

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

Judge Edwina Richardson Mendelson

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

What is Kinship Care?

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

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

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

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

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

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

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

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

⁴ Mabry, Kinship Care, supra note 2.

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



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

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

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

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

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

The Legal Landscape

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

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

⁷ Mabry, supra note 2.

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

⁹ Johnson, *Disrupt Disparities*, supra note 6.

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

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

¹² American Bar Association Center on Children and the Law. *Child Law Practice Today*, July/August 2017 Issue. *Kinship Care is Better for Children and Families* Heidi Redlich Epstein, https://www.americanbar.org/groups/public_interest/child_law/resources/child_law_practiceonline/child_law_practice/vol-36/july-aug-2017/kinship-care-is-better-for-children-and-families/, accessed August 10, 2022.

¹³ N.Y. Fam. Ct. Act §1017(1)(a)

¹⁴ N.Y. Fam. Ct. Act §1055(a)(i)

the caregiver as a foster parent, should the caregiver desire it.¹⁵

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

Kin may also care for children pursuant to an order of custody¹⁸ or guardianship.¹⁹ Parents may also designate a person in parental relationship²⁰ for short periods of time—up to a year—without going to court.²¹ These designations allow parents to delegate to substitute caregivers the legal ability to make education and medical decisions for their children.

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

How Are We Doing?

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

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

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

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

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

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

¹⁶ N.Y. Fam. Ct. Act §1012(m)

¹⁷ N.Y. Fam. Ct. Act §1012(n)

¹⁸ N.Y. Family Court Act Article 6

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

²⁰ N.Y. General Obligations Law §5-1551

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

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

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

²⁴ Johnson, *Disrupt Disparities*, supra note 5.

²⁵ New York State Office of Children and Family Services, Administrative Directive, *Kin-First Firewall Practice*, 20-OCFS-ADM-18, October 14, 2020, https://cdn.ymaws.com/www.nysda.org/resource/resmgr/family_defense_resources/20-OCFS-ADM-18_2_.pdf, accessed August 10, 2022.

²⁶ *Id.*

Services Law in relation to the eligibility of children for the Kinship Guardianship Assistance Program (KinGAP), a subsidized guardianship program. KinGAP Expansion is New York State's effort to expedite permanency for children and youth for whom adoption or reunification is not feasible. The changes to the law expanded KinGAP in two key ways: first, it eliminates the need for the prospective relative guardian to be related by blood, marriage, or adoption to a child or to all siblings in a sibling group; second, it eliminates the requirement that KinGAP payments automatically terminate upon the child's 18th birthday if the agreement was effective prior to the child turning 16.²⁷ "These changes increase permanency options for children who would otherwise remain in foster care and provide committed foster parents the supports necessary to care for the child after transitioning to guardianship."²⁸

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

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

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

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

What Can Judges Do?

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

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

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

²⁸ *Id.*

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

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

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

³² *Id.*

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

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



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

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

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

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

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

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

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

Attorneys make a difference."³⁶

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

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

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

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

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

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

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

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

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

