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AGING OUT: 2018 LEGISLATION SEEKING TO ADDRESS  
VIRGINIA'S PERMANENCY PROBLEM FOR CHILDREN IN  
FOSTER CARE

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## ABSTRACT

*Virginia has one of the highest rates of youth who “age out” of the foster care system and one of the lowest family reunification rates in the country. This is due to several factors, including that the termination of parental rights has an accelerated timeline in Virginia compared to the federal timeline. Children who age out of the system lack a sense of permanency that is critical to healthy psychological development. As a result, many such children tend to experience lower levels of educational attainment and income, and higher levels of substance use, criminal justice system involvement, and homelessness than average. During its 2018 session, the Virginia General Assembly sought to address some aspects of this problem through their enactment of House Bills 1219, 1333, and 106 and Senate Bills 44 and 646. House Bill 1219 allows the court, at an annual foster care review of a child who is eligible, to initiate the restoration of a parent’s rights if the child so wishes and if restoration is deemed appropriate after an investigation of the parents’ circumstances. Further, House Bills 1333 and 106 and Senate Bills 44 and 646, collectively, provide for the creation of the Kinship Guardian Assistance Program, which provides support to relatives of a child who take that child into their care and custody from foster care, after a determination that their biological parent is not fit to care for the child. These bills allow children to either return to their parents or to remain with extended family, creating the permanency and stability they so desperately need.*

## INTRODUCTION

Though Virginia scores fairly high in many measures of child well-being, ranking at number ten in the “Kids Count Data Book” compiled by the Annie E. Casey Foundation,<sup>1</sup> there are still some measures in which the Commonwealth struggles. One of these is permanency for children who have been removed from their parents by the child welfare system. Children who cannot return to their birth parents—usually because their parents’ rights have been terminated—remain in foster care until they are either adopted or they emancipate (“age out”).<sup>2</sup> Children whose parents’ rights

<sup>1</sup> ANNIE E. CASEY FOUND., 2018 KIDS COUNT DATA BOOK: STATE TRENDS IN CHILD WELL-BEING 21 (2018), <http://www.aecf.org/m/resourcedoc/aecf-2018kidscountdatabook-2018.pdf>.

<sup>2</sup> Melinda Atkinson, *Aging Out of Foster Care: Towards a Universal Safety Net for Former Foster Care Youth*, 43 HARV. C.R.-C.L. L. REV. 183, 183 n.2, 185–86 (2008) (explaining that “[t]he term ‘age out’ refers to the termination of court jurisdiction over foster care youths.”).

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have been terminated—but are not adopted—are considered “legal orphans.”<sup>3</sup> Some children in foster care cannot be adopted because they are over age 14 and have vetoed termination of their parents’ rights,<sup>4</sup> but they remain in foster care because their parents are not viewed as appropriate permanency options. If these children do not have relatives willing to take custody, they will age out of foster care without a permanent family.

Even many children in foster care who are eligible for adoption—especially older ones or those with physical or mental health challenges—are not adopted, and thus “age out” of foster care without any family, whether their own biological family, an adoptive family, or a kinship family.<sup>5</sup>

Virginia has one of the highest rates of aging out in the nation: 19% compared to the 9% national average.<sup>6</sup> Virginia also has greater numbers of older children (over age 16) in foster care: 21% compared to 16% nationally,<sup>7</sup> and the lowest rate of family reunification: 26% compared to 50% nationally.<sup>8</sup> On the plus side, Virginia seems to do better than many states at preventing kids from entering foster care, with a rate of 1.5 kids per 1,000, compared to the national rate of 4 per 1,000.<sup>9</sup> This may be due to better prevention efforts or to Virginia’s reliance on kinship diversion, through which families are essentially required to place their children with relatives or “fictive kin”<sup>10</sup> even though the children are not judicially removed from

<sup>3</sup> Richard L. Brown, *Disinheriting the "Legal Orphan": Inheritance Rights of Children After Termination of Parental Rights*, 70 MO. L. REV. 125, 126 (2005).

<sup>4</sup> See VA. CODE § 16.1-283(G) (2018) (indicating that a child fourteen or older may object to termination of a parent’s rights).

<sup>5</sup> Atkinson, *supra* note 2, at 186–87 (stating that almost 20% of children in foster care spend five or more years in the system and approximately 20,000 youths age out of the foster care system); see also VA. CODE § 63.2-1305(A) (2018) (explaining the Kinship Guardian Program); VA. CODE § 63.2-100 (2018) (defining “kinship care” as “the full-time care, nurturing, and protection of children by relatives”).

<sup>6</sup> *Children Exiting Foster Care by Exit Reason*, KIDS COUNT DATA CTR. (May 2018), <https://datacenter.kidscount.org/data/line/6277-children-exiting-foster-care-by-exit-reason?loc=1&loct=2#2/48/true/573,869,36,868,867,133/asc/2631,2636,2632,2633,2630,2629,2635,2634/13051>.

<sup>7</sup> ELIZABETH JORDAN ET AL., SUPPORTING YOUNG PEOPLE TRANSITIONING FROM FOSTER CARE: VIRGINIA FINDINGS FROM A NATIONAL SURVEY AND POLICY SCAN 7 (Nov. 2017), <https://chsva.org/wp-content/uploads/2017/11/SYPTFC-Virginia-Findings-from-a-National-Survey-and-Policy-Scan-11.3.pdf>.

<sup>8</sup> *Children Exiting Foster Care by Exit Reason*, *supra* note 6.

<sup>9</sup> *Children 0 to 17 Entering Foster Care*, KIDS COUNT DATA CTR. (May 2018), [https://datacenter.kidscount.org/data/tables/6268-children-0-to-17-entering-foster-care#detailed/1/any/false/870,573,869,36,868,867,133,38,35,18/any/13034,15620;\\_Foster\\_Care\\_Entry\\_Rate](https://datacenter.kidscount.org/data/tables/6268-children-0-to-17-entering-foster-care#detailed/1/any/false/870,573,869,36,868,867,133,38,35,18/any/13034,15620;_Foster_Care_Entry_Rate), KIDS COUNT DATA CTR. (Nov. 2017), <https://datacenter.kidscount.org/data/tables/9176-foster-care-entry-rate#detailed/2/any/false/1624,1567,1528,1501,1335,1334,1333,1332,808/any/18196>.

<sup>10</sup> ANNIE E. CASEY FOUND., TRAINING MANUAL 124 (2012), <http://www.aecf.org/m/resourcedoc/aecf->

their birth families. Diverted children never enter the foster care system, and are therefore not counted in the statistics, even though they have effectively been removed from their families. Nearly all local departments of social services in Virginia utilize kinship diversion as a way to prevent children entering foster care.<sup>11</sup> This practice has its own problems.<sup>12</sup> Following a 2016 report to the General Assembly on such practices, the body authorized a pilot project in several Virginia localities to learn more about the role diversion plays in the child welfare system.<sup>13</sup> A report on the program is due out soon.

Due to concerns about Virginia's high numbers of children who never find permanency with a family, three pieces of legislation were introduced during the 2018 legislative session that sought to ameliorate Virginia's high rate of children who never find permanency with a family.<sup>14</sup> Because children who age out have poorer life outcomes than children who have permanent homes—as assessed by measures including educational attainment, substance use, criminal justice system involvement, homelessness, and income<sup>15</sup>—expanding Virginia's permanency options, or making them more accessible or viable, will not only improve Virginia's foster care statistics, but also will improve the Commonwealth's overall measures of social well-being.<sup>16</sup>

Of the bills that were introduced in 2018 that sought to address the issue of permanency for children in the child welfare system in Virginia, two were carried by Delegate David Reid (D-Loudoun): House Bills (HB) 1218

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LifelongFamiliesCasePracticeStandardsManual-2012.pdf.

<sup>11</sup> VA. DEP'T OF SOC. SERVS., FINDINGS FROM THE 2011 DIVISION OF FAMILY SERVICES (DFS) PREVENTION SURVEY 3 (2010), [http://www.dss.virginia.gov/files/division/dfs/ca\\_fc\\_prevention/early\\_prevention/studies\\_survey/summary\\_analy\\_sis\\_final\\_review.pdf](http://www.dss.virginia.gov/files/division/dfs/ca_fc_prevention/early_prevention/studies_survey/summary_analy_sis_final_review.pdf).

<sup>12</sup> ANNIE E. CASEY FOUND., THE KINSHIP DIVERSION DEBATE: POLICY AND PRACTICE IMPLICATIONS FOR CHILDREN, FAMILIES AND CHILD WELFARE AGENCIES 9–10 (2013), <https://www.aecf.org/m/pdf/KinshipDiversionDebate.pdf>.

<sup>13</sup> H. APPROPRIATIONS COMM. & S. FIN. COMM., SUMMARY OF 2014–16 BUDGET ACTIONS, CHAPTER 732 (INTRODUCED AS HOUSE BILL 29) AND 2016–18 BUDGET ACTIONS, CHAPTER 780 (INTRODUCED AS HOUSE BILL 30) 109 (June 9, 2016), <http://hac.virginia.gov/documents/2016/post-session/hac%20complete%20summary%20document.pdf>; see VA. DEP'T OF SOC. SERVS., REVIEW OF CURRENT POLICIES GOVERNING FACILITATION OF PLACEMENT OF CHILDREN IN KINSHIP CARE TO AVOID FOSTER CARE PLACEMENTS IN THE COMMONWEALTH AND THE RECOMMENDATIONS FOR REGULATIONS GOVERNING KINSHIP CARE PLACEMENTS (CHAPTER 530, 2014) 2 (2016), <https://rga.lis.virginia.gov/Published/2016/SD9/PDF>.

<sup>14</sup> S.B. 636, 2018 Gen. Assemb., Reg. Sess. (Va. 2018); H.B. 106, 2018 Gen. Assemb., Reg. Sess. (Va. 2018); H.B. 1218, 2018 Gen. Assemb., Reg. Sess. (Va. 2018).

<sup>15</sup> JORDAN ET AL., *supra* note 7, at 4.

<sup>16</sup> See *id.* at 10–11; *Transition-Age Youth in Foster Care in Virginia*, CHILD TRENDS (Aug. 29, 2017), [https://www.childtrends.org/wp-content/uploads/2017/09/Transition-Age-Youth\\_Virginia-1.pdf](https://www.childtrends.org/wp-content/uploads/2017/09/Transition-Age-Youth_Virginia-1.pdf) (reporting data from children who exited foster care at ages 17–19, most to emancipation, though they are not separately tallied).

and 1219. HB 1218 dealt with the timetable for parental rights termination,<sup>17</sup> and HB 1219 concerned the process for restoration of parental rights.<sup>18</sup> A third piece of legislation was carried as multiple bills by several members of the General Assembly, who filed identical bills in both houses: Delegates Emily Brewer (R-Suffolk)<sup>19</sup> and Karrie Delaney (D-Centreville)<sup>20</sup> in the House, and Senators Barbara Favola (D-Arlington)<sup>21</sup> and Siobhan Dunnavant (R-Henrico)<sup>22</sup> in the Senate. These bills, all of which were aimed at creating the Kinship Guardian Assistance Program, allowed children to leave foster care for the guardianship of relatives in certain circumstances by providing support similar to that provided to children adopted from foster care. These bills were HB 1333 and HB 106 in the House, and in the Senate, Senate Bill (SB) 44 and SB 636.<sup>23</sup>

Part I of this article lays out the challenges and issues facing children in Virginia's foster care system that these bills sought to correct. Then, Part II discusses changes that could have been made to Virginia's existing termination of parental rights statutory framework and alternatives to the termination of parental rights. Part III discusses how the legislation sought to address these issues and the outcomes of the legislation in the 2018 Virginia General Assembly Session. Finally, this article briefly concludes with an examination of the impact this legislation will likely have on foster youth in Virginia.

## I. THE PROBLEM: VIRGINIA'S LOW RATE OF PERMANENCY

The federal Adoption and Safe Families Act (ASFA) of 1997 requires states to create a plan for the return home or for the "permanent placement" of each child in foster care.<sup>24</sup> For children in foster care whose parents lost custody due to findings of abuse or neglect, the first permanency goal is typically to reunify with their family. The state is required to make "reasonable efforts" to enable the parent to achieve this goal.<sup>25</sup> For most parents whose children have been removed by the state, Virginia law requires parents to "substantially correct," within 12 months, the conditions that

<sup>17</sup> H.B. 1218, 2018 Gen. Assemb., Reg. Sess. (Va. 2018).

<sup>18</sup> H.B. 1219, 2018 Gen. Assemb., Reg. Sess. (Va. 2018).

<sup>19</sup> H.B. 1333, 2018 Gen. Assemb., Reg. Sess. (Va. 2018).

<sup>20</sup> H.B. 106, 2018 Gen. Assemb., Reg. Sess. (Va. 2018).

<sup>21</sup> S.B. 44, 2018 Gen. Assemb., Reg. Sess. (Va. 2018).

<sup>22</sup> S.B. 636, 2018 Gen. Assemb., Reg. Sess. (Va. 2018).

<sup>23</sup> S.B. 44, 2018 Gen. Assemb., Reg. Sess. (Va. 2018); S.B. 636, 2018 Gen. Assemb., Reg. Sess. (Va. 2018); H.B. 106, 2018 Gen. Assemb., Reg. Sess. (Va. 2018); H.B. 1333, 2018 Gen. Assemb., Reg. Sess. (Va. 2018).

<sup>24</sup> Adoption and Safe Families Act of 1997, 42 U.S.C. § 622(b)(10) (2018).

<sup>25</sup> See 45 C.F.R. § 1356.21(b) (2017).

brought the child into the state's custody.<sup>26</sup> If, for various reasons, the parents are unable to do so (or at least, do so to the state and the court's satisfaction) within that 12-month time frame, the local Department of Social Services (LDSS) usually petitions to terminate the parents' rights shortly after the 12 months have passed (though often the agency or the court will extend the time if the parent is making progress).<sup>27</sup> Once the termination of both parents' rights is complete, the child is legally an orphan. Legal orphans who are not adopted have no legal connection to a family and cannot inherit or take advantage of any benefits to which a child would ordinarily be entitled.<sup>28</sup> The state is required to develop a case plan for each child with a goal of finding "permanency" that is appropriate for that child's needs.<sup>29</sup>

For most legal orphans, the LDSS develops a "permanency goal" of adoption.<sup>30</sup> Some, especially older children, may have a goal of permanent foster care or "independent living"—or, if a child has significant health issues, may temporarily or permanently have a goal of congregate care, such as in a youth home.<sup>31</sup> Other children who may have behavioral issues due to their history of trauma may also end up living in congregate care.<sup>32</sup> Over the past three years, forty-six children over the age of fourteen left foster care to enter into the custody of relatives who are not able to adopt them (usually because the parents, though unable to become fit parents, have not had their rights terminated) but who become their legal guardians.<sup>33</sup>

Finding adoptive homes for children, especially older children, those in sibling groups, or those with behavioral or mental health issues can be chal-

<sup>26</sup> VA. CODE § 16.1-283(C)(2) (2018).

<sup>27</sup> See *id.* § 16.1-283.2(A).

<sup>28</sup> See Brown, *supra* note 3, at 133–34 (discussing the statutory provisions governing the inheritance rights of legal orphans); Ralph C. Brashier, *Children and Inheritance in the Nontraditional Family*, 1996 UTAH L. REV. 93, 150–51 (1996).

<sup>29</sup> See 42 U.S.C. § 671(a)(15)(E) (2018) (requiring the state to develop a permanency plan to be eligible for payments to fund foster care and adoption assistance); 42 U.S.C. § 675(1)(B) (2018) (explaining the contents and purpose of a "case plan").

<sup>30</sup> See Brown, *supra* note 3, at 130 (discussing the emphasis on expediting permanent placement).

<sup>31</sup> See KARL ENSIGN, THE FEDERAL ROLE IN FOSTER CARE: A PAPER ON CURRENT PRIORITY ISSUE AREAS 34 (1989), <https://aspe.hhs.gov/basic-report/federal-role-foster-care-paper-current-priority-issue-areas> (explaining that, "in 1968 an Independent Living Program was established to provide older foster care children in the process of emancipation from the system with services to assist them in an effective transition to independent adulthood."); Congregate Care, Residential Treatment And Group Home State Legislative Enactments 2009–2013, NAT'L CONF. ST. LEGISLATURES (Feb. 10, 2017), <http://www.ncsl.org/research/human-services/congregate-care-and-group-home-state-legislative-enactments.aspx> (explaining that children are placed in congregate care for many reasons and that only 28% of children in congregate care did not have either a diagnosis of a mental disorder, a behavioral problem, or a disability).

<sup>32</sup> See Justeen Hyde & Nina Kammerer, *Adolescents' Perspectives on Placement Moves and Congregate Settings: Complex and Cumulative Instabilities in Out-of-Home Care*, 31 CHILD. & YOUTH SERVS. REV. 265, 268–70 (2009).

<sup>33</sup> JOINT LEGISLATIVE AUDIT & REVIEW COMM'N, FISCAL IMPACT REVIEW, H.B. 1333 at 2–3 (2018).

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lenging.<sup>34</sup> While some states' laws allow a court to require the department to find an adoptive home for a child prior to terminating their parents' rights,<sup>35</sup> Virginia removed that statutory requirement from the state code in 1998.<sup>36</sup> Virginia children whose parents' rights are terminated wait an average of 32 months before being adopted.<sup>37</sup>

#### A. The Extent of the Problem

Nationally, there are approximately 60,000 legal orphans awaiting adoption because their parents' rights have been terminated.<sup>38</sup> In Virginia in 2015, 1125 children were considered legal orphans, and fewer than 600 of these children were adopted.<sup>39</sup> The problem compounds over time: while in 2006, there were 947 children on the adoption waiting list who had parents with terminated rights, by 2015 that number had risen to 1125 children.<sup>40</sup>

Virginia's rate of children who "age out" of foster care without either being reunified with their family or adopted is more than twice the national average.<sup>41</sup> This means that this group of children remain dependent on the state of Virginia until they either are adopted or become adults.<sup>42</sup> Formerly, foster youth aged out at age 18, but now, depending on state laws under the federal extension of foster care and the child's decision, foster youth can

<sup>34</sup> See Philip Burge et al., *Making Choices: Adoption Seekers' Preferences and Available Children with Special Needs*, 10 J. PUB. CHILD WELFARE 1, 11 (2016) (explaining that "the majority of users wished for younger children such as infants or toddlers versus those older than age seven years" and "[a]bout 60% of registrants indicated a willingness to adopt children with degrees of learning disabilities and emotional behavioral disorders, primarily if the impairment was considered mild. Acceptance of physical disability was rated significantly lower with only 42.5% of registrants noting a willingness to consider a child with a physical disability; also primarily if the impairment was considered mild.").

<sup>35</sup> See RAQUEL ELLIS ET AL., *THE TIMING OF TERMINATION OF PARENTAL RIGHTS: A BALANCING ACT FOR CHILDREN'S BEST INTERESTS* 2 (2009), [https://www.childtrends.org/wp-content/uploads/2009/09/Child\\_Trends-2009\\_09\\_09\\_RB\\_LegalOrphans.pdf](https://www.childtrends.org/wp-content/uploads/2009/09/Child_Trends-2009_09_09_RB_LegalOrphans.pdf).

<sup>36</sup> See VA. CODE § 16.1-281(B) (1998) (allowing child welfare agencies and social services departments discretion to avoid court approval over terminating parental rights prior to finding an adoptive home in exchange for the department or agency's plan or proposal for future successful placement of the child); see also VA. CODE § 16.1-281(B) (1997).

<sup>37</sup> U.S. DEP'T OF HEALTH & HUMAN SERVS., *THE ADOPTION AND FOSTER CARE ANALYSIS AND REPORTING SYSTEM REPORT 5* (2016), <https://www.acf.hhs.gov/sites/default/files/cb/afcarsreport23.pdf>.

<sup>38</sup> *Id.* at 4.

<sup>39</sup> See *Adoption and Foster Care Analysis and Reporting System*, U.S. DEP'T OF HEALTH & HUMAN SERVS., [https://www.acf.hhs.gov/sites/default/files/cb/afcars\\_state\\_data\\_tables\\_fy2015.xlsx](https://www.acf.hhs.gov/sites/default/files/cb/afcars_state_data_tables_fy2015.xlsx) (last visited Oct. 12, 2018).

<sup>40</sup> *Id.*

<sup>41</sup> Adele Uphaus-Conner, *Virginia Has High Percentage of Youth Aging Out of Foster Care*, FREE LANCE-STAR (Dec. 30, 2017), [https://www.fredericksburg.com/news/local/virginia-has-high-percentage-of-youth-aging-out-of-foster/article\\_19da0aa3-4f81-5c4d-aa92-fb644486879d.html](https://www.fredericksburg.com/news/local/virginia-has-high-percentage-of-youth-aging-out-of-foster/article_19da0aa3-4f81-5c4d-aa92-fb644486879d.html).

<sup>42</sup> See Karen E. Dottore, *Fostering Futures in Virginia: Why Is It Needed and What Does It Add to Existing Programs?*, 21 RICH. PUB. INT. L. REV. 297, 300-01 (2017).



remain in the system up to age 21.<sup>43</sup> Virginia adopted the federal extension of foster care to age 21 in 2016.<sup>44</sup> Further, since young adults who age out of foster care continue to struggle to find success by many outcome measures, including employment, some may remain dependent on the state even after attaining emancipation at 21.<sup>45</sup>

### B. What Drives Virginia's Foster Youth's Lack of Permanency?

Why have so many children in Virginia lost their birth families and become legal orphans? One driver of this phenomenon is a very well-intentioned federal law, the Adoption and Safe Families Act (ASFA) of 1997, which sought to shorten the amount of time that kids are without a permanent family (either their birth family or an adoptive one).<sup>46</sup> Unfortunately, the main issue preventing kids from having a permanent family is not that their parents' rights have not yet been terminated. Instead, there are just not enough people who want to adopt an older child, especially one who has been traumatized—often by maltreatment and by the process of removal and foster care itself.<sup>47</sup> Thus, the ASFA timeline—requiring termination proceedings to begin for a child in foster care for 15 out of the last 22 months—has led to a nationwide crisis, with more than 60,000 children whose parents' rights were terminated but have not yet been adopted.<sup>48</sup> While around half the states adhere to the ASFA timeline, one of the reasons for Virginia's high aging-out numbers may be its even shorter statutory timeline, of 12 months, for parents to comply with the requirements set forth by their LDSS in order to regain custody of their children.<sup>49</sup>

Further, Virginia has a low rate of children who are placed in relative foster homes, that is, with foster parents who are related to them: 6% com-

<sup>43</sup> CHILD WELFARE INFO. GATEWAY, EXTENSION OF FOSTER CARE BEYOND AGE 18, at 2 (2017), <https://www.childwelfare.gov/pubPDFs/extensionfc.pdf>; Dottore, *supra* note 42, at 305.

<sup>44</sup> Dottore, *supra* note 42, 305 (citing H.B. 30, 2016 Gen. Assemb., Reg. Sess. (Va. 2016)).

<sup>45</sup> See PEW CHARITABLE TR., TIME FOR REFORM: PREVENTING YOUTH FROM AGING OUT ON THEIR OWN 1 (2008), <http://www.pewtrusts.org/~media/assets/2008/09/30/agingout2008al.pdf>.

<sup>46</sup> See 42 U.S.C. § 671(a)(15)(C) (providing that reasonable efforts shall be made to place the child in a timely manner in accordance with the permanency plan, and to complete whatever steps are necessary to finalize the permanent placement of the child).

<sup>47</sup> See Burge et al., *supra* note 34, at 1.

<sup>48</sup> CHILD WELFARE INFO. GATEWAY, GROUNDS FOR INVOLUNTARY TERMINATION OF PARENTAL RIGHTS 3 (2017), <https://www.childwelfare.gov/topics/systemwide/laws-policies/statutes/groundtermin/>; *Adoption and Foster Care Analysis and Reporting System*, *supra* note 39.

<sup>49</sup> See VA. CODE § 16.1-283(C)(2) (2018) (mandating twelve months as the statutory timeline for parents to remedy the conditions which led to child's placement in foster care in order to avoid termination of parental rights); CHILD WELFARE INFO. GATEWAY, *supra* note 48, at 3 (explaining that "many States have adopted the ASFA standard" but "[s]ome States... specify shorter time limits.").

pared to the national average of 32%.<sup>50</sup> This is concerning because children placed with relatives have a greater degree of placement stability, thus are less likely to live in multiple foster homes.<sup>51</sup> They also retain their connection to their existing family, which is less traumatic than being sent to live with complete strangers. Further, the possibility exists that a child can exit foster care to the relative's legal guardianship, even if the child cannot be adopted. For example, youth over 14 can veto termination of their parents' residual rights.<sup>52</sup>

### C. Why Should We Be Concerned?

All the evidence shows that children thrive most in permanent families, and that severance of the family bond and placement in foster care, in and of itself, causes trauma to children.<sup>53</sup> A study by the University of Chicago found that children who age out of foster care without a permanent family struggle in many areas: "Across a wide range of outcome measures, including postsecondary educational attainment, employment, housing stability, public assistance receipt, and criminal justice system involvement, these former foster youth are faring poorly as a group."<sup>54</sup> Indeed, former foster youth who do not achieve permanency are less likely to graduate from high school (58% of foster youth do so by age 19 compared to 87% of all youth); graduate from college (less than three percent of foster youth compared to 28% of all youth); or earn income from employment (70% of foster youth by age 26 compared to 94% of all youth).<sup>55</sup> While 78% of Virginia's children in foster care find permanency, this is the lowest percentage in the country; the national average is 88%.<sup>56</sup>

While Virginia's extension of foster care to age 21 through the Fostering Futures program means that many foster youth are also offered the opportunity to gradually ascend to adulthood with support, not all actually remain

<sup>50</sup>*Children in Foster Care by Placement Type*, KIDS COUNT DATA CTR. (May 2018), <https://datacenter.kidscount.org/data/tables/6247-children-in-foster-care-by-placement-type?> (using the filters on the left side of the webpage, select "by state," select "uncheck all," and then select "Virginia").

<sup>51</sup> Sarah A. Font, *Is Higher Placement Stability in Kinship Foster Care by Virtue or Design?*, CHILD ABUSE & NEGLECT 99, 101 (2015).

<sup>52</sup> VA. CODE § 16.1-283(G) (2018).

<sup>53</sup> NINA WILLIAMS-MBENGUE, MOVING CHILDREN OUT OF FOSTER CARE: THE LEGISLATIVE ROLE IN FINDING PERMANENT HOMES FOR CHILDREN 1 (2008), <http://www.ncsl.org/documents/cyf/movingchildrenoutofcare.pdf>.

<sup>54</sup> MARK E. COURTNEY ET AL., MIDWEST EVALUATION OF THE ADULT FUNCTIONING OF FORMER FOSTER YOUTH: OUTCOMES AT AGE 26, at 6 (2011), <https://shnny.org/uploads/Child-Welfare-Midwest-Study-2012.pdf>.

<sup>55</sup> JORDAN ET AL., *supra* note 7, at 4.

<sup>56</sup> *Id.* at 10.

in foster care.<sup>57</sup> Virginia is one of the majority of states where youth are still more likely to leave foster care at age 18 than to remain to age 21.<sup>58</sup>

Foster youth choose to leave prior to 21 for various reasons. In a California study, reasons given for choosing not to participate included wanting to no longer have to deal with the court and social services systems and wishing to return to a biological parent.<sup>59</sup> While others are either not eligible (there are requirements for the youth to participate)<sup>60</sup> or not allowed (a court must sign off on the care plan to extend foster care to 21) to remain in foster care.<sup>61</sup> In any case, even a 21-year-old can benefit from the support and emotional connection provided by a permanent family, particularly given that neurological research shows that young people's brains don't reach maturity until age 25.<sup>62</sup> Additionally, the support offered in extended foster care, while extensive and important, does not provide the same benefits as those found in an actual family.<sup>63</sup> Foster care to age 21, as important as it is for youth without family and as much as it helps give them stability during that vital period of "launching" into adulthood,<sup>64</sup> is not "home;" it will never be, in the words of Robert Frost, "the place where, when you have to go there, they have to take you in."<sup>65</sup>

While federal law requires states to move to terminate a parent's rights after a child has been in foster care for 15 of the last 22 months, Virginia's statutory scheme, like about half of the states,<sup>66</sup> creates a fast-track to termi-

<sup>57</sup> *Id.* at 13, 15.

<sup>58</sup> JORDAN ET AL., *supra* note 7, at 7–8.

<sup>59</sup> MARK E. COURTNEY ET AL., CALIFORNIA YOUTH TRANSITIONS TO ADULTHOOD STUDY (CALYOUTH): EARLY FINDINGS FROM THE CHILD WELFARE WORKER SURVEY 20–21 (2015), [https://www.chapinhall.org/wp-content/uploads/CY\\_CW\\_RE1214.pdf](https://www.chapinhall.org/wp-content/uploads/CY_CW_RE1214.pdf).

<sup>60</sup> *See* VA. DEP'T OF SOC. SERVS., CHILD AND FAMILY SERVICES MANUAL CH. E § 14B, at 13–15 (2016), [http://www.dss.virginia.gov/files/division/dfs/fc/intro\\_page/guidance\\_manuals/fc/07\\_2016/Section\\_14B\\_Fostering\\_Futures.pdf](http://www.dss.virginia.gov/files/division/dfs/fc/intro_page/guidance_manuals/fc/07_2016/Section_14B_Fostering_Futures.pdf) (outlining five criteria, at least one of which participants must satisfy to be eligible).

<sup>61</sup> CARL E. AYERS & EM PARENTE, VA. DEP'T OF SOC. SERVS., FOSTERING FUTURES POLICY WORKDAY, at slide 3, slide 6 (2017), <http://mobile.roanokeva.gov/Teams/JuvJusticeServ.nsf/xsp/.ibmmodres/domino/OpenAttachment/teams/juvjusticeserv.nsf/A236E6934289054485257FD30041C094/Body/VDSS%20Fostering%20Futures.pdf>.

<sup>62</sup> *See* MADELYN FREUNDLICH ET AL., THE ADOLESCENT BRAIN: NEW RESEARCH AND ITS IMPLICATIONS FOR YOUNG PEOPLE TRANSITIONING FROM FOSTER CARE 1, 14 (2011), <https://www.aecf.org/m/resourcedoc/AECF-theAdolescentBrain-2011.pdf>.

<sup>63</sup> *See* Amy M. Salazar et al., *Defining and Achieving Permanency Among Older Youth in Foster Care*, CHILD. & YOUTH SERVS. REV. 1, 13 (2018).

<sup>64</sup> *See* JIM CASEY YOUTH OPPORTUNITIES INITIATIVE, THE ROAD TO ADULTHOOD: ALIGNING CHILD WELFARE PRACTICE WITH ADOLESCENT BRAIN DEVELOPMENT 8 (2017), <http://www.aecf.org/m/resourcedoc/aecf-theroadtoadulthood-2017.pdf>.

<sup>65</sup> Robert Frost, *The Death of the Hired Man*, The Poetry Found., <https://www.poetryfoundation.org/poems/44261/the-death-of-the-hired-man> (last visited Oct. 16, 2018).

<sup>66</sup> Child Welfare Info. Gateway, *supra* note 48, at 1, 3.

nation in just 12 months.<sup>67</sup> In moving to terminate after 12 months,<sup>68</sup> the state's emphasis is on adoption rather than reunification to provide permanency. This is problematic even when it does work and children find homes. Breaking the primary attachment bond is harmful to children and should only be done as a last resort, when it is clear a parent cannot become fit.<sup>69</sup> Many children from abusive or neglectful homes are deeply attached to and love their parents. They would prefer their parents learn to be better parents than lose them entirely, as family separation in and of itself causes trauma that impacts a person throughout their life.<sup>70</sup> Studies show that children on the margins of removal—i.e., those children who are not severely maltreated and for whom there is a choice between removal to foster care and staying with parents who obtain support and training—have better adult life outcomes when they are kept with their parents.<sup>71</sup> Also, even adopted children happily settled in loving homes may struggle with issues of feeling abandoned by their birth parents or guilt based on the belief they have betrayed their birth family.<sup>72</sup> Finally, because different people start from different baselines and have varying life issues, including mental health problems, addiction, stress, childhood trauma histories, domestic violence, or simply poor parental role models, requiring every parent to become “fit” within a 12-month time frame is not realistic and deprives children of the opportunity to return to their primary attachment figure: the parent (or parents) they love.<sup>73</sup>

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<sup>67</sup> See VA. CODE § 16.1-281(B) (2018).

<sup>68</sup> *Id.* at §16.1-283(C)(2).

<sup>69</sup> See Douglas F. Goldsmith et al., *Separation and Reunification: Using Attachment Theory and Research to Inform Decisions Affecting the Placements of Children in Foster Care*, 55 JUV. & FAM. CT. J. 1, 11 (2004).

<sup>70</sup> See Anu-Katriina Pesonen et al., *Childhood Separation Experience Predicts HPA Axis Hormonal Responses in Late Adulthood: A Natural Experiment of World War II*, 35 PSYCHONEUROENDOCRINOLOGY 758, 762–63 (2010) (showing that children separated from parents during WWII have higher levels of stress hormones even as older adults).

<sup>71</sup> Joseph J. Doyle, Jr., *Child Protection and Child Outcomes: Measuring the Effects of Foster Care*, 97 AM. ECON. REV. 1583, 1584 (2007).

<sup>72</sup> See Gina M. Samuels, *Ambiguous Loss of Home: The Experience of Familial (Im)permanence Among Young Adults with Foster Care Backgrounds*, 31 CHILD. & YOUTH SERVS. REV. 1229, 1233–34 (2009).

<sup>73</sup> See *id.*

## II. CHANGES THAT COULD INCREASE PERMANENCY

### A. Potential Changes to Virginia's Termination of Parental Rights Statutory Framework

Giving parents slightly more time to “remedy substantially”<sup>74</sup> the problems that brought the child into foster care could help slow the rush to termination. This is especially important for parents who struggle with trauma or addiction issues, which can take more than 12 months to resolve, or for parents who are incarcerated.<sup>75</sup> Parents who have experienced childhood sexual abuse or have been foster children themselves may find Child Protective Services (CPS) intervention to be re-traumatizing, making it difficult to “substantially correct” their parenting within the statutory timeline.<sup>76</sup> Parents often mistrust or have a negative view of CPS, which can delay their ability to “remedy substantially” the problems that caused their child to be placed into foster care in the first place.<sup>77</sup> Additionally, the lack of resources for addiction services contributes to the problem, especially when you consider the impact of the opioid crisis that Virginia, along with the rest of the country, is experiencing.<sup>78</sup> If Virginia law provided parents with 15 months (the same timeline as called for in the federal legislation), this could help children return to their parents as well as create consistency between Virginia statutes, as Virginia Code § 63.2-910.2 follows the federal “15 of the last 22 months” timeline.<sup>79</sup> This change would give parents a little more breathing room to “get their act together” and regain custody of their children.

Another approach to promoting permanency is to help return older children to parents whose rights were terminated but who may have matured

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<sup>74</sup> VA. CODE § 16.1-283(C)(2) (2018).

<sup>75</sup> See NAT'L INST. ON DRUG ABUSE, PRINCIPLES OF DRUG ADDICTION TREATMENT: A RESEARCH-BASED GUIDE 14 (3d. ed., 2018), <https://www.drugabuse.gov/publications/principles-drug-addiction-treatment-research-based-guide-third-edition/frequently-asked-questions/how-long-does-drug-addiction-treatment>; Maryanne Zavez, *Use of the Adoption and Safe Families Act at 15/22 Months for Incarcerated Parents*, 33 VT. L. REV. 187, 188 (2012).

<sup>76</sup> See Denise E. Elliott et al., *Trauma-Informed or Trauma-Denied: Principles and Implementation of Trauma-Informed Services for Women*, 33 J. COMMUNITY PSYCHOL. 461, 472 (2005).

<sup>77</sup> Kota Takaoka et al., *How Parents Suspected of Child Maltreatment Change Their Cognition and Behavior: A Process Model of Outreach and Child Protection, Generated via Grounded Theory*, 71 CHILD. & YOUTH SERVS. REV. 257–58 (2016).

<sup>78</sup> *Parents with Mental Illness and Child Custody Issues*, HEALTHYPLACE.COM (May 30, 2017), <https://www.healthyplace.com/parenting/parents-with-mental-illness/parents-with-mental-illness-and-child-custody-issues>; see *The Opioid Addiction Crisis is a Public Health Emergency in Virginia*, COMMONWEALTH VA. DEP'T HEALTH (Nov. 21, 2016), <http://www.vdh.virginia.gov/home/the-opioid-addiction-crisis-is-a-public-health-emergency-in-virginia/>.

<sup>79</sup> 42 U.S.C. § 675(5)(E) (2018); VA. CODE § 63.2-910.2(A) (2018).

and developed appropriate parenting skills in the years since, or to parents who would be suitable parents to an older child even if they struggled to parent their child when their child was younger. In 2013, following a study by the Virginia Commission on Youth which recommended it, Virginia passed a statute allowing for the restoration of the rights to those parents whose children have reached age 14 and at two years post-termination do not have an adoptive family on the horizon, if the child wishes for restoration and the parents agree.<sup>80</sup> Unfortunately, the statute is very rarely used.<sup>81</sup> The statute, prior to the legislative changes passed in 2018, required either the child's Guardian ad Litem (GAL) or their social worker to petition the court for the restoration of parental rights for legal orphans meeting these qualifications.<sup>82</sup> It is rare for the GAL, whose role may be minimal at best after termination, or the social worker, who likely had a contentious relationship with the birth parents or, due to high turnover in the profession, may not have been involved at an early enough stage in the child's care to know anything about the parents, to move for restoration.<sup>83</sup> Most children are not aware that this is an option, though most do return to their families—even though no legal relationship exists—after they are emancipated.<sup>84</sup>

#### B. An Alternative to the Termination of Parental Rights

Kinship guardianship is another permanency option that enables a child to retain family bonds as well as a connection with a parent who is not, at that time, able to provide a safe and nurturing environment. A kinship guardian takes legal and physical custody of a child, while the parent retains their residual (non-custodial) parental rights.<sup>85</sup> In Virginia, there has not been great financial support for kinship guardians. Guardians may apply for child-only Temporary Assistance for Needy Families (TANF), which provides monthly assistance of no more than \$254 per month (depending on locality),<sup>86</sup> and Medicaid or Family Access to Medical Insurance Security

<sup>80</sup> VA. CODE § 16.1-283.2 (2018); VA. COMM'N ON YOUTH, RESTORATION OF PARENTAL RIGHTS 9 (2013), <http://vcoy.virginia.gov/pdf/Restoration%20of%20Parental%20RightsFINAL0114.pdf>.

<sup>81</sup> See Charles H. Slempp III, *Restoring a Family Tie*, ROANOKE TIMES (June 13, 2013), [https://www.roanoke.com/opinion/commentary/restoring-a-family-tie/article\\_ef3db2c2-82c8-50c1-a927-ce0ce1365f80.html](https://www.roanoke.com/opinion/commentary/restoring-a-family-tie/article_ef3db2c2-82c8-50c1-a927-ce0ce1365f80.html).

<sup>82</sup> VA. CODE § 16.1-283.2 (2018).

<sup>83</sup> See Slempp III, *supra* note 81.

<sup>84</sup> Henrika McCoy et al., *Older Youth Leaving the Foster Care System, Who, What, When, Where, and Why?*, 30 CHILD. & YOUTH SERVS. REV. 735, 742 (2008).

<sup>85</sup> VA. CODE § 16.1-228 (2018).

<sup>86</sup> See LINDA GIANNARELLI ET AL., WELFARE RULES DATABOOK: STATE TANF POLICIES AS OF JULY 2016, at 14 (2017), [https://www.acf.hhs.gov/sites/default/files/opre/2016\\_welfare\\_rules\\_databook\\_final\\_10\\_30\\_17\\_b508\\_2](https://www.acf.hhs.gov/sites/default/files/opre/2016_welfare_rules_databook_final_10_30_17_b508_2).

(FAMIS),<sup>87</sup> which provides medical assistance for the child even if the guardian themselves would not be income-eligible. Caregivers may also potentially receive Supplemental Nutrition Assistance Program (SNAP), also called food stamps, if the addition of a child or children to the household would make the entire family income-eligible.<sup>88</sup> Kinship guardians may also be eligible for some assistance in paying for childcare for young children.<sup>89</sup> However, the extent of the support is often insufficient, especially for kinship caregivers on limited incomes. For example, to be eligible for SNAP, a family of two (say a grandparent and grandchild), cannot have a net income of more than \$1,372 per month or \$16,464 a year.<sup>90</sup>

Additionally, many relatives care for relative children on an informal basis.<sup>91</sup> Sometimes grandparents or other relatives step in when parents are unwilling or unable to care for a child, without any state intervention. These relatives may or may not seek a formal transfer of custody from the child's parent. Other children are "diverted" to kinship caregivers informally after CPS intervention. This diversion is part of a safety plan a parent must sign while CPS workers provide services to the parent to improve parenting and prevent judicial removal of the child.<sup>92</sup>

In Virginia, relatives may become legal guardians without the child ever entering foster care by way of an agreed-upon transfer of custody or by petitioning the court for custody as a "person with a legitimate interest."<sup>93</sup> Another avenue is first becoming a foster parent and then accepting transfer of custody from the state.<sup>94</sup> Virginia's low utilization of relatives as foster care

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<sup>87</sup> *Medicaid*, COVER VA., [http://coverva.org/programs\\_medicaid.cfm#famiplus](http://coverva.org/programs_medicaid.cfm#famiplus) (last visited Oct. 16, 2018);

FAMIS, Cover Va., [http://coverva.org/programs\\_famis.cfm](http://coverva.org/programs_famis.cfm) (last visited Oct. 16, 2018).

<sup>88</sup> See *Supplemental Nutrition Assistance Program (SNAP)*, U.S. DEP'T AGRIC., FOOD & NUTRITION SERVS., <https://www.fns.usda.gov/snap/eligibility#What%20are%20the%20SNAP%20income%20limits> (last visited Nov. 11, 2018).

<sup>89</sup> See 22 VA. ADMIN. CODE § 40-661-10 (2018) (defines "family" as any group of adults and/or children related by blood, marriage, adoption, or kinship); 22 VA. ADMIN. CODE § 40-661-20 (2018) (explaining that child care services are provided to children in eligible families that meet certain criteria).

<sup>90</sup> VA. DEP'T. OF SOC. SERVS., SNAP INCOME ELIGIBILITY LIMITS, [http://www.dss.virginia.gov/files/division/bp/fs/intro\\_page/income\\_limits/SNAP\\_Income\\_Eligibility\\_Limits.pdf](http://www.dss.virginia.gov/files/division/bp/fs/intro_page/income_limits/SNAP_Income_Eligibility_Limits.pdf) (last visited Oct. 16, 2018).

<sup>91</sup> See ALLEN W. HARDEN ET AL., FORMAL & INFORMAL KINSHIP CARE (1997), <https://aspe.hhs.gov/execsum/formal-and-informal-kinship-care>.

<sup>92</sup> VA. COMM'N ON YOUTH, REPORT ON THE DEFINITION OF KINSHIP CAREGIVERS 6 (2013), [http://vcoy.virginia.gov/pdf/Definition\\_of\\_Kinship\\_Caregivers\\_RD101.pdf](http://vcoy.virginia.gov/pdf/Definition_of_Kinship_Caregivers_RD101.pdf).

<sup>93</sup> VA. CODE § 16.1-278.15 (2018); VA. CODE § 20-124.1 (2018) (defining "person with a legitimate interest");

VA. DEP'T OF SOC. SERVS., CHILD AND FAMILY SERVICES MANUAL CH. E § 10, at 3 (2015), [https://dss.virginia.gov/files/division/dfs/fc/intro\\_page/guidance\\_manuals/fc/07\\_2015/Section\\_10\\_Achieving\\_Permanency\\_Goal\\_Custody\\_Transfer\\_to\\_Relatives.pdf](https://dss.virginia.gov/files/division/dfs/fc/intro_page/guidance_manuals/fc/07_2015/Section_10_Achieving_Permanency_Goal_Custody_Transfer_to_Relatives.pdf) [hereinafter VDSS].

<sup>94</sup> VDSS, *supra* note 93, at 10.

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placements is unfortunate as relative placements have been shown to be beneficial for children and may help achieve permanency for the child without the need for parental rights termination.<sup>95</sup> Because Virginia struggles with permanency, increasing the number of relative foster homes would not only enable more children to maintain family connections, but also would create an opportunity for legal permanency—relative guardianship—for these children, without the need for them to become “legal orphans.”<sup>96</sup>

### III. LEGISLATIVE ACTION IN THE 2018 GENERAL ASSEMBLY TO ADDRESS PERMANENCY

#### A. HB 1218 and HB 1219

HB 1218 and HB 1219, both sponsored by Delegate Reid, sought to address two issues: the timeline of parental termination of rights and the low rate of parental rights restoration.<sup>97</sup> The bills were submitted for drafting by House Minority Leader Delegate David Toscano (D-Charlottesville), an attorney with experience in child welfare and adoption.<sup>98</sup> Freshman Delegate Reid, one of a few Virginia legislators with first-hand experience with the child welfare system having himself been a child who went through the foster care system and was adopted, took over as chief patron of the bills.<sup>99</sup> Neither bill was determined to have a fiscal impact.<sup>100</sup>

HB 1218 sought to address the issue of legal orphans by giving parents a few months of additional time to “remedy substantially” the situation that brought their child into foster care.<sup>101</sup> The bill proposed to achieve this by expanding the 12-month timeline provided in Virginia Code § 16.1-283(C)(2) to the federal 15 out of the last 22 months under ASFA.<sup>102</sup> HB 1218 was assigned to Subcommittee 2 of the House Courts of Justice

<sup>95</sup> See PEW CHARITABLE TR., *supra* note 45, at 6.

<sup>96</sup> See Brown, *supra* note 3, at 126 (defining “legal orphan”); Salazar et al., *supra* note 63, at 9.

<sup>97</sup> H.B. 1218, 2018 Gen. Assemb., Reg. Sess. (2018) (addressing the timeline of parental termination of rights); H.B. 1219, 2018 Gen. Assemb., Reg. Sess. (2018) (addressing the restoration of parental rights).

<sup>98</sup> Va. House of Delegates Democratic Leader David Toscano, DAVIDTOSCANO.COM, <https://davidtoscano.com/about-david> (last visited Oct. 12, 2018). See generally H.B. 748, 2010 Gen. Assemb., Sess. (Va. 2010) (corroborating Delegate Toscano’s specialization in child welfare and adoption).

<sup>99</sup> See H.B. 1218, 2018 Gen. Assemb., Reg. Sess. (Va. 2018); H.B. 1219, 2018 Gen. Assemb., Reg. Sess. (Va. 2018); see also David Reid: Serving the 32nd District, DELEGATEDAVIDREID.COM, <https://www.delegatedavidreid.com/my-story/> (last visited Oct. 12, 2018).

<sup>100</sup> DEPT OF PLANNING & BUDGET, 2018 FISCAL IMPACT STATEMENT, H.B. 1219, at 1 (2018).

<sup>101</sup> H.B. 1218, 2018 Gen. Assemb., Reg. Sess. (Va. 2018).

<sup>102</sup> 42 U.S.C. § 675(5)(E) (2018); H.B. 1218, 2018 Gen. Assemb., Reg. Sess. (Va. 2018).



Committee, where it was tabled by a four to two vote (four Republican members voting to table, two Democrats voting against the motion to table, and two members—one Democrat and one Republican—abstaining).<sup>103</sup> The motion was made to table the bill because staff in the Office of the Executive Secretary of the Supreme Court of Virginia expressed concern that an additional review hearing would be required to expand the timeline an additional three months.<sup>104</sup> However, Virginia’s statutory scheme simply requires a second permanency hearing six months after an initial permanency planning hearing.<sup>105</sup> The initial permanency planning hearing is held within five months of a first foster care review hearing, which occurs four months after initial disposition, which occurs within 60 days of the preliminary removal hearing (totaling 11 months).<sup>106</sup> Currently, when the foster care goal changes from reunification to adoption, a new permanency planning hearing must be held so the court already has an additional hearing.<sup>107</sup> Further, once a parent’s rights are terminated, additional hearings are required to review adoption plans, and a foster care review hearing is required each year for as long as the child is in foster care.<sup>108</sup> Therefore, one additional hearing would not appear to have necessitated a change in the law and would not be likely to place an undue burden on the court system, given the additional hearings already required for permanent foster care. Federal legislation passed in 2018, the Family First Prevention Services Act,<sup>109</sup> will reconfigure the federal timeline, which may necessitate, or at least facilitate, a change in the Virginia Code in regard to its timelines relating to the termination of parental rights, which may ultimately reduce the number of children placed in foster care.<sup>110</sup>

HB 1219, also assigned to Subcommittee 2 of House Courts of Justice Committee, sailed unanimously through the subcommittee, the full committee, the full House, the Senate Courts of Justice Committee, and the full

<sup>103</sup> See H.B. 1218 Residual Parental Rights; Termination if in Child’s Best Interest, Foster Care Placement, VA. LEGIS. INFO. SYS., <https://lis.virginia.gov/cgi-bin/legp604.exe?181+sum+HB1218> (last visited Oct. 12, 2018).

<sup>104</sup> See *id.*

<sup>105</sup> VA. CODE § 16.1-282.1(A2) (2018).

<sup>106</sup> See *id.* §§ 16.1-252(A), 16.1-278.2(A), 16.1-282.1(A) (2018), 16.1-282.2(A).

<sup>107</sup> See *id.* §§ 16.1-282.1, 16.1-282.2.

<sup>108</sup> *Id.* § 16.1-282.2.

<sup>109</sup> Bipartisan Budget Act of 2018, Pub. L. No. 115-123, 123 Stat. 64, 169 (incorporating the Family First Prevention Services Act of 2017, H.R. 253).

<sup>110</sup> See John Kelly, *CliffsNotes on Family First Act, Part Three: Adoption, Foster Home Recruitment, Reunification and More*, CHRON. SOC. CHANGE (Feb. 15, 2018), <https://chronicleofsocialchange.org/finance-reform/cliffsnotes-family-first-act-part-three-adoption-foster-home-recruitment-reunification/29897>.

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Senate.<sup>111</sup> Governor Ralph Northam signed HB 1219 into law, and it went into effect on July 1, 2018.<sup>112</sup> HB 1219, as amended and codified, modifies Virginia Code § 16.1-282.2 slightly, by adding a Section (C), which allows the court, at the annual foster care review of a child who is eligible, to initiate restoration of a parent's rights by inquiring as to whether the child wishes such restoration, and if they do, ordering an investigation of the parents as provided for under the existing restoration statute.<sup>113</sup> If restoration is deemed an appropriate option, the processes of the restoration statute would be followed, and, following a successful trial period, the parent's rights would be restored.<sup>114</sup> Under the statute as it existed prior to this change, the initiation of the restoration process was left up to the social worker, who initially filed for termination, or the GAL, who likely argued for it.<sup>115</sup> Accordingly, very few eligible children in foster care were returned to their families under this statute. The change will mean that more eligible children will at least have the opportunity to return to the family as a legally recognized member of it rather than aging out of foster care without a family.

#### B. HB 1333, HB 106, SB 44, SB 646

A collection of four bills introduced in 2018 created the Kinship Guardian Assistance Program, or KinGAP, enabling Virginia to become the 36th state to have such a program.<sup>116</sup> The movement towards Virginia's KinGAP legislation began in 2008, when Title IV-E of the federal Social Security Act was amended by the enactment of the Fostering Connections to Success and Increasing Adoptions Act to allow relatives who become guardians of children in foster care to receive financial assistance similar to that received by non-relative adoptive families.<sup>117</sup> In 2012, Virginia's Commission on Youth outlined the costs and benefits of such a kinship assistance program, and ultimately recommended that the Virginia Department of Social Services (VDSS) move forward with the implementation of such a program.<sup>118</sup> Virginia requested and received a waiver from the feder-

<sup>111</sup> See H.B. 1219 Parental Rights; Annual Foster Care Review, VA. LEGIS. INFO. SYS., <https://lis.virginia.gov/cgi-bin/legp604.exe?181+cab+HC10201HB1219+UCHB2> (last visited Oct. 7, 2018).

<sup>112</sup> *Id.*

<sup>113</sup> H.B. 1219, 2018 Gen. Assemb., Reg. Sess. (Va. 2018); see VA. CODE § 16.1-282.2 (2018).

<sup>114</sup> See VA. CODE § 16.1-238.2; H.B. 1219, 2018 Gen. Assemb., Reg. Sess. (Va. 2018).

<sup>115</sup> See H.B. 1637, 2012 Gen. Assemb., Reg. Sess. (Va. 2012).

<sup>116</sup> See S.B. 44, 2018 Gen. Assemb., Reg. Sess. (Va. 2018); S.B. 636, 2018 Gen. Assemb., Reg. Sess. (Va. 2018); H.B. 106, 2018 Gen. Assemb., Reg. Sess. (Va. 2018); H.B. 1333, 2018 Gen. Assemb., Reg. Sess. (Va. 2018).

<sup>117</sup> Fostering Connections to Success and Increasing Adoptions Act of 2008, Pub. L. No. 110-350, 122 Stat. 3949, 3950 (2008) (amending 42 U.S.C. § 671(a) of the Social Security Act).

<sup>118</sup> VA. COMM'N ON YOUTH, BARRIERS TO KINSHIP CARE IN VIRGINIA 20 (2011),

al government to create a pilot KinGAP program but abandoned the project due to barriers such as the need for enabling legislation to fund the project.<sup>119</sup> Bills relating to kinship assistance were filed in the Virginia General Assembly beginning in 2013.<sup>120</sup> Typically, these bills would partially proceed through the legislative process, but then would fail, often in the financial committees based on a budget analysis prepared and presented by the Department of Planning and Budget (DPB) that included fiscal impact statements for the legislation.<sup>121</sup> However, the fiscal impact of the KinGAP bills was actually rather low, based on the small number of relatives that would qualify for KinGAP assistance payments.<sup>122</sup> In order to qualify, the relatives must be the foster parents of the child, the child's original family cannot be appropriate for reunification, and the child cannot be adoptable.<sup>123</sup>

In 2013, Senator Janet Howell (D-Reston) sponsored a bill requiring the VDSS to adopt regulations relating to kinship care, including funding for support payments.<sup>124</sup> However, the bill as passed merely directed VDSS to review and make recommendations for such regulations.<sup>125</sup> In 2016, Senator Barbara Favola introduced a bill that would have created the Kinship Guardian Assistance Program.<sup>126</sup> This bill, while passing the Senate unanimously and reporting unanimously from the House Health, Welfare, and Institutions Committee, was tabled in the House Appropriations Health and Human Resources Subcommittee.<sup>127</sup>

Half of the funding for the KinGAP program is federal; Title IV-E of the Social Security Act provides approximately 50% of the funds for each eligible child.<sup>128</sup> Relatives must have been foster parents of the children for six months first and must agree to take custody as legal guardians.<sup>129</sup> Under Section 673(d)(3)(A) of the Act, these relative children must be unable to

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<https://rga.lis.virginia.gov/Published/2012/RD17/PDF>.

<sup>119</sup> JAMES BELL ASSOCS., PROFILES OF THE TITLE IV-E CHILD WELFARE WAIVER DEMONSTRATION PROJECTS - VOLUME I: DEMONSTRATIONS ACTIVE BETWEEN FEDERAL FISCAL YEARS 1996 AND 2012, at 170 (2013), [https://www.acf.hhs.gov/sites/default/files/cb/waiver\\_profiles\\_vol1.pdf](https://www.acf.hhs.gov/sites/default/files/cb/waiver_profiles_vol1.pdf).

<sup>120</sup> S.B. 284, 2014 Gen. Assemb., Reg. Sess. (Va. 2014).

<sup>121</sup> See generally VA. CODE § 2.2-1501(1) (2018) (delineating the duties of the Department, including "Development and direction of an integrated policy analysis, planning, and budgeting process within state government.").

<sup>122</sup> See VA. COMM'N ON YOUTH, *supra* note 118, at 19 (predicting that the cost of the existing foster care system would significantly outweigh any money saved by the KinGAP program).

<sup>123</sup> 42 U.S.C. § 673(d)(3) (2018).

<sup>124</sup> S.B. 284, 2014 Gen. Assemb., Reg. Sess. (Va. 2014).

<sup>125</sup> S.B. 284, 2014 Gen. Assemb., Reg. Sess. (Va. 2014) (as passed on Apr. 3, 2014).

<sup>126</sup> S.B. 433, 2016 Gen. Assemb., Reg. Sess. (Va. 2016).

<sup>127</sup> S.B. 433 Kinship Guardianship Assistance Program; Established, VA. LEGIS. INFO. SYS., <http://lis.virginia.gov/cgi-bin/legp604.exe?161+sum+SB433> (last visited Sept. 23, 2018).

<sup>128</sup> JOINT LEGIS. AUDIT & REVIEW COMM'N, *supra* note 33, at 4.

<sup>129</sup> 42 U.S.C. § 673(d)(3)(A) (2018).

be returned to their birth parents and unable to be adopted.<sup>130</sup> An example of such a child would be one whose parents' rights have not been terminated because the child is old enough and has chosen to exercise a veto on termination. KinGAP is essentially the same as the adoption assistance program, as it provides financial support after negotiation with the family and takes into account the specific needs of the family and the child, but never exceeds the amount of a monthly foster care maintenance payment.<sup>131</sup>

In 2018, four legislators introduced KinGAP bills: Democratic Senator Barbara Favola, who carried the legislation for three years, Republican Senator Siobhan Dunnivant, and two new members of the House of Delegates, Democrat Karrie Delaney and Republican Emily Brewer. The bills were all essentially the same, though some had an "enactment clause" added based on the fiscal impact concerns.<sup>132</sup> Delegate Brewer, concerned about the Fiscal Impact Statement (FIS) of \$83,475 prepared by the Department of Planning and Budget (DPB) and believing that the impact would actually be less, asked the Joint Legislative Audit and Review Commission (JLARC) to prepare an additional fiscal impact statement.<sup>133</sup> While the initial JLARC FIS, due to lack of understanding of the restrictions under the federal legislation, showed a greater fiscal impact than the DPB FIS, the revised statement essentially concurred with the DPB FIS.<sup>134</sup>

Ultimately, of the four identical KinGAP bills, two, one in each body, were passed by the legislature, signed by the Governor, and enrolled in the Acts of Assembly.<sup>135</sup> They entered the Virginia Code by modifying Section 63.2-100 (Definitions) as well as Section 63.2-905 (Foster Care Services) and adding Section 63.2-1305, which actually creates and lays out the parameters of the Kinship Guardian Assistance Program.<sup>136</sup> The two bills that were codified in Chapter Nine (Social Services) of Title 63.2 (Welfare) of the Virginia Code were Senator Dunnivant's and Delegate Brewer's bills (SB 636 and HB 1333). Delegate Delaney's bill, HB 106, was tabled in

<sup>130</sup> *Id.*

<sup>131</sup> *Id.* §§ 673(d)(1)–673(d)(2).

<sup>132</sup> S.B. 44, 2018 Gen. Assemb., Reg. Sess. (Va. 2018); S.B. 636, 2018 Gen. Assemb., Reg. Sess. (Va. 2018); H.B. 106, 2018 Gen. Assemb., Reg. Sess. (Va. 2018); H.B. 1333, 2018 Gen. Assemb., Reg. Sess. (Va. 2018); *CASA Goes to the Capital!*, CASA OF CENT. VA., <https://www.cvcasa.org/blog-5-ways-suspensions-hurt-casa-kids/2018/1/24/casa-goes-to-the-capital> (last visited Sept. 30, 2018).

<sup>133</sup> See JOINT LEGIS. AUDIT & REVIEW COMM'N, *supra* note 33, at 1 (indicating that the patron of HB 1333 asked for a new Fiscal Impact Statement to be done).

<sup>134</sup> *Id.*

<sup>135</sup> H.B. 1333 Kinship Guardianship Assistance Program; Established, VA. LEGIS. INFO. SYS., <https://lis.virginia.gov/cgi-bin/legp604.exe?181+sum+HB1333> (last visited Sept. 30, 2018) [hereinafter HB 1333 LIS]; H.B. 636 Kinship Guardianship Assistance Program; Established, VA. LEGIS. INFO. SYS., <https://lis.virginia.gov/cgi-bin/legp604.exe?181+sum+SB636> (last visited Oct. 4, 2018).

<sup>136</sup> VA. CODE §§ 63.2-100, 63.2-905, 63.2-1305 (2018).

House Welfare and Institutions Committee.<sup>137</sup> However, she signed on as a chief co-patron of Delegate Brewer's bill.<sup>138</sup> Senator Favola's bill, SB 44, passed the Senate but was repeatedly passed by for the day by the House until it adjourned; thus, it failed.<sup>139</sup> However, she was able to sign on as a chief co-patron of Senator Dunnavant's bill.<sup>140</sup>

### CONCLUSION

It is too soon to know if these two new permanency options for older youth in foster care will have an effect on Virginia's permanency statistics because in Virginia, all bills except for emergency legislation go into effect at the beginning of the fiscal year, July 1.<sup>141</sup> It will also be some time before there is data on how many families are actually impacted by any of these bills. Because they likely only affect a small number of Virginia's children, their impact on these statistics may be slight. But given the importance of permanent families to the well-being of children and youth as they transition to adulthood, the impact on the individual children whom these new laws will affect may be great.

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<sup>137</sup> H.B. 106 Kinship Guardianship Assistance Program; Established, VA. LEGIS. INFO. SYS., <http://lis.virginia.gov/cgi-bin/legp604.exe?181+sum+HB106> (last visited Oct 5, 2018).

<sup>138</sup> H.B. 1333 LIS, *supra* note 135.

<sup>139</sup> S.B. 44 Kinship Guardianship Assistance Program; Established, VA. LEGIS. INFO. SYS., <http://lis.virginia.gov/cgi-bin/legp604.exe?181+sum+SB44> (last visited Oct 5, 2018).

<sup>140</sup> S.B. 636 Kinship Guardianship Assistance Program; Established, VA. LEGIS. INFO. SYS., <http://lis.virginia.gov/cgi-bin/legp604.exe?181+mbr+SB636> (last visited Oct 5, 2018).

<sup>141</sup> VA. CODE § 1-214(A) (2018).