Georgetown Journal on Poverty Law and Policy
Volume XXXIII, Number 1, Fall 2025

Parents, Kin, and the State: Family and Households Between Functional Parenthood and Child Protection

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ABSTRACT

Family law scholars are reconsidering traditional parenthood laws, favoring functional definitions that recognize individuals' relationships with children if they perform a parental function and nurture a parent-child bond. Advocates, primarily focused on middle-class LGBTQ families, view this as a normative good for diverse family structures. This Article offers a different perspective through an in-depth study of Kentucky's laws governing parents who share childrearing with their kin amidst substance abuse, incarceration, and poverty. It reveals complex interactions between functional parenthood law and child protection law. Contrary to the depoliticized view that functional parenthood law simply recognizes existing family relationships, these relationships often result from care and household strategies developed in the shadow of the law or as a direct result of state intervention and coordination. The Article argues that functional parenthood law has unrecognized costs, including potentially severe and negative impacts on parent-child relationships in poor and racialized communities, among others.

* Assistant Professor, Cleveland State University College of Law. I am grateful to those who provided helpful conversations, comments, and critiques during various stages of this project. Special mention to Janet Halley, Duncan Kennedy, and M.H. Tse for their close reading and generous feedback and to Courtney G. Joslin and Douglas NeJaime for their leadership in the field and gracious engagement with an earlier draft. I also want to thank Jamie Abrams, Libby Addler, Susan Frelich Appleton, Anna Arons, Albertina Antognini, Paulo Barrozo, Swethaa Ballakrishnen, Kristina Brant, Jeannie Suk Gersen, Cynthia Godsoe, Lisa F. Grumet, Josh Gupta-Kagan, Clare Huntington, Elizabeth Katz, Nicolas Parra-Herrera, Solangel Maldonado, Clare Ryan, Shelly Simana, Holger Spamann, Dinan Wu, and Yiran Zhang. In addition, I thank the participants at the Cleveland State University College of Law Faculty Workshop, USC Gould School of Law Faculty Workshop, University of Dayton School of Law Faculty Workshop, Boston College Law School Faculty Workshop, Harvard Law School S.J.D. Colloquium, Sixth Nonmarriage Roundtable, Jurisprudence of Distribution Workshop, NY Area Family Law Scholars Workshop, Family Law Teachers and Scholars Conference, and Law and Society Early Career Workshop. I am deeply indebted to the Kentuckians who were willing to share their professional knowledge and experiences about this difficult topic. Errors are mine alone.

Introduction

In a widely read memoir about his childhood, J.D. Vance describes his family, whose origins he traces to Appalachian Kentucky, as radically different from the small, private, and "peaceful" nuclear families common among "upper-income white people from the Northeast."[1] He shares a traumatic episode from when he was 12 years old. His infuriated mother, while driving on a highway, threatened to kill them both, leading to her arrest and inviting a child protection agency into his "chaotic" family life:

> Ostensibly, the caseworkers were there to protect me, but it became very obvious . . . that they were obstacles to overcome. When I explained that I spent most of my time with my grandparents . . . they replied that the courts would not necessarily sanction such an arrangement. . . . If things went poorly for my mother in the courts, I was as likely to find myself with a foster family as I was with Mamaw. The notion of being separated from everyone and everything I loved was terrifying. So I shut my mouth, told the social workers everything was fine, and hoped that I wouldn't lose my family when the court hearing came.
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> That hope panned out—Mom didn't go to jail, and I got to stay with Mamaw. The arrangement was *informal*: I could stay with Mom if I wanted, but if not, Mamaw's door was always open. The enforcement mechanism was equally *informal*: Mamaw would kill anyone who tried to keep me from her. This worked for us because Mamaw was a lunatic and our entire family feared her.[2]

Here, the informal arrangement between the parent, the grandparent, and the child[3] served as an alternative to the foster care and child protection system. As Vance saw it, that informality worked out for him but could have gone wrong for many other children; therefore, he sees a problem in how "state laws define the family," which do not recognize "extended networks of kin" that play a crucial role for families like his.[4]

Two distinct legal approaches aim to address the real and perceived problems of the informality that Vance mentions. The first involves reforming the child protection system to incorporate "kinship care," which refers to situations where

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1. J.D. Vance, Hillbilly Elegy: A Memoir of a Family and Culture in Crisis 69 (2016); Terry Gross, *'Hillbilly Elegy' Recalls a Childhood Where Poverty Was the 'Family Tradition,'* NPR: Fresh Air (Aug. 17, 2016, 1:38 PM), https://www.npr.org/2016/08/17/490328484/hillbilly-elegy-recalls-a-childhood-where-poverty-was-the-family-tradition [https://perma.cc/W53Z-UFDC]. For another biography written by a lawyer-turned-lawmaker from Appalachian Kentucky, *see generally* Cassie Chambers, Hill Women: Finding Family and a Way Forward in the Appalachian Mountains (2020).

2. Vance, *supra* note 1, at 242–43 (emphases added).

3. At 12, Vance was arguably old enough to be consulted about this arrangement. This Article, however, does not address the child's role in making kinship care arrangements.

4. Vance, *supra* note 1, at 243; Gross, *supra* note 1.

children are cared for by extended family members or "anyone to whom children and parents ascribe a family relationship."[5] This approach has already been implemented at federal and state levels, although many scholars and policymakers view the current incorporation as insufficient.[6] The second approach, currently gaining traction among U.S. family law scholars and policymakers, advocates for granting Mamaw custodial or parental rights based on her role in Vance's life. This is functional parenthood law.

This Article examines how functional parenthood law can play out in contexts similar to Vance's description, where parents and their kin share in childrearing while simultaneously being susceptible to interventions under the child protection system, which independently incorporates kinship care. It argues that functional parenthood law, in its most revolutionary form and without adequate accommodation, can impose significant costs on poor and racialized families and communities, particularly on parents within those communities.

Historically, legal parenthood has favored biological ties and marital status, typically assigning a maximum of two legal parents to a child, one man and one woman. Legal parents possess a bundle of rights and obligations concerning their child, which are largely inapplicable to those without parental status.[7] Core elements in this bundle include the parents' right to custody of, and duty to care for and support, their child. These views are changing. Family law scholars and policymakers are rethinking and remaking both the rules for assigning legal parent status and the rules of custody and support.[8] Concurrently, there are calls to update the understanding that parental status is generally exclusive and that the bundle of parental rights and obligations is integrated,[9] and to recognize "multiparents" with disintegrated rights and responsibilities.[10]

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5. *Kinship Care*, CHILD WELFARE LEAGUE OF AM., https://www.cwla.org/kinship-care/ [https://perma.cc/4QEY-NP99] (last visited May 29, 2024).

6. *See infra* Section I.A.

7. In an agenda-setting article published more than four decades ago, Katharine Bartlett both stated the law and critiqued it. *See* Katharine T. Bartlett, *Re-thinking Parenthood as an Exclusive Status: The Need for Legal Alternatives When the Premise of the Nuclear Family Has Failed*, 70 VA. L. REV. 879, 879 (1984) ("Parenthood, with few exceptions, is an exclusive status. The law recognizes only one set of parents for a child at any one time, and these parents are autonomous, possessing comprehensive privileges and duties that they share with no one else."). Bartlett's article is still citied to describe and critique the mainstream legal framework. *See, e.g.*, DOUGLAS E. ABRAMS, SUSAN V. MANGOLD & SARAH H. RAMSEY, CHILDREN AND THE LAW: DOCTRINE, POLICY, AND PRACTICE 171–73 (7th ed. 2020). *See also* ABRAMS ET AL., *supra*, at 159–60 ("Usually, a child has a mother and a father and their parental status, with all the rights and responsibilities of parenthood, is not disputed."). *But see infra* notes 9 and 109.

8. *See, e.g.*, *infra* note 10. The backdrop of these discussions includes the legalization of same-sex marriage, advancements in reproductive technology, the rise in nonmarital childbirth, and economic forces causing households to consolidate for economies of scale. *See generally* June Carbone & Naomi Cahn, *Parents, Babies, and More Parents*, 92 CHI.-KENT L. REV. 9, 16-20 (2017).

9. *See, e.g.*, Susan Frelich Appleton, *Parents by the Numbers*, 37 HOFSTRA L. REV. 11, 15, 22–23 (2008); Courtney G. Joslin & Douglas NeJaime, *Multiparenthood*, 99 N.Y.U. L. REV. 1242 (2024) [hereinafter Joslin & NeJaime, *Multiparenthood*].

10. *See, e.g.*, Bartlett, *supra* note 7; Melanie Jacobs, *Why Just Two? Disaggregating Traditional Parental Rights and Responsibilities to Recognize Multiple Parents*, 9 J. L. & FAM. STUD. 309 (2007); Appleton, *supra* note 9; Joslin & NeJaime, *supra* note 9.

In this evolving landscape, many scholars argue for a shift towards functional definitions of parenthood: If individuals have taken on a parental role and nurtured a parent-child bond, the law should recognize their relationship to the child.[11] The argument for prioritizing function over form, based on the understanding that legal forms are lagging behind social practices, is not new in liberal family law discourse.[12] The celebration of functional parenthood law for its inclusivity, as well as the progressive tone in the literature, is also understandable given that the predominant context underlying the discourse has been LGBTQ families and/or reproductive technology.[13] In 2016, in the immediate wake of *Obergefell v. Hodges*,[14] Professor Douglas NeJaime wrote: "Same-sex couples who sought access to marriage sidelined *biological* and *gendered* notions of parentage and instead centered . . . *function*."[15] On the other side of function, therefore, lies tradition.

Recently, however, Professors Courtney G. Joslin and Douglas NeJaime—leading scholars in the law of parenthood—have added a decidedly depoliticized claim that functional parenthood law is nothing revolutionary and simply recognizes already existing social families.[16] To understand how courts across the U.S. apply functional parenthood laws, Joslin and NeJaime compiled and coded a dataset of "every electronically available functional parent decision issued between 1980 and 2021."[17] They found that grandparents and other relatives are the most

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11. *See, e.g.*, Nancy D. Polikoff, *This Child Does Have Two Mothers: Redefining Parenthoodto Meet the Needs of Children in Lesbian-Mother and Other Nontraditional Families*, 78GEO. L. J. 459 (1990); Linda C. McClain, A Diversity Approach to Parenthood in Family Life and Family Law, in WHAT IS PARENTHOOD?: CONTEMPORARY DEBATES ABOUT THE FAMILY 41, 49, 51 (Linda C. McClain & Daniel Cere eds., 2013); Douglas NeJaime, *Marriage Equality and the New Parenthood*, 129 HARV. L. REV. 1185 (2016); Douglas NeJaime, *The Constitution of Parenthood*, 72 STAN. L. REV. 261, 272–73 (2020); Jessica Feinberg, *Whither the Functional Parent? Revisiting Equitable Parenthood Doctrines in Light of Same-Sex Parents' Increased Access to Obtaining Formal Legal Parent Status*, 83 BROOK. L. REV. 55 (2017); Clare Huntington & Elizabeth S. Scott, *Conceptualizing Legal Childhood in the Twenty-First Century*, 118 MICH. L. REV. 1371, 1425–26 (2020).

12. *See* Anne C. Dailey & Laura A. Rosenbury, *The New Law of the Child*, 127 YALE L. J. 1448, 1485, n. 138 (2018) (providing a partial list of this literature). Perhaps the ideological dimension is easier to see through counterexamples. *See, e.g.*, Pontifical Council for the Family, Family, Marriage, and "De Facto" Unions, THE HOLY SEE (July 26, 2000), https://www.vatican.va/roman_curia/pontifical_councils/family/documents/rc_pc_family_doc_20001109_de-facto-unions_en.html [https://perma.cc/X4JS-3QTG] (last visited Nov. 16, 2025); Lynn D. Wardle, *Form and Substance in Parentage Law*, 15 WM. & MARY BILL RTS. J. 203 (2006).

13. *See* Polikoff, NeJaime, and Feinberg, *supra* note 11; Courtney G. Joslin, *Protecting Children (?): Marriage, Gender, and Assisted Reproductive Technology*, 83 S. CAL. L. REV. 1177 (2010); Susan Hazeldean, *Illegitimate Parents*, 55 U.C. DAVIS L. REV. 1583, 1623 (2022).

14. Obergefell v. Hodges, 576 U.S. 644 (2015).

15. NeJaime, *Marriage Equality and the New Parenthood*, *supra* note 11, at 1266 (emphasis added). In addition to function, the original quote also opposes "intent," another new pathway to parenthood that this Article does not address, to traditional notions of parenthood. *Id.*

16. Courtney G. Joslin & Douglas NeJaime, *How Parenthood Functions*, 123 COLUM. L. REV. 319 (2023) [hereinafter Joslin & NeJaime, *Functions*]. For a similar claim about multi-parentage, see Joslin & NeJaime, *Multiparenthood*, *supra* note 9.

17. Joslin & NeJaime, *Functions*, *supra* note 16, at 319. For articles that deeply and critically engage with *Functions*, see Janet Halley, *A Critique of De Facto Parentage in the Uniform Parentage Act*

common users of existing functional parenthood law and that "[i]n the overwhelming majority of cases, the functional parent has been the child's primary caregiver."[18]

In other words, kinship households such as Vance and his Mamaw's[19] have been added as another form of diverse families that would benefit from legal recognition.[20] Joslin and NeJaime's study has also identified Kentucky, a state that had not previously featured prominently in the new parenthood discourse, as the "country's leader in functional parenthood cases."[21] Among the 669 decisions across 32 jurisdictions in their dataset, more than 18 percent were from Kentucky.[22] Hence, the focus of this Article: What is going on in Kentucky?

Before examining how Kentucky parents lose custody of children not only to the state but also to their kin while struggling with substance abuse, incarceration, and poverty, it is imperative to clarify the meaning of functional parenthood law in today's debate. Its most passionate proponents, including Joslin and NeJaime, argue that individuals who perform parental functions should be able to seek full legal parentage. I will call the proposed or existing laws under this approach "functional *parentage* law."[23]

Apart from functional parentage law, which is still at an incipient stage, some states already have what I will call "functional *custody* law": statutes, common law rules, and/or equitable principles allowing non-parents to seek custody based on their caregiving relationship with the child. These laws have largely developed

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(2017) (Sept. 2024) (unpublished manuscript) (on file with author); and Gregg Strauss, *Functional Parentage Description* (Oct. 2025) (unpublished manuscript) (on file with author).

18. Joslin & NeJaime, *Functions*, *supra* note 16, at 319.

19. It took a long time for me to realize that the oft-used term "kinship families" erases the existence of parents. I use the term "households" instead of "families," as it allows us to better recognize or imagine the existence of multiple households which change over time, including original households consisting of children and their parents. *See* Immanuel Wallerstein & Joan Smith, *Households as an Institution of the World Economy*, *in* CREATING AND TRANSFORMING HOUSEHOLDS: THE CONSTRAINTS OF THE WORLD ECONOMY 3, 7, 13 (Wallerstein & Smith eds., 1992). Vance continued his "chaotic but happy routine of splitting time between Mom's and Mamaw's" after the highway incident. VANCE, *supra* note 1, at 113–16. Even after his Mom entered rehab, she remained an important figure in Vance's life—for better or worse. *Id.*

20. For an earlier claim that criticizes how functional parenthood discourse excludes kinship caregivers, see Sacha M. Coupet, *Ain't I a Parent?: Exclusion of Kinship Caregivers from the Debate over Expansions of Parenthood*, 34 N.Y.U. REV. L. & SOC. CHANGE 595 (2010).

21. Clare Huntington, *Pragmatic Family Law*, 136 HARV. L. REV. 1501, 1508 & n.35 (2023) (citing Joslin & NeJaime's *Functions* and noting that "[a]fter adjusting for state population, the rate of functional parenthood cases in Kentucky . . . is 0.27 cases per 10,000 people, as compared with 0.08 in Pennsylvania and 0.02 in California," the two states that followed Kentucky in Joslin & NeJaime's dataset); Courtney G. Joslin & Douglas NeJaime, *J.D. Vance's Views on Stepparents Are Straight Out of Project 2025*, SLATE (Aug. 2, 2024, 11:00 AM), https://slate.com/news-and-politics/2024/08/jd-vance-stepparents-kamala-project-2025.html [https://perma.cc/JD92-38XD].

22. Joslin & NeJaime, *Functions*, *supra* note 16, at 353–54.

23. The Uniform Parentage Act of 2017 represents this approach and incorporates a set of procedural and substantive rules to establish parentage under functional standards. UNIF. PARENTAGE ACT § 609 (UNIF. L. COMM'N 2017); Courtney G. Joslin, *Nurturing Parenthood Through the UPA*, 127 YALE L.J. F. 589, 601–02 (2017).

at the state level under the uncertain limits and necessities posed by *Troxel v. Granville*, the U.S. Supreme Court case that reaffirmed parents' constitutional right to make decisions concerning the care, custody, and control of their child in the context of grandparent visitation.[24] The plurality opinion in *Troxel* made clear that the law must give some deference to parents when non-parents seek custody or visitation over parents' objections—but with much ambiguity and little guidance on what that deference must look like.[25] Although their existence and prevalence vary widely by state, functional custody laws enjoy a national reform trend.[26]

In its contemporary usage, the confusing term "functional *parenthood* law" can refer to either functional parentage law, functional custody law, or both, thereby conflating full parentage and custody. The vast majority of cases in Joslin and NeJaime's dataset are custody, not parentage, decisions.[27] The conflation is problematic because, currently, parentage encompasses much more than custody. It includes not only legal incidents across different fields of law such as inheritance, tax, and citizenship, but also the symbolic power supported by both constitutional rights discourse and popular understandings of what "parent" means. It is also more permanent, as a parent without any custodial rights is still a parent.

To some degree, though, the conflation is understandable. Functional parentage law as currently imagined is based on existing functional custody laws, with similar requirements that claimants must prove in an adversarial proceeding against legal parents.[28] Thus, functional parentage claims are likely to resemble existing functional custody claims. I agree with Joslin and NeJaime that one can draw insights from existing functional custody cases to make educated predictions about what functional parentage law will do. The difference is that they base their reform claims largely on the successes and benefits of existing functional custody law, whereas this Article also considers its failures and costs. To avoid confusion, I will distinguish between custody and parentage whenever possible, except when citing others who use the term functional parenthood in ways that conflate parentage with custody or visitation.

Through an in-depth case study of Kentucky, this Article offers an understanding of functional custody/parentage law that differs from the depiction offered by its advocates in two major ways:

First, it traces the mutual interactions between functional custody/parentage law and child protection law. Joslin and NeJaime, while acknowledging that

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24. Troxel v. Granville, 530 U.S. 57, 60–61, 72 (2000).

25. *Id.* at 68–70, 72–74.

26. *See infra* Section I.D.

27. What counts as a "functional parent doctrine" in this study is explained over many pages. Joslin & NeJaime, *Functions*, *supra* note 16, at 329–45. For instance, mere visitation is included alongside full parentage. *Id.* at 340–41. For discussions on the distinctions between functional custody and parentage law, *compare* Solangel Maldonado, *De Facto Parents, Legal Parents, and Inchoate Rights*, 91 U. CHI. L. REV. 557 (2024), *with* Douglas NeJaime, *Parents in Fact*, 91 U. CHI. L. REV. 513 (2024).

28. *See infra* Section I.D.

much remains to be studied regarding functional parenthood law's role in child protection cases,[29] nonetheless stress that it "serve[s] both child-protective and family-preserving roles."[30] In essence, functional parenthood law is expected to prevent what Vance feared might happen[31]—being placed with a stranger foster family, "separated from everyone and everything [he] loved."[32] On this view, functional parenthood law will bolster kinship care and mitigate some harms of the child protection system in separating families.[33]

However, as much as functional parentage law can work against the child protection system, it can also work in tandem with it. Contrary to the depoliticized understanding that functional custody/parentage law simply recognizes and responds to already existing families, the family relationships recognized by functional custody/parentage law do not exist in a legal vacuum. Often, they emerge as a direct result of state intervention and coordination under the child protection system, which itself incorporates kinship care.[34] Even without direct intervention/coordination, these relationships can result from care and household strategies made in the shadow of the child protection system.[35] Depending on individual family dynamics and local practices of child protection, functional custody/parentage law—in conjunction with child protection law—can also increase the likelihood or permanency of parent-child separation, rather than preserve families facing state intervention.

Second, this Article re-centers parents, surfacing the distributional stakes at play when they rely on their kin, including the power dynamics as well as the pleasures and pains of childrearing. The existing literatures on both functional custody/parentage law and kinship care tend to minimize or gloss over these stakes between parents and kin.[36] They often remove parents from the picture, portraying kin caregivers as "stepping up" for children in parents' absence or inability.[37] Similarly, they skip over conflicts between family members, real or potential.[38]

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29. Joslin & NeJaime, *Functions*, *supra* note 16, at 421–22.

30. *Id.* at 422.

31. *Id.* at 420–21. *See also* Anne L. Alstott, Anne C. Dailey, & Douglas NeJaime, *Psychological Parenthood*, 106 MINN. L. REV. 2363, 2416–17 (2022) (suggesting that psychological parent doctrines may preserve children's existing relationships with "stepparent, grandparent, or other relative" and prevent their removal into stranger foster care).

32. VANCE, *supra* note 1, at 243.

33. *See infra* Section I.A.

34. *See infra* Sections I.A, II.C.

35. *See infra* Section I.B.

36. S*ee, e.g.*, Joslin & NeJaime, *Functions*, *supra* note 16, at 319–96 (arguing that functional parenthood law does not intrude on family privacy because "in a significant share of functional parent cases in the data set, the person recognized as the child's functional parent is the only person truly parenting the child," and implying that functional parent recognition benefits parents because it does not terminate their parental rights). *But see id.* at 421–22 (stating that legal recognition of functional parent "may have costs for the legal parent, the functional parent, and the child"). For literature on kinship care, see *infra* note 59.

37. Joslin & NeJaime, *Functions*, *supra* note 16, at 362–67, 391–96.

38. *Id.* at 371 n.265, 393 (ruling out functional parents' child protection referrals as exceptional).

True, many kin caregivers provide valuable care for children who might otherwise face worse circumstances; but they are also complex human beings who negotiate kinship care with parents. Similarly, parents are not always simply missing or unable to care; in many cases, they struggle, sometimes fail, and sometimes succeed. When parents' informal care arrangements with kin fall through, or as they navigate kinship care orchestrated by the state, painful intra-kin conflicts sometimes arise. Instead of shying away from these conflicts, some of which are inevitable, this Article sheds light on ways in which legal rules enable, condition, and decide them.

Ultimately, this Article cautions that functional parentage law is not without costs when applied to populations radically different from middle-class families who *plan* their familial relationships.[39] Nationwide, millions of children experience parental incarceration,[40] extreme poverty,[41] or parental substance abuse.[42] In poor, and often racialized, communities where these situations are common, parents *must* rely on kin networks to provide essential care for children while being susceptible to state intervention. I term these families and communities *peripheral*.[43] Without proper safeguards, functional parentage law's impact on

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39. For comparison between "elite" and "non-elite" modes of reproduction and parenthood, see June Carbone & Naomi Cahn, *Jane the Virgin and Other Stories of Unintentional Parenthood*, 7 UC Irvine L. Rev. 511, 514 (2017). For old and recent critiques of functional parenthood law rooted in its potential implications for minority, under-represented, or lower income families, see Annette Ruth Appell, *Virtual Mothers and the Meaning of Parenthood*, 34 U. Mich. J. L. Reform 683 (2000); and Katharine K. Baker, *Equality and Family Autonomy*, 24 U. Pa. J. Const. L. 412 (2022).

40. An estimated 5.1 million children, or 7%, experience the incarceration of a parent over the course of their childhood. Annie E. Casey Found., A Shared Sentence, 5 (2016), https://www.aecf.org/resources/a-shared-sentence [https://perma.cc/LL3S-DHFW].

41. 5.5 million children, or 8%, live in extreme poverty, in households with incomes less than 50% of the federal poverty level. *Children in Extreme Poverty in United States*, Annie E. Casey Found. (Nov. 2023), https://datacenter.aecf.org/data/tables/45-children-in-extreme-poverty [https://perma.cc/KEB2-Z3FM].

42. An annual average of 8.7 million children, or 12%, live in a household with at least one parent who had a substance use disorder in the past year. Rachel N. Lipari & Struther L. Van Horn, U.S. Dep't of Health & Hum. Servs., Children Living with Parents Who Have a Substance Use Disorder (Aug. 24, 2017), https://www.samhsa.gov/data/sites/default/files/report_3223/ShortReport-3223.html [https://perma.cc/RDA7-CVK8]. To be clear, there are differences among substance use, substance abuse, and substance use disorder, and parental substance use even without a disorder can lead to state intervention in poor and racialized communities. In this Article, I will use the term "substance abuse" without distinguishing among these categories.

43. My use of the term 'peripheral' instead of the more common term 'marginalized' is intended to capture center-periphery dynamics operating at two levels. On one hand, the households featured in this Article are often situated in the peripheries of capitalist production. *See* Wallerstein & Smith, *supra* note 19, at 14. On the other hand, the laws applicable to them are often in the peripheries of U.S. legal knowledge production. Until recently, third-party custody statutes, which grant standing to non-parents to seek legal custody, have received relatively little scholarly attention. *But see infra* note 85. In a sense, functional parenthood discourse has brought these statutes into central legal discourse, such as articles published in prestigious law reviews with a broad audience. In this dynamic process of knowledge production, *some* third-party custody laws were recategorized as functional parenthood laws, while others were not. *See, e.g.*, *infra* note 183 and accompanying text. I have written more about the center/periphery framework in general and its application in this Article in Rama Hyeweon Kim, Comparative Law From the Periphery: Traveling and Changing Legal Ideas on Family, Sex, and Gender in South

parent-child relationships in the United States' peripheries may be more severe than currently recognized.

The Article proceeds as follows: Part I outlines the legal landscape of kinship care, including both private custody/parentage law and public child protection law.

Part II, the heart of this Article, offers a granular description of this legal framework's manifestation in Kentucky, revealing how the losses of parents who lack resources and discursive power might go unnoticed amid perplexing legal technicalities. The descriptive analysis draws from various sources, including recent appellate court cases and qualitative interviews. To understand the contemporary legal and, to a lesser extent, social context where the state's functional custody law is actually or potentially relevant, I reviewed 79 appellate cases from 2019 through 2023 where the law was applied, invoked, or simply mentioned.[44] Additionally, I conducted thirteen interviews with attorneys, judges, child protection agency workers, and policy advocates.[45] These interviews provided deeper insight into the appellate cases.

Based on the Kentucky case study, Part III offers observations about the likely impacts of functional parentage law reform in the kinship care context. It then argues that the currently representative law reform proposal, and the legal literature supporting it, are insufficiently attentive to its implications, and especially its negative implications, for peripheral families and communities, and especially for peripheral parents.

I. Kinship Care: Public and Private, Formal and Informal

At any given point in time, an estimated 2.5 million children are in kinship care.[46] This figure requires cautious interpretation. Throughout a child's upbringing, numerous adults, including kin members, provide care, whether compensated with money or not. Thus, the line between a child being under parental care with support from kin[47] and being in non-parental or kinship care is not always clear and can change over time. Child welfare literature primarily distinguishes these arrangements based on living situations and the degree of parental involvement

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Korea and the United States (2025) (S.J.D. Dissertation, Harvard Law School) (on file with Harvard Law School Library).

44. Further details about my approach to case selection, as well as the list of the cases I reviewed, are available in Appendix A.

45. Details of these interviews are available in Appendix B. Hereinafter, I will cite the interviews by names only, omitting the details.

46. *Children in Kinship Care in United States*, Annie E. Casey Found. (Sept. 2023), https://datacenter.aecf.org/data/tables/10455-children-in-kinship-care [https://perma.cc/9YWU-SH4Z].

47. Childcare literature has a name for this situation: Family, Friend, and Neighbor (FFN) care. Yiran Zhang, *Subsidizing the Childcare Economy*, 34 Stan. L. & Pol'y Rev. 67, 80 (2023).

compared to that of the kin caregiver. Even so, kinship households may not be permanent—a dynamic that could shift with law reforms.[48]

This Part shows how both child protection law and custody/parentage law provide background and foreground rules for parents and kin who raise these 2.5 million children together, splitting and (re)structuring households along the way. It is sometimes assumed that kinship care arrangements can be divided into two categories: public and formal (i.e., kinship foster care) or privately arranged and informal, with the latter comprising the overwhelming majority and awaiting formalization by functional custody/parentage law.[49] However, the reality is far more complex.

Kinship care arrangements exist along multiple continua rather than as a simple dichotomy. Two key axes to consider are: the degree of in/formality (e.g., informal caregiving, guardianship) and the degree of child protection agency involvement (e.g., none, physical custody transfer). To these, a third axis of the stage of the child protection case (e.g., pre-case opening, permanency-planning) may be added. These axes create a multidimensional space in which kinship care arrangements can be situated. Functional parentage law can impact every point along these continua. To capture this complexity, this Part proceeds in four sections:

First, I offer general explanations of the child protection system, its problems, and its incorporation of kinship care, and set out the questions that must be explored to fully comprehend functional parentage law's implications in the kinship care context. This overview also contextualizes the given problem within the critical discourse surrounding the child protection system. Second, I analyze how parents and kin negotiate kinship care privately prior to formalization. Third, I explain the range of private and public rules that can lead to kin having formalized custody. Functional custody/parentage law must be considered within this entire economy of legal rules. Finally, I introduce competing functional custody/parentage law reform proposals.

A. The Child Protection System and Kinship Care

The child protection system poses serious threats to parents: If they fail to provide proper care and instead abuse or neglect their child, the state will intervene and potentially take custody and control of the child; failure to comply with the state's demands to reform may even result in termination of parental rights—known as the "death penalty" in child protection.[50] By the same token, the system

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48. In kinship care literature, one can find statements and statistics that capture both transiency and permanency of kinship care/households. For instance, compare the statement, "Nationally, relatives or family friends are raising approximately 2.7 million children because their parents can no longer care for them," with the statement, "Overall, 1 in 11 children lives in kinship care at some point before the age of 18. One in 5 black children spends time in kinship care at some point in their childhood." Both of these appear on the same webpage. The former gives an impression of permanent kinship households for 2.7 million, or 4%, of American children, whereas the latter emphasizes transience. *Stepping Up For Kids*, ANNIE E. CASEY FOUND. (Jan. 1, 2012), https://www.aecf.org/resources/stepping-up-for-kids [https://perma.cc/F2CU-NM5X].

49. *See, e.g.*, Coupet, *supra* note 20, at 603–04.

50. HINA NAVEED, HUMAN RTS. WATCH, "IF I WASN'T POOR, I WOULDN'T BE UNFIT" (Nov. 17, 2022), https://www.hrw.org/report/2022/11/17/if-i-wasnt-poor-i-wouldnt-be-unfit/family-separation-crisis-us-child-welfare [https://perma.cc/HF35-EHU5].

offers promises: to children, protection from abusive or neglectful parents, and to (reformable) parents, the opportunity to reunify with their children if they comply and turn their lives around.[51]

While seemingly unproblematic and essential for children's welfare, the system both reflects and perpetuates grave inequalities in the U.S. Three-quarters of substantiated child protection cases nationwide concern child neglect, which is strongly correlated with poverty, rather than child abuse.[52] Black children, despite comprising 14% of the child population in the U.S., constitute 23% of children in foster care.[53] These facts have sparked serious critiques that the child protection system separates parents and children in poor and racialized communities too readily and, in many cases, without offering better alternatives for the children. Highlighting the harms inflicted by state machineries on poor and racialized communities,[54] many critics of the system now call it "family policing system" or "family regulation system,"[55]

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51. The system poses its threats and offers its promises through a process. The federal government sets broad standards and provides partial funding, while state laws define the specifics of each system. States have mandatory reporting laws requiring that certain individuals, typically professionals, to report suspected child maltreatment. If a referral is accepted, the agency initiates an investigation, with social workers conducting home visits. After the investigation, the agency may substantiate the report, concluding that the allegation or risk of maltreatment is supported under state law. Federal law requires states to make "reasonable efforts" to prevent or eliminate the need for foster care placements. Therefore, agency responses in substantiated cases include providing preventive services to address family issues. However, if a child's safety cannot be ensured at home, the child may be placed in foster care. After removal, federal law again requires states to make "reasonable efforts" to reunify the child with their parents. This involves creating and implementing a case plan to rehabilitate the parent, which usually includes various assessments, classes, and other obligations. States do not support reunification indefinitely. Under federal law, if children have been in foster care for 15 out of the previous 22 months, states should ordinarily move to terminate parental rights, making the children eligible for adoption. Courts are involved throughout the process, although the sufficiency and effectiveness of judicial oversight are contested. *See generally* Martin Guggenheim, *General Overview of Child Protection Laws in the United States*, *in* CHILD WELFARE CASES: ADVICE AND GUIDANCE FOR FAMILY DEFENDERS 1, 3–6 (Martin Guggenheim & Vivek S. Sankaran eds., 2015) (explaining the federal legal framework on child protection). *See also* TINA LEE, CATCHING A CASE: IN EQUALITY AND FEAR IN NEW YORK CITY'S CHILD WELFARE SYSTEM 40–51 (2016) (offering a brief overview of the life of a child protection case in New York).

52. CHILD.'S BUREAU, U.S. DEP'T OF HEALTH & HUMAN SERVS., CHILD MALTREATMENT 2022 ii (2024), https://www.acf.hhs.gov/sites/default/files/documents/cb/cm2022.pdf [https://perma.cc/25AG-2ERU].

53. *Foster Care Race Statistics*, ANNIE E. CASEY FOUND. (May 14, 2023), https://www.aecf.org/blog/us-foster-care-population-by-race-and-ethnicity [https://perma.cc/9QU7-ZGK8] (last visited Aug. 13, 2024).

54. *See, e.g.*, S. Lisa Washington, *Pathology Logics*, 117 NW. U. L. REV. 1523 (2023); Shanta Trivedi, *The Harm of Child Removal*, 43 N.Y.U. REV. L. & SOC. CHANGE 523 (2019); Anna Arons, *The Empty Promise of the Fourth Amendment in the Family Regulation System*, 100 WASH. U. L. REV. 1057, 1071–76 (2023).

55. Nancy D. Polikoff & Jane M. Spinak, *Foreword: Strengthened Bonds: Abolishing the Child Welfare System and Re-Envisioning Child Well-Being*, 11 COLUM. J. RACE & L. 428, 431–32 (2021). This Article's descriptive analysis aligns with concerns raised by family regulation/policing scholars regarding the severe harm inflicted by excessive interventions of the child protection system on poor and racialized families and communities. Nonetheless, I continue to use the term "child protection" throughout—with the proviso that the outcomes can be quite unprotective of actual children—for two reasons. First, to avoid a structuralist picture that pits the family as a group against the agency, since a major goal of this Article is to shed light on conflicts within the family, which are shaped by both public

with some scholars, lawyers, and advocates calling for its abolition.[56]

This system incorporates kinship care. Since the mid-1990s, a broad consensus has emerged in the child welfare field that kinship care is preferable to stranger foster care.[57] This has led to a significant integration of kinship care within the foster care system, with one-third of children in foster care currently placed in kinship foster homes.[58] However, many reformers and critics of the child protection system deem the current situation insufficient.[59] They argue that child protection agencies frequently fail to prioritize kin at various points of state intervention, despite the broad consensus on kinship care's benefits, which is recognized by federal law.[60] A paradigmatic case, again, is what Vance feared might happen: social workers taking him from both his Mom *and* Mamaw because, "[i]n the eyes of the law, [his] grandmother was an untrained caretaker without a foster license."[61]

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and private legal rules. Second, "family policing system" is associated with abolitionist claims, which diverge from my vision, whereas "family regulation" is an ambiguous term. Many aspects of the legal system regulate families, not just abuse and neglect law tied to the foster care system. For poor and racialized families under intense state surveillance, the framework of a dual family law system remains revealing and productive. *See generally* Jacobus tenBroek, *California's Dual System of Family Law: Its Origin, Development, and Present Status (Part I)*, 16 STAN. L. REV. 257 (1964). I use the term "child welfare" to refer to the broader field that includes, but is not limited to, abuse and neglect and the foster care system.

56. *See generally* DOROTHY ROBERTS, TORN APART: HOW THE CHILD WELFARE SYSTEM DESTROYS BLACK FAMILIES—AND HOW ABOLITION CAN BUILD A SAFER WORLD (2022); ALAN J. DETTLAFF, CONFRONTING THE RACIST LEGACY OF THE AMERICAN CHILD WELFARE SYSTEM: THE CASE FOR ABOLITION (2023); JANE M. SPINAK, THE END OF FAMILY COURT: HOW ABOLISHING THE COURT BRINGS JUSTICE TO CHILDREN AND FAMILIES (2023).

57. *See, e.g.*, Jennifer Miller, *Creating a Kin-first Culture*, CHILD L. PRAC. TODAY (July 1, 2017) https://www.americanbar.org/groups/public_interest/child_law/resources/child_law_practiceonline/child_law_practice/vol-36/july-aug-2017/creating-a-kin-first-culture-/ [https://perma.cc/QXV2-DXWC]; Mark F. Testa, *Introduction: Kinship Care Policy and Practice*, 95 CHILD WELFARE, no. 3, 2017, at 13.

58. CHILD.'S BUREAU, ADMIN. FOR CHILD. & FAMS., U.S. DEP'T OF HEALTH & HUM. SERVS., THE AFCARS REPORT 2 (May 2023), https://www.acf.hhs.gov/sites/default/files/documents/cb/afcars-report-30.pdf [https://perma.cc/4H3R-U97K].

59. *See, e.g.*, Washington, *supra* note 54, at 1558–61 (discussing how potential kinship caregivers are excluded by the family regulation system's "pathology logics"); Cynthia Godsoe, *An Abolitionist Horizon for Child Welfare*, LPE PROJECT (Aug. 6, 2020), https://lpeproject.org/blog/an-abolitionist-horizon-for-child-welfare/ [https://perma.cc/86KD-NUAW] (discussing how "[s]weeping bans on kinship foster placements due to minor criminal convictions or inadequate housing" force children to live with strangers); Joshua Gupta-Kagan, *The New Permanency*, 19 U.C. DAVIS J. JUV. L. & POL'Y 1, 35–38 (2015); Joshua Gupta-Kagan, *Creating a Strong Legal Preference for Kinship Care*, 1(4) FAM. INTEGRITY & JUST. Q. 18 (2022) [hereinafter Gupta-Kagan, *Strong Preference*]. The focus on child protection agencies' failure to prioritize kinship care has inadvertently led to a lack of attention on the intricacies of state-coordinated kinship care. An early exception came from none other than Dorothy Roberts, the most pioneering scholar in the family policing/regulation literature. Dorothy E. Roberts, *Kinship Care and the Price of State Support for Children*, 76 CHI.-KENT L. REV. 1619 (2001). Two recent exceptions are: Deidre M. Smith, *Keeping it in the Family: Minor Guardianship as Private Child Protection*, 18 CONN. PUB. INT. L.J. 269 (2019); and Josh Gupta-Kagan, *America's Hidden Foster Care System*, 72 STAN. L. REV 841 (2020) [hereinafter Gupta-Kagan, *Hidden Foster Care*].

60. Gupta-Kagan, *Strong Preference*, *supra* note 59.

61. VANCE, *supra* note 1, at 243.

Therefore, a subtle convergence exists towards granting more legal recognition to kinship households between the critical discourse surrounding the child protection system and the functional custody/parentage discourse, despite the fact that they are not currently in conversation.[62] Against this backdrop, a spoken and unspoken hope seems to exist among family law scholars that functional parentage law would shield families from the child protection system's over-interventions.[63]

I will return to the question of whether it is feasible and desirable to use functional parentage law to further increase kinship care after considering the Kentucky case.[64] Before that, however, there are two other questions that must be explored to fully comprehend functional parentage law's implications for peripheral families and communities. Currently, these questions are not being asked amid the apparent disconnect and subtle convergence between the two discourses.

First is the question of how functional parentage law will interact with already-existing kinship care practices under child protection law. Today, child protection agencies across the U.S. prompt, reinstate, initiate, or impose kinship care in their investigation, removal/placement, and permanency practices.[65] State-coordinated kinship care spans a spectrum from completely informal to strictly formal, just as privately arranged kinship care does. Beyond kinship foster care, where the state takes legal custody and the kin caregiver becomes a licensed foster caregiver, both state-coordinated and privately arranged kinship care can involve formalizing kinship caregivers' roles through guardianship, legal custody, power of attorney, or no formal arrangement.

According to some researchers' estimates, among all children in kinship care in the U.S., 40% have had some level of agency involvement.[66] This figure is in addition to the 11% of children in kinship foster care and comparable to the 49% in privately arranged care with no agency involvement.[67] While these estimates, based on a large-scale, nationally representative survey, have limitations, they indicate that a significant number of children are in kinship care following encounters with the child protection system.[68] Functional parentage law will become relevant to these children and their parents/kin.

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62. This is not to say that critics of the child protection system would necessarily agree with the precise ways in which functional custody/parentage laws increase kin rights. *See, e.g.*, Gupta-Kagan, *Strong Preference*, *supra* note 59, at 27 (arguing that states should create a strong legal preference for kinship care but should not provide counsel or grant standing to kin, as the latter would undermine reunification efforts).

63. *See, e.g.*, Joslin & NeJaime, *Functions*, *supra* note 16, at 411; Alstott et al., supra note 31, at 2417.

64. *See infra* Section III.A.

65. State-coordinated kinship care operates within the framework explained *supra* note 51 as a general context, but also exists as exceptions at various points. *See infra* Section II.C.

66. Mathew D. Bramlett et al., *Health and Well-Being of Children in Kinship Care: Findings from the National Survey of Children in Nonparental Care*, 95 CHILD WELFARE, no. 3, 2017, at 41, 49. The 40% estimate includes both children who never entered foster care and those who were in foster care and then released through a kinship care arrangement (but are not adopted by the kin).

67. *Id.*

68. *Id.* Bramlett et al.'s estimates are based on data drawn from national surveys conducted between 2011 and 2013. The 2013 National Survey of Children in Nonparental Care is "the first large-

The second question concerns the dynamics and relationships within the families and communities that both the critical discourse of the child protection system and the functional custody/parentage discourse aim to preserve. Both child protection law and functional custody/parentage law have the potential to shape these dynamics, resolve or create intra-kin conflicts, and formalize informal relationships within these families and communities. In the following pages of this Part, I will elaborate on this point.

B. Bargaining in the Shadow of Child Protection

Let us begin with how parents and kin negotiate private kinship care, assuming a state that does not have functional custody/parentage law.[69]

When those in the child welfare field coined the term "kinship care" in the 1990s[70] and began efforts to integrate kinship care within the public child protection and foster care system, they highlighted the longstanding importance of kinship care across cultures and throughout history.[71] Advocates for public and formal kinship care often referenced Carol Stack's seminal work, *All Our Kin*,

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scale, population-based, nationally-representative survey to focus on issues specific to this group of children." Nonparent caregivers surveyed include foster caregivers as well as non-foster caregivers. Two other notable findings are as follows: First, non-Hispanic Black children constituted 35.1% of children in nonparental care, while only representing 13.5% of American children overall. Children's race did not differ significantly between those cared for by foster caregivers and by non-foster caregivers. Second, despite the term "nonparental care," many parents still played a role in their children's lives. According to the survey, 32.9% of children in non-foster care saw their nonresidential mother weekly or more often, and 15.7% saw their nonresidential father weekly or more often. U.S. DEP'T OF HEALTH & HUM. SERVS., THE COMPLEXITIES OF KINSHIP CARE: KEY FINDINGS FROM THE 2013 NATIONAL SURVEY OF CHILDREN IN NONPARENTAL CARE (May 2016), https://aspe.hhs.gov/reports/complexities-kinship-care-key-findings-2013-national-survey-children-nonparental-care [https://perma.cc/YPQ9-V7Z7]; U.S. DEP'T OF HEALTH & HUM. SERVS., CHILDREN LIVING APART FROM THEIR PARENTS: HIGHLIGHTS FROM THE NATIONAL SURVEY OF CHILDREN IN NONPARENTAL CARE 2, 7, 21 (May 2016), https://aspe.hhs.gov/reports/children-living-apart-their-parents-highlights-national-survey-children-nonparental-care [https://perma.cc/76VT-V87S].

69. Even under the broad contemporary definition of functional parenthood law that includes visitation, one-third of the states do not have such laws. Joslin & NeJaime, *Functions*, *supra* note 16, at 323; Hazeldean, *supra* note 13, at 1610.

70. According to Oxford English Dictionary, the word "kinship" as in "kinship group," "kinship structure," or "kinship system" has been used since 1866 by anthropologists to describe "ties of relationship, by descent, marriage, or ritual, that form the basis of social organization." *Kinship, 1.b*, OXFORD ENG. DICTIONARY ONLINE, http://www.oed.com/dictionary/kinship_n?tab=meaning_and_use#40207340 [https://perma.cc/S24L-5EHW] (last visited Oct. 26, 2025). However, the term "kinship care" gained widespread use within the child welfare field in the 1990s. Some in the field believe that Carol Stack coined the term in her 1974 book, *infra* note 72, which she did not. *See, e.g.*, Rob Geen, *Kinship Foster Care: An Ongoing, Yet Largely Uninformed Debate*, *in* KINSHIP CARE: MAKING THE MOST OF A VALUABLE RESOURCE 1, 2 (Rob Geen ed., 2003). The Child Welfare League of America notes that the term was "adopted" from Stack's work and was first recommended by the 1991 National Commission on Family Foster Care. The Child Welfare League of America, *Written Comment on Separate Licensing Standards for Relative and Kinship Foster Family Homes (RIN 0970-AC91)*, https://www.cwla.org/wp-content/uploads/2023/04/CWLA-kinship-NPRM-comment.pdf [https://perma.cc/K9P2-2G9L].

71. *See* Dana Burdnell Wilson, *Kinship Care: A Natural Bridge*, 3 CHILD.'S VOICE, Spring 1994, at 22.

which showcased the vital role of private and informal kin caregiving in inner-city Black communities in the 1960s.[72]

There is a crucial difference between the peripheral communities that Stack describes and those that exist in today's reality. Poor Black mothers in *All Our Kin* managed to share parental responsibilities and rights among kin members largely outside the "legal system of the courts and welfare offices."[73] As Stack saw it, there was little interaction between the "local, folk system of rights and duties pertaining to parenthood" and the "publicly sanctioned laws of the state."[74] Mothers who turned to the formal legal system to regain custody were frowned upon, and these reputational "sanctions within the community" were the only, yet highly effective, enforcement mechanism of the informal system.[75]

By contrast, the expansion of formal regulations in child protection as a threat or a promise, whether perceived or actual, casts a long shadow over today's private and informal space.[76] Parents facing the risk of state intervention—particularly Black parents, but others as well—are keenly aware of this frightening aspect and factor it into their daily decision-making.[77] When contemplating whether to leave their child with kin, the potential for child protection investigations can sway their decision in two directions: They may either lean on their kin network for vital care to preempt unwanted state intervention,[78] or they may "stay to themselves" and eschew social connections to shield themselves from unwelcome child protection agency referrals that could arise from personal conflicts.[79]

Similarly, potential and current kin caregivers navigate their relationships with parents in the shadow of child protection law. They might be supportive of parents' attempts to prevent state intervention in the family or community. Or they might assume custody by threatening to report the parent to the child protection agency, motivated either by a belief that it was necessary for the child's well-

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72. *See generally* CAROL B. STACK, ALL OUR KIN: STRATEGIES FOR SURVIVAL IN A BLACK COMMUNITY (1974). *But see* MATTHEW DESMOND, EVICTED: POVERTY AND PROFIT IN THE AMERICAN CITY 161–62 (2016) (describing how social and legal changes since the 1960s have destroyed kin networks in poor communities).

73. STACK, *supra* note 72, at 46.

74. *Id.* at 46, 89.

75. *Id.*

76. For the concept of bargaining in the shadow of legal rules, see Robert H. Mnookin & Lewis Kornhauser, *Bargaining in the Shadow of the Law: The Case of Divorce*, 88 YALE L.J. 950 (1979).

77. *See generally* KELLY FONG, INVESTIGATING FAMILIES: MOTHERHOOD IN THE SHADOW OF CHILD PROTECTIVE SERVICES (2023).

78. *See, e.g.*, S.G. v. Cabinet for Health & Fam. Servs., 652 S.W.3d 655 (Ky. Ct. App. 2022).

79. FONG, *supra* note 77, at 39–41, 73–75. The prominence of the child protection system in the consciousness and experiences of those living in peripheral communities is a common theme in ethnographies focused on these communities. *See, e.g.*, DESMOND, *supra* note 72, at 262 (describing a subject's suspicion that a new friend, who quickly began calling themselves sisters, made a referral to child protective services), 289–90 (describing another subject's suspicion that a former neighbor and a current roommate made a referral), 320–21, 390–91 n. 4. For a recent example demonstrating how threats of child protection agency referrals can play a role in interpersonal conflicts, see Joseph Goldstein, *At 30, She Died in Childbirth. It Shredded Her Brooklyn Family.*, N.Y. TIMES (July 2, 2024), https://www.nytimes.com/2024/07/02/nyregion/christine-fields-woodhull-childbirth-death.html#:~:text=It%20Shredded%20Her%20Brooklyn%20Family,threatened%20to%20tear%20it%20apart [https://perma.cc/HL4T-7ENP].

being and the parent's own good, by desires to keep the child, or by both reasons, potentially resulting in an "unofficial custody loss" for the parent.[80]

Before moving on to the more public or formal situations, it is worth noting that many states now offer ways for kin caregivers to make day-to-day educational or medical decisions through a custodial power of attorney signed by a parent or, in some states including Kentucky, through consent laws that allow them to make such decisions without a parental signature.[81] Therefore, while the need for long-term stability that formalization aims to deliver remains a concern, state laws have evolved to address the particular logistical challenge of informality once stressed by advocates of kinship care—that caregivers had difficulty enrolling children in school or getting them medical care.[82]

C. Pathways to Formalization

Still assuming a state that does not have functional custody/parentage law, there are four scenarios that lead to kin taking on a formal caregiving role.[83] These scenarios range from the most private pathway in the sense that the child protection agency is not directly involved, to the more public pathways in the sense that the agency is heavily involved:

TABLE 1: PATHWAYS TO FORMALIZATION

Scenarios	Law
1. Kin seeking formalization file a custody action.	Private custody law
2. Kin seeking formalization file an abuse or neglect petition in court.	Private right of action under public child protection law
3. Kin seeking formalization make a child protection agency referral, leading to state-coordinated kinship care.	Private use of public child protection law
4. Child protection agency involvement is triggered by factors other than referrals by kin, leading to state-coordinated kinship care.	Public use of public child protection law

80. Kathi Lynn Harland Harp, Substance Use and Crime as Predictors and Consequences of Custody Issues: A Longitudinal Analysis of African American Mothers 17 (May 2, 2013) (Ph.D. dissertation, University of Kentucky) (ProQuest) (using the term "unofficial loss of custody" to refer to involuntary, as well as voluntary, relinquishment of custody due to "threats to report the mother," as opposed to "official" loss of custody involving an open child protection case).

81. Gerald W. Wallace, *A Family Right to Care: Charting the Legal Obstacles*, 3 GRANDFAMILIES: CONTEMP. J. RSCH. PRAC. & POL'Y 122, 156–57 (2016); *Care and Custody*, GRANDFAMILIES.ORG, https://www.grandfamilies.org/Topic-Library/Care-Custody [https://perma.cc/X3RF-6BQL] (last visited Dec. 29, 2023); *Education*, GRANDFAMILIES.ORG, https://www.grandfamilies.org/Topic-Library/Education [https://perma.cc/S9FL-WYPY] (last visited July 17, 2025). For concerns about such laws, see Tianna N. Gibbs, *Paper Courts and Parental Rights: Balancing Access, Agency, and Due Process*, 54 HARV. C. R-C.L. L. REV. 549, 579–85 (2019).

82. *See, e.g.*, Coupet, *supra* note 20, at 608–09.

83. In addition to custody, adoption and guardianship are important legal tools for formalization. For guardianship, see Smith, *supra* note 59.

Scenario 1 occurs when kin file a private custody action as one way to formalize their caregiving relationship.[84] Courts decide such custody disputes based on statutory or common law rules that vary across states in terms of standing requirements, substantive showings, and burden of proof. While some states require a showing of parental abandonment, unfitness, or extraordinary circumstances that pose a risk of harm to the child, others incorporate more relaxed standards.[85]

Scenario 2 occurs when individuals, rather than the child protection agency, file abuse or neglect petitions in court—an exceptional feature in the modern child protection system, which has long been institutionalized and professionalized. About half the states, including Kentucky, allow such private petitions in their laws, although the prevalence of their use in practice is unknown.[86] Kentuckians, especially those in rural regions, sometimes file private petitions for custody purposes, increasingly blurring the line between the private and the public.[87]

Scenario 3 occurs when kin attempt to formalize custody by reporting parents to the child protection agency.[88]

Lastly, and much more commonly than Scenario 3,[89] Scenario 4 occurs when the agency intervenes on behalf of the child due to other reasons, such as referrals made by a schoolteacher, nurse, police officer, or neighbor. Kin, who may or may not have previously been involved in caregiving, could be given a formal role through state-coordinated kinship care within the child protection case.

The dynamics between parents, kin, and the state can differ significantly across these scenarios. On one end of the spectrum, parents may resent kin as much as they resent the state for intervening in their relationship with the child, particularly if the kin initiated legal action for custody or enlisted the agency (Scenarios 1, 2, 3). Kin, especially those with the means to hire private attorneys, may aim to secure formal custody without getting the agency involved (Scenario 1) or may actively seek the agency's assistance to continue their caregiving role (Scenario 3).[90] On the other end, both parents and kin might find themselves

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84. Less commonly, it could be a parent who does not have physical or legal custody filing an action, with kin either intervening or defending.

85. These laws also range from those that limit standing based on grandparent or other relative status to those that do not have such status-based restrictions. These laws are understudied in academic literature. *See generally*, Josh Gupta-Kagan, *Children, Kin, and Court: Designing Third Party Custody Policy to Protect Children, Third Parties and Parents*, 12 N.Y.U. J. LEGIS. & PUB. POL'Y 43 (2008); Barbara A. Atwood, *Third-Party Custody, Parental Liberty, and Children's Interests*, 43 FAM. ADVOC. 48 (2021). For recent fifty-state surveys, see *"Nonparent" Custody and Visitation Statutes in 2021*, 55 FAM. L.Q. 538–52, 596–608 (2022) (prepared by the FLQ student editorial staff at New York Law School).

86. Anna Arons, *Prosecuting Families*, 173 U. PA. L. REV. 1029, 1056–57, n. 136.

87. Kristina Brant, *When Mamaw Becomes Mom: Social Capital and Kinship Family Formation Amid the Rural Opioid Crisis*, 8 RUSSELL SAGE FOUND. J. SOC. SCIS. 78, 85 (2022).

88. FONG, *supra* note 77, at 74.

89. Nationwide, 30% of child protection agency referrals come from friends, neighbors, relatives, or anonymous sources. The remaining 70% are submitted by professionals. CHILD.'S BUREAU, CHILD MALTREATMENT 2022, *supra* note 52, at xi.

90. *See* FONG, *supra* note 77, at 74. An even poorer caregiver might not seek the agency's assistance, either. I am indebted to Kristina Brant for this point. *See* Kristina Brant, *Nonparental Primary Caregivers: A Case Study from the United States*, *in* SOCIAL PARENTHOOD IN COMPARATIVE

surprised and frustrated by the agency's intervention, with many kin being thrust into a caregiving role unexpectedly and without having sought it (Scenario 4). As parents and kin navigate state-coordinated kinship care, however, their relationships can change significantly.

D. Introducing Functional Custody/Parentage Law

Functional custody/parentage law introduces a new or modified pathway by which non-parents, including kin caregivers, can formalize their relationships with children. The national reform proposals on functional custody/parentage law have varied in their requirements and effects.

In 2000, *The ALI Principles of the Law of Family Dissolution* presented the first national reform proposal for functional custody law, sparking heated debate. Its requirements for "de facto parent" were far more stringent than contemporary proposals, both in substance and form.[91] An individual must have "regularly performed a majority of caretaking functions" for at least two years,[92] either with a legal parent's consent to form a "parent-child relationship" or due to a legal parent's "complete failure or inability" to perform caretaking functions.[93] The ALI Principles also prioritized legal parents over de facto parents, stipulating that courts should not allocate the majority of custody to a de facto parent over a legal parent's objection, barring exceptional circumstances.[94]

Three contemporary national reform proposals continue the ALI Principles' functional approach. The Uniform Nonparent Custody and Visitation Act of 2018 ("UNCVA")[95] and the recently approved Restatement of Children and the Law ("Restatement")[96] incorporate functional custody law, whereas the Uniform Parentage Act of 2017 ("UPA")[97] incorporates functional parentage law.[98] All three proposals

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PERSPECTIVE 70, 79 (CLARE HUNTINGTON ET AL. EDS., 2023) (DESCRIBING A POOR KIN CAREGIVER FORGOING ANY FORMALIZATION ATTEMPT OR EVEN APPLICATION FOR FOOD STAMPS FROM THE FEAR OF CHILD PROTECTION AGENCY).

91. Principles of the L. of Fam. Dissolution: Analysis and Recommendations § 2.03(1)(c) (Am. L. Inst. 2002).

92. *Id.* In case of a co-parenting situation, the individual must have "regularly performed a share of caretaking functions at least as great as that of the parent with whom the child primarily lived." *Id.* §2.03(1)(c)(ii)(B).

93. *Id.*

94. *Id.* § 2.18(1)(a). The ALI Principles also allowed a pathway for grandparents and other relatives who are not de facto parents or parent by estoppel but have a significant relationship with the child. *Id.* § 2.18(2).

95. Unif. Nonparent Custody & Visitation Act (Unif. L. Comm'n 2018) [hereinafter UNCVA].

96. Restatement of the L., Children & the L. § 1.82 (Am. L. Inst., Tentative Draft No. 2, 2019) [hereinafter Restatement].

97. Unif. Parentage Act (Unif. L. Comm'n 2017) [hereinafter UPA].

98. To facilitate a comparison of their doctrinal requirements and effects (*i.e.*, visitation and custody *versus* full parentage), the following paragraphs discuss the UNCVA and the Restatement before the UPA. This order is for analytical purposes and does not reflect the chronological development of these reforms. Both the UNCVA and the Restatement consciously adopted or rejected specific innovations of the UPA. *See, e.g.*, Jeff Atkinson & Barbara Atwood, *Moving beyond Troxel: The Uniform Nonparent Custody and Visitation Act*, 52 FAM. L. Q. 479, 495, 497–98 (2018); RESTATEMENT § 1.82 cmt. *b*.

require kin seeking to formalize their caregiving relationship to prove the relevant functional requirements by clear and convincing evidence.[99]

Under the UNCVA, kin can prove either that they have a "substantial relationship" with the child and that denying custody would result in harm to the child, or that they are a "consistent caretaker," without having to prove harm.[100] The requirements to be considered a consistent caretaker follow the requirements for a de facto parent under the ALI Principles but are less stringent. Still, the UNCVA mandates that the caretaker must have lived with the child for at least 12 months.[101] It also requires that the caretaker must have established a "bonded and dependent relationship" with the child either with a parent's "express or implied consent," or without it "if no parent has been able or willing to perform parenting functions."[102]

The Restatement adopts a similar two-tier approach but uses the term "de facto parents," distinguishing them from "third parties."[103] While third parties face a heightened unfitness or harm standard to seek custody, de facto parents do not.[104] The Restatement differs from the ALI Principles and the UNCVA in two important aspects. First, it eschews a specific time requirement for residence or caregiving.[105] Second, it does not distinguish between a consent-based co-parenting situation and a need-based situation involving parental absence or incapacity. Instead, it simply requires that "a parent consented to and fostered the formation of the parent-child relationship between the third party and the child."[106]

The UPA's "de facto parentage" foreshadowed the Restatement's departures from the ALI Principles. Like the Restatement, it does not require a specific time period or specifically address parental absence or incapacity.[107] However, the UPA is less stringent than the Restatement regarding the existing parent's role: A parent does not need to consent to *and* foster the formation of the relationship between the claimant and the child; merely "foster[ing]" *or* "support[ing]" the relationship suffices.[108]

Beyond the already highlighted point that functional parentage law confers full parent status, not just custody rights that can be modified in the future, it conceptually makes another notable jump. The aspirational idea behind the UPA's de

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99. UNCVA § 5; RESTATEMENT §§ 1.80–1.82; UPA § 609(d).

100. UNCVA § 4. Notably, the UNCVA does not use the term de facto parent.

101. The 12 months period comes with the proviso, "unless the court finds good cause to accept a shorter period." UNCVA § 4(b)(1). In addition, the claimant must have "regularly exercised care of the child" and "made day-to-day decisions regarding the child." *Id.* § 4(b)(2), (3).

102. *Id.* § 4(b)(4).

103. RESTATEMENT §§ 1.80–1.82. Unlike UNCVA, the Restatement distinguishes between visitation and custody by third parties.

104. *Id.* §§ 1.81–1.82.

105. Living with the child for "a significant period of time," assuming "significant obligations of parenthood," and being in a "parental role for a length of time sufficient to have established a bond and dependent relationship with the child that is parental in nature" are sufficient. *Id.* § 1.82(a)(1)–(3).

106. *Id.* § 1.82(a)(4).

107. UPA § 609.

108. *Id.* § 609(6).

facto parentage—that caregiving individuals are (already) parents (waiting to be recognized)—is decidedly universalist, aiming to enable status claims in any context under a set of universal functional standards.[109] Thus, parentage claims can potentially arise, and their effects will be respected, at any point along the continua of the aforementioned three axes on which kinship care arrangements can be situated (i.e., the degree of in/formality, the degree of agency involvement, and the stage of a child protection case).[110] Whether this will indeed be the case in practice, of course, will depend on how the aspirational idea manifests in the specific doctrinal design of a functional parentage law, which I will revisit after the Kentucky case study.[111]

Compared to the universalist functional parentage project, the discussions about third-party or non-parent custody laws, based on functional or other standards, have generally been limited to the private setting.[112] However, in Kentucky, there is frequent interaction between private custody law and public child protection, offering an apt case for studying functional parentage law reform.

II. What Is Going on in Kentucky?

This Part offers a detailed description of how private custody law and public child protection law govern parents and kin who raise children together in Kentucky.[113] My two key findings mark the particularity and generalizability of this case study in the functional parentage law context. The first is the particular prevalence of state-coordinated kinship care *outside* the foster care system in the state.[114] This suggests that the implications of functional parentage law reform will differ in states dissimilar to Kentucky in this regard compared to those that are similar. The second finding concerns functional custody law's frequent

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109. To my knowledge, no effort has explored the implications of extending the full bundle of parentage rights and duties to functional parents beyond the rules of custody and support, nor has anyone clearly delineated what currently constitutes this bundle. This area remains in flux, and a revolutionary change in parentage law could lead to a reorganization of the various rights and duties that make up the bundle of parental status.

110. Does this mean that kinship or stranger *foster* caregivers can become parents through functional parentage law? Probably not. *See infra* notes 384–85 and accompanying text.

111. *See infra* Section III.C.

112. *See, e.g.*, Elizabeth Barker Brandt, *De Facto Custodians: A Response to the Needs of Informal Kin Caregivers?* 38 Fam. L. Q., no. 2, Summer 2004, at 291, 313 (arguing that de facto custody law should not grant standing within the child protection system, because it will complicate the process). *But see* Joslin & NeJaime, *Functions*, *supra* note 16, at 371–73 (discussing 33% of the cases in their dataset that feature child welfare involvement); Joslin & NeJaime, *Multiparenthood*, *supra* note 9, at 1273–74, 1307–09 (situating multiparenthood law in the child protection context).

113. For Part II, I reviewed cases decided between 2019 and 2023 and conducted interviews between October 2023 and January 2024. *See* Appendices A and B. The local laws and practices discussed in this Part reflect those in effect at the time of this research. One legislative change that occurred after this research concluded was the introduction of Subsidized Permanent Custody in July 2024, which subsequently led to changes to the rules and practices of the Department for Community Based Services within the Cabinet for Health and Family Services in 2025. *See infra* note 243.

114. As discussed *supra* Section I.A., child protection agencies across the U.S. coordinate kinship care outside the foster care system. However, Kentucky remains unique due to its foster kinship care rate being among the lowest in the nation. *See infra* note 208.

interactions with public child protection law. While the current prevalence of such interactions in other states is unclear, this finding is generalizable to how functional parentage law, as currently promoted and envisioned, will operate.

Kentucky's de facto custodian statute, an innovative functional custody law initially envisioned as a private pathway to custody, now often arises within or intersects with child protection cases. In Kentucky, functional custody law works hand in hand with the removal authorities under child protection law, making kinship care arrangements that were made on a temporary basis and outside the foster care system more permanent. Combined with the state child protection agency's kinship care practice, it constitutes a system that reduces costs for the state and traps many kin caregivers in unpaid or underpaid care work, while granting other kin caregivers more autonomy and opportunities to leverage this system to their advantage. At the core of the system is an implicit trade: The state compensates kin's familial role with legal recognition and custody. While kin caregivers are not winners in this system either, the losses of parents and parent-child relationships amid crises—in the family and in the state—can go unnoticed.

Part II proceeds in five sections: First, I explore the social reasons invoked to explain the prevalence of kinship care in Kentucky today, including substance abuse, incarceration, poverty, and culture. Second, I explain the rules of private custody law, focusing on the de facto custodian statute. Third, I describe how kinship care in child protection law operates in practice, including the role of the de facto custodian statute in cases of permanent kin custody. Fourth, I examine the interactions between private custody actions and public child protection proceedings. Finally, I demonstrate how Kentucky courts and lawmakers have attempted to address these interactions and how parents were often left out in the development of laws in this area.

A. Contexts of Kinship Care: Kentucky and Its Families in Crises

Kin caregivers' advocates and child welfare professionals in Kentucky like to point out that the state's rate of kinship care is among the highest in the country.[115] Estimates based on census data support this assertion, indicating that over the last decade, the rate of children in kinship care in Kentucky has consistently been twice the national average.[116] Approximately 80,000 Kentucky children—eight percent of all children in the state—live in households with no legal parent present.[117] These arrangements include those made privately by parents and kin

115. *See, e.g.*, *About Us*, KINSHIP FAMILIES COALITION OF KENTUCKY, https://kinshipky.org/about/ [https://perma.cc/C3A9-7GW7] (last visited July 18, 2025); *About KY Kinship Resource Center*, UK COLLEGE OF SOCIAL WORK, https://socialwork.uky.edu/centers-labs/kentucky-kinship-resource-center/about-ky-kinship-resource-center/ [https://perma.cc/L54S-DW7W] (last visited July 18, 2024).

116. *Children in Kinship Care in Kentucky*, ANNIE E. CASEY FOUND., https://datacenter.aecf.org/data/tables/10455-children-in-kinship-care?loc=19&loct=2#detailed/2/19/false [https://perma.cc/TD2X-THR3] (last visited July 31, 2024).

117. This includes adoptive and biological parents. *Children Living with Neither Parent in Kentucky*, ANNIE E. CASEY FOUND., https://datacenter.aecf.org/data/tables/111-children-living-with-neither-parent?loc=19&loct=2#detailed/2/19/false/2545,1095,2048,1729,37,871,870,573,869,36/any/439,440 [https://perma.cc/TK5E-MDR9] (last visited July 31, 2024).

as well as those coordinated by the state's child protection agency (Department for Community Based Services in Cabinet for Health and Family Services, hereinafter "DCBS" or the "Cabinet"[118]).

A significant portion of the kinship care arrangements likely involve some level of past or ongoing DCBS intervention. This encompasses not only the small subset of children—1,123 in 2022—who reside in relative foster homes[119] but also those who were previously in DCBS custody and then placed through a kinship care arrangement[120] and those who never entered foster care but whose care arrangement was facilitated by the state. Although precise data is unavailable, estimates suggest that between 15,000 and 33,000 Kentucky children are in kinship care due to state removal from their original households.[121]

Even in cases without any DCBS intervention, the circumstances leading parents to rely on their kin network for a large portion of care over extended periods often resemble those that might otherwise invite or necessitate such intervention. These situations include substance abuse, incarceration, and poverty of the parents, all of which are closely linked with warranted and unwarranted investigations for dependency[122] or neglect, rather than for physical or sexual abuse.[123]

Parental drug abuse is the most common "caregiver-related risk factor" in Kentucky's dependency, neglect, or abuse ("maltreatment") cases that are substantiated[124] and often leads to kinship care even without DCBS involvement. Consider that even in the best-case scenario where a substance-using parent is otherwise functional as a parent and not being punished by the state or the community for their substance abuse, they must leave their child with someone else to

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118. The Cabinet for Health and Family Services includes departments beyond the Department for Community Based Services ("DCBS"), such as the Department for Income Support, which enforces child support. Yet, many Kentuckians colloquially refer to their child protection agency as simply the "Cabinet."

119. CHILD.'S BUREAU, ADMIN. FOR CHILD. & FAMS., U.S. DEP'T OF HEALTH & HUM. SERVS., THE AFCARS REPORT: KENTUCKY 2 (May 2023), https://www.acf.hhs.gov/sites/default/files/documents/cb/afcars-tar-ky-2022_0.pdf [https://perma.cc/Y9D9-KACR].

120. *Id.* at 4 (stating that 24 percent of children exiting foster care lived with relatives).

121. *See* Graham Ambrose, *How Many Kentucky Children In Kinship Care? The State Still Can't Say*, WKU PUBLIC RADIO (Feb. 2, 2021, 1:15 PM) https://www.wkyufm.org/health/2021-02-02/how-many-kentucky-children-in-kinship-care-the-state-still-cant-say [https://perma.cc/98JF-NBWE]; *Kinship Care in Kentucky*, KY. YOUTH ADVOCS., https://kyyouth.org/wp-content/uploads/2019/04/Kinship-Care-in-KY-2019.pdf [https://perma.cc/DS8M-NSLY] (last visited Aug. 15, 2024).

122. Some states, including Kentucky, distinguish dependency from other forms of neglect. Dependency occurs when a child who is under improper care not due to an intentional act of the parent. KY. REV. STAT. ANN. § 600.020(20) (West, Westlaw through 2025 Reg. Sess.).

123. In 2022, less than 16 percent of Kentucky children with substantiated maltreatment cases were victims of physical or sexual abuse. CHILD.'S BUREAU, CHILD MALTREATMENT 2022, *supra* note 52, at 45. Two factors that may stem from contexts quite different from these risk factors, yet can lead to kinship care, are military deployment and the death of parents. Interview with Advocate 2. *See infra* Appendix B.

124. CHILD.'S BUREAU, CHILD MALTREATMENT 2022, *supra* note 52, at 48.

enter a residential treatment facility.[125] The onset of the current opioid crisis in Kentucky has increased the reliance on kinship care and seems to be on the minds of everyone observing, working with, or advocating for Kentucky's kinship households and kin caregivers.[126]

Incarceration often compels parents to depend on kinship care.[127] An estimated 12% of Kentucky children have experienced the current or past incarceration of a parent, a rate significantly higher than the national average of 7% and one of the highest in the nation.[128] At any given point in time, about 30,000 Kentucky children have a parent in state custody.[129] This situation reflects a half-century-long project of mass incarceration, which has seen the construction of "cages in the coalfields" battered by the economic decline,[130] turning the state into "one of the most incarcerated places on earth."[131] This project saw more women being locked up than ever before,[132] largely for non-violent, drug- or property-related crimes.[133] The majority of these women are mothers,[134] who are more likely than fathers to have been primary caregiver of their child at the time of incarceration.[135] Unless the father is

125. Traditional residential treatment facilities often lack family-based programs and do not accommodate patients' children. How Can Family-based Residential Treatment Programs Help Reduce Substance Use and Improve Child Welfare Outcomes?, Casey Fam. Programs 2–3 (Aug. 2019), https://www.casey.org/media/SF_Substance-use-family-based-treatment-programs.pdf [https://perma.cc/ZH86-7Q8L]. *See* Bea Halbach-Singh et al., Vera Inst. of Just., The Criminalization of Poverty in Kentucky 12 (Aug. 2023), https://vera-institute.files.svdcdn.com/production/downloads/publications/the-criminalization-of-poverty-in-kentucky-report.pdf [https://perma.cc/EN4N-FDTB].

126. Parental substance abuse was mentioned in every conversation that I have had for this project. For instance, when I mentioned that Kentucky was a pioneer in functional custody law, Attorney 2, who regularly represents kin caregivers and participates in grandparent caregivers' conferences, immediately linked it to the opioid crisis—even though the statute predates the onset of the current opioid crisis. Interview with Attorney 2. *See infra* Appendix B. For kinship caregivers' advocates' perspective, Norma Hatfield, *Kinship Families Are Waiting for a Champion*, Ky. Youth Advocs. (Aug. 31, 2023), https://kyyouth.org/guest-blog-kinship-families-are-waiting-for-a-champion/ [https://perma.cc/V8DS-7VFN].

127. Dylan B. Jackson et al., *Parental Incarceration and Children's Living Arrangements in the United States*, 40 Child & Adolescent Soc. Work J 695, 695–97 (2023) (noting that more than a quarter of the children exposed to parental incarceration are in non-parental care, compared to 2.5% of children who have no lifetime exposure to parental incarceration).

128. Ky. Youth Advocs., Data Trends and Policy Recommendations to Address the Impact of Maternal Incarceration on Kentucky's Children 1 (Dec. 2020), https://kyyouth.org/wp-content/uploads/2020/12/BlueprintBrief_ParentalIncarceration_Dec2020.pdf [https://perma.cc/FA3Z-DVUT].

129. *Id.*; Ky. Youth Advocs., Minimizing the Impact of Parental Incarceration on Children 1 (2018), https://kyyouth.org/wp-content/uploads/2018/02/KYA-Issue-Brief-Parental-Incarceration_Feb2018.pdf [https://perma.cc/SU6Y-RABP].

130. Judah Schept, Coal, Cages, Crisis: The Rise of the Prison Economy in Central Appalachia 5 (2022).

131. Halbach-Singh et al., *supra* note 125, at 3.

132. *Id.* at 11–12.

133. Ky. Youth Advocs., *supra* note 128, at 6.

134. *Id.* at 1.

135. Annie E. Casey Found., *supra* note 40, at 2; Creasie Finney Hairston, Annie E. Casey Found., Kinship Care When Parents Are Incarcerated 7 (May 2009), https://assets.aecf.org/m/resourcedoc/aecf-kinshipcarewhenparentsincarcerated-2009.pdf [https://perma.cc/W8VN-WCGZ].

available for caregiving (and, in cases of estrangement, deemed appropriate by the mother), incarcerated mothers frequently have no choice but to depend on kin caregivers, regardless of whether her arrest or incarceration prompted intervention by DCBS.[136]

Economic desperation is another common context in which parents turn to their kin network. In general, children of parents with lower socioeconomic status (in terms of education, income, and employment) are more likely to experience living with members of their extended family during their childhood.[137] While kinship care discourse tends to focus on the socioeconomic status of kinship households,[138] in my interviews, *parental* poverty frequently emerged as a topic.

Over the last decades, deindustrialization and disinvestment have severely impacted Kentucky's local economies, which has not only coincided with but also, in many ways, enabled the unfolding of the opioid crisis in the region.[139] Interviewees expressed diverse opinions on the connection between parental poverty and parental substance abuse. One attorney, attributing a majority of functional custody cases to parental addiction, stressed that "it's all income levels" that are being affected.[140] Other interviewees spoke more cautiously about the connection or viewed poverty as a structural issue, rather than merely a consequence of individual substance abuse.[141]

Indeed, Kentucky's overall poverty rate and child poverty rate are high, especially for Black children and children in rural Appalachia.[142] There is no doubt that serious and persistent racial disparities exist in Kentucky,[143] potentially resulting in a higher incidence of kinship and non-parent caregiving for Black Kentucky children. For example, Black people constitute 9% of the state's

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136. A 2017 ASPE research brief indicates that, nationwide, nearly half of the children in non-parental care have had a parent incarcerated at some point, with parental incarceration identified as a reason for their non-parental care in about half of these cases. Over half of the children who have experienced parental incarceration are in state-coordinated kinship care outside the foster care system (*i.e.* voluntary kinship care). OFF. OF THE ASSISTANT SEC'Y FOR PLAN. & EVALUATION, U.S. DEP'T OF HEALTH & HUM. SERVS., PARENTAL INCARCERATION AND CHILDREN IN NONPARENTAL CARE 3–4 (2017), https://aspe.hhs.gov/reports/parental-incarceration-children-nonparental-care [https://perma.cc/C2WN-EFGE]. In Kentucky, incarceration itself is deemed a parental neglect. LeeAnna Dowan, *Dependency, Neglect and Abuse DNA: Definitely Not Average*, *in* LEGAL TRAINING FOR DEPENDENCY, NEGLECT, AND ABUSE CASES 106, 108-09 (KY. CT. JUST. 2020), [https://perma.cc/535Z-Z9A7].

137. Christina J. Cross, *Extended Family Households Among Children in the United States: Differences by Race/Ethnicity and Socio-Economic Status*, 72 POPULATION STUD. 235, 248 (2018).

138. *See, e.g.*, Yanfeng Xu et al., *A New Kinship Typology and Factors Associated with Receiving Financial Assistance in Kinship Care*, 110 CHILD. & YOUTH SERVS. REV. 104822 (2020).

139. HALBACH-SINGH ET AL., *supra* note 125, at 15–17.

140. Interview with Attorney 1. *See infra* Appendix B. However, it is important to note that, while middle- or upper-class parents are not immune to the opioid epidemic, they do not receive the same punitive response under both criminal law and child protection law as poor and racialized parents do—a response that often exacerbates rather than solves the problem. *See generally* WENDY A. BACH, PROSECUTING POVERTY CRIMINALIZING CARE (2022).

141. Interviews with Attorney 3, Attorney 4, and Judge 3. *See infra* Appendix B.

142. *Rural Poverty & Well-Being*, ECON. RSCH. SERV., U.S. DEP'T OF AGRIC., https://www.ers.usda.gov/topics/rural-economy-population/rural-poverty-well-being/ [https://perma.cc/Y2BY-SS55] (Jan. 14, 2025).

143. *See generally* KY. YOUTH ADVOCS., 2021 COUNTY DATA BOOK (2021), https://kyyouth.org/wp-content/uploads/2021/11/2021-County-Data-Book.pdf [https://perma.cc/LT5Q-LXBX].

working-age residents, but nearly 20% of its jail and prison population.[144] A staggering 41% of Black children and 36% of Latinx children in Kentucky live in poverty, compared to 20% of white children.[145]

However, the rural-urban dynamic complicates the racial picture of kinship care in Kentucky. Although almost all of Kentucky's 120 counties have some Black children residing in them, the majority live in the state's urban centers,[146] which, to be sure, remain substantially segregated.[147] By contrast, the poorest counties in rural Appalachia have a predominantly white population, with a child poverty rate comparable to that of Black children in Kentucky.[148] It is also noteworthy that among incarcerated mothers, white mothers are slightly overrepresented, reflecting the high incarceration rates of women in rural counties.[149]

Finally, some Kentuckians, both natives and transplants, point to culture as an independent factor for the formation of kinship care/households. Recall Vance's emphasis on how "for families like [his]—and for many black and Hispanic families—grandparents, cousins, aunts, and uncles play an outsize role."[150] Similarly, one interviewee argued that state-coordinated kinship care was feasible only because of the ready availability of kin networks, with multiple "generations" of large families residing in Kentucky.[151] In a related vein, Attorney 2 recounted a story of a client who looked after a neighbor's child during her incarceration, only to face a "really aggressive action" filed by the mother upon her release from prison.[152] Describing caregivers like their client as "salt to the earth, good people," Attorney 2 highlighted the "Appalachian spirit of community," which inspires them to "scrimp and save and shop at the Dollar Tree to ensure they can provide for anybody they care about."[153]

While an enduring culture may indeed support and contribute to the prevalence of kinship care in Kentucky, two points warrant mention. First, the culture of extended family and community likely coexists with the norm of nuclear family,[154] with these norms divided along the lines of race, class, and locality (rural/urban) in complex ways within the state. Second, functional custody/parentage

144. HALBACH-SINGH ET AL., *supra* note 125, at 11.

145. *Children in Poverty by Race and Ethnicity in Kentucky*, ANNIE E. CASEY FOUND. (Nov. 9, 2021), [https://perma.cc/M9FX-JQSA] (last visited Nov. 16, 2025).

146. KY. YOUTH ADVOCS., *supra* note 143, at 16–19.

147. Suhail Bhat, *Louisville Is More Diverse Than Ever But Remains Largely Segregated*, LOUISVILLE PUB. MEDIA (Sept. 24, 2021, 5:55 AM), https://www.lpm.org/news/2021-09-24/louisville-is-more-diverse-than-ever-but-remains-largely-segregated [https://perma.cc/WFA7-V28S].

148. KY. YOUTH ADVOCS., *supra* note 143, at 5.

149. KY. YOUTH ADVOCS., DATA TRENDS AND POLICY RECOMMENDATIONS TO ADDRESS THE IMPACT OF MATERNAL INCARCERATION ON KENTUCKY'S CHILDREN 4, 6 (Dec. 2020), https://kyyouth.org/wp-content/uploads/2020/12/BlueprintBrief_ParentalIncarceration_Dec2020.pdf [https://perma.cc/FA3Z-DVUT]. The rural-urban divide also introduces a range of possible differences such as the availability of kin networks, court and DCBS practices, and experiences of poverty.

150. VANCE, *supra* note 1, at 243.

151. Interview with Advocate 3. *See infra* Appendix B.

152. Interview with Attorney 2. *See infra* Appendix B.

153. *Id.*

154. *See generally* Hall v. Hall, No. 2019-CA-001618-ME, 2020 WL 5083464 (Ky. Ct. App. Aug. 28, 2020).

law does not simply recognize or resist either cultural norm. The core idea that grandparents and other kin deserve custodial/parental rights can be interpreted in opposite ways: It may be a recognition of a culture of extended family and community; or it may be a reiteration of the norm that parents *must* do their jobs without relying on others, and if they don't, they deserve to lose some of their rights.[155]

For our purpose of studying functional parentage law reform, the key takeaway from this section is that the common contexts in which parents and kin caregivers separate and (re)unify with their children seem to be deeply intertwined within the state's political economy and the legal system that not only sustains but also creates it.[156] These contexts or conditions exist in other communities across the U.S.

B. De Facto Custody and Other Private Pathways to Kin Custody

Under Kentucky statute, if an individual demonstrates by clear and convincing evidence that they have been "the primary caregiver for, and financial supporter of, a child" with whom they have resided for an extended period, the individual is considered a de facto custodian ("DFC").[157] The statutory period is either six months or one year, depending on the child's age and whether the child was placed by the state's child protection agency.[158] A DFC has standing to pursue custody of the child on an equal footing with the child's parent(s).[159] The court then determines custody between DFC(s) and parent(s) under the best interest of the child standard.[160]

The DFC statute, signed into law in April 1998, is considered by some accounts as the first law of its kind in the U.S.[161] Not only did its adoption precede the introduction of the term "de facto parent" in the ALI Principles,[162] de facto

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155. *But see* Huntington, *supra* note 21, at 1508, 1534 (suggesting that Kentucky became "country's leader in functional parenthood cases" *despite* its politics and culture).

156. David Kennedy, *Law and the Political Economy of the World*, 26 LEIDEN J. INT'L L. 7, 8 (2013) (noting how law not only regulates but also creates the elements of economic and political life).

157. KY. REV. STAT. ANN. § 403.270 (West, Westlaw through 2025 Reg. Sess.). Although the statutory language is unclear, appellate courts generally interpret that the qualifier "primary" applies not only to "caregiver" but also "financial supporter." Swiss v. Cabinet for Fams. & Child., 43 S.W.3d 796, 798 (Ky. Ct. App. 2001). At a minimum, courts consider and compare financial contributions made by the alleging DFC, parents, and sometimes the state. *See* Louise E. Graham & James E. Keller, 16 KY. PRAC. DOMESTIC RELATIONS L. § 21:29.30 (Westlaw through Feb. 2024 update).

158. § 403.270.

159. *Id*.

160. *Id*. The rebuttable presumption that joint custody and equal parenting time is in the best interest of the child applies. *Id.*

161. Ana Beltran, *Care & Custody*, GRANDFAMILIES.ORG (Dec. 29, 2023), https://www.grandfamilies.org/Topic-Library/Care-Custody#defacto [https://perma.cc/X3RF-6BQL]; Priscilla A. Gibson & Shweta Singh, *Let's Help Caregivers and Children in Informal Kinship Care: De Facto Custodian Legislation*, 89 CHILD WELFARE, no. 3, 2010, at 79, 87. *But see* HAW. REV. STAT. § 571-46(a)(2) (West, Westlaw through 2024 Reg. Sess.).

162. The shared term "de facto" often leads to the assumption that the DFC statute followed the ALI Principles' functional approach. However, since the term "de facto parent" was not adopted during

custodians could potentially be entitled to more rights than de facto *parents* under the ALI Principles. While the ALI Principles prioritized legal parents over de facto parents,[163] the DFC statute explicitly stated that once the court determines a non-parent to be a DFC, it should give the DFC and each parent "the same standing" and "equal consideration" in determining custody under the best interest of the child standard.[164]

Unlike the common association of functional parenthood law with LGBTQ families, the DFC statute was created specifically to address the needs of kin caregivers.[165] Local grandparent caregiver support groups—particularly white, financially stable caregivers who sought "rights legislation" in family law, rather than predominantly Black caregivers more interested in securing state financial support—played an essential role in its creation.[166]

Before the passage of the DFC statute, Kentucky grandparents enjoyed generous statutory rights for visitation but faced stringent standards for gaining custody.[167] Kentucky's appellate courts emphasized parents' superior rights to custody vis-à-vis non-parents. For non-parents to pursue custody over the objection of parents, they had to show by clear and convincing evidence that the parent had waived their superior right to custody or was unfit ("waiver and unfitness doctrines"). Instances where non-parents prevailed under these doctrines were not common.

In 1995, the Supreme Court of Kentucky decided two separate cases involving custody battles between a parent and a grandmother who had been a primary caregiver.[168] In both instances, the child had lived with its grandmother from infancy and for years before the custody actions were filed. Nonetheless, the court

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the drafting process of the ALI Principles until March 20, 1998, it is unlikely that the DFC statute could have been influenced by the ALI's terminology, as it passed the state Legislature just three days later on March 23, 1998. Linda C. McClain & Douglas NeJaime, *The ALI Principles of the Law of Family Dissolution: Addressing Inequality Through Functional Regulation*, *in* THE AMERICAN LAW INSTITUTE: A CENTENNIAL HISTORY 337, 354 (Andrew S. Gold & Robert W. Gordon eds., 2023); PRINCIPLES OF THE L. OF FAM. DISSOLUTION: ANALYSIS AND RECOMMENDATIONS § 2.03 (AM. L. INST., Tentative Draft No. 3, Part I, 1998); S.B. 205, 1998 Gen. Assemb., Reg. Sess. (Ky. 1998), https://apps.legislature.ky.gov/record/98rs/SB205.htm [https://perma.cc/2UQW-MLJM]. The Reporters for the ALI Principles, while stating that its definition of de facto parent most closely followed the criteria offered in *In re Custody of H.S.H.-K*, 533 N.W.2d 419 (Wis. 1995), also quoted the definition under Kentucky's DFC statute in their comments. PRINCIPLES OF THE L. OF FAM. DISSOLUTION: ANALYSIS AND RECOMMENDATIONS § 2.03 cmt. *c* (AM. L. INST. 2002).

163. *See supra* note 94 and accompanying text.

164. § 403.270.

165. *See generally* Wayne J. Harper, The Making of a Grandparent Custody Law: The Kentucky Case Experience Cover Sheet (Aug. 1, 1999) (unpublished manuscript) (on file with author).

166. Wayne J. Harper et al., *Differentiating Characteristics and Needs of Minority Grandparent Caregivers*, 9 J. ETHNIC & CULTURAL DIVERSITY SOC. WORK 133, 143–44 (2001).

167. KY. REV. STAT. ANN. § 405.021 (West, Westlaw through 2025 Reg. Sess.). *See also* Posey v. Powell, 965 S.W.2d 836, 838 n. 5 (Ky. Ct. App. 1998).

168. Greathouse v. Shreve, 891 S.W.2d 387 (Ky. 1995) (custody dispute between an unmarried father and a maternal grandmother); Shifflet v. Shifflet, 891 S.W.2d 392 (Ky. 1995) (custody dispute between a mother and a paternal grandmother).

ruled in favor of the parent when applying the waiver doctrine. In *Greathouse v. Shreve*, the court defined waiver as "an intentional or voluntary relinquishment of a known right to custody."[169] While a "surrender of care and long term acquiescence in the living arrangements" were factors to consider in determining parental waiver, Kentucky grandparents were told to "realize, when they take in a grandchild to care for, that agreeing to care for a grandchild is a temporary arrangement, not a surrender of custody, regardless of the quality of care and the bonding that follows."[170] In *Shifflet v. Shifflet*, the court reaffirmed that "[t]he parent's superior right to custody is not lost to a non-parent, including grandparent, simply because a child is left in the care of the non-parent for a considerable length of time."[171] These decisions set a very high bar for parental waiver.

Writing around the time of the DFC statute's enactment, Louise Graham, a seasoned family law professor at the University of Kentucky College of Law, found the contemporary trends in case law problematic, offering excessive visitation rights but insufficient custody rights to grandparents.[172] Graham argued that the waiver doctrine in the 1995 cases failed to protect the child's welfare by severing their established relationship with "a long-term custodian acting as a de facto parent."[173] Graham proposed allowing grandparents or any other de facto parent to advocate for the child's interests without having to prove parental waiver by clear and convincing evidence.[174]

The DFC statute aimed to do precisely that, and more: Its drafters sought to address the predicaments of kin caregivers who felt that children under their care were at risk due to "threats from parents who, without the de facto custody legislation, enjoy[ed] a preferential status."[175] Some parents reportedly even used children as bargaining chips "if caregivers objected to parental behavior or failed to comply with parent's demands for financial assistance."[176] The DFC statute was expected not only to alter custody disputes decisions in court, but also to empower kin in their relationships with problematic parents.

In adjudicating claims under the newly enacted DFC statute, Kentucky appellate courts generally adhered to its original purpose. In 2001, in one of the earliest appellate cases on the statute, the Kentucky Court of Appeals set a precedent by ruling that mere co-parenting is not sufficient to satisfy the primary caregiver requirement under the statute.[177] This ruling significantly limited the statute's scope, confining its primary beneficiaries to kin caregivers and excluding many heterosexual stepparents and unmarried lesbian partners.[178]

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169. *Greathouse*, 891 S.W.2d at 390.
170. *Id.* at 390–91.
171. *Shifflet*, 891 S.W.2d at 394.
172. Louise Graham, *The Kentucky Law Survey: Family Law*, 86 KY. L.J. 795, 828 (1998).
173. *Id.* at 829.
174. *Id.* at 829–30.
175. Graham & Keller, *supra* note 157, § 21:29 (emphasis omitted).
176. *Id.*
177. *See* Consalvi v. Cawood, 63 S.W.3d 195, 198 (Ky. Ct. App. 2001), *overruled on other grounds by* Moore v. Asente, 110 S.W.3d 336 (Ky. 2003); Graham & Keller, *supra* note 157, § 21:29.20.
178. *See* B.F. v. T.D., 194 S.W.3d 310 (Ky. 2006).

A twist in this story is that the waiver and unfitness doctrines—the private pathways to custody for non-parents that had been considered too narrow by the advocates of the DFC statute—have not only survived but also expanded. The Kentucky Supreme Court significantly broadened the waiver doctrine in its 2010 decision, *Mullins v. Picklesimer*, a landmark case in functional parenthood literature.[179] In this case, involving a lesbian couple who created and co-parented a child until their relationship ended, the supreme court set a new standard for standing and custody determination for those who were neither parents nor DFCs. Recall that in the 1995 decisions, the court required voluntary and indefinite relinquishment of custody by the parent to constitute parental waiver.[180] By contrast, the *Mullins* court ruled, "[w]e see no reason why the law of waiver of custody rights should apply only to the *full* surrender of the child to the nonparent, to the exclusion of a waiver of some *part* of the superior parental right."[181]

Today, Kentucky kin caregivers who cannot meet the somewhat rigid requirements of the DFC statute turn to the waiver and unfitness doctrines. When asked about the practical difference between the DFC statute and the waiver and unfitness doctrines in the kinship care context, attorneys responded that they typically claim all of them.[182] Although the waiver and unfitness doctrines do not always count as functional parenthood law under the contemporary definition,[183] they are sometimes difficult to disentangle from the DFC statute in the kinship care context.

Before moving on to kin custody in child protection proceedings, one has to wonder whether Kentuckians, when they debated the DFC statute, considered its relationship with child protection. It seems that some did, albeit incompletely. Some local family law experts viewed the DFC statute as offering a better alternative to child protection law and highlighted the benefits of "allow[ing] grandparents to win custody without humiliating the child's parents in public legal proceedings."[184] Others, however, were worried that young and economically disadvantaged parents would lose custody of their children to more financially stable grandparents without maltreating their children. This latter concern was voiced by Graham—the same family law professor who criticized the 1995 supreme

179. *See* Mullins v. Picklesimer, 317 S.W.3d 569 (Ky. 2010).

180. *Supra* notes 168–71 and accompanying text.

181. *Mullins*, 317 S.W.3d at 579 (emphasis added).

182. Attorney 1 and Attorney 3 noted that the DFC statute's time requirements can be potentially more burdensome than the waiver doctrine. By contrast, Attorney 2 noted that the waiver doctrine is more difficult to use when DCBS is involved, and Attorney 4 stated that DFC cases are "absolutely easier" to win than waiver cases "as long as you meet the time period." Interviews with Attorney 1; Attorney 2; Attorney 3; Attorney 4. *See infra* Appendix B.

183. Although *Mullins* primarily addresses the waiver doctrine, it is regarded as a paradigmatic functional parenthood decision in national discourse—understandably, given the case's fact pattern involving pre-*Obergefell* lesbian parenthood, the court's references to similar cases from other jurisdictions, and its discussion of the psychological parent concept. *See, e.g.*, UPA § 609 cmt. Although focusing on the DFC statute, I also tried to measure *Mullins*' influence. *See* Appendix A.

184. Judy Jones, SERIES: GRANDPARENTS; Law Helped Grandmother Win Custody of Children; Mother Contends State Violated, THE COURIER-J. (Louisville, Ky.), May 8, 2000, at 01A.

court decisions. In 2000, she commented regarding the DFC statute: "We have to accept a lot of 'good enough' parenting in this society"; "[I]f the case is not about taking kids away from a situation that's not [sic] dangerous, then it's almost like it's about money."[185]

C. State-Coordinated Kinship Care

Let us now shift our focus to investigate how kinship care is independently incorporated in public child protection law and how it operates in practice.[186] My approach is to loosely follow the life of a child protection case.

The state initiates, reinstates, and arranges the transfer of physical and legal custody from parent to kin at various points in a child protection case. DCBS' coordination of kinship care can be imperfect, less-than-formal, and less-than-voluntary for the parties. This includes a routine practice where DCBS coordinates kinship care *outside* the foster care system—a practice recognized and sometimes promoted in child welfare literature as "voluntary kinship care."[187] At the heart of this practice are the state's incentives to save costs.

Understanding this process is essential because, at any point during it, Kentucky's functional custody law can become relevant, making a kinship household more permanent when it otherwise could have been temporary. As I address in Section E, Kentucky courts exclude foster caregivers from pursuing functional custody claims within or outside a child protection case but allow such claims for voluntary kinship caregivers. Functional parentage law can operate in a similar manner, with different effects. Throughout this section, I will flag the points where functional custody/parentage law can become relevant.

1. Understanding "Voluntary" Kinship Care

The state's coordination of kinship care begins early in the life of a child protection case. Well before a child is formally removed or even before a case is substantiated, the state will look for related or unrelated kin, the latter commonly referred to as "fictive kin."[188] The degree of coordination at this stage can range

185. *Id.*

186. As previously mentioned, both cases where DCBS intervention is triggered by external sources and cases where kin prompt the intervention can lead to state-coordinated kinship care, although this distinction is rarely mentioned in this section. From the agency's perspective, the source of the referral and the specific intra-kin dynamics are, at least in principle, irrelevant unless they impact the child's well-being. Either way, it is a child protection, not custody, case. In fact, DCBS explicitly states in its Standards of Practice that reports "relate[d] to custody changes, custody issues" without maltreatment allegations will not be accepted. KY. DEP'T FOR CMTY. BASED SERVS., STANDARDS OF PRACTICE § 2.2 (2024), [https://perma.cc/GZ22-BWM3]. This stipulation ironically suggests that such reports are frequent enough to merit specific mention. Private maltreatment petitions filed by individuals can also prompt DCBS intervention, although they are not featured in this section.

187. New Directions for Kinship Care Policy and Practice: A Position Paper from the Kinship Summit at Albany, New York, September 2016, 95 CHILD WELFARE, no. 4, 2017, at 150–51; Testa, supra note 57, at 15–17.

188. It used to be the case that only relatives were eligible for voluntary kinship care until fictive kin was added in 2017. Now, "an individual who is not related by birth, adoption, or marriage to a child

anywhere from simply reinstating or reinforcing the role of an already involved caregiver to transferring physical custody to a new caregiver. The level of formality in these processes varies as well. In some cases, DCBS workers will simply have parents sign a notarized power of attorney.[189] More commonly, though, such interventions occur as part of a "safety plan," a one-page form document signed by the parent(s), caregiver(s), and social worker.[190]

The question of voluntariness, for both parents and kin caregivers ("Was there a truly voluntary consent to the arrangement given the looming threat of removal to foster care?"), presupposes a contractual framework in understanding how the child protection system operates.[191] Yet, the state's role goes beyond mere negotiation with families. It entails recruiting and training kin caregivers; for parents, it also entails disciplining and criminalizing them.[192] The safety plan, for instance, used to include a warning that the alternative to compliance was foster care.[193] After a Sixth Circuit case scrutinized this practice,[194] the threat was replaced with a repeated caution *not* to be threatened: The plan is a "*voluntary* agreement between the signed parties," which expires after 14 working days, unless "extended *voluntarily*."[195]

Considering that 14 days is a short time to resolve any fundamental issues in the original household, I asked under what circumstances a DCBS supervisor would place a child with a kin caregiver as part of a safety plan:

> So a situation where we would do a safety plan is when the parent is *agreeable*. So the parent is saying, yes, I know that I don't have myself together right now. I'm going to leave my child with my mom while I go to rehab or something of that nature. So we can close the case out even after that 14 days as long as the child is in a safe and stable home. . . . [s]o the end goal is just to confirm that the child's in a safe environment.
>
> . . .
>
> Me: I see. So the case might close out, but the child might just live with the grandma.
>
> DCBS Worker 3: Yes.[196]

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but has an emotionally significant relationship with the child," or, in the case of a child one year or younger, has such a relationship with a parent, siblings, or half-siblings, also qualifies. KY. REV. STAT. ANN. § 199.011(10) (West, Westlaw through 2024 Reg. Sess.).

189. Interview with DCBS Worker 3. *See infra* Appendix B. KY. REV. STAT. ANN. § 403.352 (West, Westlaw through 2024 Reg. Sess.).

190. KY. DEP'T FOR CMTY. BASED SERVS., SAFETY PLAN (Feb. 2020), https://manuals-sp-chfs.ky.gov/resources/Documents%20and%20Forms/CPS%20Safety%20Plan.pdf [https://perma.cc/US65-BE6A].

191. *See* Dupuy v. Samuels, 465 F.3d 757, 761–62 (7th Cir. 2006).

192. ROBERTS, *supra* note 56, at 161–90.

193. Schulkers v. Kammer, 955 F. 3d 520, 528–29 (6th Cir. 2020).

194. *Id.* at 542–49.

195. KY. DEP'T FOR CMTY. BASED SERVS., *supra* note 190 (emphasis added).

196. Interview with DCBS Worker 3. *See infra* Appendix B.

Instead of speaking to the degree of safety concerns for the child, DCBS Worker 3 emphasized the parent's *compliance*. If the parent is not resistant to the maltreatment allegations, they intervene less, closing out the case or not opening one at all.[197] They would do so assuming that the supposedly temporary care provided by the kin caregiver would continue beyond the 14-day period.[198]

Advocates and attorneys in Kentucky have reported incidents where voluntary kinship care arranged in this manner continues for months because the agency does not follow up, and "parents don't know any better."[199] This aligns with similar practices in many other states—often called the "hidden foster care system"—about which child welfare experts have raised due process concerns.[200] Functional custody/parentage law could be used to make such kinship households more permanent without addressing the underlying due process issues.

If at the end of the investigation DCBS decides to initiate court proceedings, it can file a maltreatment petition with or without seeking an ex parte emergency custody order.[201] In either case, at the first hearing, called the temporary removal hearing, the court determines whether there are reasonable grounds to believe that the child would be maltreated if not removed from the original household.[202] As long as the agency proves this by a preponderance of the evidence, the child will either be removed or, if already removed on an emergency basis, remain removed,[203] while the case progresses to determine whether the allegations of maltreatment are true[204] and what should happen to the parent and the child.[205]

This is where another, more typical form of voluntary kinship care comes into play: Kin who have been contacted, vetted (although not licensed), and endorsed by DCBS are frequently granted temporary custody at the first hearing or even emergency custody on an ex parte basis.[206]

Children in either form of voluntary kinship care are *not* considered to be in foster care.[207] As a result, according to federal data, Kentucky seemingly offers

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197. *Id.* Social workers' emphasis on parents' deference and compliance is not limited to Kentucky. *See generally* JENNIFER A. REICH, FIXING FAMILIES: PARENTS, POWER, AND THE CHILD WELFARE SYSTEM 73–111 (2005).

198. The use of safety plans to organize long-term kinship care is deemed problematic both locally and nationwide. A recent amendment to the relevant statute aims to further regulate this practice by mandating that DCBS file a court petition at the end of the 14 days and collect and maintain data about this practice. KY. REV. STAT. ANN. § 620.048 (West, Westlaw through 2024 Reg. Sess.).

199. Interviews with Attorney 2; Attorney 3; Attorney 4; Advocate 2. *See infra* Appendix B.

200. Gupta-Kagan, *Hidden Foster Care*, *supra* note 59. *See also* Lizzie Presser, *"They Took Us Away From Each Other": Lost Inside America's Shadow Foster System*, PROPUBLICA (Dec. 1, 2021, 5:00 AM), https://www.propublica.org/article/they-took-us-away-from-each-other-lost-inside-americas-shadow-foster-system [https://perma.cc/HDV2-D8UK].

201. §§ 620.060, 620.070.

202. §§ 620.080, 620.090(1).

203. § 620.080(2).

204. § 620.100(3).

205. § 620.140.

206. §§ 620.060(2), 620.090(1).

207. The definition of voluntary kinship care adopted by the Children's Bureau encompasses practices with varying degrees of formality, including cases where "children have been placed with kin

an example for those who argue that state child protection systems do not sufficiently incorporate a preference for kinship care.[208] While one may reasonably disagree on whether DCBS' preference for kinship care is sufficient in practice, not only does the state law incorporate a preference for relatives, but a general consensus in favor of kinship care also seems to exist in the state.[209] Generally speaking, a child enters foster care in one of the following three instances: if DCBS fails to find an appropriate kin caregiver before removal;[210] if a kin caregiver, post-removal/placement, cannot, should not, or does not want to take care of the child anymore, and no alternative kin caregiver is available;[211] or, if a kin caregiver, when contacted by DCBS, opts to join the foster care system instead of accepting temporary custody.[212]

2. Looking for Kinship "Resources"

How does the state identify kin caregivers in practice?[213] DCBS' protocols faithfully reflect the national kinship care advocates' guidelines. While the focus of the latter has been to address the problem of agencies doing too little,[214] from another perspective, DCBS can also be seen as doing too much, with its potentially invasive process of searching for kinship "resources."

The process typically starts by asking the parent if they have "friends, family . . . teachers, anyone that has a relationship with [their] child that they can go and stay with a while."[215] In many cases, the accused parent is a single mother, who is also asked to name the legal or putative father.[216] While the accused parent

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by a court." Child Welfare Info. Gateway, *Kinship Care and the Child Welfare System*, U.S. DEP'T OF HEALTH & HUM. SERVS., ADMIN. FOR CHILD. & FAMS., CHILD.'S BUREAU 5 (2022), https://www.childwelfare.gov/resources/kinship-care-and-child-welfare-system/ [https://perma.cc/9FPY-436K].

208. *See, e.g.*, Gupta-Kagan, *Strong Preference*, *supra* note 59, at 24 (citing Kentucky, which is ranked 49th in the percentage of foster children placed in kinship foster homes according to federal data, as an example of the states located at the bottom of a wide spectrum of kinship placement practices).

209. § 620.090(1).

210. *See infra* Section II.C.2.

211. *See, e.g.*, Blakely v. Blakely, No. 2018-CA-001341-ME, 2020 WL 2298380 (Ky. Ct. App. May 8, 2020) (involving multiple kin placements); S.H. v. Commonwealth, No. 2017-CA-001466-ME, 2019 WL 994133 (Ky. Ct. App. Mar. 1, 2019) (paternal grandmother considered and denied after paternal aunt became unable to care for the child).

212. *See infra* Section II.C.3.

213. Under the federal Fostering Connections to Success and Increasing Adoptions Act of 2008, states must exercise due diligence to identify and notify relatives within 30 days after removal, explaining the options that they have in participating in the care of the child. 42 U.S.C. § 671(a)(29). States are free to determine what constitutes "due diligence" as well as the range of individuals counted as relatives. U.S. DEP'T OF HEALTH & HUM. SERVS., ADMIN. FOR CHILD. & FAMS., CHILD.'S BUREAU, ACYF-CB-PI-10-11, PROGRAM INSTRUCTION 23 (July 9, 2010), https://www.acf.hhs.gov/cb/policy-guidance/pi-10-11 [https://perma.cc/U3QF-BVRH].

214. *See, e.g.*, A.B.A CTR. ON CHILD. & THE L. & GENERATIONS UNITED, KINSHIP PROMISING PRACTICES 1–2 (2022), https://www.grandfamilies.org/Portals/0/Documents/General%20Kinship%20Publications/kin-promising-practice%202022%20Final.pdf [https://perma.cc/MSV4-F49X].

215. Interview with DCBS Worker 2. *See infra* Appendix B.

216. Interview with DCBS Worker 3. *See infra* Appendix B. CHILD.'S BUREAU, CHILD MALTREATMENT 2022, *supra* note 52, at 46.

usually suggests someone they prefer for their child's care, they might also have reasons to not offer names to DCBS.[217] This could be their attempt to resist the state's intervention in any way possible.[218] But it could also be due to strained relationships,[219] concern for violence,[220] or a complete lack of relationship, such as between mothers and biological fathers who were never involved.

DCBS' protocol instructs workers to conduct "thorough" research to identify and locate the absent parent (usually biological fathers) and relatives, going above and beyond merely asking the accused parent's preference.[221] The law of kinship care, similar to the law of child support, does not always align with community norms that grant more responsibility and authority to mothers than fathers when relationships are unstable.[222] The protocol highlights the importance of locating absent fathers not just to give fathers themselves opportunities but also to engage paternal kin.[223] Suggested methods and techniques for finding absent parents and relatives include: internet searches;[224] going through obituaries and other announcements in local newspapers; sending a "vague note" to postal services for forwarding addresses; and asking around the local neighborhood to see if anyone knows any relatives.[225] This search is supposed to continue throughout the case.[226] If the accused parent fails to provide the name of a willing and qualified kin, they are asked again at the next case planning conference, and then again, until case closure.[227]

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217. *See, e.g.*, S.T. v. Cabinet for Health & Fam. Servs., 585 S.W.3d 769, 772 (Ky. Ct. App. 2019) (describing parents who initially did not name any relative for potential kin placement).

218. Priscilla A. Gibson & Michaela Rinkel, *Increased Attention to the Search Process Improves the Chances of Foster Kinship Placements*, 15 J. FAM. SOC. WORK, no. 2, 2012, at 141, 152.

219. Karin Malm & Roseana Bess, *Identifying and Recruiting Kin to Act as Foster Parents*, *in* KINSHIP CARE: MAKING THE MOST OF A VALUABLE RESOURCE, *supra* note 70, at 25, 28–29, 35–36; Kristina P. Brant, In the Epicenter: Surveilling, Supporting, and Punishing Families amid the Rural Opioid Crisis and Beyond 241 (Aug. 27, 2021) (Ph.D. dissertation, Harvard University) (ProQuest) (describing parents who prefer their children to be placed in stranger foster care than kinship care).

220. Interview with Advocate 3. *See infra* Appendix B.

221. KY. DEP'T FOR CMTY. BASED SERVS., ABSENT PARENT AND RELATIVE SEARCH HANDBOOK: A GUIDE FOR SOCIAL WORKERS 3, https://manuals-sp-chfs.ky.gov/resources/Documents%20and%20Forms/Absent%20Parent%20and%20Relative%20Search%20Handbook.doc [https://perma.cc/BG9G-SGP7].

222. *See* Carbone & Cahn, *supra* note 39, at 524–28. *See also* Leslie Joan Harris, *Involving Nonresident Fathers in Dependency Cases: New Efforts, New Problems, New Solutions*, 9 J. L. & FAM. STUD. 281, 283–89 (2007) (noting a shift toward including non-resident fathers in child protection proceedings and its connection to the preference for kinship care).

223. *See* KY. DEP'T FOR CMTY. BASED SERVS., *supra* note 221, at 3.

224. Cabinet for Health & Fam. Servs. v. Batie, 645 S.W.3d 452, 458 (Ky. Ct. App. 2022).

225. KY. DEP'T FOR CMTY. BASED SERVS., *supra* note 221, at 8. In addition, federal law allows and encourages states to utilize parent locater service, intended for child support enforcement, for the purpose of locating absent parents and relatives. CHILD.'S BUREAU & OFF. OF CHILD SUPPORT ENF'T, U.S. DEP'T OF HEALTH & HUM. SERVS., ACYF-CB-IM-12-06 & OCSE-IM-12-02, REQUESTS FOR LOCATE SERVICES, REFERRALS, AND ELECTRONIC INTERFACE (Aug. 1, 2012), https://acf.gov/css/policy-guidance/requests-locate-services-referrals-and-electronic-interface [https://perma.cc/5C5N-Y6BJ].

226. *See* KY. DEP'T FOR CMTY. BASED SERVS., STANDARDS OF PRACTICE § 4.3 (2024), [https://perma.cc/MPT8-N5LT] (providing that social service worker should continue search for relatives after the initial search period of thirty days following the temporary removal hearing if the search has been unsuccessful).

227. Interviews with DCBS Worker 2, DCBS Worker 3. *See infra* Appendix B.

3. Why Prefer Voluntary Kinship Care?

Many Kentucky practitioners seem to believe that the general consensus in the child welfare field favoring kinship care over foster care also provides a rationale for voluntary kinship care involving direct parent-to-kin custody transfer.[228] Beyond this child-centric reason, another oft-cited reason is the shortage of foster homes, as described by an attorney practicing in a small county in central Kentucky ("X County"):

> Our Cabinet in [X] County strongly prefers not to take custody of children. They do not want the judge to give them custody if there is any other alternative. And it is so dire in [X] County in terms of the lack of appropriate foster placements, that there are some cases where we have DCBS workers sleeping on the floor of their staff office with children on air mattresses because the court has placed the children in the Cabinet's custody, and they don't have any place to put them. . . . Their goal, I think, is overwhelmingly to place with a [kin caregiver] rather than take custody, if at all possible.[229]

Stories of children sleeping on DCBS office floor, publicized by a local newspaper in 2023, created a sense of crisis and resulted in comments from the governor.[230] Kin caregivers are seen as "[stepping] up" for the children in this crisis.[231] Similarly, a supervisor at DCBS mentioned that they "really dig deep to find [kinship] connections" because it is exceedingly difficult to place certain children with foster caregivers, who usually prefer "cute little new babies."[232]

There is yet another dimension concerning cost and resource considerations. Under Title IV-E of the Federal Social Security Act, states are required to provide foster care maintenance payments for children placed in state-approved foster homes.[233] The federal government offers partial reimbursement of these payments for children from poor families, leaving the remaining financial burden to state child protection agencies.[234] Kentucky has interpreted this to mean that children

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228. *See* Interviews with Judge 1, Judge 2. *See infra* Appendix B. However, this general rationale does not necessarily justify voluntary kinship care over foster kinship care.

229. Interview with Attorney 4. *See infra* Appendix B.

230. *See* Andrew Wolfson, *Unplaced Children Sleeping on Floor of Kentucky Cabinet's Louisville Office*, CIN. ENQUIRER (July 8, 2023, 4:56 PM), https://www.cincinnati.com/story/news/2023/07/07/children-sleeping-in-office-if-kentucky-cant-place-them-in-foster-care/70392803007/ [https://perma.cc/YXC2-BSTW]; Bode Brooks, *Lawmakers Press for Answers After Reports Says Kentucky Foster Children Are Sleeping on Office Floors*, FOX 56 NEWS (WDKY) (July 24, 2023, updated 7:37 PM), https://fox56news.com/news/kentucky/lawmakers-press-for-answers-after-reports-say-kentucky-foster-children-are-sleeping-on-office-floors/ [https://perma.cc/WE4G-8EZK].

231. *New Report – Kinship Across Kentucky: Recommendations from Caregiver Voices*, KY. YOUTH ADVOCS. (Sep. 24, 2024), https://kyyouth.org/new-report-kinship-across-kentucky-recommendations-from-caregiver-voices/ [https://perma.cc/N4TS-VPXX].

232. Interview with DCBS Worker 2. *See infra* Appendix B.

233. 42 U.S.C. § 672(a).

234. Gupta-Kagan, *Hidden Foster Care*, *supra* note 59, at 884–86.

in kin caregivers' temporary or permanent custody are not considered to be in foster homes, thereby excluding them from receiving foster care maintenance payments.

Instead, kin caregivers who took custody of children due to alleged or adjudicated maltreatment were supported through the Kinship Care Program.[235] Funded by TANF block grants (rather than Title IV-E funding), the program offered a monthly benefit of $300 until the child turned 18, approximately half the foster care rate.[236] However, the program was discontinued in 2013 due to fiscal concerns.[237] Since then, relative caregivers who receive temporary custody in child protection cases have received the same financial assistance as those who become caregivers without state intervention: TANF child-only benefits, which are available as long as the child meets income eligibility (most children do) and the parents do not reside in the same household.[238] In Kentucky, this amount was fixed at $186 per month in 1995 and remained unchanged for 28 years (!) until a long-overdue increase for inflation in 2023 to $372.[239]

From the perspective of kin caregivers, accepting temporary custody means that they receive fewer resources but gain greater autonomy in the child's care and face less oversight from DCBS. For instance, the kin will not have to go through a comprehensive home study or complete hours of training,[240] and they will retain the authority to make medical and educational decisions for the child. Conversely, when the state assumes legal custody, it gains more control over the child's placement and care, including the ability to change placements without judicial approval.

However, having more control may not be preferable for the agency. For those at DCBS, increased control means more regulatory compliance and the need to

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235. Sheryl Edelen, SERIES: GRANDPARENTS; New Law Gives Financial Aid to Some Caregivers; Program Limits Leave Many on Their Own, COURIER-J. (Louisville, Ky.), May 7, 2000 at 13A.

236. *Id.*

237. Jessie Halladay, *Kentucky Is Cutting Child-Care Funding*, COURIER-J. (Louisville, Ky.), Jan 30, 2013, at A1.

238. 921 KY. ADMIN. REGS. 2:006 § 6; 2:016 § 9 (Westlaw). This is called "child-only" TANF cases, where no adult is included in the benefit calculation. In most states including Kentucky, if a child lives with a relative outside the foster care system, they can receive child-only TANF benefits regardless of the relative caregiver's income. Olivia GOLDEN & AMELIA HAWKINS, URB. INST., TANF CHILD-ONLY CASES (Nov. 11, 2011), https://www.urban.org/sites/default/files/publication/25426/412573-TANF-Child-Only-Cases.PDF [https://perma.cc/LXC5-HUMU]. Fictive kin are not eligible for child-only TANF benefits in Kentucky.

239. Dustin Pugel, *Kentucky's Basic Cash Assistance Program Just Got a Much-Needed Update*, KY. CTR. FOR ECON. POL'Y (Apr. 25, 2023), https://kypolicy.org/kentuckys-basic-cash-assistance-program-just-got-a-much-needed-update/ [https://perma.cc/HMN2-X5JB]. This change was associated with providing support for kinship caregivers. Nadia Ramlagan, *Updates to KY Benefits Program 'KTAP' Aim to Help Family Caregivers*, PUB. NEWS SERV. (Apr. 13, 2023), https://www.publicnewsservice.org/2023-04-13/livable-wages-working-families/updates-to-ky-benefits-program-ktap-aim-to-help-family-caregivers/a83993-1?utm_medium=email&utm_source=govdelivery [https://perma.cc/G4P6-57V3].

240. For differences between the two options, see KY. DEP'T FOR CMTY. BASED SERVS., RELATIVE AND FICTIVE KIN SERVICE ARRAY WORKSHEET (Sept. 2022), https://manuals-sp-chfs.ky.gov/resources/Documents%20and%20Forms/Relative%20and%20Fictive%20Kin%20Service%20Array%20Worksheet.pdf [https://perma.cc/KD8Q-3B6G].

allocate resources for training, home studies, and decision-making regarding the child's welfare. Indeed, DCBS does not hide its preference in its practice. Once kin agree to seek temporary custody by signing the relevant form, they forfeit the option to pursue foster approval later, locking them into the decision that limits their access to foster care maintenance payments.[241] By contrast, those initially pursuing the foster care route can still opt for temporary custody later.[242] This asymmetry illustrates the state's clear preference for kin to take temporary custody.[243]

4. Problems with Voluntary Kinship Care from Kin's Perspective

As frequently stressed by kin caregivers' advocates, DCBS' recruitment can be overwhelming for potential kin caregivers.[244] Unless the kin had already been deeply involved in the care of the child or was the one who made the referral,

241. KY. DEP'T FOR CMTY. BASED SERVS., ACKNOWLEDGEMENT STATEMENT: OPTIONS AND AVAILABLE SERVICES FOR RELATIVE AND FICTIVE KIN CAREGIVERS (Aug. 2021), https://manuals-sp-chfs.ky.gov/resources/Documents%20and%20Forms/DPP-178%20Acknowledgement%20Statement%20Options%20and%20Available%20Services%20for%20Relative%20and%20Fictive%20Kin%20Caregivers.pdf [https://perma.cc/NZ5A-CDLS]; KY. DEP'T FOR CMTY. BASED SERVS., RELATIVE AND FICTIVE KIN SERVICE ARRAY FLOW CHART, https://manuals-sp-chfs.ky.gov/resources/Documents%20and%20Forms/Relative%20and%20Fictive%20Kin%20Service%20Array%20Flow%20Chart.pdf [https://perma.cc/5PG7-RZ8G] ("Once relative/fictive kin accepts custody, children SHALL NOT enter DCBS custody for the purpose of the caregiver becoming of foster parent."); KY. DEP'T FOR CMTY. BASED SERVS., STANDARDS OF PRACTICE § 5.1 (2024) ("[H]owever, if they [kin caregivers] choose not to seek approval as a foster parent, they will not have the option to do this at a later time after they have received temporary custody;"), [https://perma.cc/ZSK9-LPLY].

242. KY. DEP'T FOR CMTY. BASED SERVS., STANDARDS OF PRACTICE § 5.1, n. 4, 6 (2024), [https://perma.cc/ZSK9-LPLY].

243. At the time of this research, kinship caregivers' advocates were challenging the DCBS' voluntary kinship care practice. Sarah Ladd, *Senate Bill Could Spare Kinship Care Families in Kentucky From Making a Costly Decision*, KY. LANTERN (Feb. 6, 2024, 4:59 PM), https://kentuckylantern.com/2024/02/06/senate-bill-could-spare-kinship-care-families-in-kentucky-from-making-a-costly-decision/ [https://perma.cc/6ZV5-J568]. These efforts led to a recent legislative change offering more financial support to kin caregivers through the Subsidized Permanent Custody program. *See* Shannon Moody, *KYGA24: Major Updates for Kinship Families*, KY. YOUTH ADVOCS. (July 3, 2024), https://kyyouth.org/kyga24-major-updates-for-kinship-families/ [https://perma.cc/XH3C-2FJ8]; Sarah Ladd, *'Flabbergasted:' Help for Kinship Care Families Passed Unanimously. $20M Price Tag Could Derail It.*, KY. LANTERN (June 26, 2024, 5:50 AM), https://kentuckylantern.com/2024/06/26/flabbergasted-help-for-kinship-care-families-passed-unanimously-20m-price-tag-could-derail-it/[https://perma.cc/K5W2-6ZAK]. It remains to be seen whether and to what extent this reform will change the DCBS' voluntary kinship care practices toward a more formal and public model of kinship care, with more due process and support. DCBS has updated its Standards of Practice in 2025 to incorporate this change, without stipulating the amounts available. *See* KY. DEP'T FOR CMTY. BASED SERVS., STANDARDS OF PRACTICE §§ C8.5, C8.7 (2025), https://manuals-sp-chfs.ky.gov/C8/Pages/C8-5-ntroduction-to-Subsidized-Permanent-Custody.aspx [https://perma.cc/TK7A-UBA5], https://manuals-sp-chfs.ky.gov/C8/Pages/C8-7-Relative-and-Fictive-Kin-Subsidized-Permanent-Custody-(SPC).aspx [https://perma.cc/HRD9-H8MQ]; *see also* 922 KY. ADMIN. REGS. 1:145 § 5 (Westlaw) ("If funding is available and the subsidized permanent custody is completed and agreed to by the cabinet and the caregiver . . . the payments shall be for an amount that is more than zero dollars, but does not exceed the foster care maintenance payment rate . . .").

244. Ladd, *Senate Bill Could Spare Kinship Care Families in Kentucky from Making a Costly Decision*, *supra* note 243.

contacts from DCBS can be abrupt.[245] Decisions about whether to take in the child, and under what legal arrangements, are often made under pressure, with significant but poorly understood implications. Once contacted by DCBS, kin caregivers are asked to decide whether to seek temporary custody—a decision that is irreversible—before the first hearing and without the benefit of state-appointed counsel.[246]

Meanwhile, from the perspective of kin who *want* custody of the child, DCBS' efforts can be insufficient. Between the rapid pace of removal, heavy workload, and the varying boundaries of kinship between and within families, DCBS does not, and presumably cannot, engage all relevant adults, especially in the beginning. If a suitable caregiver is found early in the process, DCBS may not actively seek or notify other potential caregivers. Both DCBS supervisors I interviewed confirmed that although they identify and compile a list of potential caregivers, they notify them one at a time.[247] If the first person contacted is willing and deemed appropriate after a home visit, others on the list will not be notified. This process, described by one attorney as "abysmal," sometimes requires kin to take the initiative in seeking out the opportunity:

> If a grandparent calls me and says, "I'm calling in a referral," I will say, "When you call in this referral, make sure you say I'm available to take these children." I've told people to reach out to the local office after [they] call the hotline. . . . You have to be the squeaky wheel because . . . they [the Cabinet] don't have the resources. I've had people who reach out, and it takes forever to get [their] home evaluated. I've had people who just never get a phone call. It's very frustrating, and then they [the relatives who want to care for the child] call an attorney.[248]

If DCBS is not amenable to their request, Kentucky relatives excluded from placement can intervene in the court case.[249] This is where functional parentage law is expected to play "family-preserving roles": to allow informal kin caregivers

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245. Interview with DCBS Worker 2. *See infra* Appendix B.

246. Ky. Dep't for Cmty. Based Servs., Relative/Fictive Kin Service Array Tip Sheet 2 (Mar. 2023), https://manuals-sp-chfs.ky.gov/resources/Documents%20and%20Forms/Relative%20and%20Fictive%20Kin%20Tip%20Sheet.pdf [https://perma.cc/QR2A-29HJ]; Ky. Dep't for Cmty. Based Servs., Notice to Relative of Removal of a Child (Mar. 2013), https://manuals-sp-chfs.ky.gov/_layouts/download.aspx?SourceUrl=https://manuals-sp-chfs.ky.gov/resources/Documents%20and%20Forms/DPP-1275A%20Notice%20to%20Relative%20of%20Removal%20of%20a%20Child.doc [https://perma.cc/QB9X-MBNQ].

247. Interviews with DCBS Worker 2, DCBS Worker 3. *See infra* Appendix B.

248. Interview with Attorney 3. *See infra* Appendix B.

249. *See* S.S. v. Cabinet for Health & Fam. Servs., 372 S.W.3d 445 (Ky. Ct. App. 2012) (affirming a trial court's order recognizing a great-grandmother, who intervened in a child protection case after being excluded from placement, as a DFC). Even without the DFC statute, relatives (but not fictive kin)—can generally intervene during the temporary custody phase based on the statutory preference. Ky. Rev. Stat. Ann. § 620.090(2) (West, Westlaw through 2024 Reg. Sess.); Cabinet for Health & Fam. Servs. v. Batie, 645 S.W.3d 452, 464-66 (Ky. Ct. App. 2022).

excluded from placement to have an additional path to fight back against the state. Indeed, some Kentucky kin excluded from placement decisions file a separate functional custody action against the state and its foster caregivers.[250]

However, it must be noted that DCBS' placement decision is not merely a choice between kin and strangers. While media reports on the child protection system tend to highlight custody battles between family/community members and unrelated foster caregivers, different kin members, such as those from maternal and paternal sides, also compete for placement and custody in Kentucky.[251]

Even if the agency were to strike the right balance between doing too much and too little and refine the messiness of its kinship care practice, considerable discretion would remain in selecting among potential caregivers—including the possibility of rejecting all kin in favor of placing the child in stranger foster care.[252] However problematic it might seem, it is also important to acknowledge that the exercise of broad discretion is a routine—and often inevitable—aspect of the agency's practice in general, not just in the context of kinship placements. Part of the reason we tolerate this level of discretion is based on our understanding that decisions are being made regarding who should *temporarily* care for a child—or at least that is the belief.[253] The next sub-section will explore the possibility that this hope will be dashed in many cases.

5. Kin Custody as New Permanency

In Kentucky, the state's coordination can readily result in prolonged separation between parent and child and long-term restructuring of households. As previously mentioned, voluntary kinship care using safety plans can lead to parent-child separations that last longer than the intended purpose of safety plans as short-term investigatory tools.[254]

Even in more common scenarios where the agency does follow up and involves the courts, the case does not always progress according to the typical child protection and foster care process envisioned by federal legislation. The primary assumption of this system, at least in the ideal, is that the best interest of the child—for which the state is exercising its parens patriae power—is served by reunification with their rehabilitated and reformed parents.[255] Termination of

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250. *See infra* notes 262–64 and accompanying text.

251. *See, e.g.*, *infra* notes 316–39 and accompanying text. *See also* Brant, *supra* note 87, at 87–88 (describing a maternal grandmother's efforts to get her granddaughter placed before the paternal grandparents). One unhappy trial judge complained about "each of [child protection] cases" having "up to ten (10) different relatives and fictive kin" who want the child to be placed with them. S.T. v. Cabinet for Health & Fam. Servs., 585 S.W.3d 769, 775 (Ky. Ct. App. 2019).

252. *See, e.g.*, S.G. v. Cabinet for Health & Fam. Servs., 652 S.W.3d 655 (Ky. Ct. App. 2022); G.P. v. Cabinet for Health & Fam. Servs., 572 S.W.3d 484 (Ky. Ct. App. 2019).

253. For initial placement decision's implications for later permanency outcomes, including both kinship and non-kinship foster care placements, see Gupta-Kagan, *The New Permanency*, *supra* note 59, at 61–62.

254. *See supra* Section II.C.1.

255. *See supra* note 51.

parental rights and adoption are supposed to motivate and threaten parents to turn their lives around in a timely manner while offering a less preferred solution when reunification is not possible. The typical process aims to balance these two traditional permanency options through regular administrative and judicial reviews, reunification services for parents, and strict timelines.

However, Kentucky serves as a prime example of the "new permanency" in child welfare, which creates a durable relationship through guardianship or other legal mechanisms without legally terminating the existing parent-child relationship.[256] In Kentucky, that mechanism is kin's legal custody. At the request of DCBS, permanent custody is granted to kin within a child protection case, with district courts empowered to enter permanent custody orders.[257] All three pathways to kin custody previously discussed—DFC, waiver, and unfitness—play a role here.[258]

From the perspective of the timelines envisioned in the typical process, the new permanency can be established too early in some cases—just months after the child is removed and kin receives temporary custody—depriving parents of the opportunity to receive reunification services.[259] In others, permanency is significantly delayed, leaving kin caregivers in a limbo state originally meant to be temporary and, at the same time, without offering robust support to parents.[260]

In states where the new permanency practice is not prevalent, functional parentage law can offer a pathway through which kin can pursue (new) permanency, with or without the agency's facilitation and support. In states like Kentucky where new permanency is already prevalent, functional parentage law can add a pathway through which kin can elevate their formal status to that of a legal parent—in addition to the already existing option of adoption—as they continue navigating their relationship with parents in post-new-permanency situations.

D. Interactions Between the Private and the Public

The discussion in Section C was limited to public child protection proceedings, where the agency is the lead prosecutor, even if kin intervene or receive custody. To further complicate matters, Kentucky kin caregivers can, and do, file private custody actions in court while a separate child protection case is pending

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256. For literature on the new permanency, see, for example, Gupta-Kagan, *The New Permanency*, *supra* note 59, at 1; SPINAK, *supra* note 56, at 283.

257. KY. REV. STAT. ANN. § 620.027 (West, Westlaw through 2025 Reg. Sess.).

258. KY. CT. JUST., ORDER: PERMANENT CUSTODY PURSUANT TO KRS 620.027, FORM AOC-DNA-9 (2018), https://www.kycourts.gov/Legal-Forms/LegalForms/DNA-9.pdf [https://perma.cc/FG7R-C4XE]. In addition to the three pathways, grandparents have special standing to pursue custody within a child protection case. § 620.027.

259. *See, e.g.*, Blakely v. Blakely, No. 2018-CA-001341-ME, 2020 WL 2298380 (Ky. Ct. App. May 8, 2020) (permanent custody granted just four months from removal). The DCBS supervisors whom I interviewed reported that "their Judge" would begin granting permanent custody to grandparents as early as the six-month mark, depending on the specifics of the case (*e.g.*, the lack of parental involvement). Interviews with DCBS Worker 2, DCBS Worker 3. *See infra* Appendix B.

260. *See infra* note 266 and accompanying text.

or unresolved. In rural counties, these cases can end up being filed in different courts.[261]

Sometimes, kin file private functional custody actions against DCBS and its non-kin foster caregivers. In a 2020 case, functional custody law played precisely the "family-preserving" role that proponents of functional parenthood law envision.[262] In this case, a fictive kin caregiver offered a place to live to a woman and her newborn whom he met at a trailer park. He cared for the child even after the mother moved out. The mother gave him power of attorney, but the arrangement was otherwise informal. DCBS had been involved since before birth and was aware of the arrangement. After almost a year, however, DCBS removed the child and placed her with an unrelated foster caregiver with whom the mother's older child had been placed and who later adopted that half-sibling. The kin filed a custody action, asserting his status as a DFC. Notably, even the foster caregiver, as a witness for DCBS, testified to the bond between the kin and the child, admitting that "it would help [the child] if [the kin] had custody of her."[263] Both the trial court and the court of appeals sided with the kin.[264]

However, these "family-preserving" cases where kin challenge DCBS and its unrelated foster caregivers are not the only or most common type of case involving DCBS intervention and functional custody law. This is likely due to two factors: First, DCBS already prioritizes kin to a significant degree. While this does not mean that everyone is happy with DCBS' discretionary placement practices,

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261. In family courts, which are available in 71 out of Kentucky's 120 counties, a single judge handles all cases concerning a particular family, whether it is a public child protection case (referred to as "DNA" or "J" cases) or a private custody case (referred to as "CI" cases). KY. CT. OF JUST., FAM. CT., https://www.kycourts.gov/Courts/Family-Court/Pages/default.aspx [https://perma.cc/V5GN-FKVA] (last visited July 23, 2024). In rural counties without family courts, child protection cases fall under the jurisdiction of district courts, while private custody disputes are handled by circuit courts. KY. REV. STAT. ANN. §§ 23A.010, 23A.100, 24A.130 (West, Westlaw through 2025 Reg. Sess.). Even when the same judge presides over both cases pertaining to the same child, judges are trained to approach the two proceedings with distinct perspectives. *See generally* KY. CT. JUST., LEGAL TRAINING FOR DEPENDENCY, NEGLECT, AND ABUSE CASES (2025), https://www.kycourts.gov/Court-Programs/Family-and-Juvenile-Services/Documents/2025%20DNA%20Training%20Book.pdf [https://perma.cc/VK5M-7FSK] (last visited Oct. 10, 2025).

262. Cabinet for Health & Fam. Servs. v. Neal, No. 2019-CA-001166-ME, 2020 WL 3027249 (Ky. Ct. App. June 5, 2020).

263. *Id.* at *2.

264. In this case, DCBS, already heavily involved with the mother concerning her older child, removed this child constructively from the mother's care and effectively from the kin's care. *Id.* at *1. Once the child was removed, the kin, as a non-relative, did not have a legally preferred status vis-à-vis foster caregivers; indeed, fictive kin, unlike relatives, were not eligible for voluntary kinship care at the time. *See supra* note 188. Based on its best interest judgment, DCBS prioritized the foster caregiver, presumably because the child could grow up with her half-sibling and because the fictive kin had a criminal history, among other factors. *Cabinet for Health & Fam. Servs. v. Neal*, 2020 WL 3027249, at *1-*2. However, DCBS should not have removed the child from the kin's care in this case because, as it later conceded, there were no maltreatment concerns regarding this child. *Id.* at *1. Informal caregiving by kin is not, in itself, a valid reason for intervention. In the past, child protection agencies have sometimes mistaken informal and shared caregiving as inherently neglectful. ROBERTS, *supra* note 56, at 294; Roberts, *supra* note 59, at 1623–34.

it does mean that those challenging DCBS' placement may be disputing not only stranger foster caregivers' physical custody but also other kin's legal or physical custody. Second, in cases where all potential kin caregivers are indeed excluded from placement in favor of unrelated foster caregivers, the former likely do not have enough resources to hire attorneys and bring the case to a trial, much less to an appellate court.

A common type of case previously ignored in functional parenthood discourse is when voluntary kin caregivers bring a custody action. Private custody cases sometimes arise when state-coordinated kinship care leaves "loose ends," such as safety plans that continue indefinitely or other voluntary kinship care cases that conclude without undergoing the comprehensive process mandated when DCBS retains legal custody. Attorney 4 illuminated why voluntary kinship care cases sometimes close out at the temporary custody stage[265]—a practice they found problematic—and how those cases later evolve into private functional custody cases:

> Attorney 4: [I]f a parent is not responsive to the Cabinet, if they're not pulling in for drug screens, at a certain point, everybody just says, "Look, it's on you at this point. You know, if you're not going to cooperate, we're not going to keep coming back here every 90 days to check in on your progress."
>
> Me: And then that caregiver can file for de facto custody in a [private] action?
>
> Attorney 4: Yes. I will often get cases like that, where the grandparents will come to me, and they will bring me a case or a docket order that just says, "Remand from active docket, temporary custody with the grandparent." Three years later, [the grandparents] will say, "Well, now [the parents] want visitation," or "Now, I want to adopt." Often, that's when I will get the case. And that's where we will file a [private]

265. One judge in an urban county told me that they would be surprised if this happened, whereas multiple other interviewees reported such instances. Written sources confirm that in some cases, courts either deem permanent custody unnecessary in voluntary kinship care cases or at least blur the distinction between temporary and permanent custody. *See* KY. CT. JUST., LEGAL TRAINING FOR DEPENDENCY, NEGLECT, AND ABUSE CASES 93 (2020), [https://perma.cc/535Z-Z9A7] (providing that cases will be closed in the court case management system at disposition and stating that only foster care cases must be re-docketed for annual permanency hearings); Reply Brief of D.O., A.O. and R.O. at 2, 10-11, D.O. v. Glisson, 847 F.3d 374 (6th Cir. 2017) (No. 16-5461); Rose v. Bright, No. 2020-CA-1551-ME, 2022 WL 1510479, at *1 (Ky. Ct. App. May 13, 2022) (describing a procedural history suggesting that at the disposition in the child protection case, the circuit court ordered that the children remain in the "temporary custody" of voluntary kin caregivers); E.S. v. Off. of Jefferson Cnty. Att'y, No. 2019-CA-000911-ME, 2020 WL 4507357 (Ky. Ct. App. July 10, 2020). The crucial issue is whether the child protection proceeding provides due process, rather than the designation of "temporary" or "permanent" custody. From the parents' perspective, granting permanent custody prematurely is similarly problematic—if they desire reunification, they will have to hire an attorney and file a separate action to modify custody and timesharing (consequently, private custody law can become relevant in more typical cases where kin are granted permanent custody within a child protection case).

> custody action to clean up those loose ends, which is not what the [DFC] statute intends. But that's very, very often how it ends up.[266]

In other words, voluntary kin caregivers pursue functional custody in a private action either because they seek legal closure or because parents desire formal or informal reunification while the kin disagree.

Even without controversial practices that leave "loose ends," voluntary kin caregivers sometimes pursue private custody actions while a child protection case involving the same child is pending. These actions might occur years after the initial intervention, as in Attorney 4's aforementioned example, or just months later.[267] The dynamics between parents, kin, and the state may vary, although the information available from most appellate cases only allows for speculation about these dynamics.

At one end of the spectrum, we can envision instances where kin find the child protection proceeding lengthy, intrusive, or unhelpful for themselves *and* parents. While there would be little need for a separate custody action if both parents agreed with kin custody, one parent, or specifically the accused parent, might align with the kin. In a 2022 case, a maternal grandmother with temporary custody from a child protection proceeding against the mother filed a separate functional custody action due to a conflict with the father, who had previously agreed to the grandmother's caregiving.[268] Given that the mother did not actively participate in the private custody case, she might have agreed with her own mother's permanent custody.

At the other end, we can envision kin who are diametrically opposed to the accused parent(s), or who enlist, rather than avoid, child protection law. The private use of child protection law by kin caregivers is most evident when they file a maltreatment petition in court, claiming that DCBS failed to intervene despite parental maltreatment.[269] This brings DCBS "in on the back end," allowing kin to bypass its discretionary placement.[270] Beyond believing that there is maltreatment that DCBS failed to address, kin might have other reasons to file such petitions, such as seeking an ex parte emergency custody order to avoid having to surrender

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266. Interview with Attorney 4. *See infra* Appendix B.

267. *See, e.g.*, Hoskins v. Elliott, 591 S.W.3d 858 (Ky. Ct. App. 2019) (featuring a voluntary kin caregiver who filed a private functional custody action eight months after beginning care for the child and while a child protection case against the mother was ongoing).

268. Corbin v. Mullins, No. 2021-CA-1243-MR, 2022 WL 4390656, at *1–*2 (Ky. Ct. App. Sept. 23, 2022).

269. In Kentucky, all individuals, regardless of their professional roles, are mandated reporters. KY. REV. STAT. ANN. § 620.030 (West, Westlaw through 2024 Reg. Sess.). Consequently, when filing a private maltreatment petition, the petitioner must affirm that they have made a referral to DCBS or other state institutions, such as the police. KY. CT. JUST., JUVENILE DEPENDENCY/NEGLECT OR ABUSE PETITION WITH EMERGENCY CUSTODY ORDER AFFIDAVIT, FORM AOC-DNA-1 (2021), https://www.kycourts.gov/Legal-Forms/Legal%20Forms/DNA-1.pdf [https://perma.cc/G4VA-KJT4].

270. Interview with DCBS Worker 2. *See infra* Appendix B. Trial courts across the state vary in terms of how they treat private maltreatment petitions, including the specific procedure. Some judges are wary of such practice and reportedly do not entertain them.

the child they are currently caring for to the parents during intense conflicts.[271] They might also use private maltreatment petitions to work around the requirements under the DFC statute or as a "jumping off point" to pursuing a private custody action.[272] For these reasons, kin might first pursue emergency, and then temporary, custody, before aiming for permanent custody as part of the child protection case. Simultaneously, they might file a separate custody action, sometimes arguing that the time they spent with temporary custody of the child, granted through the maltreatment action, must be recognized under the DFC statute.[273]

Although trial courts across Kentucky vary in their handling of child protection cases when a voluntary kin caregiver files a private custody action, some prioritize the latter, closing the child protection case once the kin caregiver wins custody.[274] The ideal envisioned by the family court system, as repeated by judges and attorneys during interviews, is that a single, problem-solving judge familiar with the family would preside over both cases and resolve matters appropriately.[275] If parents make meaningful progress quickly enough, or if the kin's intentions are dubious, the judge would let the child protection case continue rather than defer to the custody case. However, this approach is not always feasible because not all counties have family courts.[276]

Furthermore, this approach potentially favors kin over parents when their interests do not align, especially those with the resources to hire attorneys and actively initiate the shift from public child protection proceedings to a private legal resolution.[277] In such instances, the public might yield to the private, as noted by a DCBS supervisor who admitted to being "not a fan" of this practice:

> [S]ometimes these dockets get so crowded . . . I think that sometimes judges, attorneys, and social workers . . . we lose sight of what is in [the] best interest [of the child], and we just say, "Well, this is an

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271. Interview with Attorney 2. *See infra* Appendix B.

272. Interview with Judge 1. *See infra* Appendix B; Brant, *supra* note 219, at 233–35.

273. *See, e.g.*, my discussion of the case cited *infra* note 291; Brant, *supra* note 219, at 235–37 (describing how a mother's reunification became more difficult when her ex-husband and ex-mother-in-law filed a private custody action once they were granted joint temporary custody in a child protection proceeding).

274. *Compare* H.H. v. T.D, No. 2023-CA-0252-ME, 2023 WL 7393053, at *1 (Ky. Ct. App. Nov. 9, 2023) (describing a procedural history suggesting that the child protection court led kin caregivers to "agre[e] to remand the [private custody] action in favor of [the child protection case]") *and* A.A. v. Cabinet for Health and Fam. Servs., No. 2019-CA-000838-ME, 2020 WL 1074779, at *1 (Ky. Ct. App. Mar. 6, 2020) (describing a procedural history suggesting that the child protection court was held in abeyance upon learning of a pending custody case). When the same judge presides over the case, often the judge will refer it to private custody proceeding, especially if the parent is not making progress on their case plan quickly enough. Interview with Judge 2. *See infra* Appendix B.

275. Interviews with Judge 1, Judge 2. *See infra* Appendix B.

276. *See supra* note 261.

277. Additionally, in a private custody action, the state does not cover the costs for guardians ad litem, drug testing, or other related expenses, unlike what typically happens in a child protection case.

> appropriate grandpa, so let's just give him . . . de facto custody, and we'll just close this case out, that's one less case."[278]

Similar to child protection cases that close at the temporary custody phase, the parent and the child remain separated, while DCBS is relieved of its responsibilities to provide reunification services to—and continue its efforts to reform and rehabilitate—the parents.[279]

E. Parents Are Left Out

Kentucky's child protection practices of voluntary kinship care, in conjunction with functional custody law, create a system that addresses underlying problems of parental substance abuse, incarceration, and poverty by rearranging households and compensating kin's care work with legal recognition rather than financial support. At the same time, this system fails to provide adequate support to parents and often actively disadvantages peripheral parents.

The role of functional custody law in privatizing dependency becomes clearer when comparing voluntary kin caregivers with unrelated foster caregivers, whose work is compensated with money but not legal custody. The Kentucky Court of Appeals blocked foster caregivers' attempts to establish permanent legal relationships with their foster children through functional custody law in 2001, early in the history of the DFC statute.[280] The court reasoned that DCBS, not the foster caregivers, served as the primary financial supporter of the child.[281] This stance was upheld in a recent case where foster caregivers tried to intervene in a child protection proceeding and request legal custody of children they had cared for while the parents worked on their case plan for over three years.[282] If the court had focused solely on the functional parenting provided by the foster caregivers or the bond between them and the children, there would have been little reason not to grant custody to the foster caregivers.[283] Nonetheless, the court of appeals denied their standing, barring the use of functional custody law to circumvent the limits on their rights within the child protection system.[284]

The paid/unpaid caregiver dichotomy and the inclusion of only the latter group in the beneficiaries of functional custody/parentage law is not unique to

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278. Interview with DCBS Worker 2. *See infra* Appendix B.

279. Sometimes, parents are advised to file a private action to modify the custody order once they have independently completed their case plan without the agency's support. Interviews with Judge 2, Attorney 2. *See infra* Appendix B.

280. Swiss v. Cabinet for Fams. and Child., 43 S.W.3d 796, 797–78 (Ky. Ct. App. 2001).

281. *Id.*

282. T.C. v. Cabinet for Health and Fam. Servs., 652 S.W.3d 670 (Ky. Ct. App. 2022).

283. The youngest child, who spent her entire two and a half years of life with her foster caregivers, reportedly cried when required to visit her parents. *Id.* at 674.

284. For recent coverage of Colorado foster caregivers attempting to intervene in a child protection proceeding and a tragedy that unfolded "[o]nce the system 'put this idea in their heads that adoption could be an achievable goal for them,'" see Eli Hager, *When Foster Parents Don't Want to Give Back the Baby*, ProPublica (Oct. 16, 2023, 6:00 AM), https://www.propublica.org/article/foster-care-intervention-adoption-colorado [https://perma.cc/6Y26-T53A].

Kentucky law and is common in functional custody/parentage law reform proposals.[285] This distinction is underpinned by an ideology that contrasts familial care, seen as altruistic and unpaid, with market-based care, perceived as individualistic and paid.[286] When the state is introduced into this family/market dichotomy, a distinctive picture emerges: Unlike unrelated foster caregivers, who are treated as paid caregivers engaged by the state, kin serve as unpaid or underpaid caregivers within the family;[287] their familial caregiving, in turn, earns them a functional custody claim.

The bottom line is that a quasi-private child protection system is in operation, occupying a space between the private realm, where parents and kin arrange kinship care themselves, and the public domain of traditional child protection and foster care.[288] Functional custody law forms a critical component of this system, along with the practice of voluntary kinship care. This system not only recognizes but also, as previously discussed, recruits and pressures kin caregivers. It traps them in unpaid or underpaid care work[289] and divides their loyalties between the children they are caring for, the parents (sometimes their own children), and their own needs and desires. Meanwhile, some kin caregivers enlist this system to fend off the state or to formalize their relationship with children in private and informal kinship care.

Notably, parents are left out of the care-work-for-custody deal between kin caregivers and the state—despite bearing significant costs of the quasi-private system. By offering the state a cheap and convenient way to offload child protection cases, this system could further undermine parents' prospects for reunification. The burden on parents becomes clear when they must fight not only the state but also the kin to maintain their custody in cases where kin are unsupportive. This is particularly evident when kin are allowed to pursue private custody actions while parents work with, through, and against the child protection system. In such cases, parents must fight on two fronts—without the benefit of appointed counsel for indigent parents in private custody cases.

The implications of the quasi-private child protection system for parents have led to ambivalent appellate cases regarding how to factor the ongoing child protection case into functional custody jurisprudence. Among other challenges, courts have struggled to determine when a voluntary kin caregiver with temporary custody acquires, loses, and subsequently regains DFC status in a private custody

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285. *See infra* note 385. For a criticism of this distinction, see Pamela Loufer-Ukeles, *Money, Caregiving, and Kinship: Should Paid Caregivers Be Allowed to Obtain De Facto Parental Status*, 74 MO. L. REV. 25 (2009).

286. Frances E. Olsen, *The Family and the Market: A Study of Ideology and Legal Reform*, 96 HARV. L. REV. 1497 (1983).

287. *But see* Miller v. Youakim, 440 U.S. 125 (1979).

288. Smith, *supra* note 59, at 273 uses the term "private child protection" to describe similar cases in the context of guardianship, where petitioners allege reduced parental capacity or maltreatment, and public child protection agencies are not fully involved.

289. *See* Brant, *supra* note 219, at 207 (describing kin caregivers' anger and their sense that the state is using them to save the system).

action—as parents work through, or in the case of noncustodial parents, are sometimes left out of, the public child protection system.[290] The prospects for such parents, especially peripheral parents, are not bright.

In 2019, the Kentucky Supreme Court tried to resolve some of these challenges in *Meinders v. Middleton*.[291] The facts of this case, according to Kentucky Practice Series, "are unfortunate but not as uncommon as we might like to believe."[292] It featured a mother, a biological father residing in a neighboring state, and two kin caregivers living 255 miles apart: a putative paternal grandmother in Paducah, Kentucky, and a putative paternal aunt in Lexington, Kentucky.[293] The child was born in December 2014 with no father listed on the birth certificate.[294] However, the kin had been led to believe since the pregnancy that their son or brother, who was incarcerated, was the father.[295] We do not know how certain the mother was about the biological truth, but it seems that she really needed a kin network in Kentucky: She was seemingly indigent,[296] lived in a home rented by the putative grandmother in Paducah,[297] and was incarcerated twice during the child's first eight months of life, during which the two kin cared for the child for about a month in total.[298] In September 2015, when the child was just about nine months old, the kin caregivers filed a private maltreatment petition alleging neglect at the district court in Paducah and were awarded emergency and then temporary joint custody.[299] The child stayed in Paducah with one or the other kin caregiver, presumably to maintain the status quo temporarily and allow visits with the mother.[300] On November 5, 2015, the case proceeded to an adjudication hearing, at which point the court relieved DCBS, which had been involved following the private petition, of its duties.[301] The court also decided that the child would live in Lexington with the aunt and visit the grandmother in Paducah.[302] Only then did the mother request a paternity test for the biological father, whose

290. *See generally* Graham & Keller, *supra* note 157, §§ 21:29, 21:29:40, 21:29:50. The very first appellate court case that applied the DFC statute since its enactment addressed this issue. Sullivan v. Tucker, 29 S.W.3d 805 (Ky. Ct. App. Aug. 4, 2000).

291. Meinders v. Middleton, 572 S.W.3d 52 (Ky. 2019).

292. Graham & Keller, *supra* note 157, § 21:29.50.

293. *Meinders*, 572 S.W.3d, at 54–55.

294. *Id.* at 54; Oral Argument at 25:44-25:54, Meinders v. Middleton, 572 S.W.3d 52 (Ky. 2019), https://ket.org/program/kentucky-supreme-court-coverage/dixie-meinders-et-al-v-daryl-k-middleton/.

295. *Meinders*, 572 S.W.3d, at 54–55.

296. *Id.* at 60, n. 12.

297. Middleton v. Meinders, No. 2017-CA-001096-ME, 2018 WL 1136439, at *1. At the trial, the biological father testified that he, the mother, and the child had (also) lived in Missouri at some point—a fact disputed by the kin caregivers. Oral argument, *supra* note 294, at 20:57-22:28, 38:55-39:36.

298. *Middleton*, 2018 WL 1136439, at *1.

299. The supreme court's opinion states that the putative grandmother requested emergency custody. *Meinders*, 572 S.W.3d, at 54. However, during oral argument, attorneys for both parties stated that the district court had granted joint temporary custody to the two kin caregivers at the temporary removal hearing. Oral argument, *supra* note 294, at 15:55–16:05, 29:53–30:00.

300. Oral argument, *supra* note 294, at 16:17–17:38.

301. *Meinders*, 572 S.W.3d, at 55.

302. *Id.*

result (positive) came out in January 2016.[303] On April 29, 2016, the biological father moved to transfer custody within the child protection proceeding.[304] On September 6, 2016, the father filed a separate custody action in circuit court, which the kin caregivers countered with a claim for functional custody.[305]

Many legal questions were raised, or could have been raised, in this case. The DFC statute allows for a longer statutory period when a child is "placed by DCBS," presumably because a state-coordinated placement is considered more coercive than a family-initiated care arrangement.[306] Given that the kin caregivers initiated the placement through a private petition, does the longer period of one year or the standard six-month period apply in this case? Must that period be continuous, or can the kin caregivers aggregate the time they spent with the child, including when the mother was incarcerated? Can the two kin caregivers tack on the time they each spent with the child? The DFC statute excludes the "period of time after a legal proceeding has been commenced by a parent seeking to regain custody of the child" in calculating the statutory period.[307] Was the father's motion within the child protection proceeding in April, or the separate custody action in September, such a legal proceeding, tolling the statutory period? What if DCBS had not been relieved of its duties, and the mother was making progress on her case plan—which seemed too slow to some but meaningful enough to other professionals? Would that have tolled the time?

Underlying these technical questions are the stakes between parents and kin, as well as the larger issue of how to understand the relationship between public child protection proceedings and private custody disputes. Depending on how these questions are answered, the aunt could have become a DFC as early as February 2016 and, depending on the best interest analysis, awarded sole custody. Or she did not have standing to assert custodial rights and had to return the child to the father. The court took the latter position.[308]

In addressing some of the questions just mentioned, the Kentucky Supreme Court seemingly prioritized parents involved in child protection cases over kin caregivers seeking custody-for-care-work. The court concluded that one caregiver must have had the child for a continuous period, which can be tolled by "any active participation by a parent in a custody proceeding evincing a desire to regain custody," without necessarily having to file a separate action.[309] Moreover, the court gave weight to the fact that the father attended every court appearance and asserted his parental rights in the child protection proceeding shortly after the

303. *Id.*
304. *Id.*
305. *Id.*
306. Ky. Rev. Stat. Ann. § 403.270(1) (West, Westlaw through 2025 Reg. Sess.).
307. *Id.*
308. The trial court granted sole custody to the aunt and awarded the father four-hour daytime visits twice per month in Lexington. The court found that the statutory period had begun on November 5, 2015, and that the father had failed to toll it until September 6, 2016, when he filed a separate custody action. *See* Middleton v. Meinders, No. 2017-CA-001096-ME, 2018 WL 1136439, at *4.
309. *Meinders*, 572 S.W.3d, at 61.

mother requested the paternity test.[310] The aunt's (not the aunt *and* the grandmother's) clock began ticking on November 5, 2015, when the child moved to Lexington with her, but the father (not the mother) tolled the time, definitely by his April motion, but even before that, by merely appearing in the child protection proceeding on November 19, 2015.[311] Therefore, the aunt's functional parenting lasted only two weeks. In its ruling, the court emphasized that parents have fundamental constitutional rights to raise their child, citing the U.S. Supreme Court case *Troxel v. Granville*.[312]

However, the Kentucky Supreme Court likely had it easy in *Meinders* because it involved a biological father who did not pose a serious problem to middle-class sensibilities—he had no substance abuse issues, was formerly a pharmacist,[313] and made a probable case that he belonged to the group of responsible men unfairly excluded from fatherhood.[314] When it comes to more morally challenging, hard-to-sympathize-with-from-a-middle-class-perspective parents directly involved in child protection cases, it is unclear how much support *Meinders*—or the doctrinally ambiguous *Troxel*, for that matter—can provide them at the lower court level. *Meinders* certainly did not put a brake on the role of functional custody law in the quasi-private child protection system.[315]

A recent case featuring a bitter intra-kin custody dispute in rural Appalachia—between a father and paternal grandmother on one side, and maternal grandparents and a maternal uncle on the other—illustrates how parents perceived as undeserving or lacking resources might lose custody to more favored or resourceful kin.[316] The unusual wealth of facts available in this case vividly demonstrates what state-coordinated kinship care and functional custody can look like without romanticization, so I will detail them here. In this case, the unfitness doctrine provided the court with a way around the DFC statute. The point, however, is not that the DFC statute is irrelevant, but that when a private custody dispute between parent and kin occurs with a public child protection case looming in the background, a peripheral parent's fate may be worse than if there were only the child protection case.[317]

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310. *Id.* at 59.

311. *Id.* at 59–60.

312. *Id.* at 61; Troxel v. Granville, 530 U.S. 57 (2000).

313. However, the father's pharmacy license had been revoked, and he had been charged with a DUI. *Middleton*, 2018 WL 1136439, at *2.

314. Indeed, in his oral argument, the father's attorney emphasized that even the rights of substance-using parents are protected. Oral Argument, *supra* note 294, at 22:59-23:12 ("I'm sure the Justices have seen, in DNA cases, that there have been people with *substance abuse* problems that have gotten their child faster . . . than [the father] in this case.").

315. Interview with Judge 1. *See infra* Appendix B.

316. Crossland v. Neal, No. 2019-CA-1462-MR, 2022 WL 2279851 (Ky. Ct. App. June 24, 2022).

317. The *Meinders* court noted a similar point regarding the district court's dismissal of DCBS. *Meinders*, 572 S.W.3d, at 55, n.5 ("This dismissal of the Cabinet leaves a parent, often with limited means, without assistance to make the necessary improvements to regain custody and is not helpful to reunification of children with their biological family.").

The child in this case was born to parents who both had histories of substance abuse.[318] During the pregnancy, the couple lived with the soon-to-be paternal grandmother and a disabled paternal aunt in the grandmother's two-bedroom trailer.[319] The couple also got married.[320] In November 2017, when the child was born, he required a month-long hospitalization in Louisville, one hundred miles away from the trailer.[321] It seems that the family held on to the newborn—the three women stayed in a nearby charity, while the father worked and visited on weekends.[322] Upon the child's release from the hospital, however, he was removed from the parents' care for unspecified reasons and placed into the temporary custody of the paternal grandmother,[323] meaning that the parents were no longer allowed in the trailer.[324] The case does not tell us how the parents navigated their sudden loss of housing. Suffice it to note that later, at the court, the maternal kin indicated that the parents lived in the trailer in violation of the temporary removal order, while the paternal grandmother denied this.[325]

The case also does not tell us why and how DCBS became involved. Maybe the hospital made a referral when the child was born addicted to Subutex,[326] a medication used to treat opioid addiction. However, even if this had not occurred and the parents had been allowed to go home with the child, it would have been unsurprising if DCBS intervened later, given the state's pronounced presence in the lives of poor families. Before the child's arrival, for instance, the police were frequently called to the household for domestic violence, resulting in at least one assault charge against the father.[327] Who was the aggressor, and against whom, were vehemently disputed in the custody case;[328] regardless, any such incident could have easily led to DCBS intervention on behalf of the child.

The child did not stay long with the paternal grandmother, however. In January 2018, he was removed once again, with frozen water pipes being cited as one of the problematic conditions of the trailer home.[329] We do not know what prompted this second placement, either. Perhaps maternal relatives made a

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318. *Crossland*, 2022 WL 2279851, at *1.

319. *Id.*

320. *Id.*

321. *Id.*

322. *Id.*

323. *Id.* The reasons for removal are not clear from the appellate case. In fact, "[a]lthough matters in the [child protection] proceeding were extensively referenced in this custody proceeding . . . they [were] not part of the record on appeal." *Id.* at *1, n.1. In his testimony, the father stated that "he still did not understand why he was removed from caring for child while child was still at the hospital and blamed it on [the mother]'s being volatile at the hospital." *Id.* at *4.

324. *Id.* at *1. *See also* Brant, *supra* note 219, at 216–20 (describing how parents often lose housing due to "removals").

325. *Crossland*, 2022 WL 2279851, at *2, *4.

326. *Id.* at *1.

327. *Id.* at *2–*4. The paternal grandmother and the father disagreed about how often the police were called. *Id.* at *3.

328. *Id.* at *2–*4. The trial court believed the maternal kin's account. *Id.* at *6.

329. *Id.* at *1.

referral against the paternal grandmother; or a caseworker found the condition of the trailer problematic during monthly home visits, even though it had been deemed appropriate a month earlier.[330] This time, the maternal grandmother wanted to take the child, but her motion for temporary custody was denied in the child protection proceeding.[331] Instead, temporary custody was granted to the maternal uncle.[332] Since the uncle worked full-time, the maternal grandparents effectively became the primary caregivers anyway.[333] In September 2018, the maternal grandparents filed for custody, citing all three bases: DFC, waiver, and unfitness.[334]

The trial court ruled, and the court of appeals affirmed, that even though the maternal grandparents did not meet the requirements under the DFC statute,[335] they nonetheless had standing because the parents were unfit.[336] Permanent custody was awarded to the grandparents, while the father was granted visitation every other weekend, and the mother received supervised visitation.[337] The testimonies from the father and the paternal grandmother on one side and from the maternal grandparents and uncle on the other were "diametrically opposed"[338]—ranging from who was responsible for diaper rash to whether the father missed medical visits or was hindered from attending them.[339]

We cannot know which side had more truth in their testimonies.[340] Rather, what's notable here is that the caseworker assigned to the family deemed the father "compliant" with his case plan and his home safe and appropriate.[341] While the grandparents were "appropriate caregivers," testified the caseworker, she could not recommend permanent custody with them under the agency's policy, considering the progress the father had made towards reunification.[342] The fact that the father tested positive for Suboxone, a prescribed medication for opiate addiction, and nothing else, was seen as "progress" from the agency's

330. *See* Brant, *supra* note 219, at 221–22 (describing situations where DCBS can become involved after kinship placement).

331. *Crossland*, 2022 WL 2279851, at *1.

332. *Id.*

333. *Id.*

334. *Id.* at *2.

335. The reason is not discussed in the appellate case. *Id.*

336. *Crossland*, 2022 WL 2279851, at *9–*10.

337. Very little detail about the mother and her relationships is provided in the decision. From the fact that the mother and the father were married, we can infer that they probably planned to stay together at some point before the birth. *Id.* at *1. We also know that the mother occasionally stayed with her brother during her pregnancy, although there is no information about her relationship with her parents. *Id.* at *1. The mother was less successful in working with DCBS, never advancing to unsupervised visits, unlike the father. *Id.* at *1–*2, *7. During the trial, the mother "admitted her behavior after the child was born was poor" and did not oppose her parents assuming custody, content with supervised visits. *Id.* at *1–*3 She expressed concerns about the father's anger issues but "also indicated she believes [the father] capable of caring for child." *Id.* at *3.

338. *Id.* at *1.

339. *Id.* at *3–*7

340. The trial court generally credited the maternal kin's testimony. *See id.* at *6–*7.

341. *Id.* at *5.

342. *Id.*

perspective,[343] whereas the court interpreted it as negative against his "mental health or present fitness to care for the child."[344] Like the father in *Meinders*, the father in this case did not stop asserting "his God-given right to raise his son"; unlike the father in *Meinders*, he was involved in the child's life from birth.[345] Nevertheless, his struggle within the child protection system was thwarted by the kin's caregivers' custody claim.

Despite the implications of the quasi-private child protection system for peripheral parents, their voices remain unheard in Kentucky. During my research, seeking parallels to movements in other states like New York[346] and eager to hear parents' perspectives on state-coordinated kinship care and/or functional custody, I consistently inquired about organized advocacy on behalf of parents impacted by the child protection system. It turns out there is none. Attorney 3, who in addition to representing kin caregivers in their private practice regularly serves as a state-appointed attorney for parents, answered the question by pointing instead to the dire situations of their clients:

> They [the attorney's current clients] are living in a tent! And I just keep saying, what resources are you giving them? How are you helping them? And they [the Cabinet] just keep giving them a list of the things they want them to do. Well, they want them to do assessments and classes and drug screens. This whole list of stuff, and I'm like, how? They can't pay for all that stuff, they can't get to those things.[347] They live in a tent! Let's help them get a house. But they'll just give them a list of phone numbers. So, I think there's no groups because those folks are all really busy trying to get all the other things done on their list of stuff, they don't have time to form a group.[348]

Eventually, I reached Advocate 3, who was engaged in multi-stakeholder initiatives including DCBS, with a goal to make the system more understanding of parents' predicaments and to narrow the "huge gap between people that don't worry about transportation and people who don't have it":

> Parents, they don't have a voice. And that is my number one charge right now, to figure out how to. [T]o be honest, foster parents had a huge platform, and now kinship has a huge platform, and it's now double as hard to get parents' voice. I think people, they want to just solve

343. *Id.*

344. *Id.* at *12.

345. *Id.* at *4.

346. *See, e.g.*, RISE, https://www.risemagazine.org/rise-magazine/ [https://perma.cc/Y9YC-22R2] (based in New York) (last visited July 1, 2024); UPEND MOVEMENT, https://upendmovement.org/ [https://perma.cc/DVP6-SF2H] (last visited July 1, 2024) (with a national focus while based in Texas).

347. *See* Brant, *supra* note 219, at 143–44 (explaining how resources are either limited or difficult to access, thereby making it more difficult for parents to comply with their case plan).

348. Interview with Attorney 3. *See infra* Appendix B.

> child abuse, which, we know child abuse has included mostly neglect, which is mostly poverty. People want to solve that. So, they're like . . . "This is the quick fix. We'll just put them with family."[349]

Advocate 3, a modest reformer and not an abolitionist, largely agreed with the mainstream child welfare field's consensus, including the preference for kinship care. Nonetheless, they found the valorization of kinship care and caregivers somewhat stymying for parent-focused advocacy.

Tellingly, in 2021, the Kentucky Legislature swiftly amended the DFC statute in response to *Meinders* to allow the aggregation of statutory periods within the last two years. Introducing the bill to the Senate Judiciary Committee, Senator Phillip Wheeler—a lawyer whose own parents had cared for his three nephews—highlighted the significance of the statute:

> Why [DFC statute] is important is, when you get into an actual custody battle over the child, if you have de facto custodian status, you stand on equal footing with the parents. So, normally, unless you are considered a de facto custodian, you stand at a lesser level than the parents. I think that's normally a good thing. It's not always a good thing when it comes to children from a household suffering from addiction or abuse.[350]

Two points stand out from this pitch: first, the ease with which parental rights can be dismissed in this "abnormal" context, in a state where these rights provide a powerful rationale and rhetoric for law reform in more "normal" contexts; second, the equation of functional custody law with child protection.

State lawmakers responded with an "enthusiastic yes,"[351] either because they had "lots of grandparents in [their] district and constituents who this will directly impact,"[352] because it is not an "anti-parent," but a "pro-child" legislation,[353] or simply because it is a "common-sense change . . . to allow for judges to use their common sense."[354] It could not be clearer how parental rights and functional

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349. Interview with Advocate 3. *See infra* Appendix B.

350. *An Act Relating to De Facto Custodians: Discussion of SB 32 Before the S. Comm. on the Judiciary*, 2021 Gen. Assemb., Reg. Sess. at 03:49 (Ky. 2021), https://ket.org/legislature/archives/2021/regular/senate-judiciary-committee-175113 (statement of Sen. Philip Wheeler, Member, S. Comm. on the Judiciary).

351. *An Act Relating to De Facto Custodians: Discussion of SB32 Before the H. Comm. on the Judiciary*, 2021 Gen. Assemb., Reg. Sess. at 08:10 (Ky. 2021), https://ket.org/legislature/archives/2021/regular/house-judiciary-committee-175898 (statement of Rep. Kimberly Poore Moser, Member, H. Comm. on the Judiciary).

352. *Id.*

353. *An Act Relating to De Facto Custodians: Discussion of SB 32 Before the S. Comm. on the Judiciary*, 2021 Gen. Assemb., Reg. Sess. at 06:18 (Ky. 2021), https://ket.org/legislature/archives/2021/regular/senate-judiciary-committee-175113 (statement of Sen. Robert Stivers, Member, S. Comm. on the Judiciary).

354. *An Act Relating to De Facto Custodians: Discussion of SB 32 Before the S. Comm. on the Judiciary*, 2021 Gen. Assemb., Reg. Sess. at 04:54 (Ky. 2021), https://ket.org/legislature/archives/2021/regular/senate-judiciary-committee-175113 (statement of Sen. Whitney Westerfield, Chair, S. Comm. on the Judiciary).

custody are understood in the state: Parental rights are great, as long as parents are worthy of them; otherwise, they are forfeited to de facto custodians, who serve as unpaid or underpaid foster caregivers, either in unequal partnership with the agency or on their own.[355]

III. Parents, Kin, and the State

This final Part examines the likely implications of functional parentage law across the country when added to the existing legal landscape that governs peripheral parents and their kin who share in childrearing. While the analysis heavily relies on the Kentucky case study and is therefore somewhat speculative about legal outcomes elsewhere, it nonetheless provides crucial insights to complement the currently available, largely positive, picture of functional parentage law. First, I examine the feasibility and desirability of using functional parentage law to support and enhance kinship care outside the foster care and child protection system. I then explore how the introduction of functional parentage law can empower kin in their relationships with parents *before* they petition for parentage. Finally, based on this analysis, I argue that the UPA's de facto parentage provision and its advocates are insufficiently attentive to its implications for peripheral families and communities, and especially for peripheral parents.

A. Functional Parentage Law and Kinship Care

When proponents of functional parentage law envision it as a way to preserve families facing state intervention, they likely picture a scenario similar to the one discussed at the outset of this Article: The child protection agency removes a child due to alleged parental maltreatment, placing the child in stranger foster care despite the eager availability of an existing informal kin caregiver. Upon removal, the kin could quickly and successfully file for functional parentage because the parents would not contest the claim. The kin would then seek to retrieve the child, either by intervening in the ongoing child protection case or initiating a separate custody action.

On this view, the promise of functional parentage law lies in its potential to challenge agency practices that fail to prioritize kin and to bolster kinship care outside the child protection and foster care system[356]—except that it would not be

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The lawmakers cited here are all Republican, but the issue is generally bipartisan. For instance, the 2024 bill, discussed *infra* note 356, was introduced by Rep. Rachel Roberts, a Democrat, and its primary co-sponsor was Rep. John Blanton, a Republican. Ernesto Scorsone, the primary sponsor of the DFC statute in 1997, was also a Democrat. S.B. 205, 1998 Gen. Assemb., Reg. Sess. (Ky. 1998), https://apps.legislature.ky.gov/record/98rs/SB205.htm [https://perma.cc/2UQW-MLJM]; *see also* Harper, *supra* note 165, at 19.

355. In 2024, a bill was introduced to codify the wavier and unfitness doctrines, as well as to clarify that private custody petitions filed under the DFC statute, the waiver doctrine, or unfitness doctrine "may proceed irrespective of the status of any proceeding" under child protection law. H.B. 440, 2024 Gen. Assemb., Reg. Sess. (Ky. 2024). Although the bill did not advance beyond committee referral, it exemplifies a continuing tendency in Kentucky to empower kin vis-à-vis parents and the agency.

356. Joslin & NeJaime, *Functions*, *supra* note 16, at 411, 420–22; Joslin & NeJaime, *Multiparenthood*, *supra* note 9, at 1248, 1308–09, 1324.

called kinship care anymore, because the kin who prevail in their claim would then become parents. This seemingly aligns with the vision of many critics of the child protection system who see state-coordinated kinship care as an alternative to a system that separates families too readily based on class and racial bias.[357]

Depending on one's assessment of whether a state's child protection system sufficiently prioritizes kinship care, and in situations where parents and kin are on the same page, functional parentage law may indeed benefit all parties—especially when compared to the downsides (and only the downsides) of the public child protection system. Without denying this benefit, I offer four additional viewpoints to consider when assessing the feasibility and desirability of increasing kin-turned-parent care through functional parentage law: functional parentage law's potential role in quasi-privatizing dependency and child protection, its negative effects on parent-child reunification, an inevitable rise of legalized intra-family and intra-community conflicts, and the cost to parents who contest functional parentage.

First, functional parentage law's vision for kin-turned-parent care may simply be an easy response to difficult problems that are shaping parents' and their kin's childrearing and household strategies: solidify, valorize, and recognize kin's familial role, rather than provide adequate support for parents, kin, and their children. Importantly, the "family preserving" scenario discussed above is not purely a private ordering. The parentage claim is still made against the backdrop of ongoing intervention—the kin might not have pursued parentage absent the intervention. Aside from the difference that it is the courts, rather than the agency (with judicial oversight), that are making the placement/parentage decision, kin-turned-parent care under these circumstances bears parallels to kinship care operating as a quasi-private child protection system.

Although functional parentage law's advocates base their reform claims on the perceived success of the Kentucky case, I have presented a less-than-ideal picture of its quasi-private child protection system. Kentucky's reliance on unpaid or underpaid kin caregivers appears to be, at least in part, a makeshift strategy necessitated by a broader crisis of political economy unfolding in the state, affecting all involved parties: the agency, courts, parents, kin, and children. This observation is not in itself a critique of functionalism in either child protection law or custody/parentage law. But it does provide a good reason to step back and examine whether certain costs of quasi-privatization have been overlooked amid the convergence of viewpoints favoring its benefits.[358]

Second, and relatedly, similar to Kentucky's kin custody, kin's pursuit of functional parentage could undermine the parent's prospects for formal reunification—a point acknowledged by functional parenthood law scholars.[359] While Kentucky's quasi-private child protection system avoids the heartbreak of

357. *See supra* note 59 and accompanying text.
358. *See supra* Section I.A.
359. Joslin & NeJaime, *Functions*, *supra* note 16, at 421.

terminating parental rights and reduces adoption costs for the state, it does not reunify parents and children, either. When courts close a child protection case with children placed in temporary or permanent custody of their kin, the agency is relieved of its responsibilities to continue its efforts to reform and rehabilitate parents.

Contrary to the common perception of kinship care as an alternative to family separation, in Kentucky, kin custody might be serving as an alternative to reunification as well, not just to termination of parental rights/adoption.[360] Despite the frequent use of voluntary kinship care and high rates of children exiting foster care to kin custody, the percentage of Kentucky foster children reaching permanency through adoption (26%)[361] aligns closely with the national figure (27%).[362] Kentucky stands out, however, for its significantly lower reunification rate, especially for children in state-coordinated kinship care. Only 35% of such children are reunified,[363] compared to the national average of 46% for foster children overall.[364]

Third, the Kentucky case study prompts us to consider functional parentage law's relationship with intra-family and intra-community conflicts more seriously. The paradigmatic scenario of a kin caregiver, with support from both parents, trying to retrieve a child from stranger foster caregivers is only one of several potential configurations of functional parentage cases involving custody disputes and state intervention. Other configurations of legalized intra-family and intra-community conflicts include cases where kin try to secure children from

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360. It is tempting to view a middle route, such as kinship or non-kinship guardianship, as a direct alternative (only) to parent-child separation. According to this view, at the onset of state intervention, voluntary kinship care offers an alternative to foster care—*if* a child cannot safely remain in their home. Later, at the permanency stage, guardianship offers an alternative to the termination of parental rights and adoption—*if* reunification with parents is not possible. However, this view raises a question about whether decisions to temporarily and then permanently remove children from their original households are truly made independent of their alternatives, which now include this less drastic, more tolerable middle option. Is it possible that the availability of voluntary kinship care enables more removals from the original home and that the option of permanent custody with kin results in fewer reunifications? Despite the many advantages these middle routs undoubtedly offer, and despite the mandate for "reasonable efforts" to prevent removal and to reunify once a removal occurs as prescribed in the law-in-the-books, I believe that these questions warrant further exploration.

361. CHILD.'S BUREAU, ADMIN. FOR CHILD. & FAMS., U.S. DEP'T OF HEALTH & HUM. SERVS., THE AFCARS REPORT: KENTUCKY 4 (May 2023), https://www.acf.hhs.gov/sites/default/files/documents/cb/afcars-tar-ky-2022_0.pdf [https://perma.cc/XDF2-4JPQ].

362. CHILD.'S BUREAU, ADMIN. FOR CHILD. & FAMS., U.S. DEP'T OF HEALTH & HUM. SERVS., THE AFCARS REPORT 4 (May 2023), https://www.acf.hhs.gov/sites/default/files/documents/cb/afcars-report-30.pdf [https://perma.cc/4H3R-U97K].

363. CABINET FOR HEALTH & FAM. SERVS., KY. DEP'T FOR CMTY. BASED SERVS., REPORT ON RELATIVE AND FICTIVE KIN PLACEMENTS 3 (Sept. 30, 2023), https://www.chfs.ky.gov/agencies/dcbs/dpp/oohc/Documents/2023%20DCBS%20Relative%20and%20Fictive%20Kin%20Caregiver%20Report.pdf [https://perma.cc/3R7V-PWPK]. It is unclear whether the discussion on permanency includes children in kinship care as part of a safety plan. The administrative data provided by this report, while incomplete, is the best available data about state-coordinated kinship care. The reunification rate for Kentucky foster children is similarly low, standing at 37 percent. CHILD.'S BUREAU, *supra* note 362, at 4.

364. CHILD.'S BUREAU, *supra* note 362, at 4.

other kin, non-offending parents, or accused parents. This will occur not only because the boundaries of kinship can be extensive, but also because child protection systems across the country already incorporate kinship care, even in states where their preference for it over foster care is lower than in Kentucky.

To be sure, the role of functional custody law in creating and shaping such conflicts, versus merely resolving existing ones, remains unclear in Kentucky. The relative impact of functional custody law compared to other legal rules is also uncertain. Above all, DCBS' role is significant: It not only decides custody, but also creates and shapes intra-family and intra-community conflicts through its kinship care practice.[365] Parents and kin may have strained relationships yet become entangled during the state's invasive search for kinship resources.[366] Even when parents and kin have a good relationship at the onset of state-coordination, their dynamics can change and relationships may deteriorate as kin navigate the stressful situation of caring for the child, managing demands from the state, and supervising parents' visits with the child, while equally stressed parents manage the fear of losing the child and struggle through reunification services.[367] Functional custody law may be merely deciding rather than creating these conflicts.

The very expectation that functional parentage law will bolster kin-turned-parent care outside the foster care system assumes that it will do more than merely resolve conflicts arising from existing agency practices. Put differently, the interaction between functional parentage law and child protection law will certainly affect family dynamics, although whether this is for better or worse remains unclear. At the very least, it is worth considering the unintended costs of empowering kin and courts to change existing kinship care practices through private actions, rather than reforming the child protection proceeding. While this is an understandable response to the agency's extensive discretion and potential to create problematic outcomes, as exemplified in the Kentucky case study, an important question remains: Could adversarial court proceedings resolving intra-family and intra-community conflicts be more destructive than child protection

365. *See generally* Brant, *supra* note 219, 207–58 (describing various ways in which child protection law, as well as other relevant laws, either fail to support families, are weaponized by families themselves, or shape family relationships in the opioid crisis in Appalachian Kentucky).

366. This phenomenon can occur elsewhere as well, given national kinship care advocates' emphasis on identifying more kin. For instance, one state employs private investigators to find potential kin caregivers, a practice recently praised as "promising" in a policy brief by the ABA Center on Children and the Law and Generations United, supported by Casey Family Programs. A.B.A CTR. ON CHILD. & THE L. & GENERATIONS UNITED, KINSHIP PROMISING PRACTICES 1–2 (2022), https://www.grandfamilies.org/Portals/0/Documents/General%20Kinship%20Publications/kin-promising-practice%202022%20Final.pdf [https://perma.cc/MSV4-F49X] (introducing Missouri's Extreme Recruitment, which is "a 12–20-week intensive intervention to identify kin for the hardest to place children by using staff and a private investigator to mine records of the children to identify and locate relatives and kin to be explored for potential placement," and describing how "[i]ntroducing private investigators to the program increased contact with relatives from 23% to 80%."). The brief also indicates that both maternal and paternal kin should be identified and engaged.

367. Brant, *supra* note 219, at 248–52.

proceedings, where the state leads prosecution, kin aren't adversarial parties, and more state support is available?[368] This longstanding question is notably absent from contemporary discussions.

Finally, when a functional parentage claim arises following state intervention/coordination, and parents contest kin parentage, the outcomes may be unfavorable for parents. This is unsurprising given that parents will have to fight an uphill battle not only against the state's exercise of parens patriae power but also against kin rights. The Kentucky case study reveals that this concern materializes in practice.[369]

B. Bargaining in the Shadow of Functional Parentage and Child Protection

Functional parentage law can alter the dynamics between parents and kin who negotiate their childrearing and household arrangements by increasing kin bargaining power *before* kin seek a parentage claim.[370]

In my previous analysis, only the threats and promises of the child protection system were considered as factors enabling and constraining bargaining between parents and kin at the onset of private care arrangement.[371] However, once successful litigations under functional parentage law become prevalent, or are perceived to be so within a community, parents will likely begin to factor this into their initial decision-making.[372]

As previously mentioned, parents might employ two opposite strategies to mitigate the risk of interventions by the child protection agency: they could either avoid social connections to protect themselves or actively seek out help.[373] While it remains to be seen how functional parentage law will play out in practice, there is a non-negligible possibility that the law could further incentivize parents to isolate themselves instead of leveraging their social ties, or at least to manage the size of the kin network they trust. Consider, for instance, a poor mother of five in Kentucky who debated and eventually declined a pastor's offer to care for her children while she sought residential treatment for substance use disorder, fearing a potential de facto custody petition.[374] This is a serious problem if we want children to grow up in a "village," surrounded by a proliferation of caregiving

368. Smith, *supra* note 59, at 318. *See also* Brant, *supra* note 219, at 252–53 (describing "the most hostile family dynamics" encountered by the author during field work, involving a maternal grandmother who filed for guardianship, custody, and eventually adoption, and a mother who lost her children although there was never a DCBS case).

369. *See supra* Section II.E.

370. The extent to which functional parentage law increase kin bargaining power will depend not only on the specific doctrinal requirements of the reform proposal but also the existing local rules of custody transfer.

371. *See supra* Section I.B.

372. *See, e.g.*, Lage v. Esterle, 591 S.W.3d 416, 420 (Ky. Ct. App. 2019) (including the mother's testimony, where she mentions her fear of "some court action" affecting her interactions with caregivers in a case not involving DCBS).

373. *See supra* notes 78–79 and accompanying text.

374. Brant, *supra* note 219, at 152, 293.

relationships that prevent removals into foster care—a vision shared by both advocates of functional parentage law and critics of the child protection system.

Meanwhile, functional parentage law is unlikely to have a counter-effect of significantly motivating kin caregivers to step up or step in, at least at the outset of the caregiving relationship, given that their self-understanding is predominantly rooted in altruism.[375] Altruistic kin will be motivated at the outset with or without functional parentage law. Stepping up to help parents avoid state intervention or stepping in with an implicit or explicit threat of referral to the child protection agency can easily be justified as being altruistic towards the parent, the child, or both. However, considering a parentage claim against the parent before bonding with the child is more challenging to justify as altruistic rather than self-interested. Of course, there could be some overtly self-interested or overstepping kin who are motivated by the potential of making a functional parentage claim in the future.

After the onset of a care arrangement, formal rules of both custody/parentage law and child protection continue to provide parents and kin with bargaining leverage as they navigate their evolving relationships with each other and with the child. Kin caregivers' advocates have long stressed the kin's vulnerability in their bargain with parents because, when conflicts arise, parents can make demands and threaten to take the child back, compelling the kin to yield for the sake of the child.[376] This was precisely the claim that supported the enactment of the DFC statute.[377] Although the identification of legal parenthood as creating bargaining endowments is accurate, the depiction of altruistic but vulnerable kin *versus* self-interested but empowered parents needs some clarification.[378]

First, while kin bargaining power is limited in privately arranged and informal kinship care and may further decrease as their bond with the child deepens, especially in states where existing pathways for formalization are stringent and do not incorporate functional standards, it is not entirely absent. Parents' threat to take their children back is viable only when they can adequately accommodate the child and do not feel vulnerable to potential state intervention or to kin's formalization claim under existing laws, or, alternatively, when they are not seriously interested in the child's well-being or in maintaining a parent-child relationship, while the kin are. In other cases, kin might counter with the threat of referring to a child protection agency, pursuing formalization under existing laws, or ceasing to provide childcare.

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375. *But cf.* Huntington & Scott, *supra* note 11, at 1426 ("[T]he recognition of de facto parents encourages individuals living with partner-parents to assume the significant responsibilities of raising a child, benefitting both children and society.").

376. *See, e.g.*, Brief of Amicus Curiae Center for Children's Policy Practice & Research at the University of Pennsylvania in Support of Respondent at 6, Troxel v. Granville, 530 U.S. 57 (2000) (No. 99-138) ("Relatives and informal kin, functioning as de facto parents, may be open to blackmail and coercion by a long absent biological parent if their relationship with the child is completely unprotected.").

377. *See supra* notes 175–76 and accompanying text.

378. *See* Brant, *supra* note 219, at 244–47.

Second, the bargaining dynamics differ significantly in cases involving state intervention/coordination, where the agency and the court introduce additional sets of rules and expectations that rearrange bargaining endowments, generally increasing kin's bargaining power as state intervention increases. For example, consider a case where the agency intervened without an open case, such as by having a parent sign a notarized power of attorney and verbally ensuring that the child continues to stay with the kin. For the parent, this introduces a very real possibility of future intervention, which can shift bargaining dynamics. In cases with more extensive and formal intervention, including ongoing or past child protection cases, kin could have either temporary or permanent custody as observed in the Kentucky case study or become a guardian through the process. This could also introduce formal restrictions on parents' access to the child, such as supervised visitation or even no-contact orders.[379]

By offering a new pathway to parentage intended to be easier than adoption, functional parentage law will significantly change the power dynamics further in favor of kin. In response to parents asserting their parental rights, kin will be able to say, "See you in court, because *I'm* a parent, too." Again, this is a notable jump from "*I* can file for visitation or custody, too."

C. Functional Parentage Law in Peripheral Families and Communities

Throughout, this Article has aimed to show that state intervention in peripheral families and communities is not confined to the most obvious forms of intervention or to singular moments.[380] As functional parentage law is introduced and impacts kinship care arrangements along the continua of the three axes (i.e., the degree of in/formality, the degree of agency involvement, and the stage of a child protection case), it can work in tandem with the threats and promises of child protection law as much as it can work against them.

This creates the following four possibilities: functional parentage law assists the child protection system in delivering the social benefits it promises (e.g., by supporting parents, kin-turned-parents, and their children); it impedes the system in providing those benefits (e.g., by undermining the reunification process); it strengthens the system in harming peripheral families (e.g., by increasing legalized intra-kin conflicts); it baffles the system when it threatens peripheral families and, as a result, mitigates some of its harms (e.g., by challenging its placement decisions). Among other factors, parent-kin dynamics in individual families, as well as the existing local practice of state-coordinated kinship care, will be important in determining which of these four possibilities will materialize in any individual case. Which of these outcomes predominates is highly unpredictable given

379. The bargaining relationship continues even after the new permanency is reached, with different background and foreground rules. *See* Brant, *supra* note 219, at 238–40. Sometimes, post-permanency custody modification cases arise. *See, e.g.*, Rose v. Bright, No. 2020-CA-1551-ME, 2022 WL 1510479 (Ky. Ct. App. May 13, 2022); Bailey v. Bailey, No. 2021-CA-0395-MR, 2022 WL 5265351 (Ky. Ct. App. Oct. 7, 2022).

380. I thank M.H. Tse for our exchange about different understandings of state intervention.

what we know overall. Meanwhile, the introduction of functional parentage law will itself alter the bargaining dynamics within peripheral families and communities, with equally wide and variable distributional consequences.

Given the complicated implications just discussed, I am unconvinced that introducing a functional parentage law, in its currently envisioned form, will bring more benefits than costs in the peripheral context.[381] This assessment holds even when considering its potential to mitigate some harms of state intervention in cases where parents' and kin's interests align and in places where the agency's preference for kin is less prominent than in Kentucky.

Nonetheless, if we were to introduce functional parentage law based on its clear benefits in other contexts, I would urge reformers to consider its complicated implications in the peripheral context more seriously. They can do so by being more meticulous when examining functional parentage law's relationship with the child protection system; by finding ways to strengthen the peripheral childrearing strategy, which is already weakened by the child protection system; and by offering adequate protection to peripheral parents who must rely on their kin. While we can debate about the precise ways to achieve this, the UPA's de facto parentage provision, which is the representative proposal currently in place, is insufficient in this regard.

First, de facto parentage's relationship with its uncanny double in the child protection system is, at best, unclear. On the one hand, unlike the ALI Principles or the UNCVA, the UPA does not include parental absence or incapacity as a distinct situation that can lead to the claimant's caregiving relationship with the child;[382] instead, it requires that "another parent . . . fostered or supported" the relationship between the functional parent and the child in all situations.[383] This requirement will likely result in most non-kin foster caregivers who become caregivers through direct and formal state intervention not being able to pursue functional parentage—which I believe is a positive outcome to preserve the integrity of the child protection system. Additionally, the stipulation that the functional parent must have undertaken parental responsibilities "without expectation of financial compensation" is generally expected to disqualify foster caregivers, who receive maintenance payments from the state.[384]

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381. What about the potential benefits for parents and kin who wish to formalize their communal parenting in a way that is easier than adoption and more permanent than custody? Functional parentage law, as currently envisioned, is deeply ascriptive and procedure-heavy, and is therefore not well-suited for this purpose. It will primarily benefit kin caregivers who have the financial means to retain private attorneys—even in cases where parental objections are minimal or nonexistent. For an analysis of how the UPA's de facto parentage provision is underinclusive for this purpose, see Halley, *supra* note 17 (manuscript at 6–8).

382. *See supra* notes 106–07 and accompanying text.

383. UPA §609(6).

384. UPA §609(3). *See* Courtney G. Joslin & Douglas NeJaime, *Social Parenthood in the United States*, *in* Social Parenthood in Comparative Perspective 116, 126 (Clare Huntington et al. eds., 2023) (describing that foster caregivers are generally excluded from protection under functional parenthood laws). The requirement that functional parenting must not be financially driven is common

However, it remains unclear how these two requirements will apply to state-coordinated kinship care arrangements outside the fully formal and public foster care system, which are less-than-formal, underpaid/unpaid, and deemed "voluntary." This ambiguity can lead to results that are either overinclusive from the parents' perspective, making kinship households more permanent than they otherwise might have been, or underinclusive from the kin's perspective, trapping them in care work and compensating them with neither money nor familial status. Which outcome occurs will, again, depend on existing state-coordinated kinship care practices, among other factors.

Second, and relatedly, while the requirement that another parent must have fostered or supported the relationship may rule out non-kin foster care imposed by the state, it creates an incentive problem in the kinship care context. In crisis situations and prior to the state's intervention, parents who actively arrange private and informal kinship care to address the crisis will be more likely to face successful functional parentage claims than those who resist kin support/intervention.[385] In state-coordinated kinship care cases, and where parents desire reunification rather than kin-turned-parent care, the requirement effectively directs parents *not* to support or foster the children's relationships with their current caregivers,[386] which is at odds with the best interests of the children and with what these parents are supposed to do to successfully rehabilitate and reunify.

Last, but not least, the UPA's de facto parentage provision does not provide sufficient protection for peripheral parents in general, who must capitalize on their kin network while being in proximity to the threats and promises of the child protection system. Its residency requirement for "a significant period" could be six years—or six months.[387] Its "consistent caregiving" requirement is much less stringent than, for example, Kentucky's DFC statute, which requires claimants to be "the primary caregiver."[388] A young, single mother, who gratefully relied on a neighboring couple to care for her children during long work hours and for overnight stays, was protected from the neighbors' functional custody claim because of that provision in the DFC statute—but it is unclear whether the UPA would have safeguarded her from their functional *parentage* claim.[389]

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to all functional custody/parentage reform proposals. However, unlike the ALI Principles and the Restatement which explicitly discuss foster caregiving as being excluded under this prong (with a mention that kinship foster caregiving may be different), the UPA does not discuss this point. RESTATEMENT §§ 1.80 cmt. *f*, 1.82, cmt. *f*.; PRINCIPLES OF THE L. OF FAM. DISSOLUTION: ANALYSIS AND RECOMMENDATIONS § 2.03 cmt. *c* (AM. L. INST. 2002).

385. For examples of cases involving parents actively arranging or consenting to kinship care, see, for example, Lage v. Esterle, 591 S.W.3d 416, 419–20 (Ky. Ct. App. 2019); Lindon v. Honsberger, No. 2018-CA-000903-ME, 2019 WL 495985, at *1–*2 (Ky. Ct. App. Feb. 8, 2019).

386. *See* Halley, *supra* note 17 (manuscript at 40) (highlighting that the UPA § 609(6) requires a parent to have fostered or supported the relationship with the child, not co-parentage).

387. UPA § 609(1).

388. UPA § 609(2); *supra* note 177 and accompanying text.

389. Kruger v. Hamm, No. 2018-CA-000553-ME, 2019 WL 2063922, at *8–*9 (Ky. Ct. App. May 10, 2019).

The UPA's requirement that the functional parent "undertook full and permanent responsibilities of a parent of the child" does not clarify how much and what kind of responsibilities qualify.[390] This language—which sounds distinctly more moral compared to functional custody law reform proposals—might be used by courts that are sympathetic to peripheral parents to exclude, for instance, supposed-to-be-temporary caregivers who became involved in crisis situations; but it does not bind them to that outcome in any meaningful sense. Given that substance-using, incarcerated, poor, and young parents often face moral condemnation, while kin caregivers are praised, this requirement may not prove to be particularly useful for such parents. Similarly, the requirement of a "bonded and dependent relationship" that is "parental in nature" reads more like a validation point for the functional parent rather than a strict requirement to meet.[391]

It must be noted that the UPA's de facto parentage provision requires the claimant to have "held out the child as the individual's child."[392] This requirement diverges from the DFC statute or functional custody law reform proposals. Indeed, the Restatement, in its comments, critically observes that "the UPA's holding-out requirement may serve to restrict the de facto parent doctrine to third parties in intimate relationships with the child's parent."[393] Proponents of functional parentage law agree that the hold-out requirement "narrows the universe of individuals who can be treated as de facto parents," and that the Restatement is "more inclusive" in this regard, "covering a wider range of parent-child relationships than those covered" under the UPA.[394]

The hold-out requirement is not, however, a bulwark for peripheral parents. It will limit related kin's functional parentage only to the extent that the legal meaning of "holding a child out as one's own" remains attached to the biological and marital anchor.[395] And it will limit related kin's functional parentage based on what kin did and did not do, rather than on what kin *and* parent did and did not intend. Thus, the hold-out prong offers only indirect protection for peripheral parents—protection that will evaporate as functional parentage law becomes not a novelty but a commonplace in the kinship care context, and as "holding a child out as one's own" loses its definitional sense of "as one's own legal child."[396] Instead, it will become "as one's own caretaking child." If this happens, any long-term kin caregiver will be able to hold out by saying that "this is my child that I

390. UPA § 609(3).

391. UPA § 609(5).

392. UPA § 609(4). In addition, the UPA requires that continuing the relationship between the de facto parent and the child must be in the best interest of the child. UPA § 609(7).

393. RESTATEMENT § 1.82 cmt. *b*.

394. NeJaime, *supra* note 27, at 525, 532. *See also* Joslin & NeJaime, *Multiparenthood*, *supra* note 9, at 1270, 1299–1300.

395. Joslin, *supra* note 23, at 600–02 (explaining how the UPA's approach to the hold-out requirement unmoors it from biological parenthood).

396. I am indebted to Janet Halley for her insight that the interplay between functional parentage law and the existing sociolegal norms and expectation for kinship care can reshape the meaning of "holding a child out as one's own."

take care of long term." The evaporation might happen surprisingly fast in places like Kentucky, where a robust legal and social culture of kinship care already exists, kin are accustomed to formalization claims, and courts are used to making parent-to-kin custody transfers.[397]

I worry that a universalist approach, coupled with insufficient attention to the interests of parents at stake, might expose peripheral families and communities to levels of formal permanency that they did not seek or intend. Above all, I am concerned that it may lead to a radical redistribution of the pleasures and pains of childrearing, as well as intra-familial bargaining power, between and among peripheral parents and kin in ways that are not fully appreciated in the current discussion.

I believe that the potentially serious costs for peripheral parents must be mitigated. This position is not rooted in advocacy for parental entitlement or rights, nor in any assertion of the moral superiority of biological parenthood over other forms of parenthood. Rather, it stems from the recognition that peripheral parents who currently expect, desire, and feel compelled to raise their children within their world and according to their worldview,[398] may nonetheless lose their children, and as a result, suffer. To a significant extent, this concern will also apply to children in peripheral communities who, at least for a time, will grow up expecting and desiring relationships with their parents.

Conclusion

By delving deep into the laws and practices of both functional custody and child protection in Kentucky, this Article presents a view of functional custody/parentage law that sharply contrasts with its advocates' depiction. Contrary to the depoliticized notion that these laws simply recognize and respond to already existing families, the family relationships being recognized do not exist in a legal vacuum. They stem from care and household strategies made in the shadow of the law and sometimes result directly from state intervention and coordination. In contrast to the romanticized view of functional custody/parentage law as a normative good that includes diverse families, the inclusion of kin caregivers can lead to the exclusion of parents. Based on this understanding, this Article recommends that functional parentage law reformers tread lightly and more seriously attend to the law's implications for peripheral families and communities, and especially for peripheral parents.

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397. *See, e.g.*, J.D. Vance, Acceptance Speech at 2024 Republican National Convention (July 17, 2024), at 10:28, https://youtu.be/_8TlBHRtrvM?t=628 [https://perma.cc/5LXN-WMJ6] ("Mamaw raised me *as her own*—excuse me—Mamaw raised me as my mother struggled with addiction.") (emphasis added).

398. *See generally* Kathryn Edin & Maria Kefalas, Promises I Can Keep: Why Poor Women Put Motherhood Before Marriage (2005).

Appendix A. Cases

1. Approach

I searched for "de facto custod!" on Westlaw, limiting the date range to January 1, 2019, to December 31, 2023, and restricting the jurisdiction to Kentucky. This search yielded 146 results, all from appellate courts, with most being unpublished. After excluding completely irrelevant cases or overlapping cases, 78 cases remained.[399] Additionally, I searched for cases that cited *Mullins v. Picklesimer*, a landmark functional custody case, during the same period in Kentucky. This yielded 47 results, of which 31 remained after excluding completely irrelevant cases or overlapping cases. However, all but one of these 31 cases were already captured by the search term "de facto custod!"—demonstrating that these two rules and doctrines are closely related. In total, I reviewed 79 cases.[400]

In 64 cases, functional custody law[401] was applied or invoked, either in the given appellate case, at the trial level, or in a previous or separate case.[402] The

399. Sometimes, I had to make a judgment call about whether to include a case for review or exclude it as irrelevant. Since the goal of conducting this research was to broadly capture the legal contexts surrounding functional custody law in Kentucky in addition to conducting typical case law research, I cast a wide net: I reviewed any case that involved (alleged, attempted, or actual) kinship care or non-parent custody/visitation. As a result of this broad standard, five cases where kin—but not yet a kin *caregiver*—tried to challenge DCBS and seek placement were included in my review. *See, e.g.*, Case No. 74, S.B. v. Cabinet for Health & Family Servs., No. 2019-CA-000746-ME, No. 2019-CA-000866-ME, 2020 WL 1898378 (Ky. Ct. App. April 17, 2020). This case involved a father whose child was in foster care, and grandparents who, with the father's support, sought placement of the child. The grandparents did not have a prior relationship with the child, so the court noted that they did not qualify for de facto custodianship. The other four cases are: Cases Nos. 66, Commonwealth v. Batie, 645 S.W.3d 452 (Ky. Ct. App. 2022); 67, D.B. v. T.C.W., 674 S.W.3d 776 (Ky. Ct. App. 2023); 78, S.T. v. Cabinet for Health and Family Services, 585 S.W.3d 769 (Ky. Ct. App. 2019); and 79, V.M. v. Cabinet for Health and Family Services, No. 2020-CA-1593-ME, 2021 WL 4692638 (Ky. Ct. App. Oct. 8, 2021). If more than one case showed up in the search results that involved the same parties, I only counted them once. *See, e.g.*, Case No. 28, Hoskins v. Elliott, 591 S.W.3d 858 (Ky. Ct. App. 2019); 643 S.W.3d 115 (Ky. Ct. App. 2022).

400. Out of the 79 cases, only three cases involved same-sex couples, which are: Cases Nos. 12, Carroll v. Carroll, 569 S.W.3d 415 (Ky. Ct. App. 2019); 37, Littleton v. Stewart, No. 2020-CA-0612-MR, 2021 WL 4805059 (Ky. Ct. App. Oct. 15, 2021); and 58, Tornatore v. Karibo, No. 2019-CA-000759-ME, 2020 WL 3401153 (Ky. Ct. App. June 19, 2020). Four cases involved heterosexual partners of biological parents, which are: Cases Nos. 30, J.S.B. v. S.R.V., 630 S.W.3d 693 (Ky. 2021); 53, Sweikata v. Judd, No. 2019-CA-001236-ME, 2020 WL 5494614 (Ky. Ct. App. Sep. 11, 2020); 55, T.G.H. v. Commonwealth, No. 2020-CA-0897-ME, No. 2020-CA-0901-ME, No. 2020-CA-0902-ME, 2022 WL 727200 (Ky. Ct. App. Mar. 11, 2022); and 64, Wood v. Critz, No. 2021-CA-0902-MR, 2023 WL 125068 (Ky. Ct. App. Jan. 6, 2023).

401. In most of these cases, it was the DFC statute that was applied or invoked, sometimes along with other pathways to kin custody. In six cases, only the waiver doctrine under *Mullins* was applied or invoked, which are: Cases Nos. 12, Carroll v. Carroll, 569 S.W.3d 415 (Ky. Ct. App. 2019); 18, Decker v. Decker, No. 2018-CA-000532-ME, 2019 WL 169131 (Ky. Ct. App. Jan. 11, 2019); 37, Littleton v. Stewart, No. 2020-CA-0612-MR, 2021 WL 4805059 (Ky. Ct. App. Oct. 15, 2021); 55, T.G.H. v. Commonwealth, No. 2020-CA-0897-ME, No. 2020-CA-0901-ME, No. 2020-CA-0902-ME, 2022 WL 727200 (Ky. Ct. App. Mar. 11, 2022); 58, Tornatore v. Karibo, No. 2019-CA-000759-ME, 2020 WL 3401153 (Ky. Ct. App. June 19, 2020); and 67, D.B. v. T.C.W., 674 S.W.3d 776 (Ky. Ct. App. 2023).

402. This includes custody modification cases after successful de facto custody claims or visitation cases after successful or unsuccessful de facto custody claims. *See, e.g.*, Cases No. 14, Cooper v. Ivey, No. 2020-CA-0353-MR, 2021 WL 2172185 (Ky. Ct. App. May 28, 2021); 25, Hall v. Hall, No.

remaining 15 cases contained only marginal mentions of functional custody law but still enhanced my understanding of kinship care and/or non-parent custody/visitation law and practice in Kentucky.[403]

Overall, the 79 cases that I reviewed include all electronically available cases on Westlaw in which the DFC statute was applied, invoked, considered, cited, or mentioned during the five-year period in kinship care and/or non-parent custody/visitation contexts; but constitute only a subset of the cases concerning the waiver and unfitness doctrines, because I Shepardized only *Mullins* and not other cases in this body of law. They also constitute only a portion of the cases arising out of state-coordinated kinship care.[404] Rather than coding the cases for specific information, I channeled the various information that I gathered from the cases alongside other sources cited in the main text, while remaining aware of my own interpretive function.[405]

2019-CA-001618-ME, 2020 WL 5083464 (Ky. Ct. App. Aug. 28, 2020); and 62, Wagoner v. Stull, No. 2022-CA-0751-MR, 2023 WL 2618195 (Ky. Ct. App. Mar. 24, 2023).

403. This includes cases where kin received permanent custody within a child protection case, but the precise legal basis for the custody order remains unclear. *See, e.g.*, Case No. 17, Curles v. Prater, No. 2018-CA-001541-ME, 2019 WL 3369860 (Ky. Ct. App. July 26, 2019).

404. For example, compare Morton v. Tipton, 569 S.W.3d 388 (Ky. 2019), which is not one of the reviewed cases, with Cooper v. Ivey, No. 2020-CA-0353-MR, 2021 WL 2172185 (Ky. Ct. App. May 28, 2021), which is included as Case No. 14. In both cases, grandparents on one side of the family became caregivers in state-coordinated kinship care arrangements and received permanent custody in child protection cases. The disputes concern visitation rights for grandparents on the non-custodial side. The custodial grandmother in *Cooper* argued that "her status as a de facto custodian," granted by the child protection court, "required heightened deference to her wishes on the [visitation] matter." The court rejected this argument, stating that "*Morton* expressly rejected the contention that a de facto custodian can be bestowed a parent's superior rights" in the grandparent visitation context. However, the *Morton* court does not refer to the custodial grandparents as "de facto custodians." Despite their factual and legal similarities, only *Cooper* was included in the reviewed cases for this reason.

405. I believe my "soft" methodological approach can complement the blind spots of the more rigid approach, and vice versa. Consider Case No. 32, Kingcade v. Sherwood, No. 2019-CA-1711-MR, 2020 WL 6818440 (Ky. Ct. App. Nov. 20, 2020), which is also included in Joslin & NeJaime's dataset. Courtney G. Joslin and Douglas NeJaime, Functional Parent Doctrines Database, version 1.0 (2023), http://documents.law.yale.edu/functional-parent-doctrines. This case features a mother who lived in the maternal grandmother's home. When the child was almost one year old, the mother moved out, but the child remained in the grandmother's home. The mother had unstable housing and went through "some short-lasting relationships with various men." About seven months after the mother moved out, the grandmother filed for functional custody. Joslin & NeJaime's approach leads to coding the "functional parent" (the grandmother) as "primary caregiver" and the legal parent (the mother) as "involved but not primary caregiver." Therefore, the case supports their finding that "the functional parent appears to have served as a primary caregiver of the child in 83% of the cases" and the finding that "in … 30% of [the cases involving relatives], no legal parent had been a primary caregiver of the child." Joslin & NeJaime, *Functions*, *supra* note 16, at 363–64. This approach effectively captures one factual aspect of this case (assuming, of course, the facts discussed in the appellate case reliably reflect reality): the relative share of caregiving between the grandmother and the mother.

By contrast, my approach allows me to consider other factual and legal aspects of the case. First, notably, the maternal grandmother lost both at trial and on appeal because the courts determined that the mother shared in parental duties and co-parented the child. The mother was found to have seen the child frequently ("often daily"), attended medical appointments, provided clothing and food stamps, and sometimes brought the child to work with her while the grandmother worked. While the grandmother "provided the lion's share of care and financial support for a substantial time," as conceded by the court

2. List of Cases

A. Cases Where Functional Custody Law Was Applied or Invoked

	Name	Citation
1	A.A. v. Cabinet for Health and Family Services	No. 2019-CA-000838-ME, 2020 WL 1074779 (Ky. Ct. App. Mar. 6, 2020).
2	Anderson v. Cabinet for Health and Family Services	643 S.W.3d 109 (Ky. Ct. App. 2022).
3	Bailey v. Bailey	No. 2021-CA-0395-MR, 2022 WL 5265351 (Ky. Ct. App. Oct. 7, 2022).
4	Baker v. Kuffner	No. 2020-CA-1247-MR, 2022 WL 1509724 (Ky. Ct. App. May 13, 2022).
5	Bargo v. Smith	No. 2019-CA-000662-ME, 2020 WL 3027312 (Ky. Ct. App. June 5, 2020).
6	Blakely v. Blakely	No. 2018-CA-001341-ME, 2020 WL 2298380 (Ky. Ct. App. May 8, 2020).
7	Burgess v. Chase	629 S.W.3d 826 (Ky. Ct. App. 2021).
8	C.J. v. M.S.	572 S.W.3d 492 (Ky. Ct. App. 2019).
9	Cabinet for Health & Family Services v. Neal	No. 2019-CA-001166-ME, 2020 WL 3027249 (Ky. Ct. App. June 5, 2020).
10	Campbell v. Campbell	No. 2019-CA-1877-MR, 2021 WL 137752 (Ky. Ct. App. Jan 15, 2021).
11	Capps v. Chapman	No. 2022-CA-0711-MR, 2023 WL 4035515 (Ky. Ct. App. June 16, 2023).
12	Carroll v. Carroll	569 S.W.3d 415 (Ky. Ct. App. 2019).
13	Coger v. Rhodes	No. 2018-CA-000120-ME, 2019 WL 1312840 (Ky. Ct. App. Mar. 22, 2019).
14	Cooper v. Ivey	No. 2020-CA-0353-MR, 2021 WL 2172185 (Ky. Ct. App. May 28, 2021).
15	Corbin v. Mullins	No. 2021-CA-1243-MR, 2022 WL 4390656 (Ky. Ct. App. Sep. 23, 2022).
16	Crossland v. Neal	No. 2019-CA-1462-MR, 2022 WL 2279851 (Ky. Ct. App. June 24, 2022).
17	Curles v. Prater	No. 2018-CA-001541-ME, 2019 WL 3369860 (Ky. Ct. App. July 26, 2019).

and coded by Joslin & NeJaime, the case also supports my understanding that functional custody/parentage claims can arise in situations where a struggling parent is still in the picture and is in an ongoing relationship with the more stable kin. Second, from a footnote to the case, we also learn that shortly after the grandmother filed for functional custody, the first hearing in a separate child protection case occurred. While it remains unclear *how* DCBS became involved, the case also demonstrates the frequent intersection between private custody and public child protection proceedings.

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	Name	Citation
18	Decker v. Decker	No. 2018-CA-000532-ME, 2019 WL 169131 (Ky. Ct. App. Jan. 11, 2019).
19	E.S. v. Office of Jefferson County Attorney	No. 2019-CA-000911-ME, 2020 WL 4507357 (Ky. Ct. App. July 10, 2020).
20	Elliott v. Smith	No. 2020-CA-1530-ME, 2021 WL 5751017 (Ky. Ct. App. Dec. 3, 2021).
21	Garvin v. Krieger	601 S.W.3d 481 (Ky. Ct. App. 2020); 584 S. W.3d 727 (Ky. 2021).
22	Gonterman v. Young	No. 2019-CA-000719-ME, No. 2019-CA-000735-ME, 2020 WL 2510916 (Ky. Ct. App. May 15, 2020).
23	Gonzales v. Murillo	No. 2021-CA-1371-MR, 2023 WL 5657607 (Ky. Ct. App. Sept. 1, 2023)
24	H.H. v. T.D.	No. 2023-CA-0252-ME, 2023 WL 7393053 (Ky. Ct. App. Nov. 9, 2023).
25	Hall v. Hall	No. 2019-CA-001618-ME, 2020 WL 5083464 (Ky. Ct. App. Aug. 28, 2020).
26	Hall v. Kiskaden	No. 2018-CA-000775-ME, 2019 WL 258122 (Ky. Ct. App. Jan. 18, 2019).
27	Hayse v. Martin	No. 2022-CA-1039-MR, 2023 WL 5654237 (Ky. Ct. App. Sept. 1, 2023).
28	Hoskins v. Elliott	591 S.W.3d 858 (Ky. Ct. App. 2019); 643 S. W.3d 115 (Ky. Ct. App. 2022)
29	Irons v. Sims	No. 2018-CA-000539-ME, 2019 WL 5290529 (Ky. Ct. App. Oct. 18, 2019).
30	J.S.B. v. S.R.V.	630 S.W.3d 693 (Ky. 2021).
31	K.D.T. v. H.A.M.	No. 2018-CA-1682-ME, 2020 WL 6375194 (Ky. Ct. App. Oct. 30, 2020).
32	Kingcade v. Sherwood	No. 2019-CA-1711-MR, 2020 WL 6818440 (Ky. Ct. App. Nov. 20, 2020).
33	Kruger v. Hamm	No. 2018-CA-000553-ME, 2019 WL 2063922 (Ky. Ct. App. May 10, 2019).
34	Lage v. Esterle	591 S.W.3d 416 (Ky. Ct. App. 2019).
35	Lemaster v. Stiltner	No. 2022-CA-0799-MR, 2023 WL 4535581 (Ky. Ct. App. July 14, 2023)
36	Lindon v. Honsberger	No. 2018-CA-000903-ME, 2019 WL 495985 (Ky. Ct. App. Feb. 8, 2019).
37	Littleton v. Stewart	No. 2020-CA-0612-MR, 2021 WL 4805059 (Ky. Ct. App. Oct. 15, 2021).

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	Name	Citation
38	Maynard v. Pinson	No. 2020-CA-1107-MR, 2021 WL 4126010 (Ky. Ct. App. Sep. 10, 2021).
39	McKenzie v. Donathon	No. 2020-CA-1188-MR, 2022 WL 3329347 (Ky. Ct. App. Aug. 12, 2022).
40	Meinders v. Middleton	572 S.W.3d 52 (Ky. 2019).
41	Mullins v. Hamilton	No. 2016-CA-001818-ME, 2019 WL 1092665 (Ky. Ct. App. Mar. 29, 2019).
42	Murphy v. New	No. 2018-CA-000309-ME, No. 2018-CA-000351-ME, 2019 WL 994123 (Ky. Ct. App. Mar. 01, 2019).
43	Nelson v. Sharp	No. 2019-CA-000441-ME, 2020 WL 1969918 (Ky. Ct. App. Apr. 24, 2020).
44	Newsome v. Bryant	No. 2019-CA-000777-ME, 2020 WL 4558045 (Ky. Ct. App. July 17, 2020).
45	Perry v. Goodwin	2019-SC-000474-DE, 2020 WL 1846874 (Ky. Sup. Ct. Mar. 26, 2020).
46	Redmond v. Flanary	No. 2019-CA-000070-ME, 2020 WL 1074786 (Ky. Ct. App. Mar. 6, 2020); No. 2020-CA-0362-MR, 2021 WL 1051583 (Ky. Ct. App. Mar. 19, 2021)
47	Robinson v. Beard	No. 2018-CA-001717-ME, 2019 WL 4233164 (Ky. Ct. App. Sep. 6, 2019).
48	Rose v. Bright	No. 2020-CA-1551-ME, 2022 WL 1510479 (Ky. Ct. App. May 13, 2022).
49	Santiago v. Berry	No. 2020-CA-0157-MR, 2021 WL 943755 (Ky. Ct. App. Mar. 12, 2021).
50	Shofner v. Thompson	No. 2019-CA-001235-ME, 2020 WL 2510910 (Ky. Ct. App. May 15, 2020).
51	Sizemore v. Hutton	No. 2022-CA-1397-MR, 2023 WL 8286947 (Ky. Ct. App. Dec. 1, 2023).
52	Stump v. Spencer	No. 2021-CA-0518-ME, 2022 WL 569175 (Ky. Ct. App. Feb. 25, 2022).
53	Sweikata v. Judd	No. 2019-CA-001236-ME, 2020 WL 5494614 (Ky. Ct. App. Sep. 11, 2020).
54	T.C. v. Cabinet for Health and Family Services	652 S.W.3d 670 (Ky. Ct. App. 2022).
55	T.G.H. v. Commonwealth	No. 2020-CA-0897-ME, No. 2020-CA-0901-ME, No. 2020-CA-0902-ME, 2022 WL 727200 (Ky. Ct. App. Mar. 11, 2022).

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	Name	Citation
56	T.M. v. T.C.G.	No. 2019-CA-001444-ME, No. 2019-CA-001445-ME, 2020 WL 3027247 (Ky. Ct. App. June 5, 2020).
57	Tapp v. Garner	No. 2019-CA-0894-ME, 2021 WL 298424 (Ky. Ct. App. Jan. 29, 2021).
58	Tornatore v. Karibo	No. 2019-CA-000759-ME, 2020 WL 3401153 (Ky. Ct. App. June 19, 2020).
59	Towns v. Judkins	No. 2021-CA-0697-MR, 2022 WL 1434874 (Ky. Ct. App. May 6, 2022).
60	Turner v. Hodge	590 S.W.3d 294 (Ky. Ct. App. 2019).
61	Vance v. Smith	No. 2018-CA-001299-ME, 2019 WL 1977088 (Ky. Ct. App. May 3, 2019).
62	Wagoner v. Stull	No. 2022-CA-0751-MR, 2023 WL 2618195 (Ky. Ct. App. Mar. 24, 2023).
63	White v. Fowler	No. 2021-CA-0668-MR, 2023 WL 2193229 (Ky. Ct. App. Feb. 24, 2023)
64	Wood v. Critz	No. 2021-CA-0902-MR, 2023 WL 125068 (Ky. Ct. App. Jan. 6, 2023).

B. Cases Containing Marginal Mentions of Functional Custody Law

	Name	Citation
65	A.B. v. Cabinet for Health and Family Services	No. 2018-CA-001898-ME, 2020 WL 504857, 2020 WL 504857 (Ky. Ct. App. Jan. 31, 2020).
66	Commonwealth v. Batie	645 S.W.3d 452 (Ky. Ct. App. 2022).
67	D.B. v. T.C.W.	674 S.W.3d 776 (Ky. Ct. App. 2023).
68	Fitzpatrick v. Calloway	No. 2022-CA-0136-MR, 2023 WL 2437488 (Ky. Ct. App. Mar. 10, 2023).
69	G.P. v. Cabinet for Health and Family Services	572 S.W.3d 484 (Ky. Ct. App. 2019).
70	Gonzales v. Ball	No. 2021-CA-0066-MR, 2022 WL 258599 (Ky. Ct. App. Jan. 28, 2022).
71	J.W. v. Cabinet	No. 2022-CA-0532-ME, 2022 WL 17365980 (Ky. Ct. App. Dec. 2, 2022).
72	K.C. v. Cabinet	No. 2020-CA-1167-ME, 2021 WL 5751647 (Ky. Ct. App. Dec 3, 2021).

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	Name	Citation
73	McGeorge v. Brown	No. 2017-CA-000983-MR, 2019 WL 259443 (Ky. Ct. App. Jan. 18, 2019).
74	S.B. v. Cabinet for Health & Family Servs.	No. 2019-CA-000746-ME, No. 2019-CA-000866-ME, 2020 WL 1898378 (Ky. Ct. App. April 17, 2020).
75	S.C. v. Cabinet	No. 2021-CA-1491-ME, No. 2022-CA-0604-ME, 2023 WL 2193223 (Ky. Ct. App. Feb. 24, 2023).
76	S.G. v. Cabinet for Health and Family Services	652 S.W.3d 655 (Ky. Ct. App. 2022).
77	S.H. v. Commonwealth	No. 2017-CA-001466-ME, No. 2017-CA-001924-ME, No. 2017-CA-001467-ME, No. 2017-CA-001932-ME, No. 2017-CA-001894-ME, 2019 WL 994133, 2019 WL 994133 (Ky. Ct. App. Mar. 1, 2019).
78	S.T. v. Cabinet for Health and Family Services	585 S.W.3d 769 (Ky. Ct. App. 2019).
79	V.M. v. Cabinet for Health and Family Services	No. 2020-CA-1593-ME, 2021 WL 4692638 (Ky. Ct. App. Oct. 8, 2021).

APPENDIX B. INTERVIEWS

1. Approach

Between October 2023 and January 2024, I conducted 13 semi-structured interviews with attorneys, judges, DCBS workers, and advocates. Most interviews were carried out over Zoom, with durations ranging from 60 to 90 minutes. All interviews were recorded and transcribed except for one instance where I was invited to observe a dependency, neglect, and abuse courtroom via Zoom for a day. Between cases, I was permitted to ask questions to the judge as well as attorneys and a DCBS worker present, whether they were in the courtroom physically or joining virtually.

The interviewees were selected purposively through various channels to capture diverse perspectives and professional backgrounds.[406] The interviewees were seasoned experts with extensive experience, except for one former frontline social worker who had less than a year of experience.

During the interviews, it became clear that significant fragmentation exists in legal practices among both judges and DCBS workers. For example, I learned that a particular judge in one urban county that is better resourced than many

406. Jan E. Trost, *Statistically Nonrepresentative Stratified Sampling: A Sampling Technique for Qualitative Studies*, 9 QUALITATIVE SOCIO. 54 (1986).

others requires that DCBS retain legal custody in kinship care cases, allowing temporary custody only to non-offending parents, not to relatives or fictive kin. This diverges from the common practice described in Part II.C. The terms "our Judge" or "our Cabinet" were often used by attorneys and DCBS workers, reflecting a localized approach to handling cases. As one judge remarked, there is a "local practice," and the "[judges] all do them a little bit differently."[407]

The controversial practices discussed in this Article are anticipated to be more common in rural areas or those without family courts, areas that were not adequately represented among my interviewees.[408] Thus, the fragmentation of legal practices strengthens, rather than undermines, the argument of this Article.

2. List of Interviews

Category	Identification	Description	Medium	Date
Attorney	Attorney 1	Represents both parents and kin caregivers	Zoom	Oct. 25, 2023
	Attorney 2	Represents kin caregivers; involved in kin caregivers' organizations and conferences	Zoom	Nov. 2, 2023
	Attorney 3	Represents kin caregivers in private practice but also defends parents as public service	Zoom	Nov. 1, 2023
	Attorney 4	Represents kin caregivers in private practice but also defends parents as public service	Zoom	Nov. 20, 2023
Judge	Judge 1	Former family court judge	Zoom	Oct. 30, 2023
	Judge 2	Current family court judge	Telephone	Nov. 8, 2023, Nov. 10, 2023
	Judge 3	Current family court judge	Zoom	Dec. 6, 2023

407. Interview with Judge 2.

408. Most interviewees were based in the state's urban centers, though there were some from smaller counties or those whose work extends into rural areas, including advocates whose organizations serve statewide. No judge, attorney, or DCBS worker was based in rural Appalachian counties in Eastern Kentucky.

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Category	Identification	Description	Medium	Date
Child Protection Agency	DCBS Worker 1	Former frontline worker	Zoom	Oct. 18, 2023
	DCBS Worker 2	Current supervisor	Zoom	Nov. 7, 2023
	DCBS Worker 3	Current supervisor	Zoom	Jan. 10, 2024
Civil Society	Advocate 1	Director of a child welfare organization	Zoom	Nov. 21, 2023
	Advocate 2	Policy analyst at KY Youth Advocates	Zoom	Dec. 14, 2023
	Advocate 3	Advocate for parents involved in child protection system	Zoom	Jan. 17, 2024