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Kinship Care Giving: Law and Policy

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I. Introduction

-- Caroline /1/ is an octogenarian whose granddaughter passed away leaving five children. Caroline was intimately involved in her granddaughter's daily life and helped with her great-grandchildren. After her granddaughter's death, the children came to live with her, although the grandfather (her son) applied for Aid to Families with Dependent Children (AFDC) on the children's behalf, naming himself as the relative caretaker. Each month when the check arrived, the grandfather would take it and disappear for a week or so, using the money to purchase alcohol and drugs. None of the money was spent on the children. Caroline was supporting herself and all five children on her social security check.

Caroline came to the local legal services office for assistance. Because she was 86 years old and because her home was quite small, she did not want to engage the child protection system, despite the potential availability of foster care benefits for her and the children. Her attorneys filed a petition for custody in state court. After the grandfather was served with the petition, he attempted to secure housing for himself and the children elsewhere and to remove the children from Caroline's home. The court set the matter for an emergency hearing and granted Caroline temporary custody. She was able to receive AFDC and Medicaid for the children. Subsequently she obtained a final order of custody.

-- Norma is 65 years old. She has five children, four of whom are well adjusted adults. Her youngest daughter, who has always been troublesome, began using crack cocaine at a very young age and has had three children over the course of seven years, all by different fathers and all addicted at birth. The daughter has a history of leaving her children alone, not feeding or bathing them, and leaving them with other people to care for them. Norma frequently cared for the children, often without any financial assistance. Over the years, the child protection agency has been involved with the family several times. The agency placed the children with Norma twice, during which periods Norma received foster care benefits. Each time child protection got involved, the mother would go into treatment and stay clean and sober long enough to get her children back.

The last time Norma's daughter regained custody, she had the AFDC restored to her. Three years ago, Norma's daughter dropped the children off for a visit and never assumed responsibility for the

children again. The daughter continued to receive AFDC, even after she again left the children with Norma. If Norma made any attempt to have the check sent to her, her daughter would threaten to come take the children. Because her daughter had a history of drug abuse, prostitution, and neglect, Norma could not abide the thought of the children going with her. Child protection refused to intervene because the "children were safe with Norma and thus not in need of protection or services." Norma has depleted her retirement and savings and is clinically depressed. She came to the legal services office for assistance in obtaining retroactive and ongoing foster care benefits.

-- Jane is 70 years old. She went on vacation during Christmas one year and came home to a six-month-old baby she did not previously know existed. Her son's girlfriend had had his baby and found she could not care for him. She came by Jane's house one afternoon, left the baby with her house sitter "for a couple of hours," and never returned. Jane came to legal services for assistance and now has custody of her granddaughter.

These are classic examples of the kinship care issues legal services practitioners face every day. "Kinship care" has been defined as "any form of residential caregiving provided to children by [any relative by blood or marriage, or any person with close personal, emotional, or familial ties to another], whether part-time, temporary or permanent, and whether initiated by private family agreement or under the custodial supervision of a state child welfare agency." /2/ Many legal services offices have seen an increase in kinship care giver cases during the last five years. Kinship care giving involves many issues and requires practitioners to be knowledgeable about several areas of law. /3/

Kinship care givers strive to keep the children in their care in safe, stable environments where the children can receive the love and nurturing they need to grow to healthy adulthood. Under the best of circumstances, this is not an easy task. Child welfare policies and child custody laws were not designed with the expectation that they would be applied to relatives. As a result, kinship care givers find few resources available to address a myriad of problems and find that access to solutions in the courts is difficult.

Because third parties have no inherent right to seek custody of a child, /4/ courts traditionally have considered kinship child custody matters in one of three legal contexts: divorce, child protection, or death. Child custody procedures and standards were developed for use in disputes between parents and are generally adversarial, making it difficult to reach an amicable arrangement in the best interests of the child. In child protection matters, the goal is to provide services (one of which is foster care placement) to reunite children with their parents. The proceedings are closed and confidential, and relatives who might be best acquainted with the child's special needs are discouraged from participating in the process. Probate court guardianship is appropriate only upon the parents' death.

The income available to the family, and the cost to the government of providing support, may drive decision making on the part of the grandparent and the state as to what placement is in the best interests of a child. The two primary sources of government financial support available for relative caretakers are AFDC /5/ and foster care benefits. /6/ The level of support available from these two programs can vary significantly. A family may receive payment from only one of these programs for the care of any given child at any given time. Neither AFDC nor foster care benefits were

designed to meet the needs of kinship care givers; they and the state agencies that administer these programs are often frustrated as the agencies try to meet theirs' needs. /7/ Foster care benefits are significantly larger than AFDC benefits. However, care givers may be justifiably reluctant to engage the child protection system in their lives in order to become foster care providers.

The purpose of this article is to advise poverty law practitioners of the types of legal relationships available to kinship care givers and their kin and the consequences of each type with respect to public benefits and foster care. The circumstances under which a grandchild comes to live with a grandparent, to a large extent, determine the legal and financial options available to the care giver and the child. The relationship between the grandparent, the parent, and the child, whether child protection is involved, and the financial circumstances of the family also play a role in determining the type of legal relationship necessary to make the situation viable.

States have been struggling to develop alternative policies and laws that better fit the needs of children living with relative caretakers. /8/ Kinship care giving, with all its legal, public assistance, and social welfare ramifications, is becoming a social justice issue /9/ that demands legislative and policy changes to meet the needs of the kinship families. This article explores kinship care giving.

II. Kinship Care Givers: Reparenting in the 1990s

Kinship care giving is certainly not a new phenomenon. Historically, among farming families and in certain cultures, kinship care giving has played a stabilizing and important role in raising children. /10/ According to the Bureau of the Census, 2,372,000 grandparent-headed households cared for 3,734,000 children in 1994. /11/ Of these, 1,359,000 children lived in 841,000 grandparent-headed households with no parent present. /12/ These numbers have increased by almost 40 percent over the last decade. /13/ The crack epidemic and the increased incarceration of single mothers, incidence of alcoholism in women, and incidence of women with AIDS have combined to create exponential growth in the number of children living with kin. /14/

Kinship care giving arises in a variety of ways. Some grandparents begin by helping out their troubled adult child with weekend respite care. Over time, the duration of care becomes longer until finally the grandparent is caring for the grandchild on a full-time basis and the parent shows up only when he or she needs sleep or money. Some grandparents go to the hospital to visit a newborn grandchild and end up taking the child home because he or she was born drug addicted. Still other grandparents become care givers suddenly at the death or incarceration of their adult child. Other grandparents are involved in traditional kinship care giving and need legal advice about their options.

Grandparents who petition for custody of their grandchildren have been traditionally viewed by courts as "intermeddlers." However, that notion must be challenged. The idea that grandparents want to begin parenting again in their 50s and 60s (and older!) is simply a myth. /15/ Kinship care givers, who are often elderly and live on fixed incomes, are vulnerable, and their children can become violent if they even suggest taking legal action. /16/ When parents completely abdicate their parental responsibilities and leave their children with kin, and provide no financial, legal, or emotional support for the children or the kin, both the children and the care giver are vulnerable

and need support. /17/ Many grandparent support groups have been formed across the country and are instrumental in providing resources, counseling, and peer support to kinship care givers. /18/

III. The Child's Role

Kinship care allows children to maintain connections with their family and promotes the stability and integrity of the family. Children in kinship care usually have special needs. Often they have physical and/or mental health problems as a result of parental drug and alcohol abuse. Most have emotional problems as a result of being abandoned by or separated from their parents. A large number are also behind academically because they missed school while living with their parents or because they have a hard time concentrating because they worry about their parents. /19/ Therefore, it is of the utmost importance that any kinship decision be made with the child's best interest at the core and that advocates ensure that the child has all the services to which he or she may be entitled.

Children are at the heart of every decision made with respect to custody and placement, and yet in many cases they do not have a say in the decision-making process. Traditionally, children were treated as the chattel of their parents. /20/ The law took a significant turn in 1967 in the case of *In re Gault*, /21/ in which the Supreme Court recognized that children have constitutionally protected rights, independent of their parents. *Gault* dealt with a child's due process rights in a delinquency matter. Since *Gault*, the notion that children are "persons" with basic rights, such as the right to food, clothing, and a safe place to live, has gained increasing acceptance. /22/ Children also have the right to an informed voice in the decisions that affect them.

Although the child's life will be affected by any custody or placement decision, the child may not have the maturity to cope with a decision that is contrary to his or her wishes. Therefore, it is essential that events be explained to the child in a way that the child can understand and by someone the child recognizes as his or her advocate. Then, the child's wishes and interests must be presented to the decision maker by someone who does not have conflicting interests. All of the adult parties have their own interests, which may conflict with those of the child. They cannot effectively speak for the child. When adults are in conflict, there is a danger that emotion will overcome their ability to determine what is best for the child involved.

The child could be represented in court by an attorney or by a guardian ad litem. Those two representatives perform entirely different functions. A guardian ad litem forms an independent recommendation based on an assessment of the child's best interests. An attorney is bound to advocate the child's wishes.

Youth law has gained increasing recognition as an area of specialty. /23/ The Model Rules of Professional Conduct state that attorneys who represent minors should "as far as reasonably possible, maintain a normal client-lawyer relationship with the client" and should seek the appointment of a guardian "only when the lawyer reasonably believes that the client cannot adequately act in the client's own interest." /24/ In addition, standards of practice for lawyers representing children in abuse and neglect cases, which were recently approved by the American Bar Association, offer excellent direction in addressing issues that arise in connection with

representation of children. /25/ The preface to the rules emphasizes that "the lawyer's primary duty must still be focused on protection of the legal rights of the child client." /26/

IV. Private Kinship Care Givers: Legal Options

At some point, kinship care givers decide that they need some legal authority to continue to provide for the children in their care, whether it be to obtain medical treatment, to enroll the child in school, or to keep the child safe and stable. This section describes the legal options available to care givers when the children are not in the custody of the state pursuant to a child protection matter, /27/ including powers of attorney, legal custody, testamentary guardianship, and adoption, as well as the legal and financial consequences of each. While some federal law governs custody of children, /28/ child custody for the most part is controlled by state law. /29/ Minnesota law is used below for explanatory purposes; practitioners are advised to refer to the controlling laws in their own states.

A. Powers of Attorney

A power of attorney is a document by which a parent or guardian gives another person the temporary authority to care for his or her child. Because there is no need for judicial involvement, and legal custody remains with the parent, a power of attorney is a desirable alternative. In Minnesota the Power of Attorney Delegation of Parental Authority was enacted for this very purpose. /30/ In many states, however, such special authority does not exist. Still, advocates have successfully used powers of attorney or simple written authorizations to enable grandparents to enroll their grandchildren in school, to consent to medical care, and generally to care for the children.

1. When to Seek a Power of Attorney

A power of attorney is appropriate when children are cared for by a grandparent for short periods of time and under circumstances in which the adult child and the grandparent have good communication. For instance, a parent may need a care giver for her children because she is enrolling in school in another state for a year, enlisting in the military, or undergoing chemical-dependency treatment for a month. All parties should have the expectation that the custody arrangement is temporary. In these situations, grandparents need the authority to enroll the children in school, obtain medical treatment, and otherwise consent to field trips and other activities in which the children may be involved.

2. Consequences of Using a Power of Attorney

Judicial intervention is not necessary to execute or accept a power of attorney, and thus adversarial allegations or proceedings concerning the parent's ability to care for the child are unnecessary. Since legal custody remains with the parents, they retain control of the children. Further, parents can be comforted in knowing that, by executing a power of attorney, the grandparent agrees to

provide food, clothing, and shelter to the child and to protect the child from harm. The power of attorney may be revoked any time, in writing, by the parent or grandparent.

No independent financial consequences are attendant to executing or accepting a power of attorney. Financial responsibility remains with the parents. The child remains eligible for AFDC child-only benefits. The child may be included in the grandparent family's AFDC grant if the family is financially eligible.

3. Potential Problems

The problem with using a power of attorney is that it is revocable at any time. A troubled parent might place a child with its grandparents and execute a power of attorney when things are going well. Then, amidst a crisis or while using drugs or alcohol, the parent may seek to revoke consent and take the child. If the care giver is concerned that the child may be in danger, he or she can call the police and refuse to let the parent take the child. However, unless the danger is extremely evident, entailing child protective authorities, the police have little authority to intervene. /31/

Furthermore, a power of attorney is good only if the child's school or medical clinic chooses to accept it. Some states have enacted special legislation because of the problems grandparents have had in getting officials to honor simple powers of attorney. /32/

Therefore, if grandparents have any concern about the child's safety while in parent's care or the parent's volatility, they should exercise caution and consider other alternatives.

B. Legal Custody

"Third-party custody" /33/ refers to situations in which someone other than a child's parent(s) has legal and physical custody of the child. The custody order gives the third party the right to care for the child and to make decisions regarding the child's welfare. It may also require the parents to pay child support. Unlike adoption or guardianship, the parents' rights do not have to be terminated in order for a third party to obtain legal custody. /34/ Generally, children do not have a right to counsel in custody proceedings, although the court has discretion to appoint a guardian ad litem.

1. When to Seek Legal Custody

Grandparents should seek custody when they want clear legal authority to care for the child but do not necessarily want permanent responsibility for the child. Grandparents usually seek custody orders to establish clear, enforceable guidelines regarding where the child will live, visitation by the parents, child support, etc. Often, families utilize informal arrangements until the child must enroll in school. At that time, grandparents are moved to stabilize the child's circumstances so that the child may thrive at school.

2. Consequences of an Order of Custody

In Minnesota, as in most jurisdictions, subject-matter jurisdiction for custody determinations is found in the state's marriage dissolution act. /35/ Custody provisions in dissolution law are adversarial in nature and are designed to determine custody of children between two parents. Unless the parents are in full agreement, obtaining an order for custody can be time-consuming, expensive, and extremely divisive among family members. Furthermore, the modification standards are quite high; as a result, parents should carefully consider consequences before consenting to legal custody with any third party.

Technically, the parents remain financially responsible for children subject to an order of custody. Hence the court may order the parents to make child support payments to the grandparents and to obtain and maintain medical insurance for the children. However, when the parents are unable to hold a job and cannot pay any support, the grandparents can obtain AFDC child-only benefits for the child. The children are entitled to these benefits as long as they are financially eligible, regardless of the kinship family's income. AFDC receipt also entitles the children to Medicaid benefits.

One additional potential negative consequence to obtaining legal custody of the children is that once an order of custody has been granted, the kinship care giver is no longer eligible to become a kinship foster care provider. /36/

3. Burden of Proof

To prevail in a custody action, the third party has a heavy burden. Kinship care givers must prove to the court that it is in the child's best interests for the child to be placed in their custody. /37/ It is presumed that children's best interests are served by placement with their parents; /38/ that presumption can be overcome only if the grandparent proves that the parent is unfit, that the parent has abandoned his or her right to custody, or that extraordinary circumstances require that the parent be deprived of custody. /39/

It is not enough for grandparents to show that they can take better care of the children than the parents. Grandparents must convince the court that placing the children with their parents would be significantly harmful. Many of the grandparents who need a custody order do not have to meet this burden. Most cases proceed to a custody order by default or stipulation, and those that begin as contested cases settle because the parents are unable to comply with the court's orders, especially because the procedure usually takes at least six months to complete.

4. Commencing the Action

As third parties have no inherent right to petition for custody of another person's child, standing to file such a petition must be legislatively sanctioned. /40/ In Minnesota any third party may file a petition or motion seeking custody of a child in the county where the child permanently resides or where the child is found or where an earlier order for custody of the child has been entered. /41/

The petition and accompanying affidavit must state facts that, if proven, show that it is in the best interest of the child to be placed with the petitioning third party. Written notice of the commencement of the custody action must be personally served upon the child's parents, guardian, or custodian. /42/ Any one of these persons may appear and be heard and may file a responsive pleading.

If no responsive pleadings are filed, or if the parents are in agreement with the order (or are in default), absent a finding that it is not in the child's interest to be placed with the grandparent, the court will grant the grandparent legal custody of the child at the initial hearing. However, if one of the parents or the legal guardian /43/ objects, the court will docket the case for trial and follow custody procedures used in divorce proceedings. /44/

a. Temporary Custody

Filing and serving the petition for custody is often the most important step in a third-party custody case. It may be very worrisome for the kinship care giver because of the parents' possible reaction. Parents involved in crack cocaine or alcohol use often receive AFDC payments on their children's behalf and use that money to support their habits. These parents may threaten to take the children from the grandparents if the grandparents take steps to obtain legal custody. /45/ Sometimes money is not the contentious issue. Even when parents have not taken responsibility for their children, they may not see it that way. They may view the grandparents as trying to interfere and control the situation. Thus, they may become angry and/or violent when served with legal papers. Grandparents in this situation face a choice. They can continue to care for the children (and keep them safe) without financial assistance. Or they can take legal action and risk that the parents will snatch the children and subject them (once again) to neglect or worse.

If the parent tries to remove the child from the grandparent's home, and the grandparent has reason to believe that the child will be in jeopardy, the grandparent should apply for an ex parte order for temporary custody of the child. /46/ The court must decide whether to award the grandparent temporary custody or return the child to the parent. Usually, in the circumstances described above, especially if the child has resided with the grandparent for an extended period of time, the court grants the grandparent an ex parte temporary custody order. Afterward the grandparent must promptly serve the parent with a copy of the order, the petition for custody, and the hearing date. /47/

b. Grandparent Ex Parte Temporary Custody Order

Because domestic relations laws do not traditionally address the rights of third parties in custody disputes, some grandparents have had difficulty obtaining temporary relief to maintain the status quo and keep the children safe. Furthermore, grandparents have had little recourse when parents came and took the children from their care without warning and without sufficient means to care for the children. /48/

Responding to these problems, the Minnesota legislature recently enacted the grandparent ex parte temporary custody order statute. /49/ This statute is remarkable because (1) it is a statutory erosion of the presumption that it is in the best interests of the child to be with a parent; and (2) it allows for custody with less restrictive modification requirements. /50/

The statute presumes a minor child's best interests to be for the court to grant temporary custody to a grandparent if the child has resided with the grandparent for 12 months or more and (1) the parent has had no contact with the child on a regular basis and no demonstrated, consistent participation in the child's well-being for six months; or (2) while the child has been living with the grandparent, the parent has refused or neglected to comply with the duties imposed upon the parent by the parent-child relationship. /51/

After an order has been issued, the grandparent must state whether he or she wishes to pursue further temporary or permanent custody of the child. If so, the grandparent must file a custody petition. If the court decides to convert the ex parte temporary custody order to an order for permanent custody, it will set conditions that the parents must meet in order to have custody returned. The court must also inform the parents that they may request assistance from the local social service agency in order to meet those conditions.

5. Visitation with Parents

If the grandparent is successful in obtaining custody, the court addresses the issue of visitation with the children by the parents. Visitation is ordered only if it is in the best interests of the children. Often grandparents are concerned about the contact parents have with the children. Some grandparents report that when the parents come to see the children, they play with them and promise them gifts and time to be spent together, none of which comes to fruition. The children reel from these visits in often destructive ways, which are felt at home and at school.

The court can order visitation evaluations to ensure that the children are safe. While courts are not the panacea here, strict guidelines to which contempt procedures are attached sometimes help the situation.

6. Permanency Considerations

Third-party custody orders are effective for an indefinite period of time. Custody is never permanent in a technical sense because it can be modified by the court. However, unless the parties agree, modification of a custody decree is not an easy task. The court cannot modify the custody order unless it finds that (1) a change has occurred in the circumstances of the child or the parties and that (2) the modification is necessary to serve the child's best interests and living with the grandparent is harmful to the child. /52/ Therefore, custody is, for all practical purposes, permanent. /53/

C. Testamentary Guardianship

A guardianship is a legal relationship in which the court appoints someone other than the child's parent to care for the child and manage the child's affairs. The guardian is usually given custody of the child. In Minnesota a guardian is appointed by the probate court in accordance with instructions left in a will, /54/ by the probate or juvenile courts after parental rights have been terminated, /55/ or in juvenile court if both parents are deceased and no appointment has been made. /56/ Children do not have a right to counsel in testamentary guardianship proceedings.

1. Becoming a Testamentary Guardian

Parents may appoint, by will, a guardian of their unmarried minors. /57/ This is an effective tool for parents to use when they have a terminal illness and want to make arrangements for the care of their children after their death. Subject to the right of a minor who is 14 or older to object, a testamentary appointment becomes effective once the guardian's acceptance has been filed in the court in which the will is probated. Both parents must be deceased or the surviving parent must be adjudged incapacitated before the guardian's acceptance can become effective. /58/ If the surviving parent is not incapacitated, the testamentary appointment does not become effective until a hearing has been held on the matter.

After the guardian has filed an acceptance, he or she must give written notice within five days to (1) the minor, (2) the person having the minor's care, and (3) the minor's adult siblings, grandparents, aunts, and uncles /59/ of their right to file a written objection to the appointment with the court. If no one files an objection, the court upholds the testamentary appointment. If the appointment is contested, the court may appoint any person consistent with the child's best interests. /60/

2. Responsibilities of a Testamentary Guardian

The testamentary guardian has the rights and responsibilities of a parent. /61/ The court usually orders the guardian to report the condition of the child and to give the court a written accounting regarding the child's money, benefits, and property. /62/

The guardian is not legally obligated to provide from his or her own funds for the child. The guardian may institute proceedings to force a legally responsible person to support the child or to pay sums for the welfare of the child (i.e., child support). The guardianship is monitored by the court until the child attains 18 years of age. /63/

The testamentary guardianship continues until terminated even if the child leaves the guardian's home to live with someone else or even if the guardian no longer wants to be the guardian. /64/ A guardian's authority and responsibility terminate upon the death, resignation, or removal of the guardian or upon the child's death, adoption, marriage, or attainment of majority. /65/ Termination of the guardianship does not affect the guardian's liability for prior acts the obligation to account for the funds and assets of the child. /66/

D. Adoption

Adoption is a process by which a court creates the legal relationship of parent and child between people who are not parent and child by birth. Adoption of a grandchild is appropriate when the grandparent wants to take complete and permanent responsibility for the child without the threat of legal interference from the child's parents. Adoption is not appropriate if the grandparent is willing and able to care for the child only on a temporary basis or hopes the child will be able to reunite with his or her birth parents some day. After an adoption, the grandparent no longer is eligible to receive foster care benefits on the child's behalf, but the grandparent may be eligible for adoption subsidies. Children do not have a right to counsel in adoption matters.

1. Adoption Procedure

To start an adoption proceeding, the grandparent must file a petition for adoption in the juvenile court of the county in which the grandparent lives. /67/ Before a decree of adoption can be entered, the parental rights of the child's birth parents must be terminated. The usual method is to have the birth parents consent to the termination and adoption in writing. /68/ If consents are obtained and the court finds them valid, and also finds that termination of parental rights and adoption by the grandparent are in the best interests of the child, the court terminates the birth parents' rights.

If one of the parents does not consent to the adoption, the court holds a hearing on the petition. /69/ If the court then finds it is in the child's best interests /70/ to be adopted by the grandparent, it enters a decree of adoption and orders that the child shall be the child of the grandparent. /71/ The decree makes the adoption final. If the court is not satisfied that the proposed adoption is in the child's best interests, the court can deny the petition and order the child returned to the custody of the person or agency legally vested with permanent custody of the child. Alternatively, the court can certify the case for appropriate action and disposition to the court having jurisdiction to determine the custody of the child. /72/

2. Effect of an Adoption

Upon adoption, the child becomes the legal child of the grandparent and the grandparent becomes the legal parent of the child with all the rights and duties between them of birth parent and birth child. /73/ By virtue of the adoption, the child has the right to inherit from the grandparent or the grandparent's relatives as though the child were the grandparent's birth child.

After a decree of adoption is entered, the child's birth parents are relieved of all parental responsibilities, including support, and may not exercise any rights over the adopted child or the child's property. /74/

3. Financial Considerations

Once a grandparent adopts a grandchild, the grandchild is entitled to AFDC, medical assistance, food stamps, and other benefits only if the grandparent's family is financially eligible for such benefits. Any foster care payments, AFDC child-only benefits, or child support payments that the grandparent has been receiving end after the adoption occurs. However, the family may be eligible for an assisted/subsidized adoption. /75/ Grandparents must determine whether the grandchild is eligible for an adoption subsidy before filing a petition. /76/

V. Kinship Foster Care

Kinship foster care is kinship care provided for a child who is in the legal custody of the state child welfare agency. This section describes the framework of that system and the options it offers for children and relative care givers. Grandparents need to know what they can expect when they become kinship foster care providers and what impact involvement in the foster care system will have on their family and their relationship with their grandchildren.

A. *Child Protection Procedures*

Although parents enjoy legal protection of their right to raise their children as they see fit, the law also protects children from abusive or neglectful treatment at the hands of their parents. Federal law sets the framework for the states' response to child maltreatment. The Child Abuse Prevention and Treatment and Adoption Reform Act provides grants to states for intake, screening, and investigation of reports of abuse and neglect and the delivery of services to families. /77/ The Adoption Assistance and Child Welfare Act of 1980 provides guidance and incentives to states to improve foster care practices. /78/ The availability of grants and reimbursement to states is conditioned on adoption of procedures and definitions that comply with the federal guidelines. /79/ Regulations promulgated under the act define child abuse and neglect /80/ Each state must adopt a mechanism for receiving reports of suspected abuse or neglect of a child. /81/ Such reports trigger investigation by the responsible local agency. The result of an investigation may be a decision to seek placement of the child out of the parental home.

B. *Foster Care*

Foster care, as used in this article, refers to the whole package of services and financial support provided for children who have been placed away from the care of their parents. A child is considered "placed" for purposes of entitlement to foster care when a court order authorizes the placement or when the agency and the parent enter into an agreement that the child may be placed away from the parent's home. /82/ Juvenile courts may order placement as interim or ongoing relief in a child protection case. /83/

Foster care services are provided to ensure safe homes for children while an effort is made to correct or improve the conditions that led to placement. The child protective agency's objective is

to reunite the child with his or her parents and, if that is not possible, to provide a permanent plan for the child. The agency must develop a case plan that identifies the conditions that led to placement and the services required to correct those conditions. For instance, the plan may provide for treatment or counseling for the parents and the child and for visitation between the parents and the child. /84/ The agency must place the child in the least restrictive setting appropriate to the child's needs. Unless the child requires treatment, the least restrictive setting will be a licensed foster home.

The foster care system attempts to find a balance between parents' right to raise their own children and the emerging recognition that children have the right to be raised in a safe, nurturing environment. Children in foster care face the prospect of multiple placements and long delays while the agency works with their parents on rehabilitation and reunification. Lawmakers at the state and federal level have addressed concerns about the negative impact of extended temporary placements on children. /85/ Increasingly, the extended family has been recognized as an important foster care placement resource. Minnesota law provides that an agency must search for relatives with whom to place a child unless the parent specifically objects. /86/

C. Grandparents' Involvement

Grandparents may become involved with the foster care system because they are identified as a placement resource for children removed from home. However, grandparents may also initiate the call to the child protection agency that results in the children's placement.

Grandparents may first learn of the agency's involvement when they are informed that their grandchildren have been taken into protective custody. The grandparent may be told that the matter will be petitioned into court if the parents do not agree to an alternative arrangement for the children. The alternative arrangement proposed by the county may be one of the private kinship arrangements described above, with the grandparent acting as kinship care giver. If the care arrangement is considered to be private, the child will not be eligible to receive foster care support. The grandparent's willingness to serve as a private care giver will mean a substantial difference in the services available to prepare the parents to resume care of their child. /87/ It could also mean a substantial difference in the level of financial support available for the child. /88/ On the other hand, a private arrangement will mean that the family retains control over the child's circumstances. Families should carefully weigh the advantages and disadvantages of private care arrangements before deciding what is best for their children.

Grandparents may initiate involvement of the agency by filing a report of maltreatment. The grandparents' report will trigger a child protection assessment and evaluation of the need for protective services. /89/ A grandparent may take this step in a number of circumstances. Sometimes grandparents are afraid for the safety of children in the care of abusive or neglectful parents. Sometimes grandparents are already caring for the grandchildren because the parents have abandoned them. Grandparents may hope that the child protection agency will force the parents to accept services that will enable the parents to resume the care of their own children. Grandparents may be seeking support and services that will enable them to continue to care for the children until they return to their parent's home.

Once a case has been filed in juvenile court, either by the agency or otherwise, a number of hearings are held to determine whether the child is in need of protection or services and, if so, what services should be provided. Child protection proceedings are closed and confidential. Parties who may participate are identified by statute. In Minnesota a grandparent has the right to participate in any neglect/dependency proceeding to the same extent as a parent if the child has lived with the grandparent within the two years preceding the filing of the petition. /90/ If that is not the case, the court usually does not let the grandparent intervene in a child protection case if the county objects.

D. Potential Consequences of Juvenile Court Intervention

Juvenile court involvement has a tremendous impact on the entire family, including on the relationship between the grandparent and grandchild. The most profound changes result from the family no longer having control of decisions about what is best for the children once the juvenile court becomes involved. The agency worker evaluates the family and makes recommendations concerning placement and services. If the agency and the parents disagree, the court decides.

The initial goal of the agency and the court is to attempt to reunite the child with his or her parents. /91/ The grandparent and the agency may disagree on when or whether reunification is appropriate. If the child has been placed in foster care with the grandparent, the grandparent as kinship foster parent must cooperate with the court-ordered objectives, even if the grandparent disagrees. Failure to cooperate with a reunification plan may mean that the court will find it necessary to move the child to another foster care placement.

Generally, in order to serve as foster care providers, grandparents must be licensed. /92/ The licensing process requires an investigation of the grandparents' home, family history, and background. In addition, licensed foster care providers must attend annual training to maintain their licenses. Once the child is placed, a social worker is assigned. The worker makes regular visits to the grandparent's home to monitor the child's well-being. In addition to the agency worker, an array of strangers is involved in the family's life. The child may be represented by an attorney or a guardian ad litem. The parents may have counsel. A number of family and individual counselors may be providing services. Many grandparents resent this intrusion in what they consider to be a private family matter. This may be a factor in their decision whether to seek foster care for a grandchild. However, in spite of the dangers of loss of control over decision making and of agency involvement in the family's day-to-day life, foster care may provide the support and services that make kinship care possible.

E. Permanency Planning

Foster care is not meant to be permanent. Once a case is in court, the agency must develop a plan for the permanent care of the child /93/ Minnesota law provides that a hearing to determine a permanent placement must be conducted no later than 12 months after the child was removed from the parent's home. The court, under extraordinary circumstances, may extend the time of the hearing to 18 months after placement. /94/ Minnesota law provides three permanency options for

children who cannot return to their parents' home: transfer of permanent legal and physical custody to a relative; termination of parental rights and guardianship or adoption; and long-term foster care. /95/

1. Transfer of Legal Custody

In Minnesota the juvenile court has the authority to award permanent legal and physical custody to a relative if such a placement is in the child's best interests. The court need not terminate parental rights in order to make such an award. The juvenile court uses the same standards that the family court uses in determining the child's best interests. The agency may file the petition for custody on behalf of the relative. The order for permanent legal and physical custody of a child may be modified in the same way as custody orders in family court. The agency is a party to the proceeding and must receive notice of any modification.

2. Termination of Parental Rights and Adoption

Termination of parental rights and adoption is the preferred permanency option when a child is quite young and a determination is made that the child's return to the parent's custody is not possible. The adoption process in the child protection context is basically the same as the process followed when the parents voluntarily terminate parental rights and consent to adoption. The main difference is that if a protection case results in parental rights termination, custody may lie with the agency, and the agency or the commissioner of human services must consent to the adoption. The consent may not be unreasonably withheld. /96/ A grandparent can file an adoption petition even if the commissioner or a licensed child-placing agency does not select the grandparent as an adoptive parent. It is difficult, but not impossible, for a grandparent to adopt the child if the commissioner objects to the grandparent's petition.

If a grandparent decides to adopt his or her grandchild after a child protection action in which the parents' rights are terminated, the grandparent may be eligible for federally funded adoption support payments. These are cash support payments available for special-needs children on an ongoing basis after the adoption. The grandparent must investigate this option before making the adoption final since eligibility for the payments must be determined before the adoption occurs.

/97/

If parental rights are terminated and no immediate adoptive placement is available, the court may appoint a guardian. The juvenile court may also appoint a guardian if both parents are dead and no testamentary appointment was made. The juvenile court has authority to transfer guardianship and legal custody to (1) the commissioner of human services, (2) a licensed child-placing agency, or (3) an adult over the age of 21 who is willing and capable of assuming the appropriate duties and responsibilities to the child. /98/ If the child is Native American, the child's tribe can be appointed as the child's guardian. Legal guardianship is most often awarded to the Commissioner of Human Services or a licensed child-placing agency in order to place the child for adoption.

The responsibilities of a guardian appointed by a juvenile court are different from those of a testamentary guardian. /99/ Essentially the guardian is given legal custody of the child unless the court gives custody to some other person, and the guardian is allowed to make major decisions for the child. /100/ The court does not monitor the guardianship, although the court does retain jurisdiction until the child is no longer a minor or the guardianship is otherwise discharged. /101/

3. Long-Term Foster Care

Under Minnesota law, the court may order a child into long-term foster care only if the court finds that neither of the preferred options discussed above is in the child's best interest. /102/ The court may order long-term foster care if a child has reached the age of 12 and if reasonable efforts by the county agency have failed to locate an adoptive family for the child. The court may not order long-term foster care for a child under age 12 unless the child has a significant positive relationship with a sibling age 12 or over and they will be placed in the same foster home.

An order for long-term foster care is reviewable upon motion to the juvenile court and a showing by the parent of a substantial change in the parent's circumstances such that the parent could provide appropriate care for the child and that removal from the child's permanent placement and the return to the parent's care would be in the child's best interests.

F. Legal Action

The role of grandparents as kinship foster care providers is evolving. Some of the relevant issues are currently the object of litigation in Minnesota and other jurisdictions. /103/ For example, in Minnesota, a class of caretaker relatives and the children in their care sued Hennepin County Welfare Board and the Minnesota Department of Human Services asking for injunctive relief from the way the county was administering the foster care program for children living with relative caretakers. /104/ The suit alleged that defendants had routinely failed to assess reports of maltreatment when children were living with relatives at the time the report was filed, that defendants failed to pay foster care maintenance and difficulty-of-care payments on behalf of children who were placed with relatives by court order or voluntary placement agreement, and that defendants failed to inform families adequately about the options available for care of their children. The parties settled most of the issues in dispute. The settlement provided, in part, that relatives who had given care for children pursuant to a court order or a voluntary placement agreement between the parent and the county would be entitled to retroactive benefits for the period of care.

VI. Conclusion: The Need for Change

The presumption that it is in the best interest of a child to be with a parent must necessarily be challenged. Minnesota's grandparent ex parte temporary custody order statute is a good example of the type of legislation needed to override that presumption in certain circumstances. Parents who continuously abuse and/or neglect their children should not be presumed better caretakers than third

parties who are providing care. More preschool children die at the hands of their parents than from falls, choking on food, suffocation, drowning, fires, or gunfire in the streets. /105/ It is not in the best interests of children to languish in foster care or to move from foster home to foster home while the agency tries over and over to rehabilitate parents. At the same time, neither is it in the best interests of children to be separated from their birth families. Policy changes must reflect all of these competing interests.

Alternative solutions should include the availability of custody orders that do not contain strict modification requirements and that set forth requirements the parents must meet before custody will be returned to them. These orders must be specifically tailored to each family's situation. Permanent custody options with adequate financial support should be available in the absence of parental rights termination. Joint custody options between kin should be explored.

Advocates, agencies, and the Minnesota legislature have been considering changes to address some of the issues raised in this article. One option is to provide a subsidized guardianship that would allow relatives to assume the care of children with the assurance of a reasonable level of support without putting the family through the divisiveness of the juvenile court or family court process. Another proposal would make the juvenile court more accessible to grandparents seeking out-of-home placement and services for their grandchildren. The objective of these proposals is to provide a more realistic range of options for families to obtain services and financial support necessary to retain the care of children in the extended family without terminating parental rights.

Standby guardianships should be allowed for parents who have a terminal illness. /106/ Standby guardianships "allow for an immediate transfer of custody upon the parent's incapacity, permit retention or sharing of parental rights, and then establish permanent guardianship after the parent's death." /107/ Parents with AIDS or other serious illnesses should not have to give up their parental status while alive and competent in order to provide for their children's well-being after their death.

The law and public policy must change to meet the needs of families in the 1990s. Advocates should work toward additional options for children whose parents are without safe and stable homes as well as toward the provision of services and support for grandparents caring for this next generation.

Footnotes

/1/ While all the situations described are real, the names are not.

/2/ Marianne Takas, American Bar Ass'n Ctr. for Children and the Law, *Kinship Care and Family Preservation: A Guide for States in Legal and Policy Development* 3 (1993). "Private kinship care is kinship care entered by private family arrangement, wherein either the parent or the care giver has legal custody of the child. Kinship foster care is kinship care provided for a child who is in the legal custody of the state child welfare agency." *Id.* For the sake of simplicity the terms "grandparent" and "kinship care giver" will be used interchangeably throughout this article. While a great majority of the kinship care givers are grandparents, many other "kin" within the above

definition are caring for children not their own. While many states do not have such a broad definition of "kin," it best describes care givers in this country.

/3/ All of the units at the Legal Aid Society of Minneapolis have been affected by the increase in kinship care giving, which can involve housing issues (sometimes clients are threatened with losing their housing because a grandchild or niece or nephew comes to live with them); family law issues (we have represented seniors from the age of 35 to 86 seeking to gain custody of their kin); welfare issues (grandparents come to us who were denied Aid to Families with Dependent Children [AFDC] or foster care benefits or whose grandchildren were denied either supplemental security income or particular mental health treatments that should be covered by Medicaid); and juvenile law issues (children need representation to live free from abuse and neglect and with the care giver of their choice, and teen mothers who want to live independently have difficulty obtaining AFDC benefits).

/4/ Parents have a constitutional right to raise their own children. *Santosky v. Kramer*, 455 U.S. 745 (1982). Any legal basis for a third party to seek custody arises solely out of statutory law. Richard Victor, *Statutory Review of Third Party Rights Regarding Custody, Visitation, and Support*, 25 *Fam. L.Q.*19 (1991).

/5/ Title IV-A of the Social Security Act, 42 U.S.C. Secs. 601 -- 17 (1988 & Supp. V 1993).

/6/ Adoption Assistance and Child Welfare Act of 1980, Title IV-E of the Social Security Act, 42 U.S.C. Secs. 670 -- 79a (1998 & Supp. V.1993).

/7/ Randi Mandelbaum, *Trying to Fit Square Pegs into Round Holes: The Need for a New Funding Scheme for Kinship Caregivers*, 22 *Fordham Urb. L.J.* 907, 913 (1995).

/8/ In Minnesota at least eight different bills were introduced last session to deal with kinship issues; currently the Department of Human Services has an advisory committee to draft kinship care legislation.

/9/ Susan Waysdorf, *Families in the AIDS Crisis: Access, Equality, Empowerment, and the Role of Kinship Caregivers*, 3 *Tex. J. Women & L.* 145, 149 -- 50 n.8, 157 (1994) (Waysdorf argues that kinship care giving in the context of the AIDS crisis is perhaps the most compelling social justice issue of our time).

/10/ *Takas*, supra note 2, at 1.

/11/ U.S. Dep't of Commerce, Bureau of the Census, *Household and Family Characteristics: March 1994* (1994). The children were 13 percent Hispanic, 35 percent black, and 52 percent white. *Id.*

/12/ *Id.* Furthermore, census data indicate that grandparent-headed households represent all socioeconomic levels and ethnic groups.

/13/ American Ass'n of Retired Persons, *Grandparent Information Center Social Outreach and Support Fact Sheet*.

/14/ See generally Sylvie deToledo, *Grandparents as Parents: A Survival Guide for Raising a Second Family* (1995), for profiles of kinship families and the struggles different adult parents have that cause them to abandon their children. DeToledo writes that the advent of crack cocaine, which is more addictive than heroine or powder cocaine and is used by more women than any other drug, has resulted in a growing population of women of childbearing age addicted to multiple drugs and infants exposed to drugs while in the womb. Consequently, there has been a dramatic rise in reports of child abuse and neglect since the 1980s, the majority traceable to parental drug and alcohol addiction. *Id.* at 11 -- 66 and 115. See also Waysdorf, *supra* note 9, for an in-depth look at women with AIDS and the kinship care giving issues that have arisen as a result of the disease. Waysdorf reports that the majority of children orphaned by HIV/AIDS come from poor communities of color. *Id.* at 150 n.8 (citing David Michaels & Carol Levine, *Estimates of the Number of Motherless Youth Orphaned by AIDS in the United States*, 269 *JAMA* 3456, 3457 (1992) (by the end of 1992, some 20,000 children and adolescents nationwide had already lost their mothers to AIDS, and the estimate is that by the year 2000 at least 82,000 children will have lost their mothers to AIDS)).

/15/ DeToledo, *supra* note 14 at 22 -- 34. Grandparents are tired and have usually struggled with the parent and his or her drug or alcohol addictions and mental health issues for years. They report significant life-style changes when a child comes to live with them -- their finances suffer, their work life changes, their social life declines, their dreams disappear, they feel isolated, angry, and fearful, and they simply want their adult children to be able to parent again and to resume the role of doting grandparents. *Id.*

/16/ Our office has worked in several situations in which the father of the child was violent toward the grandparents. In one case, the grandmother and her granddaughter spent time in a shelter because of the violent behavior of her son.

/17/ DeToledo *supra* note 14, at 59 -- 71. DeToledo reports that often parents exacerbate an already difficult situation by lying to the children and making empty promises, by abusing the children during visits, and by coming in and out of the kinship household only for meals and money and then leaving without any explanation.

/18/ *Id.* at 243, 279. For example, the American Association of Retired Persons has established the Grandparent Information Center to provide information and resources to grandparents coping with primary care giving roles. For more information, contact the American Association of Retired Persons, 601 E St., NW, Washington, DC 20049; (202) 434-2296.

/19/ *Id.* at 72 -- 102, 103 -- 13.

/20/ In the 19th century, this traditional view of children began to change. Reformers and "child savers" took steps to intervene in families, to protect children from abuse and exploitation, and to rehabilitate those who had committed delinquent acts. Marvin R. Ventrell, *Rights & Duties: An Overview of the Attorney-Child Client Relationship*, 26 *Loy. U. Chi. L.J.* 259, 260 -- 64 (1995).

/21/ *In re Gault*, 387 U.S. 1 (1967).

/22/ Ventrell, *supra* note 20, at 266 -- 67.

/23/ See generally Ann Haralambie, *The Child's Attorney: A Guide to Representing Children in Custody, Adoption and Protection Cases* (1993); Donald T. Kramer, *Legal Rights of Children* (1994).

/24/ Model Rules of Professional Conduct 1.14

/25/ Standards of Practice for Lawyers Who Represent Children in Abuse and Neglect (approved by the American Bar Association House of Delegates on Feb. 5, 1996).

/26/ *Id.*

/27/ Children in the custody of the state must be in foster care placements. Kinship foster care is discussed *infra* at sec. V.

/28/ The Parental Kidnapping Prevention Act of 1980 (PKPA), 18 U.S.C. Sec. 1073, 28 U.S.C. Sec. 1738A, 42 U.S.C. Secs. 654, 633, 1035, is the primary applicable federal law. Kramer, *supra* note 23, at 245. In addition, the Indian Child Welfare Act of 1978 (ICWA), 25 U.S.C. Sec. 1915 (1988), was enacted to ensure that Indian children were not separated from their families and tribes. See Mark Fiddler, *The Application of the Indian Child Welfare Act to Grandparent Custody Actions*, in this issue.

/29/ See Victor, *supra* note 4, at 26 -- 57, for a compilation all 50 states' third-party custody and visitation statutory authority.

/30/ Minn. Stat. Sec. 524.5-505.

/31/ Takas, *supra* note 2, at 21. See also *infra* sec. IV.B.4.a, for a discussion of *ex parte* temporary custody orders in situations such as this.

/32/ E.g., the Authorization for Medical Consent for Children in the Care of Adults Other Than Parents Act was enacted in Washington, D.C., in 1993, D.C. Code Ann. Sec. 16-4901(a) (Supp. 1993). See Waysdorf, *supra* note 9, at 210 for a discussion of the history of this act.

/33/ In Minnesota the state district court has the authority to award custody to third parties upon petition. Minn. Stat. Sec. 518.165. Each state has a mechanism by which an order of custody can be obtained, although it is not necessarily called "custody." Sometimes it is called "guardianship." Throughout this article, the term "third-party custody" or "legal custody" refers to the process by which a third party obtains an order establishing legal and physical care, custody, and control of a minor child. Guardianship, as discussed below, refers to orders in probate or juvenile court obtained after the death of a parent and/or when parental rights are terminated and under which the court retains jurisdiction over the child until the child's 18th birthday or until the child has been adopted.

/34/ In some cases, grandparents seek custody because adoption is not possible. A child can be adopted only if the child's parents agree to the adoption and/or their parental rights are terminated by a court. In most cases, getting the parents' rights terminated is extremely difficult. Parents are usually more willing to consent to legal custody than adoption because adoption is so permanent.

/35/ Minn. Stat. Ann. Secs. 518.155 -- .185 (West 1992).

/36/ See *infra* sec. V.

/37/ *Id.* Sec. 518.17.

/38/ Third-party custody is antithetical to the constitutional right of parents to associate with and raise their child. *Santosky*, 102 S. Ct. 1388.

/39/ E.g., *Durkin v. Hinich*, 431 N.W.2d 553 (Minn. Ct. App. 1988), *aff'd*, 442 N.W.2d 148 (Minn. 1989) (presumption that a parent is fit to have custody and the standards to be met arise out of cases involving the termination of parental rights); *In re Welfare of A.R.W.*, 268 N.W.2d 414, 417 (Minn. 1978) (presumption of parental fitness is based in part on the public policy determination that the best interests of the child are normally served by parental custody). The Minnesota Supreme Court has combined the termination of parental rights and best-interests standards in determining custody disputes between a parent and grandparents or other third parties. *Wallin v. Wallin*, 187 N.W.2d 627 (1971). The court in *Wallin* stated as follows:

Thus it would seem to be a fundamental rule of law that, all things being equal, as against a third person, a natural mother would be entitled to custody of her minor child unless there has been established on the mother's part neglect, abandonment, incapacity, moral delinquency, instability of character, or inability to furnish the child with needed care . . . or unless it has been established that such custody otherwise would not be in the best welfare and interest of the child. . . .
Id. at 630 (citations omitted).

/40/ *Santosky*, 455 U.S. 745; see *supra* note 4.

/41/ Minn. Stat. Ann. Sec. 516.256(1)(a) (West 1992). Such a right to petition, however, does not necessarily guarantee the right to an evidentiary hearing.

/42/ Often one or both of the parents' whereabouts are unknown and have been unknown for some time. Under these circumstances, service by publication may be had, but only by order of the court. Additionally, if the county has initiated any action in juvenile court, copies of pleadings must be served on the county attorney and filed with the juvenile court.

/43/ The legal guardian can be another person or the state in a child dependency matter. See *infra* at sec. V.E.

/44/ In Minnesota the court will order court services to conduct a custody evaluation of the homes of the people requesting custody and take the evaluator's recommendation into consideration when making its decision, and/or appoint a guardian ad litem for the child.

/45/ Many grandparents have depleted their retirement savings by the time they are forced to take action in order to obtain some financial assistance.

/46/ Minn. Stat. Ann. Sec. 518.131 (West 1992) (Domestic Relations Act provision allowing for temporary orders in custody cases); Minn. R. 303.04 (1992) (allowing ex parte orders).

/47/ An ex parte temporary custody permits the grandparents and child to maintain the status quo but only lasts up to 14 days. Minn. Stat. Ann. Sec. 518.185(2). A temporary custody hearing must be set for not later than seven days after the court has issued the ex parte temporary custody order. Id.

/48/ One client, Helen, a 63-year-old paternal grandmother was caring for her grandson. The mother of the child was mentally ill and had abused the boy in the past. Helen had taken care of him off and on for six years. Most recently, she had him for six months and enrolled him in kindergarten. However, shortly before school started, the mother came and took the boy out for an ice cream cone. They never returned. Helen had no immediate recourse to get the child back into her home. The child was returned three months later with bruises covering his entire body, and he had not gone to school for the fall term.

/49/ Minn. Stat. Ann. Sec. 518.158(1) (West Supp. 1996).

/50/ Legislation was introduced in the most recent legislative session to expand the statute's application to all kin, not just grandparents.

/51/ Parental duties include providing the child with food, clothing, shelter, health care, education, and other care and control necessary for the child's physical, mental, or emotional health and development. Minn. Stat. Ann. Sec. 518.158(1) (West Supp. 1996).

/52/ Minn. Stat. Ann. Sec. 518.18 (West 1992)

/53/ In Minnesota, if an order of custody is obtained solely pursuant to the grandparent ex parte custody order statute, the court must set forth conditions the parents must meet in order to obtain custody of the children. These may be far less imposing than the traditional modification requirements and therefore better for the family as a whole.

/54/ Minn. Stat. Ann. Sec. 525.6155 (West Supp. 1996).

/55/ Id. Sec. 525.6165; Minn. Stat. Ann. Sec. 260.242 (West 1992); see *infra* at sec. V.E for a discussion of guardianship in juvenile court.

/56/ Minn. Stat. Ann. Sec. 260.242 (West 1992).

/57/ Minn. Stat. Ann. Sec. 525.6155 (West Supp. 1996).

/58/ Id. Sec. 525.6155, 525.616. If both parents are dead, the testamentary guardian appointed by the parent who died later has priority.

/59/ Id. Sec. 525.6155.

/60/ Id. Sec. 525.6175.

/61/ Id. Sec. 525.619.

/62/ Id.

/63/ Id. Sec. 525.619(d).

/64/ Id. Sec. 525.6192. A guardian must petition the court for permission to resign. Id. Sec. 525.6195.

/65/ Any person interested in the welfare of the child or the child, if 14 or more years of age, may petition for removal of a guardian on the ground that removal would be in the child's best interests. A petition for removal or for permission to resign may, but need not, include a request for appointment of a successor guardian. Id. Sec. 525.6195.

/66/ Id. Sec. 525.6192.

/67/ Minn. Stat. Ann. Sec. 259.23 (West 1992).

/68/ The birth parent's consent is not required if the parent has abandoned the child or lost custody through a divorce decree, provided the parent is served with notice of the adoption hearing, or if the parent has had her parental rights terminated, if there is no parent or guardian qualified to consent to the adoption, or if the commission or agency having the authority to place the child for adoption has the exclusive right to consent to the adoption of the child. Neither the parent nor the agency may unreasonably withhold consent.

/69/ Minn. Stat. Ann. Sec. 259.28 (West 1992). If the adoption is the result of a juvenile court hearing, the court terminates the parent's rights as part of the process. In a private adoption, the grandparent has to prove that it is in the child's best interests to terminate the relationship between the parent and child, that the parent has shown a "substantial lack of regard" for his or her parental obligations, and that the parent is withholding consent to the adoption against the child's best interests.

/70/ When deciding whether the adoption is in the child's best interests, the court considers the investigative reports and information presented at the hearing.

/71/ Minn. Stat. Ann. Sec. 259.28 (West 1992).

/72/ Id.

/73/ Id. Sec. 259.57(1).

/74/ Id.

/75/ Id. Sec. 259.67.

/76/ See infra sec. V.E.2.

/77/ Child Abuse Prevention and Treatment and Adoption Reform Act, 42 U.S.C. Secs. 5101 et seq.

/78/ Adoption Assistance and Child Welfare Act of 1980, 42 U.S.C. Secs. 670 et seq.

/79/ Id. Secs. 670, 5106b.

/80/ "Child abuse and neglect means the physical or mental injury, sexual abuse or exploitation, negligent treatment, or maltreatment of a child under the age of eighteen, or the age specified by the child protection law of the State, by a person . . . who is responsible for the child's welfare under circumstances indicating harm or threatened harm to the child's health or welfare. The term encompasses both acts and omissions on the part of a responsible person. . . . Negligent treatment or maltreatment includes failure to provide adequate food, clothing, shelter, or medical care." 45 C.F.R. Secs. 1340.2, 1355.20.

/81/ 42 U.S.C. Sec. 5106a.

/82/ As mentioned above, federal reimbursement is available to states for foster care payments made pursuant to a qualifying state plan. Guidelines for state plans were established in the Adoption Assistance and Child Welfare Act of 1980, 42 U.S.C.A. Secs. 620 -- 51, 670 -- 76 (1991). This Act provides support for efforts to prevent unnecessary placement of children into foster care. However, it does not specifically address relatives as a resource either for helping parents or for caring for children when parents cannot. Takas, supra note 2, at 5.

/83/ In Minnesota, juvenile court protection matters are referred to as child in need of protection or services (CHIPS) proceedings. The CHIPS definition is expansive, and includes children who are "abandoned; victims of physical or sexual abuse; without necessary food, clothing, shelter, education, or other required care . . . because the child's parent is unable or unwilling to provide that care; runaway or habitually truant." Minn. Stat. Ann. Sec. 260.015(2)(a).

/84/ In Minnesota an agency that places a child in foster care must, inter alia, "provide social services to the child as necessary to meet the child's needs; provide social services to the child's family . . . assist the foster care providers in meeting the needs of the child." Minn. R. 9560.0580 (1995). The agency must prepare a written placement plan that identifies "the services requested or needed by the child, the child's parent or guardian, and foster care provider, the services to be provided and who will provide them, or the reasons for denying the services . . ." Minn. R. 9560.063 (1995). The services provided may include counseling, respite care for the foster parents, day care services, etc.

/85/ For instance, under the Multiethnic Placement Act, 42 U.S.C. Sec. 5115a, an agency that receives federal assistance "may not delay or deny the placement of a child for adoption or into foster care . . . solely on the basis of the race, color, or national origin of the adoptive or foster parent, or the child, involved." The cultural, ethnic, or racial background of the child and the capacity of the prospective foster parent to meet the needs of a child of this background may be considered as one of a number of factors used to determine the child's best interests.

/86/ Minn. R. 9560.0532 (1995).

/87/ The agency must provide case planning services aimed at reuniting children with their parents. Services could include parenting classes, mental health evaluation and treatment, chemical dependency treatment, etc.

/88/ In Minnesota the difference in financial support available for a child is dramatic. A child-only grant under the AFDC program is \$250 per month. If the kinship household is already receiving AFDC when it informally takes in a relative child, the grant increases by \$85. The current rate of foster care maintenance payment for a child aged 0 -- 11 is \$13.78 per day (approximately \$413.40 per month). Children with special needs receive additional difficulty-of-care payments.

/89/ Minnesota permits the filing of protection actions by private parties. The petition may be brought by "[a]ny reputable person . . . having knowledge of a child in this state . . . who appears to be . . . in need of protection or services. . ." Minn. Stat. Ann. Sec. 260.131 (West 1992).

/90/ Id. Sec. 260.155(1)(a).

/91/ The Adoption Assistance and Child Welfare Act of 1980, Pub. L. No. 96-272, 96 Stat. 1160, specifically promoted efforts to keep children with their parents and prevent unnecessary placement of children into foster care. However, the act does not specifically address relatives as a resource either for helping parents or for caring for children when parents cannot. Takas, *supra* note 2, at 5.

/92/ 42 U.S.C. Secs. 671(a)(10), 672 (c) (1988 & Supp. V 1993); 45 C.F.R. Secs. 1355 -- 1357.40. In Minnesota, until recently, grandparents did not have to be licensed to serve as foster care providers for their grandchildren. Practitioners should check the law in their own jurisdiction to determine the requirements regarding licensure.

/93/ For a discussion of the importance of permanency determinations and the federal law requiring states to provide permanency planning, see Kramer, *supra* note 23, at Secs. 29.10 -- .15. Specific procedures differ from state to state. This article discusses the Minnesota variation.

/94/ Minn. Stat. Ann. Sec. 260.191, subdiv. 3b. (West Supp. 1996).

/95/ Id. Sec. 260.191, subdiv. 3b.

/96/ Id. Sec. 259.24.

/97/ Id. Sec. 259.67.

/98/ Minn. Stat. Ann. Sec. 260.242 (West 1992).

/99/ Id. Sec. 260.242(2)(b).

/100/ Id. Sec. 260.242(2). If the court appoints the Department of Human Services as guardian, the Department can recommend custodial placements for the child, including long-term foster care.

/101/ Id. Sec. 260.245.

/102/ Minn. Stat. Ann. Sec. 260.191 subdiv. 3b(a)(3).

/103/ National Center for Youth Law, Foster Care Reform Litigation Docket (1995).

/104/ *Budreau v. Hennepin County Welfare Bd.*, No. DC WA 94-015706 (Minn. Dist. Ct. Oct. 6, 1994).

/105/ Mississippi Voices for Children & Youth, Mar. -- Apr. 1996, at 19, points out that at least 2,000 children a year die from maltreatment at home, some 18,000 children are permanently disabled, and about 142,000 seriously injured from abuse. Id.

/106/ See, e.g., Takas, *supra* note 2, at 41; Waysdorf, *supra* note 9, at 206 -- 10.

/107/ Waysdorf, *supra* note 9, at 206 -- 7.