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Trying to Fit Square Pegs Into Round Holes: The Need for a New Funding Scheme for Kinship Caregivers

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Trying to Fit Square Pegs Into Round Holes: The Need for a New Funding Scheme for Kinship Caregivers

Cover Page Footnote
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Ms. Jones\textsuperscript{1} is a fifty-nine year-old woman. She also is the paternal grandmother of Brenda, age three, and Johnnie, age four. Ms. Jones's son, the father of the children, is deceased. The children's mother has a serious substance abuse addiction and is unable to care for the children. She visits the children every few months (she just drops by); otherwise, Ms. Jones has no contact with the mother. The children have been living with Ms. Jones for the past two years. They view her as "Mom."

Ms. Jones worked for many years as a janitor in an office building, but for the past year she has been supported by social security disability benefits on account of severe arthritis. She has been a widow for many years. The disability benefits would be sufficient income for her to live on, but she is having trouble supporting both herself and her grandchildren. When she could no longer work, she applied for public assistance through the Aid to Families with Dependent Children program, but was
found to be ineligible. Because her son's name is not on the children's birth certificates, she was unable to prove that she was related to the children, one criteria of eligibility.

Obtaining medical care for the children has been another problem because Ms. Jones has no legal authority to consent to such care. She finally found a clinic that will treat the children, but it is across town and only handles routine medical concerns.

In addition, Johnnie is due to start kindergarten in September, and Ms. Jones is worried that she will not be able to enroll him in school. Her neighbor who is caring for a nephew experienced this problem. This child had to wait six months before he could enter school.2

Ms. Smith is a divorced, single mother of three children who for the last year also has been raising her nephew, Matthew. Matthew is six years old. Matthew's mother, Ms. Smith's sister, died six months ago of an AIDS-related illness. Ms. Smith does not know who Matthew's father is.

Ms. Smith was barely scraping by on her income from her job as a cashier in a department store (her ex-husband does not provide any child support) when Matthew came to live with the family. Now, the bills have begun to pile up, and she is at risk of having her phone and utilities terminated.

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2. Kinship caregivers often require some type of legal authority in order to be able to care for the children properly. As is illustrated by the narrative concerning Ms. Jones, they need this to be able to meet the children's basic needs, such as consenting to medical and educational decisions. CHILDREN'S DEFENSE FUND, HELPING GRANDPARENTS (AND OTHER RELATIVES) CARE FOR CHILDREN WITH SPECIAL NEEDS 1-2 (1993) (on file with the Fordham Urban Law Journal); D.C. Kinship Care Coalition Position Statement (1992) (on file with the Fordham Urban Law Journal). Currently, the only options available in most states to acquire some degree of legal authority over a child are to file for custody or guardianship, to have the child deemed to be abused or neglected through child abuse and neglect proceedings, or to adopt the child.

None of these options is well-suited to kinship care situations. Most states' child custody statutes were written contemplating the divorce of the child's parents and an ensuing custody battle. Problems concerning notice, service of process, and burdens and standards of proof all emerge when the petitioner is a non-parent or the parents are unable to be located. In addition, psychologically, a grandmother, may not be able to file for custody of her own grandchildren or seek to have her child declared an unfit parent. For similar reasons, adoption is also often not an appropriate alternative. See infra notes 59-61 and accompanying text.

Although the issue of legal authority is a critical problem that must be addressed, it is beyond the scope of this Article. For a discussion of the need for more flexibility in state family law codes and a survey of recent legislation that was enacted or proposed to meet the needs of kinship care families, see Randi Mandelbaum and Susan Waysdorf, The D.C. Medical Consent Law: Moving Towards Legal Recognition of Kinship Caregiving, 2 D.C. L. REV. 279 (1994) and Susan Waysdorf, Families in the AIDS Crisis: Access, Equality, Empowerment and the Role of Kinship Caregivers, 3 TEX. J. WOMEN & L. 145 (1994).
Ms. Smith receives public assistance ("welfare") for Matthew, but it does not cover the costs of even his basic needs. When Matthew came to live with Ms. Smith, he came with virtually no clothes that fit him and none of the belongings or toys that little boys usually have. Ms. Smith also had to buy him a bed, a dresser and one other small piece of furniture. She still has not paid off the bill for these things. She often wonders if the little bit of money the welfare agency gives her is worth all the time and fuss. It is such a degrading and humiliating process.

In addition, Matthew has recently taken to having some violent tantrums where he ends up destroying many of Ms. Smith’s belongings. She understands, from the therapist Matthew is seeing, that he is acting out his anger over losing his mother. However, she does not know how long she can endure the emotional and financial strain that the addition of Matthew in her home has caused.

Ms. Watkins is a forty-nine year-old woman who has five adult children of her own and who is currently raising six children who are not her natural children. Three are her grandchildren, one is the step-sibling of one of her grandchildren, but is not related to her by blood, one is the nephew of her husband and the sixth is the child of a friend. One mother is incarcerated on a long-term sentence. Another has a serious substance abuse addiction. It is difficult to ascertain where some of the other parents are. All the children who are old enough to talk call Ms. Watkins "Grandma" and thrive in her warmth and nurturing.

For nearly two years, Mr. and Ms. Watkins and the six children have lived in a transitional shelter. Mr. and Ms. Watkins lost their home in New Jersey when they moved to Maryland to take on the care of two of the children. They are slowly getting back on their feet. Ms. Watkins was finally able to obtain public assistance for the three children that are her grandchildren. She is not eligible for AFDC for the two children to whom she is not related, and she does not have the necessary verification to receive any kind of assistance for the nephew of her husband.

The family recently obtained public housing and Mr. Watkins is about to start a permanent job. Still, every month is a struggle as Ms. Watkins wonders whether the food stamps will last until the end of the month.

Ms. Anderson must leave her job as a receptionist fifteen minutes early every day so that she can pick up her godchild, Anthony, at day care by 5:30 p.m. Fortunately, her boss is understanding. Anthony came to live with her two years ago after his mother was hospitalized for the fifth time with a mental illness. He never left. Anthony is now eight years old. Ms. Anderson, a single woman, is prepared to raise Anthony, but
worries how she will be able to provide for him on her very limited income.

Because Ms. Anderson is not related to Anthony, she is not eligible for any public assistance ("welfare") for him. She twice inquired about becoming a foster parent to Anthony. The first time she called she was told that Anthony would have to be removed from her home while she underwent a month-long foster care licensing process. This seemed ridiculous to her.

The second time she called, she was informed by the child welfare agency that she could not pursue these benefits at all. Because Anthony was already living with her at the time she contacted the child welfare agency, the agency took the position that he was safe and no longer at risk of abuse or neglect. Therefore, the agency would not initiate any court actions to place Anthony in the custody of the state, a situation that must occur before Ms. Anderson could apply to become his foster parent. Ms. Anderson knows of several friends and neighbors who have left the children they are raising on the doorstep of the child welfare agency. When the children are returned the next morning—after spending the night in the child welfare agency offices because there are insufficient foster care placements—the agency promises to pursue the necessary steps to bring the children before the attention of the court. Despite desperately needing financial assistance, Ms. Anderson cannot bring herself to put Anthony through that.

I. Introduction

Listening to the news media today, one might conclude that the only persons receiving welfare are lazy, often very young, unwed mothers. Similarly, the term "foster care" has become synonymous with orphanages or children living in the homes of licensed strangers. Yet, as these stories illustrate, welfare recipients and foster parents are frequently loving grandmothers, aunts or godparents who want to assume the responsibility of caring for—even raising—their kin, but who need some financial assistance to support the children. This Article will refer to these caregivers as kinship caregivers and will define kinship care broadly to include anyone who is caring for a child, either temporarily or permanently, who is not the child's biological or adoptive parent. Under this interpretation, non-relative caregivers would be considered kinship caregivers.³ Approximately 15% of all Aid to Families with De-

³ The term kinship care has taken on many different meanings within the child welfare field. Marianne Takas defines kinship care as "any form of residential
pendent Children cases⁴ are kinship care families⁵ and roughly
caregiving provided to children by kin, whether full-time or part-time, temporary or
permanent, and whether initiated by private family agreement or under the custodial
supervision of a state child welfare agency.” Marianne Takas, American Bar Asso-
ciation, Kinship Care and Family Preservation: Options for States in Legal and Policy Development 3 (1994). For purposes of this Article, I will
adopt, with some slight revision, the definitions of Takas with regard to two related
terms. Private kinship care is “kinship care entered by private family arrangement,
wherein either the parent or the caregiver has legal custody of the child.” Id. Kinship
foster care is “kinship care provided for a child who is in the legal custody of the state
child welfare agency” where the kinship caregiver is receiving foster care benefits. Id. A kinship caregiver who is receiving foster care benefits is called a “kinship foster
parent.”

The significance of kinship care arrangements was first documented in Carol
Stack’s powerful work, All Our Kin (1974). Recently, there have been several other
studies and reports which document the important role that kinship caregivers play in
the lives of many children. See Meredith Minkler and Kathleen Roe, Grand-
mothers as Caregivers: Raising Children of the Crack Cocaine Epidemic (1993); Child Welfare League of America, Kinship Care: A Natural Bridge (1994) [hereinafter A
Natural Bridge].

4. A case denotes a family. However, a family may represent an individual child,
a group of siblings, or a group consisting of a relative caretaker with his or her depen-
dent child or children. See infra note 15 and accompanying text.

5. No statistics directly document the number of families headed by kinship
caregivers who are receiving AFDC benefits, either for the children, the kinship
caregiver, or both. The Administration for Children and Families of the Department
of Health and Human Services compiles data on the demographic characteristics and
the financial circumstances of families who receive AFDC. This information indicates
that approximately 15% of the families receiving AFDC are headed by kinship
caregivers. See generally Office of Family Assistance, U.S. Dep’t of Health &
Human Serv., Characteristics and Financial Circumstances of AFDC Re-
cipients (1994) [hereinafter Financial Circumstances].

This figure was derived in the following manner. Table 32 of the Characteristics
and Financial Circumstances of AFDC Recipients for Fiscal Year 1992 indicate that
2.4% of all adult recipients are kinship caregivers. Specifically, 1.5% are grandpar-
ents, 3% are adult siblings, .5% are other relatives, and .1% are non-relatives. Id. at 53. Often, however, kinship caregivers do not include themselves in the AFDC grant
and only receive benefits for the children they are raising. See infra note 15. These
situations would therefore not be reflected in this table or in the 2.4% figure. A chart
on page 19 of the Overview of the AFDC Program for Fiscal Year 1993 illustrates that
14.8% of all AFDC cases for fiscal year 1992 were families with no adult recipients.
AFDC Information and Measurement Branch, U.S. Dep’t of Health &
Human Serv., Overview of the AFDC Program, Fiscal Year 1993 19 (1994)
[hereinafter Overview]. Because a parent must be included in an AFDC grant with
his or her children, most grants for families with no adult recipients would be headed
by relative caregivers other than parents. Assuming that a small percentage of the
14.8% figure might be children who are not living with a kinship caregiver, when
added to the number of cases which represent families where the kinship caregivers
and children are both in the grant (the 2.4% figure), the estimate of 15% appears
accurate.
31% of all foster parents who receive foster care payments under the federal foster care program are kinship caregivers.6

Despite their large and growing presence,7 kinship caregivers are a forgotten group in the debate over welfare reform and in the analyses of public policies concerning the Aid to Families with Dependent Children and foster care programs. Studying the experiences of this group of people and how they fare in our social service system helps to elucidate the themes and larger problems being discussed in the controversy over welfare reform. It also

6. KAREN SPAR, "Kinship" Foster Care: An Emerging Federal Issue (CRS Report for Congress No. 93-856, 1993) ("Children placed in foster care with relatives grew from 18% to 31% of the foster care caseload from 1986 through 1990 in 25 states that supplied information to the Department of Health and Human Services (HHS). Kinship Care is particularly prevalent in urban areas; for example, almost half of New York City's foster care population are children in kinship care."); see also Marla Gottlieb Zwas, Note, Kinship Foster Care: A Relatively Permanent Solution, 20 FORDHAM URB. L.J. 343, 355 (1993) ("[I]t is doubtful that without kinship foster care, New York City would [be able] to find enough homes for the surging number of foster children."); Fred H. Wulcyn & Robert M. George, Foster Care in New York and Illinois: The Challenge of Rapid Change, SOC. SERV. REV., June 1992, at 278, 279 ("In addition to rising infant placement rates, the foster care systems in New York and Illinois have come to rely heavily on relatives to provide homes for abused and neglected children."). This increase in kinship foster care can be attributed, in part, to a shortage of traditional, non-related foster families. A NATURAL BRIDGE, supra note 3, at 17. The National Foster Parent Association has reported that between 1985 and 1990, the number of traditional foster families declined by 27%, while the number of children in need of substitute care increased by 47%. Id. at 17 (citing NATIONAL FOSTER PARENT ASSOCIATION, NATIONAL FOSTER CARE FACTS AND FIGURES (1991)).

7. In 1990, in the District of Columbia, over 27,000 children under the age of eighteen, or 23.4% of all children, were living in the care of an adult other than their parent or a foster parent. ARLENE F. SALUTER, MARITAL STATUS AND LIVING ARRANGEMENTS: MARCH 1991 9 (U.S. Bureau of the Census, Current Population Reports Series P-20, No. 461). This represented a 30% increase from the 1980 data for the District of Columbia. Id. Nationally, over the past decade, these figures have increased by 16%. Id. Across the country, approximately 940,000 children live in households solely headed by their grandparents. Id. This constitutes approximately 1.4% of all children in the United States. Id. At least another 2 million live in homes with both their grandparents or grandmother and one parent. Id.; see also CHILDREN'S DEFENSE FUND, HELPING GRANDPARENTS (AND OTHER RELATIVES) CARE FOR CHILDREN WITH SPECIAL NEEDS (1993) (documenting the increasing number of grandparents who serve as caregivers) (on file with the Fordham Urban Law Journal).

A NATURAL BRIDGE, supra note 3, at 1 ("The practice of relatives or kin parenting children when their parents cannot is a time-honored tradition in most cultures."). However, the problems kinship caregivers encounter and the growing numbers of kinship care situations that exist today are new. Id. at 4. The social realities of the 1990s - deepening poverty, especially in communities of color, increased incarceration of mothers who are single parents, parental AIDS, the crack epidemic and other substance abuse addictions, teenage pregnancy, crime and parental absenteeism - have caused an exponential growth in kinship care arrangements. Id. at 4-5; see also Mandelbaum & Waysdorf, supra note 2.
clearly demonstrates that the two financial assistance programs available to kinship caregivers are not responsive to the needs of these families.

Currently, kinship caregivers must rely on one of two federal funding programs:8 Aid to Families with Dependent Children (AFDC)9 or foster care through the Adoption Assistance and Child Welfare Act of 1980 (AACWA).10 In order to be reimbursed by the federal government, state programs must adhere to federal program requirements.11 Neither program, however, was designed to meet the needs of this group of caregivers, and therefore the caregivers and public agencies that administer these programs run into enormous problems when they attempt to adapt these programs to the needs of kinship caregivers. Trying to “fit” kinship caregivers into these programs leads to a myriad of problems for

8. Two other funding programs are available to children involved in the child welfare system, Title IV-B, 42 U.S.C. §§ 620-628 (1988 & Supp. V 1993), and Title XX, 42 U.S.C. §§ 1397-1397f (1988 & Supp. V 1993). These two programs are limited, however, and will not be discussed in this article. Title IV-B authorizes funds for states in a range of child welfare services, which may be used to assist children and families without regard to income levels or custodial status. States must submit a plan for funds to be authorized, and appropriations may be limited. Federal expenditures under Title IV-B were estimated to be only about $295 million for fiscal year 1994. HOUSE WAYS AND MEANS COMMITTEE, 1994 GREEN BOOK: OVERVIEW OF ENTITLEMENT PROGRAMS 601 [hereinafter 1994 GREEN BOOK]. Title XX provides funds to states for a wide range of social services, including child welfare. Title XX is a capped entitlement program. An entitlement ceiling of $2.8 billion was enacted under the Omnibus Budget Reconciliation Act of 1989, Pub. L. No. 101-239, 103 Stat. 2106 (1989). This ceiling has decreased the entitlement’s value by the operation of inflation. Thus, in 1994 dollars, the ceiling of $2.8 billion was worth $3.161 billion in fiscal year 1991 (the first year of full implementation). 1994 GREEN BOOK, supra, at 584. The $361 million “lost” in the program’s funding demonstrates that Title XX limitations are in fact increasing.

Kinship caregivers also may apply for food stamps. Any household may receive food stamps if its net income after exclusions and deductions is below the poverty line. For more detailed information on how kinship caregivers are served by the food stamp program, see infra note 15.

11. The AFDC program is based on a scheme of “cooperative federalism.” King v. Smith, 392 U.S. 309, 316 (1968). It is financed largely by the federal government on a matching fund basis, and is administered by the states. 42 U.S.C. § 603 (1988 & Supp. V 1993). States are not required to participate in the program, but those that desire to take advantage of the federal funds are required to submit a plan to the Secretary of the Department of Health and Human Services for approval. This state plan must conform with the federal statute and regulations. 42 U.S.C. §§ 601, 602 (1988 & Supp. V 1993). While federal law does not require states to participate in AFDC, all states have done so since the Social Security Act of 1935 created the program. Adele Blong & Timothy Casey, AFDC Program Rules for Advocates: An Overview, CLEARINGHOUSE REV., Feb. 1994, at 1164, 1166.
the kinship caregivers while simultaneously creating troubling social policy dilemmas.

At the center of these problems is the incompatibility between the needs of kinship care families and the purposes and intent behind the existing governmental assistance programs. Parts II and III of this Article outline the inconsistencies present in both the AFDC and foster care programs. Part IV then studies the current reform proposals being advanced in Congress. Although reforms are greatly needed for kinship caregivers, they continue to be forgotten in the current calls for change. This analysis provides the backdrop and documents the need for the proposals for change described in Part V.

II. The AFDC Program

AFDC is the oldest federal public assistance program, enacted in 1935 as Title IV of the larger Social Security Act. It is a public assistance program for children who are deprived of the care of at least one parent, on account of absence, illness, death, incapacity or unemployment, and is colloquially known as “welfare.” AFDC is available to single or unemployed parents and to relative caretakers to the fifth degree of relationship. Both must apply for assistance at local income maintenance offices (welfare offices). The only significant difference in the way the program treats parents versus relative caretakers is that the income and resources of the parents must be considered in determining eligibility while the income and resources of the relative caretakers do not.

14. The regulations list the following relatives: father, mother, grandfather, grandmother, brother, sister, stepfather, stepmother, stepbrother, stepsister, uncle, aunt, first cousin, nephew or niece; persons of preceding generations as denoted by prefixes of grand-, great-, or great-great-; and the spouses of any aforementioned relatives even if the marriage has been terminated. 42 U.S.C. § 606(a) (1988 & Supp. V 1993); 45 C.F.R. § 233.90(c)(1)(v)(A) (1994). The Department of Health and Human Services has also recently indicated that first cousins once removed, great-great-grandparents, and any relation by blood, marriage, or adoption within fifth degree of kinship are eligible. Blong & Casey, supra note 11, at 1169 (citing HHS Action Transmittal ACF-AT-91-33 (1991)). It is important to note that AFDC is not available as a financial assistance option to distant relatives or non-relative caregivers.
15. Financial eligibility determinations are made with respect to an AFDC assistance unit. Blong & Casey, supra note 11, at 1171. The income and resources of all persons who are in the assistance unit are counted for purposes of determining eligibility and the amount of the AFDC grant. 42 U.S.C. § 602(a)(7)(A) (1988 ed. &
Much has been written about the inadequacy of AFDC grants to bring families above the poverty line and the humiliating and 


A recent Supreme Court decision, however, could seriously affect the way states group children who are being raised by kinship caregivers. Anderson v. Edwards, No. 93-1883, 1995 U.S. LEXIS 2250 (U.S. Mar. 22, 1995). The Court held that a state could require non-siblings living with one relative caretaker to be grouped into one assistance unit. Id. at *5. The plaintiff in Edwards received $341 per month in assistance to care for her granddaughter. Id. at *9. Later, Ms. Edwards also began caring for her two grandnieces, who are siblings, and received $560 per month in assistance for them. Id. Pursuant to the nuclear family filing unit rule described above, the two siblings were grouped together into a two person assistance unit. In June 1991, California adopted a non-sibling filing rule, requiring all children living with only one relative caretaker to be in one assistance unit. Cal. Dept. of Social Servs., Manual of Policies & Procedures § 82-824.1.13. Thus, the assistance that Ms. Edwards was eligible to receive for the children decreased from $901 ($341 + $560) to $694. Edwards, supra, at *9. Ms. Edwards unsuccessfully challenged the non-sibling filing rule as a violation of the federal statute and regulations governing the AFDC program.

Edwards resolved a conflict among the federal circuits and several state courts. See Wilkes v. Gomez, 32 F.3d 1324, 1329-30 (8th Cir. 1994), cert. denied, 63 U.S.L.W. 3721 (U.S. April 3, 1995) (holding that the Minnesota definition of "assistance unit" that consolidated nonsibling AFDC recipient children into a single assistance unit did not violate AFDC regulations); Bray v. Dowling, 25 F.3d 135, 145 (2d Cir. 1994), cert. denied, 63 U.S.L.W. 3721 (U.S. Apr. 3, 1995) (holding that applicable federal regulations did not prohibit a New York policy under which all children living with adult caretaker relative, including children for whom the caretaker was not legally responsible, could be considered part of one AFDC assistance unit); Maclnnes v. Commissioner of Public Welfare, 393 N.E.2d 222, 226 (Mass. 1992) (holding that federal law did not preempt statute and regulation requiring Department to add AFDC children residing with nonparent AFDC caretaker relative, to assistance unit of such relatives); Morrell v. Flaherty, 449 S.E.2d 175, 179 (N.C. 1994) (holding that N.C. policy did not conflict with federal regulations prohibiting any computation of income from nonlegally responsible adult as being available for dependent child). Currently, approximately half of the states utilize a non-sibling filing unit rule.

It also is significant to note that the eligibility test for food stamps is different from that for AFDC. Eligibility for food stamps and the amount of the food stamp grant are determined by considering the income and resources of all persons in a "household". Carrie Lewis, Introduction to the Food Stamp Program, CLEARINGHOUSE REV. Nov. 1993 at 718, 722. A household is defined as a person living alone, or a group of people living together (whether they are, or are not, related) who purchase and prepare meals together. 7 C.F.R. § 273.1 (1994). Therefore, the income and resources of a relative caretaker would likely be considered for purposes of determining food stamp eligibility. See Lewis, supra.

demeaning way in which applicants for AFDC are treated.17 The amount of financial assistance provided through the AFDC program is insufficient to meet basic needs, often two to four times less than foster care payments.18 Only nine states maintain a poverty gap—the difference between combined AFDC and food stamps and the poverty line—of less than 25%.19 Twenty-four states maintain a gap of more than 40%.20 Without even considering these two factors, however, there are some other very significant inconsistencies between the requirements and characteristics of the AFDC program and the needs of kinship caregivers and the children they are raising.

A. Goal of Self-Sufficiency

The AFDC program has as its major goal the eventual self-sufficiency of its recipients.21 It is intended as a short-term, temporary program to assist single parents caring for children.22 The goal is to

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18. TAKAS, supra note 3, at 27-29; SPAR, supra note 6, at 16.
19. LIVING AT THE BOTTOM, supra note 16, at 13. The nine states are: Rhode Island, Hawaii, Arkansas, New York, Vermont, California, Washington, Massachusetts and Connecticut. The primary reason for these gaps is that benefit levels have not kept up with inflation: “AFDC benefits have been going steadily downhill for at least the last nineteen years. The real value of AFDC has dropped in every state since 1975, with an average decline nationwide of 37%, leaving families receiving AFDC today far worse off than families who received AFDC in 1975.” Id. at 8, 30-31.
20. Id. at 13. The twenty-four states are: Alabama, Arizona, Arkansas, Delaware, Florida, Georgia, Idaho, Indiana, Kentucky, Louisiana, Mississippi, Missouri, Nebraska, Nevada, New Mexico, North Carolina, Ohio, Oklahoma, South Carolina, Tennessee, Texas, Virginia, West Virginia and Wyoming. Id.
21. “America’s aspirations for its welfare system have always included eliminating it. In the early nineteenth century reformers proposed to replace outdoor relief—support for indigents in their homes—with almshouses or workhouses where the poor would earn their keep and learn to become self-sufficient. In the 1930s, Social Security was designed to eliminate the need for relief by insuring citizens against the risks of unemployment, old age, and widowhood. In the 1970s and 1980s, reformers with more modest aspirations proposed to reduce the AFDC rolls by establishing employment and training programs.” MARY JO BANE AND DAVID ELLWOOD, WELFARE REALITIES: FROM RHETORIC TO REFORM 124 (1994).
22. In 1988, Congress passed the Family Support Act. The Act and its legislative history illustrate that Congress clearly sought to make eventual self-sufficiency a major goal of the AFDC program. 42 U.S.C. §§ 601 & 602(a)(19) (1988 and Supp. V 1993) (“For the purpose of . . . [helping] parents . . . to attain or retain capability for the maximum self-support and personal independence consistent with the maintenance of continuing parental care and protection . . .”) (emphasis added); see 133 CONG. REC. 35,653, (1987) (statement of Rep. Packard (R-Cal.) (“We need to focus on ending dependency.”)); id. (statement of Rep. McCurdy (D-OK)) (“Most of us in this House agree that welfare reform is critical if we are to make real progress in helping dependent families become self-sufficient and productive members of society.”); 133 CONG.
aid the parent in getting back on her/his feet. This is incompatible with kinship care situations where it may be in the best interest of the children that the kinship care arrangement be long-term or even permanent, and where ongoing assistance may be necessary. When children go to live with relatives because their mother has died of AIDS, is a substance abuser, or is incarcerated on a long-term sentence, one hopes that they will remain with those relatives for many years, if not their entire childhoods.

As the opening vignettes illustrate, the kinship caregivers' resources, without supplemental benefits, are often strained to the breaking point. At times, these economic straits force kinship caregivers to turn over the children to the child welfare agency for placement into foster care. Kinship caregivers are not the parents

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23. The Family Support Act attempts to achieve its goal of self-sufficiency by requiring the states to establish JOBS programs. 42 U.S.C. § 602(a)(19) (1988 and Supp. V 1993). These programs provide employment services and basic skills training, together with transition services designed to ease the financial costs of working. Id. AFDC recipients must participate in their state JOBS program unless they are exempted because they have a child under three or other serious barriers to work. Id.

24. Spar, supra note 6, at 31.

25. Id. at 25-26; A Natural Bridge, supra note 3, at 20-21; Meredith Minkler, Grandparents As Parents: The American Experience, Ageing International, Mar. 1994, at 25.
of these children and are not legally responsible for the care and support of the children they are raising. Yet, the current systems force kinship care families to choose between unfair impoverishment and disintegration, and do so heedless of manifest legislative intent to the contrary.

B. Mandatory Job-Training, Education & Employment Activities

For similar reasons, it is inappropriate to require kinship caregivers to participate in job training, education and employment activities in order to be eligible to receive financial assistance. As explained above, the overriding goal of these programs is to assist AFDC recipients in becoming self-sufficient by fostering a sense of accountability and assisting the recipients in acquiring skills and training. These objectives are in conflict with the realities of most kinship care situations. Requiring aging or retired kinship caregivers to participate in job training or readiness programs is both impractical and pointless.

C. Difficulties in Application Process

Kinship caregivers also experience problems when they attempt to apply for AFDC. Traditional AFDC applicants must meet many procedural requirements that are more difficult, if not impossible,
for kinship caregivers to fulfill. For example, relative caregivers frequently cannot produce the documents needed to verify their applications for assistance. Birth certificates, social security cards, school records and immunization records are often in the possession of the absent parents and difficult to reproduce without the absent parents' consent.

Paternal relatives often have a particularly onerous time. For example, proving their relationship to the child, as required by the statute and regulations, is difficult when the father's name is not on the child's birth certificate. In such cases, it may be impossible for the relative caregiver to receive aid.

III. The Foster Care Program

Given all the problems and inconsistencies concerning the AFDC program, one might surmise that the foster care system would be better suited to kinship caregivers. However, both the purpose and structure of the foster care system are incompatible with the needs of kinship care families in that the program is designed for children who require placement in traditional foster care settings. Rigid requirements regarding child custody and foster care licensing prohibit kinship care families from benefitting from the system.

A. Kinship Care and Custody Issues

The federal foster care statute, the Adoption Assistance and Child Welfare Act of 1980, does not even mention relative or kinship caregivers, much less promote placement with relatives as the best foster care option. Kinship caregivers are not contemplated

29. Blong & Casey, supra note 11, at 1180.
30. See supra note 14.
33. 42 U.S.C. § 671-79(a) (1988 & Supp. V 1993). "As originally passed by the House in 1979, the legislation also would have required that States give preference to relatives as foster care providers. In its report on the bill, the House Ways and Means Committee stated: 'The bill requires that a child be placed with relatives, if appropriate and reasonably possible. Consideration should be given to whether a child might have relatives who would be available as foster parents, since relatives may serve as foster parents under the federally reimbursed foster care program. Placement with relatives could help enhance the possibility that a child will ultimately be able to return home and would allow some continuity for the child during the period of separa-
in the statutory description of either case plan requirements or case review assessments. Additionally, attempts to place children with kinship caregivers have never been considered to be part of the “reasonable efforts” requirement, under which the state agency must demonstrate that efforts were made both to avoid removing children from the parental home and to promote reunification of any children so removed. The AACWA also does not require the state child welfare agency to notify kin that their relative children...

34. 42 U.S.C. § 671(16) (1988 & Supp. V 1993). This section requires the development of a “case plan,” which is defined in 42 U.S.C. § 675(1) (1988 & Supp. V 1993). In general, a case plan is a document created and maintained by the state child welfare agency that includes, at a minimum, a description of the type of home or institution in which a child is to be placed, a strategy for assuring that the child receives proper care and that the parents, child and foster parents receive certain services, and the health and educational records of the child.

35. 42 U.S.C. § 671(16) (1988 & Supp. V 1993). This section requires the development of a “case review system,” which is defined in 42 U.S.C. § 675(5) (1988 & Supp. V 1993). “The term ‘case review system’ means a procedure for assuring that the status of each child is reviewed periodically but no less frequently than once every six months by either a court or by administrative review in order to determine the continuing necessity for and appropriateness of the placement, the extent of compliance with the case plan, and the extent of progress which has been made toward alleviating or mitigating the causes necessitating placement in foster care, and to project a likely date by which the child may be returned to the home or placed for adoption or legal guardianship.” 42 U.S.C. § 675(5)(B) (1988 & Supp. V 1993).

36. 42 U.S.C. § 671(a)(15) (1988 & Supp. V 1993). The statute does not define the term “reasonable efforts” specifically. The meaning of “reasonable efforts” has been the subject of much interpretation by the federal courts, and thus it is still unclear whether exploring placements with relative caregivers and assisting these caregivers can be considered to constitute reasonable efforts. See Suter v. Artist M., 503 U.S. 347, 363 (1992) (“The term ‘reasonable efforts’ impose[s] only a rather generalized duty on the State . . . .’); Wood v. Tompkins, 33 F.3d 600, 605 (6th Cir. 1994) (characterizing Suter as imposing “only an amorphous ‘generalized duty’ on the states”); but see Harvey v. Shalala, 19 F.3d 1252, 1253 (8th Cir. 1994) (defining reasonable efforts as requiring a “legitimate effort to maintain family, as opposed to foster care, placement whenever possible”) (emphasis added).

The Child Welfare League considers the care of children by kin to be closely linked to family preservation. A NATURAL BRIDGE, supra note 3, at 1.
needed to be removed from their parents and placed in foster care. Frequently, kin never know that the relative children were placed into foster care until the children have spent months or years in foster care.\(^3\)

For a child to be eligible to receive foster care benefits and for the state to be partially reimbursed by the federal government for the cost of the child’s care,\(^3\) custody of the child must be with the state.\(^3\) In other words, a court must determine that the child cannot remain in the parental home without risk of further abuse or neglect, and that the child must be removed, if even temporarily, from the care of his or her parent(s).\(^4\)

This “removal” or “state custody” requirement has been interpreted in such a way that a child is not considered to be in state custody unless the child has been physically removed from the parental home.\(^4\) A change in legal custody alone does not constitute removal.\(^4\) Consequently, federal reimbursement would not be available, for example, to a grandmother caring for a grandchild, if the child came to stay at the grandmother’s home before legal custody was transferred to the state and the child was formally placed with the grandmother through the child welfare system.\(^4\)

**B. Process of Becoming a Kinship Foster Parent**

The U.S. Supreme Court decision of *Miller v. Youakim*\(^4\) ensures that kinship caregivers not be prevented from receiving the same

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41. *SPAR, supra* note 6, at 38.
42. *Id.*
43. *Id.* The 102d Congress passed omnibus urban aid legislation that included comprehensive child welfare provisions, but President George Bush vetoed the legislation. The House version of the legislation included a provision that would have addressed the kinship care problem. Revenue Act of 1992, H.R. 11, 102d Cong., 2d Sess. (1992). Karen Spar recounts that, “[a]s passed by the House, H.R. 11 would have specified that IV-E reimbursement would be available on behalf of otherwise eligible children who had not been physically removed from the home of their caretaker, but of whom the State had assumed legal custody. This provision was deleted during House-Senate conference committee negotiations on H.R. 11.” *SPAR, supra* note 6, at 38. No such provision has since been enacted.
44. 440 U.S. 125 (1979).
foster care providers, as long as they meet state licensing requirements for foster care homes and are providing care for a child who was receiving AFDC or who would have been eligible to receive AFDC. In practice, however, both the licensing and eligibility requirements are very difficult for them to meet. To be eligible for federal reimbursement of foster care payments, states must license all foster homes. Policies vary from state to state as to whether the child will be permitted to remain with the kinship caregiver during the licensing process. Often distinctions are based on whether the kinship caregiver is a blood relative. Very few states will permit a child to be placed with a godparent or "friend of the family" unless the caregiver is licensed. Consequently, the child is often uprooted from his family and loved ones and placed with strangers while the kinship caregiver pursues the often laborious and lengthy foster care licensing process.

C. Foster Care Licensing

To qualify for foster care benefits, a foster parent must satisfy a multitude of licensing requirements. These requirements seek to ensure that the child will be living in a safe, secure and appropriate home environment. Many of the child protection and safety requirements for licensure, however, are unduly formalistic and for-

45. Id. at 146. These kinship caregivers then become kinship foster parents and are eligible to receive foster care payments at the same rate as traditional foster parents. Miller was decided on federal statutory, not constitutional grounds. In Lipscomb v. Simmons, the Court of Appeals for the Ninth Circuit held that states could exclude relatives from state-funded foster care programs. 962 F.2d 1374 (9th Cir. 1992) (en banc). Constitutional claims of equal protection and due process violations were rejected.

46. An additional requirement for federal reimbursement is that the child must have received or have been eligible to receive AFDC benefits within the last six months prior to the child's removal from the parental home. 42 U.S.C. §§ 672(a)(3), (a)(4) (1988 & Supp. V 1993).

47. Licensing standards must be "reasonably in accord with recommended standards of national organizations concerned with standards for such institutions or homes..." 42 U.S.C. § 671(a)(10) (1988 & Supp. V 1993); see also Takas, supra note 3, at 42.

48. 42 U.S.C. §§ 671(a)(10), 672(c) (1988 & Supp. V 1993); 45 C.F.R. §§ 1355-57.40 (1994). States use a variety of different terms to describe the licensing process of relative caregivers as foster parents. It is therefore difficult to study and evaluate state practices in this area. Spar, supra note 6, at 17.

Low-income kinship caregivers are often unable to meet these requirements and are thus prohibited from participating in the foster care program. The fact that there is a loving and established relationship between a kinship caregiver and child and that certifying the kinship caregiver as a foster parent might allow the child to remain with this caregiver are not factors typically considered. There is a need for family assessments and home studies of kinship caregivers as potential foster parents to ensure the protection and safety of the children, and, at the same time, to recognize the strengths of kinship care situations and the importance of family.

D. Risk of Removal

Another problem with the structure of the foster care program concerns permanency for the child. Even when a kinship caregiver has met the licensing requirements, there is no guarantee that the child will be permitted to stay in her care on a long-term basis. A child in foster care is, by definition, in state custody. Accordingly, the state child welfare agency determines issues of physical custody. Thus, the kinship caregiver and the child face the constant risk that the child will be removed from the family. No sense of permanency exists for either the kinship foster child or the kinship foster family.

50. A NATURAL BRIDGE, supra note 3, at 43-49. For example, the requirements lack needed flexibility regarding the number of bedrooms, size and structure of the home, and the amount of furniture in the home. Id.

51. TAKAS, supra note 3, at 37.

52. Id.

53. A NATURAL BRIDGE, supra note 3, at 48.


56. At a White House Mini Conference held in Albany, New York on March 17, 1995, entitled “Grandparents As Caregivers: The Legal, Economic, Social, and Policy Issues of Kinship Care,” this was a chief concern expressed by the kinship caregivers, and the primary reason why many of the kinship caregivers did not want to participate in the foster care program even though it would provide them with increased financial assistance.

57. Thus, as a comparison of the AFDC and foster care programs illustrates, because foster care payments are higher than equivalent AFDC payments, kinship caregivers ironically receive more financial assistance when they have less responsibility for the child.
E. Adoption Subsidy Program

Permanency planning is problematic from another standpoint as well. Once a child is in the care of a kinship caregiver who is receiving foster care benefits, the only mechanism in the federal statute that provides both ongoing financial assistance and permanency for the child is the adoption assistance or subsidy program. Yet, adoption as a permanency choice is unsuitable in the majority of kinship care situations. Adoption requires the severing of all parental rights and ties. This is ill-suited to situations where, for example, a grandmother has assumed the care of her daughter’s children. For emotional and psychological, as well as other reasons, the grandmother is usually unwilling to participate in the petition to terminate the parental rights of her own daughter or in the subsequent adoption proceedings of her grandchildren. Consequently, children in kinship care arrangements often remain in kinship foster care indefinitely, without the permanency or stability offered by adoption, just so the kinship caregiver can continue to receive the higher public assistance benefits offered by the foster care program.

59. A NATURAL BRIDGE, supra note 3, at 66; TAKAS, supra note 3, at 51, 55; SPAR, supra note 6, at 31; USING RELATIVES FOR FOSTER CARE, supra note 33, at 12; see also Mandelbaum & Waysdorf, supra note 2, at 281.
60. A NATURAL BRIDGE, supra note 3, at 66.
61. This situation has been particularly egregious in New York where the state decided to promulgate regulations regarding kinship foster care. Specifically, the state enacted regulations that authorized an expedited approval process for kinship foster parents, a mandatory search for relatives of foster children, and equal payments to kinship foster parents without rigid licensing requirements. These new policies, together with a surge in the number of children in foster care, combined quickly to increase the number of children placed with relatives in New York City. Zwas, supra note 6, at 354-355. From 1986 to 1990, the number of children placed in kinship foster care in New York City grew by 200%. Id. By 1991, over 40% of the foster child population in New York City were children living with kinship foster parents. TASK FORCE ON PERMANENCY PLANNING FOR FOSTER CHILDREN, INC., KINSHIP FOSTER CARE: THE DOUBLE EDGED DILEMMA V (1990). Almost 50% of these kinship foster parents were over 50 years old, and 63% were grandparents. Id.

Additionally, a lawsuit filed by the Juvenile Rights Division of the Legal Aid Society in New York City in 1986, Eugene F. v. Gross, Index No. 86-1125 (N.Y. Sup. Ct. Feb. 23, 1990), was instrumental both in implementing and expanding the new kinship foster care policies. TAKAS, supra note 3, at 8.

A recent Second Circuit decision may affect how children in kinship foster care in New York City are treated and ultimately whether many of them will be placed in or permitted to remain in kinship foster care. Wilder v. Bernstein, Nos. 94-7322, 94-7324, 1995 U.S. App. LEXIS 3683 (2d Cir. Feb. 23, 1995). The court in Wilder held that children in kinship foster care must be treated the same way as children in traditional foster care. Id. at *21. Specifically, it found that children in kinship foster care
IV. The Need for Reform

At the core of the problems that kinship caregivers experience is the incompatibility between the needs of kinship caregivers and the children they are raising and the purported objectives of the existing governmental assistance programs. The programs were constructed and designed for different population groups and family structures and never contemplated the needs of kinship caregivers. Trying to fit kinship caregivers into these programs leads to perplexing and critical situations for both the caregivers and the public agencies responsible for implementing the programs.

Reform, especially reform of the AFDC program, is the buzzword of the day. There also have been similar calls for the transformation of the foster care system. Yet, when these proposals for reform are studied, it becomes obvious that the needs of kinship care families are not being taken into consideration. The dialogue and debate to date have ignored the fundamental needs of these families.

Additionally, the current themes prevalent in many of the welfare reform proposals, including the Personal Responsibility Act of the Contract With America, are clearly inconsistent with the cir-

were subject to the Wilder Decree, a consent decree entered into in 1984 that requires all children placed in foster care in New York City to receive certain services. Id. All children are to be placed on a first-come, first-serve basis in the best available agency program, and a classification and ranking system is to be implemented to identify the quality of the various foster care programs. Wilder v. Bernstein, 645 F. Supp. 1292 (S.D.N.Y. 1986), aff’d, 848 F.2d 1338 (2d Cir. 1988). In addition, prior to placement into foster care, or no later than thirty days after placement, children are to receive evaluations of their needs. Id.

The new Wilder decision has created a great deal of controversy between child advocates in New York as to whether it will ultimately undermine and discourage kinship foster care placements.

In the 1993-94 congressional session over thirty welfare reform bills were introduced.


cumstances surrounding kinship care arrangements and the needs of kinship care families. Time limits on eligibility, mandatory job training and education requirements for all adult recipients, and the establishment of rigid paternity rules, among other proposals, do not accommodate kinship care situations.

Kinship caregivers are different from parents; the law does not impose on them the same responsibilities and obligations to the child. Accordingly, kinship caregivers should not be forced to participate in programs designed to promote and instill this sense of duty and accountability in order to receive assistance for the care of someone else's children. Kinship caregivers do, however, exemplify responsibility. They have agreed to provide care for children whose parents cannot do so. They do more than provide substitute care; kinship caregivers also impart a sense of family and familial ties to the children. Without them, these children would be alone and completely dependent on the state.

Kinship caregivers and the children they raise deserve assistance and support. Yet, the myriad of procedural requirements for receiving aid—especially those designed to promote self-sufficiency and a sense of responsibility—inspires nothing new in kinship caregivers; and, for the children in kinship care families, the requirements stand in the way of permanency and a sense of family.

68. See supra note 26 and accompanying text.
V. Proposals for Change

What is needed is a multi-faceted solution that either revises the two existing federal programs, or alternatively replaces these programs with a new one that directly addresses the needs of kinship caregivers and the children they are raising. Reform, however implemented, should emphasize support for these families, not only through providing assistance, but through creating options and educating the caregivers about these options. There is a need for the laws and accompanying regulations to be more flexible and responsive to the concerns of kinship caregivers and for these caregivers to be both assisted and empowered by the process.

A. Revise Title IV-A (AFDC)

If revising the existing programs is the chosen method of reform, kinship caregivers should be excluded or exempted from all current and proposed restrictions concerning the AFDC program. As explained above, these procedural requirements, which are designed to reduce dependency and promote self-sufficiency, are unnecessary and inappropriate in the kinship care context. The rationales behind these programs and the incentives they create conflict with the realities of kinship care arrangements. Kinship caregivers are surrogate or substitute caregivers. They are not obligated to care for or support the children they have taken in and chosen to raise. They should be rewarded for this decision, not punished and forced to confront a labyrinth of bureaucratic obstacles in order to receive assistance.

B. Revise Title IV-E (Foster Care)

Title IV-E also needs to be amended in several significant ways in order to encompass the needs of kinship caregivers. First, Congress should amend the statute to create a preference for placement with relatives. Unless a state child welfare caseworker has reason to believe otherwise, placement with a relative caregiver

70. There is evidence that foster care staff at some state child welfare agencies encourage kinship caregivers to apply for AFDC rather than foster care payments as a matter of unofficial agency policy. Using Relatives for Foster Care, supra note 33, at 11. The kinship caregivers, unaware of their options, are easily influenced by the child welfare workers.
71. Waysdorf, supra note 2, at 189.
72. See supra part II (discussing inappropriateness of AFDC goals to kinship care situations).
should be considered the best initial, temporary and permanent option for a child if the child cannot be placed with his or her parents. To some extent, this would be legislating what is current practice in many states. In 1992, twenty-nine states had policies that required child welfare workers to give preference to relatives as foster care providers for their kin. Another fifteen states placed children with relatives routinely.

Additional legislative changes also could help promote the kinship caregiver preference. Congress could incorporate an acknowledgement of the importance of kin and placement with kin throughout the statute. For example, the availability of a kinship caretaker could be added to the list of required considerations for case plans and case reviews. Efforts to place a child with kin could become a mandatory component of the “reasonable efforts” requirement. Likewise, an initial and periodic kin notification system could be created.

Precedent for such legislative requirements can be found in the Indian Child Welfare Act of 1978 (ICWA). ICWA was enacted, in large part, to put a halt to the rampant separation of Native American children from their families and tribes. A significant portion of the legislation focuses on the preservation of the ethnic heritage of Native American children in foster care through a variety of protections emphasizing preferences for placements with ex-

73. Using Relatives for Foster Care, supra note 33, at 5-10.
74. Id.
75. See supra notes 34-35, for explanation of the terms “case plan” and “case review system.”
76. See supra note 36 and accompanying text for discussion of “reasonable efforts” requirement.
77. On May 25, 1993, Senator William S. Cohen (R-ME) proposed a multi-faceted piece of legislation entitled “The Grandparents Raising Grandchildren Assistance Act of 1993.” S. 1016, 103d Cong., 1st Sess. (1993). While the bill did not pass, it was drafted and introduced as a direct response to the growing phenomena of grandparents and other kin raising today’s children. Letter from Senator William S. Cohen to colleagues 1 (Apr. 19, 1993) (on file with author). Significantly, one of the provisions of the bill was to mandate that states adopt a kin-notification system for those situations where a child has been abandoned or orphaned by his or her parents. S. 1016, 103d Cong., 1st Sess. § 4 (1993). Before turning a child over to the state for placement in foster care, states would have to make reasonable efforts to notify the next of kin that the child is in need of placement. Id.
79. “Surveys of states with large Indian populations conducted by the Association on American Indian Affairs (AAIA) in 1969 and again in 1974 indicate that approximately 25-35 percent of all Indian children are separated from their families and placed in foster homes, adoptive homes, or institutions.” Background to Pub. L. 95-608.
tended family or tribal custodians whenever Native American children need to be placed in foster, preadoptive or adoptive homes. Thus, while the focus of ICWA is somewhat different than the concerns of kinship caregivers, it acknowledges a similar need for children to remain with family whenever possible. To accomplish this goal, ICWA authorizes grants for Native American child and family service programs and establishes standards and guidelines for the placement of Native American children in foster or adoptive homes. Specifically, the statute creates a stringent and detailed notification system and sets forth priorities for substitute care.

The second area of needed reform with regard to the current federal foster care statute concerns the licensing requirements for foster parents. The licensing requirements for kin should be modified to eliminate arbitrary criteria that do not reinforce safety and protection standards. This would enable more kin to become kinship foster parents.

81. Id. The purpose of the legislation was “to protect the best interests of Indian children and to promote the stability and security of Indian tribes and families by establishing minimum federal standards for the removal of Indian children from their families and the placement of such children in foster or adoptive homes or institutions which will reflect the unique values of Indian culture and by providing for assistance to Indian tribes and organizations in the operation of child and family service programs.” Stated Purpose of P.L. 95-608.
83. Id. “Any child accepted for foster care or preadoptive placement shall be placed in the least restrictive setting which most approximates a family and in which his special needs, if any, may be met. The child shall also be placed within reasonable proximity to his or her home, taking into account any special needs of the child. In any foster care or preadoptive placement, a preference shall be given, in the absence of good cause to the contrary, to a placement with - (i) a member of the Indian child’s extended family; (ii) a foster home licensed, approved, or specified by the Indian Child’s tribe; (iii) an Indian foster home licensed or approved by an authorized non-Indian licensing authority; or (iv) an institution for children approved by an Indian tribe operated by an Indian organization which has a program suitable to meet the Indian child’s needs.” Id.
84. See supra part III.C. (discussing current licensing requirements). “Child welfare agencies should require approval/licensing of kinship parents. Child welfare agencies should allow flexibility in determining the appropriateness of the kinship home, focusing on the protection of the child, the ability of the kinship parent(s) to provide for the child’s needs, and the overall livability of the home.” A NATURAL BRIDGE, supra note 3, at 47-48. “The same standards regarding child protection and safety required for unrelated foster parents should apply in the approval and licensing of kinship parents. There should be flexibility, however, in applying standards unrelated to child protection and safety. With regard to these latter standards, agencies should consider separate criteria for approval of kinship homes or waiver of certain requirements that apply to unrelated foster families.” Id. at 47.
Just as states have already implemented relative caregiver preference systems, some jurisdictions have relaxed licensing requirements either through explicit state laws and policies, or through formal and informal waivers of federal or state policies. In 1985, the United States Department of Health and Human Services issued a policy interpretation stating that all foster care facilities must meet licensing standards but that, in special situations, states may vary or waive certain standards when licensing or approving the homes of individual relatives as foster family homes. Some states exempt relative caregivers from some of the licensing requirements.

A third significant way that the foster care statute must be revised concerns the need for permanency. Permanency planning for children in kinship care families differs significantly from permanency planning for children in traditional foster care situations. There also is evidence that children placed with relatives by the state remain the legal responsibility of the state longer than children in other alternative care arrangements. Thus, there is a need for the creation of another option whereby permanent placement with the kinship caregiver could be countenanced, yet the

85. Using Relatives for Foster Care, supra note 33, at 8-10; Takas, supra note 3, at 37-40.
86. Spar, supra note 6, at 15.
87. Using Relatives for Foster Care, supra note 33, at 9. For example, some states exempt relatives from orientation and training requirements; other states allow waivers of age, marital status, income, or physical space requirements. Id. Some states have policies that specify what standards may be relaxed or waived by relatives; other states allow waivers on a case-by-case basis. Id. Some policy reformers and jurisdictions are even considering proposals that would set the kinship foster care rate at a percentage of the regular foster care rate in situations where certain non-essential licensing requirements have been waived. Takas, supra note 3, at 47-49. Pursuant to Miller v. Youakim, 440 U.S. 125 (1979), however, kinship caregivers must be permitted to opt out of this special kinship foster care category if they are able to meet all of the requirements necessary for licensure under the traditional foster care program. See supra notes 44-46 and accompanying text.
88. A Natural Bridge, supra note 3, at 63. "The observed differences between permanency planning for children in kinship [foster] care and [traditional] family foster care have been attributed to a number of factors: the relationship between kinship parents and the birth parents; the nature and quality of the relationship between the kinship parents and the child welfare agency; and the child welfare system's response to kinship arrangements as less urgent and requiring less attention than [traditional] family foster care." Id. at 64.
89. Spar, supra note 6, at 11; Zwas, supra note 6, at 364 (1993); Using Relatives for Foster Care, supra note 33, at 11. See infra note 108 for an analysis of why children in kinship foster care remain in state custody longer than children placed in traditional foster care placements.
kinship caregiver could continue to receive ongoing foster care payments or the equivalent.

One option, endorsed by the Child Welfare League of America, is subsidized guardianship.\textsuperscript{90} Under this proposed system, once a child has been placed with a kinship foster parent and efforts to rehabilitate the child's natural parents have failed, the kinship caregiver could become the child's legal guardian and continue to receive foster care payments.\textsuperscript{91} Under this program, there would no longer be a need for ongoing supervision by the child welfare agency and the court. Several states have been experimenting with this model on the state and local levels.\textsuperscript{92} The Inspector General has recommended a study on the costs and benefits of providing subsidies to relatives who assume guardianship for special-needs children.\textsuperscript{93} He noted that, as proponents for the adoption subsidy program successfully argued,\textsuperscript{94} the increased costs of such subsidies may be offset by the long-term savings in court and administrative costs of keeping children in foster care.\textsuperscript{95}

\textsuperscript{90} A Natural Bridge, \textit{supra} note 3, at 69.
\textsuperscript{91} This is analogous to the current subsidized adoption program created by the Adoption Assistance and Child Welfare Act of 1980, 42 U.S.C. \$ 673, and should be distinguished from other subsidized guardianship proposals that do not involve the state or the child welfare agency (i.e., proposals that advocate for assistance to kinship caregivers who on their own petitioned for and obtained guardianship over the children).
\textsuperscript{92} Using Relatives for Foster Care, \textit{supra} note 33, at 12. The Inspector General reports that six states have a form of subsidized guardianship. \textit{Id.} Illinois, for example, provides a form of subsidized guardianship, known as “successor guardianship,” for kinship caregivers who were once kinship foster parents. A Natural Bridge, \textit{supra} note 3, at 68.
\textsuperscript{93} Using Relatives for Foster Care, \textit{supra} note 33, at 14.
\textsuperscript{94} Id.; see also Zwas, \textit{supra} note 6, at 369-372.
\textsuperscript{95} Id. In her extensive monograph on kinship care policy, Marianne Takas argues against the creation of any form of subsidized guardianship for kinship caregivers. Takas, \textit{supra} note 3, at 53-54. She contends that guardianship does not provide protection against later custodial challenges by the natural parent(s). \textit{Id.} at 54. Guardianship orders, like custody orders, are never final. \textit{Id.} Instead, she favors flexible forms of adoption that might allow for post-adoption visitation by one or both parents or adoption by a kinship caregiver when only one parent's parental rights have been terminated. \textit{Id.} at 54-61. She denotes the latter “kinship adoption.” \textit{Id.} at 58.
C. A New and Separate Kinship Care Program

An alternative to amending and revising the AFDC and foster care programs would be to replace one or both of them with a separate kinship care program that would provide benefits, at a rate somewhere in between AFDC and foster care, as well as supportive services such as subsidized child care, respite care, support groups and transportation services. This new program would at-

96. The purpose and structure of the AFDC program is so ill-suited to the circumstances surrounding most kinship care situations that it might be best to create a new system that directly addresses their needs. See supra part II. This poor fit and the need for a separate program will become even more compelling if some of the current welfare reform proposals are enacted. See supra notes 64-70 and accompanying text.

97. In order to exclude kinship caregivers from the foster care statute, the federal statute would have to be repealed or amended in such a way as to override the Supreme Court decision in Miller v. Youakim, 440 U.S. 125 (1979). See supra notes 44-46 and accompanying text.

98. It may seem preposterous to be proposing the creation of a new public assistance program at a time when there is such an extreme focus and emphasis on the elimination of programs, particularly uncapped federal entitlement programs. Current proposals at the federal level would replace the programs with limited block grants to the states that would give the states great latitude with respect to how the funds can be distributed. See H.R. 4, Title V (concerning the food stamp program); Id., Titles I, III, IV (concerning the AFDC program); and Id., Title II (concerning the AFDC program and mandatory job training, education and employment activities).

While the elimination of any federal entitlement program constitutes a dire and urgent situation in need of immediate attention and advocacy, a discussion of the importance of maintaining the entitlement programs as a means of avoiding increased poverty in this country is beyond the scope of this Article. It is this author's hope that any program proposed for kinship caregivers could be implemented on either the state or federal level.

99. In discussions of this proposal with kinship caregivers, advocates, social workers, policy analysts, and interested members of the community, it was contemplated that a reasonable rate, given the current political climate and budgetary realities, would be 60-70% of the foster care rate, and that it would be calculated per child (as opposed to a grant based on the size of the family or sibling group).

100. "Grandparents and other kinship caregivers are subject to stresses far beyond the normal burdens of child rearing. Typically, they are raising youngsters impacted by substance abuse, violence, neglect and anger while trying to maintain positive relationships with the troubled parents of these children." D.C. Kinship Care Coalition Position Statement 2 (May 24, 1992) (on file with the Fordham Urban Law Journal) [hereinafter Position Statement]. See also Minkler, supra note 25, at 26. Yet, there is "no organized system to provide the battery of support services needed by kinship care providers - counseling, transportation, respite services, referral to legal and social agencies, liaison with schools, access to affordable housing, etc." Position Statement, supra, at 2. The Children's Defense Fund also has documented the inadequate level of support that kinship caregivers currently receive and the need for specialized supportive services. CHILDREN'S DEFENSE FUND, supra note 2, at 1-2.

Support groups of kinship caregivers have been found to be helpful in alleviating some of the stress that kinship caregivers experience. More than 300 grandparent support groups exist in the United States. Minkler, supra note 25, at 27. These groups have been started by the grandparents and other relative caregivers them-
tempt to establish one program that caters to all kinship caregivers regardless of the legal status of the children in their care. The custodial status of the child would not be a determining factor in the decision concerning a caregiver’s eligibility for benefits under this plan. Whether a child is in the legal custody of the state, the kinship caregiver, or even the parent would be irrelevant to the decision of whether a caregiver is eligible for kinship care benefits. The only relevant question with respect to eligibility would concern where the child is residing.

The focus of the program would be on the legal, financial and emotional needs of children living in extended families. It would recognize that children need their families and “that it is in families that children thrive, are loved and educated, and are taught family values.”

Flexibility must be a fundamental component of any kinship care program. Kinship care arrangements occur for a variety of reasons, and each situation may require different types of legal remedies and financial assistance. For example, if a child’s parents were abusive or violent, there would be an immediate need for the child protection unit of the child welfare agency and the court system to become involved so that necessary court orders could be obtained themselves, by public health and child welfare agencies, and by hospital and clinic social work staff. Children’s Defense Fund, supra note 2, at 1-2. They provide “opportunities for members to share feelings and concerns, while giving and receiving informational support about resources and methods for coping with the new caregiving role.” Minkler, supra note 25, at 27. The Pittsburgh Post-Gazette recently published an article documenting and describing the “Grandparents As Parents” program, an effort by two social service organizations “to help ease the burden” of kinship caregivers. Bob Batz, Grandparents As Parents Get Help from GAP, Pittsburgh Post-Gazette, Jan. 3, 1995.

National networks of grandparents also have been formed, including Grandparents United for Children’s Rights, based in Madison, Wisconsin, and ROCKING, Raising Our Children’s Kids: An Inter-generational Network of Grandparenting, Inc., based in Niles, Michigan. Id.

101. “When appropriately assessed, planned for, and supported, kinship care is a child welfare service that reflects the principles of child-centered, family-focused casework practice . . . .” A Natural Bridge, supra note 3, at 12.

102. Id. “Kinship care can meet the safety, nurturance, and family continuity needs of children and strengthen and support families by: enabling children to live with persons whom they know and trust; reducing the trauma children may experience when they are placed with persons who initially are unknown to them; reinforcing children’s sense of identity and self-esteem, which flows from knowing their family history and culture; facilitating children’s connections to their siblings; encouraging families to consider and rely on their own family members as resources; enhancing children’s opportunities to stay connected to their own communities and promoting community responsibility for children and families; and strengthening the ability of families to give children the support they need.” Id. at 12-13.
to protect the child. If no compelling protection concerns exist, then a caseworker\textsuperscript{103} would be assigned to meet with the family to discuss the family’s needs and situation.\textsuperscript{104}

Similar flexibility could be created in the manner and type of assistance that is provided. The system could be arranged in such a way that a kinship caregiver would be permitted to choose what type of assistance she needs. For example, a kinship caregiver could opt for slightly less cash assistance in exchange for specific supportive services such as subsidized child care, respite care, or transportation services. By providing a “menu” of services and assistance, the program would empower the kinship caregiver to determine what is best for her family and the children she is raising.\textsuperscript{105}

It has been argued that providing increased funds for kinship caregivers would create incentives for nuclear families to break up or disincentives for such families to reunite.\textsuperscript{106} While this is certainly an important policy consideration,\textsuperscript{107} there currently is little

\begin{footnotes}
\footnote{103. Caseworkers would be required to take part in specialized training sessions concerning the needs and characteristics of kinship care families.}
\footnote{104. Currently, “whether most states help relatives make an informed choice concerning licensing and reimbursement options is questionable.” \textit{Using Relatives for Foster Care, supra note} 33, \textit{at} 11.}
\footnote{105. This type of a plan is analogous to “flexible benefit plans” used by companies in the private sector. These plans allot employees a certain amount of money and then permit the employees to choose the benefit programs that are best suited to their needs from a menu of options. A study conducted by Coopers & Lybrand of 541 large companies, encompassing every major economic sector, found that 30\% of all companies surveyed offered flexible benefit plans to their employees. “Larger Companies More Likely than Smaller Companies to Offer Flexible Benefit Plans as Method to Contain Benefit Costs,” \textit{PR Newswire} (May 1993). “Flexible benefit programs offer employees an effective way to implement and manage employee cost sharing provisions. This has been the most effective mechanism for controlling the portion of health care benefits funded by employers,” said Anthony F. Martin, a partner in Coopers & Lybrand’s Human Resource Advisory Group. \textit{Id.}

Ford Motor Company found that flexible benefit programs “allow [them] to better manage [their] costs and at the same time give [their] employees the benefits they need and that they choose to fit their circumstances.” “Ford to Change Compensation Plan,” \textit{Reuters, Limited} (Jan. 9, 1995). Ford officials estimate that the flexible benefit plan will save the company approximately $4 million a year. \textit{Id.} Similarly, Dun & Bradstreet Software implemented a flexible benefit plan in June 1993 as a “cost-effective solution” to “spiraling benefits costs.” “D & B Software Offers Client/Server Human Resource Flexible Benefit Product,” \textit{Business Wire} (June 14, 1993).

An analysis of the use of such plans in the welfare and public sector context is beyond the scope of this Article.

106. \textit{Takas, supra} note \textit{3}, \textit{at} 38-39; \textit{Spar, supra} note \textit{6}, \textit{at} 34.

107. “Policy Choices are difficult to evaluate on the basis of their impact on individual behavior, since it is unclear whether, or to what extent, individuals allow Federal policies to influence highly personal decisions.” \textit{Spar, supra} note \textit{6}, \textit{at} 34.}
\end{footnotes}
evidence to support such a supposition. Moreover, the realities of kinship care situations strongly suggest that the virtues of the nuclear family cannot be assumed, and concerns over reunification may often be moot and exaggerated. Most children in kinship care situations are there because of a serious condition affecting their parent or parents' ability to care for them. On account of the nature of these adversities (AIDS, incarceration, substance abuse), the parents are not likely to be capable of caring for their children, regardless of federal policy. In fact, many kinship caregivers would like nothing more than for the children to return to their parents, if the parents are able to care for them. In actuality, however, the children are likely to remain with the kinship caregivers for long periods of time, if not their entire childhoods.

VI. Conclusion

1995 is the "Year of the Grandparent." 1995 also appears to be a time when our nation is craving some form of welfare reform and at the same time a return to an ethos of individual responsibility and "family values." Kinship caregivers represent these value concepts. They are family, and they exemplify altruism and responsibility. Yet, despite this, they continue to be forgotten and unsupported.

The existing systems work against, rather than for, the stability and security of these caregivers and the children they are raising. They do so because they were never designed to serve the needs of this population group. Unfortunately, in this era of change, the needs and special circumstances of kinship care families continue

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108. The only evidence that exists indicates that children placed in kinship foster care tend to remain there longer than children in traditional foster care. See supra note 89 and accompanying text. There are many factors, however, that influence this outcome other than the fact that the parents have a disincentive to work toward having the children returned. In general, there is a lack of adequate permanency planning for children in kinship care arrangements. Zwas, supra note 6, at 364-367. States frequently do not have viable paths out of foster care for children for whom continued care by the relative is the best permanent plan but for whom adoption is not a practical option.” USING RELATIVES FOR FOSTER CARE, supra note 33, at 12; see also supra note 61 and accompanying text. Additionally, “caseworkers may not pursue reunification of these children with their biological parents as strenuously, since children in kinship care are already with family members.” SPAR, supra note 6, at 11.

109. See supra note 7.

to go unrecognized. Unless the situation changes, kinship caregivers will continue to struggle to adhere to program regulations that are nonsensical and unresponsive, and the children in their care will continue to be at risk of losing the only family they may have.