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A Cautious Approach to Kinship Legal Guardianship in New Jersey: Its Application,
Advantages, Disadvantages, and Suggestions for Improvement

Kinship care is a growing practice in New Jersey and across the country. The term kinship care generally describes “the full-time care and nurturing of a child by someone who is related to the child by family ties or by a significant prior relationship connection.”¹ For a variety of reasons, grandparents, relatives, and family friends have taken on the responsibility of caring for children who are unable to live with their birth parents. When a child can no longer safely live with its parents, relatives and family friends are typically known to the child and can minimize the trauma of separating from a birth parent by providing a safe and nurturing environment.²

Kinship care is often seen in state child welfare systems when the state organization in charge of protecting the welfare of children removes a child from the home of its birth parents. Typically, these state organizations prefer to place a child in the home of a relative or family friend rather than in a non-relative foster home because it creates a more permanent environment and is less disruptive to a child’s life.³ In New Jersey, The Division of Youth and Family Services (DYFS) always looks for a kinship caregiver before placing a child in non-relative foster care.⁴

It is undeniable that the practice of kinship care can benefit children in unfortunate situations for a variety of reasons, including enabling the child to maintain ties to its family and encouraging family preservation. Yet, while kinship foster care is a popular alternative for a child who cannot live with its birth parents, it is not a permanent solution and has several flaws. The Adoption and Safe Families Act (ASFA) recognizes that it is important for a child to achieve permanency. ASFA says that a child can only remain in foster care for 15 of the most recent 22 months.⁵ It mandates that when this time period is over parental rights must be involuntarily

terminated unless the child is in the care of a relative or it would not be in the child's best interests.⁶

The majority of kinship caregivers are reluctant to allow for termination of the parental rights of a child's parent because the child's parent is usually a relative or close friend. So where does that leave a child who is being cared for by kin? In foster care indefinitely? The government strives to achieve permanency and stability for children in the child welfare system as soon as possible and practicable. Kinship foster care is not a permanent plan for a child; it places a child in the care of relatives or family members who have no legal decision making authority, it requires the state to be heavily involved in legal decisions which leads to ongoing litigation, and it leaves the child's fate undecided which creates a feeling of uncertainty and lack of security for the child and the kinship caregiver.

Other than being returned to its birth parents, the only way to give a child permanency is through adoption. Yet, adoption is not available when parental rights have not been terminated. Thus, in situations where the child is being cared for by kin and it is not in the child's best interests to terminate parental rights, state child welfare agencies are faced with a dilemma. What are child welfare systems to do in situations where the termination of parental rights is not appropriate and a child cannot safely be returned to its birth parents? It is at this point that the child welfare system has struggled to come up with a solution that is truly in the best interests of the child.

The New Jersey Legislature's solution to this problem is Kinship Legal Guardianship (KLG). KLG is a permanent and self-sustaining placement for a child that allows kinship caregivers to have legal rights over the child without terminating the rights of the birth parents.⁷ A Kinship legal guardian is "a caregiver who is willing to assume care of a child due to parental

incapacity, with the intent to raise the child to adulthood, and who is appointed the kinship legal guardian of the child by the court.”⁸ Kinship legal guardians are allowed to make decisions about the child’s care and are generally responsible for ensuring the child’s safety and well being.⁹

KLG became effective in New Jersey in 2002,¹⁰ making it relatively new to the child welfare system. With only ten years of history, there is little scholarship on the topic and KLG’s effect on children is only beginning to surface. This article discusses the pros and cons of KLG and considers whether this new approach should continue to be utilized in New Jersey’s child welfare system.

First (I) this article will discuss KLG in New Jersey and distinguish it from foster care and adoption. Second (II), it will examine enacted and rejected federal government legislation in this area and the approaches taken by other states and compare it to KLG. The third (III) section of this article will explore the positive and negative impact of KLG on the children, the caregiver, and the state. Finally, section four (IV) will assess whether KLG is in fact a good or bad alternative to foster care and adoption, improvements that can be made, and whether the advantages of KLG outweigh the disadvantages. The article argues that, to more effectively achieve its goal of permanency where neither adoption nor family reunification is possible, the New Jersey Legislature should amend the Kinship Legal Guardianship Act by expanding the definition of caregiver, establishing a low licensing requirement for KLG homes, initiating minimal state supervision of caregivers after KLG appointment, increasing subsidy payments, and creating a tax credit for KLG caregivers. The article then concludes (V) that, overall, the benefits of KLG outweigh its weaknesses and that KLG should continue be used in New Jersey’s child welfare system but that courts should be cautious in their appointment of KLG and should not treat it as an equal custody alternative to adoption and family reunification.

I. KLG in New Jersey

In 2002 the New Jersey Legislature found that it was “in the public interest to create a new type of legal guardianship that addresses the needs of children and caregivers in long-term kinship relationships.”¹¹ It recognized that there was an increase in the number of children who, for a variety of reasons, could not live with their parents as well as an “increasing number of relatives who found themselves providing care on a long-term basis to these children without court approved legal guardianship status because the caregivers either are unable or unwilling to seek termination of the legal relationships between the birth parent and the child.”¹² Under these circumstances, the state found it imperative that it create an alternative permanent legal arrangement for kinship caregivers and their families. Thus, the Kinship Legal Guardianship Act was passed, its goal being to “add another alternative... placement option, beyond custody, without rising to the level of termination of parental rights.”¹³

This section sheds light on the specifics of KLG in New Jersey. First it will address when KLG can be used. Next it will clarify who qualifies as kin for purposes of KLG. In the third and fourth sections KLG will be distinguished from foster care and adoption. Finally, due to the correlation between subsidy payments and successful guardianship programs, financial arrangements for KLG caregivers will be discussed.

A. When Can KLG Be Used?

Though most commonly seen in the child welfare setting, the KLG complaint comes before the court in three ways: DYFS filing, private filing, or DYFS assisted filing. KLG may *only* be used when the adoption of a child is “neither feasible nor likely.”¹⁴ When the permanency of adoption is available, KLG cannot be used to prevent the termination of parental

rights.¹⁵ Additionally, the court cannot award KLG because of simple parental incapacity. The judge must make specific findings based on clear and convincing evidence that the: “(1) parental incapacity is of such a serious nature that the parent is unable, unavailable or unwilling to care for and support the child; (2) parental inability is unlikely to change in the foreseeable future; (3) KLG is in the child’s best interest.”¹⁶ In DYFS cases, DYFS must also prove: “(4) DYFS exercised reasonable efforts to reunify the child with the birth parent; and (5) adoption is neither feasible nor likely.”¹⁷

In *New Jersey Division of Youth & Family Services v. S.V.* the mother failed to function as a “fit” parent over many years, yet there was some meaningful relationship between her and her children due to visitation.¹⁸ The mother contended that since there was a positive connection with her children, the court should have considered KLG rather than termination of parental rights.¹⁹ However, expert testimony revealed that the biological mother’s relationship with her children was not as strong as the children’s connection with the caregiver and potential adoptive parent. Therefore, termination would not do more harm than good.²⁰

As for KLG, the Court stated that the KLG statute is not meant to be an “equally available alternative” to termination of parental rights.²¹ KLG is an option where there is parental neglect, it is unlikely that the circumstances will change in the foreseeable future, adoption “is neither feasible nor likely,” the child is in the care of “a family friend or a person with a biological or legal relationship with the child,”²² and “kinship legal guardianship is in the child’s best interest.”²³ Thus, as in this case, where adoption is both feasible and likely, no matter if there is a positive relationship between the biological parent and child, kinship guardianship is inappropriate.²⁴

In *New Jersey Division of Youth and Family Services v. P.P.* the trial court terminated parental rights because the parents were not able to care for their two children due to a history of substance abuse and failure to comply with DYFS services.²⁵ The Appellate Court reversed the trial Court decision because the parents were making “substantial progress” with their substance abuse and had continuing visitation with the children.²⁶ The Appellate division stated that “DYFS failed to fully consider alternatives to termination of parental rights, especially kinship legal guardianship.”²⁷

The Supreme Court then emphasized the history of “New Jersey's strong public policy in favor of permanency.”²⁸ It held that because grandparent adoption was possible for both children, kinship legal guardianship was not available.²⁹ The court based its reasoning on the fact that the language of the Act states that kinship legal guardianship is a more permanent option than foster care when adoption “is neither feasible nor likely” and kinship legal guardianship is in the child's best interest.³⁰ Thus, when the permanency provided by adoption is available, kinship legal guardianship cannot be used as a defense to termination of parental rights.³¹ On remand the Court held that if the defendant-parents remained unfit to parent, “the trial court should not consider kinship legal guardianship unless either (or both) of the grandparents decline to adopt.”³²

As seen in *New Jersey Division of Youth & Family Services v. S.V.* and *New Jersey Division of Youth and Family Services v. P.P.* KLG is only available if adoption is not possible and it is in the child’s best interests. Thus, KLG is appropriate in only a narrowly defined class of cases as a last resort for Courts. The next section will discuss who is eligible to be appointed KLG.

B. Who Qualifies as Kin and May be Appointed KLG?

The Kinship Legal Guardianship Act sets forth that “‘caregiver means a person over 18 years of age, other than a child's parent, who has a kinship relationship with the child and has been providing care and support for the child, while the child has been residing in the caregiver's home.’”³³ Kinship relationship is defined as a “family friend or a person with a biological or legal relationship to the child.”³⁴ An individual is considered a family friend for purposes of the act if the person is “connected to a child or the child's parent by an established positive psychological or emotional relationship that is not a biological or legal relationship.”³⁵

To become a KLG, the caregiver must have “(1) a legal, biological or emotional relationship with the child; (2) the child must have resided with the caregiver for the last 12 consecutive months (or 15 or last 22 months); and (3) the parents must have a serious incapacity that makes them unable, unwilling or unavailable to parent the child in the foreseeable future (i.e. long term jail sentence, chronic drug/ alcohol use, chronic mental illness, parent has been missing for significant period of time).”³⁶

In making its determination about whether to appoint a caregiver as KLG, the court considers several factors including: the best interests of the child, the potential KLG's ability to provide a safe and permanent home for the child, the wishes of the child if the child is 12 years of age or older, the suitability of the kinship caregiver and the caregiver's family to raise the child, the ability of the kinship caregiver to assume full legal responsibility for the child, the commitment of the kinship caregiver and the caregivers family to raise the child to adulthood, and the results from a criminal history background check and domestic violence check.³⁷

However, even if a caregiver meets all the requirements to become a KLG, the court has the authority to deny KLG status if it is in the best interests of the child to do so and recommend

termination of parental rights so that adoption becomes possible. Thus, it is clear that KLG is really a last resort for courts when striving for permanency.

Typically when a third party, such as a KLG, seeks custody against the biological parent the standard is unfitness.³⁸ Yet, when a third party seeks custody and is able to show that he/she “stands in the shoes” of the parent, the test applied is the “best interest of the child” standard.³⁹ The best interests of the child standard must be applied even when the best interests of the child require denying the natural parent custody.⁴⁰ Since the best interests of the child must take priority, a finding of parental unfitness or abandonment is not required to sever parental rights in a third party custody situation.⁴¹

The Court in *Re Guardianship of J.R.* held that where foster care results in the creation of a new parent/child relationship, termination of the natural parents relationship is justified if disruption to the new relationship would hurt the child, despite present or past parental unfitness.⁴² New Jersey recognizes that a parent/child relationship can be formed between a child and someone other than the child’s natural parents. When evaluating whether a parent/child relationship is present the court should look at: (1) whether the biological or adoptive parent consented to, and fostered, the petitioner’s formation and establishment of a parent-like relationship with the child; (2) whether the petitioner and child lived together in the same household; (3) whether the petitioner assumed the obligations of parenthood by taking significant responsibility for the child’s care, education and development, including contribution towards the child’s support, without expectation of financial compensation; and (4) whether the petitioner has been in a parental role for a length of time sufficient to have established with the child a bonded, dependent relationship that is parental in nature.⁴³

Re Guardianship of J.R. shows that even if there was no emotional relationship between the caregiver and child prior to foster care one can develop over time and lead to the termination of parental rights. New Jersey's laws relating to third party custody situations demonstrate New Jersey's expansive definition of caregiver and emphasize that KLG should only be used when absolutely necessary.

C. KLG vs. Foster Care¹

Although foster parents have enough legal rights to meet the needs of the child, these rights are subject to constant oversight by the state's child welfare agency.⁴⁴ The appointment of a KLG for a child "relieves the state agency of its authority over the child, unless a new complaint of abuse or neglect is made at a later time."⁴⁵

In contrast to foster care, guardians essentially step into the role of parents. They are given control of the custody and care of the child equivalent to that of the birth parent.⁴⁶ This means that they are responsible for important decisions such as the child's health, welfare, and education.⁴⁷ Significantly, unlike foster parents, guardians do not need to ask an agency for permission to make important daily decisions regarding the child such as vaccinating the child or taking it on vacation out of the state.⁴⁸ It is also noteworthy that foster homes must be licensed by the state while there is no licensing requirement for caregivers to be considered for KLG.

Additionally, as opposed to long term foster care, KLG "cements the bond between the child and the caregiver, localizes authority over the child, and endows the relationship with an expectation of continuity."⁴⁹ Overall, KLG is a more permanent and stable placement for a child that excludes the state from private decisions.

¹ It is important to note that not all kinship caregivers are foster parents. To be a foster home, the caregiver must be approved and licensed by the appropriate state agency.

Though different in many respects, KLG and foster care share some similarities. First, they both relieve the birth parent of its right to custody and its obligation of care without requiring the termination of parental rights. Second, the birth parent maintains the right to visit the child and to consent to adoption.⁵⁰ Also, both custody arrangements require that birth parents remain responsible for child support.⁵¹ Furthermore, KLG, like foster care, does not limit or terminate any rights or benefits derived from the child's parents, including inheritance or eligibility for benefits or insurance.⁵²

KLG and foster care are also similar in that neither is a completely permanent custody situation. Foster care does not allow for permanent custody because the caregiver- child relationship is continuously subject to state oversight and intervention. A child in foster care can be placed back with its parents at any time. While KLG is more stable than foster care, it is still a reversible and impermanent arrangement. KLG can be vacated if a parent seeking to regain custody shows by clear and convincing evidence that it regained the ability to care for its child and that vacating kinship legal guardianship is in the child's best interests or the kinship legal guardian becomes unable to take care of the child.⁵³ Also, KLG only continues until the child's 18th birthday, like foster care, or the completion of secondary education.⁵⁴

D. KLG vs. Adoption

Unlike KLG, adoption requires the termination of parental rights.⁵⁵ Thus, the most critical distinction between KLG and adoption is that guardianship does not sever all the birth parent's rights. As previously mentioned, KLG allows birth parents to retain the right to visit the child as well as to consent to adoption.⁵⁶ It does not limit a birth parents obligation to pay child support or the child's right to the birth parent's benefits.⁵⁷ KLG is also not a permanent placement and can be reversed under certain conditions.⁵⁸

Adoption on the other hand terminates all the birth parent's parental rights and responsibilities towards the child.⁵⁹ When a child is adopted it is no longer entitled to the birth parent's inheritance and the birth parent has no right to visit or maintain a relationship with the child.⁶⁰ As a legal parent, the adoptive parent has an option to allow contact between the birth parent and a child, but the birth parent has no enforceable right to an ongoing relationship.⁶¹ Adoption also relieves the birth parent of the obligation to pay child support.⁶² Furthermore, in only extremely rare cases a birth parent's consent to adoption can be revoked,⁶³ making custody and the parent child relationship in adoption very permanent and stable.

An adoptive parent can transfer custody or legal authority over the child to another individual and can also make plans for the care and custody of the child in case of death or incapacitation.⁶⁴ In contrast, a guardian's authority over the child cannot be transferred.⁶⁵ Also unlike an adoptive parent, a guardian may not change the child's name or consent to an adoption by a third party.⁶⁶

The only substantial similarity between KLG and adoption is that the caregiver in both situations is able to make important private decisions without state intervention. This is a really crucial feature of KLG because it allows the caregiver and child to live a normal life without state oversight and is one of the key elements that make it superior to foster care. Yet, even with this similarity, KLG pales in comparison to the permanency offered by adoption. For this reason, as previously discussed, KLG can only be used in a limited set of circumstances.

E. Financial Arrangement for KLG Caregivers Compared to Adoption and Foster Care

Typically, guardians do not assume the responsibility of financially supporting the child under their care. As mentioned above, the birth parent's obligation to pay child support survives KLG appointment. Thus, in a perfect world the birth parent would financially support its child

even though it is being cared for by another. Unfortunately, the reality is that few parents actually pay child support on behalf of their children who are in foster care or have a guardian.⁶⁷

In 2002 New Jersey created the Kinship Care Subsidy Program (KCSP) to give financial assistance to KLG caregivers.⁶⁸ To be eligible for a monthly subsidy, a guardian must be granted KLG by the court and meet the financial requirements.⁶⁹ In 2011, a KLG could get up to \$250 per month per child under KCSP. Any income attributable to the child is subtracted from the \$250 and the caregiver receives the difference.⁷⁰

Guardian subsidy amounts are determined when the final KLG judgment is granted and are non-negotiable after that point.⁷¹ SSI payments reduce the amount of the subsidy.⁷² The caregiver is no longer entitled to subsidy payments when the child turns 18 or graduates high school, whichever occurs later, or if a guardian stops caring for the child.⁷³ Tax credits and social security are also not available for KLG caregivers.⁷⁴ A child can still inherit from its birth parents, but can only inherit from a KLG through the guardian's will.⁷⁵

In addition to subsidy payments, New Jersey offers financial help through the Kinship Navigator Program.⁷⁶ If an individual is caring for a relative's child and the household income does not exceed a certain percentage of federal poverty guidelines, then that person may be eligible for financial assistance.⁷⁷

Foster parents are entitled to higher payments than Kinship Legal Guardians.⁷⁸ In 2011, the minimum monthly foster care payment in New Jersey was \$406 per child.⁷⁹ Foster families receive payments that cover boarding and clothing for the child.⁸⁰ Additionally, there may be tax benefits if the family qualifies. Notably, if a kinship caregiver is not a foster parent and was not granted KLG that caregiver, if eligible, was only given a welfare grant of \$162 per month per child in 2011.⁸¹

In contrast to KLG and foster care, subsidies are only available after adoption if the child has special needs or is “hard-to-place.”⁸² Generally the subsidy amount is the board rate at the time the adoption is finalized, but it can exceed the board amount if the child has extreme needs and it can be re-negotiated if the child’s needs change.⁸³ Also, subsidy payments continue if the caregiver moves out of state.⁸⁴

Like KLG, adoption subsidy amounts can be reduced by the amount of the child’s SSI and payments stop at the age of 18 or when the child graduates high school, whichever occurs later.⁸⁵ Adoptive parents, however, are entitled to a substantial tax credit in the year the child is adopted and can receive social security for the child.⁸⁶ Additionally, an adopted child can inherit from its adoptive parent with or without a will.⁸⁷

In addition to state subsidies, the federal government offers TANF (Temporary Assistance for Needy Families) payments for low income families with dependent children and for pregnant women for up to five years.⁸⁸ Thus, caregivers who are not foster homes may be able to receive financial assistance through the TANF program. Unfortunately, many kinship caregivers fail to receive TANF benefits because they are unaware of their eligibility or because the state agency mistakenly denies them assistance.⁸⁹

Sadly, financial issues are a barrier for many kinship foster parents who are eligible to be appointed KLG. Caregivers are hesitant to improve their permanency status from foster parent to KLG for fear that they will not have substantial resources to support the child. While subsidized guardianship relieves some of the problem it does not terminate it, leaving children in long term foster care that may otherwise have a higher level of permanency with KLG.

This section discussed the details of KLG in New Jersey and how the process works. It is clear that KLG is only available when adoption is not possible and when it is in the child’s best

interests. In New Jersey the term kin is quite expansive and refers to both relatives and family friends, allowing a wide range of people to be eligible for appointment as KLG. KLG was distinguished from foster care and adoption as being a sort of “intermediate” level of permanency. KLG’s option of subsidized guardianship and its importance to caregivers was also talked about. The next section assesses the federal approach to kinship guardianship as well as 2 state approaches, New York and Illinois, and contrasts them with New Jersey.

II. Federal and Other State Approaches to Kinship Guardianship

The federal government has recognized that kinship caregivers face unique problems concerning child care. In many situations foster parents are reluctant to become guardians because of a decrease in monthly payments. Many foster homes depend on financial assistance through subsidies to care for the children. The federal government’s immense spending power significantly affects state’s abilities to help kinship guardians by designating federal funds specifically for the purpose of subsidized guardianships. In order to receive the federal funds, however, states must comply with federal legislation.

Unfortunately, federal legislation in this area has many shortcomings. For this reason not all states have complied with its regulations and therefore do not receive federal financial assistance for kinship guardian subsidy payments. Since the federal government’s approach to kinship guardianship is not ideal and allows for some variation, state efforts to aid kinship caregivers and find permanency for children where adoption and foster care is not appropriate vary. Below is the federal government’s failed and enacted legislation regarding subsidized guardianships as well as New York’s and Illinois’ approaches.

A. Federal Approach to Kinship Guardianship

In an effort to combat the challenges encountered by kinship caregivers, the Kinship Caregiver Support Act (KCSA) and the Guardianship Assistance Promotion and Kinship Support Act (GAP-KSA) were presented to Congress, KCSA in 2007 and GAP-KSA in 2005. The bills were created with the purpose of facilitating kinship guardian assistance programs in an effort to find permanency for more children. Yet, both bills suffered the same fate and died in committee.

In 2008 kinship guardians' precarious situations were finally given some relief by the federal government when the Fostering Connection to Success and Increasing Adoptions Act was enacted. The Act aided in minimizing some of the obstacles faced by kinship caregivers but leaves a lot to be desired. The discussion of rejected and enacted federal legislation below highlights some of the weaknesses of the current state of federal legislation regarding kinship guardianship.

i. Rejected Legislation²

The following legislation has been presented to congress and died in committee. Both the KSCA and GAP-KSA were innovative and proposed certain regulations specifically targeted at aiding kinship caregivers that current federal legislation is lacking. However there is very little information available on why neither of these bills passed.³

a. Kinship Caregiver Support Act (KCSA)

The KCSA was introduced into Congress in 2007 and died in committee.⁹⁰ It would have enabled thousands of children in foster care to find more permanent placements with relative legal guardians by giving states the option to use federal funds to subsidize guardianship

² See Also: The Invest In Kids Act

³ There is minimal information available in the congressional record and bill tracking reports for both bills. Both bills were likely not extensively considered.

payments.⁹¹ It also established a Kinship Navigator Program to help caregivers learn about and access services.⁹²

The Act defined kinship caregiver as a “grandparent or step-grandparent of a child or a relative of a child by blood marriage, or adoption who lives with the child, is the primary caregiver because the birth parent is unable or unwilling to care of the child and has a legal relationship to the child or is raising the child informally.”⁹³ Thus, the caregiver had to be a relative, not merely a family friend to qualify for financial assistance.

States with approved plans could have offered kinship guardianship assistance payments for relative caregivers who cared for a child as foster parents and who were committed to caring for the child permanently.⁹⁴ Importantly, it mandated that payments be equal to the amount of foster care maintenance payments.⁹⁵

Under the KSCA children would be eligible for the subsidy if adoption and reuniting with its birth parents were not viable options.⁹⁶ Additionally, the child must have been under the care of the state for a 12 month period and eligible for foster care payments during that time or would have been eligible for foster care payments if it had not been placed in the home of a relative.⁹⁷ The Act required children 14 years of age or older to consent to the guardianship.⁹⁸

Significantly, this Act also would have allowed states flexibility in establishing separate standards for relative foster homes.⁹⁹ Allowing states to relax foster home licensing requirements for relatives would have allowed more caregivers to be eligible for subsidies.

b. Guardianship Assistance Promotion and Kinship Support Act (GAP- KSA)

GAP-KSA, a companion bill to the KSCA, was introduced in 2005 and died in committee. It shared many similarities with KSCA, but there were a few notable differences.

GAP-KSA had a more expansive definition of relative than the KSCA. It expressly

recognized that non-relatives could be guardians for purposes of guardianship subsidy payments. Under GAP-KSA financial assistance would have been available to any “individual who assumed legal guardianship of children for whom they cared for as foster parents.”¹⁰⁰ Yet, while KCSA and GAP-KSA had different meanings for the term kinship caregiver, both bills only relaxed foster care licensing standards for relatives.¹⁰¹ The act also guaranteed that the state would pay for the caregiver’s legal costs of seeking guardianship payments.¹⁰²

ii. Enacted Legislation

The following bill has been enacted into law with the purpose of easing the burden on kinship guardian caregivers and finding permanency for more children who are lingering in foster care. Because of its shortcomings, however, not all states benefit from federal funds. If the federal government wants to effectively rid kinship guardians of care giving burdens, it would adopt a more expansive approach to kinship guardianship, like the proposed regulations discussed above. The current legislation is potentially problematic if states, like New Jersey, that have a more expansive approach to kinship guardianship adjust their laws to be eligible for federal funding, thus eliminating numerous caregivers from guardianship eligibility and depriving children of permanency.

a. The Fostering Connection to Success and Increasing Adoptions Act

In 2008 the Fostering Connection to Success and Increasing Adoptions Act was passed unanimously by both houses of Congress.¹⁰³ The legislation includes provisions relating to the support of adoption of children from foster care, encouraging states to place siblings together when possible, and providing federal assistance for relatives who become legal guardians of foster children in their care.¹⁰⁴

The Act facilitates Kinship Guardianship Assistance Payments (Kin-Gap) within states. It permits states to receive federal reimbursement for some of the costs of providing kinship guardianship assistance to eligible children who are placed with a relative who has become their legal guardian.¹⁰⁵ To be eligible for federal guardianship assistance, the relative guardian must meet the state foster care licensing standards and background check.¹⁰⁶ Also, both adoption and reuniting with birth parents must be ruled out for the child as permanency options before kinship guardianship can be considered.¹⁰⁷ Children 14 years of age or older must be consulted before being placed in a kinship guardianship arrangement.¹⁰⁸

Notably the act restricts the amount of funding available to kinship guardians to less than the caregiver would receive if it remained a foster home.¹⁰⁹ Payments are terminated when the child turns 18, or 21 under certain conditions, or when the relative guardian is no longer legally responsible and is no longer supporting the child.¹¹⁰

The Fostering Connection to Success and Increasing Adoptions Act also designates funds for the creation of kinship navigator programs, as well as others, to aid caregivers in the kinship guardianship process.¹¹¹ Currently, 39 states and the District of Columbia have subsidized guardianship programs.¹¹²

While the KCSA and GAP-KSA share many similarities with the Fostering Connection to Success and Increasing Adoptions Act they are different in a few significant ways. The KCSA and GAP-KSA would have allowed more kinship caregivers to be eligible for subsidies by lowering foster care licensing standards for relative caregivers and recognizing informal relationships. Both Acts called for equal payments to guardians and foster parents, easing the burden on caregivers and not hindering the caregiver's decision to advance from foster care to

guardianship. GAP-KSA also would have permitted more caregivers to qualify for subsidies because it was not limited to relatives of the child.

Overall Kin-Gap financial assistance is a step in the right direction by the federal government. It offers aid to many caregivers who are in need and therefore increases permanent guardianship placements for children. Yet its restriction of qualifying caregivers to relatives, its stringent requirement that the caregiver be a licensed foster home, and its mandated lower payments than foster care does not allow it to completely solve the issues faced by kinship caregivers. While several states have recognized that the Kin-Gap program is more beneficial than not recognizing any form of subsidized guardianship and have started to use it (like New York discussed below), the federal legislation's inherent shortcomings have led some states, like New Jersey, to continue to utilize its own approach to kinship guardianship in an effort to exacerbate obstacles faced by kinship guardians and find permanency for more children.

New Jersey has not followed to federal approach to kinship guardianship. In fact, KLG is more consistent with the rejected federal legislation. The most significant differences between the current federal legislation and New Jersey's legislation are that KLG allows non-relative family friends to qualify as kinship guardians and KLG does not require that the caregiver's home be a licensed foster home. Thus, New Jersey's ability to assist kinship caregivers is more expansive than that of the federal government and therefore allows more caregivers to be eligible to be appointed KLG and enables more children to find permanency.

B. Other State Approaches to Kinship Guardianship

Each state has a different approach to kinship guardianship. Some states have adopted the federal legislation, like New York discussed below, while others recognized the need for subsidized guardianship before the federal legislation was enacted as well as its shortcomings after and created their own approaches to subsidized guardianship, like Illinois, discussed below, and New Jersey. Eligibility for subsidized guardianship tends to rely on a few different factors that vary significantly among the states including the guardian's status as a relative, the sibling group exception, the age of the child, the child's attachment to the caregiver, and the amount of financial assistance available to caregivers.¹¹³

The most successful subsidized guardianship programs are those in which guardians receive financial support comparable to foster parents and do not require significant state supervision or paperwork.¹¹⁴ Currently no state offers guardianship subsidies that exceed foster care payments.¹¹⁵ Below New York and Illinois' guardianship options are discussed and compared to KLG in New Jersey.

i. New York

The state of New York mandates that when a child is removed from its home, the local department of social services must first look for relatives to place the child with.¹¹⁶ Until recently relatives could only become caregivers in New York through private placements, foster care, or guardianship. After federal legislation was passed, however, Kin- Gap (Kinship Guardianship assistance program) became an available alternative.

One option in New York is private placement where the relative needs the consent of the parents or proof that the parents abused, abandoned, or neglected the child or the child lived with the relative for a long period of time.¹¹⁷ Caregivers can also participate in a private placement

where the relative will have custody of the child but the appropriate state department will monitor the placement and can reunite the child with its parents.¹¹⁸

To be a kinship foster parent the caregiver must qualify as a licensed foster home. The definition of relative in the foster care context is: “relative within the first, second, or third degree of the parent or stepparent, through blood or marriage.”¹¹⁹ This definition includes grandparents, great grandparents, aunts and uncles and their spouses, siblings of the child, first cousins of the child and their spouses, and “unrelated persons where placement with such persons allows half siblings to stay together in an approved foster home and the parent or stepparent of one of the half siblings is related to such a person in the second or third degree.”¹²⁰

Kinship foster care allows the state to later reunite the child with its parents or ask the relative to adopt.¹²¹ Unlike a non-relative, relative foster parents may have the child live with them while they become a qualified foster home.¹²² To be approved as a kinship foster parent the caregiver must agree to a background check and meet several criteria including: must be older than 21, recognize and respect the religious wishes of parent, cooperate with the agency, cooperate with visits between siblings, arrange for school, and provide necessities. Kinship foster care is not a permanent placement option; it can be temporary or long term.¹²³ Notably, kinship caregivers who are not qualified foster parents do not receive any type of financial assistance from the state.

There are four types of legal guardians in New York: Guardian of the person, Guardian of the property, guardian ad litem, and stand by guardian.¹²⁴ Each of these guardianships can be appointed and consented to by the child’s parents or a state agency and none of them are kinship care specific. Guardianship of the person is where the guardian has legal authority to make all daily decisions concerning a child including education, medical, and other important things in

the child's life.¹²⁵ A guardian of the property handles the child's money, investments, and savings.¹²⁶ Guardian's ad litem act for the child in case of a law suit.¹²⁷ Stand by guardianship means that the legal guardian will be able to make decisions for the child sometime in the future when the parent is no longer able to do so.¹²⁸ A caregiver can be more than one kind of guardian.¹²⁹

New York also has a higher level of guardianship called permanent guardianship that is similar to adoption but does not require that the child's name be changed and the caregiver does not become a parent.¹³⁰ Permanent guardianship is more similar to adoption because it is only available when parents are deceased or their rights have been terminated.¹³¹

Finally, New York participates in the federal Kin-Gap program, providing another permanency option for children in the care of relatives. Like New Jersey, adoption and reunification with the child's parents must be ruled out before Kin-Gap can be considered.¹³² If the child is over age 14, it must be consulted and if over age 18 it must consent to the guardianship.¹³³

Kin-Gap is a more permanent placement than foster care and is available when the child has been living with a foster parent for at least six months.¹³⁴ When Kin-Gap has been established, the guardian is able to make all necessary decisions for the child.¹³⁵ If the child is not free for adoption, like KLG, parental rights continue to be with the birth parents and the child may retain contact with them if appropriate.¹³⁶ Under Kin-Gap the agency is no longer required to supervise the caregivers.

New York defines relative in the guardianship context as "a person related to the child by blood marriage or adoption who is a certified or approved foster parent and has been caring for the child for at least six consecutive months."¹³⁷ To qualify the caregiver must be related to the

child by blood, adoption, or marriage and there must be a degree of affinity.¹³⁸ The state checks the caregiver's background and criminal history, but any type of record does not necessarily prevent Kin-Gap.¹³⁹

Kin-Gap provides financial support to the caregiver similar to payments received during foster care.¹⁴⁰ Payments can continue as long as the guardian is legally responsible for the child and continues to provide support up until the age of 21 if certain conditions are present.¹⁴¹ The subsidy does not terminate if the family moves out of state.¹⁴²

While New York offers several options for kinship caregivers, the only one that comes close to KLG in New Jersey is Kin-Gap. Kin-Gap, however, is a federal program while KLG is specific to New Jersey. As discussed above, KLG is superior to Kin-Gap in that it reaches a larger population of caregivers by not having a licensing requirement and includes non-relatives. Yet, both Kin-Gap and KLG are lacking in that guardianship subsidy amounts are lower than foster care maintenance payments.

ii. Illinois

Illinois defines “kinship care” as the “full time care, nurturing, and protection of children by relatives, members of their tribes or clans, grandparents, godparents, stepparents, or any adult who has physical custody and a kinship bond with a child.”¹⁴³ In Illinois there are five different ways to secure legal authority of a child when its birth parents are absent, unable, or unwilling to raise a child: a custody proceeding under the Illinois Marriage and Dissolution Act, a guardianship proceeding under the Illinois Probate Act, a juvenile court proceeding under the Juvenile Court Act to obtain custody or guardianship, a habeas proceeding under the Habeas Corpus Act, and adoption under the Adoption Act.¹⁴⁴ A caregiver will be considered for legal custody under the best interests of the child standard.¹⁴⁵ Like New Jersey, a child must be

unable to return home and the option of adoption must be ruled out before guardianship can be considered.¹⁴⁶

However, unlike New Jersey, guardianship in Illinois requires that the guardian always serve under the supervision of the court.¹⁴⁷ Once appointed guardianship, the state child welfare agency will not be involved in the care, supervision, or legal custody of the child. Yet, the court retains jurisdiction until the child reaches the age of 18.¹⁴⁸ Though the court will not initiate intervention with the caregiver's parenting, any interested party, not limited to relatives, may petition the court.¹⁴⁹ Additionally, the guardian must get the court's approval before it takes certain actions in relation to the minor's personal and real property.¹⁵⁰ Also, in Illinois if the child is 14 years of age or older it must consent to the guardianship.¹⁵¹

Guardianship becomes an option for caregivers once the child has been living in the home of licensed relatives for a six month period and the child demonstrates a strong attachment to the guardian.¹⁵² Children of all ages can be considered for guardianship if living with a relative.¹⁵³ Siblings can also qualify for guardianship if they have a brother or sister in the same home who meets the criteria.¹⁵⁴ However, if a caregiver is a non-relative the child must be at least 12 years old and have lived with the non-relative for 6 consecutive months to be considered for guardianship.¹⁵⁵ If it is a non-relative guardianship, there is no sibling exception available.¹⁵⁶ This is different than New Jersey's approach because KLG does not distinguish between relatives and non-relatives in relation to the child's age of eligibility, the child simply must be under 18, nor does New Jersey have a sibling exception.¹⁵⁷

Similar to New Jersey, there is a guardianship subsidy available to help caregivers with finances.¹⁵⁸ The subsidy lasts until the child turns 18 unless the child is still in high school, in which case the payments stop at graduation or when the child turns 19.¹⁵⁹ Subsidy payments can

also end for a variety of other reasons including: if the guardianship is vacated by the court, if the guardian dies, and if the child enlists in the military or marries.¹⁶⁰ The subsidy continues even if the family moves out of the state.¹⁶¹

It is significant that of all the states that have subsidized guardianship programs, Illinois has had the most success with reducing its foster care caseload and finding permanency for children who are unable to live with their parents or be adopted.¹⁶² This is likely related to the fact the foster care payments and guardianship payments in Illinois are about equal, something that KLG does not compel.¹⁶³ Illinois has had a significant decline in long-term foster care and the average number of days children were in foster care was reduced as well.¹⁶⁴

Compared to the federal legislation, New York's laws, and Illinois's laws, KLG in New Jersey seems to be a rather comprehensive approach. KLG is quite a distance ahead of federal legislation in its ability to effectively help caregivers. New Jersey should not adjust its guardianship laws to become eligible for federal funding through Kin-Gap because it will limit caregiver eligibility and subsidy payments. Hopefully the federal government will recognize the weaknesses of its Kin-Gap program in the near future and will make the necessary adjustments. Where KLG may be flawed, however, is in its lack of a sibling exception and the inequality between foster care and guardianship subsidy payments. Though, significantly better than Kin-Gap, KLG still has room for improvement.

The above material discussed KLG laws and comparable kinship guardian program regulations. KLG in New Jersey was described and contrasted with federal laws, New York Laws, and Illinois Laws. The next section will illuminate the advantages and disadvantages of kinship guardianship and its impact on the children, the caregivers, and the state. Assessing the

effects of KLG aids in the determination of whether it should continue to be used by courts as a permanency option.

III. The Effects of KLG

Opinions about KLG vary greatly. Being a relatively new phenomenon, KLG's effects are only beginning to come to light. The concept of kinship care, however, has been around for a long time. KLG shares some of the same advantages and disadvantages of kinship care because of the nature of the care giving relationship as well as a few that are specific to KLG.

KLG has benefits for the children, the caregiver, and the state. KLG can help maintain family bonds, relieve caregivers of the burdens of state oversight, and save the state money. However negative criticisms are also associated with KLG. Concerns about KLG include evidence that kinship caregivers face more challenges than non-kin caregivers, they might allow unsupervised contact with birth parents, the possibility of a cycle of abuse, and KLG's divergence with public policy.

A. Arguments in Support of KLG

There are many advantages to the use of KLG in the child welfare system. One of the most prevalent arguments for KLG is that it encourages family preservation.¹⁶⁵ Since no termination of parental rights is required by ASFA when a child resides with a relative and the child is living with a caregiver with whom it shares an emotional bond and has likely known its entire life, KLG enables a child to maintain ties to its family.¹⁶⁶ Additionally, KLG caregivers are more likely to provide a home for all the children in the family, preventing the division of siblings.¹⁶⁷

Related to the theory that kinship care preserves family relationships is the idea that placement with a kinship caregiver eases the trauma of separating the child from its birth parents.¹⁶⁸ Living with a kinship guardian allows the child to remain connected to its community.¹⁶⁹ Also, kinship caregivers are better able to maintain the child's cultural ties.¹⁷⁰ Additionally, there is some evidence showing that children in kinship care are better cared for by relatives than they are by strangers.¹⁷¹

Children can also benefit from KLG because it encourages long term placements. Statistics show that placing a child in the care of a relative or a close family friend results in more stable relationships.¹⁷² Given the non-permanent nature of foster care, children who have guardians are less likely to move around from home to home.¹⁷³ Disruption of home placements is linked to higher rates of re-entry into foster care as well as associated with emotional costs for the child.¹⁷⁴ Children affected by impermanency are more likely to have behavioral problems and higher rates of delinquency.¹⁷⁵

Caregivers are also advantaged by the option of KLG. When a foster parent becomes a child's guardian it has legal authority to make important decisions for the child without court intervention.¹⁷⁶ Thus, the caregiver is no longer required to skip work to go to court to have the placement reviewed and monthly visits by a case worker are discontinued.¹⁷⁷

Beyond the benefits KLG offers to children and caregivers, there are many advantages for states that have programs like KLG. Because kinship caregivers are likely to take in more than one child if there are siblings, the state is not burdened with finding multiple foster homes.¹⁷⁸ Also, because most states- like New York and Illinois- require licensing⁴ to become a

⁴ To become a foster home, prospective foster parents must have their homes certified by the state in order to become licensed foster parents. This process usually includes some form of external review, education, assessment, or audit. *See* <http://en.wikipedia.org/wiki/Certified> (last viewed 4/22/2012). Some states require prospective guardians to be certified as licensed foster homes to be eligible for guardianship appointment.

guardian, it opens up more qualified foster homes in the state. That, however, is not a benefit to KLG in New Jersey.¹⁷⁹

Guardianship does not require substantial state involvement or funds. Foster parents are constantly being monitored by the state while guardians have autonomy to make decisions for the child.¹⁸⁰ Thus a state can save a lot of money by increasing the number of legal guardians and decreasing the number of children in foster care.¹⁸¹ Even in states where the guardianship subsidy amount is equal to foster care payments, the annual cost of maintaining a child in foster care is about double that of guardianship.¹⁸²

B. Arguments Against KLG

For a variety of compelling reasons KLG as a permanency option may not be ideal. One of the biggest criticisms of kinship care is the qualifications of the caregivers and their living conditions. Despite the stability this alternative provides, kinship care presents unique challenges to relative caregivers. “Many children in kinship care live at or below the poverty line, in overcrowded households, with caregivers who are elderly, single, or poorly educated.”¹⁸³

Generally, kinship caregivers as a group face more challenges than non-kin caregivers. It is more common for kinship caregivers to have socioeconomic problems than non-kin caregivers.¹⁸⁴ In many situations they are asked to care for a child with little, if any, advanced notice.¹⁸⁵ Kinship caregivers are more likely to be single and less educated as well.¹⁸⁶ Also, many kinship guardians are grandparents who are more likely to be in poor health than non-kin caregivers.¹⁸⁷

In addition to the negative characteristics associated with kinship caregivers, many of them have not completed licensing or training that teaches them how to deal with stressful child care situations.¹⁸⁸ In the case of older caregivers, they may not have cared for a child for many

years. Related to this, some studies have found that kinship caregivers are more likely to experience higher levels of depression and distress.¹⁸⁹ This is probably connected to the high level of stress placed on kinship caregivers when they are “required to provide the same nurturance and support for children in their care that non-kin foster parents provide, with fewer resources . . . and limited preparation.”¹⁹⁰ It is possible that this stress can impair the kinship caregiver’s capacity and willingness to provide sufficient care for the child in its custody.¹⁹¹

Another criticism of KLG is that kinship caregivers are more likely than non-kin to allow unsupervised contact with the child’s birth parents. This type of communication puts the child at risk¹⁹² and conflicts with the logic behind removing the child from the birth parent’s care in the first place.¹⁹³

KLG can also be disadvantageous because it may expose the child to a cycle of abuse. Studies have shown that intergenerational cycles of abuse exist.¹⁹⁴ Thus, children who are placed in the home of a relative or close family friend are potentially at risk of being abused, a risk the child would generally not encounter in traditional foster care.¹⁹⁵ Elizabeth Bartholet is a proponent of the cycle of abuse theory. She believes abuse and neglect are intergenerational within families and that the behavior is a result of “deprived and dangerous communities.”¹⁹⁶ In many instances kin face the same problems as the child’s birth parents, “Relatives of maltreated children are suspect both because they are related to the abusive parents and because they come from the same community that generated the abuse.”¹⁹⁷ Therefore, in an effort to circumvent the risk of maltreatment children potentially face when placed with kin, Bartholet advocates for adoption by persons in more affluent communities to avoid placement with relatives who may be unqualified.¹⁹⁸

A fourth and final criticism of KLG is that it is contrary to public policy. The government strives to find permanency for children in the welfare system. When children are placed with kin, however, the caregivers are less likely to want to adopt the child because of the caregiver's relationship with the birth parents.¹⁹⁹ Additionally, families are less likely to be reunited when the child is in a KLG placement because the state no longer regularly intervenes.²⁰⁰ The state's presence in foster care placements ensures that, if permitted by the court, a relationship with the natural parent continues and that the birth parents receive services that could eventually bring the family back together.²⁰¹ Therefore, KLG is less likely to achieve the permanency intended by government policies.

Both the advantages and disadvantages of KLG raise legitimate arguments. It is challenging to balance the positive and negative effects and reach a definitive conclusion about whether KLG should continue to be an option in the child welfare setting. I believe there is middle ground, however, where legislation may be able to minimize some of the disadvantages and push the balance in favor of KLG. In the next section I will propose some adjustments to current KLG laws as well as suggest how some of the negative criticisms of KLG can be curtailed.

IV. KLG should continue to be used by Courts. However, the Legislature should make improvements to the law so that the policies behind KLG are better served and Courts should proceed with caution when appointing KLG.

Overall, KLG in New Jersey seems to be more beneficial than harmful. New Jersey has clearly recognized that children who are not eligible for adoption and cannot be returned to their parents are in need of permanency as well as the precarious situations of many kinship caregivers. KLG as an alternative to foster care and adoption fills a void in the child welfare system and improves the lives of many caregivers and children. While KLG is a valuable

permanency alternative in its current condition and in some ways is superior to the federal and other state government programs, a few adjustments should be made to enhance its effectiveness. Yet, even if amended, courts should be cautious in their appointment of KLG.

A. Proposed Amendments to New Jersey's Kinship Legal Guardianship Act

To improve the effectiveness of KLG, the New Jersey Legislature should expand the definition of caregiver, establish a low level licensing standard, initiate minimal supervision of KLG caregivers, increase subsidy payments, and create a tax credit.

i. More Expansive Definition of Caregiver

The first, and most important, reason that KLG is superior to the federal and other state subsidized guardianship programs is New Jersey's expansive definition of eligible caregiver. KLG enables both relatives and family friends to be considered for KLG appointment as long as there is an emotional bond between the child and the caregiver. One of the benefits of KLG is that it allows a child who is forced from the home of its birth parents to live with an adult with whom it is comfortable and already has an established relationship. This is important because, as mentioned above in the section on advantages of KLG, it eases the trauma of separating the child from its birth parents as well as permits the child to maintain family, community, and cultural ties.

Restricting eligible caregivers to relatives, like the federal government, New York, and Illinois, limits the amount of people with whom the child can be placed and maybe more harmful than a non-relative placement. In some situations a child may have a closer bond to and be more at ease with a family friend than with a relative. In states that mandate kinship caregivers be related to the child, a child can be placed with a distant relative over a non-relative more capable

of providing the child with a smooth transition and comfortable home. Additionally, placement with a family friend may prevent the cycle of abuse that Bartholet warns of as a disadvantage of kinship care. If a child is more likely to be abused when placed with relatives, as the argument goes, it follows that placement with a family friend may be even more beneficial to the child than placement with a relative.

KLG's inclusion of family friends as eligible caregivers increases a child's chances of finding permanency and minimizes the child's risk of encountering a cycle of abuse. For these reasons, limiting eligible caregivers to relatives is too restrictive of a definition. New Jersey may even be able to adopt a more expansive definition of caregiver like the one proposed in GAP-KSA, allowing any individual who cared for a child in foster care to be eligible for kinship guardianship. A foster parent has the opportunity to develop an emotional bond with a child in its care. If there is evidence of a close relationship with a foster parent, there seems to be no reason that caregiver should be excluded from appointment of KLG if it is in the child's best interest. Thus, while New Jersey's definition of caregiver enables its subsidized guardianship program to be more effective than that found in other states, the Legislature should consider expanding it even further.

ii. Establish a Low Standard of Licensing for KLG Homes and Initiate Mild Supervision of KLG Caregivers

A second reason why KLG is exemplary is its lack of a licensing requirement for KLG appointment. The federal government, New York, and Illinois all require that caregivers become approved as foster homes before becoming eligible for guardianship subsidy payments. Unfortunately, many kinship caregivers who are capable of loving the child and providing it with a good home do not pass licensing standards. If not approved as a foster home, the caregiver is

prevented from receiving financial assistance through subsidy payments. Lack of sufficient resources can leave the caregiver unable to provide sufficient care, leading to the child to be placed in non-kin foster care.

New Jersey has a system in place that checks the qualifications of caregivers before placing a child in its home, but does not require the caregiver to be a licensed foster home. This gives more relatives and family friends the ability to care for a child. The fact that New Jersey does not have a licensing requirement is important because it promotes the goals of subsidized guardianship by facilitating the child living with a known caregiver as opposed to a non-kin foster home. A child is more likely to have a smooth transition into placement with a known caregiver, regardless of if it is licensed, than if it is placed in a home with strangers. Just because a caregiver is approved as a foster home, it does not mean the child will fare better.

As previously discussed, however, one of the disadvantages of the lack of a licensing requirement is that kinship caregivers may not be as qualified as non-kin caregivers because of socioeconomic problems, marital status, lower education, poor health, and deficient training. While a requirement that each guardianship home be a licensed foster home is too strict, no licensing requirement may be too lax in some situations and put the child at risk. New Jersey should consider a lower licensing standard as suggested in the KSCA and GAP-KSA for persons eligible for KLG. However, unlike the KSCA and GAP-KSA, the lower licensing standard should apply to both relative and non-relative caregivers so that, more homes are eligible for KLG and more children can benefit.

Implementing a standard of licensing for guardian homes that is less stringent than foster home approval would enable the state to ensure that the caregivers are properly qualified without requiring it to turn away suitable caregivers. New Jersey should also adopt New York's approach

to licensing, allowing the child to live with the kinship caregiver while it receives its license. This would allow the child to immediately live with a kinship caregiver rather than requiring the child to live in a non-kin foster home during the approval process. While no licensing requirement is better than a stringent licensing requirement, New Jersey should consider implementing a lower licensing standard to approve caregiver homes for KLG because it can minimize one of the disadvantages of KLG by ensuring that the kinship caregiver is, in fact, qualified and capable of caring for the child while still facilitating a kinship living arrangement and not creating an additional barrier to appointment as a guardian.

Along the same lines, state supervision of caregivers should not completely stop upon appointment of KLG. The state has no reason to believe that KLG caregivers should be exempt from agency supervision. Current KLG appointment relieves the caregiver and child of complying with the agency's requests and extinguishes constant court oversight. While it is undeniable that a KLG's ability to make important decisions for the child is one of the main benefits of KLG for both the child and caregiver, a small amount of monitoring can further ensure that a caregiver's qualifications and eligibility remain intact and that the child is not at risk of harm. A kinship guardian should not be subject to overbearing agency intervention, but having an agency occasionally check-in gives assurance that the child is being properly cared for.

Minimal agency intervention could also help promote the permanent custody options of adoption or family reunification. If the state remains involved in the KLG relationship, even in a small way, someone will always be available to answer questions about the possibility of adoption as well as offer necessary services to facilitate reunification with the birth parents in the future. This technique would reduce the contrary to public policy disadvantage discussed earlier

in this article that argues that KLG prevents the permanency offered by adoption and reunification with birth parents.

Critics of maintaining the state's presence after KLG appointment will likely argue that it will rid the caregivers of their autonomy in caring for the child as well as decrease the amount of money the state is able to save by having fewer children in the foster care system. I am not suggesting that the state be involved in the KLG caregiver's decision making regarding the child, just that it has the ability to regulate the level of care being provided. Even if the agency only looks in on the family once a year, there are benefits to it being around such as assurance of the quality of care, less risk of a cycle of abuse, and facilitation of a more permanent placement for the child.

Minimal agency involvement would not require that the caregiver go to court or that its relationship with the child be significantly influenced by the state. The negligible infringement on the caregiver's autonomy is outweighed by the benefits to the child. Further, if the caregiver is really that perturbed by the state's continued presence, perhaps it will be more inclined to move to have the birth parent's rights terminated and adopt, regardless of caregiver's relationship to the parent. This could lead to many more permanency placements because in third party custody situations the KLG does not need to prove unfitness to terminate parental rights, just the lower standard of the child's best interests must be met. New Jersey's willingness to lower the standard for termination of parental rights in third party custody situations is evidence of its strong policy supporting adoption over KLG. Thus, any technique that may motivate a caregiver to adopt will have a positive impact on the State accomplishing its objectives.

While continued agency presence after KLG appointment will cost the state more money than the current approach to KLG, it still does not compare to the financial burden created by the

foster care system. Though the state will be not be able to save as much money, it will be ensuring the safety of children in guardianship placement for a smaller cost than if the child was in foster care. Even with minimal state supervision, foster care requires much more funding than KLG because of the high level of state involvement and resources it requires. Additionally, if some of these amendments, especially the higher subsidy payments discussed below, are adopted, more caregivers will likely be willing make the jump from foster parents to KLG and further relieve the state by reducing the amount of children in the foster care system.

iii. Increase Subsidy Payments and Create a Tax Credit

A final way that New Jersey could improve KLG is through increased financial assistance to guardians. New Jersey should follow the KSCA's and Illinois's lead in offering guardianship subsidies equivalent to foster care payments. New Jersey's lower payments to KLG caregivers is one of its biggest flaws. The successful results of Illinois' subsidized guardianship program are evidence that higher guardianship payments could increase KLG's effectiveness. The main objective behind KLG is to find permanency for children. Yet caregivers are reluctant to be appointed KLG because of financial limitations, thus many children are left in foster care that could have more stable living arrangements. It seems contradictory to create a subsidized guardianship program to benefit children and then craft barriers to achievement of permanency.

Furthermore, New Jersey should implement a tax credit for KLG caregivers. Both foster parents and adoptive parents are offered this type of financial relief. There is no justification for the disparity between KLG and adoption and foster care. In each situation a caregiver is providing a home for a child in need of care and a stable environment. A reasonable tax credit seems like a small price to pay for finding a devoted home for a child.

Critics of higher subsidy payments and tax credits for subsidized guardianship will likely make the same argument as those who may be skeptical of continued state involvement because of financial burdens on the state. However, as previously discussed, the costs of increasing subsidy payments and permitting a tax credit still will not rise to the level of funding demanded by the foster care system. Financial assistance will also extinguish many caregivers' reservations about being appointed KLG and generate an incentive for more caregivers to consider KLG as a custody option, thereby creating more permanent placements for children and furthering KLG's policy goals.

iv. The Court Should Take a Cautious Approach in its Application of KLG

New Jersey, Illinois, New York, and the federal government all emphasize that subsidized guardianship is not to be used as an equivalent alternative to adoption or family reunification. While it is more permanent than foster care, KLG does not offer the same level of stability as the other custody alternatives. Even if the New Jersey Legislature adopts the suggested amendments to the Kinship Legal Guardianship Act and expands the definition of caregiver, establishes a low level licensing standard, initiates minimal supervision of KLG caregivers, increases subsidy payments, and creates a tax credit, courts should still take a cautious approach to appointing KLG.

The above proposed amendments to the Kinship Legal Guardianship Act are meant to facilitate and ease the burden on caregivers, children, and the state in the KLG context. While the amendments will make KLG more accessible, they are not meant to create a replacement for adoption or family reunification. Court's must be careful in their decisions to appoint KLG and restrict appointment to the narrow class of cases where neither adoption nor family reunification is likely.

If used correctly, KLG has the ability to benefit many children and families with nominal drawbacks. It creates a custody option where unfortunate circumstances are presented and neither adoption nor family reunification is a possibility. The existence of KLG in the child welfare system prevents children from extended stays in foster care and offers them the opportunity of a normal life, allowing children to live long-term in the home of a loved one without the state's influence.

Though KLG is superior to foster care in the level of permanency offered, it must be remembered that KLG is not one-hundred percent permanent because under certain conditions it is reversible. Children who are cared for by a KLG are left in a sort of legal limbo. Their birth parents still have rights, but they are being cared for long term by kin and at any point the birth parents can file to regain custody. This mix of legal rights and custody does not come close to reaching the level of stability provided for by adoption or family reunification. It is for this reason that the states and the federal government are correct in emphasizing that KLG should really be a last resort for courts. It should never be used in place of a more permanent custody arrangement.

If used in this narrow set of circumstances, there are more advantages to New Jersey offering the option of KLG than eliminating it from the child welfare system. Allowing a child to linger in long-term foster care is more detrimental to the child's upbringing than appointing a KLG. Children who remain in foster care tend to have very little stability and are exposed to constant and intrusive state oversight, experiences children being cared for in a KLG setting do not have to endure. However, KLG is not better than adoption or family reunification and those permanent custody arrangements should continue to be the goal even after KLG is appointed. It is for this reason that I suggested that the state agency remain involved in the lives of the child,

the caregiver, and the family in case a more permanent custody option becomes available in the future.

Overall, KLG offers advantages to the children, the caregivers, and the state. It fills a void in the child welfare system where children who had no alternatives to long term foster care placement now have another option. While critics of KLG express valid concerns, the proposed amendments would minimize the disadvantages and enable KLG to be more successful in reaching its policy goals. Thus, New Jersey should continue to offer KLG as a custody alternative in the child welfare setting but courts should be cautious to not overuse use it as an equivalent to adoption or family reunification.

V. Conclusion

KLG should continue to be used in New Jersey because it offers many advantages to the children, the caregivers, and the state. With some improvements, however, KLG can be even more effective and linked to fewer disadvantages. The New Jersey Legislature should amend the Kinship Legal Guardianship Act by expanding the definition of caregiver, establishing a low licensing requirement for KLG homes, initiating minimal state supervision of caregivers after KLG appointment, increasing subsidy payments, and creating a tax credit for KLG caregivers. Even if the Legislature makes these improvements to the KLG statute, courts should be cautious in their application of KLG because it is not as permanent of a placement as adoption or family reunification and should only be used in a narrow set of cases as a last resort to find greater stability for children than is offered by long-term foster care.

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- ¹ <http://glossary.adoption.com/kinship-care.html> (last viewed 4/22/12)
- ² http://www.kinkconnect.org/what_is_kinship_care.htm (last viewed 3/25/12)
- ³ Jeffrey C. Goelitz, *Answering the Call to Support Elderly Kinship Caregivers*, 15 Elder L.J. 233 (2007)
- ⁴ http://www.kinkconnect.org/what_is_kinship_care.htm (last viewed 3/25/12)
- ⁵ 42 U.S.C.A. § 675 (West)
- ⁶ 115 Am. Jur. Trials 465 (Originally published in 2010)
- ⁷ N.J.S.A. § 3B:12A-1 (West)
- ⁸ 52 N.J. Prac., Elements of Action § 30:23 (2011-2012 ed.)
- ⁹ <http://www.lsnjlaw.org/english/family/guardianship/kinship/> (last viewed 3/25/12)
- ¹⁰ *Id.*
- ¹¹ N.J.S.A. § 3B:12A-1 (West)
- ¹² *Id.*
- ¹³ *Id.*
- ¹⁴ N.J.S.A. § 3B:12A-6 (West)
- ¹⁵ N.J.S.A. § 3B:12A-1 (West)
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- ²⁴ 362 N.J. Super. 76, 88, 826 A.2d 821, 829 (N.J. Super. Ct. App. Div. 2003)
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- ³² *Id.*
- ³³ 52 N.J. Prac., Elements of Action § 30:23 (2011-2012 ed.)
- ³⁴ *Id.*
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- ³⁸ *Zack v. Fiebert*. See also *Watkins v. Nelson*- in a custody dispute between biological and psychological parents the best interests of the child is determinative
- ³⁹ *Id.*
- ⁴⁰ *Id.*
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- ⁴² *In re Guardianship of J.R.*, 174 N.J. Super. 211 (App. Div. 1980)
- ⁴³ *VC v MJB*, 319 NJ Super 103 (app Div 1999).
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⁵¹ *Id.*
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