

Legal Basics: Grandparents and Other Non-Parent Kinship Families

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Justice in Aging

Justice in Aging is a national organization that uses the power of law to fight senior poverty by securing access to affordable health care, economic security, and the courts for older adults with limited resources. Since the organization's founding in 1972, we have focused our efforts on populations that have traditionally lacked legal protection such as women, people of color, LGBT individuals, and people with limited English proficiency.

New York State Kinship Navigator

The NYS Kinship Navigator is a statewide information, education, referral and advocacy program for kinship caregivers in New York State. The Navigator seeks to assist these caregivers and their support network by providing information on financial assistance, legal information and referrals, and other types of issues that caregivers face when raising children in order to provide stability and permanency in the home.

Key Lessons

1. Kinship care is a general term referring to the care of children by relatives, or in some jurisdictions, close family friends. There are many terms associated with kinship families, each with distinct meaning.
2. More children are living with grandparents or other non-parents. Currently, 10% of children live in homes where the householders are grandparents or other relatives.
3. Different custody situations have varying degrees of authority and security for the children and caregivers.
4. A “kinship right to care” recognizes that kinship families are true families with core family rights.
5. Public benefits are available to children and caregivers, however, state law and custody determine eligibility.

Introduction

Nationwide, 2.7 million grandparents are raising grandchildren,¹ and their numbers are growing. Since 2009, the number of grandparents raising grandchildren increased by over 7%² and the trend is likely to

1 Ellis, Renee R. and Simmons, Tavia, “Coresident Grandparents and their Grandchildren,” US Census Population Characteristics (2014), [census.gov/content/dam/Census/library/publications/2014/demo/p20-576.pdf](https://www.census.gov/content/dam/Census/library/publications/2014/demo/p20-576.pdf).

2 Cancino, Alejandra, “More grandparents raising their grandchildren,” PBS NewHour (2016), [pbs.org/newshour/nation/more-grandparents-raising-their-grandchildren](https://www.pbs.org/newshour/nation/more-grandparents-raising-their-grandchildren).

continue. There is wide variety in the composition of households with grandparents and grandchildren, as grandfamilies can contain two parents, one parent, or no parent, and may include two grandparents, or one.³ Not all care is by grandparents; an estimated 35% of care is by other relatives or family friends.⁴ Similarly, the custodial structure and legal rights of grandparent headed households and other non-parent families varies significantly. Understanding the legal structures will help legal services providers understand the rights and benefits available to caregiving non-parents. This Chapter Summary provides a general overview of the family structures considered kinship families, and the different authorities, rights, and benefits available under different arrangements.

Note that this is a basic overview, and each state's benefit and custodian laws differ significantly. This summary is intended as a general introduction to the legal issues of grandparent and non-parent families.

Kinship Care Is a General Term Referring to the Care of Children by Relatives, or in Some Jurisdictions, Close Family Friends.

Kinship care refers to the **care** of children by relatives or, in some jurisdictions, close family friends (often referred to as fictive **kin**). Kinship care is commonly defined as “the full-time care, nurturing, and protection of a child by relatives, members of their Tribe or clan, godparents, stepparents, or other adults who have a family relationship to a child.”⁵ Within the broad umbrella of kinship care arrangements, there are three general categories: 1) informal kinship care, 2) voluntary kinship care, and 3) formal kinship care.

Informal Kinship Care

Informal kinship care involves caregiving without the involvement of any government entity or with court orders that do not involve the interest of any child welfare agency. Informal care is either based on an agreement between the parent and the family member⁶ or after a court petition for custody or guardianship. Informal kinship care is the most common kinship relationship, and at least 10 times more children are in an informal kinship care system than in formal kinship care.⁷ For these types of arrangements, caregivers may have difficulty with school enrollment and accessing other benefits. Most state statutes authorize kinship caregivers to temporarily have decision-making power through designated forms.

Voluntary Kinship Care

Voluntary Kinship Care involves the caregiver, parent, and the state's child welfare agency reaching an agreement for the grandparent or kin to be the caregiver for the child, sometimes with the involvement of the court system.⁸ In this situation the state may not have taken legal custody and this step may be used to avoid the possibility of the state doing so.⁹

3 Ellis, Renee R. and Simmons, Tavia, “Co-resident Grandparents and their Grandchildren,” US Census Population Characteristics (2014), [census.gov/content/dam/Census/library/publications/2014/demo/p20-576.pdf](https://www.census.gov/content/dam/Census/library/publications/2014/demo/p20-576.pdf).

4 Federal Interagency Forum on Child and Family Statistics, America's Children: Key Indicators of Child Well-Being 2017, page 3.

5 Administration for Children and Families, Child Information Gateway, “Kinship Care,” [childwelfare.gov/topics/outofhome/kinship](https://www.childwelfare.gov/topics/outofhome/kinship).

6 Children's Bureau, “Kinship Caregivers and the Child Welfare System,” (May 2016), [childwelfare.gov/pubpdfs/f_kinshi.pdf](https://www.childwelfare.gov/pubpdfs/f_kinshi.pdf).

7 Wallace G.W. (2016). A FAMILY RIGHT TO CARE: CHARTING THE LEGAL OBSTACLES. *GrandFamilies. The Contemporary Journal of Research, Practice and Policy*, 3 (1).

8 Children's Bureau, “Kinship Caregivers and the Child Welfare System,” (May 2016), [childwelfare.gov/pubpdfs/f_kinshi.pdf](https://www.childwelfare.gov/pubpdfs/f_kinshi.pdf).

9 Id.

Formal Kinship Care

In Formal Kinship Care, the state has legal custody of the child and formally places the child with the relative caregiver, who must meet the requirements of a foster parent depending on the state requirements.¹⁰ Legal decisions and responsibility for the child is split between the state and the caregiver, and the caregiver is acting with similar rights as a foster parent.¹¹

Note that in kinship care arrangements, physical and legal custody are not the same thing. In formal kinship care, kinship caregivers do not have legal custody of the child and cannot make decisions such as enrolling in school or giving medical or legal consent. Parents maintain legal custody unless a court has taken it away and given it either to the state agency or the kinship caregiver.

More Children Are Living with Grandparents or Other Non-Parents. Currently, 10% of Children Live in Homes Where the Householders Are Grandparents or Other Relatives.

The U.S. American Community Survey tracks grandparent primary caregivers. The number of children living with these grandparents has increased significantly in the last decade. In 2005, 2.5 million children were living with grandparents who were responsible for their care. By 2015, 2.9 million children lived with grandparents.¹² Although data is limited, research shows parental substance abuse is the most common reason behind grandparents raising grandchildren who would otherwise be in foster care.¹³ Child welfare experts attribute the national opioid epidemic as a major contributor to the increase. In recent years, the overall drug overdose death rate has sharply increased, particularly among people of childbearing age, with increases of 29 percent among 25 to 34 year-olds and 24 percent among 35 to 44 year-olds.¹⁴ As more children lose parents to the opioid crisis, more grandparents are becoming the primary caregiver to their children.

Different Custodial Situations Have Varying Degrees of Authority and Security for the Children and Caregivers.

Caregivers and children in different custodial situations have different levels of authority and security. For example, a grandparent caregiver without court ordered custody or guardianship may have the authority to consent to medical care for a child, depending on the state, but they may not have an assurance that the child can stay in the caregiver's home and remain there indefinitely.

In his journal article, *A Family Right To Care: Charting the Legal Obstacles*,¹⁵ Gerard Wallace establishes five categories of caregiver rights to the five kinship legal arrangements. The five legal arrangements are: 1) informal care, 2) legal custody, 3) guardianship, 4) foster care (including voluntary care), and 5) adoptions. The five rights categories are:

- **Recognition:** Government systems, agencies, regulations, and statutes recognize the family members as lawful surrogates.

¹⁰ Id.

¹¹ Id.

¹² Wiltz, Teresea, "Why More Grandparents are Raising Children," PEW Stateline, (November, 2016), pewtrusts.org/en/research-and-analysis/blogs/stateline/2016/11/02/why-more-grandparents-are-raising-children.

¹³ Generations United, "Raising the Children of the Opioid Epidemic: Solutions and Support for Grandfamilies," (2018), gu.org/app/uploads/2018/09/Grandfamilies-Report-SOGF-Updated.pdf.

¹⁴ Id.

¹⁵ Wallace G.W. (2016). A FAMILY RIGHT TO CARE: CHARTING THE LEGAL OBSTACLES. *GrandFamilies. The Contemporary Journal of Research, Practice and Policy*, Vol. 3, Issue 1.

- **Authority:** The caregiver has authority to: 1) consent to medical care, 2) enroll a child in school and make decisions about education, 3) access a child's health, school and other documentation.
- **Security:** The caregiver has assurance the child will stay in their home and remain there indefinitely.
- **Financial Assistance:** The family has access to benefits and financial assistance to care for the children.
- **Resources:** There are resources and services available to address kinship special challenges, such as respite care, childcare, parenting skills training, psychological counseling for loss and trauma, and legal services.

Of the five caregiving legal arrangements, informal caregivers without court orders face the greatest obstacles in obtaining legal recognition, authority, security, financial assistance, and resources. Please see the full article on *Charting Legal Obstacles* and the webinar recording for more explanation on caregiver rights and the kinship legal arrangements.

A “Kinship Right to Care” Recognizes That Kinship Families Are True Families with Core Family Rights.

Kinship families, like other families, should be supported by laws and policies that comprehensively address their family legal issues. Current federal and state law states a preference for kin as caregivers, but they do not establish a right to care. Most laws do not address the range of issues facing kinship families. Without a clear “right to care,” kinship caregivers face significant disadvantages in accessing the courts, maintaining continuity in custody, and accessing benefits and resources to help support children. This leaves caregivers with a significant imbalance of power compared to parental and state rights to care. Kinship caregivers are older, poorer, and often at a disadvantage in navigating systems of care. Legal aid programs can play an important role in helping kinship families obtain access to benefits and utilize resources available to them.

Public Benefits Are Available to Children and Caregivers, However, State Law and Custody Determine Eligibility.

Relative placement and supporting kinship families is directly related to better outcomes for children. The research is evolving, and there is evidence that when kinship families receive support, children have improved placement stability, higher levels of permanency, and decreased behavioral problems.¹⁶ Despite these advantages, kinship caregivers receive significantly fewer support services than foster caregivers,¹⁷ particularly in areas of financial support, parent training, peer support groups, and respite care. Each state's public benefits assistance program varies significantly. Lawyers helping grandparent and non-parent caregivers should review the benefits programs that may be available to help children and caregivers. Here is a general overview of assistance that may be available to families:

Medicaid for Children and the Children's Health Insurance Program (CHIP)

Each state provides children's health insurance through state and federal funding via Medicaid and the Children's Health Insurance Program (CHIP). CHIP offers insurance to children in families whose income is above their state's Medicaid levels. For eligibility purposes, Medicaid and CHIP use MAGI rules, counting only

16 Hayduk, Iryna, (2017). THE EFFECT OF KINSHIP PLACEMENT ON FOSTER CHILDREN'S WELL-BEING. *The B.E. Journal of Economic Analysis & Policy*, Vol. 17, Issue. 1. See also: Child Focus, “Children in Kinship Care: Findings from the Literature,” grandfamilies.org/Portals/0/Kinship%20Outcomes%20Review%20v4.pdf.

17 Sakai C, Lin H, Flores G. (2011). HEALTH OUTCOMES AND FAMILY SERVICES IN KINSHIP CARE: ANALYSIS OF A NATIONAL SAMPLE OF CHILDREN IN THE CHILD WELFARE SYSTEM. *Archives of Pediatric Adolescent Medicine*.

the child's income and not including the caregiver's income.¹⁸ Additionally most states do not require that a parent be a guardian to apply for CHIP benefits. States may include a measure of cost sharing. For those under 150% of the poverty level the cost sharing cannot exceed the Medicaid program's cost sharing.¹⁹ For those over 150% FPL, cost sharing cannot exceed 5% of family income.²⁰ In general, the two programs offer the same benefits to covered children. Required CHIP services include check-ups, immunizations, dental and vision, and emergency services; states may provide additional benefits.²¹

Temporary Assistance to Needy Families (TANF)

The Temporary Assistance to Needy Families (TANF) "child-only" grant is critical for kinship families, but is largely underutilized. Many caregivers do not know the grant is available, or they have difficulty understanding the eligibility rules. Caregivers do not need to have legal custody in order to apply for TANF benefits, but they do need to meet their state's TANF definition of a kin caregiver. TANF provides financial assistance to low-income families with children under 19 or who are expecting. TANF can be received for the child in kinship only, or as a family if the caregiver's income qualifies.²² A caregiver must meet their state's definition of a kin caregiver (which can vary greatly from state to state)²³ but may be incorrectly required to have legal custody to receive the benefits.²⁴ TANF child-only cases involve parents who do not live in the household or who are eligible for TANF for non-income reasons.²⁵ While benefits cannot last longer than 60 months, child-only cases have no time-limit. States may vary their federal TANF funding into different programs, including funding of kinship care.²⁶

SSI for Children

Given that SSI for Children eligibility is not impacted by the parent or guardian of the child, kinship decisions do not impact the status of this benefit.²⁷ Guardians and grandparents of children who meet SSA's definition of disability for children are encouraged to apply for this benefit.

Child Care Assistance

The federal government provides block grants to the states for funding child care services through the Child Care and Development Fund (CCDF).

Nutrition Program for Women, Infants and Children (WIC)

WIC provides food support, nutritional counselling, breastfeeding education for children up to age 5, pregnant mothers and those who recently gave birth, who are described as nutritionally at risk and whose families meet certain income criteria. Grandparents raising a qualifying child are eligible to apply. Eligibility for WIC is set below 185% of the federal poverty level, which translates to an annual income of \$38,443 for a

18 The child and grandparent(s) are considered separate households under MAGI rules. *Kinship Caregivers and the Child Welfare System*, p.10, childwelfare.gov/pubpdfs/f_kinshi.pdf.

19 *Medicaid Cost Sharing*, Centers for Medicare and Medicaid Services, medicaid.gov/chip/cost-sharing/index.html.

20 Id.

21 Centers for Medicare and Medicaid Services, healthcare.gov/medicaid-chip/childrens-health-insurance-program/

22 *Kinship Caregivers and the Child Welfare System*, p.10

23 See Golden and Hawkins, *TANF Child-Only Cases*, p.3, acf.hhs.gov/sites/default/files/opre/child_only.pdf.

24 *Kinship Caregivers and the Child Welfare System*, p.10.

25 *Families First Eligibility Information, Highlights and Personal Responsibility Plans*, tn.gov/humanservices/for-families/families-first-tanf/families-first-eligibility-information.html.

26 *Frequently Asked Questions and Answers for Relatives Raising Children*, p.3, facesofvirginia.org/images/stories/documents/TheGrandKinGuide_lowres.pdf.

27 See *Supplemental Security Income (SSI) for Children*, ssa.gov/ssi/text-child-ussi.htm.

family of three in 2018.²⁸ Eligibility is automatic for children already qualified for SNAP, Medicaid, TANF, or other state based programs.²⁹

Adoption Assistance

Generally available to adopted children who have been in the care of the state, or adoption agency, or a previous adoption placement, adoption assistance provides up to a onetime \$1,500 in initial adoption related costs as well as on-going assistance to adopting families. On-going benefits are negotiated on a case-by-case, state-by-state basis, but generally do not exceed the amount the state would have paid for family foster care.³⁰ Adoption assistance is funded under Title IV-E of the Social Security Act.

Conclusion

Grandparents and other non-parent caregivers play a critical role in helping children grow and thrive. The number of grandparents and non-parent caregivers raising children has increased significantly in recent years, and the trend is expected to continue as the opioid crisis impacts families and communities. Legal services attorneys and programs working with older adults can help caregivers understand their caregiver rights, and the authority and security they have as a kinship family. Lawyers also play a critical role connecting caregivers to benefits and supportive services to help them care for their families. This Chapter Summary is intended to be a brief introduction to the legal rights and benefits for grandparent and non-parent families, and professionals interested in learning more should refer to the webinar recording and resources listed below.

Additional Resources

- Child Welfare Information Gateway: [Kinship Caregivers and the Child Welfare System](#)
- Grandfamilies.org: [GrandFacts State by State Fact Sheets](#)
- GenerationsUnited: [Resource Library](#)
- New York Kinship Navigator Program: [Legal Resources](#)

Case consultation assistance is available for attorneys and professionals seeking more information to help older adults. Contact NCLER at ConsultNCLER@acl.hhs.gov.

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²⁸ WIC Eligibility Requirements, fns.usda.gov/wic/wic-eligibility-requirements.

²⁹ Id.

³⁰ Eligibility and Benefits for Federal (Title IV-E) Adoption Assistance, nacac.org/resource/eligibility-benefits-federal-assistance.