

BRIEF

Adoption and Guardianship for Children in Kinship Foster Care



Throughout the United States, the foster care system's reliance on grandparents and other extended family members to care for children is increasing each year. When children cannot live safely with their parents and must enter the custody of the state or tribe, child welfare law and policy prioritize placement with relatives. These placements are known as kinship foster care, whether or not the relatives are licensed as foster parents.

Research shows that kinship foster care is generally better for children than non-related foster care. Children in kinship foster care experience fewer placement changes, more stability, better behavioral and mental health outcomes, and are more likely to report that they "always feel loved."¹ Children raised by kinship foster parents keep their connections to brothers, sisters, extended family and community, and their cultural identities.² Due in part to this research, a higher percentage of children are cared for by relatives in foster care than ever before. In 2017, 32 percent of all children in foster care in the United States (140,675 children) were with relatives, which represents more than a 9-percentage point increase over the last decade.³

Children in kinship foster care are more likely to find a permanent home than children in non-related foster care.⁴ In 2017, about 35 percent of all children adopted from foster care were adopted by relatives and 10 percent of children who exited foster care, exited into guardianships.⁵

This brief focuses on adoption and guardianship for children in kinship foster care, so that these children can exit foster care into permanent families. The laws dictating how adoption and guardianship are granted, by which court, and what those options entail are developed at the state and tribal levels, so the intricacies for obtaining these legal relationships differ. This brief provides general information about the two options, how they differ, and trends in state law as they impact these options. It is important that caseworkers, relative caregivers, older children and their birth parents understand the two options and determine, based on all the information, what is best for their particular child and family.

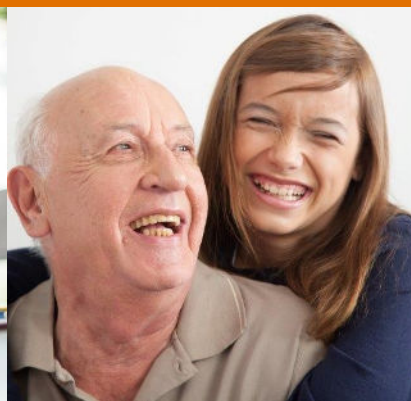
Foster Care Licensure

Data is not publicly available on how many of the 140,675 children placed with relatives are with licensed relative foster parents, but anecdotally and based on state practices, we know that many of these relatives are not licensed. Some states simply do not license relatives as foster parents. In other jurisdictions, caseworkers may not discuss licensure in a balanced way with relatives, essentially steering them away from it, or they may not give relatives an adequate time to decide. On the other hand, some relatives are given all the necessary information and choose not to pursue licensure for any number of reasons, including that they may fear the child welfare agency's involvement and possible removal of the child. However, many of these unlicensed relatives caring for children in foster care are already subject to the rules and restrictions of the child welfare system, but do not receive monthly foster care maintenance payments or other supports. According to federal Adoption and Foster Care Analysis and Reporting System (AFCARS) data, there are 23 states where more than half of all relative caregivers receive no foster care payments for the children in their care.⁶

Whether or not relatives are licensed, the options of adoption and guardianship are still open to children placed in kinship foster care. The licensure issue impacts financial support while children are in foster care and can continue to impact that support if children exit foster care to guardianships with relatives.

Caseworker Tips: Explaining Adoption and Guardianship

- Discuss adoption and guardianship with kinship foster parents from the beginning of each case and often.
- Talk about both the legal and financial ramifications of each option.
- Use the side by side comparison chart, which is part of these materials, as a tool and give them a copy.
- Ensure they understand any variations in your state or tribe.
- If your state or tribe has a guardianship assistance program (GAP), ensure that they know about it and that they understand the need to become licensed foster parents to qualify.
- Let them know that they may get a private lawyer and may have legal and related expenses up to \$2000 reimbursed.
- If developmentally appropriate, discuss adoption and guardianship with the children and ask if they have preferences.
- Make sure kinship foster parents and children are aware of the importance of going to all court hearings, including the final one granting the guardianship or adoption.
- Tell kinship foster parents and children to ask questions of their lawyers and judge if they don't understand anything in the guardianship or adoption order, including any terms concerning the child's visitation with their birth parents.



Adoption

Adoption is the most permanent of the relationships and turns the grandparent or other extended family member into the parent in the eyes of the law. Adoption creates a forever family. For some children, however, it may not be the best option for several reasons, including the legal change in family relationships.

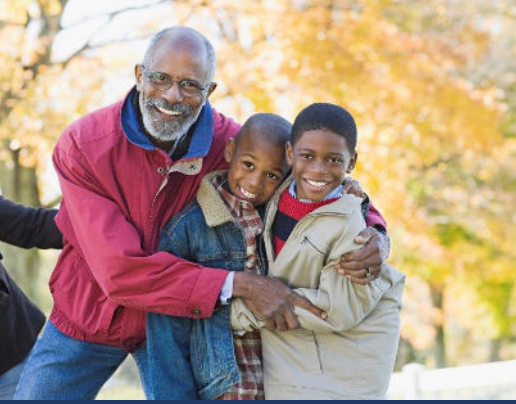
Basic Principles of Adoption

Given that the laws dictating how adoption is granted and what it entails are developed at the state and tribal levels, the following is simply a general overview of how adoption is granted and what it means throughout the United States:

- A court must generally terminate both parents' rights and responsibilities unless -
 - one parent is dead
 - a stepparent is adopting
 - paternity was never established and need not be terminated (in some states only)
 - both parents voluntarily surrender all their rights.
- In general, the court reviews the appropriateness of the adoption and, in a case involving an older child, often seeks the input of the child as well.
- If the court finds that the adoption is in the "best interest" of the child and grants it, the state or tribe no longer has legal custody and there is no more child welfare agency oversight.
- Relative caregivers become the "parent" in the eyes of the law. A grandmother, for example, becomes "mom." As an adoptive parent, access to services on behalf of the child is the same as for any birth parent.

Relative Caregiver Tips: Understanding Adoption and Guardianship

- Advocate for yourself and the child in your care and ensure you know and understand adoption and guardianship.
- Talk with your caseworker about both the legal and financial ramifications of each option.
- Consult the side by side comparison chart, which is part of these materials, to better understand your options.
- Ensure you understand any variations in your state or tribe by visiting the state law database at www.grandfamilies.org/Search-Laws, talking with your caseworker and, if possible, consulting with an attorney.
- Find out if your state or tribe has a guardianship assistance program (GAP) by referring to the map in this brief and visiting www.grandfamilies.org/Topics/Subsidized-Guardianship for the most recent information. Know that you must become a licensed foster parent to qualify and explore what it takes to become licensed by asking your caseworker and, if possible, consulting with an attorney.
- Know that you may get a private lawyer and may have your legal and related expenses up to \$2000 reimbursed.
- If developmentally appropriate, discuss adoption and guardianship with the child in your care and ask their preference, if any.
- Make sure you go to all court hearings, including the final one granting the guardianship or adoption.
- Ask questions of your lawyer and judge if you don't understand anything in the guardianship or adoption order, including any terms concerning the child's visitation with their birth parents.



- Children automatically inherit from their adoptive parents' estate, can be included on their private health insurance policies, and/or receive benefits, such as military or disability as their adoptive child. Children can no longer automatically inherit from the birth parents' estate, be included on the birth parents' private health insurance policies, and/or receive benefits through them, such as military or disability. Consequently, it is important to consider these financial ramifications when considering adoption.
- Birth parents cannot reappear one day and go to court to attempt to reclaim their rights and responsibilities.
- The adoption never ends - the child is permanently part of the family.

State Laws Concerning Adoption

Two of the fundamental areas where adoption laws differ around the country is whether a state has a preference for relatives seeking to adopt children and whether it has an open adoption law allowing relative caregivers, birth parents, and children to develop agreements for post-adoption contact.

Preferences for Relative Adoptions

At least a fourth of all states have explicit statutory provisions giving preferences to relatives in adoptions. These preferences are in addition to preferences for placing children with relatives in foster care, which exist under federal law and in all states.

In Minnesota, for example, relatives are prioritized for pre-adoptive placement. Moreover, "an authorized child-placing agency may disclose private or confidential data to relatives of the child for the purpose of locating a suitable adoptive home..."⁷

In Ohio, If the agency is given permanent custody of the child and the foster caregiver or relative has informed the agency of their desire to adopt the child, the agency must consider giving preference to an relative over a non-relative caregiver when determining an adoptive placement for the child.⁸

In Texas, adoption teams must attempt to place a child for adoption with an appropriate relative.⁹

Facilitate Relative Adoptions

Other state laws facilitate relative adoptions, but do not explicitly prefer them.

In Alaska, if parental or other specified consent has been obtained, state law requires its courts to grant a petition to adopt a child by a relative who has had physical custody of the child for at least 12 months before parental rights have been terminated, unless the court finds the adoption is not in the best interest of the child.¹⁰

Other states make it easier for relatives to adopt by allowing courts to waive certain requirements or by simply exempting relatives from requirements. The most common requirement waived or exempted is investigations on the prospective adoptive parents, such as home studies and medical histories. Arizona, Colorado, Iowa, Nebraska, New Jersey, Oregon, South Carolina and Vermont all make such waivers or exemptions.¹¹

In Tennessee, prospective adoptive parents related to children are exempted from the state's requirement to be residents.¹²

Delaware and Kentucky facilitate relatives' private adoption of children by not requiring that such children be placed for adoption by the child welfare agency.¹³

Open Adoptions

The majority of states have some type of law concerning open adoption. Kinship foster parents typically know at least one of the birth parents, so they are already "open" in that sense. But these laws can be used to explicitly require post-adoption contact with the birth parents, siblings and/or other relatives. Courts can use the laws to help facilitate enforceable agreements so that children have clear, delineated post-adoption contact with their birth parents or other relatives. Although these agreements are enforceable by the courts, a court will never invalidate an adoption because a condition, such as visitation, was not followed. To learn if a particular state has an open adoption law, visit the database of state laws at www.grandfamilies.org/Search-Laws.

Non-Kinship Adoptions

In recent years, there have been several high-profile, heart-wrenching stories of children who were in the process of being adopted by their long-term non-related foster parents when relatives were notified or came forward late in the process. The children were then removed from their loving foster parents and placed with the relatives, whom they perhaps did not know well or had not bonded with. Although living with those relatives may eventually be in the best interest of the children, no child or family should be put in this situation. Imagine being the foster parent who has to pack up a child's clothes whom they have raised as their own? Or the grandmother who had lost touch with her daughter and had no idea she had a grandchild?

The best way to address these situations and ensure they do not happen is to prioritize early identification and placement of children with relatives. A [wikiHow for Kinship Foster Care](#) has specific strategies for how children can be placed with relatives immediately after they are removed from their parents, highlighting tools from several jurisdictions.

Unfortunately, instead of focusing more on early identification and placement, some state legislatures are trying to address problems after they have already arisen and are developing laws that specifically give adoption preference to long-term non-related foster parents over children's relatives. These types of laws may not result in the best outcomes for children and may impermissibly contradict the federal requirements in the Indian Child Welfare Act (ICWA). ICWA, which has been federal law since 1978, contains specific mandatory provisions concerning the removal and placement of Indian children in adoptive, guardianship and foster homes to ensure that Indian children are not removed from their cultures and tribes.¹⁴

Examples of state laws calling for adoption preferences to non-relatives include Tennessee and New York. In those two states, when a child is placed in a foster home and becomes available for

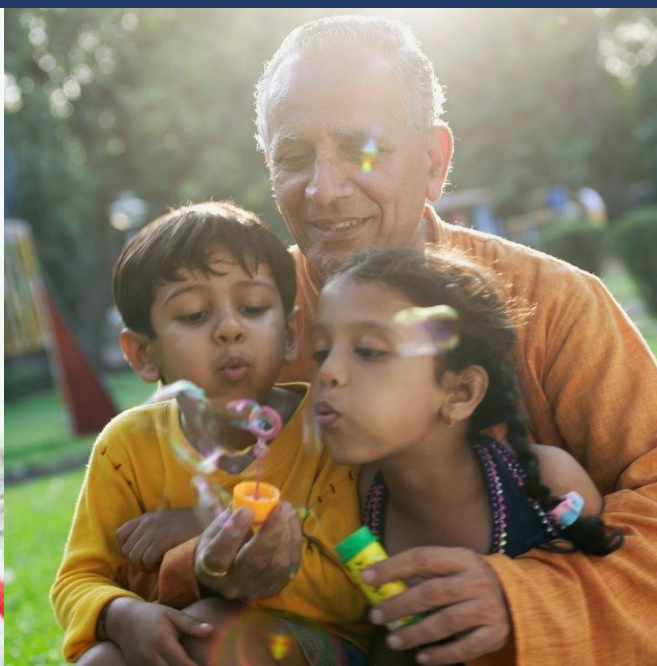
adoption, foster parents (whether related or not) must be given first preference to adopt a child who has lived in the foster home for twelve or more consecutive months.¹⁵ Missouri has a similar law, but rather than 12 months with the foster parents, it is nine.¹⁶ Oregon amended its adoption law three years ago to require the child welfare agency to consider a child's relatives and current caregiver as having equal status and priority as prospective adoptive parents.¹⁷

Although some states with these adoption preferences also have good kinship care policies and practices, others routinely place children first with nonrelated foster parents while they either look for relatives or work to approve relatives as placements for children. Those practices, coupled with laws like these, can result in children forever separated from their grandparents, other blood relatives, cultures and tribes.

Adoption Assistance - Federal and State Programs

After children are adopted by either relatives or non-relatives, ongoing monthly adoption assistance payments may be available. All states provide adoption assistance on behalf of children with "special needs" adopted from the child welfare system. "Special needs" are defined by each state but are not typically limited to what are generally considered special needs. They include characteristics or conditions that make it difficult to place a child with adoptive parents, such as being an older child or part of a sibling group. The subsidy payments usually end when a child turns 18 (age 19 to 21 in some states).

There are two general types of adoption assistance programs. One is for children who are eligible under federal child welfare law, Title IV-E of the Social Security Act (Title IV-E) and are paid monthly subsidies using that pot of federal money. The other are state adoption assistance programs that are not required to have the same restrictions found under federal law and consequently vary from state to state. About 90 percent of children in foster care, under either federal or state programs, are eligible for adoption assistance.¹⁸





Legal expenses in obtaining adoption can be very costly. When adopting a Title IV-E eligible child with “special needs” from foster care, the federal government requires states to reimburse prospective adoptive parents for their non-recurring expenses up to \$2,000. Most states also reimburse these expenses under their state programs. These expenses can include court filing fees, legal fees and transportation costs to and from the courthouse.

Under the federal program, monthly adoption assistance cannot exceed the foster care rate and children are categorically eligible for Medicaid; states seem to follow the same rate restriction for their programs and provide Medicaid for the children.

The North American Council on Adoptable Children (NACAC) website at www.nacac.org/help/adoption-assistance/adoption-assistance-us/state-programs/ has comprehensive profiles for each state’s adoption assistance program, along with other useful information.

Adoption Tax Credit and Other Tax Credits

The federal [adoption tax credit](#) of up to \$13,810 per child adopted in 2018 (the rate typically increases each year) is available to all U.S. taxpayers who have adopted a child. For relatives and non-relatives adopting a child with “special needs” from the foster care system, they may be eligible for the maximum amount of credit regardless of whether they had any qualifying expenses like legal fees, court costs and travel expenses. For more information on this tax credit, visit www.nacac.org/category/adoption-tax-credit/.

NACAC’s website also has information on state adoption tax credits, which can be used to offset state owed income tax.

Other federal tax credits may also be helpful:

Unlike the federal adoption tax credit, the [Earned Income Tax Credit \(EITC\)](#) is refundable. That means if an adoptive parent does not earn enough to pay taxes, they can get a refund check from the U.S. Internal Revenue Service (IRS). This tax credit will apply until the adoptive child turns 19 (or 24 if a full-time student). If the adoptive child is totally and permanently disabled, there is no age requirement.

[The child tax credit](#) is for dependent children under age 17, but it is not refundable.

[The additional child tax credit](#) may help adoptive parents who do not owe enough taxes to benefit from the child tax credit. Unlike the child tax credit, this tax credit is refundable.

[The child and dependent tax care credit](#) is applicable if an adoptive parent is working or looking for work and has hired someone to help care for the child.

For more information on all of these federal tax credits, see www.irs.gov.

Similar state tax credits may also be available to claim against state income taxes.

Tax credits are not counted as income and will not reduce adoption assistance or any public benefit.

Guardianship

Guardianship differs most significantly from adoption in that it does not sever the birth parents' rights and responsibilities and turn the grandparent or other extended family member into the legal parent.

Basic Principles of Guardianship

As with adoption, the laws dictating how guardianship is granted and what it entails are developed at the state and tribal levels. The following is a general overview of how guardianship is granted and what it means throughout the United States:

- A court must grant guardianship.
- The court reviews the appropriateness and permanence of the placement and, in the case of an older child, often seeks the input of the child as well.
- If the court finds that the guardianship is in the “best interest” of the child and grants it, the state or tribe no longer has legal custody and there is little or no child welfare agency oversight.
- The caregiver now stands in the shoes of the parent and can make all routine decisions without government oversight.
- Guardianship does not require the termination of parental rights.
- The parents retain certain rights and responsibilities, including the right to consent to adoption and/or name change and the obligation of child support.
- The parent can also still visit with the child unless the judge granting guardianship has limited that right due to the “best interest” of the child.
- Children cannot inherit automatically from their guardians, may not be able to be included on their guardians' private health insurance policies, if any, and/or receive military or disability benefits from them. Children can continue to automatically inherit from the birth parents' estate, be included on the birth parents' private health insurance policies, and/or receive benefits through them, such as military or disability. Consequently, it is important to consider these financial ramifications when considering guardianship.

- Birth parents can reappear one day and go to court to attempt to reclaim their rights and responsibilities and have the child returned to them if they show a change in circumstances.
- Guardianship ends when the child reaches adulthood.

Guardianships address many family concerns that may prevent a child from being adopted by their relatives:

- Guardianships do not legally change family dynamics, and for example, turn grandma into mom.
- They are responsive to long and proud Native American, Latino, and African-American traditions of stepping in to care for relatives when parents have been unable. Furthermore, some tribal cultures simply do not believe in terminating parental rights or legally adopting kin.
- Guardianships provide an important option to older foster children who in particular often want to maintain a relationship with their parents and do not want to sever all legal ties.
- For mentally or physically disabled parents who are unable to care for children on a daily basis, guardianships allow the birth parents to remain involved in the lives of their children, share their estate and allow their children to collect benefits, such as military or disability, which they are only entitled to as their children.

State Laws Concerning Guardianship

Like adoption, each state has different provisions in its laws concerning which court awards guardianships, what must be proved, and how they can be terminated. Guardianships for children exiting kinship foster care can be awarded by various types of courts. Although traditionally awarded by probate courts, there are several states that provide for the granting of guardianships through family, juvenile or dependency courts as well: Alabama, Arizona, California, Connecticut, Delaware, Florida, Indiana, Maryland, Michigan, Minnesota, Montana, North Carolina, New Jersey, New Mexico, New York, Oklahoma, Pennsylvania, South Carolina, South Dakota, Tennessee, Virginia, Vermont, West Virginia, and Washington.¹⁹

Many states have various forms of guardianship, including limited guardianship, temporary guardianship and standby guardianship. We do not address those variations here, because they are not the types of guardianships that are granted to children exiting foster care with relatives. For more information on those guardianships, visit www.grandfamilies.org/Topics/Care-Custody/Care-Custody-Summary-Analysis.

Children existing foster care with relative caregivers are typically granted what are simply called guardianships or permanent guardianships. These guardianships - created at the state level - may have unique features. For example, New York has both guardianships and permanent guardianships. "Permanent" guardians can be appointed in New York if parental rights have been terminated or the parents are deceased. As permanent guardians, they may consent to the child's adoption by someone else.²⁰ In Connecticut, a guardian may also consent to an adoption by someone else, but only if that someone else is related to child and parental rights are terminated.²¹

Relative Preference

Unlike with adoptions, there appear to be no preferences in state law for relatives to obtain guardianships, undoubtedly because guardianships for children exiting foster care were primarily created for relatives and are mostly obtained by relatives. That said, New Hampshire seems to be one of the first states to create a relative preference in private guardianship cases in which the child welfare agency is not involved. Unlike other relative preferences, this preference is specific to situations involving parental substance use. In 2017, New Hampshire enacted a preference for grandparents appointed as guardians in cases where guardianships are sought following parental substance use or dependence.²²

Although this preference is for private guardianship cases, it is highlighted here as legislative language that is best avoided. By specifying a parental cause creating the grandfamily, grandparents must first prove that the parents have used substances for the preference to take effect. That may require sharing medical and mental health history with the court that might otherwise be unnecessary to produce. Other state laws - such as some educational and health care consent laws for grandfamilies - have focused on naming and proving the reason the parents cannot parent and the paperwork burdens and privacy violations on the families are significant and typically unnecessary.



Legal Custody

Legal custody is a similar status to guardianship but is usually granted by a different court that has different procedures in situations when there is no child welfare involvement. However, states can use their “legal custody” rather than “guardianship” mechanisms for the legal relationship needed to exit the foster care system. Pennsylvania, for example, uses its long-standing Permanent Legal Custodianship relationship granted by juvenile court for children exiting foster care and accessing its guardianship assistance program, known as Subsidized Permanent Legal Custodianships.²³

Guardianship Assistance - Federal and State Programs

Guardianship assistance was designed to mirror adoption assistance and provide an option for those children in kinship foster care for whom adoption and reunification with parents are not appropriate. States and tribes found that many children in the care of loving relatives were languishing in long-term foster care. These families needed the ongoing financial support of the foster care system, but adoption and the accompanying assistance did not work for them. For example, adoption might not have been an option because they did not want to legally change family relationships. However, by not being able to exit foster care, families were subject to administrative and court oversight even though they did not need it. This unnecessary use of taxpayer funds could be much better spent on children in foster care who needed the oversight.

Ten years ago, in October 2008, The Fostering Connections to Success and Increasing Adoptions Act of 2008 (Fostering Connections Act) unanimously became federal law. Among its many provisions, it provides states and tribes with the option to use federal Title IV-E child welfare funds for guardianship assistance programs (GAP) so children in the care of grandparents and other relatives can exit foster care into permanent homes with their relative caregivers. Congress included this option due to the success of many similar state programs and federal waivers granted to a few states to operate such programs.

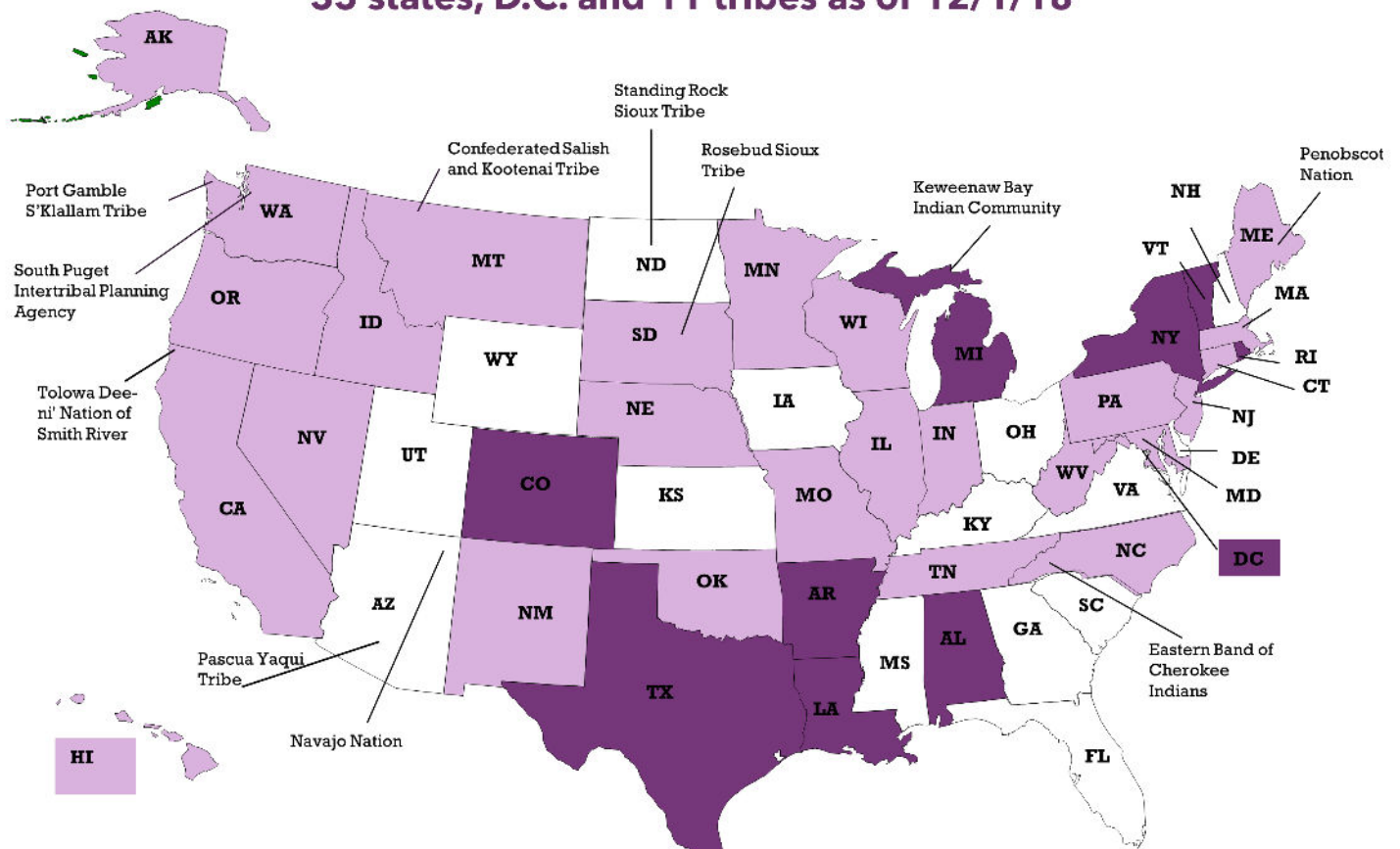


GAP is designed for children and youth:

- who have been in foster care with licensed relative foster parents providing care for at least six months
- for whom reunification with their parents and adoption are not appropriate options

Unlike adoption assistance, not all states offer GAP. In order to take the option to use federal funds for GAP purposes, states and tribes are required to submit an amended Title IV-E Plan to the U.S. Department of Health and Human Services/Children's Bureau for its approval. As of December 2018, thirty-five states, the District of Columbia, and eleven tribes or tribal consortia have been given final approval to operate federal GAP programs. Those states and tribes are noted on this map:

Approved Guardianship Assistance Programs 35 states, D.C. and 11 tribes as of 12/1/18



Light purple = GAP and prior subsidized guardianship programs
Dark Purple = GAP and no prior program

The majority of these 35 states and the District of Columbia also allow children who are not Title IV-E eligible to exit foster care into guardianships with monthly assistance provided through state or local funds. In 2018, Alabama became the most recent state to offer guardianship assistance to non-IV-E eligible children.²⁴

Under both the federal and state programs, after the guardianship agreement is approved by a court as part of the guardianship process, ongoing monthly guardianship assistance payments may be available to relative caregivers who live in jurisdictions with such programs. The subsidy payments usually end when the guardianship terminates or when the child turns 18 (age 19 to 21 in some states).

Furthermore, as with adoption assistance, a relative's expenses incurred in obtaining the guardianship are reimbursable. The federal government requires states and tribes operating IV-E GAP to reimburse relatives seeking guardianship with up to \$2,000 in non-recurring expenses. Most states also reimburse these expenses under their state programs. These expenses can include court filing fees, legal fees and transportation costs to and from the courthouse.

Under the federal program, monthly guardianship assistance cannot exceed the foster care rate and children are categorically eligible for Medicaid; states seem to follow the same rate restriction for their programs and provide Medicaid for those children.

Tax Credits

There is no federal tax credit similar to the adoption tax credit for those seeking guardianship. However, relative guardians may be able to claim the other relevant federal tax credits: EITC, the child tax credit, the additional child tax credit and the child and dependent tax care credit explained above. None of these tax credits are counted as income and will not reduce guardianship assistance or any public benefit.



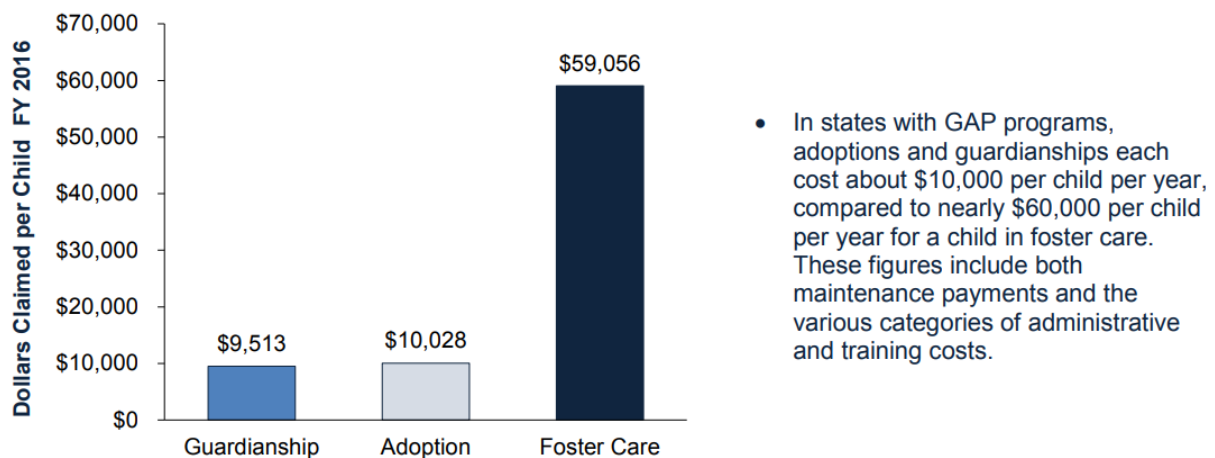
Transitioning from Guardian to Adoptive Parent

Some kinship foster parents once they become guardians have found that they then want to transition to becoming adoptive parents. That situation was foreseen by the Fostering Connections Act, and a child's eligibility for adoption assistance remains the same as if they had never gone into a guardianship. Consequently, if the relative guardian wants to pursue adoption, the child may still qualify for adoption assistance.

Cost Savings with Adoption and Guardianship Assistance

Finally, we end this brief on a simple point. In addition to the many benefits to children and families who exit foster care and create permanent families, adoption assistance and guardianship assistance save taxpayers' money. Consider research completed by U.S. Department of Health and Human Services (HHS), Office of the Assistant Secretary for Planning and Evaluation (ASPE), which shows how much money is saved when children exit foster care into one of these legal relationships and accompanying assistance:

Annual Costs per Child in the GAP Program Resemble Those in the Adoption Assistance Program



Full HHS, ASPE brief available at www.grandfamilies.org/Portals/0/GuardianshipBrief.pdf

Conclusion

Kinship foster parents and those working with them need to fully understand adoption and guardianship before deciding which one to pursue. We hope this brief gives policymakers, advocates, caseworkers and caregivers additional information in their efforts to understand these options, enhance them and make them available to more children. Each child deserves a permanent family.

Endnotes

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Generations United's National Center on Grandfamilies

For twenty years, *Generations United's National Center on Grandfamilies* has been a leading voice for families headed by grandparents, other relatives, and close family friends. Through the Center, Generations United leads an advisory group of organizations, caregivers and youth that sets the national agenda to advance public will in support of these families. Center staff conduct federal advocacy, provide technical assistance to state-level practitioners and advocates, and train grandfamilies to advocate for themselves. The Center raises awareness about the strengths and needs of the families through media outreach, weekly communications and awareness-raising events. It offers a broad range of guides, fact sheets and tools for grandfamilies, which cover issues from education and health care access to financial and legal supports and can be found at www.gu.org and www.grandfamilies.org.



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