



---

11-18-2022

## Safeguarding America's "Unnatural" Guardians: How Georgia's Legal Guardianship Statute Excludes "Atypical," Matriarchal Familial Structures Rooted in Black Culture

Destiny B. Barnett  
*University of Georgia School of Law*

Follow this and additional works at: <https://digitalcommons.law.uga.edu/blr>



Part of the [Law Commons](#)

---

### Recommended Citation

Barnett, Destiny B. (2022) "Safeguarding America's "Unnatural" Guardians: How Georgia's Legal Guardianship Statute Excludes "Atypical," Matriarchal Familial Structures Rooted in Black Culture," *Georgia Law Review*: Vol. 57: No. 1, Article 10.

Available at: <https://digitalcommons.law.uga.edu/blr/vol57/iss1/10>

This Note is brought to you for free and open access by Digital Commons @ University of Georgia School of Law. It has been accepted for inclusion in Georgia Law Review by an authorized editor of Digital Commons @ University of Georgia School of Law. [Please share how you have benefited from this access](#) For more information, please contact [tstriepe@uga.edu](mailto:tstriepe@uga.edu).

---

# Safeguarding America's "Unnatural" Guardians: How Georgia's Legal Guardianship Statute Excludes "Atypical," Matriarchal Familial Structures Rooted in Black Culture

## Cover Page Footnote

J.D. Candidate, 2023, University of Georgia School of Law; B.A., 2020, Agnes Scott College. This Note is dedicated to Betty Wilker Barnett and Louise Wilker Neal, legal guardians and grandfamily of Destiny Briana Barnett.

## **SAFEGUARDING AMERICA’S “UNNATURAL” GUARDIANS: HOW GEORGIA’S LEGAL GUARDIANSHIP STATUTE EXCLUDES “ATYPICAL,” MATRIARCHAL FAMILIAL STRUCTURES ROOTED IN BLACK CULTURE**

*Destiny B. Barnett\**

*The stereotypical American family is often seen as one man, one woman, and their child. However, this notion of the traditional family is changing. For centuries, familial matriarchs have assumed roles typically reserved for a child’s biological parents. Specifically, African American grandmothers, aunts, and other female figures have served as kinship caregivers for countless generations of children dating back to before the period of American slavery. These forgotten matriarchs, who often serve as the foundation of African American family units, have been historically abandoned by our universalist legal system that idolizes the nuclear concept of family and favors the retention of biological parents’ rights. Although legal avenues exist for these kinship caregivers to achieve rights comparable to that of a biological parent—for example, temporary or permanent guardianship—the procedural ambiguity and inaccessibility of these options make them unfeasible for many kinship family units.*

*This Note will explore Georgia’s current guardianship laws and how they restrict kinship caregivers’ access to financial and social resources due to their capricious adjudication and parental consent requirements. The Note suggests adopting a statute akin to New Jersey’s Kinship Guardianship Notification Act and reintroducing de facto parenthood (previously introduced in the Georgia Legislature as Georgia House Bill 321). The former focuses on informing kinship caregivers of how they may obtain social services from the State to support the child they are caring for, while the latter*

---

\* J.D. Candidate, 2023, University of Georgia School of Law; B.A., 2020, Agnes Scott College. This Note is dedicated to Betty Wilker Barnett and Louise Wilker Neal, legal guardians and grandfamily of Destiny Briana Barnett.

*eliminates extensive petitioning and judicial loopholes for potential de facto custodians. In addition to these suggestions, this Note advocates for the fusion of Black feminist theory and legal theory by reframing the narrative of family from one rooted in the theoretical Anglo-American nuclear ideal to one that acknowledges the innate nuance of what constitutes family across all ethnicities and social groups.*

TABLE OF CONTENTS

I. INTRODUCTION.....	474
II. BACKGROUND .....	476
A. MATRIARCHS, MAMMIES, AND OTHER MEANS OF MOTHERHOOD: THE EVOLUTION OF NON-PARENTAL, BLACK WOMEN CARETAKERS.....	476
B. GEORGIA’S LEGAL GUARDIANSHIP STATUTE AND WHO IT LEAVES OUT.....	479
C. OVERCOMING BIOLOGICAL FAVORITISM IN THE REALM OF KINSHIP LAW .....	480
III. ANALYSIS .....	482
A. LEGAL ACKNOWLEDGEMENT AND COMPENSATION METHODS .....	482
1. <i>New Jersey’s Kinship Guardianship Notification         Act</i> .....	482
2. <i>Reintroducing De Facto Custodial Parenthood</i> .....	483
B. WHERE LAW AND BLACK FEMINIST THEORY INTERTWINE: THE COMPLEXITIES AND SOCIAL REALITIES OF BLACK “MOTHERHOOD” .....	485
IV. CONCLUSION .....	487

## I. INTRODUCTION

Kinship caregivers—a group disproportionately comprised of grandmothers, aunts, and other matriarchal figures of color—have historically assumed parental roles traditionally<sup>1</sup> held by a child’s biological mother or father.<sup>2</sup> Prior studies have documented the reasons why Black matriarchal figures specifically “serve as kinship care providers and the consequences, sacrifices, and rewards of their decisions.”<sup>3</sup> These studies demonstrate that “the reasons that Black grandmothers agree to serve as kinship care providers for grandchildren include feeling [an] obligation, acting as a mechanism for family survival, and providing a safe haven for children who have been abused or neglected by their parents.”<sup>4</sup>

This kinship caregiving role presents unique challenges.<sup>5</sup> For example, many kinship caregivers and the children they nurture “live at or below the poverty line, in overcrowded households,” with these caretakers often being individuals who are “elderly, single, or poorly educated.”<sup>6</sup> Additionally, many Black kinship caregivers

---

<sup>1</sup> Traditionally in this context pertains to the stereotypical American nuclear family structure that places the biological mother and father as the primary caretakers for a household. See *Nuclear Family*, MERRIAM-WEBSTER, <https://www.merriam-webster.com/dictionary/nuclear%20family#medicalDictionary> (defining nuclear family as “a family group that consists only of father, mother, and children”).

<sup>2</sup> See Sacha M. Coupet, “Ain’t I a Parent?": *The Exclusion of Kinship Caregivers from the Debate over Expansions of Parenthood*, 34 N.Y.U. REV. L. & SOC. CHANGE 595, 597, 605–06 (2010) (explaining how historical kinship caregiving networks such as matriarchal “[o]thermothers” in Black communities operate outside the heteronormative conception of a family); see also Jeffrey C. Goelitz, *Answering the Call to Support Elderly Kinship Caregivers*, 15 ELDER L.J. 233, 234 (2007) (“Thousands of elderly relatives throughout the United States are answering the call to fill in as primary caregivers for children in need of a home.”); Regina Davis-Sowers, “*It Just Kind of Like Falls in Your Hands*”: *Factors that Influence Black Aunts’ Decisions to Parent Their Nieces and Nephews*, 43 J. BLACK STUD. 231, 232 (2012) (“Research has documented the increasing numbers of Black children living in the homes of kinship care providers.”).

<sup>3</sup> Davis-Sowers, *supra* note 2, at 232.

<sup>4</sup> *Id.* (citations omitted); see also S. Yvette Murphy, Andrea G. Hunter & Deborah J. Johnson, *Transforming Caregiving: African American Custodial Grandmothers and the Child Welfare System*, 35 J. SOCIO. & SOC. WELFARE 67, 76 (2008) (noting “legacy” as another reason African American caregivers take on such responsibility).

<sup>5</sup> See, e.g., Goelitz, *supra* note 2, at 234 (“Because kinship caregivers are often not licensed foster parents or legal guardians, they lack the legal authority to obtain medical, financial, and educational services for children under their care.”).

<sup>6</sup> *Id.*

experience increased time demands, financial burdens, and family-related stress.<sup>7</sup> Although government resources may be available to ease a few of these hardships—for example, “respite care for relative caregivers, free legal services, and welfare payments”<sup>8</sup>—many of these caregivers do not know how to access these resources or lack the legal authority to do so.<sup>9</sup> Moreover, even when informed, caregivers are often not entitled to the same financial assistance that biological, adoptive, and foster parents are entitled to.<sup>10</sup> Many states have taken steps to alleviate the plight of these largely unrecognized caretakers, but this issue has gone unaddressed at the federal level.<sup>11</sup> This note will examine how the Georgia legislature can give Georgia’s largely undercompensated and underacknowledged Black woman caregivers recognition that is long overdue.

Part II of this note details how Black matriarchal figures have been entrenched in caregiving roles for centuries, beginning as early as the late 1860s during the post-emancipation era. This historical reflection culminates by analyzing Georgia’s current legal guardianship statute and its subtle but formidable barriers to accessibility for many nontraditional kinship caregivers.

Part III assesses two avenues the Georgia legislature can pursue to alleviate the plight of these Black caregivers and argues that the Georgia legislature should adopt a statute similar to New Jersey’s Kinship Guardianship Notification Act or reintroduces *de facto*

---

<sup>7</sup> See Regina Louise Davis-Sowers, *Salvaging Children’s Lives: Understanding the Experiences of Black Aunts Who Serve as Kinship Care Providers Within Black Families*, at 116, 125, 132 (Aug. 2, 2006) (unpublished Ph.D. dissertation, Georgia State University), [https://scholarworks.gsu.edu/sociology\\_diss/29](https://scholarworks.gsu.edu/sociology_diss/29) (finding that kinship providers report “increased demands on their time,” “financial burdens associated with this new parental role,” and “family problems precipitated by changes in roles”).

<sup>8</sup> Goelitz, *supra* note 2, at 234 (citing the Kinship Caregiver Support Act, S. 985, 109th Cong. § 101 (2005) and describing that one of the main challenges for kinship caregivers because most do not hold the legal title of guardian or foster parent is their lack of legal authority to obtain medical, financial, and educational services for the children under their care).

<sup>9</sup> See *id.* (establishing that kinship caregivers’ lack of knowledge prevents access to needed services).

<sup>10</sup> See *id.* at 234–35 (explaining that such financial assistance would require kinship caregivers to “meet the same licensing standards as nonrelative caregivers, standards that may be inappropriate in the kinship setting”).

<sup>11</sup> See *id.* at 235 (“Although many states took steps to address some of these issues, federal legislation has yet to address the needs of kinship caregivers.”).

custodianship (also referred to as de facto parenthood). Part III also introduces a new legislative approach to creating and implementing kinship laws in the future that focuses on how narratives of Black women and other historically marginalized communities do not fit the traditional mold of what qualifies as a family unit. Part III concludes by highlighting the need for Georgia's legislature to acknowledge that this familial deviation is not a defect, but rather is an additional consideration worthy of statutory revision and accommodation. To that end, Part III introduces a new legislative approach that combines traditional principles of kinship law with emic theories of Black feminism to broaden the availability of legal avenues for Black kinship caregivers to be legally recognized and compensated.

## II. BACKGROUND

### A. MATRIARCHS, MAMMIES, AND OTHER MEANS OF MOTHERHOOD: THE EVOLUTION OF NON-PARENTAL, BLACK WOMEN CARETAKERS

“The role of the extended family in providing care and support for members within African American families is well documented.”<sup>12</sup> “In 2001, approximately 2,400,000 grandparents were raising grandchildren in the United States.”<sup>13</sup> Although this statistic includes all classes and ethnicities, “it is particularly prevalent among African Americans.”<sup>14</sup> Nine percent of African American children under the age of eighteen were living in grandparent-headed households compared with six percent of

---

<sup>12</sup> Murphy et al., *supra* note 4, at 68; *see also* KAREN J. FOLI, NURSING CARE OF ADOPTION AND KINSHIP FAMILIES: A CLINICAL GUIDE FOR ADVANCED PRACTICE NURSES 44 (2017) (“Informal adoption, or the rearing of children by relatives, is one of the most enduring African traditions that survived the Middle Passage. During slavery, elderly relatives often reared thousands of children whose parents had been sold as chattel.” (quoting NAT'L ASS'N OF BLACK SOCIAL WORKERS, KINSHIP CARE, POSITION PAPER (2003))).

<sup>13</sup> Meredith Minkler & Esme Fuller-Thomson, *African American Grandparents Raising Grandchildren: A National Study Using the Census 2000 American Community Survey*, 60B J. GERONTOLOGY: SOC. SCIS. S82, S82 (2005).

<sup>14</sup> *Id.*



Hispanic children and four percent of non-Hispanic White children.<sup>15</sup> These grandparents are also disproportionately female.<sup>16</sup>

When examining the history of informal kinship among African American families, these statistics are not surprising. Kinship care is a centuries-old protective tradition in African American families that was especially beneficial during the period of American slavery and the years that immediately followed emancipation.<sup>17</sup> In fact, “African American grandparents have had a historical caregiving role from slavery to the current day” and they “consistently provide[] the emotional and financial support needed to ensure the well-being of their grandchildren when parents are working or absent.”<sup>18</sup> These kinship units “continue[] to exist within the Black community, and before the 1980[]s many Black children were cared for by kin outside of the child welfare system.”<sup>19</sup> Author and memoirist Nefertiti Austin recounts:

In the 20th century, Black families were shaped by post-slavery systems of peonage, like sharecropping. Itinerant farmers owned no land and had minimal, if any, political protections. Black laborers worked under constant threat of incarceration and physical abuse by white landowners. This was no way to raise a family, and many Black men and women ran north, east or west in search of work in factories and fair payment, leaving children and spouses behind. Relatives and neighbors stepped in to help raise those children. They provided

---

<sup>15</sup> *Id.*

<sup>16</sup> See *id.* at S84 (“When analyzed by gender, 4.1% of African American men and 7% of [African American] women were providing such care.”).

<sup>17</sup> See GENERATIONS UNITED, AFRICAN AMERICAN GRANDFAMILIES: HELPING CHILDREN THRIVE THROUGH CONNECTION TO FAMILY AND CULTURE 4 (2020) [hereinafter TOOLKIT: AFRICAN AMERICAN GRANDFAMILIES], <https://www.gu.org/app/uploads/2020/07/AA-Toolkit-WEB-2.pdf> (“African American grandparents have had a historical caregiving role from slavery to the current day.”); see also Murphy et al., *supra* note 4, at 75 (“Grandmothers’ interpretative practices and the meanings associated with intergenerational caregiving were embedded in African American cultural and historical traditions.”).

<sup>18</sup> TOOLKIT: AFRICAN AMERICAN GRANDFAMILIES, *supra* note 17, at 4.

<sup>19</sup> Marcia Hopkins, *Family Preservation Matters: Why Kinship Care for Black Families, Native American Families, and Other Families of Color is Critical to Preserve Culture and Restore Family Bonds*, JUV. L. CTR., (Sept. 24, 2020), <https://jlc.org/news/family-preservation-matters-why-kinship-care-black-families-native-american-families-and-other>.

community and became kin. The village, with or without blood ties, became family.<sup>20</sup>

Tradition is not the only rationale for Black women assuming these kinship caregiving roles. In a 2008 study of African American caregiving grandmothers,<sup>21</sup> one participant claimed that her choice to undertake this duty was “framed by a sense of ancestral connection,” viewing caregiving as “a fulfillment of family obligation.”<sup>22</sup> “Talking about her decision to raise her grandchild, one grandmother stated, ‘I did this, [became a kinship caregiver] because . . . the blood that runs through [my grandchild’s] veins also runs through mine, too.’”<sup>23</sup> Another grandmother stated that “it was the right thing to do, ‘to keep [her] family together.’”<sup>24</sup> When one grandmother was asked about the prospects of compensation for her caregiving role, she responded:

Maybe grandmothers won't ever be compensated like foster parents—and I don't even think it is the thing about being compensated but trying to help us and holding up their end. We need help, we are women that are crying out. We are going under and we need help. We are doing it [caring for grandchild] because this is something that[,] if we don't do [it,] something bad will happen to the baby . . . .<sup>25</sup>

The study above exemplifies these nontraditional family units’ unique cultures and the selfless humility that the caregivers

---

<sup>20</sup> Nefertiti Austin, *Black Grandparents, Kin and Play Cousins: The Soul and Survival of Black Families*, N.Y. TIMES, <https://www.nytimes.com/2020/07/07/parenting/black-families-children-kin-grandparents.html> (last updated July 9, 2020); see also Hopkins, *supra* note 19 (describing how kinship should be a priority for those communities who have been historically disenfranchised, ripped apart, and devalued throughout American history).

<sup>21</sup> See Murphy et al., *supra* note 4, at 72 (“The focus groups represented five counties, in both rural and urban areas across North Carolina, and included 22 African American grandmother kinship caregivers.”).

<sup>22</sup> *Id.* at 76.

<sup>23</sup> *Id.* (first alteration in original).

<sup>24</sup> *Id.*

<sup>25</sup> *Id.* at 79 (first alteration in original).

emblemize despite the overwhelming legal and financial challenges that may threaten their ability to prosper.

#### B. GEORGIA’S LEGAL GUARDIANSHIP STATUTE AND WHO IT LEAVES OUT

Georgia’s Guardian and Ward statute identifies five types of legal guardians: natural guardians, testamentary guardians, temporary guardians, standby guardians, and permanent guardians.<sup>26</sup> This Note examines the natural, temporary, and permanent guardianship statutory provisions. Each biological parent is automatically the natural guardian of a minor child, “except that, if the parents are divorced and one parent has sole custody of the minor, that parent is the sole natural guardian of that minor.”<sup>27</sup>

The problem with Georgia’s present legal guardianship statute is not definitional—it is procedural. The petitioning process for one to become a temporary or permanent guardian is littered with capricious adjudication and requirements that many petitioners may find unfulfillable. Beyond the physical custody prerequisite, successfully petitioning for appointment as a temporary guardian requires surmounting several legal hurdles.<sup>28</sup> This multi-step process is both daunting to those unfamiliar with the law’s innerworkings<sup>29</sup> and overly burdensome to nonparental caregivers given that external factors (e.g., incarceration, voluntary or involuntary abandonment, parental relocation, prior neglect, and more) often prevent them from even contacting the biological

<sup>26</sup> See O.C.G.A. § 29-2-1 (2022) (listing how guardians of minors may be categorized).

<sup>27</sup> *Id.* § 29-2-3(b).

<sup>28</sup> Under Georgia law, a petition for temporary guardianship requires: (1) “[t]he name, address, and date of birth of the minor”; (2) the name and address of the petitioner as well as “the petitioner’s relationship to the minor, if any”; (3) “[a] statement that the petitioner has physical custody of the minor” and “is domiciled in the county in which the petition is being filed” or the minor is found in that county; (4) “[t]he name, address, and county of domicile of any living [biological] parent of the minor”; (5) “[a] statement of whether one or both of the [biological] parents have consented” to the petitioner’s temporary guardianship; (6) where consent is not granted, “a statement of the circumstances” necessitating the appointment of a temporary guardian; and (7) “[t]he reason for any omission in the petition for temporary guardianship in the event full particulars are lacking.” *Id.* § 29-2-5(c)(1)–(7).

<sup>29</sup> See Gerard W. Wallace, *A Family Right to Care: Charting the Legal Obstacles*, 3 GRANDFAMILIES: CONTEMPORARY J. RSCH., PRAC. & POL’Y 122, 129 (2016) (“[K]inship families in every state still face daunting obstacles to their caregiving.”).

parents of the child they are caring for.<sup>30</sup> Although Georgia's present statutory language presents a significant challenge to kinship caregivers, it has the capacity for improvement when examining statutes from other states—e.g., New Jersey—and abandoned bills in the Georgia House of Representatives itself.<sup>31</sup> The challenge lies in overcoming kinship law's favoritism toward a child's biological parents.

### C. OVERCOMING BIOLOGICAL FAVORITISM IN THE REALM OF KINSHIP LAW

Georgia law guards a biological parent's right to the care and custody of their children in a number of ways. For instance, a constitutional presumption favors preserving parental custody.<sup>32</sup> Likewise, Georgia statutes protect parental custody rights while balancing the need to protect the child's welfare.<sup>33</sup> Georgia imposes a high burden for the transfer of parental rights—often requiring proof of neglect by clear and convincing evidence<sup>34</sup>—coupled with

---

<sup>30</sup> See, e.g., Jill Nolin, *New Law Eases Way for Kinship Caregivers*, TIFTON GAZETTE (May 6, 2017), [https://www.tiftongazette.com/news/new-law-eases-way-for-kinship-caregivers/article\\_dd8344ea-3272-11e7-965a-fbc75014278a.html](https://www.tiftongazette.com/news/new-law-eases-way-for-kinship-caregivers/article_dd8344ea-3272-11e7-965a-fbc75014278a.html) (describing a grandparent caregiver's plight to secure certain "required signatures from her daughter, who was struggling with substance abuse, and the children's fathers" as "no simple task").

<sup>31</sup> See *infra* Section III.A.

<sup>32</sup> See *Wallace v. Chandler*, 859 S.E.2d 100, 102 (Ga. Ct. App. 2021) ("This right [to the care and custody of a child] is guarded in our law in a number of ways, including a constitutionally based presumption that works in favor of preserving parental custody . . ."); see also *Morgan v. Morgan*, 827 S.E.2d 73, 75 (Ga. Ct. App. 2019) ("There shall be a rebuttable presumption that it is in the best interest of the child or children for custody to be awarded to the parent or parents of such child or children . . .").

<sup>33</sup> See *Wallace*, 859 S.E.2d at 102 (establishing that Georgia guards the parental right to care and custody both via "a constitutionally based presumption that works in favor of preserving parental custody and a statutory scheme that has been enacted by the legislature to protect this right while balancing the need to protect the welfare of the child"); see also Pamela Laufer-Ukeles, *Money, Caregiving, and Kinship: Should Paid Caregivers Be Allowed to Obtain De Facto Parental Status?*, 74 MO. L. REV. 25, 32 (2009) ("Many jurisdictions still follow the strong parental preference rule by granting physical custody to a third-party psychological parent only when the biological or adoptive parent is found unfit or, in a somewhat weaker version, upon a showing that parental custody will cause substantial harm to the child." (footnote omitted)); *supra* note 28 and accompanying text (describing one example of Georgia's statutory scheme making it difficult to gain temporary guardianship).

<sup>34</sup> See *Morgan*, 827 S.E.2d at 75 (establishing that grandparents challenging an order granting custody to a child's mother "were required to show by clear and convincing evidence

the need to balance the due process rights of the biological parents with the child’s best interests.<sup>35</sup>

For example, in a 2021 parental appeal awarding a biological mother temporary custody over the maternal grandmother, the Georgia Court of Appeals discussed how both Georgia’s Constitution and the laws of the United States give parents a right to the care and custody of their children.<sup>36</sup> The court emphasized that there must be clear and convincing evidence of parental unfitness before this right can be relinquished to a non-parental figure.<sup>37</sup> Likewise, in a 2016 appeal regarding the termination of a Georgian mother’s parental rights, the court once again expressed a judicial interest in preserving the rights of the biological parents.<sup>38</sup> The court’s analysis “[wa]s guided by an overarching constitutionally based principle that the termination of parental rights is a ‘remedy of last resort which can be sustained only when there is clear and convincing evidence that the cause of the deprivation is likely to continue.’”<sup>39</sup> While these precedential hurdles are significant, appropriate legislation can surmount them.

---

that [the child] will suffer either physical harm or long-term emotional harm if custody were awarded to the mother”); *see also* *Beasley v. Jones*, 254 S.E.2d 472, 473 (Ga. Ct. App. 1979) (stating factors that may terminate “the parental rights of the mother”: “deprivation, probable continued deprivation, and that the child will probably suffer serious emotional harm”).

<sup>35</sup> *See Morgan*, 827 S.E.2d at 74–75 (describing how a custody award is predicated on a showing by clear and convincing evidence of the parent’s present fitness and that it is in the best interest of the child that custody be awarded).

<sup>36</sup> *See Ortega v. Temple*, 856 S.E.2d 471, 474 (Ga. Ct. App. 2021), *cert. denied* (Sept. 8, 2021) (“[P]arents have a constitutional right under the United States and Georgia Constitutions to the care and custody of their children. This right to the custody and control of one’s child is a fiercely guarded right that should be infringed upon only under the most compelling circumstances.” (quoting *Clark v. Wade*, 544 S.E.2d 99, 596–97 (Ga. 2001))).

<sup>37</sup> *See id.* at 477 (“The Durden standard, under which the roles of the parent and the third-party reverse, applies where there has been a permanent award of custody to the third party made pursuant to an evidentiary hearing with specific findings by clear and convincing evidence of present parental unfitness.” (quoting *Morgan v. Morgan*, 827 S.E.2d 73, 75 (2019))).

<sup>38</sup> *See In re D.M.*, 793 S.E.2d 422, 424 (Ga. Ct. App. 2016) (“[T]here is no judicial determination which has more drastic significance than that of permanently severing a natural parent-child relationship. It must be scrutinized deliberately and exercised most cautiously. The right to raise one’s children is a fiercely guarded right in our society and law, and a right that should be infringed upon only under the most compelling circumstances.” (quoting *In re J.A.B.*, 785 S.E.2d 43, 44 (Ga. Ct. App. 2016))).

<sup>39</sup> *Id.* at 427 (quoting *In re T.Z.L.*, 751 S.E.2d 854, 862 (Ga. Ct. App. 2013)).

## III. ANALYSIS

## A. LEGAL ACKNOWLEDGMENT AND COMPENSATION METHODS

Georgia's legislature can take two distinct and feasible avenues to legally acknowledge nontraditional Black family structures. The first avenue would be to adopt legislation similar to a 2005 New Jersey statute titled the Kinship Guardianship Notification Act.<sup>40</sup> This Act places nontraditional, relative-led family units—specifically, grandparent-led families—on notice about the various legal resources to best care for the child or children they are nurturing.<sup>41</sup> The second avenue reintroduces *de facto* parenthood/custodianship legislation, previously introduced as Georgia House Bill 321 (HB 321).<sup>42</sup>

1. *New Jersey's Kinship Guardianship Notification Act.* The New Jersey State Legislature enacted the Kinship Guardianship Notification Act in December of 2005.<sup>43</sup> The Act's rationale is consistent with the increase in grandparent-led families identified in Part II of this Note.<sup>44</sup> In the Act, the legislature acknowledged the “increasing number of relatives in the State, including grandparents, [who] find themselves providing care on a long-term basis to children who cannot reside with their parents due to the parent's incapacity or inability to perform the regular and expected functions of care and support of the child.”<sup>45</sup> In short, the Act “allows for the appointment of an individual as a kinship legal guardian.”<sup>46</sup> This kinship legal guardian “has the same rights, responsibilities, and authority relating to a child as a birth parent, with the exception of consenting to the adoption of the child . . . while the

---

<sup>40</sup> Kinship Legal Guardianship Notification Act, N.J. STAT. ANN. §§ 30:4C-89 to 30:4C-92 (West 2022).

<sup>41</sup> See *id.* § 30:4C-91(a)(1)–(2) (establishing that the New Jersey Department of Children and Families is required to inform individuals seeking to become kinship guardians of “the eligibility requirements for, and the responsibilities of, kinship legal guardianship” and “the full-range of services for which kinship legal guardians may be eligible”); *id.* § 30:4C-90(a) (citing an increase in the number of grandparents supporting children in New Jersey).

<sup>42</sup> H.B. 321, 154th Gen. Assemb., Reg. Sess. (Ga. 2017), <https://www.legis.ga.gov/api/legislation/document/20172018/164906>.

<sup>43</sup> N.J. STAT. ANN. § 30:4C-89.

<sup>44</sup> See *supra* Section II.A.

<sup>45</sup> N.J. STAT. ANN. § 30:4C-90.

<sup>46</sup> *Id.*

birth parent retains the obligation to pay child support and the right to court-approved visitation or parenting time with the child.”<sup>47</sup> In addition to the Act’s provisions, New Jersey’s Department of Children and Families established the Kinship Navigator program, “a referral service designed to help kinship caregivers coordinate the various government and community resources that may be available to them.”<sup>48</sup> Through this program, New Jersey recognized the importance of “ensur[ing] that individuals who may be eligible to become kinship legal guardians are aware of the eligibility requirements for, and the responsibilities of, kinship legal guardianship, and that both individuals who may be eligible to become kinship legal guardians and current kinship legal guardians are aware of the services available to [them] in the State.”<sup>49</sup> If Georgia adopted a statute similar to New Jersey’s, it would substantially alleviate the legal inaccessibility of its current kinship laws while helping its nontraditional caregivers obtain the same benefits and privileges as that of a biological parent.

2. *Reintroducing De Facto Custodial Parenthood.* Georgia House Bill 321 (HB 321) provides a second legal avenue to acknowledge nontraditional Black family structures.<sup>50</sup> Co-drafted by current Representatives Chuck Efstrotation and Brian Prince,<sup>51</sup> and former Representatives Beth Beskin, Stacey Abrams, and Michael Caldwell, HB 321 defined de facto custodian as:

[A]n individual who has shown by clear and convincing evidence to have accepted full and permanent responsibilities of a child as if he or she were a parent of the child without expectation of financial compensation for the child and where the child: (A) Has resided with such individual for a period of six months or more, if the child is under three years of age; or (B) Has resided with such individual for a period of one year

---

<sup>47</sup> *Id.*

<sup>48</sup> *Id.*

<sup>49</sup> *Id.*

<sup>50</sup> H.B. 321, 154th Gen. Assemb., Reg. Sess. (Ga. 2017), <https://www.legis.ga.gov/api/legislation/document/20172018/164906>.

<sup>51</sup> *Id.* at 1; *see also* GA. HOUSE OF REPRESENTATIVES, HOUSE MEMBER DIRECTORY, [https://www.legis.ga.gov/api/document/docs/default-source/house-document-library/house-member-directory.pdf?sfvrsn=1f476975\\_52](https://www.legis.ga.gov/api/document/docs/default-source/house-document-library/house-member-directory.pdf?sfvrsn=1f476975_52) (last visited Sept. 13, 2022) (listing Efstrotation and Prince as the only current House members).

or more, if the child is three years of age or older; and  
 (C) Has developed a bonded and dependent relationship  
 with such individual where such relationship has been  
 fostered or supported by either parent of the child . . . .<sup>52</sup>

HB 321 would have provided significant legal privileges for potential de facto custodians. Some of these privileges included (1) the right of a grandparent or de facto custodian to file an original action for visitation rights to a minor child; (2) the right of that same class of individuals “to intervene in and seek to obtain visitation rights in any action . . . concerning the custody of a minor child;” (3) the right to intervene in an action concerning the “divorce of the parents or a parent of such minor child;” (4) the right to intervene in actions regarding a termination of the parental or visitation rights of either parent of such minor child; and (5) the right to enforce specified hourly visitation period minimums.<sup>53</sup>

One essential element that HB 321 addressed was the express judicial consideration of emotional ties between the child in question and the non-parental caregivers.<sup>54</sup> For example, HB 321 allowed courts making de facto custodianship determinations to consider “[t]he love, affection, bonding, and emotional ties existing between each party and the child”<sup>55</sup> as well as “[t]he capacity and disposition of each party to give the child love, affection, and guidance and to continue the education and rearing of the child.”<sup>56</sup>

Because the initial draft of HB 321 was drafted across bipartisan lines,<sup>57</sup> the reintroduction of that bill—or one similar—is a feasible step toward achieving legal equity for Georgia’s underacknowledged caregivers. Additionally, HB 321 and other statutes, such as New Jersey’s Kinship Notification Act, are not mutually exclusive; while the Kinship Notification Act focuses on promoting equal awareness of the rights of nontraditional caregivers, HB 321 codifies those rights. If Georgia pursued both avenues, either simultaneously or

---

<sup>52</sup> H.B. 321 at 2.

<sup>53</sup> *Id.* at 3–4.

<sup>54</sup> *See id.* at 6 (including emotional fitness as a factor that courts may consider when making de facto custodianship determinations).

<sup>55</sup> *Id.*

<sup>56</sup> *Id.*

<sup>57</sup> *See* H.B. 321, *supra* note 50, at 1 (listing Democratic and Republican Representative co-drafters).



in parallel silos, such efforts would benefit these caretaker populations.

#### B. WHERE LAW AND BLACK FEMINIST THEORY INTERTWINE: THE COMPLEXITIES AND SOCIAL REALITIES OF BLACK “MOTHERHOOD”

Black feminist theory provides key insight into the decision-making processes of Black maternal caregivers.<sup>58</sup> This theory recognizes that Black women construct social realities that are significantly different from those of other racial and ethnic groups and that those realities “often center on the needs and concerns of family rather than the needs of Black women.”<sup>59</sup> “Black feminist theory aims to use research to better the lived experiences of Black women” and “recognizes [them] as cocreators of knowledge and as experts in their own lives.”<sup>60</sup> Furthermore, Black feminist theory values the “experiential versus the theoretical,” relying on “Black women’s lived experiences to validate research findings.”<sup>61</sup>

Family law’s adoption of Black feminist theory would encompass that field’s professed embrace of the “pluralistic concept of the family.”<sup>62</sup> “This belief is reflected, in part, in the use of flexible norms like the functional parent theory<sup>63</sup> and the best interests of the child standard,<sup>64</sup> rather than proscriptive descriptions of family

---

<sup>58</sup> See, e.g., Davis-Sowers *supra* note 2, at 233 (describing how Black feminist theory provides a foundation for studying Black women’s decision-making processes).

<sup>59</sup> *Id.*

<sup>60</sup> *Id.* at 234.

<sup>61</sup> *Id.*

<sup>62</sup> Coupet, *supra* note 2, at 647; see also Moore v. City of E. Cleveland, 431 U.S. 494, 504 (1977) (“Ours is by no means a tradition limited to respect for the bonds uniting the members of the nuclear family. The tradition of uncles, aunts, cousins, and especially grandparents sharing a household along with parents and children has roots equally venerable and equally deserving of constitutional recognition.”).

<sup>63</sup> See Coupet, *supra* note 2, at 636 (explaining how the functional parent theory “accord[s] legal recognition to those who perform a family relationship, regardless of the absence of formal or biological connections” (quoting Susan Frelich Appleton, *Parents by the Numbers*, 37 HOFSTRA. L. REV. 11, 16–17 (2008))).

<sup>64</sup> See Lynne Marie Kohm, *Tracing the Foundations of the Best Interests of the Child Standard in American Jurisprudence*, 10 J.L. & FAM. STUD. 337, 337 (2008) (“The best interests of the child doctrine is at once the most heralded, derided and relied upon standard in family law today . . . . The doctrine affects the placement and disposition of children in divorce, custody, visitation, adoption, the death of a parent, illegitimacy proceedings, abuse proceedings, neglect proceedings, crime, economics, and all forms of child protective services.”).

composition and structure, to determine parental rights.”<sup>65</sup> The current “marriage-centeredness” of parenthood “undermines the pluralistic ideal.”<sup>66</sup> To better embrace this ideal, courts should adopt an emic<sup>67</sup> perspective on parenthood, which would judge parental claims based on the internal norms of a community<sup>68</sup>—in this case, a Black feminist lens. An emic perspective advocates for the “extension of [legal] parental rights to nonconjugal kinship caregivers, especially in communities in which such family formation and functioning is the norm.”<sup>69</sup> Therefore, applying this emic perspective would encourage adopting a diverse set of views on what constitutes a family in addition to those commonly acknowledged in contemporary debates.<sup>70</sup>

As discussed previously, the marriage-centeredness of parenthood reveals the strong extent that cultural norms influence how such relationships are defined.<sup>71</sup> Because “[p]arenthood as understood by law . . . is always a constructed or attributed status’ . . . it is impossible for such choices about family not to be highly influenced by culture.”<sup>72</sup> As such, conceptions of parenting, parenthood, and the family itself have an innate cultural history that cannot, and should not, be easily disentangled.<sup>73</sup> These biases inevitably restrict what kinds of families courts are able to recognize, thus preventing many caregivers from having “equal

<sup>65</sup> Coupet, *supra* note 2, at 647.

<sup>66</sup> *Id.* (emphasizing how traditional biological conjugality expectations of a family place a barrier on who fits the category of a “parent”).

<sup>67</sup> *See id.* at 649 (“An emic perspective regards cultural institutions like the family from the vantage point of someone *within* a particular culture. In contrast, an etic perspective views cultural institutions, like the family, from the vantage point of one *outside* of that culture.” (footnote omitted)).

<sup>68</sup> *See id.* (“An emic, as opposed to an etic, perspective on the family would conceive of family life from the perspective of those within a particular culture or community.”).

<sup>69</sup> *Id.* at 648.

<sup>70</sup> *See id.* at 649 (“Applying an emic perspective thus would make room for a more diverse set of views on the family than those commonly acknowledged in contemporary debates.”).

<sup>71</sup> *See supra* note 66 and accompanying text.

<sup>72</sup> *See* Coupet, *supra* note 2, at 648 (quoting Angela Campbell, *Conceiving Parents Through Law*, 21 INT’L J.L. POL’Y & FAM. 242, 243–44 (2007)) (first alteration in original).

<sup>73</sup> *See id.* (describing how parenthood and culture are interwoven so they cannot be easily disaggregated); *see also* Troxel v. Granville, 530 U.S. 57, 98 (2000) (Kennedy, J., dissenting) (acknowledging varied household structure and prevailing conditions that continue to shape contemporary American family life).

opportunity to take advantage of the wider range of options’ regarding their own choices about family life.”<sup>74</sup>

“Even as the composition of the American populace is rapidly changing, law and policy continue to reflect only the values, beliefs, and principles of Anglo-American culture . . . .”<sup>75</sup> Thus, what the law considers parentage and parenthood must expand beyond one selective expression by one seemingly dominant culture. The American Law Institute has already acknowledged the growing need to expand on the concept of family<sup>76</sup>—Georgia can take the next step to make it an actuality. As a whole, kinship caregiving relationships are beneficial to families and are gradually becoming the new norm as minority populations and minority-led grandfamilies continue to soar within American society.<sup>77</sup>

#### IV. CONCLUSION

The traditional American family is continuously evolving. While many family units still include biological parents, they are not always the child’s main caregivers. Many of these nontraditional families are made up of Black female relatives who care for their nieces, nephews, and grandchildren when the child’s biological parents could not otherwise be their primary caregivers.<sup>78</sup> The legal system has historically underappreciated and undercompensated these Black caretakers—they often remain unacknowledged today. Georgia’s current guardianship statutes require extensive, burdensome amounts of adjudication and mandated disclosure of

---

<sup>74</sup> See Coupet, *supra* note 2, at 648 (footnote omitted) (quoting Twila L. Perry, *Race Matters: Change, Choice, and Family Law at the Millennium*, 33 FAM. L.Q. 461, 461 (1999)).

<sup>75</sup> *Id.* (footnote omitted).

<sup>76</sup> See PRINCIPLES OF THE L. OF FAM. DISSOLUTION: ANALYSIS AND RECOMMENDATIONS 11 (AM. L. INST. 2003) (extending parental rights to four categories of individuals who are considered parents by estoppel, including individuals who have “lived with the child since the child’s birth, holding out and accepting full and permanent responsibilities as parent, as part of a prior co-parenting agreement with the child’s legal parent,” and extending de facto parent status to adults who live with the child and who regularly perform at least half of the caretaking functions with respect to the child).

<sup>77</sup> Press Release, U.S. Census Bureau, U.S. Census Bureau Projections Show a Slower Growing, Older, More Diverse Nation a Half Century from Now (Dec. 12, 2012), <https://www.census.gov/newsroom/releases/archives/population/cb12-243.html> (“The U.S. population will be considerably older and more racially and ethnically diverse by 2060, according to projections released today by the U.S. Census Bureau.”).

<sup>78</sup> See *supra* Section II.A.

information that is often inaccessible to these caretakers due to unaccounted-for externalities.<sup>79</sup> Georgia can alleviate the plights of these caretakers by adopting a statute similar to New Jersey's Kinship Legal Guardianship Act and by reintroducing the de facto parenthood legislation that the Georgia Legislature originally proposed via HB 321. Pursuing these options would signal a long-awaited transformation of Georgia kinship law: the switch from a universalist ideal of family to a more contextual, emic, and culturally cognizant perception of caretaking based primarily on experience rather than the outdated ideal of the traditional nuclear theory.

---

<sup>79</sup> See Mychal D. Smith, *The Dangerous Myth of the "Missing Black Father,"* WASH. POST, (Jan. 10, 2017, 6:01 AM), <https://www.washingtonpost.com/posteverything/wp/2017/01/10/the-dangerous-myth-of-the-missing-black-father/> (warning against the romanticization of the nuclear family when examining Black families due to factors such as "chronic unemployment, discriminatory hiring practices, the history of mass incarceration, housing segregation and inequality in educational opportunity").