

# Family Integrity & Justice Quarterly

A Journal for Family Well-Being | Fall 2022



*Family Is Best Interest*





# Family Integrity & Justice Quarterly

A Journal for Family Well-Being

## Editor-in-Chief

Jerry Milner  
Director of Family Justice Group

## Editor-in-Chief

David Kelly  
Director of Family Justice Group

## Publisher

Stacey Moss  
President  
Public Knowledge®

## Managing Editor

Christie Matlock  
Management Consultant  
Public Knowledge®

## Editor and Contributing Author

Jey Rajaraman  
Management Consultant  
Public Knowledge®

## Copy Editors

Kristin Baughman  
Copywriter  
Public Knowledge®

## Stephanie Meisner-Maggard

Marketing Director  
Public Knowledge®

## Design

Janelle Shields  
Graphic Designer  
Public Knowledge®

## Editorial Board Members

Justin Abbasi  
Co-Founder, Harbor Scholars: A Dwight Hall Program at Yale

Zabrina Alequire, JD  
Family Defense Practitioner

Laura W. Boyd, Ph.D.  
Owner and CEO, Policy & Performance Consultants, Inc.

Melissa D. Carter, J.D.  
Clinical Professor of Law, Emory Law

Kimberly A. Cluff, JD  
MPA Candidate 2022, Goldman School of Public Policy,  
Legal Director, California Tribal Families Coalition

Kathleen Creamer  
Managing Attorney, Family Advocacy Unit  
Community Legal Services of Philadelphia

Angelique Day, Ph.D., MSW  
Associate Professor  
Faculty Affiliate of the Indigenous Wellness Research Institute  
Director of Federal Policy for Partners for Our Children  
School of Social Work, University of Washington Seattle  
Adjunct Faculty, Evans School of Public Policy and Governance

Yven Destin, Ph.D.  
Educator and Independent Researcher of Race and Ethnic Relations

Paul DiLorenzo, ACSW, MLSP  
National Child Welfare Consultant

Carmen Hidalgo  
Parent Advocate, Family Defense Practitioner

J. Bart Klika, MSW, Ph.D.  
Chief Research Officer, Prevent Child Abuse America

Heidi McIntosh  
Principal, LGC CORE Consulting, LLC

Jessica Pryce, Ph.D.  
Director, Florida Institute for Child Welfare  
Florida State University

Delia Sharpe, Esq.  
Executive Director, California Tribal Families Coalition

Mark Testa  
Distinguished Professor Emeritus, University of North Carolina, Chapel Hill

Elizabeth Wendel, MSW, LSW  
International Consultant, Family Well-Being and Mental Health Systems

## Advisory Board Members

Jamole Callahan  
Director of Training and Development  
National Center for Housing and Child Welfare

Angelique Day, PhD, MSW  
Associate Professor  
Faculty Affiliate of the Indigenous Wellness Research Institute  
Director of Federal Policy for Partners for Our Children  
University of Washington Seattle

Glenda McMillan, MSW, LMSW  
Regional Vice President, Public Knowledge®

Dr. Melissa T. Merrick  
President and CEO, Prevent Child Abuse America

Stacey Moss, JD, CWLS, PMP  
President, Public Knowledge®

Vivek S. Sankaran  
Clinical Professor of Law, University of Michigan, Michigan Law

Shrounda Selivanoff, BAS  
Director of Public Policy, Children's Home Society of Washington

Victor E. Sims, MBA BA  
Management Consultant, Public Knowledge®

Paul Vincent, MSW  
Independent Consultant

"HONORING  
THE POWER OF  
FAMILIES AND  
COMMUNITIES"

Family Integrity  
& Justice 

© 2022 by Family Integrity & Justice Works. All rights reserved. Family Integrity & Justice Quarterly is published quarterly by the Family Integrity & Justice Works (ISSN 2770-6982).

For information visit [fijworks.com](http://fijworks.com)



# Family Integrity & Justice Quarterly

A Journal for Family Well-Being

## CONTENTS

- 6 | **Securing and Restoring the Family Is in the Child's Best Interests**  
Jey Rajaraman  
Alexandra Travis  
Iesha Hammons

### FOREWORD

- 10 | **When Best Interests are Not: The Need to Redefine the Best Interest of the Child**  
David Kelly  
Jerry Milner



### MY PERSPECTIVE

- 14 | Liliana Cory
- 17 | On The Cover



### FEATURES

- 18 | **Creating a Strong Legal Preference for Kinship Care**  
Josh Gupta-Kagan

- 30 | **Kinship Matters: Reflections from the Bench on Preserving Children's Right to Family**  
Judge Edwina Richardson Mendelson



- ▶ 38 **Smile**  
*An Original Poem*  
Titus Smith
- ▶ 40 **Every Year Since 1984**  
*An Original Poem*  
Diane Redleaf

- 42 | **Family Is in a Child's Best Interest**  
Amelia S. Watson

- 50 | **Best Interest Determinations: Lessons Learned from Tribal Child Welfare Agency, Court Professionals, and Youths**  
Angelique Day  
Claudette Grinnell-Davis  
Dakota Roundtree-Swain

- 60 | **What the System Taught Me**  
Cheri Willams

### A BETTER WAY

- 68 | **Facilitating Kinship Licensure and Foster Care Exists to Guardianship**  
Angelique Day  
Grace Nielson  
Scout Hartley  
Charles E. Lewis, Jr.

### REFLECTIONS

- 76 | **A Conversation with Carolyn Tancemore**  
Jey Rajaraman





# Securing and Restoring the Family Is in the Child's Best Interests

Jey Rajaraman with Alexandra Travis and Iesha Hammons,  
Impacted Parents within the Child Welfare System

## What I Know as a Family Defender

The child welfare system needs to commit to the basic and simple principle that securing and supporting families is in the child's best interest. Family disruption should be avoided and only exercised under the most egregious circumstances. When I worked at Legal Services of New Jersey (LSNJ), I represented a mom named "Jen." She struggled with drug addiction and housing instability. Her 17-year-old son, Jack, was diagnosed with Down Syndrome. During the day, they moved from park to park. In the evenings, they sought help from friends and family for a place to sleep. Jack lived with his mother his whole life.

Although they lived in extreme poverty, Jack consistently attended school while in his mother's care. They received food stamps and were able to get food and other forms of assistance from friends and family. They were best friends who held onto each tightly.

At the time that I represented "Jen," the agency was seeking to remove Jack from her rather than provide financial support for her to secure shelter so that they could remain together.

A child like Jack is difficult to place in a long-term foster placement. If he was removed, it was likely he would either move from foster home to foster home or be placed in an out-of-state residential treatment center. The latter would make regular visitation with his mother and kin virtually impossible. He would likely age out of the system. The alternative to the agency plan predicated on removal was to support Jen and Jack as a family unit, place them together in a shelter or hotel, and assist them with housing and welfare benefits.

Living in poverty and struggling with securing stable housing and appropriate treatments has definitely been difficult for Jack and his mom. However, the alternative—the removal and separation of Jack from his mother—would likely be much more devastating and traumatic for both of them. In addition to losing her son to the system, "Jen" would no longer be able to access services and supports only available to families with children. Once Jack aged out of the system, he would need extensive supports and services. How would he be able to support himself without his mother and other family?

Removing a child from his or her parents is one of the, if not most, traumatic events that can occur during childhood. Data, research, and the stories of those with lived experience, like Iesha and Alexandra, bear this out. Here are their thoughts on best interests from personal experience.

## Iesha's Story

In 2018, LSNJ introduced a new project in conjunction with the New Jersey Division of Child Protection and Permanency (DCPP). Receiving client referrals directly from DCPP allowed us to quickly identify and assist with critical legal issues and help prevent the loss of housing, thereby preventing unnecessary removals and ultimately keeping families together. I am proud to be LSNJ's first "parent ally." In this role, I work with LSNJ's Family Representation Project to help prevent unnecessary child removals. I have assisted in over 20 of these prevention cases. In this role, I speak with parents and families and use my perspective and experience to provide support. As someone who experienced the child welfare system as both a child and a mother, I believe I possess a unique perspective that has driven my passion for helping other struggling parents.

I grew up in foster care, and my rights to my mother were terminated. I never fully understood my mother's case until I faced my own allegations, which in turn led to my children being taken from me. During my years in foster care, I was abused, and no one cared. I was told my mother picked drugs over me, but that was not true. I reconnected with mom in my twenties – we became inseparable until the day she died in 2018.

In 2013, I was walking down a block in my old neighborhood when the father of my children's sister started pushing and shoving me. Police were called to break up the fight, and we were both arrested, even though I was the victim. Five days after my arrest and release, my children, ages 2, 4, and 10, were taken by the State. The charges against me were dropped, but I still had to convince a judge and a caseworker that I was able to care for my children. I completed psychiatric evaluations, supervised visits, parenting classes, and more. It took nearly five years to get my kids back, a lifetime to a small child.

I often wondered . . . did it need to be so hard? Did the child welfare system see a Black, poor mother and a victim of domestic violence and just assume I was an unfit parent? My kids still have nightmares to this day about being taken from me. I still jump up every time the doorbell rings. I believe that best interest would have been the DCPP never taking my children. The separation, the court process, and the pain caused by it all was not in the best interest of our children. It was the opposite.

## Alexandra's Story

The removal rate of children is devastatingly high — most of them being completely preventable. It is important to bring awareness of how having a parent ally and pre-prevention work can positively impact the outcomes for families. I had two child welfare agency cases. The first tragically ended in the removal and ultimate adoption of my two eldest children to strangers, and the second case was a triumphant and rare reunification!

Let's start with the most common misconception: that substance abuse, poverty, or race must mean you are an abusive or



*Iesha Hammons*



*Alexandra Travis and Jey Rajaraman*



neglectful parent. I am here to tell you that those do not go hand in hand. Good people make mistakes. We all do. I am a survivor of childhood trauma and abuse. I thought I healed those wounds, but they were always there. As an adult, the trauma resurfaced, and I found myself in the grips of alcoholism, something that runs rampant in my family and something that I hoped would never affect me.

All I ever dreamt of was breaking the cycle of my family, but even though I had a loving and supportive spouse and two beautiful children at home, it wasn't enough. After landing a prestigious job at a five-star restaurant, and having to work with a wine sommelier, my alcoholism was triggered, and I started to abuse alcohol. It happened fast and I found myself arrested and incarcerated.

When I was going through this trauma, I didn't have anyone to talk to who could understand what I was going through. I could have really used someone like myself, a parent ally. I was labeled and deemed a child abuser and an unfit parent, something that will stay on my record and name forever! I was forced out of our family home and into homelessness. All the while, my unfailing husband was complying with every task, jumping through every hoop, and trying to hold the family together; his only fault was being married to me. The system forced my husband to choose between our children and me. After 12 years together, we even came to the sad idea of the resolution being divorce, if that's what it took. We had so many questions and no one to answer them; we were lost. I wish I had known about LSNJ sooner than I did.

In the meantime, because our children were removed, we lost our welfare benefits causing us to lose our home and all the precious memories in it; we even lost our beloved pets.

With no help, support or resources provided, and eventually seeing myself as the problem, I fled the state. My husband was seen as incapable of parenting his children by himself because we lost our housing. Our children were adopted out to total strangers, and we were just left on our knees in the dust of what was our lives. We needed support, not punishment.

Tell me, if you knew our story, would you still advocate so fiercely for adoption and termination? Would you permanently separate us as a family and prevent five siblings from having a life and future together? Would you allow these traumatic actions that caused a seven-year-old to consider suicide and a young boy to pluck out his own eyelashes, eyebrows, and hair?

That's what separation does. Was that in the best interest of my children? Was I so invaluable as a human being I wasn't worth the time, empathy, or support? What do you see when you look at me now? The hurt and trauma we are causing by removing children and terminating rights are incomprehensible and monumental. The impact of these actions can span generations!

I know our children would have wanted us during our time of struggle! Even now, after all these years, they still want us, but we will forever be terminated from each other. Is that in their best interest?

## Now What?

After removal, children and parents continue to be physically separated for most of the duration of the case. Parents and children have different case plans and are on distinct and separate service tracks. For example, in most places, stranger foster parents neither meet the child's parents nor assist with visitation or family time. After removal, and while a child is in foster care, parents are not typically included in their children's medical matters nor involved in their children's education, despite retaining the legal right to do both. Parents are not included in their child's daily activities nor involved in any decision-making. Parental input is neither considered nor deemed relevant. The current system is engineered to separate families and not to unify and support families. This is not in a child's best interest.

In making a shift, we must transition from a surveillance agency narrative to a secure and restorative narrative for both parents and children. Children should not be removed from their homes, families, and communities because they are poor. Children should not be

separated from their parents while the parent is expected to resolve the traumatic impact and shrapnel of multigenerational poverty on their own. Yet, the current agency surveillance system often lacks the tools to address the root causes of poverty and instead treats those causes as neglect. The current system needs to help treat conditions of poverty with individualized services and benefits and

eliminate the risk of separation that poor children and families currently face simply because they are poor.

Agencies have an affirmative duty to secure concrete services for families, such as services to address housing instability, mental health concerns, and substance use issues.



© Jey Rajaraman

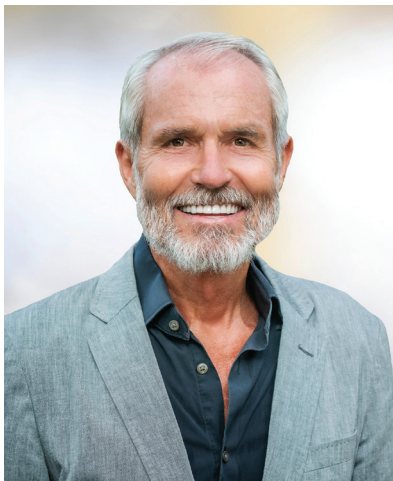


## When Best Interests are Not: The Need to Redefine the Best Interest of the Child

David Kelly and Jerry Milner



David Kelly



Jerry Milner

The phrase best interest(s) of the child is prevalent in child welfare law and practice. It is a legal standard on which attorneys root arguments and a basis of judicial determinations. It is used to guide social work practice and expert recommendations for what should happen to a child. They are words that are commonly spoken in justifying a decision to remove a child from their parents and place him/her/they in foster care. They are words utilized to sever permanently a parent's rights and promote adoption. They are words used to describe the opinions formed by lay volunteers or attorneys that advocate for what they think will benefit a child instead of a child's wishes. And they are words that are used too often as something distinct from a child's parents. They can be weaponized to punish parents.

Best interest(s) are utilized in our current system so often to justify so many things that they fail to carry true meaning, which can and does cause harm to children and their parents. We must reexamine this longstanding feature of the child welfare system and define its meaning more explicitly and completely or jettison it altogether. This is the focus of this issue of the Family Integrity & Justice Quarterly and one that is closely linked to other critical aspects of the child welfare system, including how the family's interests are understood and addressed.

As a legal standard, best interest is anything but standard. There is no federal definition of best interest(s), and state definitions vary widely. As multiple authors point out in this issue of the journal, best interest is among the most ambiguous standards in child welfare law, and this ambiguity increases the likelihood of subjective decision-making that can reflect harmful bias.

The lack of clarity on what constitutes best interests, and whose judgment prevails, in making those decisions is described adeptly in Cheri Williams' article in this issue. She notes that the local child welfare culture and subjectivity in decision-making trump the actual law. She notes further that courts can become "rodeos" of subjective arguments over what constitutes the best interests of a child.



The danger of subjectivity and bias extends to the bench, where judges and judicial officers receive arguments or reports of what is in a child's best interests and often insufficient information about the details of important family dynamics and relationships or child-specific needs and desires. Rather, making a determination of "best interest of the child" when removing a child is inextricably linked to the child's ongoing eligibility for federal

reimbursements to states for the cost of the child's foster care maintenance. Therefore, we must ask in whose best interests are those decisions made — the child's or the agency's — and whose judgment decides what is in a child's best interests? And absent a termination of parental rights, why wouldn't a parent's wishes — which are constitutionally protected — continue to carry the most weight in what is best for their own child?



The standard and determination beg a litany of questions. What do we truly mean by best interests? What does it require or entail? Who should make those decisions? How do we safeguard against implicit and explicit biases, cultural misunderstanding, and racism?

Some state statutes include attempts to flesh out the standard by including specific components of what should be considered in a best interest determination. However, we have yet to see a definition that is as holistic and accounts for critical continued family connection. The need to redefine best interest was underscored further in a recent conversation with members of the National Association of Counsel for Children's National Advisory Committee on Legal Representation, a group composed entirely of people who have or are experiencing out-of-home placement. When the Advisory Committee was asked to share what best interest meant to them, love, connection, and belonging were centerpieces of their expert opinion. Advisory Committee members spoke about the importance of their familial relationships—especially with parents and siblings. Their desire for those relationships to be strong and continue in the ways that best suited them when they were in foster care and how those relationships helped or would have benefited them. Best interest and well-being were intertwined and not viewed as something separate from their parents or family but as something deeply tied to their parents and loved ones.

We do not often see recognition of the fact that what is in the parents' best interest is almost always in the child's best interests, and we continue to see parents vilified for non-compliance with case plans that are ill-matched to their strengths and needs or patently unreasonable.

We see a fleet of lay volunteers in court who, at least in our perception, are represented by mostly white, middle-class individuals who may have no real-life connection to the cultures, the struggles, and the historical trauma experienced by the families and children whose very lives hang in the balance, yet who are called upon to say what is in the child's "best interests."

We see guardians ad litem, required for children in foster care proceedings by federal law, whose job it is to represent the child's best interests, often when they have not really known the child or the family or had or could take the time to get to know them and understand what might really be in their "best interests."

And they may or may not actually be lawyers.

Less frequently, we see children having independent legal representation, bound to represent the child's expressed interests and desires for their futures rather than substituting the lawyers' judgments for the child's wishes. In fact, we see alarmingly little attention paid to relying upon parents' and children's voices about what is in their best interests in making the determinations.

And so, we ask ourselves again, whose best interests are at stake?

In their article, Angelique Day, Claudette Grinnell-Davis, and Dakota Roundtree-Swain further this discussion by noting that there are no concrete guidelines for determining best interests, and provide insight into the concept of someone else determining a child's best interests as opposed to permitting the child or youth to express directly what they believe to be in their interests. Day, Grinnell-Davis, and Roundtree-Swain offer compelling insights into the practice of many tribal courts that, as a matter of culture and respect for children, always consult with the children on their expressed interests.

Best interest determinations affect literally every aspect of a child's experience in foster care, from whether or not they enter foster care to when and if they return home or leave for another reason. Perhaps no other aspect of the foster care experience is as continually affected by these judgments as where and with whom a child is placed—more specifically, the extent to which children remain with known family members or enter the homes of strangers.

Gupta-Kagan's article notes clearly that our laws do not actually favor placement of children with relatives, owing to the flexibility and subjectivity permitted by States and local agencies to decide where a child goes. He and

Day, et al (in A Better Way) note the freedom that agencies have to regard any background information on relatives as undesirable and to forego relative placement. This is true even if the background information is on someone else living in the home and not the relative caregivers themselves.

We believe these aspects of our child welfare system are often a reflection of our values and how we regard families involved in child welfare. For much of child welfare's history, there has been the myth of the "apple not falling from the tree," as noted in Williams' description of myths in the child welfare system. Yet, nonetheless, the judgments we make about relatives of families involved in the child welfare system reinforce this concept over and over again.

In Reflections, Mrs. Carolyn Tancemore provides a resounding description of this ongoing practice through the story of her grandson who was removed from his parents' care at birth. She wanted to care for him and made the offer, only to be told she could not meet licensure standards for adoption and because she had low income and was defensive of the child's father, her son, despite the fact that she was a nurse who loved her grandson and wanted to care for him.

Unfortunately, we do not see this story as an outlier or exceptional. While some jurisdictions have moved to a much greater reliance upon kinship care, others have not. At times, it appears that we try to screen families out rather than looking for opportunities to screen them in, all in the name of best interests. This is broadly reflected in the application of background checks and licensing standards that may be impossible for some families to meet but should not preclude them from caring for their own.

We acknowledge that families can be complicated at times and that competing dynamics may steer us away from seeing a family member as a safe and secure placement option for a child. Yet, we agree with Amelia Watson's perspective that "family is in a child's best interests." She notes that "family" is also in the parents' best interests since kinship placements often permit parents the relative comfort of knowing who their children are with

and that they are being cared for so that the parents can focus on what they need to do.

Liliana Cory notes that even when relative placements are complicated, they can bring community and support to a person that remains with them throughout their lives.

If we truly believe (and not everyone does) that children should remain with their families, we should at the very least substitute a "best efforts" standard for a best interest concept and amend federal statutes to require evidence of best efforts in monitoring and improvement efforts related to eligibility for federal funding.

The "best interests" standard and determination should be either done away with, since it is practically meaningless, or linked specifically to the family's best interest. Also, it should require substantial and objective evidence of what is in the best interests of a child and family for the court determinations and for state and federal monitoring efforts. And it should certainly not be in the hands of individuals with little understanding or knowledge of the child's and parents' circumstances to make recommendations as to what is in their best interests.

Thanks to all our authors who have gone to the core of this incredibly important part of our work with families.

---

*Jerry Milner is Co-Director of the Family Justice Group, a child welfare consulting firm devoted to transforming child welfare to a community-based, prevention-oriented, family-strengthening approach to achieving family well-being. He began his career as a front-line social worker in child welfare in Alabama, working primarily with teenagers in foster care and in prevention services for families.*

*David P. Kelly, JD, MA, is Co-Director of the Family Justice Group. For over a decade he served in the United States Children's Bureau, holding leadership positions as Special Assistant to the Associate Commissioner, Senior Policy Advisor on Courts and Justice and overseeing the Children's Bureau's work with the legal and judicial community.*



# My Perspective

Liliana Cory

The day I went into foster care for my third and final time was like any other. I was sitting in gym class waiting to watch the “Bill Nye the Science Guy” video on water safety when my gym teacher came over to me and said I needed to go to the principal’s office. This immediately threw me off, considering I never got in trouble at school. School was my safe place, the place where I was smart, well-mannered, and had a community of people who cared about me.

When I entered the principal’s office, my heart completely sank when I saw the social worker. After an hour of silence and me fighting back tears, the social worker asked, “Do you have any family in the area?” I wasn’t answering the questions the social worker was asking; I was only thinking about my brother, demanding to know where he was. Finally, the social worker leveled with me and said, “The sooner I can find placement, the sooner I can get you to your brother.” With that, I caved, “Well, I have an aunt.”

Being placed with my aunt was a big risk in my mind. She and my biological mother did not get along and have had a lot of tension in the past. I knew my parents would not be happy with us being placed with her. It was a complicated transition. I was fairly independent as a child, and suddenly the world that I knew before completely changed.

However, one thing became very clear, my aunt cared deeply about my brother and me; she held us at night when we cried, supported us when we felt hopeless and disappointed in my parents, and most of all, she kept us even though it was difficult. She was a single mom of two, working daycare making next to peanuts, and she took on two additional children when her biological kids were leaving the house.

She needed financial support and a community to help raise us. Thankfully, the state did support us. They helped with items like summer camp and childcare so she could

work. The community came in the form of her larger family; 12 brothers and sisters and her mother. That family quickly became my family. Even though my brother and I wanted to be placed back with our biological parents, it was comforting being a part of something bigger than our nuclear family we grew up with.

Tragically, my biological mother died three months before my 13th birthday, and we were faced with a life-changing choice. My biological father decided to terminate his rights, and the state began the conversation of adoption. My aunt and my brother were thrilled with this idea. I was more hesitant for a couple of reasons:

1. I already had a mother. (One that I was grieving and didn’t get a chance to say goodbye to).
2. I didn’t have the words for it, but I knew I wasn’t exactly straight, that I was attracted to a multitude of people as my sexuality began to develop.

To be clear, I love Jesus. The people in the church gave me safe sanction and offered me a profound sense of community that mourned, cried, and celebrated with me during that especially hard time of my life, but the thought always lingered in the back of my mind; what if this community knew? What if they knew I was the person they were talking about as “sinful” or as someone who was not “Christ-like.” So when I was presented with the option of being adopted or going to a group home, I chose to be adopted. I chose to hide. I had already experienced homelessness and did not want to even entertain the risk that came with “coming out” or, arguably worse, being separated from my brother.

After we were adopted, that’s when a multitude of things turned for the worse. The support my brother and I received from the state decreased and was eventually halted to a stop. In addition to this, my now adoptive mother

suffered from a series of strokes that made it impossible for her to work. That combination changed her emotional stability and her ability to provide financially; the home environment became hostile.

The only thing that made a difference was the community that I still gained from being adopted by my aunt. Her larger family and her children became my saving grace. My sister especially got me through my senior year into college, an achievement I thought I would never achieve.

This larger family continues to support me to this day. Through my undergraduate degree, my master’s degree, my career, my homeownership, and, more recently, the death of my adoptive mother, this larger family continues to hold me in profound and vulnerable ways.

Although my family story had many ups and downs, I want to make one thing very clear; families are complex. I would like to say after my adoption I lived happily ever after, however, I did not. It was a struggle, but a struggle I would continue to choose over the other options I was presented with as a child. I would choose this family over the system any day.

My family is full of nuance, just as other families are full of nuance. Families, regardless of how deserving or functional we think they are, deserve dignity, humanity, and support. My parents struggled with drug addiction, but that didn’t mean they did not love me. My aunt and my mother did not get along, but that didn’t mean there wasn’t good reason. My aunt was a supportive person but was homophobic.

Families are complex; this includes kinship families. Systems are designed with such a black-and-white mentality that the people who experience those systems lose their nuance and humanity by having to be a certain way.

I have hope that it doesn’t have to be this way. I think states have the opportunity to learn from lived experts who come through their systems. For me, these are the key lessons I take away:



Liliana Cory

1. Kinship families need financial support.
2. Kinship families should be systematically respected to the same degree that foster parents are.
3. Kinship families bring community that carries through life.
4. We cannot rely on youth’s silence to keep them housed in homes that are not affirming to LGBTQ+ youth.

---

*Liliana Cory (she/they) is passionately dedicated to the voices of those impacted by state systems. Lily is the Adolescent Programs Co-Design Manager at the Washington State Department of Children, Youth, and Families. As a foster alumna, Lily has worked directly with young people through her volunteer work as GAL in Pierce County and as a caseworker for BRS and ICWA cases.*





“Star Child” by Artist Akil Roper, [akilroperart.com](http://akilroperart.com)

## On The Cover

Tiffany Enos, cover artist, is from Sacaton, Arizona and is a tribal member of the Gila River Indian Community.

Her desire to create started when she was just a little girl. Over the years that desire started to bloom into what we see today. Her work represents her culture and desire to push the boundaries in order to grow her skills in the art field.

She works full-time as a Multimedia Specialist for her community and is a mother of a beautiful girl.



## Public Knowledge Joins National Campaign to Address the Harms Caused by the Adoption and Safe Families Act

November 19, 2022 marked 25 years since the Adoption and Safe Families Act (ASFA) was enacted. In its lifetime, ASFA has contributed to the destruction and devaluation of hundreds of thousands of families, disproportionately Black and Indigenous families.

Family Integrity & Justice Work (FIJW) at Public Knowledge® and Children’s Rights, in partnership with the Center for the Study of Social Policy (CSSP), National Association of Counsel for Children (NACC), the Family Justice Group, and United Family Advocates (UFA), hosted events to spotlight and address the harms of ASFA. In addition, recent articles have been shared on the topic.

### Events

- On November 2, Family Integrity & Justice Works at Public Knowledge presented a webinar entitled, “The Harm of ASFA.” During the event, the speakers, panelists, and impacted families shared thoughts, replacement approaches, and real stories, respectively, to help bring awareness to the injustice and trauma that families experience under ASFA’s policies. Help us continue our assault against ASFA by sharing the link to the webinar with your colleagues, peers, and networks: [The Harm of ASFA](#)
- On November 15, Children’s Rights hosted a panel discussion entitled, “Terminating Parental Rights Harms Children Too. 25 Years of ASFA: Looking Back and Moving Forward.” The panel was led by advocates who personally were harmed by ASFA, the panel discussion explored how requirements under ASFA imposed ongoing harms on children and families—and strategies to move us forward in addressing them. Watch and share the event found here: [Terminating Parental Rights Harms Children Too](#)

### Articles

- [Center for the Study of Social Policy: “ASFA 25 Years Later: Time for Repeal”](#)
- Prof. Sarah Katz: [“A Federal Law Has Been Destroying Families for 25 Years. Let’s Get Rid of It.”](#)
- Reason: [The Adoption and Safe Families Act Takes Kids Away From Loving Parents](#)
- Josie Pickens and Alan Dettlaff: Opinion: [“Repeal the Adoption and Safe Families Act”](#)
- Mical Raz: [“Our Adoption Policies Have Harmed Families and Children”](#)
- Diane Redleaf: [“The Adoption and Safe Families Act Takes Kids Away From Loving Parents”](#)
- Dorothy Roberts: [“The Clinton-Era Adoption Law That Still Devastates Black Families Today”](#)
- Richard Wexler: [“This Law Was Supposed to Protect Kids from Abuse. It Hasn’t.”](#)



# Creating a Strong Legal Preference for Kinship Care

Josh Gupta-Kagan

One new to our field would be forgiven for thinking that the law must favor placing foster children with kin rather than with strangers. After all, individuals and organizations from across the ideological spectrum endorse kinship care, government publications describe kinship care as “the preferred resource” for placing children who cannot live at home with a parent<sup>1</sup> and, after steady increases over multiple decades, authorities now place more than one-third of all foster children with kin.<sup>2</sup> And decades of evidence establish that kinship care is generally more stable and serves children’s health and well-being better than living with strangers,<sup>3</sup> a point so well accepted that it needs no further elaboration here.<sup>4</sup>

So, one should expect the law to strongly favor kinship care over stranger foster care. But it largely does not. Instead, the law grants child protective services (CPS) agencies wide discretion to determine whether to place foster children with kinship caregivers. As a result, any meaningful preference for kinship care over stranger foster care varies significantly by jurisdiction. Putting any preference into practice is subject to the whims of CPS agencies and the judgment of individual caseworkers and family court judges regarding specific kinship caregivers.

Absent laws requiring such a meaningful preference, not every state and not every county has seen relatively higher rates of kinship placements over recent years. Even where such increases have happened, the law does not prevent a change in agency administration or agency policy from significantly impacting the kinship care rates (and our field is certainly susceptible to dramatic changes in practice following high-profile cases, even if they are outliers). And individual children, parents, and kinship caregivers who would prefer kinship care to stranger foster care are left without the powerful legal remedies they deserve when agencies use their discretion to keep children away from kinship caregivers unnecessarily.

This state of the law can lead to significant harm. Consider the death of Ma’Khia Bryant, a Black foster child in Ohio shot to death by police during an incident outside her non-kinship foster home.<sup>5</sup> After

<sup>1</sup> U.S. Dep’t of Health and Human Servs., Administration for Children and Families, Administration on Children, Youth, and Families, Children’s Bureau, Placement of Children with Relatives 1 (2018), <https://www.childwelfare.gov/pubPDFs/placement.pdf>.

<sup>2</sup> The federal government reports that 35 percent of all foster children on September 30, 2020 lived in a “foster family home (relative).” U.S. Dep’t of Health & Human Servs, Admin. for Children and Families, Admin. On Children, Youth and Families, Children’s Bureau, The AFCARS Report: Preliminary FY 2020 Estimates as of October 4, 2021 – No. 28 (2021), <https://www.acf.hhs.gov/sites/default/files/documents/cb/afcarsreport28.pdf>. That compares, for instance, with 24 percent on September 30, 2005. U.S. Dep’t of Health & Human Servs, Admin. for Children and Families, Admin. On Children, Youth and Families, Children’s Bureau, The AFCARS Report: Preliminary FY 2005 Estimates as of September 2006 (13) (2006), <https://www.acf.hhs.gov/sites/default/files/documents/cb/afcarsreport13.pdf>.

<sup>3</sup> For recent summaries of this research, see Christina McClurg Riehl & Tara Shuman, *Children Placed in Kinship Care: Recommended Policy Changes to Provide Adequate Support for Kinship Families*, 39 Child Legal Rts. J. 101, 104–08 (2019).

<sup>4</sup> The point does, however, need a caveat: Those defending the widespread family separations caused by the present child protection system can rhetorically point to frequent use of kinship care as a way to distract from those family separations. It is essential to recognize that when the state separates a parent and child and places the child with a kinship caregiver, it is still imposing a harmful family separation. In this context, the value of kinship care is that it is generally better than the alternative – living with strangers or in institutions – and that is the comparison on which this article focuses.

<sup>5</sup> The facts in this paragraph are taken from the New York Times’ exhaustive account of her case. Nicholas Bogel-Burroughs, Ellen Barry & Will Wright, *Ma’Khia Bryant’s Journey Through Foster Care Ended with an Officer’s Bullet*, N.Y. Times (May 8, 2021), <https://www.nytimes.com/2021/05/08/us/columbus-makhia-bryant-foster-care.html>. For a critique of the handling of kinship care in this case and argument to “exhaust all other options” before placing a child with strangers, see Vivek Sankaran, *Ma’Khia Bryant’s Story Reveals Flaws in Foster Care System*, The Imprint (May 31, 2021 7:00 PM), <https://imprintnews.org/opinion/makhia-bryants-story-reveals-flaws-in-foster-care-system/54943>.





the CPS agency removed Ma'Khia from her mother it placed her with her grandmother, where she stayed for the next 16 months. But when her grandmother's landlord discovered Ma'Khia was there, he evicted the family. Rather than help the grandmother defend against the eviction, or help her obtain alternative family housing, or even permit the grandmother to take the children into a hotel temporarily while she sought alternative housing on her own—all steps the law might have required if it contained a strong kinship placement preference—the agency took Ma'Khia away from her grandmother and placed her with strangers. A series of short-term placements followed, ultimately leading to the turbulent final placement and Ma'Khia's death at the hands of the police. The case did not need a deadly end to illustrate the point that the law and legal system failed to keep Ma'Khia living with her grandmother rather than a succession of strangers.

Other cases appear to raise serious questions about whether all agencies truly treat kinship placements as the “preferred resource.”<sup>6</sup> Consider a few headlines from this past summer. In one Hawaii case, authorities chose to place a child with strangers over the child's grandmother, who clamored for custody for shifting reasons—a desire to keep the child from living with someone who was mourning the loss of her daughter (the child's mother), and disparaging (and subsequently retracted) statements from the grandmother's former partner.<sup>7</sup> Multiple Florida families accuse agencies there of avoiding potential kinship placement, including in pending litigation.<sup>8</sup> A California agency's alleged failure to identify and seriously consider kinship placements has also become the subject of litigation.<sup>9</sup> In an Oregon case, the agency decided to move a child to kinship caregivers—but not until three years after the kin initially sought custody, with no explanation for the delay.<sup>10</sup>

## The Law Gives Agencies and Courts Wide Discretion to Decide Whether to Use Kinship Care

While there is now a consensus that kinship care is generally better for children, the law in most states does not generally impose a strong preference for kinship care. Instead, agency and judicial practice has warmed to using kinship care more in some jurisdictions, without much change in the underlying law. This leaves agencies and courts with wide discretion on whether to use kinship care in individual cases and what steps—if any—to take to overcome obstacles to initiating or maintaining kinship placements.

When family courts order children removed from their parents, little law governs where courts may order them placed. Federal law disfavors congregate care,<sup>11</sup> but there is no federal substantive

<sup>6</sup> I thank Richard Wexler and the National Coalition for Child Protection Reform blog, which compiled news stories about the cases in this paragraph.

<sup>7</sup> John Hill, *She Took Her Fight for her Grandson Public. A Hawaii Judge Said She Went Too Far*, Honolulu Civil Beat, June 23, 2022, <https://www.civilbeat.org/2022/06/she-took-her-fight-for-her-grandson-public-a-hawaii-judge-said-she-went-too-far>.

<sup>8</sup> Florida now faces federal litigation over repeated alleged failure to meet existing, minimal legal requirements regarding kinship care, including by pointing to a variety of flimsy reasons for refusing to place children with particular relatives. Complaint, *ABCD v. DeSantis*, Case No. 4:22-cv-00222-AW-MAF (N.D. Fla. June 15, 2022), available at <https://www.abcactionnews.com/news/local-news/i-team-investigates/lawsuit-dcf-accused-of-keeping-kids-from-relatives-adopting-them-to-system-connected-strangers>. For a summary of some such claims, see Katie LaGrone, *More families accuse DCF of keeping relatives from getting custody of young family members*, ABC-WFTS (July 14, 2022), <https://www.abcactionnews.com/news/state/more-families-accuse-dcf-of-keeping-relatives-from-getting-custody-of-young-family-members>.

<sup>9</sup> See, e.g. Ishani Desai, *Maternal grandfather of Cal City toddlers files claims against CPS*, June 19, 2022, [https://www.bakersfield.com/news/maternal-grandfather-of-cal-city-toddlers-files-claims-against-cps/article\\_0ca7bdfa-ef38-11ec-af45-bb71ceaa98dc.html](https://www.bakersfield.com/news/maternal-grandfather-of-cal-city-toddlers-files-claims-against-cps/article_0ca7bdfa-ef38-11ec-af45-bb71ceaa98dc.html) (describing case in which grandparent alleged county CPS agency failed to explore kinship placement before placing young siblings with strangers who allegedly murdered the children).

<sup>10</sup> Colby Enebrad, *Biological relatives of foster child speak out after protests*, Central Oregon Daily News, Aug. 25, 2022, <https://centraloregondaily.com/%E2%96%B6%E2%8F%BF-biological-relatives-foster-child-speak-out-after-protests/>.

<sup>11</sup> Federal funding rules now limit reimbursement for congregate care facilities by imposing a set of requirements on such facilities and procedures for placement in them. 42 U.S.C. § 672(k)(2) – (4).

provision that makes it difficult for states to place a foster child with strangers when kinship caregivers are available. Federal law requires state agencies to identify adult family members that a child is in foster care and inform them that they can seek custody,<sup>12</sup> a nudge in the direction of a kinship placement preference. That requirement is not always followed,<sup>13</sup> and even when it is, it does not actually create such a preference. Instead, federal law only requires states to “consider” giving preference to kin when determining where to place children that they separate from their parents. Even that “consideration” is further qualified—the kinship caregiver must “meet all relevant State child protection standards,” without defining what is relevant.<sup>14</sup> Federal law does not require states to actually place children with these family members, nor does it require states to consider such family placements before placements with strangers, nor does it require CPS agencies to work to remove obstacles to such family placements, nor does it provide for meaningful remedies if states violate the modest requirements that do exist.

Some states' statutes and case law do explicitly preference kinship placements.<sup>15</sup> But even where placement hierarchies exist, agencies and courts can divert from kinship preferences by asserting vague substantive standards exist, such as “good cause”<sup>16</sup> or “best interests,” which functionally give agencies discretion to determine whether to trigger kinship placement preferences.<sup>17</sup> Multiple state statutes create a kinship placement preference but only for kinship caregivers approved by the agency—effectively giving the agency power to determine whether to approve a family.<sup>18</sup> State laws generally do not impose any specific obligation on agencies to overcome obstacles to preserving or maintaining a kinship placement.<sup>19</sup> And many states simply list possible placement options with no hierarchy among them.<sup>20</sup> (Ohio, where the state agency removed Ma'Khia Bryant rather than help her remain with her grandmother, is among the states without a kinship placement preference.)<sup>21</sup>

The result of these laws is to give tremendous power and discretion to CPS agencies. Judges use statutory provisions to place children in agency custody,<sup>22</sup> leaving agencies with wide discretion

<sup>12</sup> 42 U.S.C. 671(a)(29).

<sup>13</sup> See, e.g., *In the Matter of Richard H.H. V. Saratoga county dep't of Soc. Servs.*, 163 A.D.3d 1082, 1082–85 (N.Y. App. Div. 3d Dep't 2018) (describing and admonishing family court and agency for failure to comply with this requirement).

<sup>14</sup> The full text provides that “the State shall consider giving preference to an adult relative over a non-related caregiver when determining a placement for a child, provided that that the relative caregiver meets all relevant State child protection standards.” 42 U.S.C. § 671(a)(19).

<sup>15</sup> E.g. *Ariz. Rev. Stat. § 8–514(B)* (creating “order for placement preference”); *Fla. Stat. Ann. § 39.521(3)* (creating placement hierarchy of parents, other kin, and agency custody); *Miss. Code Ann. § 43–21–609(b)* (same); *Or. Rev. Stat. § 419B.192(1)* (preference for kinship placement); *S.C. Code § 63–7–1680(E)(1)* (requiring agency placement plan to give “preference” to a kinship placement absent “good cause to the contrary”); *W. Va. § 49–4–604(c)* (providing “sequence” of dispositional options to consider); *In re J.W.*, 226 P.3d 873, 881 (Wyo. 2010) (finding “a compelling preference” for “placement with nuclear or extended family members”); *Rev. Code of Wash. § 13.34.130(3)* (requiring placement with a relative absent a risk to the “health, safety, or welfare of the child”).

<sup>16</sup> *S.C. Code § 63–7–1680(E)(1)*.

<sup>17</sup> For instance, Arizona courts have ruled that family courts need not even make a best interest finding in diverting from placement hierarchies; the court need only “include placement preference in its analysis of what is in the child's best interest.” *In re Antonio P.*, 187 P.3d 1115, 1118 (Ariz. Ct. App. 2008).

<sup>18</sup> For an example of weak statutory language, see *Ala. Code § 38–12–2*, which directs the agency to “attempt to place the child with a relative for kinship care,” but then in the very next sentence, clarifies that such placement is contingent on the agency's decision to grant a foster care license or not consistent with the agency's own policies. See also *Ark. Ann. Code § 9–27–303* (providing that a kinship caregiver “shall be given preferential consideration for placement,” but only if the agency determines that the kin “meets all relevant protective standards and it is in the best interest of the child to be placed with the relative or fictive kin”); *N.Y. Fam. Ct. Act § 1017(2)(a)(ii)–(iii)* (creating a preference for placement with kin unless their “home . . . is found unqualified”).

<sup>19</sup> Agencies, of course, have an obligation to make reasonable efforts to achieve a child's permanency plan, and in some cases, that could include an obligation to overcome obstacles to make or maintain a kinship placement.

<sup>20</sup> See, e.g., *D.C. Code § 16–2320(a)(3)(A)* (disposition statute which does not preference kinship placements); *GA. Code Ann. § 15–11–212(a)(2)* (same); *Me. Rev. Stat. tit. 22 § 4036 (1)* (same); *Mo. Rev. Stat. § 211.181.1* (same); *Mont. Code Ann. § 41–3–438(3)* (same); *Ohio Rev. Code Ann. § 2151.353(A)* (same); *Pa. Cons. Stat. § 6351(a)* (same).

<sup>21</sup> *Id.*

<sup>22</sup> E.g., *D.C. Code § 16–2320(a)(3)(A)*; *Ga. Code Ann. § 15–11–212(a)(2)(B)*; *Mo. Rev. Stat. § 211.181.1(2)*.



to determine where foster children actually live. Absent clear laws preferring kinship care to living with strangers, CPS agencies can decide whether to license kin as kinship foster parents and place children with kinship caregivers, and when to place children with strangers instead.

With this discretion, agencies can refuse to place children with kin for a variety of reasons which are subject to biases based on the family member's race or financial status. Kinship caregivers are disproportionately poor, especially when compared with stranger foster families,<sup>23</sup> so the potential for bias is particularly serious. When seeking a foster care license, kinship caregivers and, in most jurisdictions,<sup>24</sup> all adults in their homes (including their partners, adult children, and other family members) must submit to criminal background and child protection registry checks. Agencies may view any issue, no matter how old or minor, as problematic. The racial and class disparities within the criminal justice system have a disparate impact on families of color and poor families from criminal background checks. Further, the racial and class disparities in the family regulation system—which substantiates hundreds of thousands of disproportionately Black, Indigenous, and poor parents and caregivers for the vaguely defined condition of “neglect”—have a disparate impact on families of color and poor families.

These licensing rules also create the potential for unwarranted state intervention in families. Consider a situation in which a kinship caregiver's adult child has a conviction on their record. Agencies may put the caregiver in an impossible situation, demanding that they kick out their adult child in order to be licensed to become a foster parent to a different relative. Other licensing criteria directly reflect a kinship caregiver's financial status rather than their ability to care for the child. Such criteria include the number of bedrooms, or factors designed to guard against hypothetical safety risks, such as the presence of smoke detectors and fire extinguishers.<sup>25</sup>

The law structures these issues as creating presumptions against agencies approving kinship placements. The default is that kinship caregivers seeking foster care licenses must meet the same licensing standards as strangers seeking to become foster parents.<sup>26</sup> Indeed, meeting “all relevant State child protection standards” is a pre-requisite just to trigger the weak obligation of a state to “consider” preferencing kinship placements.<sup>27</sup> When some negative fact appears in a family member's licensing file—a marijuana possession conviction, an old substantiation for neglect due to an ex-partner's violence, a necessity to put multiple children (perhaps of different sexes) in one bedroom, or the like—the agency must decide whether to grant the kinship caregiver a waiver.<sup>28</sup>

Under this legal structure, kinship caregivers are judged on whether they meet licensing standards developed in the abstract and, if they do not, whether they deserve an exception to those standards. The law does not require kinship caregivers to be judged based on the strength of their relationship with a child or the child's parents, nor does it require kinship caregivers be judged in comparison with the likely alternative. And nowhere does the law require agencies to help overcome obstacles to make kinship placements happen or, as Ma'Khia Bryant's case tragically illustrates, to provide assistance to preserve kinship placements.

Beyond licensing rules, once family courts remove children from parents and place them in agency custody, agencies have wide discretion in choosing placement options. And making such decisions leaves room for a range of subjective judgments about particular family members. For instance, their age (whether they be elderly or young adults), their relationship with the child's parent who is accused of neglect or abuse, or their level of compliance with agency directives. Such decisions

<sup>23</sup> Riehl & Shuman, *supra* note 3, at 109, 111.

<sup>24</sup> The Children's Bureau reports that 31 states require all adults in a potential kinship foster home to have a criminal background check. *Placement of Children with Relatives*, *supra* note 1, at 3.

<sup>25</sup> E.g. D.C.M.R. tit. 29 §§ 6005.2–3, 6007.16–22.

<sup>26</sup> 42 U.S.C. § 671(a)(10)(A).

<sup>27</sup> 42 U.S.C. § 671(a)(19).

<sup>28</sup> 42 U.S.C. § 671(a)(10)(D).



*Josh Gupta-Kagan*



leave much room for disagreement and for biases toward kinship caregivers to impact decisions. The current legal structure leaves little remedy for family members, parents, or children aggrieved by an agency’s refusal to place children with kinship caregivers.

## Kinship Foster Care Rates Vary Significantly By Jurisdiction

Many CPS agencies might respond by asserting that they would surely never oppose a kinship placement for a frivolous reason, only for a real safety concern. Indeed, the increase in the rate of kinship foster placements shows that many agencies have become more welcoming of kinship placements. But that does not mean agencies that are generally kinship-friendly will show proper deference to potential kinship placements in every case. And it surely does not mean that every agency is kinship friendly.

A striking feature of kinship care in the United States is wide variation by jurisdiction in the proportion of foster children that agencies place with kin. When local agencies follow a strong preference for kinship placement, those rates can increase to as high as two-thirds or more.<sup>29</sup> But no statewide rate reaches that high, and most do not come close. In 2020, statewide kinship foster placement rates ranged from seven percent of all foster placements in one state to 54 percent in another (See Figure 1). Such significant variation of kinship care rates has long been a feature of the American foster system.<sup>30</sup>

This variation does not reflect that kinship caregivers are more or less safe in one jurisdiction or another. Kinship caregivers in Delaware and Virginia (states with the two lowest rates of kinship placement among the 50 states, DC, and Puerto Rico) are not less safe than kinship caregivers in Maryland (fifth highest). Kinship caregivers in Kentucky (ranked 49th) are not less safe than those in West Virginia (ranked first). Rather, it shows that some CPS agencies use the wide discretion the law grants them to place many more children with kin than others.<sup>31</sup>

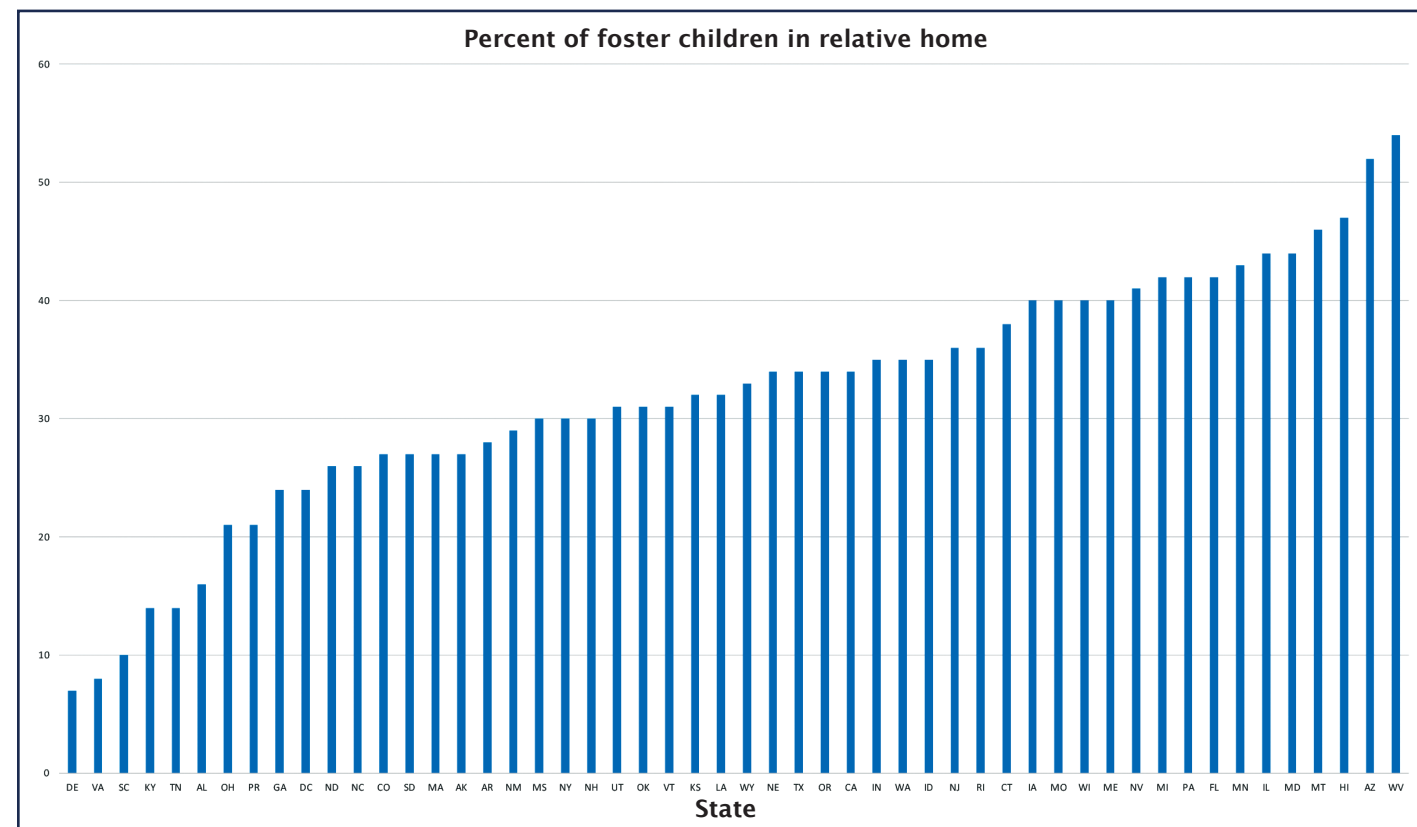


Figure 1. Source: AFCARS, Child Trends, March 2022.<sup>32</sup>

These dramatic variations in the frequency of kinship care illustrate the central point: despite decades of evidence demonstrating the benefits of kinship care, the law largely does not require agencies and courts to actually use kinship care. We do not have a set of laws that require agencies to value kinship placements consistently. Rather, our laws give agencies power to determine whether to pursue kinship placements, with different agencies doing so at vastly different rates. The result is wide disparities in when children can actually benefit from kinship care, including many jurisdictions where children suffer unnecessary separations from family caregivers.

## Legal Reforms to Strongly and Consistently Preference Kinship Care

If the state must remove a child from the parents’ custody and place the child in the state’s custody, the law should impose a strong kinship placement preference consistent with the benefits of kinship care. The goals of such reforms would be to increase kinship care rates in all jurisdictions and in jurisdictions already using kinship care frequently, to provide families with the ability to challenge agency decisions about kinship care, and for the law to reflect the value of kinship care, especially as compared with placements with strangers.

First, state legislatures should require agencies and courts to follow a placement hierarchy whenever a child must be removed from a parent. Other legal parents should have custody when possible, followed by other family members or fictive kin,<sup>33</sup> followed by stranger foster families, followed by congregate care facilities. Whenever an agency (or any other party) seeks to move down that hierarchy, the law should require it to prove why more favored options are impossible,<sup>34</sup> dangerous, or otherwise strongly contrary to a child’s best interest.

State legislatures should require any party seeking to overcome a kinship placement preference to

<sup>29</sup> See Judge Leonard Edwards, *Relative Placement: The Best Answer for Our Foster Care System*, 69 *Juv. & Fam. Ct. J.* 55, 59 (2018) (describing Allegheny County, Pennsylvania); Edwards *supra* note 3, at 7 (asserting that “[s]everal model counties have demonstrated that they can place children with relatives in over 80% of their dependency cases”). Allegheny County currently reports that the “majority placement” – “the placement setting in which a child spends greater than 50% of his/her placement spell in a given year” – was kinship care for 65% of foster children. <https://analytics.alleghenycounty.us/2021/01/07/child-welfare-placement-interactive-dashboard/> (“majority placement” tab, last visited July 25, 2022). At any point in time, about 57% of Allegheny County foster children are in kinship care. *Id.* (“PIT” – point in time – tab).

<sup>30</sup> A similar range is evident, for instance, in 2011 data. U.S. Dep’t Of Health and Human Servs., Admin. For Children and Families, Admin. on Children, Youth and Families, Children’s Bureau, Report to Congress on States’ Use of Waivers of Non-Safety Licensing Standards for Relative Foster Family Homes 6–7 (2011), available at [http://www.acf.hhs.gov/sites/default/files/cb/report\\_congress\\_statesuse.pdf](http://www.acf.hhs.gov/sites/default/files/cb/report_congress_statesuse.pdf).

<sup>31</sup> Other variables beyond the scope of this article contribute to the different rates in different states. For instance, states use hidden foster care with different frequencies, and some may have low rates of *formal* kinship foster care but high rates of kinship care via hidden foster care. See Josh Gupta-Kagan, *America’s Hidden Foster Care System*, 72 *Stan. L. Rev.* 841 (2020). For instance, South Carolina has reported more than 2,000 children living in kinship care via the hidden foster care system, *id.* at 858, but only several hundred in kinship foster care (counting licensed kinship homes and court-ordered unlicensed kinship placements). E.g. S.C. Dep’t of Soc. Servs., Placement Types for Youth in Foster Care on June 30, 2020, <https://dss.sc.gov/media/2534/placement-types-for-children-in-foster-care.pdf>.

<sup>32</sup> Each state’s data is available at <https://www.childtrends.org/publications/state-level-data-for-understanding-child-welfare-in-the-united-states>. Child Trends has helpfully created state-specific data based on state submissions to the federal government, which the U.S. Children’s Bureau aggregates into the national AFCARS reports. See Child Trends, State-level Data Trends for Understanding Child Welfare in the United States: Companion Guide (2022), [https://www.childtrends.org/wp-content/uploads/2022/02/ChildWelfareDataCompanionGuide\\_ChildTrends\\_March2022.pdf](https://www.childtrends.org/wp-content/uploads/2022/02/ChildWelfareDataCompanionGuide_ChildTrends_March2022.pdf).

<sup>33</sup> “Fictive kin” refers to individuals with a close family-like relationship to a child or the child’s parents, but who are not related biologically or through marriage or adoption. E.g., 29 D.C.M.R. § 6027.3(b). Fictive kin’s close relationship with the child or child’s parents distinguishes living with them from living with strangers in foster care. As of 2018, the U.S. Children’s Bureau reported that only 28 states defined kinship care to include fictive kin. *Placement of Children with Relatives*, *supra* note 1, at 2. States that have not done so should expand definitions of kin to include anyone with a close family-like relationship with the child or the child’s parent that pre-dates agency involvement; those relationships, not biological or legal ties, define kinship care.



meet a significant burden of proof to ensure that a kinship placement preference is meaningful. Current law largely puts the burden on the kinship caregiver—they must show that they meet state licensing standards, or at least grants CPS agencies the discretion to determine whether to waive such standards.<sup>35</sup> That is, the law asks, “Why should the state place this child with this kinship caregiver?” To strengthen kinship placement preferences, the law must frame the question differently: “Why should this child not have the right to live with family members?”

This burden begins with agencies’ obligations to find relatives promptly after a child enters foster care and inform them that they can seek custody. If an agency claims that no potential kinship caregivers have been identified, it should establish the efforts it made to identify such individuals. When agency efforts are lacking, courts should not hesitate to order agencies to take such steps.<sup>36</sup>

If an agency wants to place a child with strangers rather than with a proposed kinship caregiver, the agency must prove more than some risks may exist with that kinship placement and more than simply that the agency’s licensing process did not approve the placement. No arrangement is risk-free, and the risks of any particular kinship placement must be balanced with the risks of placing children with strangers. The agency instead should have to provide some compelling evidence that the kinship placement presented an unacceptable risk to the child’s safety or emotional well-being and one that is significantly greater than placing a child with strangers. A standard like this ensures a real kinship preference, not merely a kinship preference, if agencies decide to support a kinship placement. A standard like this focuses on the essential questions of safety—not only in the abstract but in comparison with the real-world alternatives to kinship care.

The Washington Supreme Court’s recent decision in *In re K.W.*<sup>37</sup> provides an example of what a meaningful kinship placement preference ought to mean and what other state courts should follow and other state legislatures should seek to codify.<sup>38</sup> The court recognized a preference for placing children with kinship caregivers, and made clear that agency predictions of a family member’s likelihood of passing an agency home study, or past CPS agency involvement does not suffice for overcoming a kinship placement preference.<sup>39</sup>

That essential holding flips the current legal structure in many cases. Currently, kinship caregivers seeking foster care licenses must frequently convince agencies why they deserve a waiver from licensing standards. The meaningful kinship preference required by *In re K.W.* instead requires an agency or any party opposing a kinship placement to prove why any perceived problem with kinship caregivers renders living with strangers better for a child. The agency would have to establish what threat a criminal conviction for a misdemeanor or a relatively minor neglect substantiation poses to the specific child at issue.

The Washington Supreme Court continued by admonishing agencies and family courts to be wary of discretionary decisions based on such factors because they will have a disproportionate impact on low-income families and families of color,<sup>40</sup> and family courts must review agency denials of kinship placements to ensure they are not based on factors which could serve as “proxies for race.”<sup>41</sup> Indeed, establishing a stronger kinship preference and a clearer standard for when agencies may place children with strangers can serve to limit the potential for racial or class bias to infect decisions.

<sup>34</sup> Such proof should include why any possible kinship placement is impossible, not simply that one potential placement is.

<sup>35</sup> *E.g.* 42 U.S.C. § 671(a)(10) & (19).

<sup>36</sup> For a description of where the legal process failed to accomplish this at the outset of a case – leaving the matter to be corrected years later on appeal – see *Matter of Richard HH*, 163 A.D.3d at 1084–85.

<sup>37</sup> 504 P.3d 207 (2022).

<sup>38</sup> In fact, the Washington legislature did recently codify a similar rule, requiring kinship placements unless a risk to the “health, safety, or welfare of the child” existed. Rev. Code of Wash. § 13.34.130(3).

<sup>39</sup> *Id.* at 221.

<sup>40</sup> *Id.* at 220, 221.

<sup>41</sup> *Id.* at 222.

Second, the law should further require CPS agencies to make active efforts to facilitate and maintain placements higher on the hierarchy. This includes strong efforts to identify and explore all potential kinship caregivers and to aid them in making a placement work. When obstacles arise—such as when a child’s kinship foster parent faces eviction, and thus the child faces losing a preferred placement—agencies should have to help preserve that kinship placement, as agencies failed to do in Ma’Khia Bryant’s case.

Both state legislatures and Congress can enact these reforms. Some state legislatures have already enacted kinship placement preferences,<sup>42</sup> and other states should follow and include provisions to ensure such preferences are meaningful and difficult to overcome. Congress should remove the mushy statutory language that states must “consider” a kinship placement preference<sup>43</sup> and require states to impose such a preference, along with provisions to enforce it.

One recently introduced federal bill illustrates modest steps towards these goals. H.R. 7416, the Promoting Permanency Through Kinship Families Act<sup>44</sup> includes several provisions to enforce a meaningful kinship placement preference. Agencies declining to use kinship placements in individual cases would have to “document the basis for that determination with clear and convincing evidence.”<sup>45</sup> Criminal and child protective registry records could not prevent licensing of kinship caregivers “in the absence of particularized information demonstrating that the caregiver poses a current safety threat to the child” or some comparable evidence.<sup>46</sup> States would be prohibited against discriminating against kinship caregivers on the basis of their age.<sup>47</sup> Agencies would be required to make reasonable efforts to maintain kinship placements unless they were either reunifying children with their parents or establish “clear and convincing evidence that remaining in the kinship placement is contrary to the welfare of the child.”<sup>48</sup>

Third, to enforce these laws, all states must ensure a strong right to effective counsel for all parties. Note that this does not require providing counsel or standing to kin; at the placement stage, such steps would inappropriately undermine the parent-child relationship and reunification efforts. But vigorous and effective advocacy for parents and children<sup>49</sup> will help identify kinship caregivers and enforce these reformed laws preferencing placement with them. The federal government can further enforce such changes by making the adequacy of agency efforts a part of Child and Family Services Reviews. State agencies that fail to identify kinship resources effectively or place children with available kinship caregivers should lose federal funding; the federal government should not fund placement with strangers or in institutions when kinship caregivers are available.<sup>50</sup>

## Conclusion

The law should better reflect the social science evidence showing the benefits of kinship care and the consensus within our field that kinship care is strongly preferable to stranger foster care. Current

<sup>42</sup> *Supra* note 15.

<sup>43</sup> 42 U.S.C. § 671(a)(19).

<sup>44</sup> H.R. 7416 was introduced by Rep. Karen Bass and co-sponsored by Reps. Mary Gay Scanlon, Sheila Cherfilus-McCormick, Jahana Hayes, and Brenda L. Lawrence. The full text of H.R. 7416 is available at <https://www.govinfo.gov/app/details/BILLS-117hr7416ih>.

<sup>45</sup> H.R. 7416, § 3(c)(3) (2022).

<sup>46</sup> *Id.* At § 4.

<sup>47</sup> *Id.* At § 5.

<sup>48</sup> *Id.* at § 3(c)(3) (2022).

<sup>49</sup> The proper scope and role of lawyers for children is a topic beyond the scope of this article. For present purposes, I will note that children’s lawyers should represent what children want – which will more often be living with family members than strangers – or, for young children unable to voice a desire, their right to live with kin whenever possible.

<sup>50</sup> Child and Family Services Reviews (CFSRs) are described in 45 C.F.R. §§ 1355.31–37 and permit the federal government to impose consequences on state agencies which fail to meet federal standards. See also Vivek S. Sankaran & Christopher Church, *Easy Come, Easy Go: The Plight of Children Who Spend Less than Thirty Days in Foster Care*, 19 U. PA. J.L. & SOC. CHANGE 207, 234 (2016) (describing the history, process, and function of CFSRs).



law may suggest that direction—such as in the federal provision that states “consider” a kinship placement preference or in state laws that create kinship placement preference so long as the agency has approved it—but largely does not require it. (That should not, of course, stop advocates from seeking stronger legal rulings in individual cases or state courts interpreting existing laws as strongly as possible, as the Washington Supreme Court did in *In re K.W.*)

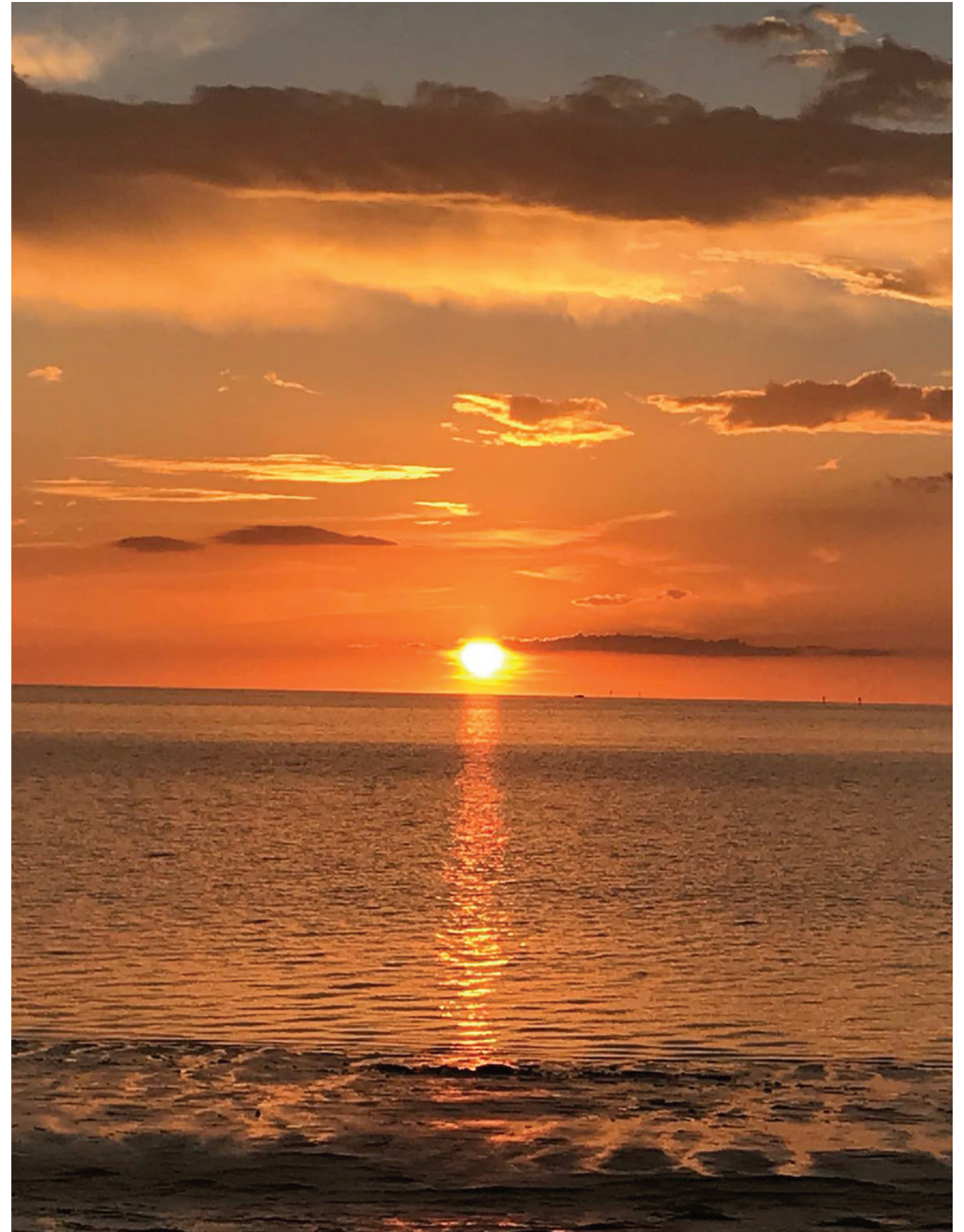
The status quo is a legal structure that grants agencies and courts too much power and discretion to decide when to use kinship care, results in significant variations by jurisdiction in the use of kinship care, and leaves families without adequate remedies when denied the opportunity to live together. Legal reforms can establish a strong kinship placement preference and requirement that agencies act to achieve and maintain such placements. In jurisdictions with high kinship care rates already, such reforms can codify that practice and help ensure it applies to each individual family and that some future change in administration or judicial personnel does not limit the use of kinship care. In jurisdictions with lower kinship care rates, such reforms can become a powerful tool for improved outcomes and can provide parents and children (and their lawyers and advocates) stronger tools to seek kinship placements and avoid placements with strangers.

---

*Josh Gupta-Kagan is a clinical professor of law at Columbia Law School.*



© Eva-Katalin | iStock.com



© Florida Sunset by Anisa Rabim



# Kinship Matters: Reflections from the Bench on Preserving Children’s Right to Family

Judge Edwina Richardson Mendelson

The New York State court system’s celebration of Reunification Month this June served as a great reminder to us that family preservation is, in fact, the law and that removing a child from their parent or primary caregiver must be reserved for the most extreme and egregious of threats to a child’s safety and wellbeing. We know, however, that there are times when a parent is unable to safely care for a child, even with supportive resources. In those instances, every effort should be made to have the child live with relatives and keep them connected with their family.

## What is Kinship Care?

Many of us have engaged in some form of kinship care in our lives; having a close friend or family member care for your child when you are not able to, such as for a hospital stay or military deployment, is kinship care. “Kinship care is commonly defined as ‘the full-time care, nurturing, and protection of a child by relatives, members of their Tribe or clan, godparents, stepparents, or other adults who have a family relationship to a child.’”<sup>1</sup>

While the formal foster care system has only in recent times focused on ensuring that children taken from their parents are placed with relatives,<sup>2</sup> communal childcare within an extended family unit has long been a cultural marker of family composition amongst Black and Indigenous communities in the United States. As former foster youth Marcia Hopkins explains:

“[I]nformal ‘kinship’ care has been a strength for many cultures, including communities of color, throughout history. In Native American culture, kinship is broadly defined so that everyone within the

band, clan, and tribe is considered a relative and plays a supportive role in caring for community members. For Black families, child rearing by relatives has been a long-standing tradition and protective factor that was especially beneficial for Black families during slavery and often elderly relatives cared for children whose parents were sold into slavery.”<sup>3</sup>

Kinship care was introduced as a formal part of the nationwide child welfare system only in 1978, and it wasn’t until the 1990s that kinship care was considered a specific program within foster care.<sup>4</sup> Even so, for states to receive federal payments for foster care and adoption assistance, federal law under title IV-E of the Social Security Act requires only that states “consider giving preference to an adult relative over a nonrelated caregiver when determining a placement for a child, provided that the relative caregiver meets all relevant state child protection standards.”<sup>5</sup> Most kinship caregivers

<sup>1</sup> Child Welfare Information Gateway, <https://www.childwelfare.gov/topics/outofhome/kinship/about/>, accessed August 9, 2022.

<sup>2</sup> Mabry, Salendria, Kinship Care: The Way it Was vs. The Way it Is, Foster Care Newsletter, 2016, <http://foster-care-newsletter.com/kinship-care-the-way-it-was-vs-the-way-it-is/#.Y0AmA3bMLrc>, accessed October 5, 2022.

<sup>3</sup> Hopkins, Marcia, Family Preservation Matters: Why Kinship Care for Black Families, Native American Families, and Other Families of Color is Critical to Preserve Culture and Restore Family Bonds, September 24, 2020, Juvenile Law Center Blog, <https://jlc.org/news/family-preservation-matters-why-kinship-care-black-families-native-american-families-and-other>, accessed on October 5, 2022.

<sup>4</sup> Mabry, Kinship Care, supra note 2.

<sup>5</sup> Children’s Bureau, “Placement of Children With Relatives,” Child Welfare Information Gateway, 2018, accessed on October 6, 2022 at <https://www.childwelfare.gov/pubPDFs/placement.pdf>.



Judge Edwina Richardson Mendelson



are not foster parents and privately provide full-time care for children, sometimes in the “hidden” or “shadow” foster system.<sup>6</sup> Moreover, funding and supports for kin caregivers of children taken into foster care by the formal child welfare system lag far behind their families’ levels of need.<sup>7</sup>

There are approximately 2,614,000 children currently in kinship care across the country; 129,000 in New York.<sup>8</sup> These arrangements may be formal, legally recognized arrangements, or they may be informal.<sup>9</sup> “Across every generation and culture, grandparents, other relatives, and close family friends have stepped forward to raise children whose parents can no longer care for them. This time-honored tradition, known as kinship care, helps protect children and maintains strong family, community, and cultural connections. When children cannot remain safely with their parents, other family and friends can provide a sense of security, positive identity, and belonging.”<sup>10</sup>

Why is Kinship care important? Simply, children do better when in the care of kin.

“The notion that children do better in families is a fundamental value that cuts across all racial, ethnic, and socioeconomic boundaries. Kinship care helps children maintain familial and community bonds and provides them with a sense of stability, identity, and belonging, especially during times of crisis. Kinship care also helps to minimize the trauma and loss that accompany parental separation. For children in the custody of the state child welfare system, placement with caring relatives helps prevent the unnecessary stress of adjusting to foster care with adults they do not know. Kin can provide safe, stable, and nurturing care temporarily when children are removed from their homes, and they can provide care permanently when parents are unable to resume fulltime care of their children.”<sup>11</sup>

Indeed, there are many benefits to placing children with relatives or other kinship caregivers, such as minimizing trauma, increased permanency, improved mental health benefits, improved sibling and community relationships, and maintaining ties to an adult for older youth.<sup>12</sup>

## The Legal Landscape

In New York, the law, as it relates to caregiving for a child who is under court jurisdiction as an alleged abused or neglected child, requires that courts and child welfare agencies make efforts to place the child with relatives. During the pendency of an abuse or neglect matter, the judge is required to order an investigation to locate “any non-respondent parent of the child and any relatives of the child, including all of the child’s grandparents, all relatives or suitable persons identified by any respondent parent or any non-respondent parent and any relative identified by a child over the age of five as a relative who plays or has played a significant positive role in his or her life”<sup>13</sup> and subsequently places the child in the care of such person. For dispositional purposes, the court may place (or continue the placement of) the child in the custody of a relative or other suitable person.<sup>14</sup> In either case, the court is required to direct the local department of social services to expedite the certification of

<sup>6</sup> Ryan Johnson, Disrupt Disparities: Kinship Care in Crisis, 2017, <https://aarp-states.brightspotcdn.com/80/58/66bd55214a8b9581fae55af253b6/disrupt-disparities-kinship-care-in-crisis-3-21.pdf>, accessed October 6, 2022.

<sup>7</sup> Mabry, supra note 2.

<sup>8</sup>The Annie E. Casey Foundation. *Kids Count Data Center*. 2017 Current Population Survey Annual Social and Economic Supplement (CPS ASEC) Research File, 2018 CPS ASEC Bridge File, 2019–2021 CPS ASEC. Estimates represent a three-year average. <https://datacenter.kidscount.org/data/tables/10455-children-in-kinship-care?loc=34&loct=2#detailed/2/34/true/2097,1985,1757/any/20160,20161>, accessed August 10, 2022.

<sup>9</sup> Johnson, *Disrupt Disparities*, supra note 6.

<sup>10</sup> The Annie E. Casey Foundation. *Stepping Up for Kids*. Baltimore: The Annie E. Casey Foundation, 2012. <https://assets.aecf.org/m/resourcedoc/AECF-SteppingUpForKids-2012.pdf>, accessed August 9, 2022.

<sup>11</sup> The Annie E. Casey Foundation. *Stepping Up for Kids*. Baltimore: The Annie E. Casey Foundation, 2012. <https://assets.aecf.org/m/resourcedoc/AECF-SteppingUpForKids-2012.pdf>, accessed August 10, 2022.

<sup>12</sup> American Bar Association Center on Children and the Law. *Child Law Practice Today*, July/August 2017 Issue. *Kinship Care is Better for Children and Families* Heidi Redlich Epstein, [https://www.americanbar.org/groups/public\\_interest/child\\_law/resources/child\\_law\\_practiceonline/child\\_law\\_practice/vol-36/july-aug-2017/kinship-care-is-better-for-children-and-families/](https://www.americanbar.org/groups/public_interest/child_law/resources/child_law_practiceonline/child_law_practice/vol-36/july-aug-2017/kinship-care-is-better-for-children-and-families/), accessed August 10, 2022.

<sup>13</sup> N.Y. Fam. Ct. Act §1017(1)(a)

<sup>14</sup> N.Y. Fam. Ct. Act §1055(a)(i)

the caregiver as a foster parent, should the caregiver desire it.<sup>15</sup>

“Relative” is defined in the law in the way we traditionally think of relatives: those related by blood, marriage, or adoption;<sup>16</sup> but a suitable person includes “any person who plays or has played a significant positive role in the child’s life or in the life of the child’s family.”<sup>17</sup>

Kin may also care for children pursuant to an order of custody<sup>18</sup> or guardianship.<sup>19</sup> Parents may also designate a person in parental relationship<sup>20</sup> for short periods of time—up to a year—without going to court.<sup>21</sup> These designations allow parents to delegate to substitute caregivers the legal ability to make education and medical decisions for their children.

Federal law, too, has placed an emphasis on keeping children in family settings—first and foremost, in their own family with supports to promote safety—but also emphasizing expansive definitions of kin and prioritizing placement in family settings when children cannot remain in the home. “The Family First Prevention Services Act, signed into law in 2018, seeks to accelerate movement toward this vision, emphasizing prevention services, prioritizing family placement and incentivizing high-quality, residential treatment.”<sup>22</sup> Specifically, the law provides for the provision of prevention services to kin caregivers to help keep children out of foster care, reduces barriers for kinship foster homes, and encourages navigator programs to help kinship families, among other measures.<sup>23</sup>

## How Are We Doing?

Although the use of kinship care has increased in the United States child welfare system, it is not yet used with the same urgency, and at the scale necessary to meet the needs of children and their families.<sup>24</sup> While New York has made strides, there is still much to do.

In 2020, the New York State Office of Children and Family Services (OCFS), the state agency having oversight over the local departments of social services, established the requirement of kin-first firewall practice to be implemented both at the time of removal and again if

children are moved while in state custody. The intent is to “make kinship placements the presumptive placement for children, thereby expanding family-based care...”<sup>25</sup> This practice must include multiple exhaustive reviews in the location and engagement of all possible kin, as expansively defined:

- An adult who is related to the parent(s) or stepparent(s) of a child through blood, marriage, or adoption to any degree of kinship.
- An adult with a positive relationship to the child or child’s family including but not limited to a child’s godparent, neighbor, family friend.
- An unrelated person where placement with such person allows half siblings to remain together in an approved foster home, and the parents or stepparents of one of the halfsiblings is a relative of such person.<sup>26</sup>

Chapter 384 of the Laws of 2017 (KinGAP Expansion) amended New York State Social

<sup>15</sup> *Id.*; N.Y. Fam. Ct. Act §1017(2)(a)(iii)

<sup>16</sup> N.Y. Fam. Ct. Act §1012(m)

<sup>17</sup> N.Y. Fam. Ct. Act §1012(n)

<sup>18</sup> N.Y. Family Court Act Article 6

<sup>19</sup> In New York, Article 17 of the Surrogate’s Court Procedure Act is the law that controls Surrogate Court guardianship appointments involving children; see also, N.Y. Family Court Act Article 6.

<sup>20</sup> N.Y. General Obligations Law §5-1551

<sup>21</sup> <https://ocfs.ny.gov/forms/ocfs/ocfs-4940/OCFS-4940.docx>; <https://www.nycourts.gov/ip/justiceforchildren/PDF/incarceratedparents/2019%20English-Incarcerated%20Parent%20Flyer.pdf>

<sup>22</sup> The Annie E. Casey Foundation. *Keeping Kids in Families: Trends in U.S. Foster Care Placement*. Baltimore: The Annie E. Casey Foundation, 2019. <https://assets.aecf.org/m/resourcedoc/aecf-keepingkidsinfamilies-2019.pdf>, accessed August 10, 2022.

<sup>23</sup> American Bar Association Center on Children and the Law. *New Opportunities for Kinship Families: Action Steps to Implement the Family First Prevention Services Act in Your Community*, [https://www.americanbar.org/content/dam/aba/administrative/child\\_law/new-opportunities-kinship-families.pdf](https://www.americanbar.org/content/dam/aba/administrative/child_law/new-opportunities-kinship-families.pdf), accessed August 11, 2022.

<sup>24</sup> Johnson, *Disrupt Disparities*, supra note 5.

<sup>25</sup> New York State Office of Children and Family Services, Administrative Directive, *Kin-First Firewall Practice*, 20-OCFS-ADM-18, October 14, 2020, [https://cdn.ymaws.com/www.nysda.org/resource/resmgr/family\\_defense\\_resources/20-OCFS-ADM-18\\_2\\_.pdf](https://cdn.ymaws.com/www.nysda.org/resource/resmgr/family_defense_resources/20-OCFS-ADM-18_2_.pdf), accessed August 10, 2022.

<sup>26</sup> *Id.*



Services Law in relation to the eligibility of children for the Kinship Guardianship Assistance Program (KinGAP), a subsidized guardianship program. KinGAP Expansion is New York State’s effort to expedite permanency for children and youth for whom adoption or reunification is not feasible. The changes to the law expanded KinGAP in two key ways: first, it eliminates the need for the prospective relative guardian to be related by blood, marriage, or adoption to a child or to all siblings in a sibling group; second, it eliminates the requirement that KinGAP payments automatically terminate upon the child’s 18th birthday if the agreement was effective prior to the child turning 16.<sup>27</sup> “These changes increase permanency options for children who would otherwise remain in foster care and provide committed foster parents the supports necessary to care for the child after transitioning to guardianship.”<sup>28</sup>

Both efforts were undertaken in preparation for New York State’s implementation of the Family First Prevention Services Act (FFPSA), which set the goal of no more than 12 percent of children in foster care living in congregate care and at least 50 percent of children in foster care living in kinship foster care. As of September 2021, 41 percent of children in foster care are with a kinship resource, and 14 percent are in congregate care.<sup>29</sup> By March 31, 2022, the number of children in a kinship foster homes increased to 46 percent.<sup>30</sup>

The New York State Kinship Navigator Program provides information, referrals, and assistance via its website and toll-free telephone line. The Kinship Navigator is a statewide program operated by Catholic Family Center and specially designed to provide an information and referral network for kinship caregivers across all of New York State.<sup>31</sup> Pre-dating FFPSA, New York’s program has been available since 2006, and provides comprehensive, one-stop-shopping, resources, and services that address the many needs of kin caregivers,<sup>32</sup> including youth services, legal resources, county agencies, aging services, and other local agencies to help aid in working towards stable permanency plans.

On the national level, a number of agencies have come together to support and advocate for kin caregivers. [Grandfamilies.org](http://www.grandfamilies.org) is a

collaboration of [Casey Family Programs](http://www.caseyfamilyprograms.org), [Generations United](http://www.generationsunited.org), and the [American Bar Association Center on Children and the Law](http://www.americanbar.org/groups/children_and_the_law). It serves as a national legal resource in support of grandfamilies –and other kin caregivers—within and outside the child welfare system. Its mission is to: educate individuals about state laws, legislation, and policy in support of grandfamilies; assist interested policymakers, advocates, caregivers, and attorneys in exploring policy options to support relatives and the children in their care and provide technical assistance and training.<sup>33</sup> Grandfamilies.org contains a treasure trove of resources for kin, practitioners, child welfare staff, and courts alike.<sup>34</sup>

## What Can Judges Do?

While judges in every state are bound by many ethical rules and regulations, there is much that judges can do to support kinship within ethical bounds.

**Lead from the top:** Hold regular, high-level meetings with your child welfare agency leadership on policy and practice issues of importance. Make kinship a priority topic. Use the same framework in your local Child Welfare

<sup>27</sup> New York State Office of Children and Family Services, Administrative Directive, *Expansion of the Kinship Guardianship Assistance Program (KinGAP)*, 18-OCFS-ADM-03, March 2, 2018, [https://ocfs.ny.gov/main/policies/external/ocfs\\_2018/ADM/18-OCFS-ADM-03.pdf](https://ocfs.ny.gov/main/policies/external/ocfs_2018/ADM/18-OCFS-ADM-03.pdf), accessed August 10, 2022.

<sup>28</sup> *Id.*

<sup>29</sup> New York State Office of Children and Family Services, Child Welfare News and Notes, September 2021 – Vol.5, No. 3, *New York State on Track for Family First Implementation on September 29*, <http://www.ocfs.state.ny.us/programs/cwcs/newsletter.php?number=144>, accessed August 10, 2022.

<sup>30</sup> New York State Office of Children and Family Services, Strategic planning and Policy Development, *Children in Care and Custody (All Statuses) by Setting Type*, <https://ocfs.ny.gov/main/sppd/docs/ffpsa-reports/setting-type/2022-Q1-Care-and-Custody-by-Setting-Type.xlsx>, accessed August 11, 2022.

<sup>31</sup> New York State Kinship Navigator, <https://www.nysnavigator.org/about/>, accessed August 10, 2022.

<sup>32</sup> *Id.*

<sup>33</sup> <https://www.grandfamilies.org/About-Us>

<sup>34</sup> See, for example, *Model Licensing Standards for Foster Homes*, Grandfamilies.org, <http://www.grandfamilies.org/Portals/0/Documents/Publications/Model%20Licensing%20Standards%202018%20update.pdf>, accessed August 12, 2022.



Court Improvement Program collaboratives and make sure kinship advocacy groups are at the stakeholder’s table.

**Lead from the bench:** Treat everyone in your courtroom with respect. Ask questions. Ask them again. Ask the families what they need. Ask the children what they want. Ask at each and every court appearance whether the family can be reunified with support if there has been separation. If not, ask about kin and whether there are any kin caregivers for the child. Ask the child who they want to be with. Ask the parents who they would like the child to be with if they are unable to safely reunify. Importantly, do not be afraid to rule that reasonable efforts were NOT made if they weren’t—particularly so if those efforts should have been made to identify kin caregivers. Hold the agency accountable. Every time. Ask.<sup>35</sup>

**Advocate for resources:** Each year, New York State Chief Judge DiFiore holds a hearing regarding Civil Legal Services funded by the judiciary. I recently testified,

“In my leadership role connected with the New York State Child Welfare Court Improvement Project, just last week I participated in a program where I heard from kin caregivers—many of whom are

grandparents and great grandparents — about how desperate they are to have attorneys help them in Family Court, which is far too complicated for them to navigate on their own. The impact of the opioid epidemic on children and families has created a huge need for grandparents and other relatives to care for children when their parents are unable to.

Very few legal service providers represent kinship caregivers for free, and one is the Empire Justice Center which is a grantee of our Judiciary Civil Legal Services funding...

Without legal representation, vulnerable children enter foster care to live with strangers, instead of being safely cared for by loving kin.

Attorneys make a difference.”<sup>36</sup>

<sup>35</sup> See, for example, *Judicial Guide to Implementing Fostering Connections to Success and Increasing Adoptions Act of 2008*, which contains questions judges can, and should ask at various hearings, <http://www.grandfamilies.org/Portals/0/Documents/Fostering%20Connections%20to%20Success%20and%20Increasing%20Adoptions%20Act%20of%202008%20Judicial%20Guide%20to%20Implementing%20Fostering%20Connections%202011%201.pdf>, accessed August 12, 2022.

<sup>36</sup> The Chief Judge’s 2019 Hearing on Civil Legal Services, <http://ww2.nycourts.gov/accesstojusticecommission/public-hearings-2019.shtml>, accessed August 12, 2022.



**Lead with humility and humanity:** Set the tone in your courtroom. The families that come before you do not want to be there. They are angry, scared, and perhaps in crisis. Listen to what they say with open ears, an open mind, and an open heart. What we do is hard. What these families are going through is harder. It is very easy to shut down and turn off when you hear angry words, or hurt, or are shown signs of apparent disrespect. But this is precisely the time when you must show grace and do what is best for the family. This was never more apparent to me than it was many years ago when, I, myself, sought to become a kin caregiver to my three nieces. Already a judge, I found myself navigating courthouses as a litigant, doing what so many other family members do every day: show up for my family. These three young girls, then 16, 15, and 10 had lost both of their parents to quick, unexpected medical tragedies. We soon realized that the initial plan of them staying with their paternal grandmother—with support from other family members—was unsustainable. Before I made any legal moves, I first spoke with the girls—my nieces, to make sure they in fact, wanted to live with me and my own daughter, whose life would be immeasurably impacted by this change.

I, too, experienced what Secretary Jeh Johnson and his team, who produced the 100-page Special Adviser on Equal Justice report, concluded, which was that many who serve in our courts work hard to “get it right and make it better.” Yet even with these good intentions, many in New York are still subject to a “second-class system of justice,” where court users are crowded through a dehumanizing and overburdened system that is still marked by racial intolerance.<sup>37</sup> Even with my education and training as a lawyer and a family court

judge, and the assistance of a lawyer, the process was extremely difficult to navigate. Yet there are so many who do this every day without assistance. Ultimately, we came to an agreement about the care of the girls and were able to avoid a trial. It proved to me that we must do everything we can to support families and kin caregivers at every possible junction.

I am happy to say that the girls came into my full-time care, and we have all formed incredible bonds. All my girls are now fully grown adults who are thriving and living wonderful lives, expanding our family into another generation with my now three growing grandchildren. And now, I lead the Equal Justice in the Courts Initiative, implementing all of Secretary Johnson’s recommendations to make the courts better for **all** its users.

We have come a long way in preserving families whenever possible and keeping children with kin. But there is more work to be done.

---

<sup>37</sup> In June 2020, Chief Judge DiFiore commissioned former U.S. Secretary of Homeland Security Jeh Johnson as Special Adviser on Equal Justice in the Courts to conduct an in-depth review of the New York State court system’s policies, practices, rules, and programs as they relate to issues of racial and other bias. The full report, with its recommendations, can be found here <https://nycourts.gov/whatsnew/pdf/SpecialAdviserEqualJusticeReport.pdf>

---

*Judge Edwina Mendelson is the Deputy Chief Administrative Judge for the newly expanded New York State Unified Court System’s Office for Justice Initiatives, tasked with ensuring meaningful access to justice for all New Yorkers in civil, criminal, and family courts, regardless of income, background, or disability.*





# Smile

By Titus Smith

Through the rain, through the storm,  
There will always be a rainbow,  
no matter what you do know that you, will make it through

You should smile, even if it is raining,  
You should smile, even if there is pain inside  
Smile, I'll be right beside you baby  
Smile, every once in a while  
Smile...

There's a reason for the season  
Behind every heartache there is joy  
Every sorrow is designed to make you strong  
You should smile, even if it is raining,  
You should smile, even if there is pain inside  
Smile, I'll be right beside you baby  
Smile, every once in a while  
Smile ...

There's a silver lining,  
behind every gray cloud,  
Shining down, to signify the start of a new day  
To re new, to rejoice, to love, To smile

Smile  
Yea, smile, smile  
Smile Smi-smile,  
smi-smile, smi-smile  
Smile  
Even if it's raining  
Smile  
Even if there is pain inside  
Smile I'll be right beside you baby Smile  
I'll be there Smile Just smile, just smile  
Through the hard times.  
Smile  
Just smile baby, smile baby, smile for me  
Smile Huh-huh-huh-huh-huh-huh  
Smile  
Smile  
Smile  
Smile

*Song lyrics written and performed by artist Achalisse and produced by artist Mistro Ts (given name is Titus Smith). Titus wrote the words to this song with his mother, at the age of 12, after being reunited with his family.*



© monkeybusinessimages | iStock.com



---

# Every Year Since 1984

By Diane Redleaf

Nothing is robust.  
Nothing is aligned.  
Nothing is integral.  
Nothing is purposeful or mission-driven.  
Nothing is child-centered.  
Nothing is family-focused.  
Nothing is long-term oriented.  
Nothing is “in the best interests of the child.”  
All these words from on high.  
None of them true.  
As if Big Brother issues these descriptions  
to pacify the public.  
Pacification being another word for violence  
in the English language.

---





# Family Is in a Child's Best Interest

Amelia S. Watson

Family matters. I know this to the core of my being. It is one of the things that sustains me in my life and my profession. I knew family mattered when I started twenty years ago in Tacoma, Washington representing parents in Pierce County dependency and termination of parental rights cases. I knew it from my own experiences of having a large extended family. I continue to know family matters in my current role with the Office of Public Defense Parents Representation Program supporting parent attorneys and social services workers providing family defense in Washington State.

Like many people, the constellation that connects my family is both simple and complex. Some of my family are related by blood, including some who were surrendered for adoption but later found their way back to us. Some are related by marriage or were at one time, but while the marriage has ended, the family connection remains. Some would be considered fictive kin whom I have formed familial relationships with over time. With many of my family, I have so many memories I couldn't begin to name them all from our time spent together at holidays, vacations, graduations, weddings, and so many other experiences. Others I have met less often, perhaps at a family reunion, or still others that I have not met yet at all. But to me, they are all mine.

Not all of the parents I represented felt connected to family. Some had no family connections, or some shared they had fractured relationships with family or were ashamed to share with them that they were involved in a dependency case. Many of them did have family they wanted to be a placement. They loved their families, knew their children would be well cared for by kin, and were desperate to have children placed with them. And the family regulation system was so busy othering them that it was not even stopping to notice. Stranger foster care was viewed as "safe," and relatives were viewed as unknown and therefore questionable, presumably "unsafe until proven otherwise."

Too many people working in the family regulation system think children are better off in stranger foster care rather than with relatives. This is despite the overwhelming research that children who have been removed from their parents do better when placed with their family. I wondered, is this how they see their family, or did they just see relatives caught up in the system as different as "those people."

When representing parents, so many opportunities could flow from relative placement. A placement with an auntie or a grandmother meant a place of love to a child—but also a home that was comfortably familiar, where they knew where the light switch was if they had to get up in the middle of the night. It was not foreign; it was connection. My parent client could breathe easier and focus on what they needed to do to get their child and not fear where their child was; this was especially true for clients who shared with me their traumatic and abusive experiences in foster care. Visitation would often be easier to address, potentially occurring in the more natural setting of a relative's home and occurring more frequently. Often the trajectory of the case could feel completely different, with me not worrying the case would morph into a parental alienation where we would battle the foster parents for a parent's constitutional right to have their children returned home. So many opportunities came from the relative placement that was often quashed right at the start when the court ordered foster care over the parent's objection. It felt like basic family connectedness and what was truly in a child's best interest was ignored regularly—like they weren't thinking of family the way I thought of mine.

## Complexities and Historical Problems with Background Checks

One complex area where prospective relatives are judged and stopped from becoming



*Amelia S. Watson*



a placement is when the state conducts background checks. Nationally, federal law requires states to conduct criminal history background checks and disqualify individuals from receiving foster care maintenance or adoption payments either permanently or for five years when someone is convicted of certain felonies. If states fail to do this, they lose federal reimbursement. This was passed as a part of the Adoption and Safe Families Act of 1997 (ASFA). Also, under federal law, child abuse and neglect (CA/N) records must be checked. Washington, like many states, has codified these under state law, requiring background checks for individuals wanting unsupervised access to children under the care of the Department of Children, Youth, and Families (DCYF). In Washington, relatives have historically had to undergo the same background checks as stranger foster parents regardless of whether they want to be licensed, adopt, or just be temporary placement for a child while their parent works to have their child returned to their care.

States can add more crimes to the required federal list, making it even harder for relatives to be placement due to criminal or CA/N history. Many states do. Some states permanently disqualify individuals convicted of a drug-related crime or assault or battery. These three crimes, when felonies, are actually five-year disqualifying crimes on the ASFA list; and when lesser charged, they aren't even a part of the federal ASFA list. I am sure to many people, this feels like we are assuring the safety of children, but to me, it feels like we are putting children's welfare at risk by prohibiting access to relatives who love them and could take care of them. Having these crimes be permanent disqualifiers says that no matter what someone has done since that conviction and no matter the child's relationship with their relative, it doesn't matter—the child will be better off without that relative, and it's alright they may lose the only familial connection available to them.

This is one of the many ways the ASFA and the family regulation system dismantle families and a place where the race of a family and the racism inherent in the system makes the risk of dismantling Black, Indigenous, and other People of Color (BIPOC) families larger. The systemic racism of over-policing in the

criminal legal system leads to disproportionate conviction rates for BIPOC individuals. The over-policing in the family regulation system also leads to disproportionate CA/N findings for BIPOC individuals. Both systems impact the lives of BIPOC relatives wishing to care for their family, leaving BIPOC children at risk of being placed at disproportionate rates in stranger foster care, the majority of whom are white.

In 2002, when I started representing parents in Tacoma, Washington, it was often a painful and traumatic struggle for parents, children, and relatives caught up in the family regulation system, even though, at the time, Washington had a statute that provided clear preferences for placing with relatives. And logistically, the convoluted and complex rules around background checks were frustrating and Orwellian. If a parent was lucky enough to have identified a relative within 24–48 hours of their child being taken from them, DCYF could do an emergent background check and receive results back within an hour. If the parent and the relative missed the window and the child was in a foster care home, it was no longer considered an emergent background check—meaning that a background check went through the regular process, which took weeks, if not months, to complete. That also meant the DCYF agency case worker had to object to the proposed relative placement under DCYF policy, even if the worker believed the best placement was with that relative. Even though state law allowed courts to place with relatives while the background check was pending, judges often refused to do so. If the background check results were delayed months out, the parent would often be left arguing to place with a relative was finally approved, but the DCYF worker would often argue the child was bonded to the foster parents and shouldn't be placed for example, with their grandmother (whom they had known their entire life).

I remember once having to argue to get a child placed with a relative who worked as a school bus driver (and therefore had already had a criminal history check for her job). The relative came to the initial shelter care hearing willing to be a placement. However, the emergent placement window had already ended before I was even assigned to the case. The caseworker objected to the relative

being the placement. It felt untenable that this relative who knew this child and family, who cared for other people's children for a living, this person who already had a background check, wasn't good enough. The caseworker argued it wasn't a background check for this purpose, "So we just don't know, do we?" and "We have to confirm they haven't committed a crime since they got that other background check." I have no doubt, that every day, family defenders face similar questions from agency caseworkers and make similar pleas to courts to place children with their family, with children's wellbeing in the balance.

Back when I was doing direct representation, Washington State's disqualifying list included additional crimes not on the ASFA list and having no impact on child safety, like forgery, malicious mischief, and theft (both felony and gross misdemeanor). Additionally, a founded CA/N neglect finding was a permanent disqualifier. And under the old policy, the caseworker had to look at all criminal and civil infraction history, not just what was on the list. The line caseworker assigned to a dependency might have no experience reading a criminal history and might not know anyone convicted of a crime before. This caseworker was left to judge whether a relative's background was "approved" or whether they wanted to ask the court to keep the child with a "safe" foster parent who was a stranger.

Caseworkers were left to decide whether a crime impacted child safety. They would sometimes demand relatives track down old court records, sometimes from other counties or states. Some of the records were so old they were no longer in existence, putting the background check in limbo. If the caseworker wanted to, they could seek administrative approval to overrule some crimes on the list. But that was only if the caseworker wanted to start the process, and it could require multiple approval levels above the line caseworker. Relatives with any criminal, civil infraction or CA/N history were swimming upstream. Convincing the court to take what the court often perceived as a risk on a relative rather than the "safety" of a foster care placement felt like an uphill battle.

It felt like parents, children, and families were in a lottery system. Did the DCYF caseworker

understand the importance of and want to support family connection? Was the caseworker trained that research showed children had better outcomes in relative care rather than stranger foster care? Would the caseworker meet the parent and relative where they were at? What if the parent whose child was just removed was angry at the worker, or what if the relative didn't trust the worker—would the caseworker get that those were understandable responses? Would the caseworker come with their own preconceived notions about what criminal or CA/N history must mean based on their own experiences, presuming foster care was better? Would the background check be delayed for weeks or months with no explanation offered? Would the prospective relative even be given a chance? Would the child be given a chance?

When I moved from direct representation of parents to supporting a statewide system managing parent representation, I brought my concerns around background checks with me and realized others in Washington State were also concerned. The Washington State Parent Ally Committee (WSPAC), a majority of whom were former parents with lived experience in the system, started sharing the problems they were still having with background checks. Even though they had changed their lives, had their dependency cases dismissed, and now mentored parents going through the family regulation system, their criminal histories and CA/N findings labeled them like a scarlet letter. Sometimes they were barred from certain jobs or volunteer work with unsupervised children or they were not able to be relative placement. The motto of the WSPAC is "People Change, Families Reunite" but the family regulation system refused to see the change. At the 2008 Washington State Birth Parent Conveying organized by Children's Home Society of Washington and the WSPAC, there was a call to push state leaders to revisit background checks policy.

## Changes Over Time

There have been many calls from communities and advocates since that time, and there have been changes in Washington since then that attempt to make background check requirements less harmful on relatives.



DCYF now has a separate unit responsible for conducting background checks. They are trained to understand how to read criminal history and look for trends in criminality but are also knowledgeable that people can change and that people can be unfairly judged. Rather than leaving it to a caseworker's discretion whether to request administrative approval for a crime or CA/N finding like before, all crimes that are eligible and all CA/N findings are assessed for administrative approval. Line caseworkers are prohibited from making secondary assessments under DCYF policy, meaning if someone is cleared by the background checks unit, their criminal history should not be used by the caseworker to object to the placement. Our agency and family defenders can contact the background checks unit lead if we hear of problems with background checks like someone failing when we believe they should have been cleared. We also now participate along with other advocates and our state Child and Family Ombudsman's Office in a standing monthly meeting with the background checks unit lead to work through issues we are seeing and think through ways to refine the background checks process.

In 2014, State law was amended to limit crimes and civil infractions on the DCYF disqualifying list to only ASFA crimes or a crime or civil finding involving child safety, permanency, or well-being. Crimes like theft were removed from the background checks list, and all the permanent disqualifiers on our current state list are federally required. In 2020, a state law passed requiring DCYF to develop a system for individuals with a CA/N finding to request a Certificate of Parental Approval (CPI). If someone has received a CPI, the previous CA/N finding cannot be used as the sole basis to disqualify that individual. And for those without CPIs, a CA/N finding is no longer a permanent disqualifier in Washington State.

DCYF changed its policy and expanded the time a relative can be assessed for an emergent background check for up to seven days rather than the old window of 24–48 hours. This gives parents more time to identify the best placement for their child and to access a background check process where someone could be cleared within an hour's time.

Last year, legislation passed that allows for child-specific foster care licenses. The background checks unit now has the authority to approve an individual's criminal history, knowing it is for a specific relative foster care placement when they might have been hesitant to clear a person for a full foster care license. Child-specific foster care licenses will allow relatives to access funding and benefits that can strengthen and support those placements.

The Parents Representation Program provides technical assistance to family defenders to help them understand the technicalities of Washington State's background checks law and policy. We also provide access to funds and encourage the use of independent experts, such as forensic social worker experts to complete private home studies and testify when DCYF is objecting to relative placement, including due to criminal history or due to the check not being completed.

## Ongoing Problems

While progress has been made, there is still more to be done in Washington to speed up criminal and CA/N history checks and to address the bias and racism inherent in those checks. There is no system to allow for portable background checks so that if an individual is criminal history cleared for one purpose, they could get cleared for things like relative placement at the same time, which would eliminate future wait time for prospective relative placements. We hear regularly that prospective relatives are discouraged by a trial-level caseworker from even starting the background process by telling a relative they won't pass and it's "a waste of time" because they have criminal or CA/N history. DCYF caseworkers can even stop the referral for the background check from even happening. For example, in a recent case, a caseworker refused to refer for the background check unit and said they were objecting to the placement because the relative has a good relationship with the parent. Under DCYF policy, caseworkers are still required to object to relative placements when the background check is still pending, or a relative has a disqualifier. Children are still being placed in stranger foster care where there is an available relative stepping forward to care for them.



© franckreporter | iStock.com

A Washington State Supreme Court case has some examples of ongoing problems with background checks. In the unanimous decision, the Court found the trial court abused its discretion in refusing a Black child's request to be placed back with his relatives. One of the relatives, Grandma B., had a job that required her to have a background check, but she still had to go through the process again. A private home study was done of Grandma B. after DCYF refused to conduct a home study because another a home study was being completed for relative Aunt H.; this led to a private home study being completed on Grandma B. However, both DCYF and the Court Approved Special Advocate objected to the private home study on Grandma B., and the trial court said it was inadequate but refused to explain why. Another relative was discouraged from applying for a background check due to a criminal history. The decision notes relatives must be given a meaningful

preference in dependency cases. They also noted child protection service and criminal history can serve as proxies for class and race, stating:

"We know that like all human beings, judges and social workers hold biases, and we know that families of Color are disproportionately impacted by child welfare proceedings. Therefore, actors in child welfare proceedings must be vigilant in preventing bias from interfering in their decision-making. Factors that serve as proxies for race cannot be used to deny placement with relatives with whom the child has a relationship and is comfortable."<sup>1</sup>

Parents' attorneys continue to reach out to our agency to provide technical assistance around

<sup>1</sup> *Matter of Dependency of K.W.*, 199 Wash.2d 131, 156 (2022).



background checks and relative placement. Private home studies have now become one of the most common experts our agency funds. But we can only support parents' attorneys on background check problems who ask for technical assistance. I worry about parents' attorneys' gatekeeping; I worry about implicit racial bias and parents' attorneys giving up on a prospective relative when DCYF objects.<sup>2</sup> What if the parent attorney does not fully understand the background check policy? What if they don't ask for expert funds for private home studies and disregard the importance of a relative placement in the life of a child? I worry about gatekeeping because I was one of those attorneys. I remember telling a Black father that I needed another proposed relative to offer the court because his mother had a founded for CA/N, and that was a permanent disqualifier under DCYF's policy. I wish I could go back and call myself on my own racism, encourage myself to get a private home study, share my client's family with the judge, and demand that the court consider my client's wishes. I wasn't seeing this grandmother like I saw my own and was allowing an arbitrary policy to make it more likely a Black child would end up in stranger foster care.

## We Need Data to Address Unanswered Questions

DCYF acknowledges that they need to be focused on racial equity and addressing disproportionality and disparate outcomes for BIPOC children and families. A number of the background check changes that are described in this piece were intended by DCYF to impact racial disproportionality.

DCYF's March 4, 2020 press release for the new Secretary's List of Crimes and Negative Actions notes: "[t]he updated list has a less restrictive lens that creates opportunities for more individuals to have a second chance through individualized consideration. This reduces the number of automatic disqualifiers, reduces racial inequities and improves outcomes for children."<sup>3</sup>

When DCYF announced the new Certificate of Parental Improvement (CPI) Program, it stated "DCYF, in collaboration with stakeholders, aims to create a CPI process that:

- Reduces disproportional impacts of founded findings.
- Meets the best interests of children, youth, and vulnerable adults in these programs.
- Ensures consistency and recognizes unique circumstances and changed behavior."<sup>4</sup>

But I don't know if the reforms to background checks are making a difference and addressing racial disproportionality. And I don't know if DCYF knows either. At critical decisions, when relative steps forward, what are the checks to make sure they are truly being considered? If relatives are failing background checks, why are they failing? If they are passing background checks, what happens then—are they actually becoming the placement? Is DCYF conducting internal audits to mitigate bias at each decision point? Is racial disproportionality still showing up—has it increased?<sup>5</sup>

As DCYF notes on its website, one of its priorities is to "[p]ay attention to data about outcomes for children, youth, and families consistently...Use both quantifiable data and individuals' stories and experience to inform our actions and provide accountability." We need DCYF to gather data, and we need them to make it publicly available. DCYF needs to

<sup>2</sup> See Richardson, L. Song & Goff, Phillip Atiba. "Implicit Racial Bias in Public Defender Triage." *The Yale Law Journal*, vol.122 no.1, 2012, pp.2626-2649, [https://www.yalelawjournal.org/pdf/1199\\_pzeey4t1.pdf](https://www.yalelawjournal.org/pdf/1199_pzeey4t1.pdf). Accessed 31 August 2022.

<sup>3</sup> DCYF Releases Revised Secretary's List. Washington State Department of Children, Youth & Families. 4 March 2020, <https://dcyf.wa.gov/news/dcyf-releases-revised-secretarys-list>. Accessed 31 August 2022.

<sup>4</sup> DCYF Program Addresses Disproportionality. Washington State Department of Children, Youth & Families. 27 January 2021, <https://content.govdelivery.com/accounts/WADEL/bulletins/2bd42a4>. Accessed 31 August 2022.

<sup>5</sup> For example, see OJJDP's website noting that while youth arrests have declined for all race groups, the disparity in arrest rates between white youth and Black Youth (as well as Indigenous Youth) has increased in recent years. *OJJDP Statistical Briefing Book: Racial and Ethnic Fairness*. U.S. Department of Justice, Office of Justice Programs, Office of Juvenile Justice and Delinquency Prevention. 24 June 2022, [https://www.ojjdp.gov/ojstatbb/special\\_topics/qa11502.asp?qaDate=2020](https://www.ojjdp.gov/ojstatbb/special_topics/qa11502.asp?qaDate=2020). Accessed 31 August 2022.

set goals and have a plan for addressing where racial disproportionality persists.<sup>6</sup>

## We Need a Federal Fix

The federal criminal disqualifier list is another harm caused by ASFA. Allowing states to add on lesser crimes and CA/N history, potentially as a permanent disqualifier, creates additional layers of harm. I know that people can learn from past mistakes, and I know that people can age out of crime. We need a system that takes this into account. In the name of child

safety, we are harming children through this background process that was federally created, especially BIPOC children. It needs to stop.

<sup>6</sup> *Racial Equity, Diversity and Inclusion*. Washington State Department of Children, Youth & Families. <https://www.dcyf.wa.gov/practice/racial-equity-diversity-inclusion>. Accessed 31 August 2022.

*Amelia S. Watson is the Parents Representation Program Co-Supervising Attorney at the Washington State Office of Public Defense.*



© Soloviyova | iStock.com



# Best Interest Determinations: Lessons Learned from Tribal Child Welfare Agency, Court Professionals, and Youths

Angelique Day, Claudette Grinnell-Davis, and Dakota Roundtree-Swain

## Introduction and Background

Since the institution of the first juvenile courts in the United States in the early 1900s, the legal concept of best interests has been well-established, under the argument that children need protection due to diminished developmental capacity.<sup>1,2</sup> Built into the American child welfare system since the Adoption Assistance and Child Welfare Act of 1980 (AACWA), best interests have been used to protect children deemed unable to make decisions on their behalf. Juvenile Courts apply the principle of best interests in all cases regarding minors, including when determining whether certain youths may be tried as adults in criminal court.<sup>3</sup> In juvenile justice cases, recent SCOTUS decisions have identified even violent youth offenders as children in need of protection due to arguments of either neurobehavioral underdevelopment or diminished responsibility.<sup>4</sup>

In 1989 the United Nations on the Convention of the Rights of the Child (CRC) proclaimed internationally that children have the right to express their wishes, views, and dissents freely in judicial and administrative proceedings that are related to decisions about their lives, regardless of perceived diminished capacity. This call for increased youth participation has been heeded by the international child welfare community, which has conducted countless studies discussing youth participation in child welfare-related proceedings.<sup>5</sup> At the time of the writing of this paper, the United States is the only member country of the United Nations that has not ratified this Convention.<sup>6</sup>

This extension of developmental psychology and behavioral neuroscience into legal

practice, sometimes called *developmental jurisprudence*, is most commonly seen in juvenile justice cases. However, as legal scholar Emily Buss has argued, similar jurisprudence can, and should, be carried over into dependency and maltreatment proceedings.<sup>7</sup> Buss argues that juvenile courts are forums for youth to develop decision-making experience, personal autonomy, and the ability to self-identify as system-involved youth—all developmental milestones in line with Erikson's adolescent stage of development.<sup>8</sup> As a result, insofar as it is developmentally appropriate to do so, youths in these systems should not only be active in these proceedings but allowed to articulate their expressed wishes and have them taken seriously. These youths, whenever possible, should be treated with respect and be co-creators of the life that the child welfare system is carving out for them.

<sup>1</sup> Buss, E. (2016). Developmental jurisprudence. *Temple Law Review*, 88, 741

<sup>2</sup> Dolgin, J.L. (1996). Why Has the Best Interest Standard Survived?: The Historic and Social Context. *Children's Legal Rights*, 16(2), 1

<sup>3</sup> Buss, 2016. In general, the youngest age in which a case is remanded to adult court is 16.

<sup>4</sup> Monahan, K., Steinberg, L., & Piquero, A.R. (2015). Juvenile justice policy and practice: A developmental perspective. *Crime and Justice: A review of research*, 44 <https://doi.org/10.1086/681553>

<sup>5</sup> van Bijleveld, G., Dedding, C., & Bunders, J. (2013). Children's and young people's participation within child welfare and child protection services: A state-of-the-art review. *Child & Family Social Work*, 20. <https://doi.org/10.1111/cfs.12082>

<sup>6</sup> United Nations. (2022, August 5). *Treaty bodies countries—Ratification*. [https://tbinternet.ohchr.org/\\_layouts/15/TreatyBodyExternal/Countries.aspx](https://tbinternet.ohchr.org/_layouts/15/TreatyBodyExternal/Countries.aspx)

<sup>7</sup> Buss, E. (2013). The developmental stages of youth participation in American juvenile court. In T. Gal & B. Duramy, (eds.) *International Perspectives and Empirical Findings on Child Participation: From Social Exclusion to Child-Inclusive Policies*. Oxford University Press, 304–332

<sup>8</sup> Erikson, E. (1993). *Childhood and Society*. New York: W.W. Norton.





While Buss argues that there is little evidence that developmental jurisprudence has been attempted,<sup>9</sup> interviews with tribal child welfare officials and youths that we have conducted as a part of a larger study on child welfare reform indicate otherwise. Tribal courts adhere to both American jurisprudence doctrines such as *parens patriae*<sup>10</sup>, from which the origins of best interests arise, and to traditional governance that varies from tribe to tribe—traditional governance principles that indicate greater respect for children’s capacities than in state courts. As such, our participants reported having, in some cases, involved youths, including pre-adolescent youths as young as six or seven, in their child welfare proceedings.

This paper presents a summary of how tribal courts have functioned differently and, to a large extent, more successfully than state and county courts in applying best interest determinations. We explore how tribal courts have managed to operate from a developmental standpoint within their respective traditional beliefs on the importance of children and developmental capacity and how tribal youths themselves have experienced the tension between their best interests and expressed wishes in state courts. Finally, we offer some recommendations for future judicial practice that could be tried and tested in both tribal courts as well as non-tribal ones.

## Current Study Description & Methods

Eleven tribal stakeholders representing 11 different tribal communities in five different states (Michigan, Oklahoma, Arizona, Washington, and Alaska), participated in interviews as a part of a larger study on child welfare (CW) court reform efforts. Nine subjects were cisgender women, and two were cisgender men. All of the tribal agency and court personnel (n=9) were enrolled members of a tribe (though not necessarily within the tribe they worked for) and had worked in both tribal and state or private child welfare agencies. The AIAN young adults with lived system service experience (n=2) were served in concurrent jurisdiction; their child welfare cases were state agency supervised with their tribal nations intervening

as interested parties. Both of these adults were in kinship placements, and one experienced reunification, which was eventually disrupted. Both of these young adults with lived system experience were enrolled in college at the time of the interview. More specific demographics for each of the participants are captured in Table 1. Participants were given a gift card as an honorarium to compensate them for their time in engaging in these interviews.

**Table 1: Participant Demographics**

Role	N	#Years in Current Role
CW Administrator*	3	1-4
CW Supervisor	1	7
CW Direct Line Staff	3	1
Court Professional	2	4.5 - 6
Young Adult with Lived Experience	2	5.5 years (average time in care)

\*The tribal child welfare administrators interviewed have worked in leadership in both tribal child welfare and state child welfare settings

We used a framework analysis qualitative approach<sup>11</sup> to code our interviews. Such an approach uses pre-determined codes from a literature review to identify themes but then derives additional codes from the transcripts themselves. We familiarized ourselves with the data through thorough, repeated reading of transcripts transcribed from audio-recorded interviews. Preliminary themes were derived from both the interview guide and the iterative inductive process of reviewing the transcripts. The final themes reported in this study emerged from this inductive process, as well as the use of inter-coder reliability across the two coders who analyzed the transcripts.

## Results

Four of the extracted themes from the inductive

<sup>9</sup> Buss, 2013

<sup>10</sup> Fraser, C. (2000). Protecting Native Americans: the tribe as *parens patriae*. *Michigan Journal of Race & Law*, 5, 665

<sup>11</sup> Goldsmith, L.J. (2021). Using framework analysis in applied qualitative research, *The Qualitative Report*, 26 (6). 2061-2076. <https://doi.org/10.46743/2160-3715/2021.5011>

process will be discussed here: state/tribal court differences, best interests, expressed wishes, and developmentally appropriate engagement.

### State/Tribal Differences

Some of our interviewees remarked that their tribes were more child-centered than state courts are. As the tribal CW administrator reported,

“...(they– the two judges presiding over the court) value that [the child has] input and they both would make sure that child had a chance to speak, and if that child wasn't there they wanted to know why that child's not there (at court).  
... we have little kids running around the corner, you know, maybe they had no idea was happening just running wild but that's why we're there; we're there for that child– the child should be there.”

One can argue that children running in the halls of a county courthouse are not a sign of having a child express their wishes. However, the tribal administrator describes procedures that are far more child-inclusive than in other jurisdictions. They also described court procedures that are atypical of western court processes, such as holding court sessions with chairs arranged in a circle and not having a raised judge’s bench. The child welfare administrator also described judges making a point of wanting to know if the child was not present, whether there was a good reason for the child’s absence, and for being willing to hear a child’s expressed wishes down to the very youngest of ages. However, it is important to note that the process of holding court and listening to youths also varies in tribal jurisdictions.

One of the tribal Guardian Ad Litem (GAL) described two very contrasting tribal courtroom experiences that he participated in:

“Actually the (tribal #1) courtroom, they (the judges) were at eye level. So that wasn't on a raised dais, they actually were on the same level as everybody. But the (tribal #2) courtroom, it was a raised dais, and the judge stayed up there the whole time. We would ask for chamber time, and so we would ask for some time to go back

into the judge's chambers. And during that moment, I don't know, I wish the judge could be a little bit more human in those moments, but he wasn't. He would keep his robe on and it'd still be really buttoned up, but maybe that's just me.”

While some tribal systems maintain more traditional governance practices as passed down from the elders, other tribes operate under the assumption that tribal members are better off when their governments, including the courts, are more in line with other (non-tribal) governmental structures.

Much of the way practices are implemented depends on the preferred worldview of leadership within the tribal community responsible for implementing the programs they oversee. However, one child welfare administrator made it clear that they believe it is better when tribes incorporate traditional beliefs into the process as much as possible.

“Our ceremonies actually revolve around... They're initiated by children. They're the catalyst behind them. And so I think getting in that space and having our legal system, especially tribal legal systems, more proximate to those values are better for everybody. So, when we center children's voice you get better outcomes, of course.”

This difference in worldview does include the perceived developmental capability. Another CW administrator interviewed commented that:

“...Native people believe that children are inherently intelligent and able to understand more than Western society gives him credit for... I talk to kids just like I would talk to an adult...and I think being genuine with them and being honest with them and not playing, no sugarcoating... just talk to them...”

This description is different from assumptions of “diminished capacity.”

### Best Interests, Expressed Wishes, and Developmental Capability

In many instances, best interest, expressed wishes, and developmental capability were



coded in the same statements, indicating known relationships and tensions between these concepts. A tribal front-line worker described the environment of the tribal CW agency she works in:

“The courts with the tribe that I work for, they will listen to just about any child. They will take their word into heavy consideration as long as the child is obviously able to convey their feelings and their thoughts... Even younger than 13, the tribe I work for will listen to the kiddo. But at the end of the day, when it comes to court hearings, most of the time the court is asking what does my (tribal child welfare) agency think in regard to the youth. And prior to that, we do our due diligence to find out from the youth themselves. Like, “What do you want to see happen?” Because essentially, we’re advocating for what they want and what their voice is.”

A GAL expressed a similar tension.

“I don’t know, I’d like to think in my mind that it wouldn’t have changed because I felt like I tried to do... And I was aware at the time too, because I was part of the (redacted specific name) Guardian ad Litem office, like I knew the controversy around those two ideas (best interests and expressed wishes). And so, I think my representation was kind of a hybrid representation, to begin with...”

One of the inherent challenges in best-interests doctrine, in addition to developmental capacity, is that it is not well-articulated, with no concrete guidelines for implementation.<sup>12</sup> The question becomes what information becomes a part of the best interest determination. The statement above from a tribal guardian-ad-litem indicates that listening to a youth’s expressed wishes is a part of their representation of the youth’s best interests. However, there is nothing in the best interest standard that indicates youth, regardless of age, should be consulted before a determination of best interests is made.

Not consulting with youths or with the family at large, however, can clash with tribal culture. As a GAL remarked:

“... there’s so much bias that’s in foster care as you know. And so like, can you only imagine if I was a non-native white dude that comes into the tribal court saying, “Oh yeah, I know what’s best for these Indians. You know? And so I think the biased aspect of express interest... And that happens with best interest too, by the way... Like you’re representing their interest against their parents’ kind of dynamic, or representing their interest against their culture or against their community, you know? And not that I ever saw that happen, but it could happen. It could happen. I hear it all the time that it does happen actually... And naturally, that’s how things happen in their community to begin with, so there wasn’t like a legal like I’m representing this child’s interest against their parents, that would be crazy. And grandparents you don’t have standing here like that’s completely culturally opposite of like what the community values were.”

The same guardian-ad-litem went on to question whether the adversarial setting is the best one in which to engage in child welfare practice for positive long-term outcomes.

For the youths themselves, however, the tension between best interests and expressed interests frequently felt like a tension of (dis) respect. One of the young adults with lived experience commented that workers who listened to expressed wishes and then did nothing with them felt as if proceedings were happening to them instead of with them, losing feelings of agency and autonomy after a moment of vulnerability.

“For the most part, yeah (treated as part of the team)... but then I feel like when I tried to say something, they wouldn’t listen. They would try to assume. I guess it was the age thing at the difference too. I was 15 and trying to... I guess you can’t until you’re 16 or something like that. Okay. I had a voice but didn’t have a voice. I had an opinion but couldn’t really be in charge of my own plan.

They weren’t really listening to me. They’re

<sup>12</sup> Dolgin, 1996

just like, “Oh, that’s what he prefers, but this is what we’re going to do.” I’m like, “Damn, okay. Nice to know that this is not what we’re going to do... not necessarily do exactly what the kid wants, but at least make an attempt to find strategy around it or with it. They weren’t even trying to do that.”

Of particular frustration was the emphasis that school was more important than permanency, with youths openly stating that school seemed secondary to having their say and being involved in decisions that greatly impacted their lives. School is important, but how can a youth focus on algebra when they know a judge is deciding their current and future lives on a far-off bench? That is not something to expect from anyone—let alone youth in care.

Additionally, the adults with lived experience recognized the tension between their best interests and their expressed wishes from when they were children. One stated this reality starkly.

“I knew I wanted to stay with my mom, but I didn’t think my mom was ready to have all (of us kids—the full sibling set) back full time.”

As this case indicates, sometimes the youth themselves have the developmental capacity to recognize that their expressed wishes may not be in their best interests. One front-line worker recognized that asking about expressed interests may actually be a great way to assess youths’ current cognitive capacity, mental health, and decision-making capability.

“I would say, especially for tribes, it’s important to let the child, or whatever individual you’re interviewing or working with, tell their story to you. That’s going to be key to getting further engagement to building that rapport and that trust, is to allow them to tell you their story. Because not only does that give you an insight on how they’ve lived and viewed their experience, but it also helps you engage their cognitive ability, their understanding, it’s showing them too that you’re creating this space for them to tell their story. As well as also, again, going through their



Angelique Day



Claudette Grinnell-Davis



Dakota Roundtree-Swain



rights. They have a right to not answer questions, their right to confidentiality, what your expectations professionally are, and just being really transparent and open with them.”

This statement summarizes the principles and importance of developmental jurisprudence in practice. Authentic engagement with youth in court proceedings can become the way that a youth in care gets to gain skills that their non-fostered peers may learn in less bureaucratic settings. However, regardless of the setting, all youth must have moments to make decisions and, most importantly, make mistakes when it comes to the blossoming adult life that they have ahead.

One of the challenges, in some instances, is keeping youths safe when they express their wishes, as it could put them in need of protection.

“I remember expressing myself once and it wasn't held in confidence. It was related to my mother and, even now thinking about it, I would've been very nervous or scared of the retaliation had I voiced that I didn't want to be with my mother. So, that was another obstacle. So I don't even know how that would've changed how I was heard, but I do wish I had some kind of proof that says this is what I wanted, some notes somewhere. And I think that's why I petitioned. I asked, I didn't petition. I asked for my records and I didn't receive them, so I wasn't sure.”

A tribal CW administrator also commented that expressed wishes could be expressed concerns about a youth's safety.

“That's a good way to tip you off, that you don't want to see your mom or dad, that something's going on.”

Sometimes, not wanting to do something is an indicator that a youth's personal radar and assessment of safety is working well, and the worker or official should take that seriously enough to investigate the circumstances. Not taking expressed wishes seriously enough could actually have deleterious developmental consequences in addition to safety. As seen in the prior literature cited above, not engaging

youth in decisions about their care is robbing them of key developmental milestones around autonomy and self-esteem. Given the overwork of tribal workers and court officials (which everyone who participated in the interviews also talked about), being able to assess the reality and trustworthiness of a youth's expressed wishes can provide another set of eyes and ears in a case.

Youths' stories of their histories, times in care, current situations, and possible futures become not only important information for a case but may also provide a path forward through a case as the tension between best interests and expressed wishes is negotiated.

“I feel like best interest of the child could be a rallying point, and I think that's intended ... if you have somebody that's skilled in facilitating, you have somebody that's representing a child... And so all the people that love this child, like who loves this child the most – if we can get them around a table, we can come up with some really good ideas about what's in the best interest of this child. So it touches on making sure that you talk to the youth and encourage them to engage in the court hearings and that you're getting in touch with youth before important hearings such as the disposition and the permanency hearings so that you have a good sense of what your stance is going to be for best interests.

... if you let them kind of lead that way and you know they kind of figured out themselves well, maybe that won't work... and then we can guide them that way, but they need to feel like they're kind of not in charge, but they're at least walking beside you...

I think kind of some things that we were talking about before, being a part of the meetings and making recommendations about what they think is going to be in their best interest and make them successful because what we think may not all necessarily be what they think and we want them to make those decisions so they feel committed to them, and they're successful in their endeavors. So I think that's the

biggest one for me when they can identify that they need support and what that looks like for them.”

The expression of best interests, expressed wishes, and developmental capacity does not have to be a sticking point of legal philosophy in a case; the tension between them can be an important point of assessment, decision-making, and mediation to move cases forward and promote the development and autonomy of a system-involved court adolescent.

## Discussion

True, authentic engagement experiences of youth in care, are mixed; however, these interviews suggest that authentic youth engagement may be more of an option for youth supervised by tribal courts than those who experience court proceedings in state and county courts. There is widespread literature indicating the lack of communication and information youth receive about their cases while in care,<sup>13,14</sup> the lack of control they have about decisions related to their life,<sup>15,16</sup> and a lack of opportunities to attend and/or be heard in court hearings.<sup>17,18</sup> All of this is happening while general practice is, at least ideologically, moving towards the theoretical consensus that youth should, in some way, be involved in decisions about their care. Researchers have found that attending dependency court hearings was not emotionally detrimental to youth, and, even further, those who were included reported feeling more positive feelings towards their court process.<sup>19</sup> Additionally, the inclusion of youth in court decisions about their care has been found to increase feelings of independence and pride, allows them the opportunity develop the abilities to self-advocate, and increases their self-esteem.<sup>20,21</sup> Indigenous worldviews apply strengths-based approaches that align with more holistic concepts of health and wellness; indigenous youth development and well-being occur through strengths-based relationships with those that are responsible for overseeing their child welfare cases (tribal child welfare social service agencies and courts). This approach not only promotes indigenous youth health and mental health but ripples out across the entire child and family system to promote community well-being.<sup>22</sup>

Key barriers to engagement in court proceedings identified in the literature included the youth's ability to self-advocate, their access to information, their age (younger youths were less frequently consulted), CPS' view of the youth, and the health of their relationship with their social worker and/or legal representative.<sup>23</sup> These barriers can easily be overcome when child welfare agencies and courts take the time to authentically engage youth. Tribal courts provide promising lessons learned on how other court systems could better engage youth in meaningful ways around expressing their wishes in best interest determinations.

<sup>13</sup> Hochman, G., Hochman, A., & Jennifer, M. (n.d.). *Voices from the Inside: Foster Care*. Retrieved August 5, 2022, from <http://pew.org/2y11shq>

<sup>14</sup> Block, S. D., Oran, H., Oran, D., Baumrind, N., & Goodman, G. S. (2010). Abused and neglected children in court: Knowledge and attitudes. *Child Abuse & Neglect*, 34(9), 659-670. <https://doi.org/10.1016/j.chiabu.2010.02.003>

<sup>15</sup> Ponciano, L. (2013). The voices of youth in foster care: A participant action research study. *Action Research*, 11(4), 322-336. <https://doi.org/10.1177/1476750313502554>

<sup>16</sup> Fox, A., & Berrick, J. D. (2007). A Response to No One Ever Asked Us: A Review of Children's Experiences in Out-of-Home Care. *Child and Adolescent Social Work Journal*, 24(1), 23-51. <https://doi.org/10.1007/s10560-006-0057-6>

<sup>17</sup> Block et al., 2010

<sup>18</sup> Khoury, A. (2006). Seen and heard: Involving children in dependency court. *American Bar Association Child Law Practice*, 25 (10). 145-155. [https://guardianadlitem.org/wp-content/uploads/2014/12/cinc\\_article.pdf](https://guardianadlitem.org/wp-content/uploads/2014/12/cinc_article.pdf)

<sup>19</sup> Weisz, V., Wingrove, T., Beal, S. J., & Faith-Slaker, A. (2011). Children's participation in foster care hearings. *Child Abuse & Neglect*, 35(4), 267-272. <https://doi.org/10.1016/j.chiabu.2010.12.007>

<sup>20</sup> Kriz, K., & Roundtree-Swain, D. (2017). “We are merchandise on a conveyer belt”: How young adults in the public child protection system perceive their participation in decisions about their care. *Children and Youth Services Review*, 78. doi: 10.1016/j.childyouth.2017.05.001

<sup>21</sup> Thomas, N., & Percy-Smith, B. (2012). ‘It's about changing services and building relationships’: Evaluating the development of Children in Care Councils: Children in Care Councils. *Child & Family Social Work*, 17(4), 487-496. <https://doi.org/10.1111/j.1365-2206.2011.00806.x>

<sup>22</sup> O'Keefe, V.M., Fish, J., Maudrie, T.L., Hunter, A.M., Tai Rakena, H.G., Ullrich, J.S., Clifford, C., Crawford, A., Brockie, T., Walls, M., Haroz, E.E., Cwik, M., Rumbaugh Whitesell, N., & Barlow, A. (2022). Centering indigenous knowledge and worldviews: Applying the indigenist ecological systems model to youth mental health and wellness research and programs. *International Journal of Environmental Research and Public Health*, 19 (10). 6271.

<sup>23</sup> Kriz & Roundtree-Swain, 2017



## Summary and Conclusion

By including developmental jurisprudence as a lens through which to view youth engagement and punishment, tangible growth points become clearer. Developmental jurisprudence, put simply, is the idea that adults are neurologically different from children because of key developmental factors in the brain's development during adolescence.<sup>24</sup> When thinking about young people from a developmental, as well as through an indigenous lens, one can begin to understand their actions and how involving them in decisions about their care is an essential part of growing up.

<sup>24</sup> Buss, 2016

Angelique Day, Ph.D., MSW, is an Associate Professor School of Social Work and Adjunct



© Cannon Beach Oregon by Anisa Rabim

Faculty, Evans School of Public Policy and Governance; Faculty Affiliate and Federal Policy Lead, Partners for Our Children Faculty Affiliate, Indigenous Wellness Research Institute University of Washington, Seattle.

Claudette Grinnell-Davis is faculty staff at the University of Oklahoma. Prior to her current role, she taught child and family services courses at the University of Nebraska - Omaha and supported local and state efforts to improve child welfare service delivery, particularly for Native families.

Dakota Roundtree-Swain (they/them), Ph.D. (ABD), M.A. serves as a Consultant with the Capacity Building Center for States (The Center). They have over seven years of experience providing technical assistance, policy recommendations, and advocacy in child welfare systems on the state, regional, and national levels.



© Sheldon Spotted Elk

Sheldon Spotted Elk is a Northern Cheyenne (Tsitsistas) and Ka'eskone Veboo'o. He is a descendant of Indian Boarding School survivors and the colonial project that aimed to "kill the Indian, and save the man."



# What the System Taught Me

Cheri Williams

I stood at the door, trembling. I was 24 years old and working my first solo case as a child protective investigator. I nervously played multiple “what-if” scenarios through my mind each time before I knocked.

What would happen when someone answered the door and learned I worked with the state? How would they react when I told them that someone had called with concerns about their children?

Surprisingly to me, each door I knocked on was usually answered. With my warmest smile and kindest voice, I explained who I was, why I was there, and asked to come inside. Most people let me in, although they usually had terror in their eyes as I asked them about their kids, relationships, whether they had any mental health issues, substance abuse problems, or a history of violence.

Although I had a degree in family and child sciences, I had no idea what it really meant to be a parent. I certainly had my fair share of criticisms for what my parents had or hadn't done, but that was all the parenting life experience I had. My supervisor also wasn't a parent.

It's critical to know how young and afraid I was as I share my personal truth and experiences of more than 24 years working in the child welfare space.

Despite no real experience with parenting, I was the sole person investigating a family. Through a couple of conversations with my direct supervisor, I determined whether a parent was “appropriate” or not. If that sounds incredibly subjective to you, it was. After starting each investigation, I had a short phone call with my supervisor where I routinely got the same question

:  
“Can you *guarantee* their safety, Cheri?”

If I couldn't answer with a confident yes,

the response was always, “Then you have to pull ‘em.”

I would take the next step to call the police and wait for them to arrive at a neutral meeting spot. I'd brief the officers, whose primary duty at that point became guaranteeing my personal safety. I would then go back to the home and knock on the door again, but this time with reinforcements.

As a representative of the state, I removed screaming children from their parent's arms and loaded them into the backseat of my blue Chevy Malibu. It was the first car I had ever purchased for myself as an adult, and now the back seats were tear-stained from the dozens of children I personally removed.

This happened again and again for 15 months until my mind, body, and spirit could no longer take it. We didn't talk about trauma back then. We didn't know much about it—at least in my child welfare circles. I was taught that my sole focus was to keep kids physically safe, no matter the cost. “Mental injury” was also a legal maltreatment, but we learned in training that it was difficult to prove, so physical safety became the battle cry I carried forward day after day.

But the system taught me a whole lot more than that—primarily that the most important thing was to avoid being on tomorrow's front page of the newspaper.

It took me nearly 20 years in child welfare to learn how I had unknowingly reinforced harmful learning in my early career. This realization has now inspired me to dedicate every day in the second half of my career to prioritizing the well-being of families and empowering them to keep their children safe.

It's important to note that I'm not placing blame or shame on anyone who currently or has in the past worked in the child welfare system. I have met some of the most amazing people in



Cheri Williams



my life through this field of work. My intent is to share how the system can dehumanize all who touch it. And that core values and beliefs are baked into the system that remains largely unconscious to us.

As the late, great Maya Angelou says, “Do the best you can until you know better. Then when you know better, do better.” This is me trying to do better. For all children and their families.

## Myths The System Taught Me

### Myth #1: “Protect yourself at all costs.”

My state’s child welfare system was in crisis when I completed my 12-week classroom training in 1998. Everything I was taught in theory about the law and judicial proceedings was now confronted with real children, real families, and what we now know to be real trauma. Shortly after I started my career, a child named Kayla McKean<sup>1</sup> was murdered by her father. Past investigators had missed lots of signs that could have potentially saved her life, and the system was thrust into an extreme state of hypervigilance.

#### Vigilant:<sup>2</sup>

Attentive to discover and avoid danger, or to provide for safety; circumspect; wary.

In this vigilant atmosphere, investigators like myself had more than 30 new investigations each month. We worked 50–60+ hours each week, including many nights and weekends. My friends eventually stopped inviting me places since I usually cancelled due to a crisis case. I was taught to “discover and avoid danger...and provide for safety.” Essentially, I was taught to go into a home with the express purpose of finding everything the parents were doing wrong and determine whether those parents were “appropriate.”

What I wasn’t taught in formal training, but I now realize, is that early in my career I was consistently taught to prioritize my own safety, comfort, and well-being above the needs of children and families. Again, I was asked after commencing each investigation whether I, a 24-year-old young woman who

grew up initially in a trailer park and later in the suburbs, could guarantee the safety of children, despite never having parented.

My 24-year-old brain couldn’t understand how I could ever *guarantee* anything. I was also commonly asked by my superiors whether I wanted my name on the front page of the newspaper the next day because a child on my caseload was murdered. These two questions repeated over time, made an “unspoken” rule loud and clear:

Protect yourself and protect the state. It’s far better to err on the side of caution.

And those were the exact words I heard my favorite judge utter over and over in my numerous judicial hearings, “I’m going to err on the side of caution and find probable cause for this removal.”

### Myth #2: Poor parents cannot be trusted to keep their kids safe.

About 60 percent of child protection investigations are due to allegations of neglect.<sup>3</sup> In these cases, I was trained to assess a situation based almost solely on what food, shelter, clothing, and medical care kids were given.

If I went to a home and parents had no way to keep their water running?

“Pull ‘em.”

If a mom kept missing doctor appointments for her medically fragile child because she had no reliable transportation?

“Pull ‘em.”

I was taught to approach each family as a stand-alone system, with the full responsibility of providing basic needs landing squarely on the shoulders of many parents who were living in generational poverty. We never talked about

<sup>1</sup> 'Baby steps' made to protect kids 20 years after Kayla McKean, 6, was murdered by father

<sup>2</sup> vigilance | Definition of vigilance by Webster's Online Dictionary (webster-dictionary.org)

<sup>3</sup> Child abuse, neglect data released | The Administration for Children and Families (hhs.gov)

root causes of why some families simply didn’t have access to resources or supports. I don’t remember having a single conversation about the systemic effects of poverty over time. Pair that with the fact that my education, and the education of most of my peers, was not in social work, and I was the perfect specimen to “succeed” in this field.

Risk averse: ✓

Anxiously wired: ✓

Young enough to:

- ✓ Think I knew what an “appropriate parent” was, despite never having been one
- ✓ Go along with what The System taught me
- ✓ Likely not have a fully formed pre-frontal lobe in my brain
- ✓ Be motivated by fear

### Myth #3: The apple doesn’t fall far from the tree.

I heard this statement repeatedly when looking for relatives to care for children. The underlying belief was that relatives were just as “bad” as the parents who had children removed and that “one bad apple spoils the whole bunch.”

Throughout my career, I’ve watched as hundreds of children have been removed and placed with licensed foster parents, many of whom are amazing people, yet the fact remains these foster parents are strangers to these children. I also now realize how much “easier” it was on me as a worker to place a child in a foster home fully intent on vetting available relatives, yet the new cases always kept coming. And once I knew kids were safe, my priority remained trying to “guarantee” the safety of others. In all honesty, following up on potential relatives after the initial removal and placement were rare.

### Myth #4: Local child welfare culture and subjective interpretation always trumps the law

In 2000, after being a child protective investigator for only 15 months, I went to work for an organization that conducted medical

examinations and forensic interviews of children and was there for nearly seven years, including five years as a supervisor.

While the law has specific definitions of abuse, I saw thousands of child protection cases hinge on the legal interpretations of a very small team of people—a child protective investigator, their supervisor, and sometimes the findings of an expert medical doctor or attorney. I also saw many medical and legal professionals disagree over whether abuse had, indeed, occurred. What these years taught me is that local child welfare culture and subjective interpretation are much stronger forces than broad child protection laws.

Remember how I struggled to understand “appropriate” parenting earlier? I can’t tell you the number of shelter petitions I wrote that described parental behavior as “inappropriate.” While I always went on to behaviorally define what I meant by that word, the fact remains that there is bias and interpretation from the start of every investigation. Implicit bias and confirmation bias can play a huge role. And I never learned about this until much later in my career.

When parties to a child abuse case began legal arguments on the “best interest of the child” in court proceedings, I witnessed the courtroom quickly become a rodeo of subjective judgments and “better than’s.”

*“Foster care is better than...”*

*“Ensuring this child is safe is better than...”*

The problem was anyone could stand in court and argue their “better than” philosophy. And since we didn’t yet know about the far-reaching effects of trauma, the central importance of family connection, and the emotional damage family separation causes, “better than” often looked like a child in a home with more resources, plenty of food, and brand-new school clothes rather than in a home with their family of origin.

## What I Know Now

The lessons the system taught me were not obvious. I did not learn them overtly in



my classroom training. Still, the culture I experienced in those eight years as both a field investigator, medical investigator, and supervisor laid the foundation on which my career has been built. But as I've learned and personally retraced my experiences in a system that dehumanizes both families and its workforce, I realized I could no longer perpetuate the broken foundation any longer. I had to dedicate myself to empowering and strengthening families.

I've had to break apart what I've learned inside my mind and commit to building something new. Something fundamentally different and strong. Something deeply rooted in humanity. Not the rescue-mentality kind of help, but the support that truly allows families to help themselves.

Not only will I outline below my lessons learned, but I will show specific examples of how a long-standing agency can learn and chart a new course in deep alignment with our mission, vision, and values. Whether we work in the public or private sector, we can all do something to continue advancing a new way of working with families.

### 1. Families are their own experts.

I now realize families are their own experts. Most times, they know exactly what they need to safely care for their children. But often, they simply don't have the resources or supports they need to do so. Through my learning, I'm beginning to understand the importance of elevating the voices of those with lived experience in the system. In 2021, the corporate board of Bethany Christian Services, where I get to serve as senior vice president of domestic programs, blessed our new strategic vision. Within this new vision, we proclaimed our bold commitment to elevating the diverse voices of the children, youth, and families we serve. We are doing this by building intentional infrastructure across our 30-state network to elevate family voices. We are offering honorariums to those with lived experience who speak into our work as we deconstruct the old ways of working and build new ways alongside families.

We are also centering youth, family, and community voices to identify what families

need to keep their children safe, their families intact, and their well-being supported. When we can safely prevent kids from entering foster care by investing in their families, we realize children and families can stay safe, healthy, and whole. Due to this belief, our goal over the next five years is to ensure at least 40 percent of our family support, strengthening, and preservation programs are co-built with communities across our network.

How can you elevate the voices of the youth, families, and communities you are serving, especially when you may not agree with what they have to say?

### 2. Poverty should never be conflated with neglect.

While my family moved from a trailer park to the suburbs when I was in fourth grade, my parents grew up very poor in the deep South, my mom one of six children and my dad one of eight. At times, my grandparents did not eat to ensure their kids had food in their bellies. I am only one generation away from poverty, yet I never understood the realities people who grow up in generational poverty face every day. Through years of life experience, I have now learned how differently I experience institutions and systems in my community versus how people in poverty experience them. The chasm is wide.

I recently heard Aysha E. Schomburg, the associate commissioner of the Federal Children's Bureau in the Administration on Children, Youth, and Families, share her priorities with national stakeholders. Her first call to action was for states to revisit their legal definitions of neglect. This is key, because I have now learned most families truly want to care for their children's needs but lack the resources or support to do so. I also now know that other avenues of support are possible.

Through Bethany's Safe Families for Children program, we are leveraging volunteers through churches to surround families in times of crisis, providing those critical concrete social supports. We are beginning to measure the notable increase in families' Protective Factors, which we know increases child safety and well-being. Bethany remains committed to finding new and innovative ways for the global church



© FG Trade | iStock.com

to humbly come alongside families without judgment or a spirit of saviorism, so these families can stay together.

How can we all rethink what constitutes neglect? How can we explore other supports available in our communities that will keep kids safe versus jumping straight to investigations and potential removals?

### 3. Relatives can do it.

While I was taught to be wary of relatives earlier in my career, I now know that with the right supports, relatives can do it! Kinship care (being placed with relatives and close family friends) has many positive outcomes for children involved in child welfare. Kinship care helps to preserve cultural and family

bonds, promotes child and parent wellbeing, promotes permanency, minimizes trauma, and maintains sibling bonds long-term.<sup>4</sup>

In 2021, Bethany conducted listening sessions with relative caregivers across the nation. Many of them detailed the complexities of working with the system to care for children in their families. Whether grandparent, aunt, uncle, cousin, or even fictive kin, many relatives end up taking a child in without the advanced planning and training that unrelated foster parents have. With many child protection systems remaining overwhelmed, states must invest resources in getting kids quickly placed

<sup>4</sup> <https://www.childwelfare.gov/topics/permanency/relatives/impact/>



with their kin. Kinship caregivers also require specialized supports due to the complexity of caring for their relatives' children.

After learning more about these complex needs, Bethany created a program, called Say Yes 2 FAMILY (Family Always Matters In the Lives of Youth). Provided through a cooperative agreement with the Administration for Children and Families, Say Yes 2 Family partners with 30-Days to Family®, an evidence-based program that significantly increases the placement of children with family in their first 30 days in care. Each child removed to foster care has an average of 150 relatives<sup>5</sup>, and Bethany believes relatives can do it. Bethany also offers specialized kinship training, support, and counseling, as well as shared parenting supports, to ensure kids stay closely connected with their families.

How can you start shifting your mindset about relatives and investing your dollars in a manner that promotes this shift?

**4. Best-interest determinations are extremely subjective and must be reframed through a lens of family connection and human belonging.**

Since my beginnings in investigations in 1998, I have worked in foster care, adoption, quality improvement, and training and I have held numerous leadership and executive roles. I have worked in several child welfare systems in multiple states. I now realize each agency, county, and state has its own culture and subjectivity around best interest determinations.

I first heard Dr. Amelia Franck-Meyer, president and founder of Alia Innovations, speak at a conference in 2019 and her bold truth-telling about the consequences of family separation re-ignited in me pieces of myself that had been cast aside for decades. Pieces of my soul knew that pulling crying children from their mothers' arms was traumatic for all of us. I've learned that a better way is possible, and one of the ways is through co-building solutions with community.

Bethany partners with Alia Innovations<sup>6</sup> both in our Say Yes 2 FAMILY program, as well as in our five-year strategic plan to significantly change the way we invest in families through family

support, strengthening, and preservation services. Not only has Dr. Franck-Meyer published the research to prove the detrimental societal cost of family separation<sup>7</sup>, she and her team are helping organizations like Bethany build a new way, together with communities.

How can you innovatively build solutions together with the communities you serve?

## Final Reflections

This year marks exactly half of my life I have invested in serving vulnerable children and families. Over the past five years, I can point to two specific experiences that have caused me to reflect deeply on my career. The first was a three-day intensive training experience on racial equity I attended in the summer of 2018, and the second was seeing Dr. Franck-Meyer speak in the fall of 2019 on how the system harms families. This timeframe coincided with taking my current role with Bethany's headquarters, where I help set the strategic direction for future programs.

These two experiences kicked off my deep and personal journey of reflecting on the perpetuation of systemic inequities in the child welfare system in America. At first, I was ashamed that I had been in this work for twenty years before learning many of the foundational origins of America's child welfare system. But now I know that by continuing to partner with transformational trailblazers, and, most of all, truly listening to youth, families, and communities, we can build a new way together—in both public and private child protection spaces.

And that is what it's going to take. Reflecting. Learning. Listening. Dreaming. Building. Supporting. Now that we know better, we can all do better. The well-being of children and families in our communities depends on it. Who's in?

<sup>5</sup> 30 Days to Family® FAQ - Institute for Child Welfare Innovation

<sup>6</sup> <https://www.aliainnovations.org>

<sup>7</sup> [Alia-Research-Brief-2019.pdf \(thetcj.org\)](https://www.aliainnovations.org/Alia-Research-Brief-2019.pdf)

*Cheri Williams is a Senior Vice President of Domestic Programs at Bethany Christian Services.*





# A Better Way Facilitating Kinship Licensure and Foster Care Exits to Guardianship

Angelique Day, Grace Nielson, Scout Hartley, and Charles E. Lewis, Jr.

Studies have shown that Kinship placement and guardianship has the lowest rate of reentry into the foster care system.<sup>1</sup> However, potential Kinship caregivers are denied the opportunity to care for the children they love because of barriers to licensure and restricted use of KinGAP (Kinship Guardianship Assistance Programs). Federal child welfare and foster care legislative reform is needed to provide children, their relatives, and fictive kin with easier ways of establishing guardianship as a form of permanency. Through the nationwide implementation of KinGAP, diligent recruitment of relatives as a part of case planning for permanent guardianship, the adoption of standardized licensing requirements, and parity in funding and supports to kin guardians we can address the obstacles Kinship guardians face when trying to care for their family.

## Background

In 2011, the U.S. Census Bureau's Current Population Survey found that 1.65 million children in the U.S. live in households with grandparents and no parents present.<sup>2</sup> Additionally, in 2021, an estimated 2.3 million grandparents are responsible for grandchildren, 1.1 million of whom are over the age of 60.<sup>3</sup> In a nationally representative sample, Kinship caregivers tend to be older and have lower family income.<sup>4</sup> Without consistent financial assistance as a result of failure to obtain licensure, these families suffer. Issues of Foster and Adoptive Parent (FAP) standards, licensure opportunities, restricted use of KinGAP, and the minimal effort for location of relatives that harm foster children and their Kin are outlined in this briefing. Inconsistencies in FAP standards create huge barriers for Kin and non-Kin foster parents. For instance, states vary in standards like upper age limits, citizenship, education standards, income requirements, and caps on the number of children allowed

in the home. Additionally, the definition of who qualifies as a relative eligible for Kin care varies by blood, marriage, or adoption ranging from the first to fifth degree.<sup>5</sup> And while these differences make it difficult for agencies to determine if Kin can be eligible caregivers, it also disqualifies certain qualified individuals based on their age, race, or history that no longer is indicative of their current abilities to care for individuals like their nieces, nephews, or grandchildren.

Licensure is another large challenge Kinship caregivers face when serving as guardians of family members. In fact, Kin experience the most difficulty getting licensed compared to any other placement type.<sup>6</sup> Kin often do not have the time and resources to acquire licenses as

<sup>1</sup> Goering, E. S., & Shaw, T. V. (2017). Foster care reentry: A survival analysis assessing differences across permanency type. *Child Abuse and Neglect*, 68, 36–43. <https://doi.org/10.1016/j.chiabu.2017.03.005>

<sup>2</sup> Vandivere, S., Yrausquin, A., Allen, T., Malm, K., & McKlindon, A. (2012). *Children in nonparental care: A review of the literature and analysis of data gaps*. Washington, DC: U.S. Department of Health and Human Services, Office of the Assistant Secretary for Planning and Evaluation.

<sup>3</sup> U.S. Census Bureau. "Table S1002 – Grandparents, 2019 American Community Survey 1-Year Estimates." December 2021. <https://data.census.gov/cedsci/table?q=S1002&tid=ACSST1Y2019.S1002&hidePreview=false>

<sup>4</sup> Stein, R.E.K., Hurlburt, M.S., Heneghan, A.M., Zhang, J., Rolls-Reutz, J., Landsverk, J., Horwitz, S.M. (2014). Health status and type of out-of-home placement: Informal kinship care in an investigated sample. (2014). *Academic Pediatrics*, 14(6), 559– 564. <https://doi.org/10.1016/j.acap.2014.04.002>

<sup>5</sup> Child Welfare Information Gateway. (2018). *Placement of children with relatives*. Washington, DC: U.S. Department of Health and Human Services, Children's Bureau

<sup>6</sup> Foster Family-based Treatment Association. (2015). *The Kinship Treatment Foster Care Initiative Toolkit*. Hackensack, NJ: Author. [https://cdn.ymaws.com/www.fta.org/resource/resmgr/files/Publications/FFTA\\_Kinship\\_TFC\\_Toolkit.pdf](https://cdn.ymaws.com/www.fta.org/resource/resmgr/files/Publications/FFTA_Kinship_TFC_Toolkit.pdf)





the child is usually placed with them within a short time frame. This lack of preparation can be overwhelming, and many do not realize the options they have regarding licensure. Many Kin feel the process can be intrusive considering the relationship they have with the children, which discourages them from becoming deeply involved with the child welfare system. Additionally, some agencies believe that relative caregivers are morally obligated to care for kin without receiving economic support were less likely to present the option of becoming licensed FAP to the prospective caregiver.<sup>7</sup> Many public agencies remain hesitant to grant flexibility in licensing permitted by the federal government despite the consistent struggles Kin have with this process. Without licensing, Kin guardians face a severe barrier in obtaining foster care monetary assistance. In 23 states, more than half of kinship caregivers do not receive maintenance payments.<sup>8</sup> A child is eligible for a Kinship guardianship assistance payment if the child has resided with the caregivers for at least six consecutive months in the home of the prospective relative guardian.<sup>9</sup> Length of required time of residency needs to be amended to reduce the amount of time Kin caregivers must wait to receive federal assistance. However, even with that change, current guardianship assistance programs are being underutilized. In 2016, six states accounted for 75 percent of Guardianship Assistance Programs (GAP) guardianships; those six states serve 51 percent of the children in foster care in the U.S. The same study found that in the same year, six states with approved GAP programs reported no GAP caseload.<sup>10</sup>

When looking at kin guardianship assistance, agencies often consider Kin placement as an alternative to foster care, which does not require licensure.<sup>11</sup> Kin often are being used as shadow foster care placements and Child Protective Services workers are placing children in homes and then closing the case. By not bringing the case into the formal foster care system, Kin are not getting an option to qualify for benefits they would receive if the case was formal and they were offered the opportunity to become licensed. We can see how nuanced licensing eligibility directly correlates with the lack of financial support Kin receive as guardians. Finally, current law requires

“diligent recruitment” of foster families that reflect the race, color, and national origin of the child welfare population.<sup>12</sup> However, that law does not include the location of relatives as a part of the case planning process. Current law does encourage states to consider giving relative caregivers preference over a non-related placement. However, some child welfare agencies are more successful than others at placing children with relatives.<sup>13</sup> The Emancipated Youth Connections Project (EYCP) assisted twenty young adults who left the foster care system without sustained relationships, and found family or other caring adults as caregivers? Their results show that for 19 of the 20 participants, 139 new permanent connections were made with biological family members.<sup>14</sup> This shows if effort is made in locating relatives, there can be significant positive impacts on youth in the foster care system.

## Current Policies

### Licensing Requirements: the Family First

<sup>7</sup> Center for Law and Social Policy (CLASP) (2012). Possibilities and pitfalls: The role of licensing in supporting relatives in caring for children in foster care.

<sup>8</sup> Generations United. (2018). Adoption and guardianship for children in kinship foster care. Retrieved from [https://www.grandfamilies.org/Portals/0/Documents/2017/2018-Grandfamilies-Adoption-GuardianshipBrief%20\(2\).pdf](https://www.grandfamilies.org/Portals/0/Documents/2017/2018-Grandfamilies-Adoption-GuardianshipBrief%20(2).pdf)

<sup>9</sup> Ssa, ordp. Adoption and Guardianship Assistance Program. Act §473. Retrieved February 24, 2022, from [https://www.ssa.gov/OP\\_Home/ssact/title04/0473.htm](https://www.ssa.gov/OP_Home/ssact/title04/0473.htm)

<sup>10</sup> US Department of Health and Human Services. (2018) Title IV-E gap programs: Work in Progress. [https://www.aspe.hhs.gov/sites/default/files/migrated\\_legacy\\_files//179696/GuardianshipBrief.pdf](https://www.aspe.hhs.gov/sites/default/files/migrated_legacy_files//179696/GuardianshipBrief.pdf)

<sup>11</sup> Foster Family-based Treatment Association. (2015). The Kinship Treatment Foster Care Initiative Toolkit. Hackensack, NJ: Author. [https://cdn.ymaws.com/www.fftfa.org/resource/resmgr/files/Publications/FFTA\\_Kinship\\_TFC\\_Toolkit.pdf](https://cdn.ymaws.com/www.fftfa.org/resource/resmgr/files/Publications/FFTA_Kinship_TFC_Toolkit.pdf)

<sup>12</sup> Ssa, ordp. *State Plans for Child Welfare Services*. Act §4422. Retrieved February 24, 2022, from <https://www.bia.gov/as-ia/raca/archived-regulatory-efforts/nacs#:~:text=The%20Native%20American>

<sup>13</sup> Ssa, ordp. *State Plan for Foster Care and Adoption Assistance*. Act §471. Retrieved February 24, 2022, from [https://www.ssa.gov/OP\\_Home/ssact/title04/0471.htm](https://www.ssa.gov/OP_Home/ssact/title04/0471.htm)

<sup>14</sup> Friend, B. (2009). California Permanency for Youth project: An overview. In T. LaLiberte & E. Snyder (Eds), *Permanency or aging out—Adolescents in the child welfare system*. Minnesota: Center for Advanced Studies in Child Welfare, University of Minnesota School of Social Work.



© nazar\_ab | iStock.com

Prevention Services Act (FFPSA) created a new national model for licensing standards for foster parents in 2018. The eleven standards include: eligibility threshold, physical and mental preparedness, background checks, home studies, a health and safety standard for living spaces, safe and healthy home conditions, home capacity (aligning with IVE household occupants guidelines), basic and private sleeping arrangements, emergency preparedness, transportation, and training.<sup>15</sup> Under these standards, states are able to formulate their own licensing requirements. The problem is states were given flexibility in adopting these new standards.

Additionally, while all title IV-E programs require all prospective foster and adoptive parents to undergo criminal background checks, laws in 31 states, the District of Columbia, Guam, the Northern Mariana Islands, and Puerto Rico require relatives to undergo a criminal background check that includes all adult members of the household in addition

<sup>15</sup> Administration for Children and Families. (2019, February 4). *Family First Prevention Services act implementation...* Retrieved February 24, 2022, from <https://fosteringchamps.org/wp-content/uploads/2018/02/ffpsa-implementation-timeline.pdf>



to child abuse and neglect central registry checks.<sup>16</sup> This is another barrier to licensing requirements for Kin, especially considering how quickly some guardians are pressed into being caregivers.

There are also problematic licensing standards within foster care placement manuals across all fifty states that have negative impacts on relative placement, one being upper age limits. Six states (AR, DE, LA, MD, WV, and WI) set a limit of 65 years. Only two states (NJ and ND) include anti-age discrimination language in their regulation of foster caregivers and two states (MO and NV) do not have age limits for placements.<sup>17</sup>

Proof of citizenship or legal residency is required to become a foster parent in at least eight states, making it difficult for Kin who are not documented to qualify for licensing. Certain states have income requirements that explicitly state foster parents must have adequate income to care for the child without reliance on foster care payments. This creates additional barriers to licensure for families in poverty or with low income.<sup>18</sup> Finally, The Native American Children's Safety Act clearly applies background checks (criminal record and child abuse registry) to tribal placements of children in foster care settings. The act provides that a tribe may not place a child in foster care with an individual for any of the prohibited crimes given in Title IV-E of the SSA (i.e., those at Section 471(a)(20)(A)(i) and (ii)). There does not appear to be an exception for relative placement.<sup>19</sup>

## Eligibility for Kinship Guardianship Assistance

As of June 2021, there are 53 Title IV-E agencies with approved plans to receive federal funding for guardianship assistance claims. However, 10 states do not have Title IV-E GAP.<sup>20</sup> Without it, many families do not have the necessary financial assistance to support their loved ones. Of the previously mentioned 1.65 million children living with their grandparents, 48 percent of those who live in grandmother-only housing live in poverty.<sup>21</sup> Through the recommendations outlined below, practical ways of combating income disparities and uplifting foster families can be achieved.

## Diligent Recruitment of Kin

Sec. 422(b)(7) of the Social Security Act requires that the state's IV-B, Subpart 1 plan "provide for the diligent recruitment of potential foster and adoptive families that reflect the ethnic and racial diversity of children in the State for whom foster and adoptive homes are needed."<sup>22</sup> Without the intentional wording to locate relatives in the process of recruitment for foster parents, Kin can be forgotten or overlooked as caregivers.

There are current efforts in Kin recruitment called Permanency Action Recruitment Teams (PART) that work with teens poised to age out. These advocates work to identify significant others such as Kin, fictive Kin, friends, and acquaintances with whom they have had a positive and constructive relationships. After having identified those individuals, they are contacted and invited to a PART meeting. Ninety-eight of the 199 teens were placed in permanent homes. At almost 50 percent placement rate, their outcomes support the legislative recommendation to actively recruit family members as guardians.<sup>23</sup>

<sup>16</sup> Child Welfare Information Gateway. (2018). Placement of children with relatives. Washington, DC: U.S. Department of Health and Human Services, Children's Bureau

<sup>17</sup> Beltran, A. & Epstein, H. (2013). The standards to license kinship foster parents around the United States: Using research findings to effect change. *Journal of Family Social Work*, 15(5), 364-381

<sup>18</sup> Beltran, A. & Epstein, H. (2013). The standards to license kinship foster parents around the United States: Using research findings to effect change. *Journal of Family Social Work*, 15(5), 364-381

<sup>19</sup> *Native American Children's Safety Act (NACSA) (P.L. 114-165)*. Indian Affairs. (n.d.). Retrieved February 24, 2022, from <https://www.bia.gov/as-ia/raca/archived-regulatory-efforts/nacsa#:~:text=The%20Native%20American>

<sup>20</sup> Administration for Children and Families. (2021). *Title IV-E Guardianship Assistance*. <https://www.acf.hhs.gov/cb/grant-funding/title-iv-e-guardianship-assistance>

<sup>21</sup> Lee, E., Clarkson-Hendrix, M., & Lee, Y. (2016). Parenting stress of grandparents and other kin as informal kinship caregivers: A mixed methods study. *Children and Youth Services Review*, 69, 29-38

<sup>22</sup> Ssa, ordp. *State Plans for Child Welfare Services*. Act §4422. Retrieved February 24, 2022, from <https://www.bia.gov/as-ia/raca/archived-regulatory-efforts/nacsa#:~:text=The%20Native%20American>

<sup>23</sup> Avery, R. J. (2010). An examination of theory and promising practice for achieving permanency for teens before they age out of foster care. *Children and Youth Services Review*, 32(3), 399-408



Angelique Day



Grace Nielson



Scout Hartley



Charles E. Lewis, Jr.

## Recommendations

### Relative Criminal Background Checks

#### Inclusion of All Types of Relative/Kin Placements

Potential Kinship caregivers are denied the opportunity to care for the children they love because of old criminal convictions that do not directly implicate child safety. To address the issue, amend 471(a)(20)(C) to apply to all types of relative/Kin placements (i.e., foster, adoptive, and guardianship) and conform language with the employee requirements in (D). 471(a)(20)(A) and (B) In most cases, there should be less strict criminal history requirements for relatives seeking to foster than for strangers. This proposal avoids conflicts with the Adam Walsh Act and can be preferred over the prescriptive National Association of Regulatory Administration (NARA) licensing requirement. The bill would not direct a state on what it must do with the information received from a relative's criminal records check (as with employees), and states are still free to follow the NARA model licensing standards and to propose alternative criminal history check procedures/requirements.

And note for Tribal Children: Changes made for relative placements would require conforming changes for tribal children. The Native American Children's Safety Act (P.L. 114-165) amended the "character investigation" provision of the Indian Child Protection and Family Violence Prevention Act to clearly apply background checks (criminal record and child abuse registry) to tribal placements of children in foster care settings.

The act provides that a tribe may not place a child in foster care with individuals for whom any of prohibited crimes given in Title IV-E of the SSA (i.e., those at Section 471(a)(20)(A)(i) and (ii)). Without an exception for relative placements, youth are placed at risk. Currently, language is aligned with IV-E, but without conforming amendments, changes to IV-E could create unintended differences for relatives of tribal children.

### Eligibility for Kinship Guardianship Assistance

Not all states implement KinGap. This has implications for Kin caregivers in those states and for tribes in those states with tribal-state agreements for Title IV-E. For example, a tribe with a tribal-state IV-E agreement cannot implement KinGap if the state does not choose to operate the program. In addition, many states that have KinGap do not use the program.

### Requiring Implementation of KinGAP

To amend this problem, states should be required to implement KinGAP. Additionally, encourage states to implement KinGAP by delinking KinGAP from AFDC eligibility requirements. Delink by removing "foster parent" requirement: Amend 471(a)(28) "at the option of the State, provides for the State to enter into Kinship guardianship assistance agreements to provide Kinship guardianship assistance payments on behalf of children to grandparents and other relatives who have assumed legal guardianship of the children for whom they have cared as foster parents and for whom they have committed to care on a permanent basis, as provided in section 473(d).



## Decreasing Length of Residency

Amend section 473(d)(3)(A)(i)(II) of the Social Security Act (42 U.S.C. 673(d)(3)(A)(i)(II)) by striking “eligible for foster care maintenance payments under section 472 while residing for at least 6” and inserting “residing for at least 3.”

Directly delinking KinGap AFDC requirements does not benefit as many Kin families as clarifying that Kin are not required to be licensed foster care providers prior to being eligible for KinGAP. To decrease the time that Kin caregivers could go without federal support, modify the 6-month residency period to a 3-month period. Keep the requirement that the child is in the care and custody of the child welfare agency (Section 473(d)(3)(A)), but remove the requirement that the child be eligible for Title IV-E foster care maintenance payment. Title IV-E agencies are free to implement safety requirements such as home studies and background checks. If necessary, clarify that the amended relative criminal history checks (Section 471(a)(20)(C)) apply.

## Requiring Diligent Recruitment of Kin

To address the issue of recruitment of Kin, add implementation requirements to existing law to facilitate a focus on Kinship care by clarifying that “diligent recruitment” includes locating relatives.

## Implement Kin Location into Case Planning

Sec. 422(b)(7) of the Social Security Act requires that the state’s IV-B, Subpart 1 plan “Provide for locating and involving relatives and fictive Kin as a permanent part of case planning, address barriers to family involvement, and provide for the diligent recruitment of potential foster and adoptive families that reflect the ethnic and racial diversity of children in the State for whom foster and adoptive homes are needed.”

## Documentation of Continual Efforts

Sec. 471(a)(19) of the SSA requires that the state’s IV-E plan “provides that the State shall make and document continual efforts to identify and locate relatives or fictive Kin as a potential placement and family support

resource and consider giving preference to an adult relative over a nonrelated caregiver when determining a placement for a child, provided that the relative caregiver meets all relevant child protection standards.”

## Clear and Convincing Evidence

If the State determines that placement with any relative or fictive Kin is not in the child’s best interest or that the relative does not meet the requirements of a relative caregiver, the State must document the basis for that decision with clear and convincing evidence. If the State determines that efforts to identify and locate relatives and fictive Kin would be futile or inconsistent with the child’s best interests, the State shall document the basis of its determination with clear and convincing evidence.

## Kin as Visitation Resources if Placement is Found Inappropriate

If the State determines that the child requires placement in an environment other than a home environment, the State shall make continual efforts to identify and locate relatives to serve as visitation resources for the child and potential future placement resources.

---

*Angelique Day, Ph.D., MSW, is an Associate Professor School of Social Work and Adjunct Faculty, Evans School of Public Policy and Governance; Faculty Affiliate and Federal Policy Lead, Partners for Our Children Faculty Affiliate, Indigenous Wellness Research Institute University of Washington, Seattle.*

*Grace Nielson is a current undergraduate, senior social work student at the University of Missouri. Nielson's focus areas lie in child welfare policy, domestic violence prevention, and political management. She serves the Congressional Research Institute for Social Work Policy as a Senior Leader for their annual Student Advocacy Day Conference and has previously served in the U.S House of Representatives as a Congressional and Legislative Intern.*

*Scout Hartley is a PhD student at the Rutgers School of Public Affairs and Administration,*

*where his interests include child welfare administration and federalism.*

*Charles E. Lewis, Jr., a political social worker, is*

*the founder and director of the Congressional Research Institute for Social Work and Policy (CRISP), a nonprofit organization that works to engage social workers with the U.S. Congress.*





# Reflections

## A Conversation with Carolyn Tancemore

Jey Rajaraman

Several years ago, I received a call from a public defender representing a father in an abuse and neglect matter in Essex County. She said, “We need you to jump in and rep grandma.” Representing kin alongside a parent was always an advocacy opportunity I eagerly took on. These opportunities enabled me to support family preservation in cases where parents had not directly sought my services. Ever present in my advocacy work was how to encourage the judiciary to see families as a singular unit and not to pit individual family members against parents facing family separation. I did my research, met with paternal grandmother (Mrs. Carolyn Tancemore) and her son. This meeting enabled me to hear about their family and how their grandson/son had been taken because they did not live under “perfect” condition. I couldn’t take on their case fast enough.

I had the honor to advocate for this family alongside, not against, Josiah’s attorney and his father’s public defender. After dozens of motions and a hearing, we were able to clear the administrative obstacles preventing Josiah from being placed in his grandmother’s care. As family defenders, we face what often feel like an insurmountable challenges, barriers, and obstacles to preserve or reunite a family. We are told that our clients are not safe. We are told they are incapable to parent, often due to poverty and mental and cognitive disabilities. This continued narrative is unacceptable.

I am happy and honored to share Ms. Tancemore’s story told in her own words. Her story, like so many others, illustrates the system’s flawed vision of “best interest.” A perspective that does not take into consideration that a child’s best interest is inexorably intertwined with the well-being of the family. A perspective that perpetuates an adoption system at the expense of family preservation.

### Can you tell me about how you grew up?

I grew up in Kingston, Jamaica, and migrated to the United States at an early age with my son Joel. I was a single mother while raising my son. Even though I was a single mother, I made sure Joel had everything in life. I worked hard and made sure he went to school and was happy. He never would hurt anyone and loved playing sports growing up. I have been so proud of Joel and the person he has become.

### Can you tell me about your grandson Josiah?

My son got married and had a baby with his wife. During my daughter-in-law’s pregnancy, I surprised them with a baby shower brunch.

I also gave her the name that I wanted my grandson to have, Josiah.

### How did Division of Child Protection and Permanency (DCPP) get involved?

After Josiah was born, my son and I went to the hospital to pick them up. To our surprise, after waiting for hours, we were told that DCPP came and took him away. We were devastated. I had no idea that my daughter-in-law was being watched by DCPP because of her history and drug issues. No one talked to me or my son. We were in shock. My son has never hurt anyone. He does not have a drug or criminal history. DCPP took Josiah without talking to my son. They said that he had a low IQ and would likely let his wife parent—since they



*Carolyn Tancemore and Josiah*



considered her a danger, they took Josiah. They didn't give us a chance!

### How did you feel when he was separated from your family?

I saw Josiah one time. I was devastated when they took him away after a two-hour visit. I had no idea how the system worked at the time. I watched my son and his wife go to several meetings, doctor's appointments, and other visits with no sign of getting Josiah back. One day I was contacted by a man from DCPD who asked me for a few relatives or friends that would possibly adopt Josiah. I gave him the names and numbers of several people, but they never hear from anyone.....still no Josiah!

### How did you gain custody of him?

DCPD took Josiah from his family because his father has a low IQ and his mother struggled with drug use. I wanted him with me right away! DCPD denied placing him with me and placed him with a stranger, because DCPD said I couldn't be licensed for adoption.

After three years, I got my own lawyer from New Jersey legal services. My life changed after I got an attorney. Not only did she get me longer visits with my grandson, but she also got me overnights with him while she fought for me to have custody of Josiah. With her help, support, and advocacy, I was finally granted legal guardianship of Josiah. DCPD gave me a hard time, but I endured. I am grateful for my attorney and the team at legal services.

### Why couldn't you be licensed?

I was told I didn't make enough money and some past history where there was no litigation. I also defended my son and didn't want his rights to be terminated. I thought we could live and work together. I was made to feel like I was wrong for loving my son. I told them I would take care of Josiah without foster care payments or adoption subsidies. I told DCPD that I did not need the financial support in order to take care of my grandson. However, I was open to whatever background checks and licensing requirements necessary. I just wanted my grandson to be with me and

his family. I was willing to be licensed, and I took every class they mandated, but DCPD still gave me a hard time.

### How did you feel about the court process?

I wasn't allowed to come to court. I couldn't be heard by the judge or court because I was the grandparent. I had to get an attorney so that the court could hear how DCPD wouldn't consider me because of financial reasons. Through my attorney, we filed to get the case so that I could be heard regarding custody and visitation.

I went to court with my son—it was so hard to see Josiah in the hallways of the courthouse. He would run to us and grab us. He even did this once in front of the judge—they had to pull him off of my neck!

What was it like to not have your grandson? I was broken! I couldn't believe that I couldn't take care of him or help my son. I am a nurse and have no criminal history. I am active in my community and go to church. I was denied because of not making enough money and some past history where there was no litigation.

### What was it like to watch your son and his wife go through this?

I felt horrible watching my son and his wife deal with DCPD. My son was deemed to be low-functioning, with a low IQ, and my daughter-in-law struggled with drug use and has a history with the Division. No one worked with them. I felt like they judged her because of her history and my son because he loved her. I felt judged because I defended them. I felt like I had to choose between my grandson and my son. Like, if I really loved my grandson, I couldn't defend his parents. I didn't understand why it felt like I was being asked to choose.

### Can you tell us about your grandson?

Josiah is the best grandson ever. He loves to color, read, and sing. We take him to swim classes, and we travel to see family in Jamaica. He is so happy and kind. He loves his parents too!

### What would you want the child welfare system to know?

I would want them to understand that families are not perfect, but we stand together and believe in each other. The system needs to know that many people of color and black communities face poverty and crime and would be rejected for licensure. It's not fair to judge families this way. I am a single mom doing my best for my children. I would also like the court to know that adoptions don't

always work because Josiah wanted to be with us even though his foster parent cared for him. I would like the courts to trust black families more and believe in us.

---

*Jey Rajaraman is an attorney and Management Consultant for Family Integrity & Justice Work at Public Knowledge®. Prior to that, she worked tirelessly for families in the child welfare system as chief counsel of the Family Representation Project at Legal Services of New Jersey.*

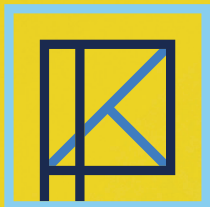


*Josiah*



# More than a partner.

We are a management consulting firm with a vision.

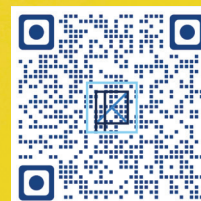


**PUBLIC  
KNOWLEDGE®**  
YOUR CATALYST FOR CHANGE



We created a Community of Practice specifically to develop an overarching child welfare vision and plans for improvement.

*To help drive this vision nationally is the Family Integrity & Justice Works at Public Knowledge®*



**Over 30 years**  
of Firm Experience



**Internationally**  
Making An Impact



**Value Driven**  
Management Consultants



(800) 776-4229 | [info@pubknow.com](mailto:info@pubknow.com) | [pubknow.com](http://pubknow.com)

