Harming Vulnerable Children: The Injustice of California's Kinship Foster Care Policy

Meredith L. Alexander

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MEREDITH L. ALEXANDER*

The Story of Lilly¹

Lilly was three years old when she first entered the foster care system in Los Angeles, California, in February of 2006. Lilly’s mother, Sandra, had a history of drug use and was frequently in and out of jail. Lilly had been living with Sandra, Sandra’s girlfriend Anne, and Anne’s six year old daughter Emily. One day, Sandra and Anne left Lilly and Emily in a motel room for an unknown amount of time. Frightened and unsure where their mothers had gone, Lilly and Emily went to the motel office to ask what happened to their moms. The motel employees contacted Child Protective Services, and a social worker came to pick up the girls. Lilly and Emily were placed in foster care under the care of strangers.

Lilly’s grandmother informed Lilly’s maternal uncle, Thomas, and his wife Linda, that Lilly was in foster care. Lilly’s other family members were unable to care for

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* 2010 J.D. Candidate, University of California, Hastings College of the Law; B.A. 2003, University of Massachusetts, Amherst. I would like to thank Professor Lois Weithorn for her invaluable guidance. I am grateful to Maria Ramiau, Staff Attorney at the Youth Law Center, and Natasha Frost, former Director of the Benefits Program at the Alliance for Children’s Rights for providing substantive assistance. I would also like to thank the Alliance for Children’s Rights for putting me in contact with a family impacted by California’s foster care policy, and extend a very special thank you to the family who was willing to share their experience. I dedicate this piece to all foster youth, with the desire that it will bring us one step closer to fulfilling our promise to properly care for all children when their parents cannot, and to give them the hope of a better future.

¹ Factual vignette based on a case litigated by the Alliance for Children’s Rights, Los Angeles, Calif., and interview of family conducted by author [Feb. 21, 2010 – Mar. 22, 2010]. All names have been changed to protect the privacy of individuals described
Lilly. Thomas and Linda did not want Lilly to be raised by a stranger in foster care, so by their own initiative they contacted Lilly’s child welfare worker and asked if they could be her caretakers. Lilly’s child welfare worker wanted Lilly and Emily to be placed in the same home, and so Thomas and Linda volunteered to take in and care for both girls.

Thomas and Linda are both teachers at a community college. They did not have any other children before taking in Lilly and Emily. Although Thomas and Linda were happy to take in Lilly and Emily, it was unexpected for them to suddenly have two young girls to care for and financially support. Shortly before Lilly and Emily first entered foster care, Thomas and Linda had moved into a distressed home. Living on teachers’ salaries, in a home that required a significant amount of work, Thomas and Linda were unsure how they would be able to support their new family. They had to make room for both girls and purchase a car to have adequate transportation. It was difficult, and quite expensive.

Once Lilly and Emily were placed in Thomas and Linda’s home, Emily (their non-relative foster child) immediately started receiving medical coverage and foster care benefits (a monthly stipend sent to Thomas and Linda to help them financially care for Emily). Lilly (their relative foster child) did not start receiving medical coverage for several months, and it was not until about one year later that she began to receive the monthly foster care benefits. Thomas and Linda could not afford to pay for Lilly’s medical insurance, and employers generally do not allow people to add foster children to their policies unless they have been adopted. During those months when Lilly was not covered, they just hoped for the best and struggled to pay out-of-pocket for necessities such as vaccines required by Lilly’s school. Even when Lilly started receiving medical and foster care benefits, they were inconsistent, unlike Emily’s. Some months Lilly would get some funding and other months she would not get anything at all.
Some of the family’s greatest struggles were with child care and clothing. During the first year that Lilly lived with Thomas and Linda, before she began receiving foster care benefits, they could not afford to pay for childcare. Instead, they had to completely re-arrange their schedules in order to care for Lilly. Thomas and Linda also struggled to purchase clothes and shoes for the girls because they grew so fast. Thomas and Linda were constantly trying to balance the sacrifices they needed to make in order to support their new family. As they noted, “living on a teacher’s salary, you really have to stretch it. It’s hard to know what to cut out.”

Lilly finally started to receive some foster care benefits about one year after moving in with Thomas and Linda. Shortly thereafter, Lilly’s mother was released from jail and wanted to regain custody of Lilly. Lilly went to live with her mother for about eleven months, until her mother was arrested again (although it was later discovered that for most of those eleven months Lilly was not even with her mother, but instead was bounced around to different friends and family members). Lilly entered foster care again and Thomas and Linda asked to get her back. The child welfare worker agreed to place Lilly back in their care; however, the worker told them that Lilly would not be eligible to receive any foster care benefits, unless they adopted her. Lilly never again received foster care benefits or medical coverage through the foster care system. Linda must now pay extra to have Lilly on her health care policy, which she is now able to do because Thomas and Linda have adopted both girls. In contrast, Emily’s monthly foster care benefits and medical coverage remained consistent.

Lilly is now seven and a half years old, and Emily is ten. They are both still living with Thomas and Linda. Recently Lilly has been acting out at school, which is common for children who have been exposed the type of instability and trauma that Lilly was exposed to at such a young age. When Lilly was covered for medical care through the foster care system, she had access to a
therapist who told Thomas and Linda that Lilly may continue to have behavioral and adjustment issues for the rest of her life. However, now that Lilly is no longer receiving any medical coverage through the foster care system or foster care benefits, Thomas and Linda cannot afford therapy for her. Linda noted that if it were Emily, their non-relative foster child, who was in need of therapeutic services, the therapy would automatically be provided and covered.

Having taken in and cared for both a relative and non-relative foster child, Linda noticed that the greatest difference between caring for a relative and non-relative foster child is how much harder it is to get medical coverage and financial benefits for a relative foster child. The difference in support for relative and non-relative foster children is “so obvious because I have a child who is a relative and one who is not, and the benefits always lined up for the non-relative child.”

Introduction

The majority of children in foster care have been removed from their parents’ home due to physical, sexual and psychological abuse, chronic neglect, abandonment, threats of harm, and/or drug addiction. As a result of this abuse, it is not surprising that children in foster care suffer severe emotional, developmental, and health related trauma. This suffering, combined with the fact that children are innately unable to protect and care for themselves, makes foster children one of the most vulnerable groups in our society.

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When states step in and remove children from their biological parents or current caregivers, it has become common to formally place children in the care of relatives, also known as “kinship foster care.” Kinship foster care can mitigate the trauma of removal and placement in the foster care system by providing continuity, stability, and preserving family ties. Children in kinship foster care are significantly less likely to experience multiple placements, and are more likely to be placed with their siblings, and maintain connections with their community, cultural heritage, and traditions.

Over the past two decades the child welfare system has increasingly relied on relatives to care for abused and neglected children. In 2003, approximately one-third of all children in foster care, an estimated 131,000 children, were placed with relative caregivers. The federal child welfare program and many state foster care programs have embraced kinship foster care by making placements with a relative one of the primary placement priorities.

Despite the recognition that placement with a relative is often the best option for children in need of foster care, many children in...
kinship foster care, such as Lilly, are unjustly denied supportive benefits.\textsuperscript{11}

The foster care funding scheme is a complex web of federal, state, and county laws and regulations. There are two separate funding schemes through which foster children may receive support: a federal system and a state system. Children in kinship foster care are entitled to federal foster care funding only if they are otherwise eligible, such as meeting federal removal and state licensing requirements.\textsuperscript{12} However, these federal eligibility criteria do not embrace the unique needs of children in kinship foster care. Many children in kinship foster care are federally ineligible because they do not meet the federal removal requirements merely due to the nature of kinship care, and not because they are any less deserving or needy than children placed in non-relative foster care.\textsuperscript{13} Additionally, relative caregivers will often not be able to meet other eligibility requirements, such as licensing, also because the requirements are not tailored to the unique needs of kinship foster care.\textsuperscript{14} As such, children in kinship foster care are often ineligible to receive federal foster care benefits.

States have broad discretion to craft their own foster care funding scheme for non-federally eligible children.\textsuperscript{15} In 2008, only nine states supported kinship foster care with state foster care funding.\textsuperscript{16} Although California has identified relatives as the state’s

\textsuperscript{11} Berrick, supra note 6, at 77.

\textsuperscript{12} Miller v. Youkaim, 440 U.S. 125, 144 (1979). See infra text accompanying notes 187-206, for a description of federal foster care eligibility.

\textsuperscript{13} Part of the removal requirement is that a judge must make a finding, within six months of the children being removed from the home that it is in the best interest of the children to be removed from their parents’ home. 42 U.S.C § 671(e) (2009). Children in kinship foster care have often been living in the home of their relatives for more than six months before the state gets involved. Interview with Maria Ramiu, Staff Attorney, Youth Law Center, in San Francisco, Calif. (Apr. 10, 2009). As such, the judicial findings do not occur within the statutorily mandated six months.

\textsuperscript{14} Geen, supra note 7, at 139. Many of the licensing requirements are arbitrary and do not necessarily reflect what is truly safe and in the best interest of the children. Amy Jantz Templeman, Licensing and Payment of Kinship Foster Parents, in KINSHIP CARE MAKING THE MOST OF A VALUABLE RESOURCE 63, 63 (Rob Geen ed., 2003). For example, many states require that for a home to be licensed or approved there must be ample space for the foster child. This requirement is arbitrary in that it is not necessarily connected to the safety of the children. Many relative caregivers are low-income and may not be able to meet such rigid space requirements.

\textsuperscript{15} Geen, supra note 7, at 137.

\textsuperscript{16} CHILD WELFARE INFO. GATEWAY, U.S. DEP’T OF HEALTH & HUM. SERVS., PLACEMENT OF CHILDREN WITH RELATIVES, 2 n.7 (2008), available at http://www.childwelfare.gov/
primary placement preference, California does not provide any state foster care funding for kinship foster care. However, California does offer state foster care benefits to non-federally eligible strangers caring for foster children. This policy is likely the reason why Emily received immediate and consistent foster care benefits in Thomas and Linda’s care, while Lilly continues to receive insufficient support from the foster care system. In California, children in kinship care who are ineligible to receive federal foster care funding are only offered welfare support under Temporary Assistance to Needy Families grants (“TANF” formerly known as “AFDC”). TANF benefits are not a suitable substitute for foster care benefits because they are significantly less and do not offer the same level of attached opportunities and services as foster care benefits. As a result of this backwards policy, children are either: (1) placed in the more emotionally appropriate home of their relatives, but might suffer from lower quality of care due to financial constraints, or (2) children might be denied the benefits of kinship foster care and placed in the home of strangers or worse yet, in group homes, solely because the state refuses to provide the necessary financial assistance to support kinship foster care.

The foster care system is designed to protect the health and wellbeing of all children. When the state takes children into its custody, the state is taking on the responsibility to act in those children’s best interest. This note argues that the California policy of denying state foster care benefits to children in kinship foster care significantly disadvantages these children, and thereby undermines systemwide/laws_policies/statutes/placement.pdf. These states are Alabama, Arizona, Arkansas, Connecticut, Illinois, Louisiana, Pennsylvania, South Carolina, and Tennessee. Eight other states, including Delaware, Florida, Kentucky, Mississippi, Nevada, Oklahoma, Texas, and Wisconsin, provide relatives with some benefits, but not foster care payments. 16. CAL. FAM. CODE § 7950(a)(1) (2009); CAL. WELF. & INST. CODE §§ 361.3(a), 11402(a)-(b), 16000(a) (2009); CAL. DEP’T OF SOC. SERVS. MANUAL OF POLICY & PROCEDURE [hereinafter MPP] §§ 31-405.1(c) (updated Dec. 2009), 45-203.21 (updated Aug. 2009); King v. McMahon, 186 Cal. App. 3d 648, 655 (1st Dist. 1986).
17. CAL. FAM. CODE § 7950(a)(1); CAL. WELF. & INST. CODE §§ 361.3(a), 11402(a)-(b), 16000(a); MPP §§ 31-405.1(c), 45-203.21; McMahon, 186 Cal. App. 3d at 655.
18. CAL. FAM. CODE § 7950(a)(1); CAL. WELF. & INST. CODE §§ 361.3(a), 11402(a)-(b), 16000(a); MPP §§ 31-405.1(c), 45-203.21; McMahon, 186 Cal. App. 3d at 655.
19. CAL. WELF. & INST. CODE § 11402(a); MPP § 45-203.21.
20. See infra Table 2 accompanying notes 229–235, for a comparison of California TANF and foster care payment rates.
21. “[I]n determining reasonable efforts to be made with respect to a child, as described in this paragraph, and in making such reasonable efforts, the child’s health and safety shall be the paramount concern.” 42 U.S.C. § 671(a)(15)(A) (2009). See also Berrick, supra note 6, at 77.
their best interests. Specifically, California policy conflicts with the state's primary placement preferences and places an undue burden on children in kinship care. Furthermore, the policy does not take into account the unique hardships of relative caregivers and the children in their care. The very system that is meant to protect our state's most vulnerable children is putting a large portion of these children at a systemic disadvantage. These already vulnerable children are either denied the emotional support and benefit of kinship foster care or suffer from an unnecessary lower quality of care. Both of these possibilities not only increase the trauma of being in foster care, but also create additional and significant obstacles for foster children to overcome in order to become productive and self-sufficient adults.

Section I of this note identifies the needs of children in foster care and explores how kinship foster care uniquely addresses these needs. Section II provides an overview of the foster care system, including laws specific to kinship foster care and the underlying policies of the child welfare system. Section III reviews federal and state foster care benefits, including the eligibility for these benefits, and explains why children in kinship foster care are often ineligible for federal foster care benefits. Section III also discusses other benefits, such as TANF and Kinship Guardianship Assistance Programs ("Kin-GAP") including eligibility as they apply to kinship foster care and an analysis of why these other benefits are not suitable replacements for foster care benefits. Section IV explores California foster care laws and the state's refusal to support kinship foster care, including an analysis of the state's justifications for this policy. Section V provides recommendations to remedy this flaw in the California foster care system. This note argues that the federal statute should be amended to prohibit states from denying foster care benefits to children placed with relative caregivers merely because of their familial status. The federal statute should also be amended to embrace eligibility requirements that are tailored to the unique needs of children in kinship foster care. Additionally, California should take responsibility and change its policy to provide state foster care benefits for children in kinship foster care.
I. Needs of Children in the Foster Care System

A. The Power of the Foster Care System

Children enter the foster care system when a state has determined that they have suffered abuse, neglect, or abandonment, and therefore, it is not safe for the children to remain in their homes.\textsuperscript{22} The United States Supreme Court has repeatedly held that parents have a liberty interest in raising their children without state intrusion; however, parents' liberty interest is not absolute.\textsuperscript{23} Through its *parens patriae* power, a state has the authority and duty to intervene to safeguard children's wellbeing and protect them from abuse or neglect at the hands of their parents.\textsuperscript{24} The foster care system is one manifestation of the state's *parens patriae* power. When children have been abused, neglected, or abandoned by their parents, the state has the power to remove the children from their parents, take legal and physical custody of the children, and find a suitable alternative placement for them.\textsuperscript{25}

B. Foster Care Disproportionately Affects Minority and Impoverished Children

In addition to the general vulnerability of all foster children, the foster care population is disproportionately comprised of minority and impoverished children. Compared to the general population, Black and Hispanic children are over-represented in the foster care population, while white children are underrepresented.\textsuperscript{26} In 2006,
Black children comprised an average of twenty-six percent of the foster care population, while only fifteen percent of all children in the United States were Black.\textsuperscript{27} At one point in time, on September 20, 2006, the percentage of Black foster children reached as high as thirty-two percent of all children in foster care.\textsuperscript{28} Also in 2006, twenty-eight percent of children in foster care were Hispanic, while only twenty percent of all children in the United States were Hispanic.\textsuperscript{29} White children comprised fifty-seven percent of all children in the United States but only forty percent of the foster care population.\textsuperscript{30} The racial disparities are even more drastic in kinship foster care.\textsuperscript{31} Approximately sixty percent of children in kinship foster care are Black compared to forty-five percent of children in non-relative foster care.\textsuperscript{32}

Society’s views of what constitutes abuse and neglect frames the criteria used to determined what children are victims of abuse and neglect.\textsuperscript{33} The majority of children entering the foster care system come from impoverished families.\textsuperscript{34} Most foster children come from families with incomes of less than two hundred percent of the poverty line.\textsuperscript{35} It is apparent that society has deemed the effects of poverty to constitute neglect; therefore, when the state takes children into custody, it is often really due, at least in part, to poverty.\textsuperscript{36} Because the foster care system disproportionately affects minority and impoverished children, illogical funding policies are harming already vulnerable children and further perpetuating their marginalization.
C. The Foster Care System Itself Traumatizes Already Vulnerable Children

Although abuse and neglect can severely traumatize children, the foster care system imposes new and additional stress, independent of the abuse and neglect already suffered by these children. The state’s action of removing children from their parents and placing them in foster care can expose already abused or neglected children to new hardships. Children in foster care are still more likely to have behavioral and emotional problems, compared to children who live with their parents but have high-risks of suffering from poverty, abuse or neglect. Separation from their parents can be extremely distressing for children. This trauma can lead to a variety of severe attachment disorders. Removal not only alters the parent-child relationship, but it also denies children the type of upbringing they would have received, such as following certain religious or cultural beliefs, had they remained in their parents’ care. Additionally, children in foster care are more likely to have low school engagement, be suspended or expelled from school, and have health related problems.

D. Kinship Foster Care Can Mitigate the Trauma of Removal and Foster Care

i. Kinship Foster Care Defined

Children have been cared for and raised by relatives long before child welfare agencies began formally placing children in their care. However, kinship care is relatively new to the child welfare system.

37. Lipscomb v. Simmons, 962 F.2d 1374, 1389 (9th Cir. 1992).
42. See Lipscomb, 962 F.2d at 1389.
43. Kortenkamp & Ehrle, supra note 26, at 2-4.
Traditionally, children were placed with strangers or in group homes. Since kinship care is relatively new to the child welfare system, there is often some confusion as to what kinship care actually is with regards to the foster care system. “Informal” or “private” kinship care traditionally refers to any arrangement where children are cared for fulltime by a relative without state involvement through a child welfare agency.\textsuperscript{44} Such an arrangement could be a situation in which a mother asks her sister to take in and care for her children. In informal or private kinship care, the relatives caring for the children would not be considered foster parents.\textsuperscript{45} The relative caregiver would have only physical custody of the children, and the biological parents would retain legal custody.\textsuperscript{46}

“Formal” kinship care or “kinship foster care” refers to children in state custody who are placed by the state’s child welfare agency with a relative to act as a foster parent.\textsuperscript{47} In order for a kinship foster care arrangement to occur, the state must step in, open a child welfare case, and take legal custody of the children.\textsuperscript{48} The state would then make a formal legal determination to place the children with a relative caregiver. In kinship foster care, the relative caring for the children is considered the foster parent and has physical custody of the children, but the state retains legal custody.\textsuperscript{49}

\textsuperscript{44} Geen, \textit{supra} note 7, at 133.
\textsuperscript{45} CRUMBLY & LITTLE, \textit{supra} note 41, at 75. Physical custody is the physical care and supervision of a child including day-to-day responsibilities such as feeding and clothing. \textit{Id.}
\textsuperscript{46} "Legal custody is the right to make major decisions affecting the best interest of a minor child, including medical, religious, and educational decision." \textit{Id.} at 80.
\textsuperscript{47} Geen, \textit{supra} note 7, at 133. For the purpose of this note, I will use “kinship foster care” to refer to this type of care. I will use “non-relative foster care” to refer to all situations in which children are placed by the state with non-relative caregivers.
\textsuperscript{48} CRUMBLY & LITTLE, \textit{supra} note 41, at 87.
\textsuperscript{49} \textit{Id.} at 87-88. An additional type of kinship care that exists is a “voluntary” kinship placement, where the state child welfare agency informally advises a parent to let a relative care for a child, but the agency does not take any formal action. Geen, \textit{supra} note 7, at 133. This is also known as an “illegal placement,” since the state agency helps the family make alternative care arrangements for a child, but does not take the formal and necessary steps to legally place the child. This type of kinship care is not discussed in this note; however, it is a large problem for the children involved in such an arrangement. Since the agency did not take any legal action, the state has not taken the children into custody. This means the children are not entitled to any foster care benefits or services.
In California, for the purpose of kinship foster care, a relative is defined as:

An adult who is related to the child by blood, adoption, or affinity within the fifth degree of kinship, including stepparents, stepsiblings, and all relatives whose status is preceded by the words ‘great,’ ‘great-great,’ or ‘grand’ or the spouse of any of these persons even if the marriage was terminated by death or dissolution.\(^\text{50}\)

This definition is extremely broad and expansive, including persons such as a former great uncle by marriage, or even an ex-step-parent.\(^\text{51}\)

\textit{ii. Benefits to Children in Kinship Foster Care}

The government generally does a poor job of raising children, but current research suggests that there are significant benefits to kinship foster care.\(^\text{52}\) Kinship foster care can mitigate the trauma of removal and separation from the children’s biological parents.\(^\text{53}\) It also provides significant benefits of continuity, stability, and preserving family ties, while maintaining growth and development within the context of children’s culture and community.\(^\text{54}\)

Placing foster children with relative caregivers can reduce the trauma of removal and being in the foster care by giving children a sense of family support.\(^\text{55}\) Children in kinship foster care are more frequently placed in close proximity to their homes of removal (typically from their biological parents), which allows them to maintain a connection to their birth family, community, cultural

\(^{50}\) CAL. WEL. & INST. CODE § 11400(m) (2009).

\(^{51}\) With such an expansive definition of relative, the California policy of denying state foster care benefits to relative caregivers affects a broad range of individuals outside the realm of immediate family.

\(^{52}\) Ehrle et al., supra note 5, at 1; Geen, supra note 7, at 143; Harden, supra note 3, at 33-34; CRUMBLY & LITTLE, supra note 41, at 1; Ehrle & Geen, supra note 9, at 1; Berrick, supra note 6, at 81. See also Interview with Ramiu, supra note 13.

\(^{53}\) Ehrle & Geen, supra note 9, at 1.

\(^{54}\) Berrick, supra note 6, at 80 (quoting C. Ingram, Kinship Care: From Last Resort to First Choice, 75 CHILD WELFARE 550, 552 (1996)).

\(^{55}\) Ehrle et al., supra note 5, at 1.
heritage, and traditions.\textsuperscript{56} Children in kinship foster care have more continuity in their lives because they are more likely to be placed with their siblings and have consistent contact with their birth families.\textsuperscript{57} When children are raised without a stable support system and with a lack of connectedness, their transition to adulthood and independent living is difficult, if not impossible.\textsuperscript{58} Kinship foster care provides a natural support system, not otherwise found in the foster care system, which helps enable children to successfully transition to adulthood.\textsuperscript{59}

The sense of connectedness and stability that kinship foster care provides is extremely beneficial to foster children, especially in contrast to the overall instability of most foster care placements.\textsuperscript{60} Children in foster care have much better outcomes, such as graduating high school or getting a GED, and staying out of the criminal justice system, if their family lives are stable, even when there are additional risk factors such as poverty.\textsuperscript{61} A significant factor that contributes to stability for foster children is fewer placements.\textsuperscript{62} The more foster children are bounced from home to home, the less stable their lives are. Placement instability is linked to negative developmental outcomes for children in foster care, which decreases the chances of making the successful transition to adulthood.\textsuperscript{63} Children in kinship foster care are significantly less likely to experience multiple placements.\textsuperscript{64} A California study revealed that children in kinship foster care averaged fewer placements while within the system than children in non-relative foster care.\textsuperscript{65}

The overall developmental outcome of children in kinship foster care placements is somewhat unclear. Some research suggests these children tend to have higher functioning than children in non-relative placements, while other research suggests that children in kinship

\begin{itemize}
\item \textsuperscript{56} Geen, \textit{supra} note 7, at 143.
\item \textsuperscript{57} \textit{Id.}; Ehrle et al., \textit{supra} note 5, at 1.
\item \textsuperscript{58} Interview with Ramiu, \textit{supra} note 13.
\item \textsuperscript{59} \textit{Id.}
\item \textsuperscript{60} \textit{Id.}
\item \textsuperscript{61} Harden, \textit{supra} note 3, at 33-34.
\item \textsuperscript{62} \textit{Id.} at 38.
\item \textsuperscript{63} \textit{Id.}
\item \textsuperscript{64} Geen, \textit{supra} note 7, at 143.
\item \textsuperscript{65} Berrick, \textit{supra} note 6, at 81.
\end{itemize}
care have poorer outcomes. However, the developmental outcome of children in foster care may be strongly influenced by the child’s experience prior to entering foster care, and relative caregivers are more likely to take in children that have been more severely abused and neglected, or have pre-existing behavioral issues.

Yet, kinship foster care can help promote a child’s psychological and emotional well-being. Children in kinship foster care are better able to avoid common emotional problems that result from out-of-home placements, such as separation anxiety, as well as adjustment and conduct disorders. Children in kinship foster care are more receptive to learning new behaviors, compared to children in non-relative care. Additionally, kinship foster care can reduce feelings of abandonment and rejection resulting from removal. Kinship foster care further avoids the “double jeopardy” of feeling abandoned and rejected by both biological parents and extended family. It also provides abused and neglected children the opportunity to confront and work on unresolved family issues and traumas, which can minimize the steps of recollection, identification, disclosure, and confrontation associated with the healing process.

Furthermore, children in kinship foster care are more likely to talk to their caregivers about their problems and feel a greater sense of permanency in their living situation. Children in kinship foster care tend to feel a sense of belonging, worth, history, and value to others. In one study that examined the child’s personal experience in foster care, seventy percent of children in kinship foster care indicated they were “happy” to “very happy,” while only fifty-nine percent of children placed with non-relatives indicated such. Ninety-four percent of children in kinship foster care indicated they “always felt loved” compared to eighty-two percent of children in

66. Harden, supra note 3, at 38.
67. Id.
68. CRUMBLE & LITTLE, supra note 41, at 1.
69. Id.
70. Id. at 2.
71. Id.
72. Id.
73. Id.
74. Ehrle & Geen, supra note 9, at 1.
75. CRUMBLE & LITTLE, supra note 41, at 2.
76. Berrick, supra note 6, at 80.
non-relative placements. By providing a sense of connectedness and stability, as well as a supportive and loving environment, abused and neglected children have a greater chance to thrive in kinship foster care compared to the foreign homes of strangers.

iii. Unique Hardships of Relative Caregivers and the Children in Their Care

Relative caregivers suffer unique and additional hardships compared to non-relative caregivers. According to child welfare workers, the greatest difference between the needs of relative and non-relative caregivers is the level of financial assistance needed by relative caregivers. The 2000 Census showed that fifty percent of children in kinship foster care lived in low-income households, while only twenty-four percent of children in non-relative foster care lived in low-income households. Some children in kinship foster care live with families that have trouble paying housing costs and worry food will run out before there is enough money to buy more.

The unique economic hardship of relative caregivers may be attributed to several factors. Relative caregivers are typically older than non-relative caregivers and are more likely to be single and in poor health. The majority of relative caregivers are grandparents. Because relative caregivers tend to be older, they are likely to be retired or living on fixed incomes. In general, relative caregivers are less likely to be employed. Additionally, relative caregivers tend to be significantly more impoverished and have less formal

77. Id.
78. Geen, supra note 8, at 2.
80. Ehrle & Geen, supra note 9, at 1.
82. Scarcella et al., supra note 40, at 1.
83. Relative caregivers may be stable financially while taking care of their own immediate family. Ehrle & Geen, supra note 39, at 1. However, relative caregivers often take in relative foster children with little or no advance notice, unlike non-relative caregivers who must go through foster care licensing and training prior to taking in a foster child. Geen, supra note 7, at 142.
84. Geen, supra note 7, at 135-36; Berrick, supra note 6, at 77; HARDEN ET AL., supra note 81.
education, meaning less earning capacity, than non-relative caregivers. A California study from 1989 to 1991 of six hundred relative and non-relative foster caregivers, showed that fifty-two percent of relative caregivers were the only adult in the home compared to twenty-four percent of non-relative caregivers. The household income (including foster care payments) for relative caregivers was $32,424 and yet was $51,320 for non-relative caregivers. Only four percent of relative caregivers were college graduates compared to twenty-one percent of non-relative caregivers.

Additionally, children are often placed in the care of a relative with little advance notice, which does not give the caregiver sufficient time to plan for, or make any special arrangements for, the children. Relative caregivers are also more likely to take large sibling groups, as opposed to just one foster child, which further diminishes the family’s resources and multiplies the family’s need for financial assistance. As such, without proper support from the child welfare system, children in kinship foster care are more likely to experience economic hardship than in non-relative foster care.

II. Foster Care System Overview

The child welfare system is a complex web of federal statutes and regulations, state statutes and regulations, county policies, and numerous agencies from the federal to the local county level. Historically, child welfare policy was left to individual states as there is limited power granted to the federal government by the Constitution. However, the federal government has become

85. Geen, supra note 7, at 135-36; Berrick, supra note 6, at 77; HARDEN ET AL., supra note 81.
86. Berrick, supra note 6, at 78.
87. Id.
88. Id.
89. Geen, supra note 7, at 142.
90. Id. at 143; Berrick, supra note 6, at 77.
91. Ehrle & Geen, supra note 9, at 1.
92. See WESTERN CTR. ON LAW AND POVERTY, FOSTER CARE BENEFITS MANUAL, 1-10 (Spring 2008), for a list of the numerous and various agencies involved in the child welfare system.
increasingly involved in child welfare by using complex funding schemes to gain state compliance with federal standards of child welfare.  

A. Federal Legislative History of Child Welfare Funding and Kinship Care

Although informal or private kinship care has long been in existence, legislation regarding kinship care is still very recent. Federal child welfare legislation began when Congress created the Aid to Dependent Children ("ADC") program, authorized by the Social Security Act of 1935. ADC grants were small and used to help states support needy and dependent children. Although they were not specifically tailored towards foster care, the grants created the foundation for the current federal funding scheme used today to induce states to develop and implement child welfare programs. In 1962, ADC was renamed Aid to Families with Dependent Children ("AFDC").

Funding specifically for foster care was created in 1961, in reaction to the "Louisiana Incident" of 1960. Louisiana had expelled 23,000 children from the state welfare program on the sole basis that Louisiana felt these children were unsuitable to receive welfare assistance because they had been born out of wedlock. In response, Congress amended the Social Security Act to create a foster care component of AFDC ("AFDC-FC") so that states could not deny welfare services to children from homes the state deemed to be unsuitable. The foster care component established a federal financial matching program to induce state compliance, in which the

96. Murray & Gesiriech, supra note 93, at 2.
97. Id.
98. Id.
99. Id.
100. Id.
101. See Social Security Act Amendments, Pub. L. No. 87-31, 2-7, 75 Stat. 75, 76-78 (1961); Murray & Gesiriech, supra note 93, at 2. Today, this program is known as Aid to Families with Dependent Children-Foster Care (AFDC-FC). The rule was referred to as the "Flemming Rule," named after Arthur Flemming, the then current Secretary of the Department of Health, Education and Welfare. Murray & Gesiriech, supra note 93, at 2.
federal government would match state funds used to support children removed from unsuitable homes. In 1967, Congress further amended the Social Security Act, making it mandatory for all states to have a foster care program.

In 1962, Congress began to embrace kinship care when it amended Title IV-E of the Social Security Act to allow states to give welfare payments to relatives to help care for relative children. Congress legally recognized the importance of kinship care in the Personal Responsibility and Work Opportunity Reconciliation Act ("PRWORA"). As part of the welfare reform of the mid-1990s, PRWORA was enacted to repeal the AFDC program, and create TANF in its place. One of the main principles of TANF was to provide assistance to needy families so that children may be cared for in their own homes or in the homes of relatives. Although PRWORA and TANF are not geared directly toward foster care, they greatly influenced the foster care system because they focused on family preservation. Within PRWORA, Congress required that states “consider giving preference to an adult relative over a non-relative caregiver when determining a placement for a child, provided that the relative caregiver meets all relevant state child protection standards.” PRWORA is significant to kinship foster care because it was the first time Congress legally embraced relative caregivers as possible placements for children.

102. Murray & Gesiriech, supra note 93, at 2.
103. Id. at 3.
It was not until 1978 that Congress legally recognized the significance and importance of kinship foster care; however, this legislation was limited only to Native American children. The following year, in *Miller v. Youakim*, the United States Supreme Court found kinship foster care for all children to comport with the federal foster care system, and held that relative caregivers, who would otherwise qualify, could not be denied federal foster care benefits merely because of their familial relationship. Just one year later, Congress enacted the Adoption Assistance and Child Welfare Act of 1980 ("AACWA"), which created the requirement that states must use the "least restrictive (most family like) and most appropriate setting available and in close proximity to the parent's home, consistent with the best interests and special needs of the child." Many states interpreted AACWA to create an implicit preference to place foster children with relative caregivers, and crafted their legislation to contain a relative placement preference.

**B. Current Federal Law: Adoption and Safe Families Act**

In 1997, the Adoption and Safe Families Act ("ASFA") was enacted specifically to restructure the foster care system. ASFA was the first federal statute to consider kinship foster care as a possible permanent placement. In the mid-1990s, Congress and the Clinton Administration had three primary concerns about the foster care system: (1) children remained in foster care too long (known as the "foster care drift concern"), (2) focus on family preservation was at the expense of children's safety and wellbeing, and (3) there was not enough focus on adoption as a permanent

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112. Crumbly & Little, supra note 41, at 101; Hussain, supra note 104.

113. Murray & Gesiriech, supra note 93, at 5.

placement. ASFA was enacted in an attempt to address each of these concerns. Although there have been some amendments since 1997, ASFA remains the governing federal legislation of the foster care system today.

Since ASFA was enacted, there has been some other federal legislation regarding kinship foster care that demonstrates a growing movement towards embracing kinship foster care. In 2000, the federal Older Americans Act was reauthorized, giving funds to state offices on aging in order to assist older caregivers who raise relative children. More recently, Congress passed the Fostering Connections to Success and Increasing Adoptions Act of 2008 ("Fostering Connections Act"), which requires that counties in all states identify, locate, and notify relatives when children enter the foster care system. Additionally, the Fostering Connections Act guarantees federal funding for state Kinship Navigator Programs.

i. Primary Policies of ASFA

The primary goal of ASFA is to protect the health and safety of children by protecting them from harm caused by their parents or current caregivers. Other primary principles include supporting families and promoting permanency for children. Although the child welfare system was already built upon the ideology that "the child’s health and safety shall be the paramount concern," ASFA substantially impacted the child welfare system by making permanence an additional primary purpose. Permanence is typically thought to be achieved through reunification, adoption, or legal guardianship. However, many experts now argue that

115. Gordon, supra note 106, at 645-46, 650 (claiming that "reasonable efforts' had become 'unreasonable efforts'"); Murray & Gesiriech, supra note 93, at 5.
116. Gordon, supra note 106, at 646-50; Murray & Gesiriech, supra note 93, at 5.
117. Older Americans Act, Pub. L. No. 106-501, 114 Stat. 2226 (2000). Although many of the caregivers in kinship foster care are grandparents, they are still generally too young to be eligible for benefits under the Older Americans Act.
119. Id.
120. 42 U.S.C. § 671(a)(15)(A). See also Berrick, supra note 6, at 77.
121. 42 U.S.C. § 675(5)(C). See also Berrick, supra note 6, at 77; Geen, supra note 7, at 141.
123. Id. § 675(5)(C), (E).
124. Berrick, supra note 6, at 78.
permanent placement with a "fit and willing relative" should also be considered an acceptable permanency option, particularly since placement with such a relative is statutorily mandated if safe and suitable.\textsuperscript{125}

In an attempt to promote the achievement of permanence, ASFA created a rigid timeframe policy to cap the maximum amount of time a child could remain in the foster care system.\textsuperscript{126} ASFA mandates that after a child has spent fifteen to twenty-two months in the foster care system, the state must file a petition to terminate parental rights.\textsuperscript{127} This rigid timeframe was thought to stop foster care drift by reducing the number of children indefinitely in the system. Placement with a "fit and willing relative," is one of the few exceptions to this timeframe policy.\textsuperscript{128}

\textit{ii. Statutory Preference for Kinship Placements}

Federal and many state statutes create a preference for foster children to be placed with relatives whenever possible.\textsuperscript{129} In order for a state plan to be approved, and therefore eligible for federal financial participation, ASFA requires that states "consider giving preference to an adult relative over a nonrelated caregiver when determining placement for a child, provided that the relative caregiver meets all relevant state child protection standards."\textsuperscript{130} The federal definition of a "relative" is any relation by blood, marriage, or adoption who is within the fifth degree of kinship to the child.\textsuperscript{131} This includes the father, mother, brother, sister, half-brother, half-sister, uncle, aunt, first cousin, first cousin once-removed, nephew, niece, stepfather, stepmother, stepbrother, or stepsister, the spouse of any of the above persons (even after marriage has been terminated by

\textsuperscript{125} See 42 U.S.C. § 675(5)(C)(i). \textit{See also} Geen, \textit{supra} note 7, at 141. Placement with such a relative is also one of the few exceptions to the timeframe to terminate parental rights. 42 U.S.C. § 675(5)(E).

\textsuperscript{126} 42 U.S.C. § 675(5)(E). \textit{See also} Gordon, \textit{supra} note 106, at 651.

\textsuperscript{127} 42 U.S.C. § 675(5)(E). One exception to this timeframe is if a child is placed with a relative caregiver. \textit{Id.}

\textsuperscript{128} \textit{Id.} § 675(5)(C)(i). \textit{See also} Geen, \textit{supra} note 7, at 141.

\textsuperscript{129} As of January 2008, thirty-six states and Puerto Rico gave statutory preference or priority to relative placements, and all but six of the remaining states use statutory language such as "may consider placement with relatives." \textit{CHILD WELFARE INFO. GATEWAY, supra} note 16, at 1-2.

\textsuperscript{130} 42 U.S.C. § 671(a)(19).

\textsuperscript{131} 45 C.F.R. § 233.90(c)(1)(v) (2009). States can each create their own definition of relative.
death or dissolution) or any such person of a preceding generation with the prefixes grand-, great-, great-great-, or great-great-great.  

A statutory preference for kinship placements is consistent with the underlying purpose of the child welfare system: to encourage the care of dependent children in their own homes, or in the homes of relatives. This preference is also consistent with the federal mandate that foster care shall be in the least restrictive, most family-like setting. Kinship foster care is most likely to satisfy this requirement because of the stability and continuity relative caregivers can provide to foster children.

C. Child Welfare Funding Schemes

The child welfare funding scheme is also a complex web of numerous federal, state, and local funding streams administered by numerous federal, state, and local agencies. Under the federal foster care system, the federal government sets out minimum requirements for all states, and conditions funding upon these requirements in order to ensure state compliance with federal regulations. However, states retain great leeway and discretion to create their own program outside of the federally supported system. This complex structure results in two foster care systems in each state: one system created under the federal requirements that is partially funded by the federal government (“federal AFDC-FC”), and a second system that is completely state created and funded (“state AFDC-FC”). TANF is a third funding system that is not specifically tailored to foster care, but is frequently used to fund kinship foster care when states fail to do so.

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132. Id.
135. See supra text accompanying notes 52-77, for a discussion of the benefits of kinship foster care.
136. This note only focuses on the funding schemes most relevant to kinship foster care. See GREEN BOOK, supra note 105, at 10-6.
138. Geen, supra note 7, at 137.
139. See, e.g., McMahon, 186 Cal. App. 3d at 653-54 (explaining that California has two foster care programs, one “federal” program jointly supported by federal and state funds, and another state program designed to fund some non-federally eligible foster children).
The federal AFDC-FC program is authorized in Title IV-E of the Social Security Act. Title IV-E is a permanently authorized, open-ended entitlement program used to support children in foster care. Federal AFDC-FC is comprised of a combination of federal and state funds. In order for a state to receive federal financial contributions under Title IV-E, the state must create a foster care plan that comports with all of the federal statutory requirements. The funding scheme is implemented by the federal government reimbursing the state a certain percentage for every federally eligible foster child. In order for a foster child to be federally eligible, the child must meet federal removal and placement requirements. Children that are federally eligible and are placed in kinship foster care or non-relative foster care are equally entitled to federal AFDC-FC.

For non-federally eligible children, states can create their own state foster care program and funding scheme. States have broad discretion and flexibility, but limited federal guidance, to approach and develop state kinship foster care programs. The federal government provides no financial support for state foster care programs. As the law stands today, states can choose whether or not to use state funds to financially support relatives caring for foster children.

140. Id. Foster care maintenance payments (the monthly financial support sent to the foster caregiver) come from Title IV-E. 42 U.S.C. §§ 670 – 679c.
141. GREEN BOOK, supra note 105, at 11-18. See also Kasia O’Neill Murray, The Child Welfare Financing Structure 2 (2004), available at http://pewfostercare.org/research/docs/MurrayPaper2.pdf. An entitlement program is where the federal government pays federal financial participation for all qualified expenditures. Under an entitlement program there is no cap for how much funding a state can distribute, and the federal government will reimburse the state a certain percentage of all eligible expenses. The more a state spends, the more a state is reimbursed by the federal government. Whereas with a block grant program, such as TANF, the federal government gives a state a set amount of money, no matter how much or little the state has spent. See infra text accompanying notes 214–235, for a discussion of TANF. The percentage match varies by state and is the same percentage used for the federal medical assistance percentage. 42 U.S.C. § 674(a)(1). California’s federal financial match rate is fifty percent for federally eligible children. Id. § 1396d(b). This means California will receive a fifty percent reimbursement for all federally eligible foster children. For non-federally eligible children in foster care, California is one hundred percent responsible and will not receive any federal financial reimbursement.
142. 42 U.S.C. § 671(a); King, 392 U.S. at 316-17.
143. Murray, supra note 141.
144. 42 U.S.C. § 672. See infra text accompanying notes 187–206, for an explanation of federal eligibility.
147. Geen, supra note 7, at 137.
children that are not eligible for federal AFDC-FC.\textsuperscript{148} The United States Supreme Court has not decided the constitutionality of states limiting state funded foster care benefits to non-relative caregivers.\textsuperscript{149} However, the Ninth Circuit Court of Appeals has held that limiting state funded foster care benefits to foster children placed with non-relatives does not violate the Equal Protection Clause.\textsuperscript{150} In 2008, only nine states supported kinship foster care with state AFDC-FC.\textsuperscript{151} If a state does not provide state AFDC-FC to support federally ineligible children in kinship foster care, those children, and possibly their relative caregivers, may be only entitled to receive the lesser TANF benefit.

\section*{III. Foster Care Benefits}

As a result of the complex funding schemes of child welfare, there are primarily three types of benefits used to support foster care: (1) federal AFDC-FC, (2) state AFDC-FC, and (3) TANF.

\subsection*{A. AFDC-FC Benefits\textsuperscript{152}}

AFDC-FC benefits primarily include foster care maintenance payments, which are monthly cash benefits given to foster caregivers to cover the care and supervision of the foster children in their home.\textsuperscript{153} Foster care maintenance payments are to cover the cost of

\begin{itemize}
    \item \textsuperscript{148} \textit{Id.} at 138.
    \item \textsuperscript{149} \textit{Youakim}, 440 U.S. at 145.
    \item \textsuperscript{150} Lipscomb v. Simmons, 962 F.2d 1374, 1380, 1384 (9th Cir. 1992). \textit{Lipscomb} involved a class action brought against the state of Oregon for its policy of excluding kinship foster care from any state foster care benefits. \textit{Id.} at 1376. The Ninth Circuit Court of Appeals found that such a policy is not unconstitutional. \textit{Id.} at 1380, 1384. The court further noted that although the court may not agree with the policy, it is not the court’s place to second-guess state legislatures. \textit{Id.} at 1378, 1384. \textit{See also} King v. McMahon, 186 Cal. App. 3d 648 (1st Dist. 1986).
    \item \textsuperscript{151} \textit{CHILD WELFARE INFO. GATEWAY, supra} note 16, at 2. These states are Alabama, Arizona, Arkansas, Connecticut, Delaware, Florida, Kentucky, Louisiana, Mississippi, Nevada, Oklahoma, Tennessee, Texas, and Wisconsin. \textit{Id.} at n.7.
    \item \textsuperscript{152} The primary difference between federal and state AFDC-FC is that states can deny state AFDC-FC benefits for kinship foster care. Aside from this difference, these systems provide similar benefits, and therefore can be explained in one general AFDC-FC section.
    \item \textsuperscript{153} 42 U.S.C. § 675 (4)(A) (2009); 45 C.F.R. §1355.20 (2009); CAL. WELF. & INST. CODE §11460(a) (2009); MPP § 11-401 (updated Mar. 2006). Monthly cash aid benefits given to foster care caregivers are called “foster care maintenance payments” under both the federal and state funding schemes. Under the federal funding scheme, the state foster care program must comport with federal requirements. Under the state’s own internal foster care program for children not
food, clothing, shelter, daily supervision, school supplies, the child's personal incidentals, liability insurance with respect to the child, and reasonable travel expenses to the home of removal for visitation purposes. Foster care maintenance payments are solely for the care and supervision of the foster children, and are not to benefit the caregivers. Foster care maintenance payments are made on a per-child basis, meaning each eligible child receives the same set monthly amount, regardless of how many foster children are living in the same home. If a caregiver has more than one foster child placed in their care, the caregivers will receive the base amount for each individual child. The payments also gradually increase based on the foster child's age. In California, the state and federal rates are the same.

There are basic foster care and specialized care maintenance payments. The basic foster care maintenance payment is the standard monthly amount that a foster child would receive. A specialized care increment is a set amount given to the foster caregivers in addition to the basic foster care maintenance payment to help support children who have special medical, behavioral, or developmental issues. A specialized care increment is available only if the county has a specialized care program.

federally eligible, the state has the freedom to create its own guidelines. In California, the structure of foster care maintenance payments is the same as the federal structure, although the eligibility criteria are different.

154. CAL. WELF. & INST. CODE § 11460(b); MPP §§ 11-401.11-12. "Liability insurance" includes coverage for damage to the home or property of the foster parents and harm done to another party. U.S. Dep't of Health and Human Servs., Administration of Children and Families, Child Welfare Policy Manual § 8.3B.1, Question 8.

155. WESTERN CTR. ON LAW & POVERTY, supra note 92, at IV-3.

156. This is different than TANF which is a variable amount that increases based on the number of eligible individuals in the home and is not a set amount per person. See infra text accompanying notes 214–235, for a discussion of TANF benefits.

157. See infra Table I accompanying note 161, for basic foster care payments based on the child's age.

158. WESTERN CTR. ON LAW & POVERTY, supra note 92, at IV-4. However, children in kinship foster care are denied any state foster care benefits.

159. MPP § 11-401.12-3. In California, the types of medical, developmental, or behavioral, criteria that make a foster child eligible for the specialized care increment are set by each individual county, with the approval of the California Department of Social Services. MPP § 11-401.32.
TABLE 1
Basic Foster Care Payment Rates

<table>
<thead>
<tr>
<th>Age</th>
<th>California and Federal Basic Foster Care Maintenance Payment¹⁶¹</th>
</tr>
</thead>
<tbody>
<tr>
<td>0-4</td>
<td>$446</td>
</tr>
<tr>
<td>5-8</td>
<td>$485</td>
</tr>
<tr>
<td>9-11</td>
<td>$519</td>
</tr>
<tr>
<td>12-14</td>
<td>$573</td>
</tr>
<tr>
<td>15-19</td>
<td>$627</td>
</tr>
</tbody>
</table>

In addition to basic foster care maintenance payments and specialized care increments, children eligible for foster care funding may also be eligible for other financial and social service benefits.¹⁶² These additional benefits are linked to foster care maintenance payments because they are only available to foster children eligible to receive foster care maintenance payments.¹⁶³ Specialized Care Incentives and Assistance Program ("SCIAP") provides annual funding to all counties to assist with specialized care, whether or not the county has a specialized care system.¹⁶⁴ SCIAP funds may be used only for goods and services which are not covered under the specialized care system or any other funding source, such as respite care, orthodontia, wheelchair ramps, apnea monitors, glasses, and psychiatric visits, among others.¹⁶⁵ Although basic foster care maintenance payments include the cost of clothing, foster children may be eligible for additional supplemental clothing allowances.¹⁶⁶ Additional money for clothing can either be an initial, one-time

¹⁶¹. WESTERN CTR. ON LAW & POVERTY, supra note 92, at IV-4. Counties can set their own rate higher than the state rate, but this is not statutorily mandated.

¹⁶². Some of these benefits are only available if the county has created a program for the specific benefit.

¹⁶³. See infra text accompanying notes 187–206, for a discussion on eligibility for foster care maintenance payments.

¹⁶⁴. CAL. WELF. & INST. CODE § 4648(a)(3).


payment, or it can be a continued annual benefit. In California, caregivers may also be eligible to receive an “infant supplement” when a foster child in their care has a child of her own. An “infant supplement” is given to the caregiver for the care and supervision of the minor parent’s child. Other possible benefits include licensed childcare, respite care, funeral expenses, and Emergency Assistance/Emergency Shelter Care payments.

**B. Miller v. Youakim: Federal AFDC-FC for Kinship Foster Care**

In *Miller v. Youakim*, the United States Supreme Court held that all children placed with relatives, who are otherwise eligible for federal foster care, cannot be denied federal foster care benefits. This means that children in kinship foster care that are otherwise eligible for federal AFDC-FC cannot be denied federal AFDC-FC solely because they are related to their caregiver. Since *Youakim* was decided, federal funding for kinship foster care has often been referred to as “Youakim benefits.”

In *Youakim*, the issue was whether Illinois’ interpretation of the federal standards for AFDC-FC as allowing states to exclude all children placed with relatives was correct. Illinois had excluded relative placements from the definition of a “foster family home,” which resulted in the denial of federal benefits for kinship foster care. 

167. CAL. WELF. & INST. CODE §§ 11460(c), 11461(f)(1); MPP § 11-420.1 (updated Aug. 2009).
168. CAL. WELF. & INST. CODE §§ 11460(e), 11465(d)(2).
171. Department of Health, Education, and Welfare Program Instructions (“HEW”) Program Instruction APA-PI-75-9 (Oct. 25, 1974); Youakim, 440 U.S. at 145 (upholding HEW’s instruction to include relative caregivers in the federal foster care benefit system).
172. WESTERN CTR. ON LAW & POVERTY, supra note 92, IV-3.
173. Youakim, 440 U.S. at 129.
In 1969, four children in Illinois were removed from their mother and made wards of the state. From 1969 to 1972, the children were placed in unrelated foster care facilities, where they each received full federal foster care benefits. In 1972, two of the children were placed with their older sister, Linda Youakim, and her husband. Although the Illinois welfare department approved the Youakim’s home as meeting the state licensing requirements, the state still refused to give Linda any AFDC-FC benefits on behalf of these children solely because they were related to Linda. Illinois only offered the significantly lower TANF benefits to the two children in Linda’s care. The Youakims found these benefits insufficient to provide proper support, and therefore declined to accept the other two children. The other two children remained in unrelated foster care facilities and continued to receive full federal AFDC-FC benefits.

The Youakims brought a class action challenging the Illinois distinction between kinship and unrelated foster care as violating the Equal Protection Clause of the Fourteenth Amendment of the United States Constitution. However, the Supreme Court resolved the issue purely on a statutory basis and never reached the constitutional question. The Court found that there was nothing in the text or legislative history that indicated Congress intended to discriminate against children on the basis of their relationship to their foster parents. The Court relied heavily on the Department of Health, Education, and Welfare’s formal interpretation of the scope of federal AFDC-FC, which stated that “the foster care rate of payment prevails regardless of whether or not the foster home is operated by a relative.” The Court held that Congress did not intend to exclude relative caregivers from federal AFDC-FC, and therefore, a state

174. Id. at 128-29.
175. Id. at 129-30.
176. Id. at 130.
177. Id.
178. Id.
179. Id. at 131.
180. Id.
181. Id.
182. Id.
183. Id.
184. Id. at 142.
185. Id. at 132 (quoting HEW Program Instruction APA-PI-75-9 (Oct. 25, 1974)).
program implementing the federal guidelines cannot distinguish between kinship and non-relative care with regards to federal foster care benefits. 186

C. Eligibility for Federal AFDC-FC and Why Many Children in Kinship Foster Care Are Not Eligible

Even though Youakim ensures that children in kinship foster care are not categorically denied federal AFDC-FC, the children must still meet all federal eligibility criteria. The federal eligibility criterion does not embrace the unique circumstances of kinship foster care, and therefore, because of the factors associated with many children in kinship foster care, they often do not meet the requirements. In order for a child to be eligible for federal AFDC-FC, the child must be categorically eligible, as well as meet the (1) federal removal, (2) placement, and (3) AFDC-linkage requirements. 187 To be categorically eligible, the child must be eighteen years or younger, and be a United States Citizen or "qualified" immigrant. 188 Although children in kinship foster care do not face unique barriers to being categorically eligible, they are often ineligible because they do not meet the removal, placement, or AFDC-linkage requirements. 189

i. Removal

Federal AFDC-FC removal requirements are satisfied if a child is removed by a voluntary placement agreement, or if a judicial determination is issued stating that staying in the home would be

186. Id. at 145-46.


188. 42 U.S.C. § 672(a); CAL. WELF. & INST. CODE § 11403 (2009); MPP § 45-201.11 (updated Aug. 2009). In California, a child may be eligible to receive foster care benefits until he or she is nineteen years old if he or she meets other certain requirements. CAL. WELF. & INST. CODE § 11403; MPP § 45-201.11(c). See also WESTERN CTR. ON LAW & POVERTY, supra note 92, II-2-II-3. If the foster child is a qualified immigrant and came to the United States on or after August 22, 1996, the caregiver must be either a United States Citizen or a qualified immigrant. 8 U.S.C. § 1613(c)(2)(F) (2009). California imposes the additional categorical requirement that the child be deprived of parental support. CAL. WELF. & INST. CODE §§ 11401(f)(1), 11250; MPP § 45-202.1 (updated Aug. 2009).

189. 42 U.S.C. §§ 671, 672(a)(1). See also Geen, supra note 7, at 139.
contrary to the welfare of the child. This judicial finding must be made within six months of the physical removal, or the child will be federally ineligible. The state must also be legally responsible for the care and placement of the child. The removal requirement is often a substantial barrier for children in kinship foster care to receive federal AFDC-FC because it is a particularly difficult requirement for them to meet. When a parent can no longer care for a child, relatives may informally take the child into their home, and often do not initially seek assistance from the child welfare department because of a desire to avoid state involvement in their lives. However, at some point the financial burden of caring for an additional person (or persons) may become too much to bear and the relative may then seek financial assistance from the child welfare department. Alternatively, even when child welfare workers are called to a particular home, some workers will not open a case if the parents agree to send the child to live with a relative. Even if the department does open a child welfare case and a court makes the necessary finding that removal and placement were in the child’s best interest, the finding will not likely occur within the statutorily required six months from removal. As such, the child is automatically ineligible for federal AFDC-FC because of failure to meet the removal requirement. Because this scenario is common

190. 42 U.S.C. § 672(2)(A)(i)-(ii). Voluntary Placement Agreements (“VPA”) are not the same as voluntary kinship care. VPA involves state intervention and are formal written agreements between the parent(s) and the state to place a child in out-of-home care. 42 U.S.C. § 672(f); CAL. WELF. & INST. CODE § 11400(o); MPP § 45-202.412 (updated Aug. 2009). Under a VPA, the parent(s) retain legal custody but the state sets certain requirements for the parents to follow and provides services. WESTERN CTR. ON LAW & POVERTY, supra note 92, at II-9. A VPA is only valid for 180 days, and the resulting benefits are only available for those 180 days. 42 U.S.C. § 672(e); 45 C.F.R. § 1356.22(b) (2009); CAL. WELF. & INST. CODE § 11401.1; MPP § 45-202.412(c).

191. 42 U.S.C § 671(e).

192. Id.; 45 C.F.R. § 1356.71(d)(1)(iii); CAL. WELF. & INST. CODE §§ 10600, 16000.1; MPP §§ 45-201.4, 45-202.6.

193. Interview with Ramiu, supra note 13.

194. Id.

195. Id.

196. Social workers can help families make appropriate decisions regarding placements, but they cannot require a child be placed in another home if the child is at risk with his or her parent. Although the law does not allow for social workers to “facilitate” placements, there is evidence that some counties are still making these “illegal” placements. Interview with Natasha Frost, Former Dir. of Benefits Program, Alliance for Children’s Rights, in L.A., Calif. (Aug. 7, 2009).

197. Interview with Ramiu, supra note 13.

198. Id.
practice and is unique to kinship foster care, many children in
kinship foster care are not receiving necessary benefits when the
state does not provide state AFDC-FC. 199

ii. Placement in a Licensed or Approved Home

The placement requirement may also be difficult for children in
kinship foster care to satisfy. Placement requirements are met if the
child is placed in a licensed or approved foster home (or facility). 200
Individual states are responsible for setting the criteria for licensing
and approving foster homes (and facilities). 201 The federal
government gives each state broad discretion to develop its own
licensing and approval process. 202 Although each state may have
some different criteria, many of the licensing regulations are based
on “middle-class values,” such as having an apartment with a
minimum square footage, which do not necessarily reflect safety
concerns. 203 Since relative caregivers are often low-income, they
may not be able to meet these “middle-class values” and therefore
are unable to become licensed or approved.

One common barrier relative caregivers face in trying to meet
licensing requirements is the space requirement. Most states impose
space requirements, which are particularly problematic for low-
income individuals to meet. This is especially true in California
where the high cost of housing is prohibitive in many counties, and
even most middle income residents live in small houses or
apartments. 204

Another potential barrier is the criminal background check.
States can establish their own criteria for providing waivers to certain
crimes, thereby enabling individuals who have committed those
crimes to still get licensed or approved as foster parents. Although
California can waive most crimes for relative caregivers, there is still
the possibility that child welfare workers might not seek or grant a

199. Id.
(updated Aug. 2009).
201. 42 U.S.C. § 672(c). See infra text accompanying notes 263–268, for a discussion of
California’s licensing requirements.
202. Geen, supra note 7, at 139.
203. Templeman, supra note 14, at 63.
204. Id. at 77.
waiver, and could then deny “anyone with anything more than a traffic violation,” even though some crimes may have no relation to how the relative would raise the foster child.205

iii. Income: AFDC-linkage

The AFDC-linkage requirement is not as great a barrier for children in kinship foster care as the removal or licensing requirements; however it can still pose potential issues. This requirement is satisfied if the child would have been eligible for aid, based on the July 16, 1996, standards, while in the home of removal, at the time of removal or during the petition month.206 Many children in the foster care system come from economically disadvantaged homes; however, they still may not meet qualifying criteria that is thirteen years old and severely outdated. One example of how a child might not meet the AFDC-linkage test is if the child has a bond that was intended for college. Even if that bond is not sufficient to support the child, the child may still be ineligible for federal AFDC-FC.

D. Other Benefits Are Not Suitable Substitutes for AFDC-FC

i. Children Who Do Not Receive AFDC-FC Will Not Receive Other Necessary Benefits

When children are denied foster care benefits, they are not only denied basic monthly maintenance payments, they are not eligible for the additional benefits and services connected to foster care benefits.207 In Youakim, the United States Supreme Court found that the federal government could not have intended kinship foster care to be excluded from federal AFDC-FC particularly because it is linked to so many other benefits and services.208 The same underlying concept applies to state foster care. Specialized care increments, child care, respite care, payments of health-related services not

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205. Id. at 76.
206. 42 U.S.C. § 672(3); Murray, supra note 141, at 2. This is referred to as the AFDC-linkage test.
207. Geen, supra note 8, at 4.
covered by insurance, vouchers for clothing, school supplies or other specific needs are all benefits that are connected to AFDC-FC, and would therefore not be available to children in kinship foster care who are not receiving AFDC-FC. Although health care is available to all needy children in California, some children in kinship foster care receive health insurance through a separate organization than children in non-relative foster care, which can make it more difficult to access services. In California, respite care services are available to non-relative caregivers, but they are not available to relative caregivers. Additionally, relative caregivers may encounter more problems than non-relative caregivers when they try to obtain daycare for relative children in their care. The result of California’s policy of denying state foster care benefits for kinship foster care is that these foster children receive significantly fewer services than children in non-relative foster care, despite their greater need for services because of the unique hardships that they and their relative caregivers face.

**ii. TANF Benefits**

TANF is frequently used to support children in kinship foster care when states do not provide state AFDC-FC. However, TANF benefits are significantly lower than AFDC-FC and they do not include any of the attached benefits and services. Because the first purpose of PRWORA is to provide assistance to needy families so that children may be cared for in their own homes or in the homes of relatives, any relative may receive “child-only” TANF benefits for a

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210. *Id.* at 4.
211. *Id.*
212. *Id.*
213. *Id.*
214. Unlike the entitlement programs of Title IV of the Social Security Act, TANF is a fixed block grant, where each state annually receives a predetermined and set amount of federal financial contribution. Murray, *supra* note 141, at 4. There is no percentage match for block grants. States may use TANF for any of the four principle purposes of PRWORA, as well as to continue other activities previously authorized under AFDC. Although it appears states have liberal spending abilities of TANF funds, TANF sets major eligibility conditions for individual recipients and states. Recipients must abide by rigid work requirements and a five year life-time maximum. This life-time maximum is collectively calculated; however, there are some exceptions to this five year limit. States are required to spend specific sums of their own funds on needy families and must report certain expenditure data.
needy child in their care.\textsuperscript{215} This means that all relative caregivers whose relative foster children are not eligible to receive state AFDC-FC, are eligible to receive TANF just for the children for which they are caring.\textsuperscript{216} If the relatives are also needy, and would otherwise be individually eligible for TANF assistance, those relatives may also receive TANF for themselves, as well as for the children in their care (known as "family assistance grants").\textsuperscript{217} Family assistance grants are generally significantly higher than child-only benefits, although still not nearly as high as AFDC-FC.\textsuperscript{218} The amount given under a TANF family assistance grant is based on a sliding scale per each person in the "assistance unit."\textsuperscript{219} However, unlike foster care benefits, the cash-aid amount of TANF benefits decline on a sliding scale for each person/child in the assistance unit, and the payments for children do not vary depending on age.\textsuperscript{220}

\paragraph*{a. TANF Eligibility and Requirements}

TANF has significant eligibility conditions for individual recipients. Since PRWORA was enacted to promote independence and self-sufficiency, recipients must abide by rigid work requirements and a five year life-time maximum of receiving benefits.\textsuperscript{221} Adult recipients are required to engage in work activities, as defined by the individual state, within twenty-four months of beginning to receive benefits (or earlier if the state chooses).\textsuperscript{222} Adult recipients must generally engage in thirty hours per week of approved work activities, although there are some exceptions to this rule.\textsuperscript{223} Federal law does not contain any exemptions from these requirements for relative caregivers receiving TANF in lieu of foster care benefits.\textsuperscript{224} However, states generally do not apply work requirements to child-only cases, and many states

\begin{thebibliography}{9}
\bibitem{215} Geen, \textit{supra} note 7, at 140.
\bibitem{216} \textit{Id.}
\bibitem{218} Anderson, \textit{supra} note 217, at 732.
\bibitem{219} An assistant unit is the number of eligible recipients within one household.
\bibitem{220} Scarcella et al., \textit{supra} note 40, at 4.
\bibitem{221} 42 U.S.C. §§ 607, 608(a)(7). \textit{See also} GREEN BOOK, \textit{supra} note 105, at 7-1.
\bibitem{222} 42 U.S.C. § 607.
\bibitem{223} \textit{Id.}
\bibitem{224} Anderson, \textit{supra} note 217, at 720.
\end{thebibliography}
have exemption policies based on age, typically starting at sixty years old. Since TANF child-only payments are significantly less than the higher family assistance grants, relative foster parents might have the incentive to obtain the higher family grants; however, doing so would subject the relative caregivers to these rigid time limits and work requirements, which are not only unrelated to the needs of foster children, but make it more difficult for caretakers to adequately care for foster children.

b. TANF Is Not a Suitable Substitute for AFDC-FC

TANF is focused on behavioral reform of the recipient to promote self-sufficiency, which does not appropriately address the needs of foster children or their caregivers. TANF is not based on a per-child payment, it does not take into account the age and special needs of foster children, nor does it come with the same attached benefits and services as AFDC-FC.

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225. *Id.* at 725.
226. *Id.* at 732. See also CAL. WELF. & INST. CODE §§ 11200-11329.5 for California’s implementation of federal TANF, named California Work Opportunity for Kids (“CalWORKs”).
227. GREEN BOOK, supra note 105, at 7-2. Additionally, although TANF benefits are available to all caregivers caring for relative children, many relative caregivers do not receive such assistance because they are unaware they are eligible, they want to avoid involvement with public agencies, eligibility workers are unaware of the assistance available to relative caregivers, or they have applied for assistance and were mistakenly denied. Geen, *supra* note 7, at 140.
228. Interview with Frost, *supra* note 196.
TABLE 2  
Comparison of monthly payments of TANF and AFDC-FC

<table>
<thead>
<tr>
<th>Number of eligible persons in the household(^{229})</th>
<th>TANF(^{230})</th>
<th>AFDC-FC(^{231})</th>
</tr>
</thead>
<tbody>
<tr>
<td>1</td>
<td>$340-359</td>
<td>Age</td>
</tr>
<tr>
<td></td>
<td></td>
<td>0-4</td>
</tr>
<tr>
<td></td>
<td></td>
<td>5-8</td>
</tr>
<tr>
<td></td>
<td></td>
<td>9-11</td>
</tr>
<tr>
<td></td>
<td></td>
<td>12-14</td>
</tr>
<tr>
<td></td>
<td></td>
<td>15-18</td>
</tr>
<tr>
<td>2</td>
<td>$555-584</td>
<td>Age</td>
</tr>
<tr>
<td></td>
<td></td>
<td>0-4</td>
</tr>
<tr>
<td></td>
<td></td>
<td>5-8</td>
</tr>
<tr>
<td></td>
<td></td>
<td>9-11</td>
</tr>
<tr>
<td></td>
<td></td>
<td>12-14</td>
</tr>
<tr>
<td></td>
<td></td>
<td>15-18</td>
</tr>
<tr>
<td>3</td>
<td>$689-723</td>
<td></td>
</tr>
</tbody>
</table>

\(^{229}\) For TANF, all relative caregivers are eligible for child-only TANF. If the relative caregiver is not independently eligible for CalWORKs, the relative should not be included in the total number of eligible persons in the household. If the relative caregiver is eligible, he or she should be included in this total. Under AFDC-FC, this number correlates only to the number of foster children in the home.


\(^{232}\) These amounts do not include additional clothing allowances and specialized care increments. A clothing allowance is an additional yearly amount of $216. A specialized care rate is for foster children with special needs, and can increase the total monthly payment to $1301-$1497. SACRAMENTO COUNTY DEP’T OF HUMAN ASSISTANCE, supra note 231, at 2.

\(^{233}\) Amount based on two children within the same age range. If children are in a different age group, the amount may vary slightly.
TABLE 2, continued

<table>
<thead>
<tr>
<th>Number of eligible persons in the household²³⁴</th>
<th>TANF²³⁵</th>
<th>AFDC-FC²³⁶</th>
</tr>
</thead>
<tbody>
<tr>
<td></td>
<td>Age</td>
<td>Amount²³⁷</td>
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<td></td>
<td>0-4</td>
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</tr>
<tr>
<td></td>
<td>0-4</td>
<td>$1338</td>
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<td>$1881</td>
</tr>
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<td>4</td>
<td>$821-862</td>
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</tr>
<tr>
<td></td>
<td>Age</td>
<td>Amount²³⁸</td>
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<tr>
<td></td>
<td>15-18</td>
<td>$2508</td>
</tr>
</tbody>
</table>

iii. Kin-GAP Benefits

Kin-GAP provides monthly financial benefits to children who have established a legal guardianship with a relative caregiver.²³⁹ States that have an approved Kin-GAP program receive federal

²³⁴ For TANF, all relative caregivers are eligible for child-only TANF. If the relative caregiver is not independently eligible for CalWORKs, the relative should not be included in the total number of eligible persons in the household. If the relative caregiver is eligible, he or she should be included in this total. Under AFDC-FC, this number correlates only to the number of foster children in the home.


²³⁷ Amount based on three children within the same age range. If children are in a different age group, the amount may vary slightly.

²³⁸ Amount based on four children within the same age range. If children are in a different age group, the amount may vary slightly.

financial contributions for their Kin-GAP program. Kinect British financial benefits are generally higher than TANF benefits; however, monthly payments under Kin-GAP cannot exceed $2000, so they may still be lower than AFDC-FC.

a. Kin-GAP Eligibility

In addition to establishing a legal guardianship with their caregivers, children are eligible for Kin-GAP assistance if they have been removed from their home pursuant to a voluntary placement agreement or as a result of a judicial determination that continuation in their home would be contrary to their welfare. The children must have been eligible for federal AFDC-FC while residing in the home of the prospective relative guardian for at least six months. However, states may elect to not require the children to be eligible for federal AFDC-FC. Additionally, reunification and adoption must not be appropriate permanency options. The children must demonstrate strong attachment to the prospective relative guardian and the prospective relative guardian must have a strong commitment to caring permanently for the children. Children fourteen years old or older must be consulted regarding the proposed legal guardianship.

b. Kin-GAP Is Not a Suitable Substitute for AFDC-FC

Even if a state does not require children in kinship foster care to be eligible for federal AFDC-FC, such as California, Kin-GAP is still not a sufficient alternative to AFDC-FC. Kin-GAP benefits are only available to a caregiver once a legal guardianship is established.

240. 42 U.S.C. §§ 673(d), 674(a)(5). California has an approved Kin-GAP program. See CAL. WELF. & INST. CODE §§ 11360-11376.
243. Id. § 673(d)(3)(a)(i)(II).
244. California does not require children in kinship foster care to meet federal AFDC-FC eligibility requirements in order to be eligible for Kin-GAP. See CAL. WELF. & INST. CODE § 11363(a).
246. Id. § 673(d)(3)(a)(iii).
247. Id. § 673(d)(3)(a)(iv).
248. CAL. WELF. & INST. CODE § 11363(a)(3).
This means Kin-GAP benefits are not available while children are in
kinship foster care, they are only available once the children have
exited foster care through legal guardianship. When children are
initially taken into state custody, the state has a duty to attempt to
reunify the children with their parents. Although there are some
exceptions to this duty, the state must provide services to help
remove the issues that resulted in the children entering the foster care
system and must also provide services to help facilitate
reunification. Therefore, legal guardianship is not always an
option for relative caregivers, and certainly is not an option for a
majority of the time children are in a relative’s care. Additionally,
even when legal guardianship is a viable option for relative
caregivers, many relative caregivers do not want to go through the
process of establishing a legal guardianship.

IV. California Fails to Adequately Support Kinship Foster Care

A. California Foster Care Law

California, like other states, has interpreted Youakim to mean
that the state must extend benefits to children living with relatives
only if those children are otherwise eligible for federal foster care
benefits. By limiting Youakim to the federal foster care program,
California denies foster care benefits to children in kinship foster
care who do not meet the federal eligibility criteria. This means
that California does not provide any state foster care funding to non-
federally eligible children in kinship foster care; however, California
will provide full state AFDC-FC benefits to strangers caring for non-
federally eligible children.

250. See id.
251. See infra text accompanying notes 345-349, for a discussion of legal guardianship.
252. King v. McMahon, 186 Cal. App. 3d 648, 655 (1st Dist. 1986). This is a common
interpretation of Youakim because the question presented to the Supreme Court was whether a
state can refuse to grant federal foster care benefits to otherwise eligible children placed with
relatives.
253. Id.; CAL. WELF. & INST. CODE § 11402(a)-(b); MPP § 45-203.21 (updated Aug. 2009).
254. CAL. WELF. & INST. CODE § 11402(a); MPP § 45-203.21.
i. King v. McMahon: No State AFDC-FC for Kinship Foster Care

In 1986, a class action lawsuit was brought against the State of California alleging violation of the Equal Protection Clauses of the federal and state constitutions by granting state foster care benefits to non-relative caregivers, but denying such benefits to relative caregivers merely because of their status as a relative.\footnote{255} In \textit{McMahon}, the California Court of Appeal held that foster children are not a suspect class, nor is the right to live with relatives a fundamental right, and therefore the court applied the rational basis test to analyze whether the state policy was rationally related to a legitimate state purpose.\footnote{256} The legitimate state interest was articulated as the need for the state to allocate limited resources to provide for all California's abused, neglected, and abandoned children.\footnote{257} The court held that the denial of state foster care benefits for relative caregivers was rationally calculated to achieve this goal of providing the maximum amount of foster care funding within the available public funds.\footnote{258} The California Court of Appeal held that \textit{Youakim} did not apply to \textit{McMahon} on the basis that \textit{Youakim} resolved the issue on a statutory basis regarding the federal foster care statutes never reaching the constitutional question, and additionally because \textit{Youakim} was limited to federal foster care benefits and did not include state foster care benefits.\footnote{259}

\textit{ii. Statutory Preference for Kinship Placements}

Although California denies state AFDC-FC to children in kinship foster care, California does have a statutory preference for placing children with relative caregivers.\footnote{260} In fact, the first placement preference for foster children in California is in the home of a relative.\footnote{261} In the preamble to the California Work Opportunity

\footnotesize{\textit{255.} See generally \textit{McMahon}, 186 Cal. App. 3d 648. \\
256. \textit{Id.} at 651. \\
257. \textit{Id.} at 664. \\
258. \textit{Id.} at 665. \\
259. \textit{Id.} \\
261. MPP § 30-336 (updated Jan. 2005).}
and Responsibility to Kids Act ("CalWORKs"), the California Legislature declared that “the family unit is of fundamental importance to society in nurturing its members, passing on values, averting potential social problems, and providing the secure structure in which citizens live out their lives.”262 Whenever safe and appropriate, a child should be placed with a relative.263 When the child welfare agency removes children from their homes, the agency has an affirmative duty to seek out relatives for assessment and placement.264 Furthermore, the state cannot deny placing a child with a relative caregiver even if the relative is unwilling to adopt or become the child’s legal guardian.265

iii. Licensing and Approval

Under California law, all caregivers must be approved or licensed in order to care for a foster child.266 Relative caregivers do not need to be licensed, but they do need to be approved.267 The approval and licensing processes involve similar assessment of the caregiver.268 In order to be approved, the caregiver must have the ability to care for the child, clear a criminal and child abuse background check, and pass a home inspection.269 The only difference between the non-relative licensing and relative approval process is that relative caregivers do not need to complete the training requirements for non-relative caregivers, although they are encouraged to do so.270

262. CAL. WELF. & INST. CODE § 11205. CalWORKs is California’s implementation of TANF.
263. CAL. FAM. CODE § 7950(a)(1); CAL. WELF. & INST. CODE §§ 361.3, 16000; MPP § 31-405.1(c) (updated Dec. 2009).
264. CAL. WELF. & INST. CODE § 361.2(a), (e)(1). Additionally, within thirty days after a child enters foster care, the county department must notify relatives. Cal. Assem. B. 938 (Cal. 2009) amends CAL. WELF. & INST. CODE § 309 and implements the notification requirements of the Fostering Connections Act.
266. WESTERN CTR. ON LAW & POVERTY, supra note 92, at III-1.
267. Id. Placement with a non-custodial parent does not require assessment and approval. CAL. DEP’T OF SOC. SERVS., ALL COUNTY LETTER 05-13, at Enclosure A at 1-2 (June 2005).
268. WESTERN CTR. ON LAW & POVERTY, supra note 92, at III-1.
269. CAL. WELF. & INST. CODE §§ 309(d), 361.4(a), (b); MPP § 31-445 (updated Dec. 2009); CAL. DEP’T OF SOC. SERVS., ALL COUNTY LETTER 01-85 at 2 (Dec. 2001); CAL. HEALTH & SAFETY CODE § 1521.5 (2009).
270. CAL. DEP’T OF SOC. SERVS, ALL COUNTY LETTER 05-06 at 1-2 (June 2005). In addition
The California policy of requiring that all foster caregivers be approved or licensed may be good in terms of relative caregivers qualifying for federal foster care funding, since federal foster care benefits are contingent on the caregiver meeting state approval or licensing standards. However, the policy may also be destructive because it could preclude children from ever being placed with relative caregivers if child welfare workers know or assume ahead of time that relative caregivers will not meet approval requirements, and therefore, will not qualify for foster care benefits.

There is also some concern that children are still being placed in unapproved homes. Although California policy is clear that only licensed or approved caregivers may care for foster children, some children are still being placed in unapproved homes, which leave them ineligible for federal AFDC-FC. It is unclear how this is happening because it is technically illegal. However, such illegal placements occur in counties throughout the state.271

B. Analysis of the Justifications for California’s Refusal to Provide State AFDC-FC for Children in Kinship Foster Care

Although Youakim is limited to the federal foster care system, the opinion is important to both federal and state foster care systems because of the Court’s extensive discussion of the needs of foster children and the reasons not to exclude children in kinship foster care from receiving foster care benefits.272 In dicta, the Court made numerous arguments why children placed with relative caregivers should be treated the same as those placed with non-relative caregivers. The Court noted that foster care “was designed to meet the particular needs of all eligible neglected children, whether they

to the traditional licensing eligibility standards, California also imposes a factor that the child must come from a poor family, as defined by the welfare eligibility of the home from which they were removed. Shelley Waters Boots & Rob Geen, Family Care or Foster Care? How State Policies Affect Kinship Caregivers, in NEW FEDERALISM: ISSUES AND OPTIONS FOR STATES, No. A-34, 3 (July 1999). This means that if the child’s home of removal was not eligible for welfare benefits, the foster family cannot receive foster care benefits, regardless of the foster family’s own income. Id. Although many children in foster care are removed from impoverished homes, this requirement can still act as a barrier for some children in kinship foster care.

271. Interview with Ramiu, supra note 13.
are placed with related or unrelated foster parents."\textsuperscript{273} The Court further observed that distinguishing between related and unrelated foster care would:

\begin{quote}
[C]onflict in several respects with the overriding goal of providing the best available care for all dependent children removed from their homes because they were neglected... [and that the] rights of allegedly abused children and their guardians would thus depend on the happenstance of where they are placed.\textsuperscript{274}
\end{quote}

Additionally, the Court noted that it was "common sense... that all dependent foster children are similarly in need of the protections and monetary benefits afforded by the AFDC-FC program."\textsuperscript{275} This dicta is important in assessing the merits of California’s policy to deny state AFDC-FC for kinship foster care and ultimately supports the premise of this note that California’s policy is backwards and should be changed.

\textit{i. California Has Limited Financial Resources}

In \textit{McMahon}, the California Court of Appeal noted that one rationale used to justify the states’ policy of denying state AFDC-FC to relative caregivers is that there are more children in the state that are in need of foster care benefits than there are children receiving it.\textsuperscript{276} However, it is possible, and even probable, that denying state benefits for kinship foster care would actually result in the state paying more in foster care benefits. If California continues to deny state foster care benefits for kinship foster care, it is quite possible that relative caregivers will not take in and care for relative children. Those children will then be placed in non-relative care and the state would be required to pay the same benefits it denied the children while in kinship foster care, or even more if the children are placed in group homes.\textsuperscript{277} As noted in the \textit{Lipscomb} dissent, "[a]t a

\begin{itemize}
\item \textsuperscript{273} \textit{Id.} (emphasis added).
\item \textsuperscript{274} \textit{Id.} at 139-40.
\item \textsuperscript{275} \textit{Id.} at 144.
\item \textsuperscript{276} \textit{King v. McMahon}, 186 Cal. App. 3d 648, 665 (1st Dist. 1986).
\item \textsuperscript{277} For example in California, group homes receive $1,486-$6,694 for federally eligible children, and $1,337-$6,025 for non-federally eligible children, compared to the $446-$627 for
minimum, the State winds up paying to strangers or an institution precisely the sums it denies the children's relatives; in all probability, it ends up paying much more."²⁷⁸

In *Lipscomb*, Petitioner Sheri Lipscomb was a young disabled girl placed with her aunt and uncle.²⁷⁹ Her aunt and uncle were willing to provide care to Sheri, but stated that due to financial concerns they would be forced to give Sheri up without state foster care benefits.²⁸⁰ Because Sheri was disabled, she would likely end up in an institution since it is difficult to find a foster family to take in a disabled child.²⁸¹ Other *Lipscomb* Petitioners, Autumn and Billy Scalf, were given up by their aunt and uncle due to lack of financial support.²⁸² Autumn and Billy were placed in non-relative foster care, where they received state foster care benefits; however, they were uncomfortable and unhappy in the non-relative placement.²⁸³

The state should not be allowed to sacrifice what is in a foster child's best interest (often placement with relatives) for the state's own interests unrelated to child welfare (financial self-interest). When the state displaces the rights of parents and exercises its in *loco parentis* authority, the state takes on a grave and delicate responsibility.²⁸⁴ A state's *parens patriae* authority may be broad with respect to assuming responsibility for children who are not competent to protect themselves.²⁸⁵ However, the state’s authority should not be nearly so broad when it promotes interests unrelated to child welfare, such as the state’s financial self-interest, over the child’s best interest.²⁸⁶ A state would likely be powerless to so drastically invade the home and family life in order to serve interests unrelated to child welfare.²⁸⁷ As such, the state should not make determinations that drastically and permanently traumatize already

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²⁷⁸ Lipscomb v. Simmons, 962 F.2d 1374, 1387 (9th Cir. 1992) (Kozinski, J., dissenting).
²⁷⁹ Id. at 1386.
²⁸⁰ Id. at 1387. They were not eligible for federal foster care benefits.
²⁸¹ Id.
²⁸² Id.
²⁸³ Id.
²⁸⁴ Id. at 1388.
²⁸⁵ Id. at 1390.
²⁸⁶ Id.
²⁸⁷ Id. at 1389-90.
vulnerable children, based on self-interests unrelated to the children’s welfare.\textsuperscript{288}

An argument used to buttress the limited financial resources justification is that relative caregivers already qualify for TANF benefits, whereas non-relative foster caregivers are not entitled to any public benefits. The California Court of Appeal in \textit{McMahon} quoted the opinion of the lower court in \textit{Youakim} as support for this position.\textsuperscript{289} However, the lower court in \textit{Youakim} was overruled on this very issue by the United States Supreme Court before \textit{McMahon} was decided:

The purpose of the AFDC-FC program was not simply to duplicate the [TANF] program for a different class of beneficiaries. As the language and legislative history of \textsection 408 demonstrates, the Foster Care program was designed to meet the particular needs of all eligible neglected children, whether they are placed with related or unrelated foster parents.\textsuperscript{290}

Even though \textit{McMahon} upheld the California policy of denying state foster care benefits for kinship foster care, the court did acknowledge that foster care payments are “greater than basic [TANF], upon a recognition that foster children have greater needs and foster care is more costly than care for children in the parental home.”\textsuperscript{291} Additionally, given the unique financial hardships of relative caregivers, children in kinship foster care have even greater needs than foster children in non-relative care.\textsuperscript{292} Therefore, the limited resources argument should not be a sufficient justification for denying state AFDC-FC for kinship foster care.

\textsuperscript{288} In \textit{Lipscomb}, the dissent argued that foster care is a unique situation that warrants individual analysis in applying the rational basis test. \textit{Id.} at 1384-85. However, the majority in both \textit{Lipscomb} and the California Court of Appeal in \textit{King v. McMahon}, argued that under the rational basis analysis the test should always be applied to the group of affected individuals as a whole. \textit{Id.} at 1380; \textit{King v. McMahon}, 186 Cal. App. 3d 648, 664-65 (1st Dist. 1986).

\textsuperscript{289} \textit{See McMahon}, 186 Cal. App. 3d at 667-68.


\textsuperscript{291} \textit{McMahon}, 186 Cal. App. 3d at 653.

\textsuperscript{292} \textit{See supra} text accompanying notes 78–91, for a discussion of the unique hardships of relative caregivers.
ii. Relatives Do Not Need Financial Incentives to Care for Relative Foster Children

In McMahon, the California Court of Appeal noted that relative caregivers will likely care for relative children regardless of available benefits, and therefore they do not need any financial incentive. In McMahon, the court found the record to prove that relatives are highly motivated to take care of relative foster children, even if they are low-income. Although likely true, this does not account for the quality of care relative caregivers are able to provide. One cannot "squeeze blood from a stone." This rationale denies the fact that relative caregivers suffer greater hardships than non-relative caregivers, which can ultimately harm the children in their care and potentially result in the children being moved into non-relative foster care.

Additionally, this rationalization rests on the presumption that relative caregivers already have an obligation to care for their relative children who have been abused or neglected; however, relatives have no such obligation. Relatives are not legally obligated to support relative children. In interpreting the federal foster care program requirements, the United States Department of Health Education, and Welfare Program Instructions ("HEW") declared that "[a] non-legally liable relative has no financial responsibility towards the child placed with him and the income and resources of such a relative are not factors in determining entitlement to a [federal] foster care payment." Although the HEW interpretation applies only to federal foster care benefits, the underlying principles translate to state foster care benefits. As such, children in kinship foster care should not be denied benefits on the basis that their relative caregiver may take them in regardless of receiving foster care benefits.

293. McMahon, 186 Cal. App. 3d at 665.
294. Id. at 655.
295. Lipscomb v. Simmons, 962 F.2d 1374, 1388 (9th Cir. 1992) (Kozinski, J., dissenting) (explaining that although relatives may agree to care for related foster children, this does not mean they can afford to adequately do so).
296. Berrick, supra note 6, at 84.
iii. Funding Kinship Foster Care Will Promote Improper Incentives or Fraud

An additional rationalization stems from the concern that giving relative caregivers the higher foster care benefit will create an incentive for private kinship caregivers to enter the child welfare system, and thereby significantly increase the financial and social service burden on the state. These concerns are inconsistent with the underlying policies of foster care because they are based on the caregiver's perspective, rather than the abused or neglected child's perspective. This current policy is legislating against people potentially committing fraud instead of protecting and supporting children without parental support. Foster care maintenance payments are made to ensure that children in foster care are adequately cared for, not to support the family caring for the children. Whether or not there is incentive for relative caregivers to enter the child welfare system should be irrelevant to the debate. Additionally, there are administrative and judicial procedural safeguards to ensure children do not unnecessarily enter the child welfare system. There must be a judicial determination that a child should be removed from their parents' home, and it is the responsibility of the local county child welfare agency, with court approval, to ensure that the placement is appropriate.

This fraud/incentive rationale may also have the opposite detrimental effect of inducing relatives to refuse to care for relative foster children. The United States Supreme Court found that denying relatives federal foster care benefits would actually have the opposite effect and give relatives "an incentive to refuse to accept foster children altogether." The Court also noted that "the availability of significantly more financial assistance under [federal] AFDC-FC might motivate child-placement authorities to refrain from placing foster children with relatives even when these homes are best suited to the needs of the child." There is no reason to

299. Berrick, supra note 6, at 75-76; Geen, supra note 7, at 141.
300. Geen, supra note 7, at 142.
301. Interview with Ramiu, supra note 13.
302. WESTERN CTR. ON LAW & POVERTY, supra note 92, at IV-3.
303. Interview with Frost, supra note 196.
305. Id.
think that denying state foster care benefits for kinship foster care would be any different than the denial of federal AFDC-FC.

Moreover, the fraud issue is not unique to kinship foster care. The very nature of the foster care system encourages fraud by discouraging a large portion of the potential pool of capable foster caregivers through low reimbursement rates. Although foster care benefits are significantly greater than TANF, they do not come close to the average cost of raising a child. The average person interested in, and capable of, fostering children has no incentive to become a foster parent because they will not be able to care for foster children at the same level that they would care for their own children. Desperate people living on the margins, and people who have no intention of using the foster care payments for the foster children’s benefit, have great incentives to take in multiple foster children purely for the foster care benefits. Since the fraud situation is not unique to kinship foster care, it should not be the basis for denying benefits to children placed in kinship foster care.

iv. Safety Concern: the Hypothetical Intergenerational Cycle of Abuse

Another concern of supporting kinship foster care is the fear that relatives of abusive or neglectful parents will be inadequate caregivers, and therefore kinship foster care is not the safest placement for the children. This is based on the idea that “the apple does not fall far from the tree,” meaning that if the biological parents were inadequate, it is because their parents were inadequate as well. This idea is highly speculative and unsupported. Few studies investigate the safety of children placed in kinship foster care. Of those few, there are two conflicting studies; one study

306. Interview with Ramiu, supra note 13.
307. Id.
308. Id.
309. Id.
310. Id.
311. Gcn, supra note 7, at 142.
312. Id. See also Berrick, supra note 6, at 79.
313. Both studies were conducted in Baltimore, Maryland in the 1980s and involved relatively small sample sizes. See S. Zuravin, M. Benedict & M. Sommerfield, Child Maltreatment in Family Foster Care, 63 AM. J. ORTHOPSYCHIATRY 589, 590 (1993) (study included a sample size of 296 foster homes from 1984 to 1988); Howard Dubowitz, Susan Feigelman & Susan Zuravin,
found that children in kinship care are 2.4 times less likely to suffer abuse or maltreatment from their foster parents, while the other study found that children in kinship foster care are more likely to be abused. Although there is limited and conflicting data whether children placed with relatives rather than non-relatives are more or less likely to be abused, many experts have concluded that kinship foster care is overall safe. In analyzing the safety and benefits of kinship foster care, Jill Duerr Berrick, one of the prominent scholars in kinship foster care, ultimately concludes that “kin typically can provide safe and nurturing environments for the children they take in.” Jennifer Ehrle, Rob Geen, and Regan Main, other leading experts in kinship foster care, have similarly found that “there are substantial benefits to placing children separated from their parents with relatives rather than with unrelated foster parents.” Maria Ramiu, Staff Attorney at the Youth Law Center, in San Francisco, California, believes that kinship foster care is not any worse than non-relative foster care in terms of safety, yet kinship foster care provides significant benefits in terms of stability and connectedness.

This safety rationale is contradictory to the fact that both federal and California statutes mandate that relative caregivers be considered the primary placement preference when children must be removed from their home. This placement preference diminishes the states argument that safety is a legitimate concern for denying state AFDC-FC for kinship foster care. However, even if the intergenerational cycle of abuse concern were valid, it could be mitigated through proper training and monitoring of all foster caregivers.

Theoretically, legitimate safety concerns would support the need to provide state AFDC-FC for kinship foster care. Safety issues would create an even greater reason to support kinship foster care over non-related foster care in order to provide necessary services for

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314. Zuravin et al., supra note 310, at 592 (“Regular homes were 2.4 times more likely to have a confirmed report of maltreatment than were kinship or special homes.”).

315. Dubowitz et al., supra note 310, at 156 (“Fifty percent of the reports [of maltreatment] involved the relative caregiver.”).

316. Berrick, supra note 6, at 80.

317. Interview with Ramiu, supra note 13.

the family to have an opportunity to break the hypothetical intergenerational cycle of abuse.\textsuperscript{319} The instability and lack of permanency often found in non-relative care can inhibit foster children’s ability to become self-sufficient.\textsuperscript{320} As a result, many foster children return to relatives once they exit foster care.\textsuperscript{321} In this scenario, the relatives have not had any state intervention, and therefore the intergenerational cycle of abuse will continue.\textsuperscript{322} However, if the state intervenes, places a foster child in kinship foster care, and provides the necessary training, services and support, the state is giving this family the opportunity and skills to be able to break the cycle, which is ultimately in the best interest of the foster child.\textsuperscript{323} Providing state AFDC-FC would ensure families in kinship foster care receive the necessary services and support that are attached to AFDC-FC, and ultimately better protect the safety of foster children.

Moreover, safety concerns should not even be part of the debate as it is the county’s responsibility to ensure that placement is appropriate.\textsuperscript{324} California is shifting the blame to everyone else, when in fact the county is responsible to ensure that children would be safe in their foster care placements.\textsuperscript{325} If a child is placed with an inappropriate caregiver, it is the county that is at fault, and therefore the potential and hypothetical issue of safety is not a legitimate basis for California’s illogical policy.\textsuperscript{326}

\textit{v. Relatives Are Not Sufficiently Trained or Monitored}

Another safety concern is that relative caregivers often lack consistent caseworker supervision, are provided fewer supportive services, and often provide birth parents unencumbered access to the children in their care.\textsuperscript{327} In California, initial foster care training is not mandatory for relative caregivers, although it is encouraged.\textsuperscript{328} However, similar to the hypothetical intergenerational cycle of

\textsuperscript{319} Interview with Ramiu, supra note 13.
\textsuperscript{320} Id.
\textsuperscript{321} Id.
\textsuperscript{322} Id.
\textsuperscript{323} Id.
\textsuperscript{324} Interview with Frost, supra note 196.
\textsuperscript{325} Id.
\textsuperscript{326} Id.
\textsuperscript{327} Geen, supra note 7, at 142.
\textsuperscript{328} CAL. DEP’T OF SOC. SERVS., ALL COUNTY LETTER 05-06, at 1-2 (June 2005)
abuse, this concern regarding the lack of training actually supports
the need to fund kinship foster care to ensure that relative caregivers
have access to the necessary services. Additionally, relative
caregivers receive more regular and ongoing monitoring than non-
relative caregivers. Relative caregivers are reassessed every
year. Currently, non-relative caregivers must be reviewed no less
than every five years. In practice, non-relative caregivers are
generally monitored every three years. Therefore, in California,
relative caregivers actually have more consistent and ongoing state
monitoring and this rationalization is unfounded.

vi. Kinship Foster Care Does Not Satisfy ASFA’s Policy of
Permanence

There is some concern that kinship foster care is counter to
ASFA’s underlying purpose of permanence. Permanence is
traditionally thought to be achieved through reunification with the
biological parents, adoption, or legal guardianship. Research
shows that children in kinship foster care do tend to remain in foster
care longer than children in non-relative foster care, are less likely to
reunify with their biological parents, and are less likely to be
adopted. Some research further indicates that biological parents
are less likely to complete case plan requirements for reunification
when children are placed with relative caregivers, and that children
in kinship foster care are more likely to be placed in long-term foster
care.

329. Interview with Ramiu, supra note 13.
330. CAL. DEPT OF SOC. SERVS., ALL COUNTY LETTER 05-13E, at 2 (June 2005). In a
settlement agreement between the state and the Youth Law Center, California agreed to this
renewal timeframe. At the time of the settlement agreement, non-relative caregivers were
required to renew their licensure every year as well. Interview with Ramiu, supra note 13.
331. CAL. HEALTH & SAFETY CODE § 1534(a)(1)(C) (2009). Non-relative placements are
licensed, not “approved,” and are subject to the inspection requirements in the licensing statutes.
Relative placements are approved by the county child welfare placing agency and are not subject
to the licensing inspection statute. See also interview with Ramiu, supra note 13. The change
from one to five years was a result of budgets cuts. However, there was no change in the
timeframe for relative caregivers in order to remain in compliance with the settlement agreement.
332. Id.
333. Geen, supra note 7, at 140.
334. Berrick, supra note 6, at 78.
335. Rob Geen, Finding Permanent Homes for Foster Children: Issues Raised by Kinship
336. Geen, supra note 7, at 141. See generally Geen, supra note 114, at 153.
a. Reunification

The fear that children in kinship care are less likely to reunify with their biological families may be unfounded. Although early studies show that children placed with relative caregivers are less likely to reunify with their biological parents, more recent data shows that reunification occurs at a similar rate, it just happens later when children are placed in kinship foster care.\(^{337}\)

Even if children in kinship foster care are less likely to reunify with their parents it may be because they have much more frequent and consistent contact with their biological families.\(^{338}\) Therefore, reunification may not be necessary since the child may already have a safe and stable home with sufficient contact to feel connected to their birth family. Another possibility is that kinship foster care may reduce birth parents’ motivation to meet reunification case plans and goals.\(^{339}\) This may be a result of parents having greater access to their children in kinship foster care. Additionally, birth parents might be less inclined to complete reunification case plans because they are more comfortable with the placement arrangement and do not feel the shame and stigma generally associated with having ones’ children taken into foster care. If children are in a safe and stable environment and are comfortable with the amount of contact with their birth families, this should be sufficient to satisfy ASFA’s permanency requirements.

b. Adoption

Children in kinship foster care are less likely to be adopted than children in non-relative foster care.\(^{340}\) Some research indicates that many relative caregivers are reluctant to consider adoption because they do not want to terminate the parental rights of their relatives, and they feel it would be unnecessary since they already have a familial bond to the children in their care.\(^{341}\) Even without formalizing the relationship with adoption, many relative caregivers

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337. Berrick, supra note 6, at 81-82.  
338. Geen, supra note 7, at 143.  
340. Id. at 1; Berrick, supra note 6, at 82.  
341. Berrick, supra note 6, at 82.
still claim to make a lifetime commitment to care for their relative foster children and that their personal relationship with the children is secure.\textsuperscript{342}

Additionaly, some research indicates that the reason many relative caregivers do not adopt their relative foster children is because of a lack of knowledge about adoption.\textsuperscript{343} Some studies indicate that child welfare workers fail to speak to relative caregivers about the option of adoption.\textsuperscript{344} Research also shows that if relative caregivers were properly informed about adoption, the majority of them would actually be willing to consider it.\textsuperscript{345} However, as noted above, some relative caregivers might still not want to consider adoption because they do not want to further punish the biological parents (their relatives) by terminating their parental rights.\textsuperscript{346} Moreover, states and counties do not keep record of the number of failed adoptions, and advocates in the field are seeing that there are in fact some failed adoptions.\textsuperscript{347} As such, adoption may not be the best indicator of when foster children, especially those in kinship foster care, have achieved permanence.

c. Legal Guardianship

Although there is some concern that kinship foster care stands in the way of achieving permanency because relative caregivers are less likely to pursue legal guardianship, this concern does not prove to be true in California.\textsuperscript{348} In California, data shows that children in kinship foster care exit to legal guardianship more frequently than children placed with non-relatives.\textsuperscript{349} This is likely attributed to the fact that California has adopted a Kin-GAP program to provide financial assistance and incentive for relative caregivers to establish a legal relationship with the children in their care.\textsuperscript{350} Relatives who were not eligible to receive federal foster care funding are still

\textsuperscript{342} Id.
\textsuperscript{343} Geen, supra note 332, at 1.
\textsuperscript{344} Id.
\textsuperscript{345} Id.
\textsuperscript{346} Id. at 3.
\textsuperscript{347} Interview with Frost, supra note 196.
\textsuperscript{348} Berrick, supra note 6, at 83.
\textsuperscript{349} Id.
\textsuperscript{350} See generally Cal. WELF. & INST. CODE §§ 11361-11376 (2009).
eligible to receive Kin-GAP, if they otherwise qualify.\textsuperscript{351}

Even if children in kinship foster care in California were less likely to exit foster care to legal guardianship, legal guardianship may not be the best indicator of whether permanence is achieved. A legal bond may not be as strong or important to vulnerable abused or neglected children as the emotional bond and lifelong commitment that relative caregivers are likely to share with them.\textsuperscript{352}

\textit{d. Recommendation: Redefine Permanence}

While kinship foster care might not meet the traditional interpretation of how permanence is achieved, whether kinship foster care actually achieves this goal really depends on how one thinks about permanence.\textsuperscript{353} As traditionally defined, permanence is very difficult to achieve and may not be an accurate measure of what is truly in the best interest of foster children.\textsuperscript{354} Traditionally, permanence is interpreted based on establishing some kind of legal bond between the foster children and their caretakers; however, permanence is more likely established through the lifelong commitment relative caregivers make to care for their relative foster children and the personal bond developed between the caregiver and children, rather than a legal bond.\textsuperscript{355} Some experts argue that permanency should be defined as “establishing a ‘lasting’ bond between a family and a child [and] emphasize the importance of psychological bonding and giving a child a sense of social belonging and identity, along with a permanent home.”\textsuperscript{356} Acknowledging the inaccuracy of the traditional notion of permanence, some child welfare worker agencies have begun expanding their notion of

\textsuperscript{351} Id. § 11363.
\textsuperscript{352} Berrick, supra note 6, at 82.
\textsuperscript{353} Geen, supra note 7, at 143.
\textsuperscript{354} Geen, supra note 332, at 4.
\textsuperscript{355} There may be some difficulty with a relative caregiver not having a legal relationship for a child in their care because they would not have legal custody of the child, and therefore would not have the legal authority to make important decisions. However, in California, all relatives can complete a Caregiver Authorization Affidavit (CAA), which does not grant legal custody, but does allow the relative caregiver to make important decisions about the child in their care. CAL. FAM. CODE § 6550 (2009). CAAs do not terminate parental rights, nor do they require the birth parents to consent. Id.
\textsuperscript{356} Geen, supra note 7, at 143.
permanency to include long-term foster care with kin. Instead of fixing on legal bonds, child welfare agencies should focus on finding better methods to assess actual permanence as felt by the foster children, including relative caregivers’ commitment to the children in their care, as well as how the children in kinship foster care feel about the permanency and stability of their living situation.

Children in kinship foster care may technically remain in the foster care system longer than children in non-relative foster care; however, children in kinship foster care are more likely to have fewer overall placements. Although this may not fit into the statutory definition of permanence, it certainly is more stable and permanent than continually moving from one placement to another, or suffering through a failed adoption. The stability and safety offered through kinship foster care fits better with the underlying purpose of foster care — to protect the health and well-being of abused and neglected children and to provide the most family-like placement. According to a national sample, children in kinship foster care tend to be emotionally closer to their caregivers and overall feel a greater sense of permanency in their living situation. What children actually feel in their placements should be considered in measuring the achievement of permanence, and therefore, long-term placement with relatives should be considered a means of achieving the goal of permanence.

Moreover, the claim that long-term kinship foster care does not satisfy ASFA’s underlying policy of permanence is inconsistent with agencies’ common reliance on voluntary kinship placements. Intensive case studies by the Urban Institute during the spring and summer of 2001 in Alabama, California, Connecticut, and Indiana showed that some child welfare agencies consider the mere transfer of custody from a parent to a relative to be a permanent outcome, while generally prohibiting a child placed with a non-relative to

357. Berrick, supra note 6, at 77.
358. Geen, supra note 332, at 5.
359. Id. at 1; Berrick, supra note 6, at 81. Fewer placements can contribute to more stability and security, which are very valuable to a child in the foster care system. See Harden, supra note 3, at 38.
361. Ehrle & Geen, supra note 9, at 1.
362. See Geen, supra note 332, at 5.
remain in long-term foster care. These studies also confirmed that child welfare agencies encourage and help arrange for relatives to take custody of children without the agency initiating a child welfare case or taking the children into state custody. Child welfare workers in California reported “that the agency is unlikely to open a case when a child is in voluntary kinship care.” If child welfare workers are satisfied that placement with relative caregivers is sufficient to warrant not opening a child welfare case, such a placement should equally be considered sufficient to satisfy the safety and permanency requirements of ASFA.

C. Detrimental Effect of California’s Policy on Children in Kinship Foster Care

California’s policy to not support kinship foster care with state AFDC-FC conflicts with the underlying policies of the child welfare system including the placement preferences, it sends mixed messages to relative caregivers, and ultimately harms the state’s most vulnerable children. The state relies on relative caregivers as the preferred primary placement for abused and neglected children, yet the state does not provide sufficient funding for children in kinship foster care to support and promote the placement of foster children with relative caregivers. Despite this placement priority, in November 2009, kinship foster homes comprised only thirty-four percent of all foster homes in California. California, like Oregon, has “intentionally placed itself in a conflict of interest situation: Having undertaken responsibility for the fate of [foster] children, it has nevertheless adopted policies that have the potential to cause

363. Id. at 2. The Urban Institute conducted intensive case studies of local kinship care policies and frontline practices during the spring and summer of 2001 in four states – Alabama, California, Connecticut, and Indiana, including Alabama: Jefferson (Birmingham), Mobile, and Taladega Counties; California: Los Anegles, San Diego, Santa Clara (San Jose), and Santa Cruz Counties; Connecticut: Bridgeport, Hartford, and Torrington Counties; and Indiana: Lake (Gary), La Porte, and Marion (Indianapolis) Counties.


365. Id. at 2.

them serious harm."\textsuperscript{367} Distinguishing between kinship and non-relative foster care for funding purposes creates a "conflict in several respects with the overriding goal of providing the best available care for all dependent children removed from their homes because they were neglected."\textsuperscript{368} The Oregon policy upheld in \textit{Lipscomb}, is similar to California's refusal to support kinship foster care with state funds. In its opinion, the Ninth Circuit Court of Appeals acknowledged that denying state AFDC-FC for kinship foster care will "cause some children to be separated from their relatives for financial reasons."\textsuperscript{369} In oral argument, the State of Oregon even conceded that denying state foster care benefits for kinship foster care is not necessarily rational on the individual basis.\textsuperscript{370}

Although both the California Court of Appeal and the Ninth Circuit Court of Appeals found states' denial of providing state support for kinship foster care is not unconstitutional, this in no way means that such a policy is sound or fair. Both \textit{McMahon} and \textit{Lipscomb} applied a rational basis analysis. The constitutional rational basis standard is very easy to pass, and as such it is often viewed as a "rubber stamp."\textsuperscript{371} Additionally, courts try to avoid dictating to the states on matters concerning economic and social welfare programs.\textsuperscript{372} The California Court of Appeal made it clear that it did not decide whether "the state regulation is wise, that it best fulfills the relevant social and economic objectives that the state might ideally espouse, or that a more just and humane system could not be devised."\textsuperscript{373} Rather, it considered only the question of whether the practice violated the federal and California constitutions.

\begin{itemize}
  \item \textsuperscript{367} \textit{Lipscomb} v. Simmons, 962 F.2d 1374, 1384 (9th Cir. 1992) (Kozinski, J., dissenting).
  \item \textsuperscript{368} \textit{Miller} v. Youakim, 440 U.S. 125, 139 (1979).
  \item \textsuperscript{369} \textit{Lipscomb}, 962 F.2d at 1381.
  \item \textsuperscript{370} \textit{Id.} at 1388.
  \item \textsuperscript{371} \textit{King} v. \textit{McMahon}, 186 Cal. App. 3d 648, 662 (1st Dist. 1986); \textit{Lipscomb}, 962 F.2d at 1379. Rational basis analysis is the minimal level of judicial scrutiny applied to constitutional challenges. See \textit{ERWIN CHEMERINSKY, CONSTITUTIONAL LAW: PRINCIPALS AND POLICIES}, 677 (3d Ed. 2006). "Social and economic legislation... that does not employ suspect classifications or impinge on fundamental rights must be upheld against equal protection attack when the legislative means are rationally related to a legitimate government purpose. Moreover, such legislation carries with it a presumption of rationality that can only be overcome by a clear showing of arbitrariness and irrationality." \textit{Hodel} v. \textit{Indiana}, 452 U.S. 314, 331-32 (1981).
  \item \textsuperscript{372} See \textit{McMahon}, 186 Cal. App. 3d at 669; \textit{Lipscomb}, 962 F.2d at 1378, 1384.
  \item \textsuperscript{373} \textit{McMahon}, 186 Cal. App. 3d at 669 (quoting \textit{Dandridge} v. \textit{Williams}, 397 U.S. 471, 487 (1970)). See also \textit{Lipscomb}, 962 F.2d at 1384 (stating that it is not for the judiciary to vote on whether the policy is fair).
\end{itemize}
Although the California Court of Appeal and the Ninth Circuit Court of Appeals refused to strike down this type of policy, the policy should nonetheless be changed because of the conflict it creates with the underlying policies of the child welfare system, and most importantly because of the harm it causes to the California’s most vulnerable children. The result of failing to adequately support kinship foster care is that foster children who could be living in the homes of relatives, with all the emotional benefits associated with such placement, are instead placed in foster care with strangers or in group homes. Alternatively, if relatives do still take in relative foster children even without receiving foster care benefits, given the unique hardships of relative caregivers, the foster children in their care are the ones who suffer from a lower quality of care. This California policy forces children to either suffer the unnecessary trauma of being in foster care with strangers, or suffer from a lower quality of care. Neither option is a suitable place for vulnerable children to be raised, nor do these options create an environment in which vulnerable children can heal from past abuse or neglect, begin to thrive, or learn to become productive and self-sufficient adults. Children in kinship foster care are no less deserving or in need than children in non-relative foster care, and therefore they should not be treated any differently.

V. Recommendations

A. Federal Legislation

Vulnerable foster children cannot rely on the judiciary to protect them. The California Court of Appeal was clear that social and economic welfare decisions should be left to the other branches of government. Additionally, the Ninth Circuit Court of Appeals stated that:

[T]he Constitution does not empower [the] Court to second-guess state officials charged with the difficult responsibility of allocating limited public welfare funds among the myriad of potential recipients . . . [and it] is not the function of the

judicial branch of the federal government . . . to fashion new and improved child-care plans for the states.\textsuperscript{375}

As such, it is unlikely that the California or federal judicial systems can be relied upon to overturn California's, unjust policy.

Although the federal government must walk a thin line of governing our nation without invading state sovereignty, child welfare is not an area in which Congress has been shy to exercise its power.\textsuperscript{376} In enacting broad legislation such as ASFA, Congress has made it clear that federal law can and should be used to protect the health and well-being of our nation's most vulnerable children. If states have created and implemented child welfare systems that are treating children inequitably, the federal government should intervene.

As the law stands today, state foster care systems are inconsistent and foster children's rights are based upon the state from which they happen to be removed. Even if children are placed out-of-state, which is a common occurrence, the state of removal retains jurisdiction of, and responsibility for, those children.\textsuperscript{377} Therefore, if a child is removed from California, and placed with his or her aunt in Pennsylvania, and the child is ineligible for federal AFDC-FC, the child will not receive state AFDC-FC even though Pennsylvania funds kinship and non-relative foster care equally. Since California is responsible for the child, California policies would apply and the child would be ineligible for state AFDC-FC since he or she was placed in kinship foster care. However, if a similarly situated child was removed from a home in Pennsylvania and that child was placed in kinship foster care in Pennsylvania, this child will be eligible to receive state AFDC-FC. It is unjust that similarly situated, vulnerable and needy children are treated unequally by the foster care system. To ensure consistency and that all our nation's children are adequately protected and cared for, the federal government should amend ASFA to bar states from creating a policy that does not support kinship foster care with state AFDC-FC for non-federally eligible children.

\textsuperscript{375} Lipscomb, 962 F.2d at 1378, 1384.
i. Require States to Treat Children in Non-relative and Kinship Foster Care Equally

The federal government should amend ASFA to include a provision that states cannot deny foster care benefits to children in kinship foster care merely on the basis that they are related to their caregivers. Such a condition is consistent with the federal foster care funding scheme as it exists today. States must already submit their foster care plan to the federal government for approval in order for the state to receive federal financial participation.\textsuperscript{378} Currently, ASFA requires states to “consider giving preference to an adult relative over a nonrelated caregiver when determining placement for a child, provided that the relative caregiver meets all relevant state child protection standards.”\textsuperscript{379} This is one of the many conditions the federal government already imposes on states in order to protect the health and well-being of our nation’s most vulnerable children. If the federal government included another provision within the already detailed compliance requirements, all states would likely provide state foster care benefits for children in kinship and non-relative foster care equally in order to participate in the federal program. This would help ensure that the best interests of foster children are adequately pursued and that children who would best thrive in kinship foster care are not either denied such placement or put in kinship foster care and then denied adequate support.

ii. Amend Eligibility Requirements to Embrace Unique Needs of Kinship Foster Care

The federal government should also amend ASFA’s removal requirements so that children in kinship foster care have a more liberal timeframe for the judicial findings. Children in kinship foster care are in the unique position that they may not be able to meet the removal requirement of having the requisite judicial findings made within six months. Taking away this timeframe, or at a minimum significantly expanding it for children placed in kinship foster care, would help ensure that children in kinship foster care are more likely

\textsuperscript{378} 42 U.S.C. § 671(a); King v. Smith, 392 U.S. 309, 316-17 (1968).
\textsuperscript{379} 42 U.S.C. § 671(a)(19).
to meet the federal eligibility requirements. Under Youakim, these children would then be entitled to federal AFDC-FC. This solution would alleviate the financial strain on states because fewer children will need to be funded solely through state AFDC-FC. However, this solution should not be in lieu of the above recommendation. Although eliminating or expanding the removal requirements will be very helpful to many children in kinship foster care, it does not account for the other reasons why children may not be eligible for federal foster care, such as licensing and home approval provisions. Therefore, it is critical that ASFA is still amended to ensure that states are not arbitrarily and unjustifiably denying state AFDC-FC to needy and deserving children.

B. State Legislation

To better protect and care for our nation’s vulnerable and needy children, federal legislation would be the best recourse; however, this does not absolve California of its obligation to adequately protect and care for children within the state. Regardless of federal action or inaction, California needs to take responsibility for ensuring the health, safety, and welfare of all its children. California should change its own policy and provide state foster care benefits to children in kinship foster care. To create and implement the new policy, California should create a Kinship Foster Care Program.

i. Examples of Other State Programs

As of January 2008, nine states provide full state AFDC-FC, including any attached benefits and services, for children in kinship foster care who meet the state’s non-relative eligibility standards.380 These states are Alabama, Arizona, Arkansas, Connecticut, Illinois, Louisiana, Pennsylvania, South Carolina, and Tennessee.381 California should look to these other states as examples and construct a Kinship Foster Care Program accordingly.

381. Id. at 2 n.7.
a. Pennsylvania

Pennsylvania has an established Kinship Care Program that was enacted in 2003. As long as relatives are complying with the regulations governing foster parents, the relative caregivers shall receive the same foster care rate as other foster parents.

b. Alabama

Alabama has an established Kinship Foster Care Program within the state department. Under this program, the department is required to attempt to place children in need of out-of-home care with a relative for kinship foster care. If the relative is approved as a foster care provider, the relative may receive payment for the full foster care rate, including financial assistance and services.

ii. Proposed California Kinship Foster Care Program

California’s Kinship Foster Care Program should ensure that the state continues to first consider placement with a relative caregiver, similar to the Pennsylvania and Alabama programs. Additionally, California should follow Pennsylvania’s and Alabama’s lead in providing state AFDC-FC for children in kinship foster care. Furthermore, the program should form local kinship care task force groups to ensure that caregivers, child welfare workers, and local communities are properly educated on the unique issues of kinship foster care and the benefits and services to which children in kinship foster care are entitled. California needs to do a better job of informing relative caregivers of the possible benefits to which relative children in their vicinity are entitled.

382. 62 PA. CONS. STAT. § 1303(a) (2008).
383. Id. § 1303(b).
384. Id. § 1303(c)(1)(i).
385. ALA. CODE § 38-12-2(a) (2010).
386. Id. § 38-12-2(b).
387. Id. Alabama has yet to developed regulations to define and implement this program. C.D.H. v. Marion County Dep’t of Human Resources, JU-06-168.04 (Oct. Term, 2007-2008).
care may be entitled. This will help ensure that relative caregivers are aware of the benefits available to them before it is too late (before the first six months has passed). If relative caregivers are made aware of this possibility, they may seek assistance from the child welfare department within the federally mandated timeframe, and the children in their care would have a better chance of being eligible for federal AFDC-FC. Creating such educational programs is in the state’s best interest because it will help ensure that more children in kinship foster care are eligible for federal AFDC-FC, which would alleviate some of the state’s concern of funding too many foster children with state AFDC-FC.

Through local kinship care task force groups, relative caregivers should be able to have access to training, parenting classes, resources and information about the foster care system, and emotionally supportive groups. These task force groups should also focus on educating child welfare workers about the unique needs of relative caregivers. This will enable child welfare workers to better identify the needs of relative caregivers, offer available and appropriate services, and ultimately better ensure the safety and wellbeing of the foster children in their care. The Kinship Foster Care Program should also promote the ideology that long-term kinship foster care satisfies the underlying purpose of permanence.

iii. Financing the California Kinship Foster Care Program

Some child welfare workers may be placing children in non-relative foster care in order to ensure these children are financially stable. Therefore, it is possible that changing the state’s policy will in fact have a small fiscal impact. However, California also has options to finance a Kinship Foster Care Program. Currently, the Kin-GAP program is providing support and services for relative caregivers only on the backend (when exiting foster care), but there are no services provided on the front-end (upon entering foster care). Some of the Kin-GAP funds should be re-allocated to front-end support. Combining some Kin-GAP funds with a reallocation of other state funds could be used to establish a Kinship Foster Care Program.

388. Interview with Ramiu, supra note 13.
389. Id.
Additionally, the Fostering Connections Act guarantees federal funding for Kinship Navigator Programs, which would provide front-end funding to support kinship foster care. California should enact legislation that would enable the state to draw down on federal funding available through the Fostering Connections Act to help support kinship foster care.

Conclusion

The California policy of denying state foster care benefits to children in kinship foster care places a significant disadvantage to already vulnerable children, causing them to suffer more unnecessary trauma and harm. The policy undermines the underlying purpose of foster care — to ensure the safety and wellbeing of all children. This purpose should be achieved by placing children, who cannot remain in their homes, in a safe setting that is consistent with their best interest. California policy denies many foster children this opportunity by not fully embracing the substantial benefits of kinship foster care, and thereby fails to properly care for the state’s most vulnerable children.

Research demonstrates that there are numerous benefits to placing foster children in the care of their relatives. Kinship foster care can significantly minimize the trauma of removal and the effects of being in the foster care system. California has recognized the benefits of kinship foster care to the extent that the state has made placement with a relative the primary placement preference. Yet, California refuses to provide state foster care funding for children in kinship foster care. The state pays strangers to care for abused and neglected children, while denying relative caregivers the support they need to provide a home to these same children. This policy is contradictory and unjustly harms children that could be, or are, placed in kinship foster care. As a result of California’s policy, children are either not placed with relatives, even if such a placement

391. When this Note went to press, Cal. Assem. B. 12 (Cal. 2008), which would implement the financial components of the Foster Connections Act, enabling California to draw down on federal funds for kinship care, was stuck in appropriations. http://www.leginfo.ca.gov/billinfo.html (enter “12” in search field).
would be in their best interest, or children are placed with relatives at a high risk that they will not receive needed foster care funding and will suffer from the effects of limited financial resources. To stop this illogical and unjust treatment of foster children, ASFA should be amended to prohibit states from denying state foster care benefits to children in kinship foster care solely because they are related to their caregivers. Additionally, the California policy should be amended to allow state foster care benefits to be provided for children in kinship foster care, thereby fulfilling the state’s duty to protect its most vulnerable children.