbursement of nonrecurring expenses</li> </ul>		
<b>Private Kinship Adoption</b> <sup>378</sup>	<ul style="list-style-type: none"> <li>✓ TANF</li> <li><input type="checkbox"/> Per Diem Payments</li> <li><input type="checkbox"/> GAP payments</li> <li><input type="checkbox"/> Other monthly payments</li> <li><input type="checkbox"/> Child support</li> <li>✓ SNAP</li> <li>✓ Medicaid/CHIP</li> <li>✓ Tax deductions</li> <li><input type="checkbox"/> Kinship navigator program</li> <li><input type="checkbox"/> Case worker</li> <li><input type="checkbox"/> Training</li> <li><input type="checkbox"/> Additional services</li> <li><input type="checkbox"/> Reimbursement of nonrecurring expenses</li> </ul>	\$531 – \$1,805	- Caregiver must meet income & resource limits for TANF, SNAP, and Medicaid/CHIP.
<b>Adoption from Kinship Foster Care</b> <sup>379</sup>	<ul style="list-style-type: none"> <li><input type="checkbox"/> TANF</li> <li><input type="checkbox"/> Per Diem Payments</li> <li><input type="checkbox"/> GAP payments</li> <li>✓ Other monthly payments</li> <li><input type="checkbox"/> Child support</li> <li>✓ SNAP</li> <li>✓ Medicaid/CHIP</li> <li>✓ Tax deductions</li> <li><input type="checkbox"/> Kinship navigator program</li> <li><input type="checkbox"/> Case worker</li> <li><input type="checkbox"/> Training</li> <li>✓ Additional services</li> <li>✓ Reimbursement of nonrecurring expenses</li> </ul>	\$603 – \$6,000	Caregiver must be licensed foster care provider for post-adoption payments, reimbursement of nonrecurring expenses of legal proceedings and additional services; and meet income and resource limits for SNAP and Medicaid/CHIP. Child must have “special needs” under Title IV-E for post-adoption payments.

<sup>378</sup> See Section III.D.1.-2., *supra*.

<sup>379</sup> See *Id.*

**Appendix B: Average Monthly Cash Assistance and Food Stamps**<sup>380</sup>

TANF <sup>381</sup>	\$170-1039
Per Diem Payments <sup>382</sup>	\$242-6,000
Guardianship Assistance Payments <sup>383</sup>	\$242-6,000
Post-Adoption Monthly Payments <sup>384</sup>	\$242-6,000
Child Support <sup>385</sup>	-
SNAP <sup>386</sup>	\$170-505
Tax Deductions <sup>387</sup>	\$191-261
Reimbursement of Nonrecurring Expenses <sup>388</sup>	-

<sup>380</sup> Estimates for a kinship family of one adult and two children. Numbers vary so much given the differences in state policies on eligibility criteria. See Section III, *supra*.

<sup>381</sup> See CENTER ON BUDGET AND POLICY PRIORITIES, POLICY BRIEF: DESPITE RECENT INCREASES IN SOME STATES, TANF CASH BENEFITS ARE STILL TOO LOW (2019), <https://www.cbpp.org/research/family-income-support/policy-brief-despite-recent-increases-in-some-states-tanf-cash>.

<sup>382</sup> See Section III.B., *supra*.

<sup>383</sup> See Section III.C., *supra*.

<sup>384</sup> See Section III.D.2., *supra*.

<sup>385</sup> Varies dramatically. Not included in Appendix A calculations.

<sup>386</sup> See CENTER ON BUDGET AND POLICY PRIORITIES, A QUICK GUIDE TO SNAP ELIGIBILITY AND BENEFITS (2018), <https://www.cbpp.org/research/food-assistance/a-quick-guide-to-snap-eligibility-and-benefits>.

<sup>387</sup> See e.g., Kathleen Elkins, *Here's the Average Tax Refund People Get in Every U.S. State*, CNBC (Apr. 4, 2017), <https://www.cnbc.com/2017/04/17/heres-the-average-tax-refund-people-get-in-every-us-state.html>.

<sup>388</sup> This is a lump sum reimbursement payment and therefore not included as cash assistance here. See Section III.E.-F., *supra*. The amount of the lump sum reimbursement varies from \$250-2,000. See *id*.