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KINSHIP FOSTER CARE: A RELATIVELY PERMANENT SOLUTION

I. Introduction

The number of children in foster care exploded in the 1980s, particularly in the latter part of the decade.\(^1\) This trend reflected a steep escalation in the incidence of reported child abuse and neglect, stemming from rampant drug abuse, poverty and homelessness in the nation's urban centers.\(^2\) New York City, which has the country's largest foster care system, reported that the number of children in foster care grew 100% between 1985 and 1989, with nearly 33,000 children in care by 1989.\(^3\) Because of this astonishing rate of growth, the task of quickly recruiting and licensing qualified foster parents to provide care for these children became virtually impossible.\(^4\)

Due in part to these dramatic trends, foster children were placed in the homes of their relatives\(^5\) with increasing frequency.\(^6\) Moreover,
legislation enacted in 1985 mandated the placement of children with relatives whenever possible,7 embodying the widespread belief that foster children are less traumatized by placement with relatives than by placement with strangers.8 These growth trends and policy changes initiated a quick surge in kinship foster care. Though kinship foster care was virtually nonexistent prior to 1985, by 1990 the number of foster children cared for by relatives in New York City amounted to over 22,000 children, or 45.8% of the total number of children in foster care in the city.9 Foster care placement with relatives obviates the need for strangers to care for these children, and ostensibly ensures that children are placed in a familiar, family-like setting.

Kinship foster care is intended to provide substantially the same standard of care as children receive in placement with unrelated foster parents. Legislation and administrative regulations governing kinship caregivers10 closely parallel those governing foster parents.11 In practice, however, the two differ enormously in New York City.12 Frequently, agencies place foster children in the homes of relatives with
little regard for the adequacy of these homes. Furthermore, caseworkers do not provide these children with mandated foster care services, and often permit the children to languish in foster care without realistic plans for discharge through adoption or return to their natural parents. Many factors contribute to New York City’s failure to mold kinship families to the foster care model, which has proven costly for both the children and for New York City’s taxpayers.

This Note evaluates the existing kinship foster care system, and examines the possibility of addressing the program’s problems by creating a new legislative category for kinship guardians. Kinship guardians would receive stipends to care for their relatives’ children on a permanent basis, but not under the auspices of the foster care system. Thus, these children would not be entitled to foster care services, which are designed to reunite children with their natural parent(s). Part II provides the background to New York City’s foster care system, including its history, legislative goals and the mechanisms it provides for placement in foster homes. Part III traces the development of the city’s kinship foster care program, while Part IV details the shortcomings of that system. Part V concludes by proposing the creation of an additional legislative category, “kinship guardians.”

This Note does not advocate replacing kinship foster parents with kinship guardians. Rather, this Note argues that kinship foster care should continue with more thorough approval and supervision of kinship foster homes, and better services to kinship foster children. Only if these services fail to reunite the foster child’s natural family should kinship caregivers then become permanent kinship guardians. These recommended amendments to current legislation will better serve kinship foster children and their willing kinship caregivers, while pre-


14. Double Edged Dilemma, supra note 5, at 10-13 (caseworkers did not adequately supervise kinship foster homes, did not arrange for visitation between kinship foster children and their natural parents, and failed to assess and provide rehabilitative services for kinship foster children or their natural parents); see also infra text accompanying notes 138-55.

15. Jesse Thornton, Permanency Planning for Children in Kinship Foster Homes, 70 Child Welfare 593 (1991); see also infra text accompanying notes 156-75.

16. See infra text accompanying notes 94-175.
serving the resources of the foster care system for those children most in need of its services.

II. Background

A. Growth of the Foster Care System in New York City

In the early decades of this century, children not cared for by their natural parents were typically placed in institutional care. This practice tapered off when foster homes emerged as a more humane and less expensive alternative for providing care to children who were neglected, abused or abandoned by their parents.\textsuperscript{17} With the number of children in foster care climbing steadily through the 1970s, Congress attempted to contain and regulate this growth through programs outlined in the Federal Adoption Assistance and Child Welfare Act of 1980 (the "Federal Act").\textsuperscript{18} The New York Legislature had similar goals when it enacted the Child Welfare Reform Act of 1979 (the "New York Act"),\textsuperscript{19} which was designed to reform an underregulated system of foster care.\textsuperscript{20}

These acts sought to increase preventive\textsuperscript{21} and rehabilitative services,\textsuperscript{22} and improve the adoption rate for children in foster care.\textsuperscript{23} These services and adoption programs were designed to help children avoid foster care, or to minimize the length of time spent in foster care pending adoption or return to the natural family. The New York Act required the state to monitor local child welfare agencies' success in implementing these standards, and authorized corresponding fiscal incentives for success and funding sanctions for failure.\textsuperscript{24} As a result of these reforms, the number of children in care dipped slightly in the early 1980s.\textsuperscript{25}

In the mid-1980s, this trend reversed dramatically as thousands of children were admitted to foster care, and the rate of discharge from  

\textsuperscript{17} COMMITTEE ON THE OFFICE OF ATT'Y GEN., NAT'L ASS'N OF ATT'YS GEN., LEGAL ISSUES IN FOSTER CARE 3 (1976).
\textsuperscript{19} 1979 N.Y. Laws 610, 611 (codified at N.Y. SOC. SERV. LAW §§ 409-409 (h) (McKinney 1992)).
\textsuperscript{20} See FAILED PROMISES, supra note 1, at 13.
\textsuperscript{21} Preventive services are targeted toward preserving natural families and preventing children from entering foster care. See FAILED PROMISES, supra note 1, at 4, 45-49.
\textsuperscript{22} Rehabilitative services are those that ameliorate problems during foster care so that the natural family can be reunited. See DOUBLE EDGED DILEMMA, supra note 5, at 12-13.
\textsuperscript{23} FAILED PROMISES, supra note 1, at 13.
\textsuperscript{24} Id.
\textsuperscript{25} Wulczyn & George, supra note 6, at 4.
KINSHIP FOSTER CARE

between 1987 and 1989, the number of children in foster care in New York State doubled. Between 1987 and 1989, the number of children in foster care in New York State doubled.\textsuperscript{27} In New York City, primarily minority children from poor communities\textsuperscript{28} fell into the system mainly due to epidemic levels of crack and cocaine abuse.\textsuperscript{29} Poverty,\textsuperscript{30} homelessness,\textsuperscript{31} and incidents of domestic violence also contributed to this trend.\textsuperscript{32} In particular, increased drug use among pregnant women resulted in an overwhelming number of infants who went directly from birth hospitals to foster care.\textsuperscript{33} This phenomenal growth in the number of children in foster care necessitated a tremendous number of new foster homes, especially homes equipped to handle children with special physical and psychological needs.\textsuperscript{34}

\textsuperscript{26} Id. at 3.
\textsuperscript{27} See id.
\textsuperscript{28} See \textit{Failed Promises}, supra note 1, at 24-25, 31. Of the foster children in New York City's care in 1989, 55.8\% were African-American, 20.5\% Hispanic and 16.1\% Asian or interracial. Id. at 31.
\textsuperscript{29} See Wulczyn & George, supra note 6, at 13; see also \textit{Failed Promises}, supra note 1, at 6-7, 34-35. Although no causal link was established between the spread of crack and cocaine use and the rise in the foster care population, "the evidence that is available suggests that substance abuse by pregnant women contributed significantly to the demand for foster care." Wulczyn & George, \textit{supra} note 6, at 13.
\textsuperscript{30} See \textit{Failed Promises}, \textit{supra} note 1, at 24-25. In New York City, one in three children live on a family income 75\% below the established poverty level.
\textsuperscript{31} The number of homeless families has increased dramatically, reflecting a greater number of impoverished families and a significant lack of affordable housing. See Berlin Testimony, \textit{supra} note 2, at 7.
\textsuperscript{32} See \textit{Failed Promises}, \textit{supra} note 1, at 35. At the time this study was published in 1989, the number of reports of domestic violence to the New York City Police Department had increased 400\% since 1984.
\textsuperscript{33} See id. at 34. The number of babies born in New York City with traces of drugs in their urine tripled from 1,325 cases in 1986 to 5,188 in 1988. Most of the traces indicated crack cocaine. Depending on the level of exposure, prenatal drug use can result in a host of physical and mental problems for the child that require extensive special services. See Berlin Testimony, \textit{supra} note 2, at 8.

A related issue, the AIDS epidemic and its ramifications, also figures into the trend. Largely affecting drug abusers and minority populations, parents of foster children are more likely to contract HIV than the general population. See, \textit{e.g.}, \textit{Child Welfare League of Am., Nat'l Comm'n on Family Foster Care, A Blueprint for Fostering Infants, Children and Youth in the 1990's}, xix, xx, 4 (Mar. 1991) [hereinafter \textit{Blueprint}]; \textit{Double Edged Dilemma}, \textit{supra} note 5, at 57. For parents, the ramifications of a full-blown case of AIDS only complicates issues of poverty, ill health and homelessness. For children born with the HIV virus from their infected mothers, special services may be required beyond those already necessitated by prenatal exposure to drugs. As yet, many current and potential ramifications of AIDS remain unrealized and untested. See generally \textit{Blueprint}, \textit{supra}, at 3; \textit{Failed Promises}, \textit{supra} note 1, at iv (one in 80 children born in New York City is born to an HIV-positive mother).

\textsuperscript{34} See Berlin Testimony, \textit{supra} note 2, at 8.
B. General Foster Care Regulations

Legislation and regulations implemented in response to the New York Act set forth the goals of foster care and the procedures required to fulfill these goals. First, children must be placed in licensed and supervised foster homes or other care facilities. Each child is entitled to a service plan which ensures the provision of adequate care and services while the child is in care, and establishes a permanent plan for the child. Periodic court review must occur so that children are not kept in placement unnecessarily.

Generally, the foster care agency charged with the care of a child

35. The state legislature enacts laws regarding foster care, which are incorporated into the Family Court Act and the Social Services Law. In New York State, regulations pursuant to these laws and the federal foster care laws are promulgated by the State Department of Social Services and are published in New York's Codes, Rules and Regulations. The New York State Department of Social Services oversees the New York City Department of Social Services which is under the auspices of the New York City Human Resources Administration.

In essence, foster care is both a state and federal program. If a child qualifies, 50% of a foster parent’s stipend comes from the federal government. The remaining money is funded equally by the state and local government. To qualify for the federal money, the foster care provided must fulfill the standards established by federal law. In New York, state laws essentially codify the federal laws so that funding can be obtained from the federal government whenever possible. Funding is designed to cover the added expenses of child care — food, shelter, clothing and incidentals — while medical treatment is covered for these children under Medicaid. Eugene F. v. Gross, No. 86-1125 (N.Y. Sup. Ct., Feb. 23, 1990).

36. Extensive documentation of all these aspects of foster care must be readily available in a case record for each foster child. These records are necessary to obtain federal and state funding and to provide evidence to state officials that local child welfare agencies are complying with state regulation. See Kinship Care Audit, supra note 13, at 10. Further, they allow for continuity of care in an environment of very high turnover for foster care caseworkers. See infra notes 149-51 and accompanying text.

37. N.Y. COMP. CODES R. & REGS. tit. 18, § 444.5 (1989). Foster homes are inspected for safety and adequate space for the care of children. The health and character of the foster parent and other adult members of the household are evaluated. Foster parents' household income must be adequate, and they must not have been the subject of any founded maltreatment or abuse allegation in New York. Finally, foster parents must be willing to cooperate in the provision of services and ongoing supervision and visitation. They receive training and orientation with regard to these procedures and the special needs of children in foster care.


39. Id. § 392; N.Y. FAM. CT. ACT §§ 1055, 1055-a (McKinney 1983 & Supp. 1993); see also N.Y. SOC. SERV. LAW § 153-d(1)(a) (McKinney 1992) which sets forth financial disincentives for failure to comply with the law.

40. In New York City, foster care agencies are typically private, not-for-profit agencies authorized to provide for the care of dependent children. For some children, however, the Child Welfare Administration (part of the New York City Department of Social Services) serves as the foster care agency. Both are subject to the same standards for supervision of foster care. See N.Y. SOC. SERV. LAW § 371(10) (McKinney 1992).
must not place the child in foster care unless placement is necessary. Once a child is placed, the agency must ensure that the foster care setting remains appropriate, and must make diligent efforts toward discharging the child from foster care through rehabilitative services for both the child and the natural parent(s). During the placement, the foster care agency must periodically review the placement and the service plan, reevaluating the child's permanency goal at regular intervals. Toward that end, the caseworker from the foster care agency must visit the foster home and maintain contact with the foster parent on a periodic basis. Finally, regular visitation between the child and the natural parent is mandated, unless such visitation is contrary to the best interest of the child.

This complex, highly regulated system requires not only that the foster care agency perform its legal duties, but also that foster parents willingly cooperate with the agency. Without the cooperation of foster parents, foster children cannot obtain medical care, counseling or other services. Furthermore, foster parents must be available for home visits from agency caseworkers, and must ensure that the foster children are available for planned visits with their natural parents. Thus, foster parents must not only provide adequate care for foster children — they must also be willing and flexible participants in the

41. Id. § 398-b.
42. Id. "Services" typically include assisting the child's parent with regard to substance abuse treatment, income maintenance, employment, housing and parenting skills. For foster children, medical treatment, tutoring and counseling are provided when indicated. In order to ensure that services needs are recognized and addressed, caseworkers must perform the required periodic assessments.
43. Every child in foster care must have a discharge goal or permanency plan that indicates who will care for the child upon discharge from foster care. Both the Federal Act and the New York Act seek to keep natural families intact. In keeping with this policy, ideally the foster child's plan or goal will be to "return to parent." If the child cannot be returned to the parent, an adoptive home must be sought and the child's goal becomes adoption. Where an adoptive home cannot be found, other alternatives exist for discharge from foster care depending on the age of the child and the availability of kinship or other care facilities. Because of the extensive supervision and government expenditures for foster care, it is to the benefit of the child, the parent and the public to ensure expedient discharge from the foster care system. See Thornton, supra note 15, at 596.
45. N.Y. COMP. CODES R. & REGS. tit. 18, § 430.12(c).
46. Id. § 430.12(d).
47. See, e.g., id. §§ 444.5 (10), (12), (14); see generally FAILED PROMISES, supra note 1, at 71-74; BLUEPRINT, supra note 33, at 19-20.
48. Id.
49. See id.
foster care system. Without such participation, the goals of the entire system are undermined.

C. Placement of Children in Foster Homes

Under the Federal Act, Congress mandated that foster children be placed in the "least restrictive" setting possible. This standard entails placement in a "family-like" setting, preferably one which is "in close proximity to the [natural] parent's home." The New York Act expands this mandate, stating that foster care should "permit the child to retain contact with the persons, groups and institutions with which the child was involved while living with his parents or to which the child will be discharged." Thus, a child removed from his or her home should ideally attend the same school, interact with the same friends, and continue to visit with extended family members after foster care placement.

Under the "least restrictive" standard, other issues are also considered in selecting an appropriate foster home. For instance, whenever possible, siblings and half-siblings must be placed together. Additionally, a placement that is "consistent with the best interest and special needs of the child" will provide the foster child access to rehabilitative services, and eventually prepare the child for a permanent home, either with the natural or adoptive parent(s).

The task of quickly finding and licensing numerous foster homes, much less homes that fulfill these legislative ideals, has proved challenging. Despite the availability of foster care stipends, few people are willing to care for unknown, often troubled, children. Frequently, the foster care placement ripens into a permanent placement as the foster parent chooses to adopt the child when it is clear the child cannot return to the natural parent. Such a pattern exacerbates the need for carefully selected placements for foster children. Telephone Interview with James M. Abramson, Esq., counsel to seven New York City foster care agencies (Nov. 24, 1991).

Despite the increase in demand for foster homes, the number of qualified foster parents has fallen 30% since 1984. See Blueprint, supra note 33, at xix. To further complicate the problem, many foster parents are so overwhelmed by the inefficiencies and frustrations of the foster care system, they defect in overwhelming numbers every year. See Failed Promises, supra note 1, at 10.

52. See id.
56. See Failed Promises, supra note 1, at 13. Frequently, the foster care placement ripens into a permanent placement as the foster parent chooses to adopt the child when it is clear the child cannot return to the natural parent. Such a pattern exacerbates the need for carefully selected placements for foster children. Telephone Interview with James M. Abramson, Esq., counsel to seven New York City foster care agencies (Nov. 24, 1991).
57. See Failed Promises, supra note 1, at 10.
58. Double Edged Dilemma, supra note 5, at 6.
the number of available homes inevitably lags behind the number of new foster children.

In New York City, the problem of placement escalated so seriously that a number of children were shuffled nightly from one care facility or home to another while willing foster parents were unsuccessfully sought.\textsuperscript{59} This pattern, a sharp contrast to the mandatory standards applicable to foster care placement, formed the basis for a successful class action suit brought on behalf of these children.\textsuperscript{60} Around the same time, so many infants born in New York were being removed from their natural mothers immediately after birth that the state offered extra payment incentives to families willing to take infants directly from the hospital.\textsuperscript{61} Desperate to accommodate this continual influx of children of all ages, it is not surprising that in the late 1980s the city turned to relatives to serve as foster parents.

III. KINSHIP FOSTER HOMES: Humane Solution to a System in Crisis?

A. The "New" Kinship Foster Care System

Placing foster children in the care of relatives emerged in the late 1980s as an important alternative to placement with strangers. Yet the concept of kinship care is not new.\textsuperscript{62} In minority communities, extended family members have traditionally cared for children when the children's own parents could not care for them.\textsuperscript{63} Such arrangements were made informally,\textsuperscript{64} and the families generally received no additional state or federal money to care for these children. In some cases, children in foster care were officially placed with relatives, but these relatives were exempt from licensing requirements and received only Aid for Families with Dependent Children ("AFDC") welfare payments that amounted to much less than foster care stipends.\textsuperscript{65}

\textsuperscript{59} Doe v. New York City Dep't of Social Servs., 670 F. Supp. 1145, 1147 (S.D.N.Y. 1987).

\textsuperscript{60} See id. (class of foster children successfully sued New York City and City officials under 42 U.S.C. § 1983 for deprivation of substantive Due Process due to the night-to-night "program").

\textsuperscript{61} DOUBLE EDGED DILEMMA, supra note 5, at 18. This practice has been adjusted so that these larger payments only last until the child is one year old. N.Y. COMP. CODES R. & REGS. tit. 18, § 427.2(c)(6) (1990).

\textsuperscript{62} See, e.g., CAROL STACK, ALL OUR KIN: STRATEGIES FOR SURVIVAL IN A BLACK COMMUNITY (1974).

\textsuperscript{63} BLUEPRINT, supra note 33, at 71-72. Minority children comprise most of New York City's foster care system. See supra note 28.

\textsuperscript{64} Minority children were historically excluded from the child welfare system. Wulczyn & George, supra note 6, at 2.

\textsuperscript{65} DOUBLE EDGED DILEMMA, supra note 5, at 5.
B. Policy Changes for Kinship Foster Homes

While some argue that sheer demand forced the upswing in the number of placements in kinship foster homes, law and policy changes have also contributed to the dramatic growth. In *Miller v. Youakim*, the U.S. Supreme Court ruled that states should not exclude relatives from foster care stipends. The Court held that Congress never intended “to differentiate among neglected children based on their relationship to their foster parents,” and noted that this exclusionary policy conflicted with Congress’s overriding goal to provide the best available care to children.

The *Miller* decision did not immediately change the course of the foster care system in New York. A federal audit conducted in 1982 revealed that New York State was not treating kinship caregivers the same as other foster parents. Among other problems, the auditors found that the state did not evaluate and record the suitability of kinship caregivers as foster parents. Responding to this potentially dangerous omission, the State Department of Social Services issued regulations for approval and funding of kinship foster homes. Finally, in 1989, the state legislature required that agencies that had custody of foster children as a result of neglect proceedings must explore placement with relatives, and gave judges the latitude to directly order a foster care agency to place children with available relatives.

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68. The criteria for receiving foster care benefits include: (1) child was eligible for AFDC benefits before placement, (2) child was removed from home in accordance with judicial determination, (3) state or county agency has placement responsibility for child, and (4) foster home meets foster care standards established by state. 42 U.S.C. § 608(a)(1988).
70. Wulczyn & George, *supra* note 6, at 9-10.
72. N.Y. COMP. CODES R. & REGS. tit. 18, pts. 443, 444 (1985). The approval regulations for kinship caregivers are abbreviated and allow for emergency 24-hour approval. This regulation was emphatically promulgated to local child welfare agencies with an administrative order. *Double Edged Dilemma*, *supra* note 5, at 53-54. Funding, in line with the *Miller* decision, provides for equivalent payments to kinship caregivers and other foster parents.
C. Approval of Kinship Foster Homes

For the most part, state regulations governing foster homes apply to homes of relatives as well as homes of strangers. Only the approval procedures differ slightly. Once a kinship home has been located by the foster care agency and the relatives decide they are willing to serve as caregivers, procedures leading to approval can commence. The physical size and space requirements for kinship foster homes are less stringent than the standards for other foster homes. These slightly different requirements reflect the fact that the kinship caregivers have not typically selected their houses or apartments with an extended family in mind.

A more significant regulatory difference for kinship foster home approval is the twenty-four-hour expedited process for emergency approval. No parallel procedure exists for strangers who wish to serve as foster parents. The emergency system, which allows children to be placed with relatives within twenty-four hours if an initial home study is conducted, mandates a follow-up study and completion of remaining approval requirements within sixty to ninety days following the placement. This expedited process allows more children to be placed immediately with their relatives, rather than temporarily staying with strangers and then moving. Eliminating such multiple foster

74. See supra text accompanying notes 35-49 for a general overview of these regulations.


76. Pursuant to N.Y. FAM. CT. ACT § 1017 and N.Y. SOC. SERV. LAW § 384-a (1-a), the state mandates a search for available relatives.

77. See N.Y. COMP. CODES R. & REGS. tit. 18, § 444.8 (1991). The regulations for kinship and unrelated foster families both require home studies (physical inspection and assessment of family circumstances), character evaluations (of the kinship caregiver(s) and other adult household members, including documentation that none of these people have been respondents in founded allegations of child abuse or neglect in New York), medical reports showing that the kinship caregiver is healthy enough to care for foster children, and a signed foster care agreement with an application. Orientation and training is also required.

78. See N.Y. COMP. CODES R. & REGS. tit. 18, § 443.7 (1988).

79. See id.
care placements for a child through expedited approvals is important to minimizing trauma to new foster children.

D. Beneficial Growth in the Kinship Foster Care System

The expedited approval process, the mandated search for relatives of foster children, the availability of equal funds for kinship caregivers, and the general swell in the number of children in foster care have all combined to quickly increase the number of children placed with relatives in New York City. This trend toward kinship care is part of a national phenomenon — in 1991, 1.3 million children nationwide were being raised by relatives. This pattern of growth is most apparent in large urban centers such as New York City, where the 200% growth in the number of children placed in kinship foster care between 1986 and 1990 compares with a 26% growth for children in placements with strangers.

Potentially, this system benefits foster children by preventing the trauma they experience when removed from their homes and put in the care of strangers. Foster children frequently know the relatives who become their kinship caregivers. As a result, the trauma of placement is not compounded by the difficulty of establishing rapport with complete strangers. Furthermore, placement with relatives allows foster children to avoid the stigma inherent in being placed in foster care with strangers. Moreover, since relatives almost always share the child’s ethnicity and religion, and belong to the same community and extended family as the foster child, the foster child’s identity and self-esteem can be better preserved in the kinship setting. Finally, the child’s natural parent will likely feel more comfortable visiting in this familial setting, thus encouraging a continued relationship between the child and the natural parent.

To the benefit of both foster children and the foster care system, relatives are more willing than other foster parents to care for large sibling groups. In one study, 44% of foster children were placed with

81. DOUBLE EDGED DILEMMA, supra note 5, at 20.
83. See DOUBLE EDGED DILEMMA, supra note 5, at 1.
84. See Hafner, supra note 12, at 9.
86. See BLUEPRINT, supra note 33, at 74.
87. See DOUBLE EDGED DILEMMA, supra note 5, at 1.
all their siblings in kinship homes. This not only furthers state policy, it also makes it unnecessary for foster care agencies to search for multiple homes for siblings. In fact, it is doubtful that without kinship foster care, New York City would have been able to find enough homes for the surging number of foster children. Moreover, with kinship placements, the city may actually save money in the long run by reducing the need to recruit foster parents. Finally, once relatives are certified as kinship caregivers, they can, and often do, serve as foster parents of unrelated children as well.

On the surface, kinship foster care seems an ideal solution to a foster care system in crisis. Not only can kinship homes provide the humane care sought in foster homes generally, they can reduce the trauma of placement for abused and neglected children. Kinship foster placements also appear to satisfy the “least restrictive” requirement by allowing the foster child to remain in a setting similar to that of the natural parent’s own home. Unfortunately, kinship foster care has not fulfilled this promise. Although kinship foster care could be superior to foster care with unrelated foster parents, in practice, kinship care typically fails to provide even the most basic care essentials.

IV. The Failure of Kinship Foster Care

Eugene F. v. Gross provides many dramatic illustrations of New York City’s failure to successfully implement kinship foster care regulations. This widely publicized suit was filed in 1986 by the Legal Aid Society on behalf of a number of children in kinship foster care in New York City. The plaintiffs accused the city of failing to provide children in the care of relatives with legally mandated financial support, medical care and other services.

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88. Id. at 32.
90. DOUBLE EDGED DILEMMA, supra note 5, at 2.
91. See id. at vii.
92. See In re Curtis H., 446 N.Y.S.2d 986, 990 (Fam. Ct. 1982).
94. Id. This case was never certified as a class action case, and remains unsettled today. It was, however, instrumental in forcing New York City to comply better with foster care regulations, and led to the development of the 24-hour emergency home approval system. DOUBLE EDGED DILEMMA, supra note 5, at 6.
In particular, kinship caregivers' affidavits revealed that they cared for too many children in cramped quarters without enough beds, clothes and school supplies for the children. While funding was available, these relatives complained that they received these funds only after long delays. In the meantime, the caregivers could not obtain basic necessities or day care for the children. Likewise, childrens' Medicaid cards were delayed, so that the kinship caregivers could not provide the children with adequate medical treatment. Caseworkers informed the caregivers that they were too overworked to pursue backlogged payments, and in some cases, caseworkers did not understand and could not explain the compensation system and services available for kinship caregivers.

In Eugene F., one maternal aunt detailed the maternal grandmother's struggle to care for her drug-addicted daughter's four children. When the grandmother initially took her grandchildren, she worked full-time and lived in a one-bedroom apartment. Over the grandmother's objections, the children's mother visited her children at the apartment while under the influence of drugs, and "would cause trouble and steal things." Soon, the aunt gave up her home and moved with the grandmother and the children to a more spacious apartment to reduce expenses and help with child care. The aunt eventually quit her job when she and the grandmother could no longer afford to hire day care.

The pair of women never received their foster care stipends, or the funds to which they were entitled for day care and other expenses. Additionally, they received Medicaid cards for the children only after a lengthy bureaucratic delay. Finally, according to the aunt, no caseworker:

had ever assessed the needs of the children, their mother, their

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96. See Affidavits of Crystal H., Delores J. and Estelle B.; Eugene F. v. Gross, No. 86-1125 (N.Y. Sup. Ct., Feb. 23, 1990). These three women are kinship caregivers or family members of kinship caregivers in New York City.
97. Id.
98. Id.
99. Id.
101. Id. at 2.
102. Id.
103. Id. at 3.
105. Id. at 9.
106. Id. at 6.
grandmother or me or made any kind of service plan for the family. The caseworker has not made any sustained effort to contact or help the children's mother, who at present is in a drug program upstate which I, and not the caseworker, found for her.\footnote{107}

\textit{Eugene F.} clearly demonstrates how New York City's kinship foster care program has failed to provide caregivers and foster children with essential funding and services. Yet, it is equally clear that lawsuits cannot solve the problems of kinship foster care. Even if the court could resolve this case, a task the court has not managed to accomplish since its filing in 1986, no real changes will occur in the kinship foster care system without greater supervision and accountability than any judge could ever provide.

Before proposals can be formulated to resolve the problems of the kinship foster care system, it is essential to explore specifically how and why the kinship foster care system has slipped through the cracks of New York City's child welfare bureaucracy. Basically, in an overwhelming number of cases, New York City has not followed state and local regulations when placing children with their relatives. Once placed, these children do not receive the services to which they are entitled. Finally, the city has failed to pursue realistic permanency plans for almost all of these children.

\textbf{A. Placement of Children with Relatives}

Though the twenty-four-hour emergency approval system significantly reduces the bureaucratic delay in home approval, an alarming number of these approvals are conducted insufficiently or not at all. New York State's Department of Social Services found that in 73\% of the cases they audited, the emergency approval did not comply with regulatory requirements.\footnote{108} As many as 29\% of the cases contained no documentation of a home approval at all.\footnote{109} In nine of the cases they reviewed, children were permitted to remain in kinship homes that had failed to meet the requirements of the emergency home app-

\footnote{107. \textit{Id.} at 8.}
\footnote{108. See \textsc{Kinship Care Audit}, \textit{supra} note 13, at 17. The relevant regulations appear in \textsc{N.Y. Comp. Codes R. & Regs.} tit. 18, § 443.7 (1988).}
\footnote{109. \textsc{Kinship Care Audit}, \textit{supra} note 13, at 17.}

\citestart{Id.} at 8.\citestop
proval process. According to another study, there was a mean delay of nearly three months in conducting the home approval.

Failure to complete timely home approvals for kinship caregivers deprives the children placed in these kinship settings of the most basic protection from inadequate care. Without a minimal examination of the home or of the kinship caregivers, there is no reassurance that the foster child will have a bed, clothes, food or school supplies. Nor is the child ensured that the caregiver will cooperate with the foster care agency to help the child obtain necessary psychological services, tutoring, and adequate medical treatment. There is also no guarantee that the child will attend school. Since a home study is required before funds will be disbursed to the kinship caregiver, the foster child will not benefit from payments designed to assist the kinship caregiver in supporting the child.

While foster parents also report that they do not receive stipends in a timely manner, it can be argued that foster parents may be better prepared to cover extra expenses than kinship caregivers. Though neither groups’ incomes are high, foster parents elect to join the foster care system, and usually have more than twenty-four hours to plan for the arrival of their foster children (because of the licensing procedures, they typically have several months). Thus, delay in making payments has a more significant detrimental impact on kinship foster families, as they may be less financially prepared for the arrival of kinship children, and the lack of funding may set them back more severely.

Affidavits of kinship caregivers in the Eugene F. case lend strong support to this argument. For example, one maternal aunt who “couldn’t bear to see [her nephews] shuttled around the foster care system again” took them into her care. She did this even though she stated that “I knew I wouldn’t be able to take care of [them] without financial help from the City. I am employed as a dresser in the theater, but my work is often sporadic. I must depend on my savings

110. Id. at 18.
111. DOUBLE EDGED DILEMMA, supra note 5, at 34.
112. N.Y. COMP. CODES R. & REGS. tit. 18, § 426.3 (1986) (federal foster care payments can be made only for children in certified, licensed or approved foster homes).
113. FAILED PROMISES, supra note 1, at 71-74.
114. Most foster parents have low to modest incomes. FAILED PROMISES, supra note 1, at 72.
115. See supra text accompanying note 58.
116. See supra text accompanying notes 95-107.
118. Id. at 2.
... between theater productions."\(^{119}\) Yet, the aunt did not receive any emergency funds or regular stipends.\(^{120}\) This woman, unprepared to serve as a foster parent, desperately needed the city's money and services in order to provide comfortable and adequate care for her nephews.

Another problem is that kinship placement does not necessarily guarantee that the foster child will be adequately cared for. Family history may indicate just the opposite. Often, the kinship caregiver taking charge of foster children is the mother or sister of the woman who neglected or abused her children.\(^{121}\) Of course, the dysfunctional parent may be the only unstable member of an otherwise healthy family.\(^{122}\) If not, however, it is important to address those influences that led the parent astray. Only if these influences can be minimized or eliminated does the kinship home present the best setting for the foster child.

In truth, however, many studies have documented multi-generational cycles of abuse, showing a greater likelihood that if a natural parent was abusive or neglectful, a kinship caregiver will behave similarly.\(^{123}\) In addition, although exact numbers are undocumented, researchers have noted that many kinship foster parents have followed the natural parent down the path to drug addiction.\(^{124}\) Certainly, with delayed or incomplete home studies, the foster care agency, and thus New York City, fails to guard its foster children against these potentially disastrous risks.\(^{125}\) No parallel risk exists in regular foster homes, as no child can enter foster care in an unlicensed foster home pending approval.\(^{126}\) Only relatives, through the twenty-four-hour emergency approval program, can take custody of children prior to completion of a full evaluation. With no accountability to ensure that the initial and follow-up approvals are completed, many children remain in kinship foster care with unapproved or disapproved rela-

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\(^{119}\) Id.

\(^{120}\) Id. at 3-8.

\(^{121}\) See DOUBLE EDGED DILEMMA, supra note 5, at 29. In 53% of the cases studied herein, the kinship caregiver was the foster child's maternal grandmother, while maternal aunts served in 18% of the cases.

\(^{122}\) Id. at 9.

\(^{123}\) See BLUEPRINT, supra note 33, at 75; ABA CENTER ON CHILDREN AND THE LAW, KINSHIP CARE: DEVELOPING A SAFE AND EFFECTIVE FRAMEWORK FOR PROTECTIVE PLACEMENT OF CHILDREN WITH RELATIVES 4 (Mar. 1991).

\(^{124}\) DOUBLE EDGED DILEMMA, supra note 5, at 9.

\(^{125}\) These risks are sadly exemplified by the recent death of kinship foster child Milli-

\(^{126}\) Abused Child Dies; Foster Mother Questioned, N.Y. TIMES, Feb. 16, 1992, § 1, at 37.

\(^{127}\) N.Y. SOC. SERV. LAW § 375 (McKinney 1992); N.Y. COMP. CODES R. & REGS. tit. 18, §§ 444.2 (a), (c) (1988).
tives,\textsuperscript{127} who may or may not be suitable foster parents.

Finally, when children are placed with their relatives, the natural parents typically have the freedom to visit their children without involving the foster care agency or the caseworker.\textsuperscript{128} While some believe this unregulated contact works positively for the parents and the children, such visitation can have many drawbacks. One such drawback is that court orders mandating supervised visitation\textsuperscript{129} for abusive or addictive parents become meaningless.\textsuperscript{130} In one-third of the cases studied by the Manhattan Borough President's Advisory Council on Child Welfare, an order of protection had been granted directing the natural parent to stay away from the kinship foster home.\textsuperscript{131} In a few instances, children were removed from the kinship foster home because these orders were repeatedly violated by the natural parent.\textsuperscript{132}

Children in care with foster parents, in contrast, are less at risk when such an order of protection exists, since the identity, address and phone number of the foster parent can be kept secret from the natural parent.\textsuperscript{133} Clearly, such an arrangement is all but impossible in a kinship setting. Thus, children placed in kinship settings can be at greater risk of continued abuse from their natural parent than children placed in a stranger's home. Only with the firm cooperation of a kinship caregiver can the natural parent be excluded from the home.

In sum, though it is vital to do so, the procedures for approving kinship foster homes are not carefully followed. Because of an often misguided presumption that relatives will always serve as better foster parents for their kin,\textsuperscript{134} mandated procedures remain largely ignored or undocumented. In reality, kinship caregivers are sometimes abusive themselves,\textsuperscript{135} and often cannot or will not regulate visitation between foster children and their abusive natural parent.\textsuperscript{136} Thus, the city's failure to comply with state regulations for kinship foster home approvals jeopardizes the welfare of the child when a kinship foster

\textsuperscript{127} See generally KINSHIP CARE AUDIT, supra note 13, at 16-21.
\textsuperscript{128} DOUBLE EDGE DILEMMA, supra note 5, at 11-12.
\textsuperscript{129} Supervised visitation requires the caseworker to be present during visits.
\textsuperscript{130} DOUBLE EDGE DILEMMA, supra note 5, at 4.
\textsuperscript{131} Id. at 11.
\textsuperscript{132} Id.
\textsuperscript{133} See N.Y. FAM. CT. ACT § 1038 (d) (McKinney 1983 & Supp. 1993). If necessary, a protective order during discovery can be sought pursuant to Article 31 of New York CPLR, should the natural parent insist on finding this information during foster care review or other foster care proceedings.
\textsuperscript{134} DOUBLE EDGE DILEMMA, supra note 5, at 10.
\textsuperscript{135} See supra text accompanying note 123.
\textsuperscript{136} See supra text accompanying notes 129-32.
parent is not, in fact, a suitable foster parent. Since the state and city still take responsibility for placing the child with the kinship caregiver, they have a duty to ensure the adequacy of that placement.\textsuperscript{137} Unquestionably, the timely completion of kinship foster home approvals serves as an important primary component of kinship foster care. Since the failure to complete these approvals in accordance with state regulations has potentially severe negative effects, the state must take steps to assure that these procedures are executed in a timely manner. The state's efforts in conducting the 1991 kinship foster care audit exemplify such a step. The legislature should require such periodic audits that will result in funding sanctions in order to ensure accountability in approving relative foster homes.

B. Provision of Services

From the very outset of placement in the kinship home, the numerous services designed to ease the burden for foster parents fail to make their way into the homes of kinship caregivers. As outlined earlier in this section, relatives are commonly deprived of foster care payments, emergency funds and Medicaid reimbursements.\textsuperscript{138} Saddled with an unanticipated young family, they also do not receive the child care assistance they frequently need.\textsuperscript{139} These entitlements are left unaddressed, in part because the foster care agencies do not appropriately supervise kinship foster families.

Kinship caregivers and their foster children do not receive mandated visits from caseworkers, nor do caseworkers document planned visits between the foster children and their natural parents. Though caseworkers are required to visit the kinship foster home once a month, this standard is largely unmet.\textsuperscript{140} In fact, many kinship foster homes have been supervised primarily by phone.\textsuperscript{141} Caseworkers also fail to visit with kinship foster children at the agency or at the kinship

\textsuperscript{137} Many articles have explored the foster child's constitutional right to safe care. See, e.g., Sheryl A. Donnella, Safe Foster Care: A Constitutional Mandate, 19 Fam. L. Q. 79 (1985); Michael B. Mushlin, Unsafe Havens: The Case for Constitutional Protection of Foster Children from Abuse and Neglect, 23 Harv. C.R.-C.L. L. Rev. 199 (1988).


\textsuperscript{139} Double Edged Dilemma, supra note 5, at 13.

\textsuperscript{140} Failed Promises, supra note 1, at 38. Fifty of the 130 cases reviewed in the state audit revealed shortcomings in contact between caseworkers and kinship caregivers. See also Kinship Care Audit, supra note 13, at 32.

\textsuperscript{141} Failed Promises, supra note 1, at 38. At the time of this study, about 3,000 such kinship cases were attended to mostly by phone.
home on a quarterly basis.\textsuperscript{142} While these shortcomings may result partly from staffing shortages in foster care agencies, and would thus affect foster children in the homes of non-relatives as well, a contributing factor is the prevalent belief among caseworkers that kinship homes need less supervision than other foster homes.\textsuperscript{143}

Even more importantly, kinship foster children do not have supervised visits with their natural parents on a regular basis, even when the permanency plan is "return to parent." While in some cases, the natural parent is a regular fixture in the kinship home, in many other cases, the natural parent has disappeared.\textsuperscript{144} Where no visitation with the natural parent occurs, caseworkers in many instances do not document the reasons for the lack of visitation, fail to facilitate visitation by offering transportation or other services, and do not take steps to ensure future visitation.\textsuperscript{145} Caseworkers, under the mistaken impression that regulations regarding arranged visitation between foster children and their natural parents do not apply to kinship homes, fill out case records with "N/A" or "Eugene F." (now a nickname for kinship foster care) where these visitation efforts should be accurately recorded.\textsuperscript{146}

Similarly, caseworkers frequently do not document services necessary for children in kinship foster homes. While many of these children are drug-exposed \textit{in utero}, or in need of special medical, psychological and educational services, these needs are not recorded in the case records. When recorded, they are not being provided.\textsuperscript{147} Nor are natural parents provided with services that could facilitate the return of their children, such as assistance with housing or drug rehabilitation.\textsuperscript{148}

Underpaid and overworked caseworkers, whose training tends to lack substance and focus,\textsuperscript{149} are easily blamed for these shortcomings in service provision. Furthermore, the kinship program is relatively

\textsuperscript{142}. \textit{Kinship Care Audit}, \textit{supra} note 13, at 32. In 40 of the 130 cases reviewed, this mandated contact did not occur.

\textsuperscript{143}. \textit{Double Edged Dilemma}, \textit{supra} note 5, at 10.

\textsuperscript{144}. \textit{See id.} at 27-28.

\textsuperscript{145}. \textit{Kinship Care Audit}, \textit{supra} note 13, at 33. In 22 of 74 cases, visitation did not occur and no documentation in the case record explained the reason. In 38 cases where visitation did not occur, auditors found no documentation of efforts to facilitate visitation.

\textsuperscript{146}. \textit{Double Edged Dilemma}, \textit{supra} note 5, at 10. These findings are based on this study's review of actual kinship foster care case records. The mistaken belief that kinship foster homes are a separate program from other foster care is common, with the famous \textit{Eugene F.} case believed to be the springboard for the classification.

\textsuperscript{147}. \textit{Double Edged Dilemma}, \textit{supra} note 5, at 13.

\textsuperscript{148}. \textit{Id.}

\textsuperscript{149}. \textit{Failed Promises}, \textit{supra} note 1, at 63-74.
new and largely misunderstood. It is the obligation of the state and the city, however, not the caseworkers, to ensure that the caseworkers understand and coordinate service provision for kinship foster children. To do so, New York City must adequately train more qualified caseworkers, and pay them salaries that will encourage them to stay with their jobs. Furthermore, the caseworker’s records should be regularly reviewed for compliance with contact and visitation requirements. Mandated periodic state audits would serve this purpose well.

While caseworkers may arguably contribute to a lack of service provision for all foster children, the situation is exacerbated further in kinship arrangements due to the nature of the family relationships. First, because of the often preexisting relationship between the child and the kinship caregiver, the caseworker may be seen as an intruder. Kinship caregivers may resist the caseworker’s efforts to “interfere” in the relationship with their foster children, even when the caseworker is only taking steps to ensure compliance for funding purposes. Further, kinship caregivers frequently resist services that are offered for the foster children, without the worry that the children will be taken away from them. There is a decided reluctance among caseworkers and foster care agencies to remove children from kinship settings.

Thus, in a foster care system already short of available services, even fewer services manage to squeeze through these additional filters of untrained, busy caseworkers and reluctant kinship caregivers. While some advocate that kinship caregivers only be provided with stipends, these children and their families clearly need the additional services that the foster care system provides. Without such services, the child’s natural family has virtually no chance for reunification, and the child’s problems during the foster care period cannot be ameliorated. The better solution would be to make these services

150. DOUBLE EDGED DILEMMA, supra note 5, at 10.
151. FAILED PROMISES, supra note 1, at 63-74, details how the problems with caseworkers — training, salary, turnover and education — contribute to the failure of the foster care system. Of course, the funds to solve these problems are not readily available in light of the decline in government allocations for social programs that began with the Reagan era. Id. at 107-08. Local governments would have to lobby for additional funds to solve these problems.
153. See id. at 990.
154. “[S]ervices for children while they are in foster care, although mandated by the 1979 Child Welfare Reform Act, are minimally available. The foster parents cite numerous cases where the workers in their agencies have no available information as to the services available to help foster parents and the children in their care.” FAILED PROMISES, supra note 1, at 73 (emphasis in original).
155. See infra note 178.
truly accessible for children in kinship foster care, and to provide for periodic state review of kinship foster care records to ensure that the needs for services are noted and addressed.

C. Permanency Planning

Since foster care is designed to provide temporary care for children, one of the central aspects of foster care involves planning for the child's eventual discharge. A number of factors, however, create a lack of realistic permanency planning for children in kinship foster settings. The result of this lack of planning means that children in kinship settings remain in foster care much longer than children in the care of non-relatives. One survey found that 88% of New York City foster children residing in kinship homes in 1988 were still in placement as of June 1990. In contrast, only 35% of children in care with non-relatives since 1988 remained in placement as of June 1990. These differences demonstrate that the kinship foster care system fails to comply with the basic goal of foster care which is timely discharge from the foster care system. This failure is costly: as long as these children remain in foster care with their relatives, caseworkers are required to visit and provide services, courts must periodically review the childrens' status, and stipends must continue to be paid.

The length of time kinship foster children spend in care is merely symptomatic of the underlying problem of inadequate permanency planning for these children. Compared to other foster children, very few are designated to be adopted by their foster parents or to be returned to their natural parents. One researcher found the following differences in planned permanency goals for children in foster care and those in kinship homes:

156. The permanency planning mandate stems from federal legislation. "In all cases in which children and youth have been separated from their parents through child protection intervention, P.L. 96-272 requires that reasonable efforts be made to reunite children and parents, or an alternative permanent plan should be sought, such as adoption." See BLUEPRINT, supra note 33, at 78.
157. Wulczyn & George, supra note 6; Thornton, supra note 15.
158. Wulczyn & George, supra note 6, at 10.
159. See supra text accompanying notes 156-75.
Goals Planned for Foster Children in Foster Care

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<tr>
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<th>Kinship Children</th>
<th>Non-related Foster Children</th>
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<tr>
<td>Discharge to independent living\textsuperscript{161}</td>
<td>88%</td>
<td>42%</td>
</tr>
<tr>
<td>Adoption by foster or kinship parent</td>
<td>10%</td>
<td>38%</td>
</tr>
<tr>
<td>Return to natural parent</td>
<td>1%</td>
<td>14%</td>
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Because foster care seeks to return children to their natural parents whenever possible,\textsuperscript{162} the low statistic (1%) for children in kinship care designated to return to their natural parents is particularly disturbing. A number of disincentives may lead to this very low figure. First, there is a basic financial disincentive that may prevent natural parents from seeking the return of their children. Simply stated, the amount of a foster care stipend that a kinship caregiver receives far exceeds Aid for Families with Dependent Children ("AFDC") payments to which a natural parent is entitled. In one example, a relative caring for several kinship foster children received $18,600 per year for the care of the children, whereas the mother of the children would have received only $9,540 from AFDC for the same children.\textsuperscript{163} Even a parent who clearly wants what is best for her children may be tempted to leave her children in care of a relative able to provide better living quarters, more food and nicer clothing.

This financial disincentive is not the only relevant factor that discourages a child's return to the natural parent. These money issues are further complicated by the fact that the natural parent may have easy access to children while they are in the care of a relative, and may thus feel no urgent need to press for the official return of the children.\textsuperscript{164} Whether or not the parent visits the child, it is theorized that in kinship care part of the therapeutic benefit of foster care is lost since the natural parent need not face the fact that a stranger can care for their child better than they can.\textsuperscript{165} Even if a relative adopts a child, the natural parent may not have to face the possibility of never seeing the child again. Without the natural parent making a strong effort, the child may remain in foster care indefinitely.

\textsuperscript{161} See infra note 168 and accompanying text. “Discharge to independent living” means that the child will be discharged from the foster care system without being adopted or otherwise placed in the subsidized care of a parent, foster parent or guardian.

\textsuperscript{162} N.Y. SOC. SERV. LAW § 384-b (1)(ii) (McKinney 1992).

\textsuperscript{163} DOUBLE EDGED DILEMMA, supra note 5, at 17. This inequity, a long-debated issue in kinship foster care, has been deemed acceptable since the relative has no obligation to provide care for the foster children. See In re Curtis H., 446 N.Y.S.2d 986, 988-89 (Fam. Ct. 1982).

\textsuperscript{164} DOUBLE EDGED DILEMMA, supra note 5, at 12.

\textsuperscript{165} Id.
At the other end of the spectrum, some parents have no ongoing relationship with the kinship caregiver, and thus have no access to the child at all. Of course, the law provides parents with a right of access. Yet, when parents cannot visit freely, the agency has failed to make arrangements for visitation as required by law. So in these cases, the parent-child relationship is damaged during foster care. As a result, the chance that the child will be returned to the parent is severely diminished.

The many children who remain in care without the goal of either "return to parent" or "adoption" are also a tremendous concern. The cost of maintaining children in foster care is very high, and the purpose of the foster care legislation is undermined when children are not efficiently removed from the system. Yet, kinship caregivers frequently do not wish to adopt their foster children, so the caseworkers select "discharge to independent living," a goal that cannot even be realized until the age of fourteen. Kinship caregivers are reluctant to adopt their foster children because of the antagonistic process required prior to adoption to terminate the natural parent's rights to the child.

Caseworkers are aware of kinship caregivers' feelings on these issues. Since caseworkers tend to view kinship cases as less urgent than other foster care cases, they often do not communicate well with kinship caregivers regarding permanency planning. Though caseworkers may agree that adoption "would not make the child's situation any more permanent than it already is," the failure of caseworkers to encourage adoption is nevertheless a problem, as is the kinship caregivers' refusal to consider this alternative. Without such finality, the child may languish in foster care for a number of years.

Finally, for those children who are ostensibly to be returned to their natural parents, this goal may never be reached. Despite state regulation requiring this goal to be changed if the child is in care for

166. See supra text accompanying notes 144-46.
167. On average, in 1989, the cost of maintaining one child in foster care for one year was $12,000. FAILED PROMISES, supra note 1, at 107.
169. COUNCIL OF FAMILY AND CHILD CARING AGENCIES, KINSHIP FOSTER HOMES AND THE POTENTIAL ROLE OF KINSHIP GUARDIANSHIP 2 (Apr. 1991). Eighty-five percent of kinship caregivers stated that they would not adopt their related foster children if a child's permanency goal were changed to "adoption." Most say they already feel like a family (70%), while others worry about the conflict adoption would cause in their relationship with the child's natural parent (30%). Thornton, supra note 15, at 597.
170. Thornton, supra note 15, at 598.
171. Kinship Care, supra note 80, at 5.
172. Thornton, supra note 15, at 598.
more than two years, children often have the goal of “return to parent” repeated year after year, even when no progress toward that goal is achieved. This situation adds to the risk of perpetual foster care for children placed in kinship homes.

The lack of adequate permanency planning in kinship foster care undermines the operation and purpose of the foster care system for kinship foster children. Rather than serving as a safe, temporary care system that provides meaningful services to neglected and abused children, the kinship care system puts children unwanted by their parents, but wanted by their relatives, in limbo. The lack of adequate permanency planning most strongly suggests the need for reform of the current kinship foster care system.

Currently, the option of “discharge to relative” allows children to exit the foster care system, but does not provide any continued stipends for kinship guardians. The ultimate compromise would balance the kinship caregivers’ desire to receive ongoing stipends without adopting their foster children, while also addressing the foster care system’s need to discharge children in kinship foster care. Such a compromise could be struck with a “discharge to kinship guardian” goal that provides foster care stipends without foster care services.

V. Some Legislative Solutions For Kinship Foster Care

The kinship foster care system in New York State and New York City has gone through many phases since the first federal audit in 1982 detected problems in the implementation of the Miller rule. Recognizing that this program is new and still evolving, kinship foster care is still plagued with problems in its current stage. These problems, already brought to the attention of the state’s courts, can only be truly addressed through another series of legislative reforms designed to ensure compliance with existing regulations, and to provide realistic permanent discharge goals for kinship foster children that include ongoing financial support.

A. Kinship Guardians

Many have proposed creating a special category of “kinship guardi-
where relatives can receive stipends equivalent to foster care payments, but not through the foster care system. Simply stated, child welfare workers would give neglected or abandoned children directly to willing relatives. These relatives would then immediately petition the court for kinship guardian status. Once granted, the kinship guardian would then apply for the same monthly stipend that children in foster care receive.

At first glance, this proposal appears to solve many problems. First, it severely slashes expenses. While stipends are clearly an expenditure, the foster care system would no longer be required to sponsor ongoing caseworker supervision, rehabilitative services for children and their natural parents, or periodic court proceedings for kinship foster families. Such a system also alleviates the burden of convincing unwilling kinship caregivers to participate in the required rituals of foster care. Finally, this program could help the state comply with its own goals of achieving short-term foster care. Since kinship guardianship can continue indefinitely, children who would otherwise flounder for years in foster care could be directly placed in permanent home settings completely free of the foster care system.

This proposal may, however, create more problems than it solves. Perhaps most importantly, kinship guardianship would undermine the very public policy that the foster care system was designed to serve, in that children in this system will probably never be returned to their natural parents. Without a foster care agency regularly intervening in the kinship family to ensure that the relationship with the natural parent continues, or that the children or natural parents receive services that could eventually reunite them, they will not likely come together again.

Many other factors may prevent the reunification of the natural family. Unlike adoption, kinship guardianship preserves the child’s legal connection to the natural parent, and thus the natural parent would have little incentive to prevent the child’s placement in the kinship home. This incentive would further be diminished by the fact that the kinship guardian receives more money to care for the child

176. See supra note 8.
177. 1979 N.Y. Laws 610, 611 (codified at N.Y. SOC. SERVS. LAW §§ 409-409 (h) (McKinney 1992)).
178. These services may be particularly important for kinship foster children. The city of Baltimore, which previously allowed relatives to care for children without receiving foster care services, discovered that this population is truly in need of such services. Rather than continue their previous program, they are now affording the same level of care to children who enter kinship homes. Hafner, supra note 12.
than the natural parent can receive through AFDC. At the same time, for the kinship caregiver, the status of kinship guardian may not afford the same legal protection or permanency as adoption provides.

Finally, this program still fails to address the logistical problems involved in kinship guardian placement. Presumably, the city or state would still be placing these children once they have found relatives willing to care for them. The government has some duty to ensure the adequacy of these placements. This duty would arguably continue as long as the relative received government reimbursement for taking care of the kinship children. Thus, the home and the kinship guardian would still require initial evaluation and periodic updates. The kinship guardian proposal fails to eliminate the existing problem of inadequate home approvals.

B. Kinship Foster Care of the Future

Considering the number of problems created or left unsolved by the kinship guardian program, the wiser choice would be to continue the existing kinship foster program, but to incorporate a few substantive adjustments. First, the state must take steps to ensure compliance with emergency home approval regulations. While the emergency approvals' purpose of reducing trauma to incoming foster children is certainly meritorious, it does not balance the potential damage of placing a child with inadequate foster parents. Thus, the legislature should create a system for supervision and review of kinship foster home approvals. When necessary, the state should impose funding sanctions for failure to comply with regulations.

The New York State Department of Social Services attempted to effectuate such accountability through an audit of the city's kinship foster care cases, but their efforts were halted in a court dispute over the audit. This audit, issued March 30, 1990, based its findings on the review of 206 kinship foster care case records from August 1987 through July 1989. The audit's findings were contested in City of New York v. Perales, in which New York City sued the State Department of Social Services. New York City prevailed as the court voided the audit on the ground that it was "result oriented" and conducted "solely for the purpose of recouping the maximum sum possi-
The court thus overturned the $55 million funding sanction against the city. This decision is being appealed by the New York State Department of Social Services, based on their belief that the audit was fair and accurate.184

Despite the judicial setback, the Department’s efforts to ensure accountability should be continued, so long as the review is not “result oriented.” The legislature could better encourage such supervision, review and accountability by requiring yearly audits. In part, the audit in dispute in the Perales case was controversial because it focused on a limited number of cases, and because the city was unable to produce the appropriate foster care records in time.185 Such controversy could be avoided in the future by expanding the number of cases reviewed in these audits. Also, with new legislation, the city would be on notice that their documentation must be accessible to state auditors, and would be better prepared to produce it in a timely manner. Further, mandated audits could squarely address more of the concerns raised in Eugene F., particularly the child welfare system’s dissemination of rehabilitative services and funding to children in kinship foster care. With such accountability, children in kinship foster care would be better assured of adequate care, secure financial support and necessary services.

As far as permanency planning for kinship foster children, an alternative goal of “discharge to kinship guardian” could provide some of the advantages of “kinship guardian” status without circumventing the safeguards of the foster care system entirely. Unlike with the special category of “kinship guardian,”186 under the goal of “discharge to kinship guardian,” the child would go through the foster care system and receive the necessary rehabilitative services before having the permanency goal changed to “discharge to kinship guardian.” This goal is clearly more realistic for a young child than “discharge to independent living,” and would be less disruptive to family relationships than adoption. Furthermore, this alternative would allow a child to receive foster care services for a time, and then be released for ongoing, financially subsidized care with the approved kinship caregiver when foster care services are no longer helpful or necessary.187 This

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183. Id., slip op. at 8.
184. Telephone Interview with Charles Carson, Esq., Of Counsel, New York State Dep’t of Social Servs. Office (Nov. 1, 1992).
186. See supra text accompanying note 176.
187. Many children who are adopted after foster care currently benefit from such ongoing, financially subsidized care. Adoption subsidies are limited to children who are
goal should be selected carefully, only after it has become clear that the natural parent most likely cannot or will not ever take the child back. Otherwise, families who have the potential to reunify will lose that opportunity when foster care services evaporate.

Unfortunately, unlike adoption, the kinship guardian's right to the child will not override those of the natural parent. This lack of absolute permanency will be compensated, however, by the other advantages of kinship guardianship. If the "discharge to kinship guardian" goal is carefully chosen and definitive guidelines are employed, such events should be rare in practice. These guidelines could easily be adapted from the criteria courts currently use to determine whether a natural parent's rights should be terminated.188

Discharging children to a kinship guardian should not become an escape hatch for kinship caregivers who want payments, but who refuse to cooperate with the foster care system. Rather, those who refuse to cooperate should not be allowed to keep custody of kinship foster children. The mistaken presumption that children are better off with their relatives, no matter how uncooperative or inadequate the relatives may be as parents, only stands to hurt the kinship foster child. On the other hand, applied appropriately, foster care supervision can serve as an excellent opportunity to evaluate the kinship caregiver's ability to care for the kinship foster child on a long term basis.

Although these legislative changes necessitate immediate expenditures, they may result in long term savings to the state. While it will be costly for the state to undertake periodic audits of kinship foster

handicapped or "hard to place," but kinship foster children frequently qualify as "hard to place," since they tend to remain in foster care for over six months without being adopted or have personal characteristics that create obstacles to their adoption. N.Y. Soc. Serv. Law §§ 451, 453 (McKinney 1992). Children who are in the permanent care of kinship guardians should likewise be entitled to subsidies if they are handicapped or "hard to place."

For a discussion of why kinship guardians do not adopt these foster children, see supra text accompanying note 169.

188. Courts recognize the following reasons for terminating a living natural parent's rights to his or her child: (1) parent's mental illness or mental retardation render that parent unable to care for the child; (2) parent severely or repeatedly abused the child; (3) parent has abandoned the child for the immediate past six months (in that the parent failed to visit or communicate with the child or the child's foster care agency); or (4) parent permanently neglected the child for a one year period (in that the parent failed to maintain regular contact with or plan for the future of the child). N.Y. Soc. Serv. Law § 384-b (4) (McKinney 1992). Foster care agencies tend to have information that would allow them to determine whether any of these or similar criteria are met. Determinations could be made in the context of agency hearings, with appropriate notice to natural parents.
care case records, in the long run, the state will save money if most
kinship foster children are placed in safer homes. Residing in a safer
home, the child will not have to be removed and re-placed or treated
for additional trauma that occurs in the kinship foster home. Simi-
larly, the kinship foster family will benefit from receiving services and
payments in a timely manner. In the best of all worlds, more natural
families could reunite due to additional services and caseworker su-
pervision, thus eliminating the need for any further foster care
services.

The potential for kinship guardian discharge could also save the
foster care system a tremendous amount of money directly. Though
the kinship family will continue to reap payments equivalent to foster
care stipends (at about $400 to $500 per month, depending on the age
of the child), the annual cost would be about half the cost of main-
taining the same child in the foster care system. Once the kinship
guardian status becomes available, children can be discharged more
quickly to the less expensive program. Of course, this system would
require federal as well as state participation. The federal government
currently funds half of all of New York’s foster care payments and
adoption subsidies. To provide perpetual payments to kinship
caregivers until the child reaches majority, the federal government
would have to make similar contributions for kinship guardians.

Finally, the current gap between foster care stipends and AFDC
payments must be closed. As long as compensation is greater for kin-
ship caregivers than for natural parents, the government undercuts its
own public policy of reuniting natural families. Since the stipend is a
necessary lure to invite kinship caregivers to take charge of their re-
lated children, those payments should be left untouched. Instead, the
AFDC payments for natural parents must be increased to an
equivalent figure. To almost double AFDC payments for the 7.7
million children receiving these payments nationally would require
serious fiscal commitment. On the other hand, since financial
problems account for many of the familial troubles that lead children
to foster care, an increase of AFDC payments nationally may save

189. FAILED PROMISES, supra note 1, at 72.
190. See supra note 167.
192. Id. § 426.5 (1986).
193. See supra text accompanying notes 162-63. (AFDC payments are about half the
amount of foster care subsidies).
194. BLUEPRINT, supra note 33, at 68.
195. FAILED PROMISES, supra note 1, at 23. The majority of foster children are from
millions of dollars designated to helping impoverished families solve their problems.

C. Conclusion

The fairly recent kinship foster care program clearly has many potential advantages for foster children, their relatives, and the foster care system as a whole. Should the program be discontinued now, New York City's entire foster care system might collapse in an effort to seek out the necessary number of new foster homes. At the same time, New York City has failed to comply with foster care regulations for kinship homes by keeping children in unapproved kinship homes, providing them few services, and planning no realistic discharge goals.

These problems cannot be completely resolved by creating a new legislative category for kinship guardians, and eliminating the kinship foster care system. Yet, if the current system continues, “discharge to kinship guardian” could serve as a more realistic permanency goal for kinship foster children. This alternative would save money for the foster care system, which could then be used to buttress AFDC payments to natural parents. For the kinship foster care system to continue, home approvals and foster care services must be executed under close agency, city and state supervision. By combining a kinship guardian program with the existing kinship foster care system, children can receive services from the foster care system until such services are no longer essential, and can be discharged to a functional, relatively permanent kinship setting.

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