
Promoting Permanency and Human Rights

LAUREN E. BARTLETT*

* Copyright © 2019 Lauren E. Bartlett. Assistant Clinical Professor of Law at Saint Louis University School of Law, former Director of Legal Clinics and Associate Professor of Law at Ohio Northern University Claude W. Pettit College of Law. For Collins and Sheila Phillips. Thank you to Martha Davis, Margaret Johnson, Sabrina Balamwala, and Courtney G. Joslin for helpful comments on drafts of this Article. I would also like to thank all of the participants at both the Developing Ideas Conference at the University of Kentucky College of Law in May 2017 and my Works in Progress Presentation at the American Association of Law Schools 2018 Annual Clinical Conference, for their helpful suggestions and critique. Thank you to Erica Bishop, Christopher Calpin, Dustin Green, Margaret Kimmel, and Kristopher Lowe for research assistance.

ABSTRACT

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

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INTRODUCTION

Sharon Gurley[†] came to the Ohio Northern University Legal Clinic for legal assistance to adopt her nine-year-old granddaughter, Kaylan. Kaylan had been living with Sharon since she was a baby. Kaylan’s father was never in the picture. Kaylan’s mother, Cathy, was unable to care for Kaylan as a baby, maybe due to addiction issues, and left her in Sharon’s care. Cathy was in and out of Sharon’s and Kaylan’s lives until recently, when Cathy was convicted of murder and sent to prison for twenty-five years. Sharon had never sought legal custody or guardianship of Kaylan and instead relied on a Caregivers Affidavit to enroll Kaylan in school and take her to the doctor. Children’s Services had never been involved. Our students explained to Sharon that while we could provide free legal

[†] This story represents a combination of client and potential client cases at the Ohio Northern University Legal Clinic, where the author supervised law students who litigated civil cases on behalf of individuals in poverty from 2015-2019. Names and details of cases have been changed for confidentiality purposes.

representation for the adoption proceedings, Sharon would have to come up with the funds to pay for the court costs, a home study, parenting classes, a fire marshal's certificate, background checks, and more, all of which were required by the court to complete an adoption. The students explained that these costs would add up to more than \$3,000. Sharon would have to pay these costs in advance, with no hope of a waiver or a payment schedule. Sharon worked part time and was living below the poverty line. She said she thought that she might be able to get the money together after her tax refunds came in. She said that she would get back in touch with us soon. We never heard from Sharon again.

Across the U.S., more and more children whose parents are unable or unwilling to care for them are increasingly relying on grandparents, like Sharon, as well as aunts, uncles, and family friends for care. Many of these caregivers step forward to care for the children as a result of a child welfare investigation.¹ Informal or voluntary kinship caregiving arrangements are also often made without the knowledge or involvement of child welfare officials, as a preventative measure to avoid possible abuse or neglect.²

While the number of children in foster care has remained fairly consistent since the 1990s,³ the number of children in kinship care⁴ has

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

² See Rankin, *supra* note 1, at 154 n.7, 178; Coupet, *supra* note 1, at 607; Weaver, *supra* note 1, at 20–21.

³ See, e.g., *Trends in Foster Care*, CHILD TRENDS (May 24, 2018), <https://www.childtrends.org/indicators/foster-care> (showing, in figure 1, *Number and Rate of Children in Foster Care, Ages 17 and younger: 1990-2017*, that despite reaching a high of 567,000 children in foster care in 1999 and a historic low of 397,000 in 2012, the number of children in foster care in the past few decades has mostly hovered around in the 400,000s, with 400,000 children in foster care in 1990 and 443,000 in 2017) [hereinafter *Trends in Foster Care*].

⁴ *Children in kinship care in the United States (2009-2018)*, KIDS COUNT DATA CTR., <https://datacenter.kidscount.org/data/tables/10454-children-in-kinship-care?loc=1&loct=1#detailed/1/any/false/1687,1652,1564,1491,1443,1218,1049,995/any/20158,20159> (last updated Sept. 2018) ("Children are considered to be in kinship care when all of the

grown significantly in the same period of time.⁵ Today, estimates indicate that there are over 2.6 million children living apart from their birth parents⁶ in private kinship care, as compared with 443,000 children in foster care across the U.S.⁷ Not only has the number of children in kinship care

following conditions are true: a parent is not present in the household; the child is not a foster child to the householder; the child is not a housemate/roommate/ border with no relatives in the household; the child is not a householder; and the child is not a spouse or unmarried partner of the householder.”) [hereinafter KIDS COUNT]. The caregivers taking care of the children in kinship care are often called “kinship caregivers.” See, e.g., Coupet, *supra* note 1, at 595, 598–99; Rankin, *supra* note 1, at 155–84.

⁵ Rankin, *supra* note 1, at 154 n.7 (“In 1997, 1.3 million children were estimated to be in private kinship care.”); see also KIDS COUNT, *supra* note 4 (showing that between 2016-2018 there were an estimated 2,677,000 children in kinship care).

⁶ The phrase “birth parents” is intended to refer to the child’s non-adoptive legal parents. I use this term rather than “biological parents” or other similar terms because those terms can be misleading and are non-inclusive, as not all legal parents are biological parents and some biological parents are not legal parents. Admittedly, the term “birth parents” is also not entirely accurate, as unmarried fathers do not become legal parents until some period of time after birth, and other people become one of the child’s non-adoptive legal parents later in the child’s life. Thank you to Courtney G. Joslin for flagging this issue.

⁷ See KIDS COUNT, *supra* note 4 (showing that in 2016-2018 there were an estimated 2,677,000 children in kinship care); *Trends in Foster Care*, *supra* note 3 (showing that there were an estimated 443,000 children in foster care in 2017). Some children are placed with grandparents or non-relatives with whom they have a relationship through the foster care system. This is called “kinship foster care” and is distinguished from private kinship care due to the involvement of the state child welfare system. See Rankin, *supra* note 1, at 154. 140,675 or approximately 32% of children in the formal foster care system live with relatives. See U.S. DEP’T HEALTH AND HUMAN SERV. ET AL., AFCARS REPORT: PRELIMINARY FY 2017 ESTIMATES AS OF AUGUST 10, 2018 – No. 25 (2018), <https://www.acf.hhs.gov/sites/default/files/cb/afcarsreport25.pdf> [hereinafter AFCARS REPORT].

increased steadily, but kinship adoptions⁸ and permanent guardianships⁹ are also on the rise.¹⁰

Scholars have identified a multitude of potential causes for the increasing number of children in kinship care, including the opioid

⁸ The term “kinship adoption” has been used to describe children adopted by relatives or non-relative close family friends who had been kinship caregivers. *See, e.g.*, CHILD FOCUS & N. AMERICAN COUNCIL ON ADOPTABLE CHILDREN, KINSHIP ADOPTION: MEETING THE UNIQUE NEEDS OF A GROWING POPULATION at 1 (2010), https://njarch.org/wp-content/uploads/2015/11/CF_Kinship_Adoption_Report_v5-pdf0.pdf [hereinafter KINSHIP ADOPTION]. In the past, adoptions required the termination of birth parents’ parental rights and of all relationships between birth parent and child. Today, children can be adopted and still have court-enforceable rights to visit with birth parents, and children in at least one U.S. state can be adopted without terminating birth parents’ rights. *See* Josh Gupta-Kagan, *The New Permanency*, 19 UC DAVIS J. JUV. L. & POL’Y 1, 5–6 (2015).

⁹ Permanent guardianship, also called “permanent custody” in some jurisdictions, provides a permanent family for children who cannot return to the care of their birth parents and for whom termination of parental rights is not an appropriate option. Oftentimes the kinship caregiver and/or the child has strong emotional ties to the children’s birth parents and may not feel it would be in the best interest of the children to terminate parental rights as required by adoption. In other cases, birth parents may have a physical or mental disability that prevents them caring safely for a child and termination of parental rights is inappropriate. *See* CHILDREN’S DEF. FUND, USING SUBSIDIZED GUARDIANSHIP TO IMPROVE OUTCOMES FOR CHILDREN: KEY QUESTIONS TO CONSIDER 1–4, 9 (Mary Biswell & Jennifer L. Miller eds., 2004), <http://cdf.childrensdefense.org/site/News2?page=NewsArticle&id=6624> [hereinafter USING SUBSIDIZED GUARDIANSHIP]. *See infra* section I.D for a more thorough description of how the legal procedure for obtaining permanent guardianship differs state by state.

¹⁰ *See* Jamel Rowe, *Paths to Permanence: Kin Guardianship and Adoption*, 59 ADOPTION ADVOCATE 1, 2–8 (May 2013). This Article does not take an opinion on whether adoption or permanent guardianship is a “better” or more permanent option for children in kinship care. Instead, this Article focuses on the subsidization of both permanent guardianships and adoption when the kinship caregiver family is living in poverty. *See also* KINSHIP ADOPTION, *supra* note 8.

epidemic;¹¹ fallout from the financial crisis of 2008;¹² mass incarceration;¹³ lack of affordable childcare;¹⁴ rise in the number of jobs requiring travel or relocation;¹⁵ rise in rates of single parenthood;¹⁶ rise in immigration;¹⁷ and more.¹⁸

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

¹² Amy Goyer, *More Grandparents Raising Grandchildren*, AARP 1–2 (2010), http://www.aarp.org/relationships/grandparenting/info-12-2010/more_grandparents_raising_grandchildren.html.

¹³ See Allison E. Korn, *Detoxing the Child Welfare System*, 23 VA. J. SOC. POL’Y & L. 293, 309 (2016); THE SENTENCING PROJECT, INCARCERATED PARENTS AND THEIR CHILDREN: TRENDS 1991-2007 1, 5 (2009), <http://www.sentencingproject.org/publications/incarcerated-parents-and-their-children-trends-1991-2007/>.

¹⁴ See Weaver, *supra* note 1, at 4. In 31 states and the District of Columbia, center-based childcare for an infant is more expensive than public college tuition. See CHILDREN’S DEFENSE FUND, THE STATE OF AMERICA’S CHILDREN 7 (2017), <https://www.childrensdefense.org/wp-content/uploads/2018/06/2017-soac.pdf>.

¹⁵ See Weaver, *supra* note 1, at 11, 20 (discussing job loss leading to more multigenerational homes and grandparents caring for grandchildren on nights and weekends when parents are away working).

¹⁶ URSULA ADLER FALK & GERHARD FALK, GRANDPARENTS: A NEW LOOK AT THE SUPPORTING GENERATION 25 (2002) (“After the 1950s things changed so dramatically in American social life that the role of grandparents also changed from that of occasional visitor to that of backup parent to the millions of children born to single mothers each year.”).

¹⁷ See Weaver, *supra* note 1, at 4.

¹⁸ Some scholars also argue that the rise of kinship care is part and parcel of a trend reintegrating elders into the nuclear family and a reframing of the legal understanding of caregiving by a network of people, including parents, extended family members, friends, neighbors, and paid caregivers. See, e.g., Weaver, *supra* note 1, at 5–6; Melissa Murray, *The Networked Family: Reframing the Legal Understanding of Caregiving and Caregivers*, 94 VA. L. REV. 385, 436–38 (2008). The rise in the number of children in kinship care can also likely be attributed to the requirement put in place in 2008 that child welfare officials notify kin that the child is being removed from the care of parents. See Fostering Connections to Success and Increasing Adoptions Act of 2008, Pub. L. No. 110-351, 122 Stat. 3949. Interdisciplinary and law-specific scholarship, research, and advocacy in the area of kinship care is strong, though sporadic, in terms of law review articles. See, e.g., Rankin, *supra* note 1 (for a discussion of why kinship care has not gotten more attention); CHILDREN DEFENSE FUND, FINANCIAL ASSISTANCE FOR GRANDPARENTS AND

Moreover, scholars and advocacy groups have pointed out that there is a strong financial incentive for states to prioritize informal kinship care over foster care: child welfare agencies avoid paying costly foster care subsidies to informal kinship caregivers.¹⁹ Informal kinship placements are often not licensed foster homes, and the state or local government often does not have to pay foster care subsidies to kinship caregivers. This policy of kinship diversion²⁰ is now commonplace and even encouraged by federal and state law.²¹ Additionally, child welfare agencies are increasingly required by law and policy to prioritize kinship care over foster care, and they must first seek out family members before placing children in foster care.²² Kinship diversion saves the state and federal government millions of dollars, but this cost savings is likely short lived, as explained further in section III.A.1 below.²³

The trend in kinship care is also not surprising from a social science research and evidence-based perspective. Kinship care is more often than not the best option for children who should not or cannot live with their

OTHER RELATIVES RAISING CHILDREN (2004), <http://cdf.childrensdefense.org/site/DocServer/financialassistance.pdf?docID=468> (discussing the need for additional subsidies and resources for kinship caregivers) [hereinafter FINANCIAL ASSISTANCE FOR GRANDPARENTS]; THE ANNIE E. CASEY FOUNDATION, THE KINSHIP DIVERSION DEBATE: POLICY AND PRACTICE IMPLICATIONS FOR CHILDREN, FAMILIES, AND CHILD WELFARE AGENCIES (2013), <https://www.aecf.org/resources/the-kinship-diversion-debate/> (discussing whether foster care with relatives should be preferred over foster care placements with non-relatives) [hereinafter KINSHIP DIVERSION DEBATE]; Coupet, *supra* note 1, at 609; USING SUBSIDIZED GUARDIANSHIP, *supra* note 9 (discussing whether permanent guardianship or adoption, or both, should be promoted as permanency options).

¹⁹This is sometimes referred to as “kinship diversion.” See KINSHIP DIVERSION DEBATE, *supra* note 18, at 2.

²⁰See *id.*

²¹See Weaver, *supra* note 1, at 5–6; Rankin, *supra* note 1, at 154–55; CHILDREN’S DEFENSE FUND ET AL., MAKING IT WORK: USING THE GUARDIANSHIP ASSISTANCE PROGRAM (GAP) TO CLOSE THE PERMANENCY GAP FOR CHILDREN IN FOSTER CARE (2012), <https://www.childrensdefense.org/reports/2012/making-it-work-using-the-guardianship-assistance-program-gap-to-close-the-permanency-gap-for-children-in-foster-care-2012-full-report/> [hereinafter MAKING IT WORK]; USING SUBSIDIZED GUARDIANSHIP, *supra* note 9, at 7–9. See also generally KINSHIP DIVERSION DEBATE, *supra* note 18.

²²See U.S. DEP’T OF HEALTH AND HUMAN SERV., CHILD WELFARE INFO. GATEWAY, PLACEMENT OF CHILDREN WITH RELATIVES 2 (2013), <https://www.childwelfare.gov/topics/systemwide/laws-policies/statutes/placement/> [hereinafter PLACEMENT OF CHILDREN WITH RELATIVES]; Fostering Connections to Success and Increasing Adoptions Act of 2008, Pub. L. No. 110-351, 122 Stat. 3949.

²³See PLACEMENT OF CHILDREN WITH RELATIVES, *supra* note 22, at 1 (“When a child is removed from the home and placed in out-of-home care, relatives are the preferred resource because this placement type maintains the child’s connections with his or her family.”).

birth parents. Social science research shows that children living with kin have better outcomes, including increased permanency,²⁴ than do children placed with non-relatives.²⁵ Social science research shows that the benefits of kinship care are many and include minimized trauma;²⁶ improved child well-being;²⁷ increased permanency;²⁸ improved behavioral and mental health outcomes;²⁹ improved sibling ties;³⁰ and better preserved cultural identity and community connections.³¹ The fact that the law and policy promoting kinship placements has followed developments in social science research is largely due to the advocacy of groups like the American Association of Retired Persons (AARP),³² Grandparents Raising Grandchildren,³³ The Children's Defense Fund,³⁴ and others.

²⁴ See Gupta-Kagan, *supra* note 8, at 3.

²⁵ Heidi Redich Epstein, *Kinship Care is Better for Children and Families*, 36 CHILD L. PRAC. TODAY 77, 77–78 (July/August 2017), https://www.americanbar.org/groups/child_law/resources/child_law_practiceonline/child_law_practice/vol-36/july-aug-2017/kinship-care-is-better-for-children-and-families.html.

²⁶ D.B. Wilson & S.S. Chipungu, *Special Edition: Kinship Care*, 75 CHILD WELFARE 387, 387 (1996).

²⁷ Tessa Bell & Elisa Romano, *Permanency and Safety Among Children in Foster Family and Kinship Care: A Scoping Review*, 18 TRAUMA, VIOLENCE, AND ABUSE 268, 270 (2017) (examining 54 studies that examined permanency and safety among children in foster family and kinship care around the world and concluding that children in kinship care experienced greater permanency, yet lower rates of adoption and reunification with birth parents).

²⁸ See *id.*

²⁹ Marc A. Winokur, Amy Holtan & Keri E. Batchelder, *Systematic Review of Kinship Care Effects on Safety, Permanency, and Well-Being Outcomes*, 28 RES. ON SOC. WORK PRAC. 19–32 (2018) (“[A]s compared to children in foster care, children in kinship care experience fewer behavioral problems and mental health disorders, better well-being, less placement disruption, fewer mental health services, and similar reunification rates.”).

³⁰ Fred Wulczyn & Emily Zimmerman, *Sibling Placements in Longitudinal Perspective*, 27 CHILD. AND YOUTH SERV. REV. 741, 741–63 (2005).

³¹ Epstein, *supra* note 25, at 82; Bell & Romano, *supra* note 27, at 269; see also James A. Rosenthal & Rebecca L. Hegar, *Kinship Guardianship, Adoption, and Foster Care: Outcomes from a U.S. National Sample*, 10 J. PUB. CHILD WELFARE 237–254 (2016), <http://dx.doi.org/10.1080/15548732.2016.1176610>.

³² See *Family Caregiving*, AARP, <https://www.aarp.org/caregiving/> (last visited Feb. 19, 2019).

³³ See Karen Wright, *Grandparents Raising Grandchildren*, <http://www.raisingyourgrandchildren.com/> (last visited Feb. 19, 2019).

³⁴ See *Child Welfare*, CHILD. DEF. FUND, <https://www.childrensdefense.org/policy/policy-priorities/child-welfare/> (last visited Feb. 19, 2019) (“We are working to ensure the needs of these kinship families are met so the children are safe, healthy, in loving families and reaching their full potential.”).

Despite clear policies supporting kinship diversion in the child welfare system and social science research strongly backing the continuation of this trend, resources for kinship caregivers are still significantly lacking. In addition, kinship caregivers face many obstacles as compared to birth parents. Kinship caregivers are far more likely to be unemployed, receive government benefits, and be less educated, as compared with birth parents.³⁵ Many kinship caregivers are elderly and have fixed incomes.³⁶ Additionally, at least 20% of kinship caregivers live in poverty,³⁷ and few receive subsidies or other financial support from the state or federal government to cover the needs of children in their care.³⁸ Moreover, kinship caregivers may face costly custody disputes with the legal parents, when and if they are present in the children's life.³⁹ Kinship caregivers without a formal legal status or power of attorney may also be unable to make key educational and healthcare decisions on behalf of the children in their care.⁴⁰

When kinship caregivers seek a formal legal status, such as temporary custody, permanent guardianship, or adoption, they face additional obstacles. Available federal subsidies for both adoptions and permanent guardianship proceedings favor children in licensed foster care.⁴¹ In all fifty U.S. states, kin who are licensed foster care providers can receive federal subsidies to adopt the children in their care.⁴² Foster parents can receive subsidies to cover court costs and fees related to the legal proceedings, including court costs, attorney's fees, and home study fees,

³⁵ See Rankin, *supra* note 1, at 163; URBAN INSTITUTE, *Children in Kinship Care* (2003), <https://www.urban.org/research/publication/children-kinship-care>; see also AARP, *GrandFacts Sheets, National 1* (2015) (discussing the socioeconomic status of grandparents raising grandchildren, often in kinship care), <https://www.aarp.org/relationships/friends-family/grandfacts-sheets/> [hereinafter *GrandFacts Sheets*].

³⁶ Rankin, *supra* note 1, at 163.

³⁷ *GrandFacts Sheets, supra* note 35, at 1.

³⁸ See ANNIE E. CASEY FOUNDATION, *Stepping Up For Kids: What Government and Communities Should Do To Support Kinship Families* 3, 9 (2012), <https://www.aecf.org/m/resourcedoc/AECF-SteppingUpForKids-2012.pdf>.

³⁹ See Coupet, *supra* note 1, at 609–10.

⁴⁰ See, e.g., Coupet, *supra* note 1, at 604; Kathleen Meara, Student Note, *What's in a Name? Defining and Granting a Legal Status to Grandparents Who are Informal Primary Caregivers of their Grandchildren*, 52 FAM. CT. REV. 128, 129 (2014) (discussing grandparents' legal status).

⁴¹ See *infra* sections II.C-D.

⁴² *Miller v. Youakim*, 440 U.S. 125, 133 (1979).

among other costs.⁴³ The costs and fees related to these proceedings can be substantial, and the foster parents often receive the subsidies regardless of their ability to pay.⁴⁴ Yet no federal subsidies are directed at private kinship adoptions, wherein the kinship caregiver seeking to adopt is not a licensed foster care provider.⁴⁵ Further, in forty-one U.S. states and territories, kinship foster care providers can receive subsidies to establish a permanent guardianship for the children in their care.⁴⁶ No such subsidies exist for the costs related to private kinship guardianship proceedings, wherein the kinship caregiver is not a licensed foster care provider.⁴⁷

In the 1980s, the federal government made an affirmative decision to focus on subsidies for adoptions out of foster care.⁴⁸ Decades later, after child advocates and policymakers voiced concerns over the rising number of children in the care of kinship caregivers who refused to move to terminate parental rights, the federal government made subsidies available for permanent guardianships out of foster care in 2008.⁴⁹ However, the federal government refuses to provide subsidies to informal kinship caregivers for the costs of adoptions or permanent guardianships.⁵⁰ This is true whether or not the kinship caregiver family is living in poverty, or receives public benefits such as Medicaid and Food Stamps.

⁴³ See *infra* sections II.D-F. However, the subsidies available in many states do not cover the entirety of the costs and fees related to the legal proceedings. In addition, the subsidies are often available in the form of a reimbursement payment, meaning the foster parents must come up with the funds upfront and wait to be reimbursed on the back end, which is impossible for some. These subsidies in form and amount are also not sufficient for many foster caregivers living in poverty.

⁴⁴ *Id.*

⁴⁵ Gupta-Kagan, *supra* note 8, at 14.

⁴⁶ CHILDREN'S BUREAU, U.S. DEP'T HEALTH & HUMAN SERV., TITLE IV-E GUARDIANSHIP ASSISTANCE, <https://www.acf.hhs.gov/cb/resource/title-iv-e-guardianship-assistance> ("As of February 2020 . . . 41 states and territories have been given final approval") [hereinafter TITLE IV-E GUARDIANSHIP ASSISTANCE].

⁴⁷ Gupta-Kagan, *supra* note 8, at 14.

⁴⁸ See Adoption Assistance and Child Welfare Act of 1980, Pub. L. No. 96-272, 94 Stat. 500.

⁴⁹ See Fostering Connections to Success and Increasing Adoptions Act of 2008, Pub. L. No. 110-351, 122 Stat. 3949; Mark F. Testa & Jennifer Miller, *Evolution of Private Guardianship as a Child Welfare Resource*, in CHILD WELFARE FOR THE TWENTY-FIRST CENTURY: A HANDBOOK OF PRACTICES, POLICIES, AND PROGRAMS 407 (2005); Gupta-Kagan, *supra* note 8, at 14.

⁵⁰ See *Glanowski v. New York State Dep't of Family Assistance*, 225 F. Supp. 2d 292, 301-05 (W.D.N.Y. 2002).

In most U.S. states the lack of federal subsidies for the legal costs and fees is less of a problem because waivers are available for at least some of the court costs and additional nonrecurring costs of adoptions and permanent guardianships⁵¹ for kinship caregivers living in poverty.⁵² Additionally, in thirty-nine U.S. states and the District of Columbia, statutes provide for a waiver of a home study requirement or a waiver for the home study fee for kin.⁵³

However, several U.S. states require the upfront payment of these costs and fees, with no exceptions, regardless of kinship or poverty status. Court costs for kinship adoptions and permanent guardianships are not guaranteed to be waived in Alabama,⁵⁴ Iowa,⁵⁵ Kansas,⁵⁶ Ohio,⁵⁷ and

⁵¹ Nonrecurring costs of kinship adoptions and permanent guardianships include home study costs, criminal background check costs, etc. These costs are also termed nonrecurring expenses and nonrecurring fees. See Adoption Assistance and Child Welfare Act of 1980; Fostering Connections to Success and Increasing Adoptions Act of 2008.

⁵² See *infra* section II.F.

⁵³ Alabama, Alaska, Arizona, Arkansas, California, Colorado, Connecticut, Delaware, Florida, Idaho, Illinois, Iowa, Kansas, Kentucky, Louisiana, Maine, Michigan, Mississippi, Missouri, Montana, Nebraska, Nevada, New Hampshire, New Jersey, New Mexico, North Carolina, North Dakota, Ohio, Oklahoma, Oregon, Rhode Island, South Carolina, South Dakota, Tennessee, Utah, Vermont, Virginia, Washington, Wyoming, and the District of Columbia. See CHILD WELFARE INFO. GATEWAY, U.S. DEP'T HEALTH AND HUMAN SERV., *Home Study Requirements for Prospective Parents in Domestic Adoptions* 4 (2015), https://www.childwelfare.gov/pubPDFs/homestudyreqs_adoption.pdf [hereinafter *Home Study Requirements*]. In Massachusetts, there is no waiver, but there is a fund to cover the home study fees for indigent litigants. See MASS.GOV, *Indigency (Waiver of Court Fees)*, <https://www.mass.gov/indigency-waiver-of-court-fees> (last visited May 16, 2020). In 2018, I completed a fifty-state survey of the laws, regulations, and practices related to waivers of court costs, home study requirements and fees, and criminal background check requirements and fees for private kinship adoptions and permanent guardianships. Lauren Bartlett, *Fifty-State Survey* (manuscript on file with author) [hereinafter Bartlett, *Fifty-State Survey*].

⁵⁴ See John King, *Adoption Subsidies*, ALA. FOSTER AND ADOPTIVE PARENT ASS'N (May 12, 2016), <https://afapa.org/2016/05/12/adoption-subsidy/>; see also ALA. CODE §§ 26-10-A-27 – 26-10-A-28 (2019).

⁵⁵ See, e.g., *Court Forms*, IOWA JUD. BRANCH, <http://www.iowacourts.gov/for-the-public/court-forms/> (May 2018) (indicating, under “Custody” and “Form 409: Application and Affidavit to Defer Payment of Costs,” that petitioners are required to provide information on household income and expenses).

⁵⁶ See, e.g., *Legal Forms*, KAN. JUD. COUNCIL (May 2019), <http://www.kansasjudicialcouncil.org/legal-forms> (showing that while there is a “Poverty Affidavit” in which petitioners can request waiver of docket fees based on income and assets, there is no adoption-specific waiver or any mention of such exceptions).

⁵⁷ See Bartlett, *Fifty-State Survey*, *supra* note 53.

Wyoming,⁵⁸ regardless of whether or not the caregiver is living in poverty. Ohio stands alone as the only state that affirmatively refuses to subsidize any of these costs or fees or provide a waiver for kinship caregivers living in poverty who seek to adopt or establish a permanent guardianship for the children in their care.⁵⁹

With kinship diversion on the rise,⁶⁰ this lack of subsidization for informal kinship caregivers living in poverty is a huge and growing problem, and the human rights of more than 224,000 children in kinship care have already been violated.⁶¹ Entrenched state and federal policies divert children away from foster care to kinship care and, at the same time, limit adoption and guardianship subsidies to children in foster care. While the system of kinship diversion helps child welfare agencies avoid costs associated with foster care, this cost avoidance is only temporary and comes at the detriment of the children the agencies are meant to serve and protect.⁶² Without the subsidization or waiver of court costs and associated fees, kinship caregivers living in poverty—like Sharon Gurley, the client described above—cannot access courts to achieve a permanent legal status for the children in their care. Ms. Gurley’s and Kaylan’s human rights to access to justice, family and adoption, and economic rights have been violated.

Kinship caregivers should not have to choose between basic human rights—such as education, healthcare, adequate housing, food, and family—and adoption for the children in their care. Moreover, children should not miss out on an opportunity for permanent care because the state or local government is trying to avoid costs. In the long term, the child welfare agencies, and in turn the state and federal governments, will bear the burden of additional costs when the children face increased disruption in care, achieve permanency less often, receive fewer services, experience

⁵⁸ See WYO. STAT. ANN. §§ 14-1-101 – 14-13-104 (2018) (showing that there is no statutory exception for kinship adoption fee waivers).

⁵⁹ See Bartlett, *Fifty-State Survey*, *supra* note 53.

⁶⁰ See, e.g., Weaver, *supra* note 1, at 5–6; Rankin, *supra* note 1, at 154–55. See also MAKING IT WORK, *supra* note 21; KINSHIP DIVERSION DEBATE, *supra* note 18; USING SUBSIDIZED GUARDIANSHIP, *supra* note 9.

⁶¹ In 2018, there were 67,000 children in kinship care in Alabama; 20,000 children in kinship care in Iowa; 20,000 children in kinship care in Kansas; 113,000 children in kinship care in Ohio; and 4,000 children in kinship care in Wyoming. See KIDS COUNT, *supra* note 4.

⁶² See *infra* section III.A.1.

more trauma, end up back in the child welfare system, or are otherwise involved with the justice system.⁶³

This Article focuses on the refusal of U.S. states and the federal government to subsidize the nonrecurring costs of private kinship adoptions and permanent guardianships for kinship caregivers living in poverty.⁶⁴ These state and federal government actions constitute a violation of the human rights for kinship caregivers and the children in their care. When kinship caregivers are living in poverty and cannot afford the out-of-pocket costs of adoption or guardianship proceedings for children in their care, the state and federal government should provide subsidies or waivers of the costs. Subsidizing or waiving the nonrecurring costs of adoption and permanent guardianship proceedings would achieve the stated purposes of the child welfare system—prevention of harm and the promotion of permanency⁶⁵—in a cost-effective manner, while promoting human rights of kinship caregivers living in poverty and the children in their care.

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

⁶³ See Gupta-Kagan, *supra* note 8, at 5, 61, 79; see also *infra* section III.A.1.

⁶⁴ There are children's rights advocates who argue that adoption when birth parents are living is never a better idea than permanent guardianship, including when birth parents give affirmative consent for the adoption. See, e.g., MAKING IT WORK, *supra* note 21. There are also those who continue to advocate for adoptions as the best option, as opposed to permanent guardianships, for children who cannot be reunited with their birth parents. See, e.g., SHARON MCCULLY & ELIZABETH WHITNEY BARNES, NAT'L COUNCIL OF JUV. AND FAM. CT. JJ., *Forever Families: Improving Outcomes by Achieving Permanency for Legal Orphans* 18 (2013). Again, this Article does not argue whether kinship adoptions or permanent guardianships are best for children whose parents are unable or unwilling to care for them. This Article instead examines the barriers that exist when kinship caregivers living in poverty wish to adopt or move for permanent guardianship of the children in their care.

⁶⁵ See 42 U.S.C. § 621 (2006) (purpose statement).

I. PATHWAYS TO PERMANENCY

Permanency is central to child welfare law.⁶⁶ Ideally, a child would permanently be in the care and custody of his or her parents. Constitutional family law principles make the parental relationship with a child paramount, and protect the right of a parent to direct the care, custody, and control of their children.⁶⁷ Under these principles, only parents generally are authorized to make important decisions on behalf of their children, such as consent to health care and enrollment in a particular school.⁶⁸ Parental decision-making must be given deferential treatment unless the parent's conduct does not meet the minimum standards of parenting.⁶⁹ Further, the state may not substitute a third party's judgment for that of a fit parent.⁷⁰

The state can intervene, however, when the parent has placed the child's wellbeing at risk. When a state child welfare agency determines that children cannot safely remain in the care of their parents due to abuse, neglect, or dependency, the agency will remove the children from their parents' custody and place the children in a substitute care setting.⁷¹ At times, children are placed in the care of foster parents.⁷² At other times, children are voluntarily placed by their parents with a caretaker.⁷³ The caregiver sometimes seeks a formal legal status from a court, such as

⁶⁶ See Gupta-Kagan, *supra* note 8, at 5 (“Permanency is a pillar of child welfare law.”).

⁶⁷ *Troxel v. Granville*, 540 U.S. 57, 65 (2000) (“The liberty interest at issue in this case—the interest of parents in the care, custody, and control of their children—is perhaps the oldest fundamental liberty interests recognized by this Court.”); Elizabeth Barker Brandt, *De Facto Custodians: A Response to the Needs of Informal Kin Caregivers?*, 38 FAM. L.Q. 291, 295 (2004) (citing *Troxel*).

⁶⁸ See *Troxel*, 540 U.S. at 65; Brandt, *supra* note 67, at 295.

⁶⁹ See *Troxel*, 540 U.S. at 70; Brandt, *supra* note 67, at 295.

⁷⁰ See *Parham v. J.R.*, 442 U.S. 584, 602 (1979). The U.S. Supreme Court has stated that “[t]he fundamental liberty interest of natural parents in the care, custody, and management of their child does not evaporate simply because they have not been model parents or have lost temporary custody of their child to the State.” *Santosky v. Kramer*, 455 U.S. 745, 753 (1982).

⁷¹ See, e.g., J. BART KLIKA & JON R. CONTE, *THE ASPAC HANDBOOK ON CHILD MALTREATMENT* 222 (4th ed. 2017); *Foster Parents*, OHIO DEP'T OF JOB AND FAMILY SERV., <https://jfs.ohio.gov/ocf/fostercarelicensing.stm> (“When a [public child services agency] determines that a child can no longer live safely in his or her own home, a local court may give custody of the child to the agency, which then places him or her in a substitute care setting.”) [hereinafter *Ohio Foster Parents*].

⁷² See Weaver, *supra* note 1, at 21–23; Rankin, *supra* note 1, at 154; Coupet, *supra* note 1, at 603–04.

⁷³ For a discussion of why children are increasingly placed with kinship caregivers, see *supra* Introduction.

temporary custody or a permanent guardianship, as described below.⁷⁴ Other caregivers obtain a power of attorney granted by a birth parent, which allows them to make key health and educational decisions regarding the children in their care.⁷⁵ Still, the majority of kinship caregivers raise the children in their care without any sort of formal legal status.⁷⁶ The living arrangement is an informal, private agreement between the parents and caregivers.⁷⁷

Child welfare law in the U.S. recognizes that children “generally do better with legally permanent caretakers”⁷⁸ and promotes various pathways to permanency, including reunification with birth parents, as well as adoption and permanent guardianships. Foster care is treated as a temporary status and is supposed to be limited in duration.⁷⁹

This Part of the Article examines the pathways to permanency available to kinship caregivers, including informal kinship care, affidavits and powers of attorney, foster care, permanent guardianship, and adoption. Each permanency pathway is defined, a brief history of the pathway is provided, and the legal procedure and the constraints on children and caregivers in each pathway are analyzed. The subsidization schemes available for kinship caregivers for each of these permanency pathways are then discussed in Part II, and the human rights implications of these pathways are discussed in Part III.

A. Informal Kinship Care

The majority of children in kinship care do not have a court-recognized or legal relationship with their kinship caregiver.⁸⁰ The lack of legal decision-making authority causes problems when, for example, the kinship caregiver wishes to enroll the child in school or consent to medical treatment for the child.⁸¹ In addition, “the lack of clarity about a caregiver’s

⁷⁴ See *infra* section I.D.

⁷⁵ See, e.g., OHIO SUP. CT., CARETAKER AUTHORIZATION AFFIDAVIT, <https://www.supremecourt.ohio.gov/JCS/CFC/DRForms/caretakerAuthAff.pdf>.

⁷⁶ See, e.g., Coupet, *supra* note 1, at 604; Meara, *supra* note 40, at 129 (discussing grandparents’ legal status).

⁷⁷ See, e.g., Coupet, *supra* note 1, at 604; Meara, *supra* note 40, at 129.

⁷⁸ Gupta-Kagan, *supra* note 8, at 5.

⁷⁹ *Id.*

⁸⁰ See KIDS COUNT, *supra* note 4.

⁸¹ See, e.g., Coupet, *supra* note 1, at 608–09; Meara, *supra* note 40, at 129.

legal status likely undermines the stability of the caregiver-child relationship.”⁸²

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

B. Caregiver Affidavit or Power of Attorney

Birth parents are sometimes willing and able to provide authority and consent to kinship caregivers to make medical, educational, and other important decisions regarding the children in their care. Many states formally recognize a grant of authority from a legal parent to a kinship caregiver through a written affidavit or power of attorney.⁸⁸ These relatively

⁸² See, e.g., Coupet, *supra* note 1, at 609.

⁸³ See Tim Hasci, *From Indenture to Family Foster Care: A Brief History of Child Placing*, 74 CHILD WELFARE 162, 163 (1995) (noting that “[t]hroughout American history, some children from impoverished families have always been reared in the homes of other people”); Weaver, *supra* note 1, at 14–15; Coupet, *supra* note 1, at 605 n.28 (“The rearing of another’s child is among the oldest literary themes”). Kinship care has also long been popularized in literature and other popular culture. For example, in *The Secret Garden*, newly orphaned Mary Lennox is sent to live with her uncle. FRANCES HODGSON BURNET, A SECRET GARDEN (1911).

⁸⁴ See Hasci, *supra* note 83, at 163. Indentured servitude of children has been popularized in books, movies, etc. For example, Cinderella is forced to be a maid to her stepmother and stepsisters after her father dies. CINDERELLA (Walt Disney 1950).

⁸⁵ See Weaver, *supra* note 1, at 15–16; Coupet, *supra* note 1, at 597.

⁸⁶ See KIDS COUNT, *supra* note 4.

⁸⁷ See *id.*

⁸⁸ See, e.g., CAL. FAM. CODE § 6552 (2017) (providing that the Caregiver’s Authorization Affidavit authorizes enrollment of a minor in school and school-related medical care); DEL. CODE ANN. tit. 14, § 202(e)-(f) (2017) (providing that the Caregivers School Authorization confirms caregiver’s authority to enroll a child in school and providing that listed conditions must be met, such as the parent or guardian is incarcerated, unavailable due to natural disaster, etc.); GA. CODE ANN. § 19-9-124 (2018) (providing that Power of Attorney for the Care of a Minor Child allows a parent to delegate caregiving authority to a relative or nonrelative to enroll child in school, consent to medical treatment, etc.); OHIO REV. CODE ANN. § 3109.52 (2019) (noting that the Caretaker Affidavit or Residential Grandparent Power of Attorney allows grandparents to enroll children in their care in school and consent to medical treatment). However, some states do not allow parents to

new legal documents are readily available at very low cost to parents and caregivers.⁸⁹ The power of attorney or caregiver affidavit forms can be found at local children's agencies or online. The forms must be signed by the parent and caregiver, usually must be notarized, and are often filed with the appropriate court in the jurisdiction where the caregiver resides.⁹⁰ Reliance by kinship caregivers on the decision-making authority granted through an affidavit or power of attorney is problematic, however. These documents usually provide for temporary authority,⁹¹ and the parent can rescind the document at any time.⁹² In addition, most private health insurance providers require a court order "for a third party to add a child onto [a health] insurance plan."⁹³ Moreover, quite a few states do not have laws recognizing kinship caregiver's authority to consent to health care or educational placement on behalf of a child in their care even when they have an affidavit or power of attorney granted by the legal parent.⁹⁴ In these

grant authority to caretakers for consent for medical treatment for children. *See, e.g.*, CAL. FAM. CODE § 6552 (2017) (requiring caregiver to consult with parents of intent to authorize medical care, or to have attempted to contact parents to do so); DEL. CODE ANN. tit. 14 § 202 (2017) (permitting caregivers to make only school-based medical decisions).

⁸⁹The first Caregiver Affidavit statutes were passed in the 1970s and more are still being enacted today. *See, e.g.*, IDAHO CODE ANN. § 15-5-104 (as added by S.L. 1971, ch. 111, § 1, p. 233) (West 2019); GA. CODE ANN. § 19-9-122 (updated by Ga. L. 2018, p. 19, § 2-2/HB 159).

⁹⁰*See, e.g.*, KY. YOUTH ADVOC., CAREGIVER AUTHORIZATION AFFIDAVIT (last updated Oct. 28, 2014), http://kyyouth.org/wp-content/uploads/2014/10/CaregiverAffidavit_Model_10.28.14.pdf; OHIO SUP. CT., CARETAKER AUTHORIZATION AFFIDAVIT, <https://www.supremecourt.ohio.gov/JCS/CFC/DRForms/caretakerAuthAff.pdf>; MONT. KINSHIP NAVIGATOR PROGRAM, CARETAKER RELATIVE'S EDUCATIONAL AUTHORIZATION AFFIDAVIT, <http://www.montanagrandparents.org/documents/caretakerrelativeeduaff-1.pdf>.

⁹¹*See, e.g.*, IDAHO CODE ANN. § 15-5-104 (2019) (demonstrating that Power of Attorney assigned to anyone other than a grandparent or sibling of the child is only valid for up to six months); OHIO REV. CODE § 3313.64(F)(4) (Lexis Nexis 2019) (showing Caregiver Affidavit good for up to twelve months for school enrollment purposes).

⁹²Meara, *supra* note 40, at 130; Carole B. Cox, *Policy and Custodial Grandparents*, 11 MARQ. ELDER'S ADVISOR 281, 296–97 (2010).

⁹³Meara, *supra* note 40, at 130.

⁹⁴*See* AMER. BAR ASS'N, EDUCATIONAL CONSENT AND/OR SCHOOL ENROLLMENT LAW CHART (2006), http://www.americanbar.org/content/dam/aba/migrated/child/PublicDocuments/educational_consent_authcheckdam.pdf (listing state laws allowing caregivers to enroll children in school and make educational decisions; Alabama, Alaska, Arizona, Arkansas, Colorado, Florida, Georgia, Illinois, Kansas, Kentucky, Maine, Massachusetts, Michigan, Minnesota, Mississippi, Montana, Nebraska, Nevada, New Hampshire, North Dakota, Oregon, Pennsylvania, South Dakota, Tennessee, Texas, Virginia, Washington, West Virginia, and Wisconsin, all do not have laws recognizing a kinship caregiver's authority to consent to educational placement on behalf of a child in their care and thus are not listed

states, sometimes local policies dictate whether or not a caregiver may provide consent for a child in the parents' absence.⁹⁵ In other states, a court order is required for the kinship caregiver to make educational decisions on behalf of the children in their care.⁹⁶ In addition to these decision-making limitations, kinship caregivers with caregiver affidavits or powers of attorney may experience problems applying for government benefits on behalf of children in their care.⁹⁷ Individual states take different approaches to this issue.⁹⁸

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

C. Foster Care

Foster care is temporary, out-of-home care, provided by a state-approved family, group home, or other residential care facility.⁹⁹ Before placing children with non-kin, or a facility, the agency is required to first try to place the children with family members or close family friends in

on the chart) [hereinafter ABA CHART]; AMERICAN BAR ASSOCIATION, STATE EDUCATIONAL AND HEALTH CARE CONSENT LAWS (June 1, 2014), https://www.americanbar.org/groups/public_interest/child_law/resources/child_law_practiceonline/child_law_practice/vol-33/june-2014/state-educational-and-health-care-consent-laws/ (noting that eight U.S. states have healthcare power of attorney laws and twenty-four states have health care consent laws).

⁹⁵ See *id.*; Meara, *supra* note 40, at 131.

⁹⁶ See, e.g., WYO. STAT. ANN. § 3-2-302 (2019).

⁹⁷ Brandt, *supra* note 6767, at 292 (noting that kinship caregivers “may have difficulty securing public assistance benefits for a child”).

⁹⁸ States participate in a Federal block grant program in which they establish their own eligibility criteria for benefits. See Professional Responsibility and Work Reorganization Act of 1997, Pub. L. No. 104-193, 110 Stat. 2105, 2112–29 (1996).

⁹⁹ CHILDREN'S BUREAU, U.S. DEP'T HEALTH & HUMAN SERV., *Foster Care*, CHILD WELFARE INFO. GATEWAY, <https://www.childwelfare.gov/topics/outofhome/foster-care/>; 45 C.F.R. § 1355.20 (2012) (“Foster family home means . . . the home of an individual or family licensed or approved as meeting the standards established by the State licensing or approval authority(ies) or with respect to foster family homes on or near Indian reservations, by the tribal licensing or approval authority(ies), that provides 24-hour out-of-home care for children.”).

kinship care.¹⁰⁰ Sometimes these kinship caregivers are licensed as foster care providers.¹⁰¹ If kinship care is not an option, then the agency will try to place the children with a licensed foster family who are non-kin.¹⁰²

The foster care provider is responsible for providing shelter, food, clothing, supervision, education, and meeting the other needs of the children placed in their care.¹⁰³ In addition, the foster care provider must promote the safety, permanency, and well-being of the children in their care.¹⁰⁴ The goal of foster care is to safely return the children to their birth parents or, when that is not possible, to permanently place children with adoptive families or “other planned arrangements for permanency.”¹⁰⁵ The foster care provider cares for children until a court decides that the children can return home safely or that they should be placed with adoptive parents or permanent guardians.¹⁰⁶

While in foster care, children remain in the legal custody of the state child welfare agency, which has the ultimate decision-making authority over the children, including decisions regarding medical care, education, and whether or not to keep the children in the foster family home or move

¹⁰⁰ Forty-eight states, Puerto Rico, and the District of Columbia require preference or priority for relative placements. See PLACEMENT OF CHILDREN WITH RELATIVES, *supra* note 22, at 2. In addition, the federal government requires that kin be given notice that a child has been removed. See Fostering Connections to Success and Increasing Adoptions Act of 2008, Pub. L. No. 110-351, 122 Stat. 3949 (codified as amended in sections of 42 U.S.C.).

¹⁰¹ See PLACEMENT OF CHILDREN WITH RELATIVES, *supra* note 22, at 2; Fostering Connections to Success and Increasing Adoptions Act of 2008. For example, in Kansas, 2,202 children were living in foster care with relatives and 3,642 were living in foster care with non-relatives in 2016. See KIDS COUNT, *supra* note 4.

¹⁰² See PLACEMENT OF CHILDREN WITH RELATIVES, *supra* note 22, at 1.

¹⁰³ See, e.g., IND. DEP’T CHILD SERV., PROVIDER MANUAL: DCS MANAGED FOSTER PARENTS 3 (2013), <https://www.in.gov/dcs/files/RulesDCSfosterparentprovidermanual22513.pdf>.

¹⁰⁴ See *id.*; see also *What We Do*, CHILDREN’S BUREAU (2018), <https://www.acf.hhs.gov/cb/about/what-we-do>.

¹⁰⁵ CHILDREN’S BUREAU, TITLE IV-E FOSTER CARE (2012), <https://www.acf.hhs.gov/cb/resource/title-ive-foster-care> [hereinafter CHILDREN’S BUREAU FOSTER CARE].

¹⁰⁶ See, e.g., *Ohio Foster Parents*, *supra* note 71.

for permanent custody.¹⁰⁷ The foster care provider has daily responsibilities for the care of the children but lacks legal authority.¹⁰⁸

Foster care has a long history in North America. The first child was purportedly placed in foster care in 1636, only thirty years after the founding of the Jamestown Colony.¹⁰⁹ Pennsylvania became the first U.S. state to require a foster care license in 1885, and most states followed shortly thereafter with regulations requiring state supervision of foster parents.¹¹⁰ Subsidization of foster care by U.S. states also has a long history,¹¹¹ yet the federal government began subsidizing foster care much more recently.¹¹² In 1961, Title IV-A of the Social Security Act made federal matching funds available to states to cover the costs associated with children placed in foster care by a court order.¹¹³ Wide expansion of the foster care system followed federal subsidization, with over 100,000 children in foster care by 1976.¹¹⁴ Over 400,000 children are in foster care across the U.S. today.¹¹⁵

Approximately 50% of children in foster care are reunified with their birth parent(s) after being placed in foster care.¹¹⁶ Between 22-25% of children are adopted out of foster care and 10-15% are placed in permanent

¹⁰⁷ CHILDREN'S BUREAU FOSTER CARE, *supra* note 105 (stating that Children's Bureau supports states to "provide board and care payments for eligible children who are under the supervision of the state and placed in foster family homes or childcare institutions that are safe and licensed).

¹⁰⁸ *See id.*; *see also* CHILDREN'S BUREAU, *How do I become a foster parent?* <https://www.acf.hhs.gov/cb/faq/foster-care1> (stating that "[f]oster parents are approved by the state to provide care of children, including their home needs to meet basic standards of safety set by law and regulation").

¹⁰⁹ *See* Hasci, *supra* note 83; Christina Dugger Sommer, *Empowering Children: Granting Foster Children the Right to Initiate Parental Rights Termination Proceedings*, 79 CORNELL L. REV. 1200, 1200 (1994) (citing CHILDREN'S BUREAU, U.S. DEP'T HEALTH AND HUMAN SERV., NATIONAL ACTION FOR FOSTER CHILDREN: A SURVEY OF ACTIVITIES BASED ON REPORTS SUBMITTED BY STATES AND COMMITTEES 121, 122 (1975)).

¹¹⁰ *See History of Foster Care in the United States*, NAT'L FOSTER PARENT ASS'N, <https://nfpaonline.org/page-1105741> (last visited May 20, 2020); Deborah Schilling Wolfe et al., *Foster Care: Child Welfare's Responsibility and Challenge*, 30 APSAC ADVISOR 27, 27 (2013), <https://fieldcenteratpenn.org/wp-content/uploads/2013/05/2018.05.31-APSAC-Foster-Care-Child-Welfares-Responsibility.pdf>.

¹¹¹ Massachusetts was the first state to subsidize foster families in 1885. *See* Wolfe et al., *supra* note 110, at 27.

¹¹² *See* Hasci, *supra* note 83, at 175.

¹¹³ *See id.* For more on subsidization of foster care, *see infra* section II.B.

¹¹⁴ Hasci, *supra* note 83, at 175.

¹¹⁵ *See* KIDS COUNT, *supra* note 4.

¹¹⁶ AFCARS REPORT, *supra* note 7, at 3.

guardianships.¹¹⁷ The remaining 5-10% of children remain in foster care until they age out or are emancipated.¹¹⁸

D. Guardianship

Guardianship, sometimes referred to as custody, is a legal vehicle by which a caregiver can obtain legal custodial rights to the children in their care.¹¹⁹ Permanent guardianship grants legal custody to a non-parent—such as a kinship caregiver—for an indefinite term without terminating the legal relationship between the parents and child.¹²⁰ Temporary guardianship grants legal custody to a non-parent for a specific temporary period of time.¹²¹

In the U.S., guardianships have a longer legal history than adoption and have been an option in child welfare cases since at least the 1930s.¹²² Yet, guardianships were infrequently used within the child welfare system until the 1990s.¹²³ Until recently, child welfare law continued to focus on a “binary” approach¹²⁴—reunification with birth parents or termination of parental rights and adoption by new parents.¹²⁵ Today, approximately 9-10% of children exiting foster care in the U.S. enter into guardianships.¹²⁶ As of 2013, at least 33,015 children were in permanent guardianships across the U.S.¹²⁷

¹¹⁷ *Id.*

¹¹⁸ *Id.*

¹¹⁹ See Gupta-Kagan, *supra* note 8, at 10.

¹²⁰ See Raymond C. O’Brien, *Reasonable Efforts and Parent-Child Reunification*, 2013 MICH. ST. L. REV. 1029, 1041 (2013) (“[T]he court may grant a state’s petition to award the relatives guardianship over the child pending reunification. Then, if there is at least clear and convincing evidence of the parent’s failure to cooperate with state efforts to be determined at a subsequent hearing, the parent’s parental rights may be terminated, and the child can be placed for adoption with other parties.”); Glenna Goldis, *When Family Courts Shun Adversarialism*, 18 UC DAVIS J. JUV. L. & POL’Y 195, 209 (2014); Gupta-Kagan, *supra* note 8, at 13.

¹²¹ See, e.g., MASS. GEN. LAWS ch. 190B, § 5-204(b) (2012).

¹²² Gupta-Kagan, *supra* note 8, at 13.

¹²³ *Id.*

¹²⁴ *Id.* at 5.

¹²⁵ *Id.*

¹²⁶ See CHILDREN’S BUREAU, U.S. DEP’T HEALTH AND HUMAN SERV., CHILD WELFARE OUTCOMES 2010-2014: REPORT TO CONGRESS 38 (2014), https://www.acf.hhs.gov/sites/default/files/cb/cwo10_14.pdf#page=38.

¹²⁷ This was the number of children receiving GAP assistance in 2013. See CHILDREN’S DEF. FUND, TITLE IV-E GUARDIANSHIP ASSISTANCE PROGRAM (GAP): AN UPDATE ON

States vary widely in terms of statutes and common law regarding guardianships and child custody in general. Some states allow temporary guardianship for a period of ninety days, with possible renewal periods.¹²⁸ Others allow a temporary guardianship to continue much longer or indefinitely.¹²⁹ Practices also vary regarding the petition required for guardianship, proof of facts required, and whether or not a hearing is required.¹³⁰ In Ohio, for example, a kinship caregiver can petition the court and receive temporary custody of children almost immediately through an ex parte motion, without a hearing, in the case of an emergency.¹³¹ All states require that the child already be living with the caregiver petitioning for temporary guardianship.¹³² All guardianships are available only by court order and not through any non-legal avenue.¹³³ Some states require that the petitioner for guardianship provide clear and convincing evidence that the parents are unfit.¹³⁴

IMPLEMENTATION AND MOVING GAP FORWARD 7 (2015), <http://www.grandfamilies.org/Portals/0/Title%20IV-E%20GAP%20Update.pdf> [hereinafter TITLE IV-E GAP].

¹²⁸ See, e.g., MASS GEN. LAWS ch. 190B, § 5-204(b) (2019).

¹²⁹ See, e.g., OHIO REV. CODE ANN. § 2111.46 (2019).

¹³⁰ Goldis, *supra* note 120, at 209–10; see also Brandt, *supra* note 67, at 300–12 (discussing de facto custodian statutes enacted across the U.S. that provide a clear process for caregivers who seek a court ordered legal status with regard to the children in their care).

¹³¹ I have an ex parte motion and judge’s decision on file reflecting this procedure.

¹³² Brandt, *supra* note 67, at 300–12.

¹³³ See, e.g., Adoption of Easley, 61 Pa. D. & C.2d 519, 521 (Pa. Com. Pl. 1973) (“Adoption was unknown at common law It exists in Pennsylvania solely by virtue of statute”) (citations omitted); Jennifer J. Monthie, *The Myth of Liberty and Justice for All: Guardianship in New York State*, 80 ALB. L. REV. 947, 947 (2016) (“Guardianship is a legal process that terminates a person’s right to make and act on some or all decisions and grants that power to another individual.”); *Guardianship*, JUD. COUNCIL OF CAL. (2019), <https://www.courts.ca.gov/selfhelp-guardianship.htm> (noting that “[g]uardianship is when a court orders someone” to take on the role of guardian); *Guardianship of a Minor*, MASS. GUARDIANSHIP ASS’N (2018), <http://www.massguardianshipassociation.org/information/guardianship-of-a-minor/> (noting that “[g]uardianship is a legal process”); *Purposes and Types of Guardianship*, ST. NEV. SELF-HELP CTR. (2019), <http://selfhelp.nvcourts.gov/self-help/guardianship/overview/purpose-and-types-of-a-guardianship> (“Guardianship means obtaining the legal authority to make decisions for another person. A ‘guardian’ is the person appointed by the court to make decisions on behalf of someone else.”). *But see Short-Term Temporary Guardianship*, ST. NEV. SELF-HELP CTR. (2019), <http://selfhelp.nvcourts.gov/self-help/guardianship/filing-for-guardianship-over-a-child/child-guardianship-if-the-parents-consent/private?enter=1> (“If a child only needs a guardian for six months or less, the parents and guardians can sign temporary guardianship papers. This is a private agreement that does not require a judge’s approval.”).

¹³⁴ See, e.g., *In re T.J.*, 666 A.2d 1, 11, 16 (D.C. 1995).

The legal status of permanent guardianship is granted by a court of law pursuant to a court order giving physical custody of the child and decision-making powers to someone other than the child's legal parents.¹³⁵ A permanent guardianship also does not terminate the child's parents' rights; the parents are given the status of non-custodial parents, and the rights and obligations of the parents are detailed in the court order.¹³⁶ The parents typically retain visitation rights, as well as other ancillary rights such as the right to choose the religious education of the child.¹³⁷ The parents also have the right to petition the court to terminate or modify the guardianship later on.¹³⁸ The number of children in permanent guardianships is difficult to track. However, at least 33,000 children received guardianship assistance in 2013, and the total number of children in kinship guardianships is much higher as not all are eligible for assistance.¹³⁹

Unlike foster care and caregiver affidavits, guardianships require a kinship caregiver to petition a court of law, pay court costs, attorney's fees, and more, and navigate the legal process. While some caregivers may be savvy enough to find an attorney or pro se forms online, many will not. The court process also takes time—time away from work and time away from the children in their care.¹⁴⁰ The upfront out-of-pocket costs also pose a substantial impediment for many kinship caregivers, especially those living in poverty.¹⁴¹

Permanent guardianship is an increasingly popular alternative to adoption.¹⁴² Research has shown that ongoing relationships with parents benefit children immensely throughout life, regardless of the parents' circumstances and even when there is a history of abuse, neglect, and

¹³⁵ See, e.g., Monthie, *supra* note 133, at 947.

¹³⁶ Gupta-Kagan, *supra* note 8, at 13.

¹³⁷ *Id.*

¹³⁸ See, e.g., D.C. CODE § 16-2395(a) (2001) ("Any party may move the court to modify, terminate, or enforce a guardianship order . . ."); *Id.* § 16-2395(d) (requiring proof of "a substantial and material change in the child's circumstances . . . and that it is in the child's best interests to modify or terminate the guardianship order."). See also Gupta-Kagan, *supra* note 8, at 13.

¹³⁹ See *infra* section II.C; see also TITLE IV-E GAP, *supra* note 127, at 7.

¹⁴⁰ Court hearings often require caregivers to find child care as children are not allowed in the courtroom. See, e.g., Gupta-Kagan, *supra* note 8, at 14; Testa & Miller, *supra* note 49.

¹⁴¹ Other scholars and practitioners point out that many caregivers may be uncomfortable with initiating adversarial proceedings against the parents, in addition to these other identified obstacles. See, e.g., Gupta-Kagan, *supra* note 8, at 14.

¹⁴² See Gupta-Kagan, *supra* note 8, at 5.

dependency.¹⁴³ Moreover, “guardianships provide permanency that is just as secure, lasting, and safe for children as adoption.”¹⁴⁴ However, while parents may readily agree to a temporary guardianship, especially in exigent circumstances, they may be more reluctant to agree to a permanent guardianship, and the burden of evidence required by courts to establish a permanent guardianship is usually higher than a temporary guardianship making the court proceedings more contentious.¹⁴⁵ All of this will weigh heavily upon the shoulders of a kinship caregiver who may be struggling to get by as it is.¹⁴⁶

E. Adoption

Kinship adoption, or the adoption of family members by non-parent relatives or family friends, may be as old as “human society itself,”¹⁴⁷ yet adoption practices have dramatically shifted over time.¹⁴⁸ Adoptions in ancient times focused on the rights of inheritance, the right to take the adoptive parents’ name, and the termination of birth parents’ rights.¹⁴⁹ Ancient law did not permit women, persons with children of their own, or persons of reproductive age to adopt.¹⁵⁰ In addition, the adoption of minors was prohibited.¹⁵¹ The Code of Hammurabi and the Napoleonic Code both provided for the adoption of children and granted adoptive children equal

¹⁴³ See *id.*; see also Eliza Patten, *The Subordination of Subsidized Guardianship in Child Welfare Proceedings*, 29 N.Y.U. REV. L. & SOC. CHANGE 237, 257 (2004).

¹⁴⁴ Gupta-Kagan, *supra* note 8, at 13.

¹⁴⁵ See *id.* at 15, 41.

¹⁴⁶ See also Coupet, *supra* note 1, at 609 (“Not surprisingly, the process of litigating these issues [between kinship caregivers and parents], as well as the outcomes, can seriously strain family relationships rather than strengthen or support them.”).

¹⁴⁷ The practice of child adoption is present in the bible: Moses was adopted by the Pharaoh’s daughter. See Exodus 2:10; see also U.N. DEP’T ECON. AND SOCIAL AFFAIRS, CHILD ADOPTION: TRENDS AND POLICIES 5 (2009), <http://www.un.org/en/development/desa/population/publications/policy/adoption-trends.shtml> (“Literary and legal sources indicate that adoption was widely practiced in many ancient societies From the frequently cited example of the adoption of Moses to that of the Emperor Octavian Augustus, adoption played a ‘major part in the traditional law of many Eurasian societies’ While adoption may be as old as human society itself . . . the motivations for adoption have changed markedly over time.”) (citations omitted) [hereinafter U.N. DESA].

¹⁴⁸ U.N. DESA, *supra* note 147, at 5.

¹⁴⁹ *Id.*

¹⁵⁰ *Id.*

¹⁵¹ *Id.*

inheritance rights with birth children, but both codes also prohibited adoptions without the consent of the child's birth parents.¹⁵²

In the 18th century, adoptions largely faded from the legal framework.¹⁵³ In corollary, orphanages, children placed into indentured servitude, and work houses for children all became popular.¹⁵⁴ It was not until the late 19th century that the law began to focus on the family as the most appropriate setting for raising a child.¹⁵⁵

The first “modern” adoption law, focusing on the best interests of the child, was enacted in 1851 in Massachusetts.¹⁵⁶ The Massachusetts law gave the judge the authority to assess whether the adoptive parents had “sufficient ability” to care for and educate the child.¹⁵⁷ This was a dramatic departure from previous adoption laws.¹⁵⁸ This child welfare approach to adoption law did not truly take root across the U.S. and around the world until the 1940s.¹⁵⁹ In addition, many “developing countries” did not pass adoption laws with this child welfare approach in mind until the 1980s and 1990s.¹⁶⁰

¹⁵² HAMMURABI, THE CODE OF HAMMURABI KING OF BABYLON 71 (Robert F. Harper trans., 1904); Napoleon Bonaparte, THE CODE NAPOLEON: OR, THE FRENCH CIVIL CODE 96–97 (William Benning 1867); U.N. DESA, *supra* note 147, at 5.

¹⁵³ U.N. DESA, *supra* note 147, at 10.

¹⁵⁴ *Id.* at 11; *see also* William K. Yost, *Adoption Laws of Ohio: A Critical and Comparative Study*, 21 CLEV. ST. L. REV. 1, 1 (1972) (“As a partial and very limited substitute for the care and training of children by persons other than their parents there developed the concepts of the apprentice and the indentured servant which survived well into the 19th century.”).

¹⁵⁵ U.N. DESA, *supra* note 147, at 17. *But see* WILLIAM H. SLINGERLAND, CHILD-PLACING IN FAMILIES 27 (Russell Sage Foundation 1970) (1918) (discussing ancient Jewish laws and customs placing children lacking parental care with members of the households of other relatives), <https://www.russellsage.org/child-placing-families>.

¹⁵⁶ *See* Act to Provide for the Adoption of Children, 1851 Mass. Acts ch. 324 § 1-8 (current version at MASS. GEN. LAWS ch. 210 §§ 1-14 (2019)); U.N. DESA, *supra* note 147, at 13.

¹⁵⁷ *See* Act to Provide for the Adoption of Children, 1851 Mass. Acts ch. 324 § 1-8 (current version at MASS. GEN. LAWS ch. 210 §§ 1-14 (2019)); U.N. DESA, *supra* note 147, at 13.

¹⁵⁸ U.N. DESA, *supra* note 147, at 13. *See generally* SANFORD N. KATZ, FAMILY LAW IN AMERICA (2d ed. 2015) (examining the state of family law in modern America).

¹⁵⁹ *See* U.N. DESA, *supra* note 147, at 15 (“A large number of countries enacted new adoption laws during or in the aftermath of the Second World War . . . During 1940-1980, several countries also introduced amendments to earlier legislation. Many of these changes were aimed at broadening the effects of adoption and at better protecting the adopted person’s welfare.”).

¹⁶⁰ *See id.*

Today, over 30% of the more than 50,000 total annual adoptions in the U.S. occur between kinship caregivers and children in their care.¹⁶¹ Adoptions offer kinship caregivers a permanent solution to legal status and decision-making challenges. If an adoption is approved, the court order is permanent and cannot be modified or terminated easily.¹⁶² The birth parents' rights and responsibilities are usually permanently terminated,¹⁶³ and the adopted child is treated as an equal with any birth children of the adoptive parents for inheritance, decision-making, and all other purposes.¹⁶⁴ Some adoptions are open, meaning that the adopted children are able to maintain contact with their birth parents. However, the majority of birth parents lose the rights to communication and visitation after the adoption order is in place.¹⁶⁵

Because adoptions are permanent and parents' rights to the care, custody, and control of children are fundamental under U.S. law, adoption proceedings are lengthy, time-consuming, and costly.¹⁶⁶ This is true even if

¹⁶¹ See CHILDREN'S BUREAU, U.S. DEP'T HEALTH AND HUMAN SERVICES, DISTRIBUTION OF THE ADOPTIVE PARENT(S) RELATIONSHIP TO THEIR ADOPTED CHILD DURING FY 2014 (2014), https://www.acf.hhs.gov/sites/default/files/cb/prior_relation2014.pdf.

¹⁶² Margaret M. Mahoney, *Permanence and Parenthood: The Case for Abolishing the Adoption Annulment Doctrine*, 42 IND. L. REV. 639, 649 (2009) ("Most courts ruling on parental requests for the termination of all ties to their children assert a strong presumption that children's interests are not served by removing a parent from the legal picture, at least where no dependency adjudication has been made and no adoption by another adult is pending."). See also Gupta-Kagan, *supra* note 8, at 10–19; KATZ, *supra* note 158, at 176; JOHN DE WITT GREGORY ET AL., UNDERSTANDING FAMILY LAW 199 (4th ed. 2005).

¹⁶³ However, "non-exclusive adoptions" are available in California, where no termination of parental rights is involved. S.B. 274, § 1(a), 2013–2014, Reg. Sess. (Cal. 2013) (enacted), https://leginfo.ca.gov/faces/billNavClient.xhtml?bill_id=201320140SB274.

¹⁶⁴ See GREGORY ET AL., *supra* note 162, at 183.

¹⁶⁵ See Solangel Maldonado, *Permanency v. Biology: Making the Case for Post-Adoption Contact*, 37 CAP. U. L. REV. 321, 324 (2008) ("For most of the twentieth century, parents who voluntarily relinquished a child for adoption or whose parental rights were involuntarily terminated had no right to contact or information about their children."); see also Gupta-Kagan, *supra* note 8, at 23 ("Almost 40 percent of all non-kinship adoptive parents report that their child had some postadoption contact with birth families.").

¹⁶⁶ See CHILDREN'S BUREAU, U.S. DEP'T HEALTH AND HUMAN SERV., PLANNING FOR ADOPTION: KNOWING THE COSTS AND RESOURCES 2–4 (2016), https://www.childwelfare.gov/pubpdfs/s_costs.pdf (discussing adoption costs and noting that home study fees alone can cost between \$1,500–4,000) [hereinafter PLANNING FOR ADOPTION]. But see Jack Darcher, *Market Forces in Domestic Adoptions: Advocating a Quantitative Limit on Private Agency Adoption Fees*, 8 SEATTLE J. SOC. JUST. 729, 735 (2010) ("The only costs to adoptive parents in public adoption usually come from legal fees, which are minimal and are often reimbursed by the state.").

the birthparents agree to the adoption.¹⁶⁷ The fees and the costs associated with adoption proceedings are high,¹⁶⁸ especially for families living in poverty. What is more, the court costs and additional fees associated with the adoption must often be paid upfront.¹⁶⁹

In thirty-five (35) states, when a parent places the child directly with a relative, the laws provide for a streamlined adoption process, such as not requiring a preplacement assessment or home study unless specifically ordered by the court.¹⁷⁰ All states require background checks of criminal history and child abuse central registries for the adopting relatives and other adults in the household.¹⁷¹

In Sharon Gurley's case, she would have been required to pay over \$3,000 upfront for a home study, background checks, a fire marshal certificate, court costs, and more, before the court would move forward with her petition to adopt her granddaughter. None of those fees could be waived pursuant to a poverty affidavit or similar procedure and none of the fees could be paid through a payment schedule. No government agency provides subsidies for these fees for informal kinship caregivers living in poverty in Ohio. In addition, if Sharon had not been lucky enough to obtain free legal assistance from the law clinic, she would have had to pay attorney's fees.¹⁷²

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

¹⁶⁷ See GREGORY ET AL., *supra* note 162, at 195–99.

¹⁶⁸ See PLANNING FOR ADOPTION, *supra* note 166, at 2–4. *But see* Darcher, *supra* note 166, at 734, 736.

¹⁶⁹ See *infra* Part II.

¹⁷⁰ See Bartlett, *Fifty-State Survey*, *supra* note 53.

¹⁷¹ PLACEMENT OF CHILDREN WITH RELATIVES, *supra* note 22, at 4.

¹⁷² Many prospective adoptive parents living in poverty will not be able to find free legal assistance, as free legal services are limited. A recent study in Boston found that eighty percent of perspective clients with family law issues were turned away from civil legal aid organizations due to lack of resources within those organizations. See *Fiscal Year 2016 Budget Request*, LEGAL SERV. CORP. (2016), <http://www.lsc.gov/media-center/publications/fy-2016-budget-request> [hereinafter *LSC Budget Request*].

II. CURRENT SUBSIDIZATION SCHEMES

Caring for children is expensive. Children need healthy food, clean clothes and new shoes that fit properly, safe housing in an adequate school district or private school fees, healthcare, dental care, child care, books, toys, tutors, sports and music classes, and more. Children living with special needs may require additional supports, including service animals, special school fees, specialized caregivers, counseling and therapy, electronic and other supportive devices, and more, all of which require additional expenditures.¹⁷³ Subsidies are given to foster care families, and to kinship caregivers in certain circumstances, to cover the long list of child-related expenses that would otherwise be paid by the children's birth parents.¹⁷⁴ When adoption or permanent guardianship are options for foster children, the state or federal government subsidizes at least some of the fees related to the legal proceedings as well. In addition, some subsidies also include post-adoption or post-guardianship payments for children that had been in foster care.

In 2016, the federal government spent approximately \$9.73 billion, or .25% of the total federal budget, on the child welfare system, including expenditures to cover these subsidization programs.¹⁷⁵ State by state, expenditures on child welfare programs vary. The state of California spends a total of \$21.04 - \$26.27 per day per child in foster care and state of

¹⁷³ See, e.g., Mary L. Gavin, *Kids with Special Needs*, KIDSHEALTH (July 2016), <https://kidshealth.org/en/kids/special-needs.html>; KAN. SPECIAL HEALTH CARE NEEDS PROGRAM, KAN. DEP'T HEALTH AND ENV'T, FINANCIAL IMPACT OF RAISING CHILDREN WITH SPECIAL HEALTH CARE NEEDS 1-6 (2013), <https://kdheks.gov/shcn/download/Finances.pdf>.

¹⁷⁴ See USING SUBSIDIZED GUARDIANSHIP, *supra* note 9, at 6-11 (comparing subsidies for foster care and permanent guardianship and explaining eligibility requirements and funding sources for subsidized guardianship). Sometimes the birth parents are paying child support to the state, which in turn uses the child support to cover at least part of the foster care or permanent guardianship payments. See, e.g., 42 U.S.C. § 654(4) (2020) (requiring states to collect child support for children in Title IV-E care); OFFICE OF INSPECTOR GEN., U.S. DEP'T HEALTH AND HUMAN SERV., CHILD SUPPORT FOR CHILDREN IN STATE FOSTER CARE i (1994), <https://oig.hhs.gov/oei/reports/oei-04-91-00980.pdf> (noting that states must collect child support from parents of children in Title IV-E foster care and recommending states also collect from parents of children in non-Title IV-E care); CHILD SERVICES, ILL. DEP'T HEALTHCARE AND FAMILY SERV., *Child Support and Foster Care Collaboration*, ILLINOIS.GOV, <https://www.illinois.gov/hfs/ChildSupport/FormsBrochures/Pages/hfs8248.aspx> (last visited Mar. 11, 2020) (explaining that child support is used to help offset the cost of foster care).

¹⁷⁵ FIRST FOCUS, CHILDREN'S BUDGET 2016 17-18 (2017), <https://firstfocus.org/resources/report/childrens-budget-2016/>.

Missouri spends \$9.27 - \$12.23.¹⁷⁶ These are huge expenditures for both the state and federal government, and yet the details of these subsidization programs are relatively unknown to the general public.

The current subsidization schemes discussed below arise out of a complicated interaction between state and federal law.¹⁷⁷ States provide payments to adoptive families and permanent guardians based on established eligibility criteria, and then the states are reimbursed by the federal government for those payments under Title IV-E of the Social Security Act.¹⁷⁸ The federal criteria centers on confusing language defining children with “special needs” in the Social Security Act,¹⁷⁹ which are rendered even more confusing by various state court interpretations¹⁸⁰ and guidance provided by the U.S. Health and Human Services Department.¹⁸¹ The eligibility criteria are clearer for permanent guardianship subsidies than for adoptions,¹⁸² but most states have limited the availability of these guardianship subsidies.¹⁸³ Overall, the state and federal subsidies focus first on adoptions out of foster care, then permanent guardianships, and lastly on other permanency pathways, including informal or private kinship care.

This Part of the Article discusses the state and federal government subsidization schemes, including the limits of the subsidies, currently in place for each of the permanency pathways described above. This Part also discusses state waivers of the nonrecurring costs related to legal

¹⁷⁶ KERRY VOOGHT ET AL., CHILD TRENDS, FAMILY FOSTER CARE REIMBURSEMENT RATES IN THE U.S. 9, 13 (2013), <https://www.childtrends.org/wp-content/uploads/2013/04/Foster-Care-Payment-Rate-Report.pdf> (demonstrating that difference in daily cost of child care is partially dependent on whether or not the child has special needs).

¹⁷⁷ See 42 U.S.C. § 673 (2020).

¹⁷⁸ See 42 U.S.C. §§ 673(a)(3), (a)(6), (d).

¹⁷⁹ See 42 U.S.C. § 673(c).

¹⁸⁰ See, e.g., *Glanowski v. New York State Dep’t of Family Assistance*, 225 F. Supp. 2d 292, 296–300 (W.D.N.Y. 2002) (finding that Title IV-E financial assistance is not available for privately adopted children with special needs because state law requires the child to have been in the care of social services, a voluntary authorized agency, or a foster parent); *In re SH RG ex rel. Northstar Adoption Assistance*, 907 N.W.2d 680, 685–86 (2018) (finding that while the child satisfied the eligibility criteria for adoption assistance under Minnesota law, she was excluded under state law from receiving it because she was privately adopted).

¹⁸¹ CHILDREN’S BUREAU, U.S. DEP’T HEALTH AND HUMAN SERV., CHILD WELFARE POLICY MANUAL AT § 8.1 (2017), https://www.acf.hhs.gov/cwpm/public_html/programs/cb/laws_policies/laws/cwpm/index.jsp [hereinafter CHILD WELFARE POLICY MANUAL].

¹⁸² See 42 U.S.C. § 673(d).

¹⁸³ See *infra* section II.C.

proceedings for adoptions and permanent guardianships. To further explain each of the subsidization schemes discussed, two charts are available in Appendices A and B.

A. Informal Kinship Care Subsidies

Informal kinship caregivers living in poverty may be eligible for limited types of financial assistance and other services for the children in their care. For example, informal kinship caregivers and the children in their care can receive monthly cash assistance through the Temporary Assistance to Needy Families (TANF) benefit program.¹⁸⁴ The kinship caregiver must meet the eligibility requirements of TANF, including low income and other financial resource caps.¹⁸⁵ TANF payments are typically significantly lower than the foster care and guardianship payments discussed in sections II.B and C below.¹⁸⁶

Informal kinship caregivers living in poverty may be eligible to receive benefits for the children in their care from the Supplemental Nutrition Assistance Program (SNAP)¹⁸⁷ and Medicaid or the Children's Health Insurance Program (CHIP),¹⁸⁸ as well as child support payments from the legal parents when available.¹⁸⁹ Informal kinship caregivers may also be able to claim the children in their care as dependents for tax

¹⁸⁴ The Temporary Assistance to Needy Families (TANF) program is commonly known as “welfare” and was established by the Personal Responsibility and Work Opportunity Reconciliation Act of 1996, Pub. L. No. 104-193, 110 Stat. 2110 (1996) (codified as amended at 42 U.S.C. §§ 601-619 (2019)).

¹⁸⁵ *See id.*

¹⁸⁶ *See Note, The Policy of Penalty in Kinship Care*, 112 HARV. L. REV. 1047, 1051 n.32 (1999) (“The program was originally designed to provide support to the children of divorced or widowed women so that these mothers could remain in the home with their children.”) [hereinafter *The Policy of Penalty*].

¹⁸⁷ *See* U.S. DEPARTMENT OF AGRICULTURE, SUPPLEMENTAL NUTRITION ASSISTANCE PROGRAM, <https://www.fns.usda.gov/snap/supplemental-nutrition-assistance-program-snap>.

¹⁸⁸ *See* MEDICAID & CHIP, HEALTHCARE.GOV, <https://www.healthcare.gov/medicaid-chip/childrens-health-insurance-program/>. *See* OHIO DEPARTMENT OF JOB AND FAMILY SERVICES, OHIO RESOURCE GUIDE FOR RELATIVES CARING FOR CHILDREN 24–26 (2018). SNAP was formerly referred to as “food stamps.”

¹⁸⁹ For example, in Ohio, a child must live with the caregiver full time and the amount of the child support order will depend on the parents' ability to pay and the needs of the child. If the caregiver receives TANF benefits and the parents pay child support, the child support will be intercepted by the county or state. *See id.* *But see* 1-13 ANDERSON'S OHIO DOMESTIC RELATIONS PRACTICE MANUAL § 13.07.

purposes, if they meet the applicable qualifying relative and residency tests, among other requirements.¹⁹⁰

In addition, twenty-nine (29) states have Kinship Navigator Programs, which help provide specialized service referrals to kinship caregivers, as well as other services such as support groups for kinship caregivers and some legal services as well.¹⁹¹ The children's services agency contracts with the Kinship Navigator Program's community support specialists to assist kinship caregivers to find and apply for needed services.¹⁹² These Kinship Navigator Programs are available to both informal kinship caregivers and caregivers with formal legal statuses, as described below.¹⁹³

Most of these subsidies for kinship caregivers are relatively new and are welcomed by caregivers and children's service agencies alike.¹⁹⁴ The cost of these minimal subsidies pales in comparison to the more than \$6 billion per year that it would cost if the 2.6 million children in kinship care entered into foster care.¹⁹⁵

When informal kinship caregivers living in poverty seek to adopt or obtain permanent guardianship for the children in their care, they face significant barriers. While foster parents are usually eligible to receive funding to cover at least some of the fees related to the legal proceedings,

¹⁹⁰ INTERNAL REVENUE SERVICE (IRS), PUBLICATION 501, EXEMPTIONS, STANDARD DEDUCTION, AND FILING INFORMATION (2017), https://www.irs.gov/publications/p501#en_US_2017_publink1000220942 [hereinafter IRS EXEMPTIONS].

¹⁹¹ The State must decide what definition to use for "kinship caregiver" for eligibility purposes. See GRANDFAMILIES.ORG, LIST OF KINSHIP NAVIGATOR PROGRAMS (April 2018), <https://www.grandfamilies.org/Topics/Kinship-Navigator-Programs/Kinship-Navigator-Programs-Summary-Analysis>. These Kinship Navigator Programs were established as part of the Fostering Connections to Success and Increasing Adoptions Act of 2008 as part of a three-year pilot program. See *id.* As of 2018, the federal government provides a dedicated stream of funding for Kinship Navigator Programs. See Children's Defense Fund, Family First Prevention Services Act of 2018, <https://www.childrensdefense.org/wp-content/uploads/2018/08/ffpsa-pages-from-law-language.pdf>.

¹⁹² See generally S. T. Sutphin, *Using Kinship Navigators to Assess the Needs of Kinship Caregivers* 50, in THE CONTEMPORARY JOURNAL OF RESEARCH, PRACTICE AND POLICY (2015), <http://scholarworks.wmich.edu/grandfamilies/vol2/iss1/3>.

¹⁹³ See *id.*

¹⁹⁴ See *id.*

¹⁹⁵ See Coupet, *supra* note 1, at 607 ("Conservative estimates suggest that if even half of the two million children being raised informally or privately by relatives without parents in the home were to enter the foster care system, it would cost taxpayers \$6.5 billion a year."). Note, however, that this article was written in 2004; these numbers are likely higher now.

as well as to receive post-adoption payments and tax breaks, informal kinship caregivers are often ineligible to receive funds upfront or a reimbursement of costs.¹⁹⁶ These barriers to permanency exist whether or not the informal kinship caregiver is living in poverty and are at the core of the arguments in Part III below.

B. Foster Care Subsidies

Licensed foster care providers are eligible for a multitude of payments and support services. Foster care providers can collect per diem financial assistance payments, receive reimbursement for other costs, as well as services for children in their care.¹⁹⁷ Foster care providers can also claim foster children in their care for tax purposes as dependents, if they meet the applicable residency test, among other requirements.¹⁹⁸ Further, foster care providers may be eligible for additional subsidies if they decide to move for permanent guardianship or adoption, as described in sections II.C through E below.

State by state, and county by county, the amount of per diem financial assistance payments available to foster care providers varies greatly.¹⁹⁹ Foster care payment rates also may differ within a county based on the age of the child in care and the scope of the child's needs.²⁰⁰ States also vary widely in how they fund the child welfare system, including how funding is allocated for foster care payments and reimbursements. Some states, such as Louisiana,²⁰¹ rely heavily on federal reimbursement of foster care payments through the Title IV-E Foster Care Program. Other states rely heavily on state funding to support their child welfare system.²⁰²

¹⁹⁶ See *infra* section II.D. Informal caregivers adopting children in their care would be eligible to receive adoption tax credits, but these are not applicable for people living in poverty.

¹⁹⁷ See 42 U.S.C. § 672; see also FAMILY FOSTER CARE REIMBURSEMENT RATES, *supra* note 176, at 4. Other reimbursable expenses include for clothing, hygiene, daycare, educational, and medical costs.

¹⁹⁸ IRS EXEMPTIONS, *supra* note 190.

¹⁹⁹ See VOOGHT ET AL., *supra* note 176, at 10–18.

²⁰⁰ *Id.*

²⁰¹ See Kristina Rosinsky & Sarah Catherine Williams, *Child Welfare Financing SFY 2016: A Survey of Federal, State, and Local Expenditures* (2016), <https://www.childtrends.org/research/research-by-topic/child-welfare-financing-sfy-2016>.

²⁰² See, e.g., SHELLEY WATER BOOTS ET AL., THE URBAN INSTITUTE, STATE CHILD WELFARE SPENDING AT A GLANCE: A SUPPLEMENTAL REPORT TO THE COST OF PROTECTING VULNERABLE CHILDREN 10 (1999) (noting that Alaska received 78% of its

To be eligible for federal reimbursement of the foster care payments through the Title IV-E Foster Care Program, states must follow the federal guidelines regarding financial assistance payments for foster care.²⁰³ For example, the guidelines require that the placement of the child in foster care must have occurred pursuant to a voluntary placement agreement or a judicial determination.²⁰⁴ This means that the children's services agency must have been officially involved in the foster care placement, which rules out some children placed pursuant to kinship diversion programs. In addition, the child must have been eligible to receive Aid to Families with Dependent Children (AFDC), based on the income and resources of his or her birth parents or legal guardian before the removal occurred.²⁰⁵ The child must also be placed with a licensed foster care provider that meets safety requirements.²⁰⁶

For many years, states refused to provide subsidies to support relatives in foster care placements.²⁰⁷ In 1979, the Supreme Court held that that practice violated federal law.²⁰⁸ States must provide equal payments to relatives and non-relatives in foster care placements that qualify for Title IV-E payments.²⁰⁹ However, states need not provide equal payments to relatives and non-relatives in foster care placements that do not qualify for Title IV-E payments.²¹⁰ This remains a problem for foster parents who are relatives in many states.

funding for child welfare from the state government in 1999, and 0% from local governments).

²⁰³ See 42 U.S.C. § 672.

²⁰⁴ See 42 U.S.C. § 672(a)(2)(A).

²⁰⁵ See 42 U.S.C. § 672(a)(1)(B). The foster care provider's income prior to or during the placement is *not* part of the eligibility requirement.

²⁰⁶ See 42 U.S.C. § 672(b). There are some—temporary—exceptions for the licensing requirement listed under 42 U.S.C. § 672(i).

²⁰⁷ See *The Policy of Penalty*, *supra* note 186, at 1050.

²⁰⁸ See *Miller v. Youakim*, 440 U.S. 125, 126–28 (1979) (holding that the language and legislative history of an Illinois law that excluded foster children residing in homes of relatives from receiving subsidies conflicted with Congress' "overriding goal of providing the best available care for all dependent children removed from their homes pursuant to a judicial determination of neglect").

²⁰⁹ See, e.g., *D.O. v. Glisson*, 847 F.3d 374, 383 (6th Cir. 2017) ("To the extent the Cabinet's failure to make maintenance payments turns on the distinction between relative and non-relative foster care providers, it plainly violates federal law.").

²¹⁰ See *Lipscomb v. Simmons*, 962 F.2d 1374, 1376 (9th Cir. 1992); *King v. McMahon*, 186 Cal. App. 3d 648, 669 (1986).

In addition to payments and reimbursements, foster care providers have access to information, training, and additional services provided by the caseworkers and other staff at the children's services agency that placed the children in their care, as well as the agency that licensed the foster care provider.²¹¹ The information and services provided by the children's services agency can be extensive, including connections to education and health service providers, local attorneys, public benefits, and more.²¹² Because the caseworker and other children's services staff must be in almost constant contact with the foster care provider, resources and information are free-flowing. Informal kinship caregivers do not have such ready access to these programs, due, at least in part, to a lack of communication with caseworkers and the children's services agency.

When foster care providers wish to move for permanent guardianship or to adopt the children in their care, at least some of the costs and fees of the adoption are paid for upfront by the state and federal government.²¹³ Foster care providers who adopt or become permanent guardians of the children in their care are also eligible for tax credits, post-adoption per diem payments, and more.²¹⁴

C. Kinship Guardianship Subsidies

While guardianships have long been an option in child welfare cases,²¹⁵ the subsidization of kinship guardianships is relatively new. As mentioned in section I.D above, kinship guardianships were used infrequently until the 1990s, at least partly due to the lack of subsidies available to guardians.²¹⁶ With more children living with kinship caregivers states began offering permanent guardianship subsidies to kinship caregivers even in the absence of federal assistance with the end goal of

²¹¹ See, e.g., SAFY OF OHIO, WHAT WE DO, <https://www.safy.org/ohio/>.

²¹² See, e.g., *Ah Chong v. McManaman*, 154 F. Supp. 3d 1043, 1053 (D. Haw. 2015) (describing “foster care related benefits” as “services provided without charge for foster children—including meals at public elementary and secondary schools, attendance at the Department of Education’s A+ Program (which provides after school care), and liability insurance”).

²¹³ See *infra* sections II.C-D.

²¹⁴ See *id.*

²¹⁵ Gupta-Kagan, *supra* note 8, at 13.

²¹⁶ *Id.*

increasing the number of children achieving permanency.²¹⁷ The number of states providing subsidies to permanent guardians increased from six in 1996 to more than thirty (30) in 2004.²¹⁸ Today, at least forty-one (41) U.S. states and territories provide subsidies for permanent guardianships.²¹⁹

In 2008, Congress passed the Fostering Connections to Success and Increasing Adoptions Act and established the Title-IV Guardianship Assistance Program (GAP).²²⁰ GAP requires states to invest in permanent guardianships by requiring states to match federal funds with state dollars.²²¹ GAP was meant to both incentivize the use of permanent guardianships in child welfare cases and to shape state' guardianship policies by placing conditions on the use of federal Title IV-E funds for guardianships.²²²

GAP includes eligibility requirements for the guardian and child at issue.²²³ GAP requires that the guardian: be a relative of the child (legislation allows states to define "relative"); be licensed as a foster care provider, and pass criminal record and child abuse registry checks; and care for the child for at least six consecutive months before moving for guardianship.²²⁴

²¹⁷ *Id.* at 14; *see also* William Vesneski et al., *An Analysis of State Law and Policy Regarding Subsidized Guardianship for Children: Innovations in Permanency*, 21 UC DAVIS J. JUV. L. & POL'Y 27, 35 (2017).

²¹⁸ Gupta-Kagan, *supra* note 8, at 14.

²¹⁹ *See* TITLE IV-E GUARDIANSHIP ASSISTANCE, *supra* note 46. Children's rights advocates, including Professor Gupta-Kagan, have pointed out that the number of guardianships and the ratio of guardianships to adoptions have not increased despite the federal GAP program, and argue that additional reforms are needed. *See* Gupta-Kagan, *supra* note 8, at 68–82; *see also* MAKING IT WORK, *supra* note 21, at 24.

²²⁰ Fostering Connections to Success and Increasing Adoptions Act of 2008, Pub. L. No. 110-351, 122 Stat. 3949.

²²¹ Vesneski et al., *supra* note 217, at 33–34.

²²² *Id.* at 33; *see also* Gupta-Kagan, *supra* note 8, at 14. In addition, in 2018, Congress passed the Family First Prevention Services Act, as part of Division E in the Bipartisan Budget Act of 2018 (H.R. 1892). Section 50761 of that act reauthorized the Adoption and Legal Guardianship Incentive Payment program. *See* CHILDREN'S DEFENSE FUND, FAMILY FIRST PREVENTION SERVICES ACT, <https://www.childrensdefense.org/wp-content/uploads/2018/08/family-first-detailed-summary.pdf>. That program "allows states to receive award payments based on improvements the state makes in increasing exits from foster care to adoption or guardianship." *Id.*

²²³ *See* 42 U.S.C. § 673(d)(a); *see also* Vesneski et al., *supra* note 217, at 33.

²²⁴ *See* 42 U.S.C. §§ 671(a)(20), 672(1), 673(d)(3)(a)(i); *see also* MAKING IT WORK, *supra* note 21, at 32.

In addition, the child must: be currently or have previously been in foster care;²²⁵ met the “special needs” eligibility for Title IV-E funding;²²⁶ already had the possibility of reunification with legal parents and adoption ruled out; and been consulted regarding the kinship guardianship arrangement, if age 14 years or older.²²⁷ In effect, this means that GAP is only available to children whose foster care providers moved for permanent guardianship out of foster care, again leaving out the majority of kinship caregivers.²²⁸

The subsidies available through GAP “include a monthly maintenance payment as well as a one-time payment of up to \$2,000 to cover nonrecurring expenses associated with establishing the guardianship,”²²⁹ such as court costs, attorney’s fees, home study fees, and more.²³⁰ GAP requires that the monthly maintenance payment “not exceed the foster care maintenance payment which would have been paid on behalf of the child if the child had remained in a foster family home.”²³¹ The majority of states set the monthly GAP payment equal to 100% of the foster care payment and four states set the monthly payment rate below 100%.²³²

²²⁵ 42 U.S.C. § 673(d)(3)(A)(i)(I)(3). These subsidies are not available to informal kinship caregivers who want to enter into a guardianship for a child they are caring for. The child must first have been removed and placed into foster care by the children’s services agency. *Id.* (noting that “[a] child is eligible for a kinship guardianship assistance payment under this subsection if the State agency determines the following . . . The child has been . . . removed from his or her home”).

²²⁶ The definition of “special needs” under the Act is complicated, and open to interpretation. *See, e.g.,* Glanowski v. New York State Dep’t of Family Assistance, 225 F. Supp. 2d 292, 300–05 (W.D.N.Y. 2002); Appeal of SH RG For Northstar Adoption Assistance, 907 N.W.2d 680, 691 (Minn. Ct. App. 2018). *See also* Vesneski et al., *supra* note 217, at 39–40. “[S]pecial needs” under the Act is not limited to children with disabilities. Instead, the statute sets forth a number of different, complicated ways that a child can meet the eligibility criteria, including, but not limited to the age of the child, whether or not the state has determined that the child cannot return to his or her home, whether or not the child can be placed without the state providing subsidies, among other things. *See* 42 U.S.C. § 673(c).

²²⁷ 42 U.S.C. § 673(d)(3)(A)(iii); *see also* Vesneski et al., *supra* note 217, at 33; MAKING IT WORK, *supra* note 21, at 20.

²²⁸ *See, e.g.,* Vesneski et al., *supra* note 217, at 35–38.

²²⁹ *Id.* at 47 (citing 42 U.S.C. § 673(d)(1)(B)(iv)).

²³⁰ *See id.* at 49. Yet, only 28 states have statutory or policy language that appears to provide for this reimbursement payment. *Id.*

²³¹ 42 U.S.C. § 673(d)(2); *see also infra* section II.E (discussing subsidies for nonrecurring expenses).

²³² Vesneski et al., *supra* note 217, at 48–49.

Children in permanent guardianships in thirty-four (34) states may also receive additional social and mental health services.²³³ Guardians may also receive family support assistance and counseling,²³⁴ and access to the Kinship Navigator Programs described in section II.A, above. Tax deductions are also available to kinship guardians, if they meet the applicable qualifying relative and residency tests, among other requirements.²³⁵

D. Adoption Subsidies

The federal government has been subsidizing adoptions for over sixty years.²³⁶ The focus of federal adoption subsidies has been to promote the adoption of children with “special needs” from foster care.²³⁷ Nationally, at least 88% of children adopted from foster care receive an adoption subsidy.²³⁸

Adoption subsidies arise out of a complicated interaction between state and federal law. The federal government provides grants to state

²³³ *Id.* at 51–52.

²³⁴ *See, e.g.*, OHIO REV. CODE ANN. § 5101.852; FLA. STAT. ANN. § 39.5085(2)(f).

²³⁵ IRS EXEMPTIONS, *supra* note 190. At times permanent guardians may seek to adopt children in their care for inheritance purposes or otherwise. However, permanent guardianships are supposed to offer a permanent placement alternative to adoption and there are currently no subsidies available for permanent guardians wishing to adopt. Professor Josh Gupta-Kagan, among others, has argued that adoption and guardianship should be treated as equal permanency options; adoption and guardianship are equally permanent in terms of a child’s legal relationship to a caregiver. Therefore, there should be no desire to move from guardianship to adoption, and no need to subsidize adoptions from guardianships. This would require double legal fees, including court costs and attorney’s fees, to pay for the change in relationship status. It does not seem desirable to subsidize these fees twice, nor to incentivize the move from guardianship to adoption. *See* Gupta-Kagan, *supra* note 8, at 6; *see also* Vesneski et al., *supra* note 217, at 34.

²³⁶ *See* Hacsí, *supra* note 83, at 175.

²³⁷ *See* 42 U.S.C. § 673. Yet, since 2003, a big chunk of the federal adoption related subsidies are directed at private and foreign adoptions through IRS income tax credits. *See* IRS EXEMPTIONS, *supra* note 190 (noting that \$251 million in 2015 was spent to support private and foreign adoptions through IRS tax credits).

²³⁸ CHILDREN’S RIGHTS, ENDING THE FOSTER CARE LIFE SENTENCE: THE CRITICAL NEED FOR ADOPTION SUBSIDIES 3 (2006), https://www.childrensrights.org/wp-content/uploads/2008/06/ending_the_foster_care_life_sentence_july_2006.pdf. In a survey of families who adopted foster care children in the 1980s, 84% of children met state’s definition of children with special needs. NORTH AMERICAN COUNCIL ON ADOPTABLE CHILDREN, THE VALUE OF ADOPTION SUBSIDIES: HELPING CHILDREN FIND PERMANENT FAMILIES 1 (2008), <https://www.nacac.org/resource/the-value-of-adoption-subsidies-helping-children-find-permanent-families/>.

governments, which administer the federal funds.²³⁹ States may also choose to provide additional state funds to adoptive parents.²⁴⁰

Just as with GAP, the federal funding for adoptions focuses on supporting children with “special needs”²⁴¹ as defined by the Social Security Act.²⁴² It is important to note that neither the language in the Act, nor the legislative history is clear as to whether or not these federal adoption subsidies are available for private adoptions (as opposed to public adoptions of children out of foster care) of children with “special needs.”²⁴³ A few courts have interpreted the “special needs” provision of the Act with regard to subsidies for private adoptions and concluded that federal law does not preempt any state law that limits the subsidies to public adoptions.²⁴⁴

²³⁹ See 42 U.S.C. § 670.

²⁴⁰ See 42 U.S.C. § 673(a)(8)(D).

²⁴¹ See 42 U.S.C. § 673.

²⁴² The state establishes its own criteria for adoption subsidies and helps define whether a child meets the “special needs” definition and the state can include additional criterion such as the income level of the adoptive parents and/or birth parents. See 42 U.S.C. § 673(c)(1)(A). It is important to note here that in terms of income, the states’ eligibility criteria for adoption subsidies are often focused on the birth families’ income level, not the eligibility of the adoptive family. In Ohio, adoption subsidies are available regardless of the adoptive family’s income. See OHIO DEPARTMENT OF JOB AND FAMILY SERVICES, ADOPTION SUBSIDIES GUIDE 7-8, <http://ocwtp.net/PDFs/Trainee%20Resources/Assessor%20Resources/Adoption%20Assistance/2B%20Adoption%20Subsidies%20Guide.pdf> [hereinafter OHIO ADOPTION SUBSIDIES GUIDE]. Therefore, even if the adoptive family can easily pay the fees out of pocket—they could be millionaires adopting a child out of foster care, for example—they are still eligible for subsidies if the child’s birth family’s income is low enough to qualify. According to a local adoption agency caseworker who spoke to me in 2017, this promised reimbursement of fees and post adoption payments regardless of the adoptive family’s income level helps recruit additional adoptive families to adopt children out of foster care.

²⁴³ See *Glanowski v. New York State Dep’t of Family Assistance*, 225 F. Supp. 2d 292, 302 (W.D.N.Y. 2002); see also 42 U.S.C. § 673.

²⁴⁴ See, e.g., *Appeal of SH RG For Northstar Adoption Assistance*, 907 N.W.2d 680 (Minn. Ct. App. 2018) (holding that federal law did not preempt Minnesota law from excluding children subject to direct-adoptive placements from receiving adoption assistance and had no claim against the state for denying them benefits under the statute); *Glanowski*, 225 F. Supp. 2d at 292 (holding that plaintiffs who privately adopted their disabled children did not qualify for adoption assistance under the federal statute); *C.B. ex rel. R.R.M. v. Dep’t of Pub. Welfare*, 786 A.2d 176, 183 (Pa. 2001) (stating that nothing in the Act or its legislative history suggests that it was intended to require states to provide assistance to facilitate private adoptions of special needs children); *Becker v. Iowa Dep’t of Human Servs.*, 661 N.W.2d 125, 127–29 (Iowa 2003) (holding that federal law did not preempt Iowa law limiting adoption assistance to children “under the guardianship of the state, county, or a licensed child-placing agency immediately prior to the adoption”).

Therefore, these courts have held that when the state legislature defines “children with special needs” as children in custody of the children’s services agency, then the subsidies will not be available in that state for private adoptions.²⁴⁵ In short, it is very difficult, if not impossible, for adoptive parents to receive federal and state subsidies unless the child is being adopted out of foster care.²⁴⁶

The types of post-adoption subsidies available in the U.S. fall into three categories: reimbursement of nonrecurring expenses, post-adoption per diem payments, and tax credits. The per diem payments and the tax credits for adoptions are discussed in detail below, and the nonrecurring expense subsidies are discussed in section II.E.

²⁴⁵ See *Glanowski*, 225 F. Supp. 2d at 302.

²⁴⁶ See, e.g., OHIO ADOPTION SUBSIDIES GUIDE, *supra* note 242, at 3 (“Only children in the permanent custody of an Ohio public children services agency or private child placing agency who are available for adoption are eligible.”). However, the U.S. Department of Health and Human Services Children’s Bureau publishes a Child Welfare Manual that, until recently, had guidance indicating that the Title IV-E adoption subsidies could apply not only to public adoptions, but also to private and international adoptions. See CHILD WELFARE POLICY MANUAL, *supra* note 181, at 8.1. That guidance was deleted from the Manual as of October 2017. See U.S. DEPARTMENT OF HEALTH AND HUMAN SERVICES, ADMINISTRATION FOR CHILDREN & FAMILIES, CHILDREN’S BUREAU, DELETIONS TO MANUAL, 8.2B.5 TITLE IV-E, Adoption Assistance Program, Independent Adoptions, https://www.acf.hhs.gov/cwpm/public_html/programs/cb/laws_policies/laws/cwpm/updates_delete.jsp (“Deleted October 25, 2017”). The Manual now states that “[i]t is highly improbable that a child who is adopted through an independent adoption will be eligible for title IV-E adoption assistance.” CHILD WELFARE POLICY MANUAL, *supra* note 181, at 8.2.B.5. Yet, in another section of the Manual, it states:

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

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

1. Post-adoption Subsidies

Adoptive families are at times eligible to receive monthly payments to support the costs of care and services for children post-adoption.²⁴⁷ These post-adoption subsidies are funded through a combination of federal, state, and local funds.²⁴⁸ Eligibility for the federally-funded post-adoption subsidies again centers on whether the adopted child falls under the definition of “special needs”²⁴⁹ in the Act.²⁵⁰ Some states also have state-funded post-adoption assistance subsidies.²⁵¹ These states usually follow the same general eligibility criteria, but the state programs also typically take into account the income level and resources available to the adoptive family.²⁵² Just as with the Adoption Subsidies described in section II.D above, these post-adoption subsidies are very difficult, if not impossible, for kinship caregivers to access.

The amount of the monthly post-adoption payments is determined through agreement between the adoptive parents and the children’s services agency before the adoption is finalized, and can be readjusted periodically.²⁵³ However, the payments cannot exceed the foster care payment that would have been paid for the child if the child were residing with a foster family.²⁵⁴ Therefore, if the child’s foster family were to be eligible to receive \$800 per month, then the adoptive family could receive \$800 or less per month as a post-adoption payment.

Additional funding is available to pay for services to address the child’s physical or mental needs, such as psychological or psychiatric care, counseling, speech therapy, customized physical devices, medical supplies, rehabilitative services, and surgical costs.²⁵⁵ This additional post-adoption

²⁴⁷ 42 U.S.C. § 673(a).

²⁴⁸ See EVAN B. DONALDSON ADOPTION INSTITUTE, NORTH AMERICAN COUNCIL ON ADOPTABLE CHILDREN, AND ADOPTION SUPPORT AND PRESERVATION, THE VITAL OF ADOPTION SUBSIDIES 2 (2012), <https://adoptioninstitute.org/old/advocacy/subsidies.pdf> [hereinafter ADOPTION SUBSIDIES].

²⁴⁹ See 42 U.S.C. § 673(c); see also *supra* footnotes 237-246 and accompanying text.

²⁵⁰ See 42 U.S.C. § 673(a)(1)(A).

²⁵¹ See, e.g., THE NORTH AMERICAN COUNCIL ON ADOPTABLE CHILDREN, STATE ADOPTION ASSISTANCE PROGRAMS (2018), www.nacac.org/help/adoption-assistance-us/state-programs/ [hereinafter NACAC STATE ADOPTION ASSISTANCE].

²⁵² See, e.g., *id.*

²⁵³ 42 U.S.C. § 673(a)(3).

²⁵⁴ *Id.*

²⁵⁵ See, e.g., NACAC STATE ADOPTION ASSISTANCE, *supra* note 251.

funding is capped per family per year, typically at \$10,000 or less.²⁵⁶ Additional state- and locally-funded adoption subsidies may also be available to adoptive families. The federal government does not provide reimbursement for these additional subsidies and these benefits take different forms in different states.²⁵⁷

2. Tax Credits

Adoption tax credits help adoptive parents offset nonrecurring expenses related to adoption proceedings.²⁵⁸ The federal adoption tax credit is available for almost all adoptions, except stepparent adoptions, which are excluded.²⁵⁹ Adoptive parents can claim qualifying expenses related to the adoption of a child under the age of 18 years old, as well as the adoption of older individuals who are physically or mentally incapable of taking care of themselves.²⁶⁰ For the 2017 tax year, taxpayers could reduce their federal income tax liability by claiming up to \$13,810 in qualifying expenses.²⁶¹ Many states also offer state tax credits for adoption expenses.²⁶²

Adoption tax credits are of limited use to low income adoptive families, however. Families with very low incomes typically do not have high enough tax liability to benefit from these subsidies.²⁶³ Rather, the majority of the adoption tax credits are claimed by and benefit taxpayers making between \$100,000 - \$200,000 per year.²⁶⁴ In addition, while tax credits may help reduce tax liability for some higher income taxpayers, they

²⁵⁶ See, e.g., *id.*

²⁵⁷ See ADOPTION SUBSIDIES, *supra* note 248, at 2.

²⁵⁸ CONGRESSIONAL RESEARCH SERVICE, ADOPTION TAX BENEFITS: AN OVERVIEW 3 (2018), <https://fas.org/sgp/crs/misc/R44745.pdf>.

²⁵⁹ *Id.*

²⁶⁰ *Id.*

²⁶¹ *Id.* The IRS defines qualifying expenses of an adoption to include reasonable and related adoption fees, court costs, attorney fees, travelling expenses, and other expenses directly related to the adoption. See IRS EXEMPTIONS, *supra* note 190. The IRS also specifically mentions home studies when defining “other expenses directly related.” *Id.*

²⁶² State adoption tax benefits are not discussed at length in this Article. For state by state information on state adoption tax benefits. See NACAC STATE ADOPTION ASSISTANCE, *supra* note 251.

²⁶³ See *id.* at 9 (stating that zero taxpayers with incomes under \$30,000 per year claimed the adoption tax credit in 2015).

²⁶⁴ See *id.*

are not refundable²⁶⁵ and cannot help kinship caregivers living in poverty to overcome the barrier of having to pay burdensome adoption costs upfront.

E. Nonrecurring Expense Subsidies

Kinship caregivers living in poverty require ongoing financial and other support for the children in their care, yet often the greatest financial obstacle to forming a permanent legal relationship outside of the foster care system are the nonrecurring court costs and fees associated with adoption or permanent guardianship proceedings. Indeed, that these nonrecurring expenses act as a barrier to permanency for children in the care of kinship caregivers is at the core of the arguments in Part III below.

The nonrecurring expenses related to adoptions and permanent guardianships may include court filing fees, attorney's fees, home studies, criminal background checks, health and psychological evaluations, other adoption agency fees, training expenses, travel expenses, and more.²⁶⁶ The highest fees related to the legal proceedings are court costs, home study fees, and attorney's fees.²⁶⁷ These fees usually must be paid upfront²⁶⁸ and, in some states, cannot be waived or reduced for people living in poverty.²⁶⁹ However, at times, states and the federal government provide reimbursement of these fees, as explained further below.

The U.S. Department of Health and Human Services estimates that the nonrecurring fees for an adoption out of foster care costs between \$0 - \$2,500, the nonrecurring fees for private adoptions costs between \$15,000 - \$45,000, and the nonrecurring fees for foreign adoptions costs between

²⁶⁵ See *id.* at 4.

²⁶⁶ The Title IV-E program requires all prospective foster and adoptive parents to undergo criminal background checks. In addition, in 31 states, DC, Guam, the Northern Mariana Islands, and Puerto Rico, all adult members of the household are required to undergo a criminal background check. Child abuse and neglect central registry checks are also required. See PLACEMENT OF CHILDREN WITH RELATIVES, *supra* note 22, at 3.

²⁶⁷ See *e.g.*, NACAC STATE ADOPTION ASSISTANCE, *supra* note 251. See also U.S. DEPARTMENT OF HEALTH & HUMAN SERVICES, ADMINISTRATION FOR CHILDREN & FAMILIES, CHILD INFORMATION GATEWAY, THE ADOPTION HOMESTUDY PROCESS 6-7 (2015), https://www.childwelfare.gov/pubpdfs/f_homstu.pdf [hereinafter THE ADOPTION HOMESTUDY PROCESS].

²⁶⁸ In other words, the fees must be paid upfront before the proceeding can begin, as opposed to allowing for payment after the proceeding or a payment schedule.

²⁶⁹ See *infra* section II.F. For example, in Ohio there is no statute or rule of court providing for waiver or reduced fees for people living in poverty for these costs. *Id.*

\$20,000 - \$50,000.²⁷⁰ Each state has its own rules (and monetary caps) regarding available reimbursements for nonrecurring adoption and permanent guardianship expenses.²⁷¹ The federal government may provide states with matching funds for the reimbursement of these fees, if the state follows rules and regulations provided within the Social Security Act.²⁷²

Most states cap the reimbursement of nonrecurring expenses at \$1,000 - \$2,000, but the cap is much lower in some states. Massachusetts and California both cap the reimbursement at \$400, and Nevada caps reimbursement of nonrecurring expenses at \$250.²⁷³ Some of the expenses not covered by this reimbursement may also be offset by the federal tax credit for adoptions, described in section II.D.2 above, depending on the taxpayer's income level. As mentioned in section II.E above, the federal government caps the reimbursement of the nonrecurring expenses of guardianship proceedings at \$2,000, though state by state the cap may be set lower. Given the total fees are much higher than the nonrecurring expense caps in most states, these fees continue to be an obstacle for many low-income kinship caregivers.

Under the Social Security Act, to be reimbursed for nonrecurring adoption expenses, adoptive parents must enter into an adoption assistance agreement with a local children's services agency prior to the finalization of the legal proceeding. In addition, as discussed above, the child must meet the definition of "special needs" under the Act. As noted above, this severely limits access for kinship caregivers. Therefore, this reimbursement is not useful to the majority of kinship caregivers looking to adopt or move for permanent guardianship outside of the foster care system.²⁷⁴

These one-time reimbursements of the nonrecurring fees related to adoptions and permanent guardianships can be crucial for adoptive parents and permanent guardians. Without these reimbursements, or the waivers described below in section II.F, they may have to make the difficult decision

²⁷⁰ IRS EXEMPTIONS, *supra* note 190, at 3; NACAC STATE ADOPTION ASSISTANCE, *supra* note 251. Home studies alone cost between \$500 - \$3,000 depending on the jurisdiction and type of proceeding. *See id.* Court costs range between \$250 and more than \$1000. *See id.*

²⁷¹ *See, e.g.*, U.S. DEPARTMENT OF HEALTH AND HUMAN SERVICES, ADMINISTRATION FOR CHILDREN AND FAMILIES, CHILD WELFARE INFORMATION GATEWAY, ADOPTION ASSISTANCE BY STATE, <https://www.childwelfare.gov/topics/adoption/adopt-assistance/>.

²⁷² U.S. DEPARTMENT OF HEALTH AND HUMAN SERVICES, ADMINISTRATION FOR CHILDREN AND FAMILIES, CHILDREN'S BUREAU, TITLE IV-E FOSTER CARE (May 17, 2012), <https://www.acf.hhs.gov/cb/resource/title-ive-foster-care>.

²⁷³ *See* NACAC STATE ADOPTION ASSISTANCE, *supra* note 251.

²⁷⁴ *But see* CHILD WELFARE POLICY MANUAL, *supra* note 181, at 8.2.D.3.

to forego other needs—including food, therapy, healthcare, education, extracurricular activities, or more—for the child in their care or for themselves.²⁷⁵

For kinship caregivers living in poverty, the reimbursement of the nonrecurring fees is not a good subsidy strategy. Very low-income families cannot come up with the funds to pay upfront court costs, attorney's fees, and other required fees. And reimbursement does not help them on the backend if they cannot pay the upfront costs. That is why waivers, as described in section II.F below, are a better choice for kinship caregivers living in poverty who wish to adopt or move for permanent guardianship.

F. Waivers for Nonrecurring Expenses

Instead of providing reimbursements for the nonrecurring expenses related to adoptions and permanent guardianships, many jurisdictions choose instead to waive or provide funds to cover the upfront costs of the adoption and permanent guardianship legal proceedings for kinship caregivers living in poverty.²⁷⁶ These waivers, in effect, remove the barrier to access to justice for kinship caregivers living in poverty. This Part of the Article reviews the state by state practices regarding waivers of court costs and home study fees, which tend to be the most costly portions of the legal proceedings besides attorney's fees.²⁷⁷ This Part concludes that there are only a handful of jurisdictions across the U.S. that choose not to provide waivers for the fees related to adoptions and permanent guardianship proceedings.

Across the U.S., there are only four U.S. states that refuse to waive the prepayment of court filing fees for private kinship adoptions when the adoptive family is living in poverty: Alabama, Iowa, Kansas, and Ohio.²⁷⁸

²⁷⁵ See, e.g., *LSC Budget Request*, *supra* note 172 (discussing the struggle to secure basic human needs for people living in poverty in the U.S., including access to justice).

²⁷⁶ For example, Massachusetts has a fund for indigent litigants to cover court costs and associated fees such as home studies and background checks. See MASS.GOV, *Indigency (Waiver of Court Fees)* (2018), <https://www.mass.gov/indigency-waiver-of-court-fees>. Anecdotal evidence points to some legal services offices setting up private funds to help cover these kinds of expenses for their clients, in states where allowed.

²⁷⁷ See PLANNING FOR ADOPTION, *supra* note 166; THE ADOPTION HOMESTUDY PROCESS, *supra* note 267, at 6–7.

²⁷⁸ See, e.g., Alabama, <https://afapa.org/2016/05/12/adoption-subsidy/>; Iowa, <https://www.iowacourts.gov/for-the-public/court-forms/>; Kansas, <http://www.kansasjudicialcouncil.org/legal-forms>.

All other states and the District of Columbia waive court filing fees for kinship adoptions for adoptive families living in poverty.²⁷⁹

In all but seven states, the home study is either waived altogether or the fee for the home study is waived for adoptions when the kinship caregivers are living in poverty. The seven states that refuse to provide a waiver for the home study for kinship caregivers living in poverty are Georgia, Hawaii, Louisiana, Missouri, Ohio, South Dakota, and Texas.²⁸⁰ Ohio is the only state in the U.S. that refuses to provide a waiver of court costs and refuses to waive the home study when the kinship caregiver is living in poverty.²⁸¹

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

III. ARGUMENTS FOR THE SUBSIDIZATION OR WAIVER OF NONRECURRING EXPENSES

The full subsidization or waiver of the nonrecurring expenses of adoptions and permanent guardianships for kinship caregivers living in poverty would allow hundreds of thousands²⁸² of children to obtain permanency. Without achieving permanency, these children could otherwise face disruption of family and home, school, sibling sets, health and other supportive services, and more.²⁸³ Many states in the U.S. have realized how important the kinship caregiver is to permanency, and there

²⁷⁹ See Bartlett, *Fifty-State Survey*, *supra* note 53.

²⁸⁰ See *Home Study Requirements*, *supra* note 53, at 6–122; see also, e.g., Georgia, <https://www.adoptionadvocatesofga.org/> (providing that the home study fee is \$1200 and omitting any mention of waiver or subsidy for families living in poverty); Hawaii, <https://www.adoptuskids.org/adoption-and-foster-care/how-to-adopt-and-foster/state-information/hawaii> (providing that home study fees apply to families seeking to adopt outside of the foster care system); Missouri, <https://ago.mo.gov/docs/default-source/publications/adoption-welcomehome.pdf?sfvrsn=4> (providing that home study fees apply to private and independent adoptions); Ohio, <https://www.adoptuskids.org/adoption-and-foster-care/how-to-adopt-and-foster/getting-approved/home-study>; Texas, <https://adoptionanswersinc.com/texas-home-study-services/pricing-and-fees/> (providing that grandparent home study costs \$550).

²⁸¹ See Bartlett, *Fifty-State Survey*, *supra* note 53.

²⁸² See KIDS COUNT, *supra* note 4.

²⁸³ See Winokur et al., *supra* note 29, at 19–32.

are only a handful of states that choose not to subsidize or waive the nonrecurring expenses for adoptions and permanent guardianships for kinship caregivers living in poverty.²⁸⁴

The state and federal governments have taken steps in recent years to address the problem of lack of resources and disparate treatment of kinship caregivers.²⁸⁵ The vast majority of states have chosen to subsidize or waive the costs and fees related to the legal proceedings for adoptions and permanent guardianships for kinship caregivers.²⁸⁶ However, the subsidies and waivers for kinship caregivers remain inadequate in many states, and other states still do not provide any subsidy or waiver whatsoever.²⁸⁷

The reasons why these states have not prioritized access to adoptions and permanent guardianships for kinship caregivers are unclear. Many of the positive changes to address the needs of kinship caregivers have come in the last decade when states and the federal government have struggled with budget crises due to the recession. While kinship caregivers may remain a priority, the state and federal governments may simply have lacked the funds to make these changes. It may also be the case that this issue has not been a focus of lobbying groups and others. Still, policymakers across the U.S. should prioritize subsidies and waivers for the costs and fees of adoptions and permanent guardianships for kinship caregivers living in poverty should.

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

²⁸⁴ See *supra* sections II.E-F.

²⁸⁵ See *supra* Part II.

²⁸⁶ See *supra* sections II.B-C.

²⁸⁷ See *supra* Part II.

A. *Cost-Benefit and Due Process Arguments*

1. *Cost-Benefit Analysis*

Kinship diversion is overwhelmingly the policy adopted by child welfare agencies across the country.²⁸⁸ Not only are child welfare agencies required by law to prioritize placements with kin over strangers, they are also required to seek out family members before placing children in foster care.²⁸⁹ These policies divert children away from subsidized foster care into informal, unsubsidized kinship care. As noted in Part II, sometimes kinship caregivers receive cash and other assistance for the children in their care, but those benefits are often far less than the foster care subsidies and other support services that the caregivers would receive if they were licensed foster care providers. When kinship caregivers seek permanency options for the children in their care, including adoption or permanent guardianship, they likely are not eligible for subsidies or waivers for the nonrecurring expenses related to the legal proceedings in several states.²⁹⁰ Furthermore, even in states that provide subsidies or waivers, not all of the fees are covered and these fees often remain an obstacle for kinship caregivers living in poverty.²⁹¹

Overall the policy of kinship diversion saves the state and federal governments a combined total of more than \$3 billion per year that they would otherwise spend on foster care and other subsidies.²⁹² Yet, these savings are likely short lived. Children in informal kinship care have less successful outcome measures than children in permanent relationships with

²⁸⁸ See KINSHIP DIVERSION DEBATE, *supra* note 18.

²⁸⁹ See PLACEMENT OF CHILDREN WITH RELATIVES, *supra* note 22, at 2.

²⁹⁰ See *supra* sections II.C-F.

²⁹¹ See *id.*

²⁹² This calculation assumes 400,000 children are diverted from state custody to live with informal kinship caregivers each year. See KINSHIP DIVERSION DEBATE, *supra* note 18, at 9 (noting that at a single point in time 400,000 children were diverted from state custody to live with kin). Foster care payments are assumed to be \$25/day as an average for each child, paid for 365 days per year. Foster care alone totals \$3 billion with additional subsidies saved on post-adoption payments and subsidies for nonrecurring expenses. See VOOGHT ET AL., *supra* note 176, at 27–32. Total child welfare spending in the U.S. topped over \$28 billion in 2012. KRISTINA ROSINSKY & DANA CONNELLY, CHILD WELFARE FINANCING IN SFY 2014: A SURVEY OF FEDERAL, STATE, AND LOCAL EXPENDITURES 11 (2016), <https://www.childtrends.org/publications/child-welfare-financing-sfy-2014-a-survey-of-federal-state-and-local-expenditures/>.

their kinship caregivers, such as adoption or permanent guardianship.²⁹³ Children without permanency are more likely to end up involved with the justice system and in foster care at a later date.²⁹⁴ The state will more likely bear a greater cost burden for these children in the future through their involvement with the justice system, Medicaid, and other social programs costs related to physical and mental health issues resulting from trauma or abuse, or due to decreased tax earnings.²⁹⁵

Historically it made sense to incentivize and prioritize adoptions and guardianships out of foster care, especially adoptions and guardianships for children with special needs.²⁹⁶ But now that so many children are being diverted outside of the system due to kinship diversion policies, the incentivization scheme has gone awry. Foster care providers are given many services and financial incentives to make the relationship with the children in their care permanent, whereas the services and incentives available to informal kinship caregivers are limited.²⁹⁷ Foster care providers also receive reimbursement of fees related to adoption or permanent guardianship proceedings for children in their care, as well as maintenance payments post-adoption, all of which are practically not available to informal kinship caregivers.²⁹⁸ Foster care providers can also claim tax credits and tax deductions and, given the higher average income of foster parents, this burdens the state and federal government more than the tax benefits provided to kinship caregivers who tend to have lower incomes do.²⁹⁹ Moreover, all of these benefits to foster parents are available to all licensed

²⁹³ See, e.g., Mark Testa, *Kinship Care and Permanency*, 28 J. OF SOCIAL SERV. RESEARCH 25 (2002) https://doi.org/10.1300/J079v28n01_02(stating that kin placements are more stable than non-kin placements but that the advantage diminishes with lengthier durations of care).

²⁹⁴ See *id.*

²⁹⁵ See, e.g., EXECUTIVE OFFICE OF THE PRESIDENT OF THE UNITED STATES, ECONOMIC PERSPECTIVES ON INCARCERATION AND THE CRIMINAL JUSTICE SYSTEM 8–9 (2016), https://www.prisonpolicy.org/scans/20160423_cea_incarceration_criminal_justice.pdf (arguing that the collateral costs of the criminal justice system are large and overly burden black and Hispanic men).

²⁹⁶ See, e.g., Mary Eschelbach Hansen, *Using Subsidies to Promote the Adoption of Children from Foster Care*, 28 J. FAM. ECON. ISSUES 377–93 (2007), <https://www.ncbi.nlm.nih.gov/pmc/articles/PMC2646856/>.

²⁹⁷ See *supra* sections II.A-B.

²⁹⁸ See *supra* sections II.A-B.

²⁹⁹ See *supra* section II.D.

foster care providers, especially when their income is higher.³⁰⁰ Informal kinship caregivers, who step up to care for children to keep them out of the custody of the children's service agency and likely have very limited incomes, are left without the same permanency options.

Taken together, the merely temporary savings of kinship diversion and the lack of incentives for kinship caregivers to move for permanency, indicate that the system is broken. The child welfare system is no longer promoting permanency. The bottom line is that adoption and guardianships save the state and federal government a great deal of money over time. If the system of kinship diversion is going to continue, indefinitely, as it seems it will, and if permanency will continue to be promoted, kinship adoptions and guardianships should be subsidized, especially for kinship caregivers living in poverty.

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

2. Due Process

On top of cost-savings, the fundamental right to due process under the U.S. Constitution supports waiving court costs for kinship caregivers living in poverty. Another way for Ms. Gurley and Kaylan to get access to adoption or permanent guardianship court proceedings would be to contest the probate court's refusal to waive the required court costs and other fees on the basis of a denial of due process under the Fourteenth Amendment of the U.S. Constitution.³⁰¹

The right to due process under the Fourteenth Amendment requires the waiver of the prepayment of court filing fees when litigants are indigent, fundamental rights are at issue, and the only way of guaranteeing or

³⁰⁰ The foster care provider's level of income does not affect the level or type of subsidy available for the children in their care. The subsidies are looked at as payments for the support of the children and are not income to the foster care provider. *See* VOOGHT ET AL., *supra* note 176, at 25–26. In addition, the higher the income level of the foster care provider, the more individual tax benefits can be claimed. *See supra* section II.D.2.

³⁰¹ U.S. CONST. amend. XIV, § 1 (“No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.”).

accessing those fundamental rights is through the court system.³⁰² Due process should therefore require the waiver of the prepayment of court filing fees, if not additional nonrecurring expenses such as home study fees, for adoption and permanent guardianship proceedings for kinship caregivers living in poverty.

U.S. courts have held that it is a denial of due process to refuse to waive the prepayment of filing fees for indigent litigants in some cases, including in divorce cases.³⁰³ The U.S. Supreme Court required the waiver of the prepayment of filing fees in divorce cases in *Boddie v. Connecticut* in 1971, stating that “the right to due process reflects a fundamental value in our American constitutional system.”³⁰⁴ The Court went on to hold that Connecticut’s refusal to allow impoverished litigants to get a divorce without prepayment of court filing fees was the “equivalent of denying them an opportunity to be heard upon their claimed right” and “a denial of due process.”³⁰⁵ The Court had previously recognized marriage as a fundamental right.³⁰⁶ The *Boddie* Court also arguably recognized the dissolution of marriage as a fundamental right in the U.S.³⁰⁷ The Court in *Boddie* also pointed out that the sole means in Connecticut for obtaining a divorce was through the courts.³⁰⁸

In addition to requiring the waiver of the prepayment of filing fees for divorce, the U.S. Supreme Court has also required the waiver of payment of transcript fees for criminal case appeals³⁰⁹ and transcript fees in termination of parental rights cases for persons living in poverty.³¹⁰ However, the Supreme Court refused to require the waiver of prepayment of filing fees for bankruptcy cases in *U.S. v. Kras*, holding that unlike a

³⁰² See *Boddie v. Connecticut*, 404 U.S. 371, 382–83 (1971). *But see* *Lyng v. Internatl. Union*, 485 U.S. 360, 368 (1988) (holding that a legislature’s decision not to subsidize the exercise of a fundamental right does not infringe the right).

³⁰³ See *Boddie*, 404 U.S. at 382–83.

³⁰⁴ *Id.* at 374.

³⁰⁵ *Id.* at 380–81.

³⁰⁶ See, e.g., *Loving v. Virginia*, 388 U.S. 1, 12 (1967) (“Marriage is one of the ‘basic civil rights of man,’ fundamental to our very existence and survival.” (citation omitted)).

³⁰⁷ *Boddie*, 404 U.S. at 383.

³⁰⁸ *Id.* at 380–81.

³⁰⁹ *Griffin v. Illinois*, 352 U.S. 12 (1956); *Mayer v. City of Chicago*, 404 U.S. 96 (1971).

³¹⁰ *M.L.B. v. S.L.J.*, 519 U.S. 102 (1996) (holding that Mississippi could not withhold a transcript from a parent wishing to appeal a termination of parental rights judgment due to indigency and the inability to pay for the transcript).

divorce, which can only be executed via court process, bankruptcy was not the only way the impoverished litigant could unburden debt.³¹¹

The U.S. Supreme Court has not decided whether the waiver of the prepayment of court filing fees for adoption or guardianship is required for indigent litigants, and just a few reported court opinions exist on this issue. For example, the Florida Supreme Court has held that indigent persons should not be denied access to the courts in adoption proceedings due to an inability to pay publication costs.³¹² In its decision to require the waiver of the prepayment of court costs in adoption cases for people living in poverty, the Florida Supreme Court stated that “[t]he fundamental right to have children either through procreation or adoption is so basic as to be inseparable from the rights to ‘enjoy and defend life and liberty, (and) to pursue happiness’”³¹³ However, other courts that have dealt with this issue refused to require the waiver of costs related to adoption proceedings for persons living in poverty.³¹⁴

Waivers are also easier and cleaner than subsidies, bureaucratically speaking. Waivers do not require reimbursement, and therefore require less staff time for processing applications, copying and reviewing receipts, issuing checks for reimbursement, and so on. The burden of waiving court costs, both monetarily and practically, falls on the court, as opposed to other agencies. Courts are already used to processing in forma pauperis applications³¹⁵ and have a process in place for waiving of court costs for people living in poverty.³¹⁶ It would not be a heavy lift to add adoption proceedings and permanent guardianships to the list of proceedings where the clerk of court must accept a valid in forma pauperis application and waive the prepayment of court costs.

³¹¹ 409 U.S. 434 (1973).

³¹² *Grissom v. Dade Cty.*, 293 So.2d 59 (Fla. 1974) (citation omitted).

³¹³ *Id.*

³¹⁴ *See, e.g., Matter of Caroline R.*, 415 N.Y.S.2d 613 (Sur. Ct. 1979) (holding that the petitioner had alternate means of adopting the child through the department of human services and therefore was not deprived of access to the courts by her inability to pay publication costs); *Adoption of Easley*, 61 Pa. D. & C.2d 519 (Pa. Com. Pl. 1973) (denying request for waiver of the prepayment of court costs sought by a stepfather living in poverty who wished to adopt his stepdaughter).

³¹⁵ In forma pauperis applications are also known as “poverty affidavits.”

³¹⁶ The U.S. Supreme Court requires courts to waive the prepayment of court costs for indigent litigants in divorce cases, for example, so this process must be in place. *See Boddie*, 404 U.S. at 382–83.

Given the precedent, Ms. Gurley may succeed in a court contest regarding the probate court's refusal to waive the prepayment of court filing fees. The "bona fides"³¹⁷ of Ms. Gurley's indigency and desire for adoption are present here. Furthermore, the U.S. Supreme Court has recognized that the interest of parents in their relationship with their children is a fundamental right.³¹⁸ In addition, at least one other court has recognized that adoption and guardianship are pure legal constructs, non-existent at common law and cannot be effectuated outside of a court.³¹⁹ Therefore, it appears that the three factors³²⁰ laid out by the Supreme Court in *Boddie* are present here.

However, even if Ms. Gurley were to succeed in getting a waiver of the prepayment of court filing fees, she is very unlikely to get a court to waive the ancillary costs, including the home study fee and other related nonrecurring expenses. While the court costs may total approximately \$300, the home study will cost upwards of \$1500³²¹ and the prepayment of the home study cost would be a substantial obstacle for Ms. Gurley. U.S. courts have overwhelmingly refused to extend the requirement of waiver of the prepayment of court costs to publication fees, let alone home study costs.³²² U.S. courts are loathe to recognize economic rights of any sort to litigants, lack of access to justice notwithstanding.³²³

³¹⁷ See *id.* at 382 ("[T]he *bona fides* of both appellants' indigency and desire for divorce are here beyond dispute.").

³¹⁸ *Santosky v. Kramer*, 455 U.S. 745, 774 (1982) ("[T]he interest of parents in their relationship with their children is sufficiently fundamental to come within the finite class of liberty interests protected by the Fourteenth Amendment."); see also *Troxel v. Granville*, 540 U.S. 57, 65 (2000) (discussing parents' fundamental right to make decisions concerning the care, custody, and control of their children).

³¹⁹ See *Adoption of Easley*, 61 Pa. D. & C.2d 519, 521 (Pa. Com. Pl. 1973).

³²⁰ The three factors include the "bona fides" of the petitioner's indigency and desire for the petitioned outcome, that fundamental rights are at issue, and the "state monopolization" of the means for achieving the petitioned outcome. See *Boddie*, 404 U.S. at 374.

³²¹ See, e.g., CARING FOR KIDS, INC., FEE SCHEDULE (2016), <https://cfkadopt.org/wp-content/uploads/2015/03/CFK-FEE-SCHEDULE-for-clients-2015-rev.pdf>.

³²² See, e.g., *Lyng v. Internatl. Union*, 485 U.S. 360, 369 (1988) ("[T]his Court has explicitly stated that even where the Constitution prohibits coercive governmental interference with specific individual rights, it 'does not confer an entitlement to such funds as may be necessary to realize all the advantages of that freedom.'"); *Regan v. Taxation With Representation of Wash.*, 461 U.S. 540, 545 (1983) ("This Court has never held that the Court must grant a benefit . . . to a person who wishes to exercise a constitutional right.").

³²³ See, e.g., *Lyng*, 485 U.S. at 369.

Beyond requesting a waiver of the prepayment of costs, Ms. Gurley could attempt to make a good faith argument that the court should waive the requirement of the home study altogether. Only nine U.S. states require home studies in adoption and guardianship proceedings when the caregiver has physical custody of the child and is related to the child by blood.³²⁴ Ms. Gurley is closely related to Kaylan, as her grandmother, and she has had physical custody of her for several years. Moreover, the children's services agency that performs the home study is used to waiving fees for home studies for adoptions and guardianships out of foster care, so they should easily be able to use the same waiver system for kinship caregivers living in poverty.

The court may refuse her request to waive the home study requirement, however. There are good reasons to require home studies and some courts may be unwilling to waive that requirement without statutory support.³²⁵ In the end, without direct precedent or statutory support, Ms. Gurley's request for a waiver of the home study fee is far from guaranteed.

In terms of Kaylan's due process rights and waiver, the cases mentioned so far in this Part have focused on analyzing the due process rights of kinship caregivers under the U.S. Constitution and not the child's due process rights. This is because the U.S. Supreme Court has refused to recognize independent due process rights of children outside juvenile delinquency proceedings and instead has required children to rely on the due process rights of the children's parent or parent-substitute.³²⁶ While some states recognize specific due process rights for children, including the right to counsel in abuse and neglect proceedings,³²⁷ there are no such

³²⁴ Only nine states do not waive the home study requirement for kinship caregivers. *See Home Study Requirements*, *supra* note 53, at 6–122.

³²⁵ *See, e.g.,* Thomas Crea et al., *Home Study Methods for Evaluating Prospective Resource Families: History, Current Challenges, and Promising Approaches*, 86 CHILD WELFARE 141–59 (Mar/Apr 2007).

³²⁶ *See, e.g., In re Gault*, 387 U.S. 1 (1967) (holding children must be afforded the right to counsel in juvenile delinquency proceedings); *Smith v. Organization of Foster Families for Equality and Reform*, 431 U.S. 816 (1977) (refusing to recognize a foster child's constitutional right to a hearing because the foster parents could request one); *Kenny A ex rel. Winn v. Perdue*, 356 F. Supp. 2d 1353 (N.D. Ga. 2005) (refusing to recognize a child's right to counsel in protection proceedings); *In re Jamie TT*, 599 N.Y.S.2d 892 (App. Div. 1993) (refusing to recognize a child's right to counsel in protection proceedings). *See also* Marty Guggenheim, *The Right to Be Represented But Not Heard: Reflections on Legal Representation for Children*, 59 N.Y.U. L. REV. 76, 119 (1984) (arguing that a constitutional right to counsel for children in custody cases cannot be inferred from *Gault*).

³²⁷ *See* CHILD'S ADVOCACY INSTITUTE, A CHILD'S RIGHT TO COUNSEL – A NATIONAL REPORT CARD ON LEGAL REPRESENTATION FOR ABUSED & NEGLECTED CHILDREN (3d ed.

recognized rights at the federal level that would help in the case of the high costs of guardianship and adoption proceedings for kinship caregivers and children in their care living in poverty.

B. Human Rights Arguments

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

U.S. courts and policymakers can and should look to human rights law for guidance, not unlike how courts look to case law or legislation from sister states for guidance.³²⁸ Human rights law may be a source of persuasive arguments for courts and policy makers, and may offer precedent and models that are more on point than anything in the state or federal systems in the U.S.³²⁹ Moreover, states, the federal government, and local governments, all have a formal obligation to comply with human rights law,³³⁰ and to not defeat the object and purpose of any human rights treaty signed by the U.S.³³¹ These obligations may not be enforceable in U.S.

2012), http://www.caichildlaw.org/Misc/3rd_Ed_Childs_Right_to_Counsel.pdf (stating that 61% of states provide counsel for abused or neglected children).

³²⁸ See *Roper v. Simmons*, 543 U.S. 551, 578 (2005) (“The opinion of the world community, while not controlling our outcome, does provide respected and significant confirmation for our own conclusions.”). See also, e.g., *State v. Wilder*, 748 A.2d 444 (Me. 2000) (looking to European common law to support its finding of the fundamental right of parents to control the upbringing of their children); Martha F. Davis, *The Spirit of Our Times: State Constitutions and International Human Rights*, 30 N.Y.U. REV. L. & SOC. CHANGE 359, 360 (2006) (“The United States Constitution, which textually focuses on limiting government action, may yield no guidance to state courts asked to interpret, for example, the substantive meaning of positive rights to ‘health,’ ‘education,’ ‘welfare.’ In such an instance, international norms articulated in transnational law may be a singularly important guide to the substantive content of the provisions.” (citations omitted)).

³²⁹ See Risa E. Kaufman, *By Some Other Means: Considering the Executive’s Role in Fostering Subnational Human Rights Compliance*, 33 CARDOZO L. REV. 1971 (2012); see also LOCAL HUMAN RIGHTS LAWYERING PROJECT, HUMAN RIGHTS IN THE U.S.: A HANDBOOK FOR LEGAL AID ATTORNEYS 7–8 (July 21, 2014), <https://www.wcl.american.edu/index.cfm?LinkServID=B1E62E62-A5A0-D585-2D87C971D50AAE18> [hereinafter HANDBOOK FOR LEGAL AID ATTORNEYS].

³³⁰ See U.S. CONST. Art. IV § 2; see also Davis, *supra* note 328, at 359.

³³¹ Vienna Convention on the Law of Treaties, May 23, 1969, art. 18, 1155 U.N.T.S. 331, 8 I.L.M. 679, entered into force, Jan. 27, 1980. While the U.S. is not a party to the Vienna Convention, the U.S. recognizes that many of the Convention’s provisions have become

courts,³³² but that does not mean that making human rights arguments in U.S. courts and before policymakers in the U.S. is futile. Human rights arguments, like those discussed below, can be used to bolster strong arguments based in U.S. law and policy. Here, the human rights framework has much to offer regarding the human rights to access to justice, rights to family and adoption, and economic rights, and the waiver of the prepayment of the nonrecurring expenses for adoption proceedings and permanent guardianships by kinship caregivers living in poverty.³³³

1. The Right to Access to Justice

The right to access to justice is clear under human rights law.³³⁴ The Universal Declaration of Human Rights, a foundational human rights

customary international law. *See, e.g.*, Maria Frankowska, *The Vienna Convention on the Law of Treaties Before U.S. Courts*, 28 VA. J. INT'L L. 281, 299–300 (1988) (discussing how the U.S. has demonstrated that it considers itself bound by the provisions of the Vienna Convention).

³³² *See, e.g.*, HANDBOOK FOR LEGAL AID ATTORNEYS, *supra* note 329, at 18–19 (providing a brief explanation of reservations, understandings, and declarations assigned by the U.S. government when ratifying human rights treaties, including reservations against a private right of action); MARTHA F. DAVIS, JOHANNA KALB & RISA E. KAUFMAN, HUMAN RIGHTS ADVOCACY IN THE UNITED STATES 153–75, 232–65 (2d ed. 2018) (discussing the difficulties of enforcing human rights treaties in U.S. courts); COLUMBIA LAW SCHOOL HUMAN RIGHTS INSTITUTE, HUMAN RIGHTS, SOCIAL JUSTICE, AND STATE LAW: A MANUAL FOR CREATIVE LAWYERING 7-8 (2008), <http://www.law.columbia.edu/sites/default/files/microsites/human-rights-institute/files/hr%20state%20law%20advocacy.pdf> (discussing the relationship between state law and transnational law) [hereinafter MANUAL FOR CREATIVE LAWYERING].

³³³ There is plenty of scholarship, as well as manuals, available on the topic of how to use human rights arguments before U.S. courts and policymakers. *See, e.g.*, Lauren E. Bartlett, *Local Human Rights Lawyering*, 62 ST. LOUIS U. L.J. 887 (2018); HANDBOOK FOR LEGAL AID ATTORNEYS, *supra* note 329; National Juvenile Defender Center, INTERNATIONAL HUMAN RIGHTS: LAW & RESOURCES FOR DEFENDERS & ADVOCATES (2012), http://njdc.info/wp-content/uploads/2013/11/International-Human-Rights_Law-and-Resources-for-Juvenile-Defenders-and-Advocates.pdf; MANUAL FOR CREATIVE LAWYERING, *supra* note 332. In addition, the Bringing Human Rights Home Lawyers' Network (BHRH Lawyers' Network) at Columbia Law School's Human Rights Institute, houses a U.S. Human Rights Online Library, which serves as an online clearinghouse for domestic human rights resources, including sample briefs, pleadings, and other materials that BHRH Lawyers' Network members can use to assist with human rights advocacy in the U.S. *See* BHRH Lawyers' Network website, <http://www.law.columbia.edu/human-rights-institute/bhrh-lawyers-network>.

³³⁴ *See, e.g.*, U.N. Hum. Rights Council, Special Rapporteur on Extreme Poverty and Human Rights, *Report on Extreme Poverty and Human Rights*, U.N. Doc. A/67/278 (Aug. 9, 2012) [hereinafter *Aug. 9, 2012 Report of the Special Rapporteur on Extreme Poverty and Human Rights*]; Inter-American Commission on Human Rights, *Access to Justice as*

document, explicitly discusses the human rights related to access to justice.³³⁵ The U.S. is a party to two international treaties that discuss the right to access to justice—the International Covenant on Civil and Political Rights (ICCPR) and the International Convention on the Elimination of Racial Discrimination (CERD).³³⁶ Under human rights law, Sharon Gurley’s right to access to justice is guaranteed and her poverty should not be an obstacle to adopting her granddaughter Kaylan.

The right to access to justice encompasses several interconnected and interdependent³³⁷ procedural rights, including the right to a fair and public hearing by a fair and impartial tribunal for a determination of rights and obligations;³³⁸ the right to an effective remedy;³³⁹ the right to equality

a Guarantee of Economic, Social and Cultural Rights, Inter-American Commission on Human Rights, Executive Summary, <https://www.cidh.oas.org/countryrep/AccessoDESC07eng/Accessodesci-ii.eng.htm>.

³³⁵ See Universal Declaration of Human Rights (UDHR), arts. 7-10, G.A. Res. 217A (III), U.N. Doc. A/810 (1948). Eleanor Roosevelt led the drafting and campaign to adopt the Universal Declaration of Human Rights. See Richard N. Gardner, *Eleanor Roosevelt’s Legacy: Human Rights*, N.Y.T. (1988), <https://www.nytimes.com/1988/12/10/opinion/eleanor-roosevelt-s-legacy-human-rights.html>.

³³⁶ International Covenant on Civil and Political Rights (ICCPR), Dec. 16, 1966, 999 U.N.T.S. 171; S. Exec. Doc. E, 95-2 (1978); S. Treaty Doc. 95-20, 6 I.L.M. 368 (1967), *ratified by the U.S.*, June 24, 1994; International Convention on the Elimination of All Forms of Racial Discrimination (CERD), Dec. 21, 1965, 660 U.N.T.S. 195, 212; S. Exec. Doc. C, 95-2 (1978); S. Treaty Doc. 95-18, *ratified by the U.S.*, Nov. 20, 1994.

³³⁷ See Martha F. Davis, *Human Rights and the Model Rules of Professional Conduct: Intersection and Integration*, 42 COLUM. HUM. RTS. L. REV. 157, 178 (2010) (discussing the recognition of the interrelationships between the full range of human rights); *Aug. 9, 2012 Report of the Special Rapporteur on Extreme Poverty and Human Rights*, *supra* note 334, at ¶4.

³³⁸ See, e.g., UDHR, *supra* note 335, at art. 10; ICCPR, *supra* note 336, at art. 2(3)(a); United Nations Convention on the Rights of the Child (CRC), art. 12, opened for signature Nov. 20, 1989, 1577 U.N.T.S. 3, *entered into force*, Sept. 2, 1990. The European Court of Human Rights has considered whether fees imposed prior to the institution of civil proceedings infringe on the human right to access to a court and has found that high fees infringe on the human rights of applicants living in poverty and unable to pay. See, e.g., *Tolstoy Miloslavsky v. United Kingdom*, Judgment § 63 (Application No. 18139/91, ECHR 1993); *Kreuz v. Poland*, Judgment §§ 60-67 (Application no. 28249/95, ECHR 2001); *Podbielski & PPU Polpure v. Poland*, Judgment §§ 65-66 (Application no. 39199/98, ECHR 2005); *Georgel & Georgeta Stoicescu v. Romania*, Judgment §§ 69-70 (Application no. 9718/03, ECHR 2011).

³³⁹ See, e.g., UDHR, *supra* note 335, at art. 9; ICCPR, *supra* note 336, at art. 2(3)(a).

and fairness before the courts;³⁴⁰ the right to equal protection of the law;³⁴¹ and the right to counsel.³⁴²

Interpretation of these rights is much broader under human rights law than U.S. federal law.³⁴³ For example, interpretations of the human rights to non-discrimination and to equal protection require that people living in poverty be considered a protected class and discrimination based on socioeconomic status is prohibited.³⁴⁴ Under the human rights framework, children are also specifically protected from discrimination on the basis of socioeconomic status and have guaranteed rights to access to justice.³⁴⁵

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

³⁴⁰ See, e.g., ICCPR, *supra* note 336, at art. 14.

³⁴¹ See, e.g., UDHR, *supra* note 335, at art. 7; ICCPR, *supra* note 336, at art. 26.

³⁴² See Martha F. Davis, *In the Interests of Justice: Human Rights and the Right to Counsel in Civil Cases*, 25 *TOURO L. REV.* 147 (2009).

³⁴³ See, e.g., CERD, *supra* note 336, at art. 2 (mandating States Parties to “amend, rescind or nullify any laws and regulations which have the effect of creating or perpetuating racial discrimination wherever it exists”).

³⁴⁴ For example, article 26 of the ICCPR has been interpreted to prevent discrimination on the basis of socioeconomic status. Article 26 of the ICCPR recites the following list “race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth or other status.” ICCPR, *supra* note 336, at art. 26. See also U.N. Human Rights Committee, General Comment No. 18, Non-Discrimination (1989); *Aug. 9, 2012 Report of the Special Rapporteur on Extreme Poverty and Human Rights*, *supra* note 334, at ¶10; *Mellet v. Ireland*, U.N. Human Rights Committee, U.N. Doc. CCPR/C/116/D/2324/2013 (2016) (noting that the Committee determined that Article 26, which provides for the right to equality before the law, had been violated on two grounds—discrimination on the grounds of socio-economic status and gender discrimination—and stating that the State “failed to adequately take into account her [Ms. Mellet’s] medical needs and socio-economic circumstances and did not meet the requirements of reasonableness, objectivity and legitimacy of purpose”). The American Convention on Human Rights specifically mentions economic status in article 1. American Convention on Human Rights (ACHR), art. 1, Nov. 21, 1969, O.A.S. T.S. No. 36; 1144 U.N.T.S. 143; S. Treaty Doc. No. 95-21, 9 I.L.M. 99, *entered into force*, July 18, 1978 (“The States Parties to this Convention undertake to respect the rights and freedoms recognized herein and to ensure to all persons subject to their jurisdiction the free and full exercise of those rights and freedoms, without any discrimination for reasons of race, color, sex, language, religion, political or other opinion, national or social origin, economic status, birth, or any other social condition.”).

³⁴⁵ See, e.g., CRC, art. 3(2), 12, *supra* note 338.

[a]round the world, persons living in poverty face a range of obstacles in claiming and enforcing, or contesting violations of, their rights. Such obstacles not only imply violations of their rights to a remedy and due process, but also undermine their ability to enjoy other human rights equally and without discrimination. States, therefore, are under an obligation to eliminate obstacles which frustrate the efforts of the poorest and most vulnerable to access justice.³⁴⁶

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

Because adoptions and permanent guardianships are legal constructs,³⁴⁷ there is no way for kinship caregivers and the children in their care to achieve permanency without access to a court of law in the U.S. Therefore, the right to access to court and the right to a remedy under the human rights framework requires that kinship adoptions and permanent guardianship proceedings initiated by persons living in poverty proceed without the onerous prepayment of court costs and other related fees.³⁴⁸

It is the responsibility of the federal government, state governments, and the local governments to ensure that the human rights of kinship caregivers living in poverty are not infringed upon and that they are not barred from access to justice due to their socioeconomic status. Moreover, without access to justice, kinship caregivers and the children in their care

³⁴⁶ Aug. 9, 2012 Report of the Special Rapporteur on Extreme Poverty and Human Rights, *supra* note 334, at ¶15.

³⁴⁷ There is no recognized adoption or guardianship at common law and no religious pathway to establish an adoption or guardianship. *See* Adoption of Easley, 61 Pa. D. & C.2d 519 (Pa. Com. Pl. 1973).

³⁴⁸ *See, e.g.,* Case of Airey v. Ireland, §31-33 (ECHR Application no. 6289/73, 1979) (ruling in favor of a woman who argued that her human rights to a fair trial and rights to privacy and family life had been violated because she was unable to pay the high cost of hiring an attorney to get a divorce and holding that the art. 6 right to a fair trial sometimes requires the state to pay for the assistance of an attorney, when a litigant cannot otherwise pay, when such a assistance proves indispensable for an effective access to court).

are unable to enjoy other human rights, including rights to family and adoption, as discussed in section III.B.2, below.

2. The Rights to Family and Adoption

In addition to the right to access to justice, there is an interconnected, interdependent, and fundamental human right to family which shows up frequently in human rights law.³⁴⁹ The right to family is often used by human rights advocates in the context of family planning, to include the right to bear children and the right to abortion, but it also covers children and family life.³⁵⁰ The right to family also appears in human rights law in

³⁴⁹ See, e.g., *id.* (“Although the object of Article 8 [(right to respect for private and family life)] is essentially that of protecting the individual against arbitrary interference by the public authorities, it does not merely compel the State to abstain from such interference: in addition to this primarily negative undertaking, there may be positive obligations inherent in an effective respect for private or family life Effective respect for private or family life obliges Ireland to make this means of protection effectively accessible”); UDHR, *supra* note 335, at art. 16(3); ICCPR, *supra* note 336, at art. 23(1); International Convention on the Protection of the Rights of All Migrant Workers and Members of Their Families, art. 44(1), Dec. 18, 1990, 2220 U.N.T.S. 93; ACHR, *supra* note 344, at art. 17(1); International Covenant on Economic, Social and Cultural Rights (ICESCR), art. 10(1), Dec. 16, 1966, 993 U.N.T.S. 3; CRC, *supra* note 338, at Preamble & arts. 7(1), 8(1), and 9(1); African Charter on the Rights and Welfare of the Child, arts. 4(1), 19(1), July 11, 1990, OAU Doc. CAB/LEG/24.9/49); The European Convention on Human Rights (ECHR), art. 8, European Convention for the Protection of Human Rights and Fundamental Freedoms, art. 8(1), Nov. 4, 1950, Europ. T.S. No. 5, 213 U.N.T.S. 221 (1950). The European Court of Human Rights has found violations of the right to family life in cases dealing with foster care and adoption cases. See, e.g., *Moretti and Benedetti v. Italy*, Judgment § 48 (Application no. 16318/07 ECHR 2010); *Kopf and Liberda v. Austria*, Judgment § 37 (Application no. 1598/06, ECHR).

³⁵⁰ See UDHR, *supra* note 335, at art. 12; ICCPR, *supra* note 336, at art. 17 (“[N]o one shall be subjected to arbitrary interference with his privacy, family, home or correspondence, nor to attacks upon his honour and reputation’ and that ‘everyone has the right to protection of the law against such interference or attacks.”); CRC, *supra* note 338, at art. 18(2) (“States Parties shall render appropriate assistance to parents and legal guardians in the performance of their child-rearing responsibilities and shall ensure the development of institutions, facilities and services for the care of children.”); see also *Fact Sheet – Parental Rights*, European Court of Human Rights (Sept. 2018), https://www.echr.coe.int/Documents/FS_Parental_ENG.pdf (providing a list of cases concerning parental rights raise issues mainly under Article 8 (right to respect for private and family life); Elizabeth Bartholet, *International Adoption: Thoughts on the Human Rights Issue*, 13 BUFF. HUM. RTS. L. REV. 151 (2007); Sonja Starr & Lea Brilmayer, *Family Separation as a Violation of International Law*, 21 BERKELEY J. INT’L L. 213 (2003).

the context of family separation, including in child welfare cases,³⁵¹ as well as in the immigration law context.³⁵² The right to family includes the underlying principles of the family as the natural and fundamental unit of society, the maintenance of which is in the best interests of the child.³⁵³

There is also an argument under human rights law that the governments must uphold the right to adoption. Though specific language referring to the right to adoption is not found in any human rights treaty, the right to adoption has been discussed and promoted by some scholars³⁵⁴ as interconnected to and interdependent with the right to family for children whose parents are not available to care for them. As Paolo Barrozo has stated, “to give the unparented access to an adoptive family is a human rights-imposed duty, binding individuals, society, and public and private institutions.”³⁵⁵ In addition, Elizabeth Bartholet has argued that “human rights principles give children the right to true family care . . . they have the right to be liberated from the conditions characterizing orphanages, street life, and most foster care.”³⁵⁶

Moreover, children’s rights are much broader under the human rights framework. For example, the U.N. Convention on the Rights of the Child emphasizes that children are the bearers of rights and specifically requires States to take “all appropriate legislative and administrative measures” to ensure the child such protection and care as is necessary for his or her well-being.³⁵⁷ These measures should include the administrative

³⁵¹ See, e.g., Jean Koh Peters, *How Children Are Heard in Child Protective Proceedings, in the United States and Around the World in 2005: Survey Findings, Initial Observations, and Areas for Further Study*, 6 NEV. L.J. 966 (2005).

³⁵² See, e.g., Ryan Mrazik & Andrew I. Schoenholtz, *Protecting and Promoting the Human Right to Respect for Family Life: Treaty-based Reform and Domestic Advocacy*, 24 GEO. IMMIGR. L.J. 651 (2010).

³⁵³ See *id.* at 652.

³⁵⁴ See, e.g., Paolo Barrozo, *Finding Home in the World: A Deontological Theory of the Right to be Adopted*, 55 N.Y.L. SCH. L. REV. 701 (2010); see also Bartholet, *supra* note 350 (arguing for international adoption in a human rights context).

³⁵⁵ See Barrozo, *supra* note 354, at 704.

³⁵⁶ *Id.* The US is the only country in the world that has not ratified the Convention on the Rights of the Child, which protects the rights of children. See U.N. Hum. Rights Council, *Report of the Special Rapporteur on Extreme Poverty and Human Rights on His Mission to the United States of America*, U.N. Doc. A/HRC/38/33/Add. 1 (May 4, 2018) [hereinafter *May 4, 2018 Report of the Special Rapporteur*].

³⁵⁷ See CRC, *supra* note 338; see also Soo Jee Lee, Student Note, *A Child’s Voice vs. A Parent’s Control: Resolving a Tension Between the Convention on the Rights of the Child and U.S. Law*, 117 COLUM. L. REV. 687, 718 (2017) (“Chief among the CRC’s base principles is the idea that children are rights-bearing individuals.”).

measures necessary to provide children like Kaylan with permanency, including permanent guardianship proceedings or adoption.

For kinship caregivers and the children in their care,³⁵⁸ the human rights to family and adoption are infringed upon when they are barred from permanency options, including moving from informal kinship care to adoption or permanent guardianship due to their poverty and for want of the ability to pay the nonrecurring costs of these proceedings upfront. Ms. Gurley's granddaughter Kaylan cannot rely on her parents for care. Her father has never been a part of her life, and her mother has been unable to care for her for her entire life. In addition, her mother has now been sentenced to prison for murder and will not be released until Kaylan has reached the age of majority. She should have a right to avoid "orphanages, street life, and foster care." In addition, she has a grandmother who wants to care for her and adopt her as her own daughter. Kaylan has a right to a permanent and legally recognized family and her grandmother's poverty absolutely should not bar her rights to family and adoption from being fulfilled.

3. Economic Rights

The U.S. generally takes a dim view of economic rights, as well as protections against discrimination on the basis of socioeconomic status if those protections come with economic rights or guarantees.³⁵⁹ This view has played out recently in the U.S. regarding recent right to healthcare discussions, for example.³⁶⁰ On the contrary, human rights law has a robust history of supporting the progressive realization of economic rights.³⁶¹

³⁵⁸ For the purposes of this argument, Kaylan and other children in the care of kinship caregivers would fall into the category of "unparented," as defined by Paolo Barrozo. Barrozo, *supra* note 354.

³⁵⁹ See Davis et al., *supra* note 332, at 442–50. *But see* Goldberg v. Kelley, 397 U.S. 254 (1970).

³⁶⁰ See, e.g., Andrea S. Christopher, MD & Dominic Caruso, *Promoting Health as a Human Right in the Post-ACA United States*, AMA JOURNAL ETHICS (Oct. 2015), <https://journalofethics.ama-assn.org/article/promoting-health-human-right-post-aca-united-states/2015-10>; James Teufel et al., *Legal Aid Inequities Predict Health Disparities*, 38 HAMLIN L. REV. 329, 337 (2015) ("Socioeconomic status has been strongly linked to health in the US and abroad. Overall health is associated with a relevant social status gradient [i.e., level on the socioeconomic ladder]. Those people who are closer to the top of the social gradient have better health outcomes than those closer to the bottom.").

³⁶¹ The ICESCR is the principal human rights treaty regarding economic and social rights. The ICESCR protects the equal rights of men and women to housing, work, social security, the highest attainable standard of health, and the continuous improvement of living conditions. See ICESCR, *supra* note 349. The U.S. is not a party to the ICESCR, yet the

Economic rights recognized under the human rights framework include, and are not limited to, the right to social protection for those in need,³⁶² the right to healthcare, the right to education, the right to work with dignity, and the right to housing and an adequate standard of living.³⁶³ These economic rights are found in the Universal Declaration of Human Rights,³⁶⁴ as well as in several human rights treaties.³⁶⁵ The United Nations Human Rights Council has appointed a Rapporteur on Extreme Poverty and Human Rights,³⁶⁶ who is an independent expert charged with making observations and recommendations to member states regarding these rights in the context of extreme poverty. The Rapporteur on Extreme Poverty and Human Rights has stated that:

from a human rights perspective, society has an obligation towards its poorest and most vulnerable members, whose well-being must be protected and promoted, not as a matter of charity but as a matter of right.³⁶⁷

U.S. has signed the treaty. See United Nations Treaty Collection, International Covenant on Economic, Social and Cultural Rights, https://treaties.un.org/pages/ViewDetails.aspx?src=IND&mtdsg_no=IV-3&chapter=4&clang=en. There are currently 71 signatories and 169 state parties to the ICESCR. *Id.* The ICESCR represents an international consensus on economic rights, otherwise known as positive human rights. See Davis et al., *supra* note 332; see also Maastricht Guidelines on Violations of Economic, Social, and Cultural Rights, Maastricht (Jan. 22-26, 1997). *But see* Samuel Moyn, *Human Rights Are Not Enough*, THE NATION (Mar. 16, 2018), <https://www.thenation.com/article/archive/human-rights-are-not-enough/> (arguing that there has been a fundamental failure by human rights movements to address economic inequality, advocate for redistributive policies, and that this has helped “prettify neoliberalism”).

³⁶² See *May 4, 2018 Report of the Special Rapporteur*, *supra* note 356.

³⁶³ See *id.*; see also ICESCR, *supra* note 349.

³⁶⁴ See, e.g., UDHR, *supra* note 335, at art. 22, 23(3), and 25(1).

³⁶⁵ See, e.g., ICESCR, *supra* note 349, at art. 9, 11(1), & 12; CRC, *supra* note 338, at art. 24(1) & 26(1); International Convention on the Protection and Promotion of the Rights and Dignity of Persons with Disabilities (CRPD), art. 25, 28(1,2), Mar. 30, 2007, G.A. Res. 61/106, Annex I, U.N. GAOR, 61st Sess., Supp. No. 49, at 65, U.N. Doc. A/61/49 (2006), 46 I.L.M. 433 (2007), *entered into force*, May 3, 2008; Convention on the Elimination of Discrimination Against Women (CEDAW), art. 11(1), Sept. 3, 1981, G.A. res. 34/180, 34 U.N. GAOR Supp. (No. 46) at 193, U.N. Doc. A/34/46, *entered into force*, Sept. 3, 1981.

³⁶⁶ See *id.*

³⁶⁷ U.N. Hum. Rights, *Report of the Special Rapporteur on Extreme Poverty and Human Rights on His Mission to the United States of America*, U.N. Doc. E/CN.4/2006/43/Add.1 (Mar. 27, 2006).

Human rights principles require states and federal government to work towards progressive realization of economic rights.³⁶⁸ This means that the U.S. should steadily work towards ensuring all people in poverty have access to an adequate standard of living and healthcare, and have social protections, among other economic rights. Full realization of these rights does not have to happen right away, but policy should move in that direction.³⁶⁹

Under the doctrine for the rights to social protection for those in need, not only should the nonrecurring expenses for adoption and permanent guardianships for people living in poverty be waived or subsidized, but the federal, state, and local governments should work together to go above and beyond and provide additional financial and other support to kinship caregivers living in poverty. The U.S. should work toward providing additional post-permanency per diem payments, not unlike the post-adoption payments available to foster care providers, as well as additional subsidies and support to ensure that all children and their kinship caregivers have access to adequate healthcare, education, housing, and food, regardless of their socioeconomic status.³⁷⁰

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

CONCLUSION

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

³⁶⁸ See Davis et al., *supra* note 332, at 440–41.

³⁶⁹ See *id.*

³⁷⁰ The federal, state, and local governments can collaborate to provide these subsidies for low income kinship caregivers and the children in their care, as they do for GAP guardianship assistance and post-adoption payments for children with “special needs.” See *supra* section II.B.

While foster care providers receive subsidies for adoptions or permanent guardianships for children in their care, informal kinship caregivers receive far fewer benefits for the children in their care. There are more than five times the number of children in informal kinship care as there are in foster care, and so many of the children in informal kinship care are left without the option of permanency because of their caregivers' inability to pay for court proceedings and ancillary costs. The goal of the child welfare system is to promote the safety, permanency, and well-being of children,³⁷¹ yet the state and federal governments are missing the mark by refusing to adequately support adoptions and permanent guardianships by kinship caregivers living in poverty.

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

First, the four states, Alabama, Iowa, Kansas, and Ohio,³⁷² that refuse to waive court costs for adoptions and permanent guardianships for people living in poverty should do so immediately and should do so by statute. Second, the seven states—Georgia, Hawaii, Louisiana, Missouri, Ohio, South Dakota, and Texas³⁷³—that refuse to provide a waiver of the home study fee for kinship caregivers living in poverty should do so immediately and should do so by statute. Doing this would remove the biggest obstacles to adoptions and permanent guardianships for kinship caregivers living in poverty.

The federal government should also ensure that the nonrecurring expenses associated with adoptions and permanent guardianships for kinship caregivers living in poverty are subsidized at the same level as foster care providers. One way to do this would be for Congress to expand the class of children eligible for GAP payments.³⁷⁴ The class should be expanded to include children in the care of kinship caregivers living at or below the federal poverty line even if the children are not wards of the

³⁷¹ See *What We Do*, *supra* note 104.

³⁷² See *supra* section II.F.

³⁷³ See *id.*

³⁷⁴ 42 U.S.C. § 673.

state.³⁷⁵ This would help ensure that kinship caregivers living in poverty would be eligible for per diem payments and other supportive services, as well as reimbursement of the nonrecurring expenses related to adoptions without requiring the child welfare agency to first have custody of the children. Amending the definition of “special needs” under the Act in this way would also mean that the Title-IV Guardianship Assistance Program³⁷⁶ would allow kinship caregivers living in poverty to receive reimbursements of up to \$2,000 in nonrecurring expenses for establishing permanent guardianships.³⁷⁷

The federal government could also choose to apply some of the new dedicated stream of funding for Kinship Navigator Programs³⁷⁸ to cover the nonrecurring expenses related to adoptions and permanent guardianships for kinship caregivers. That stream of funding is already being used to provide legal services to kinship caregivers.³⁷⁹ Therefore, it is not much of a stretch to create a pot of money within that stream that is dedicated to covering the nonrecurring expenses of legal proceedings related to permanency for children in the care of kinship caregivers living in poverty.

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

³⁷⁵ Optimally the definition should be expanded to include kinship caregivers living up to 125% of the federal poverty line. This would be in line with income level requirements for most legal aid programs. See LEGAL SERVICES CORPORATION, QUICK FACTS (2017), <https://www.lsc.gov/quick-facts> [hereinafter LSC QUICK FACTS].

³⁷⁶ See Fostering Connections to Success and Increasing Adoptions Act of 2008, Pub. L. No. 110-351, 122 Stat. 3949.

³⁷⁷ In addition to subsidizing or waiving the nonrecurring costs of adoptions and permanent guardianships for kinship caregivers living in poverty, Congress should be sure to provide adequate funding to the Legal Services Corporation to provide free legal counsel to kinship caregivers living in poverty who wish to adopt or move for permanent guardianship. See LSC QUICK FACTS, *supra* note 375 (stating that the Legal Services Corporation is a nonprofit established by Congress in 1974 to provide financial support for civil legal aid to low-income Americans). This would help to guarantee the rights of due process and access to justice for kinship caregivers living in poverty.

³⁷⁸ See *supra* section II.A.

³⁷⁹ See CASEY FAMILY PROGRAMS, WHAT ARE KINSHIP NAVIGATOR PROGRAMS (2018), <https://www.casey.org/what-are-kinship-navigators/>.

APPENDIX A: CURRENT SUBSIDIZATION SCHEMES FOR KINSHIP CARE

Type of Pathway to Permanency	Subsidies Available	Avg. \$\$ (Monthly) ³⁸⁰	Requirements to Receive Subsidy
Informal Kinship Care ³⁸¹	<input checked="" type="checkbox"/> TANF <input type="checkbox"/> Per Diem payments <input type="checkbox"/> GAP Payments <input type="checkbox"/> Other monthly payments <input checked="" type="checkbox"/> Child support <input checked="" type="checkbox"/> SNAP <input checked="" type="checkbox"/> Medicaid/CHIP <input checked="" type="checkbox"/> Tax deductions <input checked="" type="checkbox"/> Kinship navigator program <input type="checkbox"/> Case worker <input type="checkbox"/> Training <input type="checkbox"/> Additional services <input type="checkbox"/> Reimbursement of nonrecurring expenses	\$531 – \$1,805	<ul style="list-style-type: none"> - Caregiver must meet income & resource requirements for TANF, SNAP, Medicaid/CHIP, and tax deductions; and meet state definition of “kinship caregiver” for navigator program. - Child must meet residency requirements for tax purposes.
Kinship Foster Care ³⁸²	<input checked="" type="checkbox"/> TANF <input checked="" type="checkbox"/> Per Diem Payments <input type="checkbox"/> GAP Payments <input checked="" type="checkbox"/> Other monthly payments	\$773 – \$6,000	<ul style="list-style-type: none"> - Caregiver must be licensed foster care provider for per diem financial assistance, services, and case worker; meet income & resource requirements for

³⁸⁰ The Average \$\$ Monthly column represents an estimated average of the cash assistance and food stamps available for kinship care family of one adult and two children with other income below 100% of the Federal Poverty Line and limited additional resources. *See infra* Appendix B for an explanation of where these numbers came from. *See also, e.g.*, CENTER ON BUDGET AND POLICY PRIORITIES, FAMILY INCOME SUPPORT, <https://www.cbpp.org/topics/family-income-support>. The numbers vary dramatically due to differing state policies regarding eligibility criteria for TANF, SNAP, Medicaid, CHIP, as well as foster care, guardianship and post-adoption financial assistance. *See supra* Part II. For comparison, in 2019 the Federal Poverty Line for a family of three is \$1770 per month. *See* <https://aspe.hhs.gov/poverty-guidelines>.

³⁸¹ *See supra* section II.A.

³⁸² *See supra* section II.B.

	<input type="checkbox"/> Child support <input checked="" type="checkbox"/> SNAP <input checked="" type="checkbox"/> Medicaid/CHIP <input checked="" type="checkbox"/> Tax deductions <input checked="" type="checkbox"/> Kinship navigator program <input checked="" type="checkbox"/> Case worker <input checked="" type="checkbox"/> Training <input checked="" type="checkbox"/> Additional services <input checked="" type="checkbox"/> Reimbursement of nonrecurring expenses		<p>TANF, SNAP, Medicaid/CHIP, and tax deductions; and meet state definition of “kinship caregiver” for navigator program.</p> <ul style="list-style-type: none"> - Child support is collected by state, if available. - Some states provide less financial assistance for kin than for non-kin. - Child must meet residency requirement for tax purposes.
<p>Kinship Guardianship³⁸³ (these subsidies only available in 35 States and DC)</p>	<input checked="" type="checkbox"/> TANF <input type="checkbox"/> Per Diem payments <input checked="" type="checkbox"/> GAP payments <input type="checkbox"/> Other monthly payments <input type="checkbox"/> Child support <input checked="" type="checkbox"/> SNAP <input checked="" type="checkbox"/> Medicaid/CHIP <input checked="" type="checkbox"/> Tax deductions <input checked="" type="checkbox"/> Kinship navigator program <input type="checkbox"/> Case worker <input type="checkbox"/> Training <input checked="" type="checkbox"/> Additional services <input checked="" type="checkbox"/> Reimbursement of nonrecurring expenses	<p>\$773 – \$2,000</p>	<ul style="list-style-type: none"> - Caregiver must be “relative” of child; licensed foster care provider; and care for child at least 6 mos before moving for guardianship; meet income & resource requirements for TANF, SNAP, Medicaid/CHIP, and tax deductions; and meet state definition of “kinship caregiver” for navigator program. - Child must meet “special needs” definition under Title IV-E; reunification with parents ruled out; and been consulted regarding guardianship if child is 14yrs old+.
<p>Private Kinship Adoption³⁸⁴</p>	<input checked="" type="checkbox"/> TANF <input type="checkbox"/> Per Diem Payments <input type="checkbox"/> GAP payments	<p>\$531 – \$1,805</p>	<ul style="list-style-type: none"> - Caregiver must meet income & resource requirements for TANF, SNAP,

³⁸³ See *supra* section II.C.

³⁸⁴ See *supra* sections II.D.-E.

	<ul style="list-style-type: none"> <input type="checkbox"/> Other monthly payments <input type="checkbox"/> Child support √ SNAP √ Medicaid/CHIP √ Tax deductions <input type="checkbox"/> Kinship navigator program <input type="checkbox"/> Case worker <input type="checkbox"/> Training <input type="checkbox"/> Additional services <input type="checkbox"/> Reimbursement of nonrecurring expenses 		<p>Medicaid/CHIP, and tax deductions.</p> <p>- Child must meet residency requirement for tax purposes.</p>
<p>Adoption from Kinship Foster Care³⁸⁵</p>	<ul style="list-style-type: none"> √ TANF <input type="checkbox"/> Per Diem Payments <input type="checkbox"/> GAP payments √ Other monthly payments <input type="checkbox"/> Child support √ SNAP √ Medicaid/CHIP √ Tax deductions <input type="checkbox"/> Kinship navigator program <input type="checkbox"/> Case worker <input type="checkbox"/> Training √ Additional services √ Reimbursement of nonrecurring expenses 	<p>\$603 – \$6,000</p>	<p>- Caregiver must be licensed foster care provider for post-adoption payments, reimbursement of nonrecurring expenses of legal proceedings and additional services; and meet income and resource requirements for TANF, SNAP, Medicaid/CHIP, and tax deductions.</p> <p>- Child must meet “special needs” definition under Title IV-E for post-adoption payments.</p>

³⁸⁵ See *id.*

APPENDIX B: AVERAGE MONTHLY CASH ASSISTANCE AND FOOD STAMPS³⁸⁶

TANF ³⁸⁷	\$170-\$1,039
Per Diem Payments ³⁸⁸	\$242-\$6,000
Guardianship Assistance Payments ³⁸⁹	\$242-\$6,000
Post-Adoption Monthly Payments ³⁹⁰	\$242-\$6,000
Child Support ³⁹¹	-
SNAP ³⁹²	\$170-\$505
Tax Deductions ³⁹³	\$191-\$261
Reimbursement of Nonrecurring Expenses ³⁹⁴	-

³⁸⁶ Estimates for a kinship family of one adult and two children. Numbers vary so much given the differences in state policies on eligibility criteria. *See supra* Part II.

³⁸⁷ *See* CENTER ON BUDGET AND POLICY PRIORITIES, POLICY BRIEF: DESPITE RECENT INCREASES IN SOME STATES, TANF CASH BENEFITS ARE STILL TOO LOW (2019), <https://www.cbpp.org/research/family-income-support/policy-brief-despite-recent-increases-in-some-states-tanf-cash>.

³⁸⁸ *See supra* section II.B.

³⁸⁹ *See supra* section II.C.

³⁹⁰ *See supra* sections II.D.2.

³⁹¹ This amount varies dramatically. Accordingly, this is not included in Appendix A calculations.

³⁹² *See* CENTER ON BUDGET AND POLICY PRIORITIES, A QUICK GUIDE TO SNAP ELIGIBILITY AND BENEFITS (2018), <https://www.cbpp.org/research/food-assistance/a-quick-guide-to-snap-eligibility-and-benefits>.

³⁹³ *See, e.g.,* Kathleen Elkins, *Here's the Average Tax Refund People Get in Every U.S. State*, CNBC (Apr. 4, 2017), <https://www.cnbc.com/2017/04/17/heres-the-average-tax-refund-people-get-in-every-us-state.html>.

³⁹⁴ This is a lump sum reimbursement payment and therefore not included as cash assistance here. *See supra* sections II.E & II.F. The amount of the lump sum reimbursement varies from \$250-\$2,000. *See id.*