

**New York State Office of Indigent Legal Services  
Essex County Hearing on Eligibility  
August 26, 2015**

**IN SUPPORT OF LEGAL ASSISTANCE FOR KINSHIP CAREGIVERS**

**GERARD WALLACE, ESQ.  
DIRECTOR, KINSHIP NAVIGATOR  
PUBLIC SERVICE PROFESSOR, UNIVERSITY AT ALBANY**

**Summary**

Kinship care refers to non-parents caring for children. Over 95% of kinship care is private care, not foster care. Article Six kinship petitions for custody and guardianship make up a significant part of the Family Court cases heard each year. Yet despite the fact that kinship families are disproportionately poor, they are only eligible for assigned counsel when they already have court ordered custody (*i.e.*, part three (custody) respondents) (Family Court Act section 262(a)(iii).

Petitioning kinship caregivers and respondent guardians, including respondent guardians under the KinGAP program, do not qualify for assigned counsel.

**Recommendation 1**

Indigent kinship caregivers, who are full time caregivers of children and whose petitions for Article Six custody or guardianship make a prima facie showing of extraordinary circumstances, should be eligible for assigned counsel.

**Recommendation 2**

Indigent kinship caregivers, who are respondent guardians in Article Six part four (guardian of the person) proceedings, should be eligible for assigned counsel.

## Introduction

I am the director of the NYS Kinship Navigator (KN), a New York State funded program, administered by the Office of Children and Family Services (OCFS), and operated by Catholic Charities in Rochester, with offices in Rochester and Albany.

KN's legislated mission is to provide an information and referral network for NYS's kinship caregivers. In its ninth year of operation, KN operates a statewide toll-free phone line and a website and also provides leadership across New York State for the kinship community. In the last 12 months, KN received calls from every county in NYS, totaling over 3,800 calls, with 38% from New York City. About 5% of our callers are professionals looking for technical information on kinship legal issues, the remainder are kinship caregivers, most of whom have recently become caregivers and are looking for guidance. KN's web site had 47,949 unique visitors, primarily searches of our legal fact sheets and county resources.

KN is the recipient of a national kinship navigator demonstration project grant, one of seven awarded by the federal Children's Bureau. The grant works to develop policies supportive of kinship families, and to provide pilot services in five upstate demonstration counties. As part of the grant, KN collaborates closely with local departments of social services.

In October 2013, KN hosted the fourth statewide KinCare Summit in Albany. The Summit was attended by 140 invited participants, including 23 caregivers, 38 kinship service providers, 25 state agency personnel (NYSOFA, OCFS, DOED, OTDA, OMH, DOH) and other stakeholders. Of special note, the Office of Indigent Legal Services attended.

Prior to my position at KN, I was director of the Hunter College Grandparent Caregiver Law Center, and also a consultant to AARP NY. I am also public service professor at the U. at Albany School of Social Welfare. I've drafted each of the four summit reports and numerous other policy/practice publications regarding kinship care.

The recommendations herein are based upon the Kinship Navigator's database (containing over 11,000 kinship caregivers), the advice of kinship service providers from across the state, four KinCare Summit reports, the preliminary findings of the Navigator's three-year federal Children's Bureau demonstration project, its evaluation, the advice of the KinCare Coalition committee on legal assistance, and my own experience.

The U.S. Census and Center for Disease Control estimate that 3% of all children in the U.S. (2.3 million) are in non-parental care, meaning children living without parents. Nationwide, 87% of these children are living with kinship caregivers who do not receive foster care benefits. Over 60% of kinship families live under 200% of federal poverty guideline.

Kinship families have long labored far from the spotlight, while protecting children at risk, healing children with trauma, and persisting through a thicket of legal, social, and family obstacles. Caregivers and advocates have called for action to support these families. New York has responded with assistance and services. However, while OCFS is increasingly supportive of kinship families, policies supportive of informal kinship families are often difficult to find within the plans of many state agencies, including the Office of Court Administration.

These families face daunting obstacles. Their children have many of the same problems faced by foster children, including maltreatment, trauma, and loss. Additionally, the caregivers are older and poorer, and they must manage the intergenerational issues associated with the parents' failure to parent successfully.

There are very good reasons to support kinship families. They are the only large-scale resource for vulnerable children, they get better outcomes for young people, and they are less expensive than foster care. The reasons for their success are clear. Extended families are highly motivated to go the distance and address any challenges that arise over a long period of time. Most of kinship care is done by grandparents, and a grandparent's love is the cure for many ills.

### **Part I: Profile of Kinship Families in New York State**

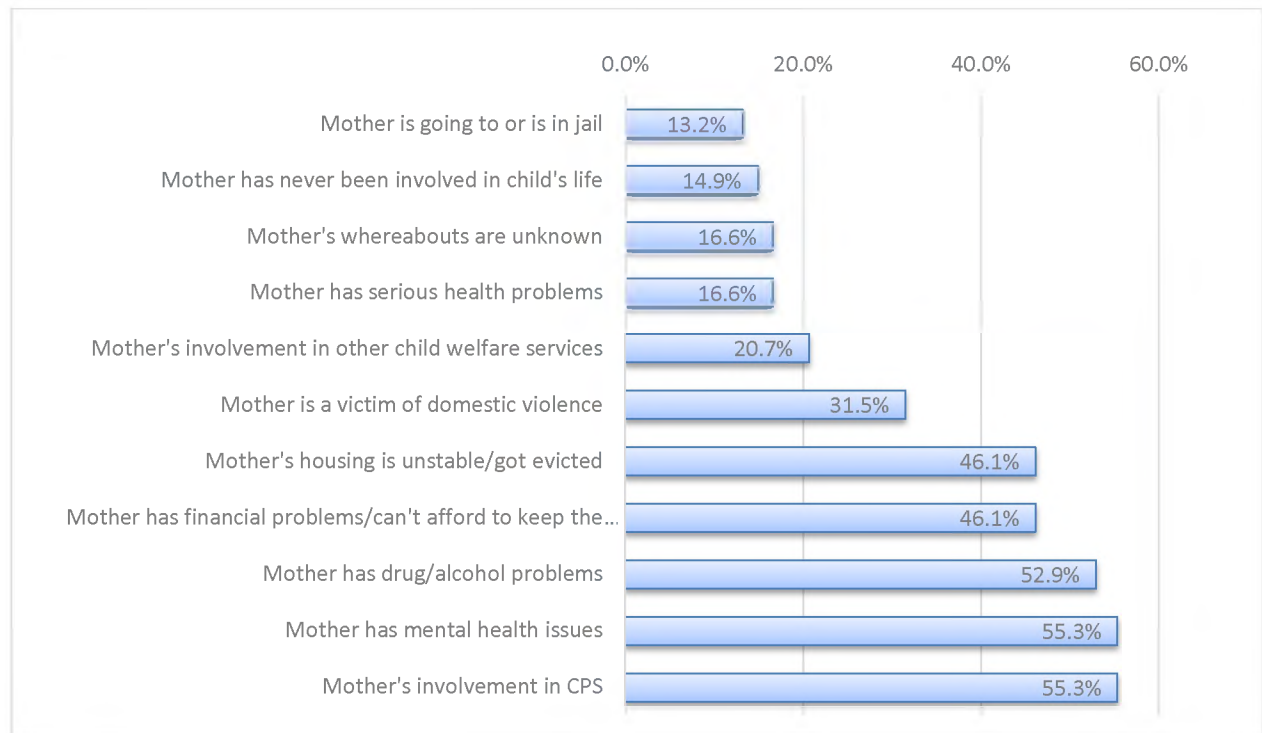
Kinship care is defined as grandparents, relatives, and family friends who are raising children when parents are unable to continue parenting. In New York State, estimates vary, from a low of 120,000 to a high 218,000 kinship families.

Most children in kinship care are not in foster care. According to 2012 OCFS data, there were 5,183 "approved" kinship foster homes; the number of "certified" kinship foster homes is only recently subject to data collection, and so far OCFS has not released data. However, in general, most kinship foster homes are "approved" and the number of "certified" is not expected to exceed 2,000. See NYS Kinship Care County table, p. 7-9.

As part of its three year Children's Bureau kinship navigator demonstration project, the Kinship Navigator's evaluator, the Center for Human Services Research at the U. at Albany, surveyed a cohort of 303 kinship families from five upstate counties: Tioga, Broome, Orange, Ulster, and Dutchess. The survey included access to child welfare data.

The below information profiles the reasons for care, income, involvement of Child Protective Services, and well-being of caregivers and children. The first two tables are from the CHSR study.

### Reasons for Kinship Care



The entire informal kinship community is an integral part of the child welfare response, as shown by the high rates of involvement with CPS and the associated causes for informal care. These families provide invaluable assistance to vulnerable children and should be viewed as an essential part of the child welfare effort to provide stable and loving homes for children whose parents are no longer able to provide care.

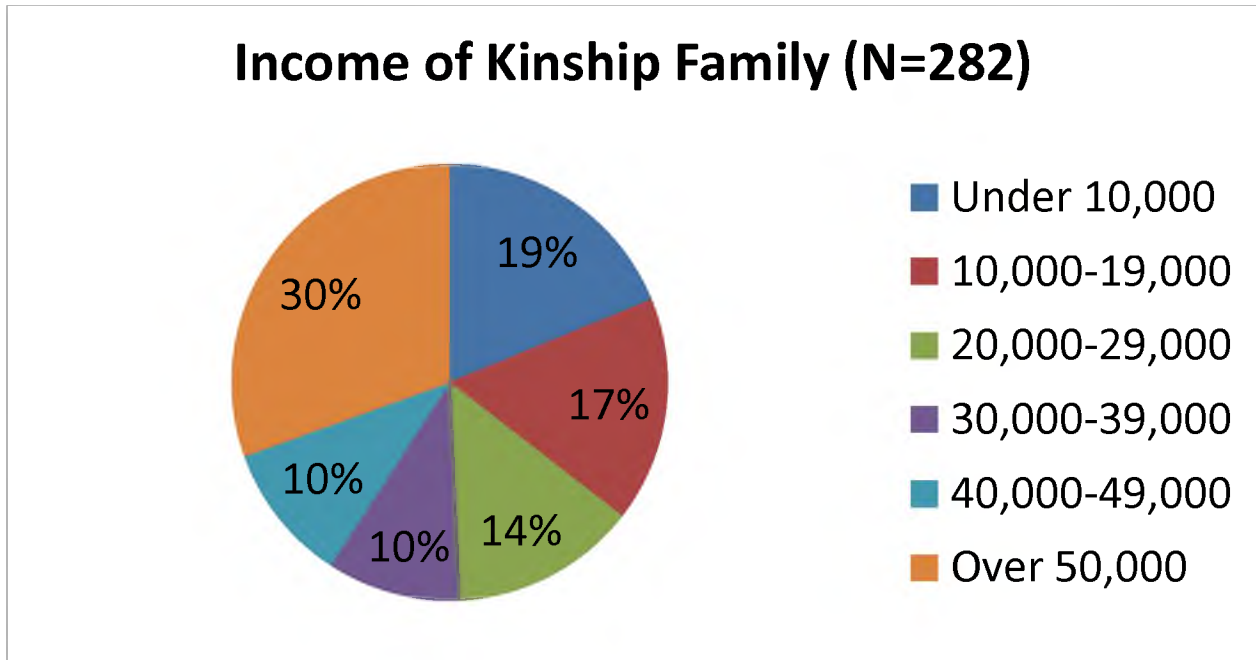
### CPS Involvement

According to this ongoing Center for Human Services Research (CHSR) study, of the 303 kinship caregivers surveyed; the study found:

- 459 kinship children were in the care of the 303 kinship caregivers.
  - The children were in informal kinship care at the time of survey (2013-2014)
  - Their case records were matched against state administrative records
- Out of the 459 children, 395 (86%) have child protective services investigations.

All of the surveyed kinship families were participants in the Kinship Navigator's demonstration project. None were foster families.

### Income of Kinship Families



### Other Data

Additionally, the CHSR study also showed that 40% of caregivers have clinically high levels of stress.

From an Annie E. Casey brief: one in ten of all children will live with a grandparent or other relative caregiver during their childhood, and one in five of all black children will live with a grandparent or other relative caregiver during their childhood (Annie E. Casey, 2013).

### From the Center for Disease Control

Children in Non-Parental Care:  
 Findings from The 2011-2012 National Survey of Children's Health,  
 Report on Assistant Secretary for Planning and Evaluation,  
 Office of Human Services Policy, HHS (Excerpts)

“10% of children in non-parental care have depression or anxiety disorders, compared with 6% of children living with one biological parent and 3% of children living with both biological parents” (Bramlett & Radel, 2014, p. 6).

“Compared with children living with two biological parents, children in non-parental care were about 1.5 times as likely to be living in a household in which it was often difficult to afford basics, five times as likely to have ever lived with a mentally ill caregiver or parent, six times as likely to have witnessed neighborhood violence, 15 times as likely to have witnessed caregiver or parent violence, 11 times as likely to have lived with a caregiver or parent with an alcohol or drug problem, and 17 times as likely to have experienced caregiver or parent incarceration” (Bramlett & Radel, 2014, p. 8).

“While Temporary Aid for Needy Families (TANF) participation may seem relatively high for those living with neither parent – 23% of children in these households receive that benefit – considering that nearly all children living apart from their parents are eligible for TANF “child-only” payments (Ehrle & Geen, 2002), the proportion receiving benefits is actually quite low” (Bramlett & Radel, 2014, p. 11).

**Children have significantly higher rates than two-parent or one-parent households:**

- TANF receipt
  - Child does not have excellent or very good dental health
  - Child has special health care needs
  - All child mental health conditions
  - Child’s receipt of mental health care
  - Reliance on public health insurance
  - Repeated grades
  - Poor school engagement
  - Child has an IFSP/IEP (special education plan)
  - Poor caregiver/child communication
  - AFE: Caregiver death
  - AFE: Witnessed caregiver violence
  - AFE: Witnessed neighborhood violence
  - AFE: Lived with someone with a mental illness
  - AFE: Parent/guardian incarceration
  - AFE: Lived with someone with an alcohol/drug problem
- \*AFE = Adverse Family Experiences (Bramlett & Radel, 2014, p. 10-11)

“The very high rates of adverse family experiences among children in non-parental care suggest that parental substance abuse, mental health problems, domestic violence and incarceration

form a cluster of factors that pervade the lives of children who have been separated from their parents. The cumulative trauma that these circumstances represent could have long-term implications for the health and well-being of these children over the life course” (Bramlett & Radel, 2014. p. 12).

Below is county breakdown of recent data on kinship families and services.

### NYS Kinship Care by County (Based upon U.S. Census Grandparents Households)

County	Population (ACS 2006-2010)	Population Under 18 (ACS 2006-2010)	Grandparent Householders Responsible for Grandchildren (ACS 2006-2010)	Non-Grandparent Caregivers	Estimated All Non-Parent Caregivers	Approved Kinship Foster Families (2012)	N Docket - (Direct) Custody	OTDA Non-Parent Grant Type 1 Cases	Kinship Families No Foster Care or ODTA Type 1 Grant	Percent of Kinship Families Not Receiving Assistance
NYS	19,303,733	4,307,867	131,108	87,405	218,513	5,183	1590	18,066	195,264	89.36%
Albany	304,102	60,516	1,036	691	1,727	13	31	337	1,377	79.73%
Allegany	49,030	10,590	299	199	498	11	6	66	421	84.55%
Broome	200,745	40,550	1,406	937	2,343	11	0	490	1,842	78.62%
Cattaraugus	80,494	18,836	589	393	982	9	12	124	849	86.45%
Cayuga	80,211	17,326	454	303	757	8	20	106	643	84.93%
Chautauqua	135,065	29,444	1,051	701	1,752	14	0	250	1,488	84.93%
Chemung	88,725	19,874	803	535	1,338	8	2	199	1,131	84.53%
Chenango	50,790	11,529	304	203	507		3	108	399	78.68%
Clinton	82,265	15,877	623	415	1,038	4	14	192	842	81.12%
Columbia	63,116	12,813	377	251	628	13	9	68	547	87.11%
Cortland	49,396	10,423	423	282	705	2	20	74	629	89.22%
Delaware	48,126	9,433	158	105	263	6	16	87	170	64.68%
Dutchess	296,910	65,914	1,819	1,213	3,032	28	21	264	2,740	90.37%
Erie	919,519	198,616	5,265	3,510	8,775	7	263	1,543	7,225	82.34%
Essex	39,405	7,605	135	90	225	1	0	39	185	82.22%
Franklin	51,731	10,760	278	185	463	9	12	47	407	87.91%
Fulton	55,556	12,333	571	381	952	1	0	69	882	92.64%
Genesee	59,970	13,253	358	239	597		5	40	557	93.30%
Greene	49,333	9,521	267	178	445	20	7	44	381	85.62%
Hamilton	4831	792	24	16	40		0	4	36	90.00%



Herkimer	64,429	14,303	522	348	870	7	34	119	744	85.52%
Jefferson	115,546	29,464	748	499	1,247	1	26	159	1,087	87.17%
Lewis	26,999	6,669	163	109	272		6	35	237	87.12%
Livingston	65,463	13,224	277	185	462	2	5	71	389	84.19%
Madison	73,228	15,964	479	319	798	7	0	78	713	89.35%
Monroe	742,931	168,645	4,740	3,160	7,900	1	52	1,231	6,668	84.41%
Montgomery	50,067	11,766	318	212	530	1	4	70	459	86.60%
Nassau	1,332,821	310,547	5,790	3,860	9,650	27	7	558	9,065	93.94%
Niagara	216,127	46,467	1,226	817	2,043	18	50	368	1,657	81.11%
Oneida	234,649	51,388	1,480	987	2,467	44	0	307	2,116	85.77%
Onondaga	465,436	107,050	2,895	1,930	4,825	10	1	786	4,029	83.50%
Ontario	107,211	24,122	290	193	483	5	1	165	313	64.83%
Orange	371,878	101,151	2,539	1,693	4,232	69	27	296	3,867	91.37%
Orleans	43,028	9,552	482	321	803	1	16	124	678	84.44%
Oswego	122,178	28,223	1,042	695	1,737	3	7	196	1,538	88.54%
Otsego	62,358	11,661	364	243	607		5	61	546	89.95%
Pulnam	99,639	23,614	251	167	418	2	5	25	391	93.55%
Rensselaer	159,156	33,900	836	557	1,393	9	14	172	1,212	87.01%
Rockland	308,749	86,758	1,468	979	2,447	9	13	157	2,281	93.22%
St. L	111,916	23,838	757	505	1,262	15	17	114	1,133	89.78%
Saratoga	218,631	49,629	1,000	667	1,667		4	143	1,524	91.42%
Schenectady	154,100	35,289	780	520	1,300	11	58	287	1,002	77.08%
Schoharie	32,796	6,526	442	295	737		3	40	697	94.57%
Schuyler	18,330	3,886	62	41	103		0	40	63	61.29%
Seneca	35,285	7,516	272	181	453	2	0	33	418	92.28%
Steuben	98,868	23,135	975	650	1,625	3	27	114	1,508	92.80%
Suffolk	1,487,286	356,949	7,401	4,934	12,335	162	250	962	11,211	90.89%
Sullivan	77,634	17,623	502	335	837		0	154	683	81.59%
Tioga	51,261	11,995	383	255	638		9	139	499	78.22%
Tompkins	101,167	16,591	350	233	583	45	10	90	448	76.86%
Ulster	182,749	36,915	1,007	671	1,678	20	30	247	1,411	84.09%
Warren	65,746	13,544	440	293	733	4	1	60	669	91.27%
Washington	63,206	13,336	548	365	913	2	1	88	823	90.15%



Wayne	93,712	22,303	565	377	942	3	8	118	821	87.15%
Westchester	944,064	226,575	4,334	2,889	7,223	60	71	518	6,645	92.00%
Wyoming	42,215	8,696	182	121	303		4	40	263	86.81%
Yates	25,331	6,206	168	112	280	7	2	55	218	77.86%
New York City	8,128,223	1,756,836	68,790	45,860	114,650	4,468	381	5,695	104,487	91.14%
Bronx	1,375,469	365,875	16,268	10,845	27,113				27,113	
Kings	2,485,484	589,060	24,612	16,408	41,020				41,020	
New York	1,585,717	234,686	9,520	6,347	15,867				15,867	
Queens	2,214,877	458,480	15,611	10,407	26,018				26,018	
Richmond	466,676	108,736	2,779	1,853	4,632				4,632	

## Conclusion

Given the significant number of kinship families, their high levels of poverty, their special challenges, the similar causality to foster care placements, and their fragile family stability, the severe disadvantages faced by these families should be recognized and addressed when they seek legal custody or guardianship.

## Part 2: Kinship Care Access to Family Court

It is not known how many kinship Article Six cases are filed each year. OCA does not collect data on third party custody/guardianship (collection is one of our recommendations to OCS).

However, a cursory reading of attorney for the child case reports, court reporters, and other sources, as well as discussions with family court judges and court clerks undoubtedly leads to the conclusion that kinship families are a significant portion of each county's family court cases.

Moreover, there is a consensus among policy makers, child welfare experts, members of the family law bar and the judiciary that kinship families are an integral part of New York's response to the needs of vulnerable children.

Yet, despite their contribution to the child welfare system, via Article Ten's but more predominantly via Article Six private actions, there is very little legal assistance.

There is only a handful of legal services (Legal Services for the Elderly and Disabled, Neighborhood Legal Services (Erie County), Rural Law Center (Clinton), MFY Legal Services (NYC) that target indigent kinship families. There are also a few family court clinics (Syracuse and Albany, for instance) and a few court offices (Orange) that assist in making out petitions. And there are informational resources (NYS Kinship Navigator, LIFT).

Most significantly, some judges have chosen to provide assigned counsel in limited circumstances (for instance, Erie, Orange, Onondaga). In such instances, to the best of my knowledge, assignment is limited to petitioning caregivers who have been full time caregivers for a significant period of time.

Lastly, case law declares that grandparent visitation cases qualifies for assigned counsel. *Matter of Samuel v Samuel*, 33 AD3d 1010, 1010-1011, 823 NYS2d 222 [2006]; *Matter of Wilson v Bennett*, 282 AD2d 933, 934, 724 NYS2d 520 [2001]), *Matter of Wright v Walker*, 103 A.D.3d 1087; 958 N.Y.S.2d 552; 2013 N.Y. App. Div.

In general, there remains a very significant void in legal assistance to indigent kinship caregivers. At the NYS Kinship Navigator, caregiver callers routinely describe the lack of counsel as a significant barrier. Particularly, when faced with adverse party parents who are provided counsel.

#### **Survey: Access to Family Courts**

In 2015, the Kinship Navigator asked the 12 OCFS kinship programs about system barriers faced by kinship families. Regarding access to family courts, ten programs replied.

Counties Participating: Albany, Dutchess, Broome, Orange, Schenectady/Rensselaer, Oneida/Herkimer, Bronx, Monroe, Cattaraugus, Columbia/Greene.

#### **Survey Results: Barriers in Accessing Family Court: Yes: 8/12**

Counties: Monroe, Sullivan, Orange, Schenectady, Broome, Dutchess, Schenectady/Rensselaer, Albany.

Examples:

- No lawyers to represent the kinship caregiver. (Monroe)
- Difficulty in filling out petitions, lack of access to legal services and representation. (Sullivan)
- Many times the caregiver is told by the Family Court judge to come back to the next appearance with an attorney. The cost of hiring an attorney is a barrier for many of the caregivers. They do not qualify for Legal Services of the Hudson Valley (LSHV) as they are employed and do not meet the income eligibility requirement. Some family court judges are more understanding of kinship care than others even with continued interaction with RAPP. (Orange County)
- Grandparents who have custody of children have attempted to file PINS due to truant/non-compliant behaviors and been told that they do not have the authority to do so. (Schenectady)

- Emergency custody is no longer granted UNLESS there has been violence. (Broome)
- Limited access to free/low cost legal representation for caregivers over 200% poverty income. (Dutchess)
- People are dissuaded from going for kinship, it is preferred that they just take custody. (Albany)

### **Sense of Security**

At the NYS Kinship Navigator, we receive roughly 4,000 calls per year from kinship caregivers. From our experience, the most frequently asked custody question is about caregiver rights. Caregivers who are already raising children are deeply concerned with the risk of children going back to parents who, in their personal estimates, are not ready to resume parenting. Additionally, caregivers report threats from parents who claim they'll take the children back if the caregivers seek public assistance or claim the dependent child tax credit. These circumstances destabilize kinship families and force caregivers to seek judicial orders to keep children in their care. Yet, as shown, legal assistance is not consistently available.

As director of the Kinship Navigator and an attorney, my experience dovetails with the staff's experience regarding caregiver rights. I have worked in the field of kinship care since 1998, and from 1999 to 2005, I was director of Hunter College's Grandparent Law Center. In my experience, when caregivers inquire what are the standards for third party custody actions, they are told to rely on judicial interpretations of *Bennett*, with no defined period of time uniformly applied to the extended disruption of custody standard, or if grandparents on DRL 72(2). In both circumstance, caregivers express their fear that without representation, they faced diminished chances for a decision based upon the best interests of children.

### **Avoidance of Dismissals**

The problem of insufficiencies in *pro se* petitions is well known. In a few municipalities, attorney family court clinics help draft petitions for kinship caregivers. However, such programs are not found in rural counties due to the small pool of volunteer attorneys. The result is often petitions are rejected, usually for a failure to sufficiently describe extraordinary circumstances.

### **Assist in Family Stability, Via Court Ordered Custody or Guardianship**

Without proof of extraordinary circumstances, courts cannot hold a best interests hearing. The procedure does not move forward to consider the well-being of children. Custody or guardianship of the person orders are never issued. With the limited legal assistance, due to legal aid often having the assigned counsel contracts to represent parents in Article Ten's and also due to the general lack of legal services targeting this population, getting by the threshold extraordinary circumstance presents a major hurdle for kinship caregivers. Failure to surmount

the barrier means few orders keeping children in the only stable and loving homes that they have ever known.

### **Part 3: Recommendations: Support for Legal Assistance to Indigent Kinship Caregivers**

#### **Recommendation 1**

Indigent kinship caregivers, who are full time caregivers of children and whose petitions for Article Six custody or guardianship make a prima facie showing of extraordinary circumstances, should be eligible for assigned counsel.

In New York State, as shown, kinship families rely on a patchwork of kinship legal services, with very few dedicated legal services. Likewise, kinship families are supported by a handful of statutes, case law, and regulation related to decision making authority, benefits, and custody/guardianship/foster care. Regarding custody and guardianship, kinship families rely on *Bennett v. Jeffreys*, 40 N.Y.2d 543, 356 N.E.2d 277 (1976) and its progeny. *Bennett* declares that caregiving for an "extended disruption" of parental custody is an extraordinary circumstance providing standing in a third party custody dispute with parents. In 2003, the grandparent visitation statute DRL section 72 was amended to define the period of time necessary for standing as two years of continuous care. This year, in *Suarez v. Suarez*, AD Docket No.: CAF 13-02243, (4th Dep't, 2015) this provision was declared unconstitutional by the Fourth Department. The case is now on appeal to the Court of Appeals.

As stated, the uncertainty in the standards applied to determine extraordinary circumstances can lead to the rejection of *pro se* petitions, and uneven application of standards at the extraordinary circumstances stage. This uncertainty is a critical justification for legal assistance.

Caregivers who have provided the only stable and loving homes for tens of thousands of New York children are just subject to too many variables in accessing family courts.

And in rural New York where there are few legal resources for the great number of poor kinship families, court access is significantly impaired by the additional factors of distance and transportation costs. Uncertainty of access and delays in proceedings can cause kinship caregivers to choose not to seek redress in family courts.

Additionally, while parental rights are a fundamental liberty interest deserving protections, the rights of caregivers, especially grandparents, have been adjudicated by the U. S. Supreme Court to warrant some increased level of protections. While no court has declared that grandparents or other kinship caregivers have a fundamental liberty interest, in *Moore v City of East*

*Cleveland* and its progeny, and in *Troxel v Granville*, the court leaned towards a heightened due process protection. *Moore v City of East Cleveland Ohio*, 97 S. Ct. 1938-39 (1977); *Troxel v Granville*, 120 S. Ct. 2054 (2000). See also, *Rivera v. Marcus*, 696 F.2d 1016 (1982), *Rivera v. Mattingly*, 2011 WL 4344422, (S.D.N.Y. Sep 12, 2011), *Balbuena v. Mattingly*, 2007 WL 2845031, \*6+ (S.D.N.Y. Sep 28, 2007), *Johnson v. City of New York*, 2003 WL 1826122, \*6+ (S.D.N.Y. Apr 08, 2003), *Rodriguez v. McLoughlin*, 49 F.Supp.2d 186, 194+ (S.D.N.Y. Jan 08, 1999), *Cabrales v. Los Angeles County*, 644 F. Supp. 1352, 1354+ (C.D.Cal. Sep 03, 1986), *Bellet v. City of Buffalo*, 2009 WL 2930464, \*3+ (W.D.N.Y. Sep 11, 2009), *Johnson v. City of Cincinnati*, 310 F.3<sup>rd</sup> 484 (2002).

For these reasons, kinship caregivers and their children need and deserve legal assistance in custody and guardianship proceedings.

### **Recommendation 2**

Indigent kinship caregivers, who are respondent guardians in Article Six part four (guardian of the person) proceedings, should be eligible for assigned counsel.

NYS family courts have the jurisdiction to hear proceedings for the appointment of guardians of the person (Article Six part four). Traditionally, many family courts have favored custody for kinship caregivers (Article Six part three). Family Court Act section 262(a)(iii) provides for assigned counsel to indigent legal custodians respondents but not guardians.

Kin who are guardians should be provided the same legal assistance as kin who are legal custodians.

Below are some of the statutory circumstances where guardianship provide kinship caregivers with necessary authority or services that are not available to legal custodians.

### **Kinship Guardianship Assistance Program (KinGAP)**

Social Services Law 458-a-f) provides a statutory scheme permitting kinship foster parents to exit foster care, become guardians, but continue to receive foster care stipends. As part of the process, the state provides up to \$2,000 for attorney assistance in obtaining the guardianship order. However, post guardianship order, there is no legal assistance, and since parents retain their rights, they may choose to challenge the kinship guardianship. In such circumstances, assigned counsel is not currently available to indigent kinship guardians respondents.

### Decision Making Authority

In certain circumstances, only guardianship provides decision making authority. Family Court Act section 657 provides that legal custodians and guardians should have the same opportunity for school enrollment and health insurance coverage. However, it also expressly describes medical authority for guardians not for legal custodians. See also, ""With respect to applications for appointment as a guardian of a child, the guardian shall have the right and responsibility to make decisions, including issuing any necessary consents, regarding the child's protection, education, care and control, health and medical needs, and the physical custody of the person of the child. A permanent guardian may consent to the adoption of the child." N.Y. Surr. Ct. Proc. Act Law § 1706; Public Health Law section 2504.

There are numerous statutes that describe authority provided to parents and guardians but not to legal custodians. Some examples are: "[I]n the judgment of a physician, *parental or guardian* involvement and consent would have a detrimental effect on the course of treatment of a minor who is voluntarily seeking treatment..." N.Y. Mental Hyg. Law section 22.11; "(a) For the purposes of this section:...(4) "reasonably available" shall mean a *parent or guardian*..." N.Y. Mental Hyg. Law section 33.21; "(a) Definitions. For the purposes of this section:..." "Qualified person" means any properly identified patient or client, *guardian of a person* with a developmental disability appointed pursuant to...or a *parent* of an infant, or a *guardian* of an infant appointed pursuant to..." N.Y. Mental Hyg. Law section 33.16; "...a *parent or guardian* shall personally appear..." N.Y. Educ. Law § 3219; "...existing rights of *parents or guardians*..." N.Y. Lab. Law § 695-g.

### Free Application for Federal Student Aid (FAFSA)

Financial aid is determined by a complex need based aid formula. One critical question for filing the FAFSA is whether the applicant is considered "independent" or "dependent." The reason this distinction is important is because parents' income and financial information is considered if the applicant is "dependent," but it is not considered if the applicant is "independent." A child who is under legal guardianship will be considered independent, but a child whose kinship caregiver only has custody will be considered dependent. Kinship custodians must file a request for a dependency override. Adding more complexity and more uncertainty to an already difficult application process. See U.S. Department of Education, "The EFC Formula, 2014-2015," pg. 3, viewed at <http://ifap.ed.gov/efcformulaguide/attachments/091913EFCFormulaGuide1415.pdf><sup>1</sup> 20 U.S.C. 1087vv(D)(1). See also FinAid, "Dependency Overrides", viewed at <https://studentaid.ed.gov/fafsa/filling-out/dependency>.



### **Federal Child Welfare Law Mentions Legal Guardianship as a Permanency Outcome**

Federal child welfare laws consider legal guardianship as a permanency outcome. Just this month, the proposed U. S. Senate "Family Stability and Kinship Care Act of 2015" seeks to provide services to children kinship care who are at "imminent risk" of entering foster care and whose caregivers are legal guardians.

For these reasons, indigent respondent guardians should be included along with legal custodians as eligible for assigned counsel.

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