IN THE MICHIGAN SUPREME COURT

IN RE D N DAILEY MINOR

Supreme Court Case No. 165889

Court of Appeals Case No. 363164

Wayne Circuit Court Family Division
Case No. 2019-000790-NA

ATTACHMENTS TO APPELLANT-FATHER'S SUPPLEMENTAL BRIEF

INDEX

STATE OF MICHIGAN

COURT OF APPEALS

In re D. N. DAILEY, Minor.

UNPUBLISHED
May 18, 2023

Nos. 363163; 363164
Wayne Circuit Court
Family Division
LC No. 2019-000790-NA

Before: LETICA, P.J., and BORRELLO and RIORDAN, JJ.

PER CURIAM.

In these consolidated appeals, respondent-mother and respondent-father appeal as of right the trial court's order terminating their parental rights to the minor child pursuant to MCL 712A.19b(3)(c)(*i*), (g), and (j). Respondents both argue that the trial court erred in terminating their parental rights because petitioner, the Department of Health and Human Services ("DHHS"), failed to make reasonable efforts toward reunification. In addition, respondent-father argues that the trial court erred when it found that termination of his parental rights was in the child's best interests. For the reasons set forth below, we affirm in both appeals.

I. FACTUAL BACKGROUND

Respondents met and began their relationship in 2016 while residents of half-way houses following their respective incarcerations. Both have lengthy substance abuse histories. Respondent-mother admitted that she has abused drugs, on and off, for more than 10 years. Respondent-father served the last six months of his criminal sentence in an inpatient rehabilitation program. Regarding their substance use, both claimed that they became addicted to prescribed pain medication. Both shared a similar story of becoming addicted to prescribed medication and then turning to street drugs after they could no longer obtain their pain medication by prescription. Their drug of choice included heroin.

In March 2019, respondent-mother gave birth to the minor child. At the time, both she and the child tested positive for opiates and morphine. The child experienced severe withdrawal symptoms after his birth. He remained hospitalized for almost three weeks while he was administered morphine to control his withdrawal symptoms. During the Children's Protective Services ("CPS") investigation that followed, respondent-mother admitted that she used heroin

before and during her pregnancy. CPS requested that respondent-father be drug tested as well. His March 2019 screen was positive for fentanyl and norfentanyl.

In April 2019, CPS requested that respondents submit to another drug screen. Both again tested positive for opiates, heroin metabolites, morphine, and fentanyl. During a family team meeting, a safety plan was developed in anticipation of the child's discharge from the hospital. Shortly thereafter, the child was placed in the care of his maternal grandmother, where he would remain throughout this case.

In April 2019, DHHS filed a petition requesting that the trial court assume jurisdiction over the child. Respondents entered pleas of admission in which they admitted that the child was born with drugs in his system, that they continued to abuse heroin, and that their continued drug use impaired their ability to care for the child. The trial court accepted the pleas and found statutory grounds to assume jurisdiction over the child. During the dispositional hearing that followed, respondents were ordered to comply with a treatment plan designed to address their substance abuse issues and improve their parenting skills.

During the six months that followed the May 2019 adjudication, respondents regularly attended substance abuse therapy, visited the child every day in the home of his maternal grandmother, participated in the care of the child during this parenting time, and contributed financially to the child's care. However, respondents also continued to consistently test positive for heroin, fentanyl, and morphine. In November 2019, the permanency plan was changed from reunification to adoption. Consistent with this change, in January 2020, DHHS filed a supplemental petition seeking termination of respondents' parental rights.

At a hearing on March 4, 2020, both respondents entered pleas of admission and stipulated that statutory grounds existed to support termination of their parental rights under MCL 712A.19b(3)(c)(*i*), (g), and (j). Respondents both admitted that they continued to abuse heroin, fentanyl, and morphine. Respondent-mother also admitted to using cocaine. Respondents admitted that their drug use impaired their ability to parent the child. The trial court accepted their pleas, considered the parties' stipulations, and found clear and convincing evidence to terminate respondents' parental rights under MCL 712A.19b(3)(c)(*i*), (g), and (j). The matter was scheduled for a contested best-interests hearing in May 2020, but the hearing was delayed approximately two years because of the COVID-19 pandemic and respondents' requests for an in-person hearing. Eventually, the best-interests hearing commenced in March 2022 and concluded in July 2022. At that time, the trial court found that termination of respondents' parental rights was in the child's best interests. These appeals followed.

II. ANALYSIS

A. REASONABLE EFFORTS

Respondents argue that DHHS failed to make reasonable efforts toward reunification, which precluded the trial court from terminating their parental rights. We disagree.

At the outset, we note that both respondents have waived any argument related to the adequacy of the services offered and the existence of statutory grounds to terminate their parental rights. Challenges to the adequacy and reasonableness of the case service plan relate to the

sufficiency of the evidence in support of a statutory ground for termination. See *In re Rood,* 483 Mich 73, 89; 763 NW2d 587 (2009). In the trial court, both respondents entered pleas of admission and stipulated that statutory grounds existed to support termination of their parental rights. They then elected only to proceed to a contested hearing regarding the child's best interests. Neither respondent claims any irregularity with the plea process, nor have they sought to withdraw their pleas. Accordingly, through their unchallenged pleas, respondents have waived any claim of error related to the reasonableness of DHHS's efforts toward reunification or the existence of statutory grounds for termination of their parental rights. See *In re Hudson,* 294 Mich App 261, 264; 817 NW2d 115 (2011); *In re Fried,* 266 Mich App 535, 541; 702 NW2d 192 (2005).

Even if it were appropriate to consider the issue, respondents' claim that DHHS failed to make reasonable efforts toward reunification is not supported by the record. Reasonable efforts to reunify the child and family must be made in all cases except those involving the circumstances delineated in MCL 712A.19a(2), which are not applicable here. *In re Mason*, 486 Mich 142, 152; 782 NW2d 747 (2010). Respondents assert that they required intensive treatment to adequately address their serious substance abuse issues. According to respondents, the trial court wasted two years referring them for various insufficient services when it should have referred them to an intensive inpatient rehabilitation program.

The record does not support respondents' position that two years elapsed before inpatient treatment was contemplated. Indeed, the record demonstrates that, at the outset, both respondents were offered, but refused, more intensive services that could have assisted in their efforts to overcome their addictions to heroin and fentanyl.

DHHS filed the petition for temporary custody in March 2019. At the beginning, it was readily apparent that respondents' drug addiction was the most significant barrier to reunification. Both respondents admitted an addiction history dating back at least 10 years. Additionally, several years earlier, both respondents had actually participated in inpatient programs. Initially, respondents were granted the opportunity to have their case moved to the specialized "baby court" docket, which offered an opportunity for more frequent review hearings at shorter intervals, more centralized services, and assistance through the Infant Mental Health program. By June 2019, respondents' need for inpatient drug rehabilitation services was recognized and discussed between the trial court and the parties. Both respondents immediately expressed reluctance, indeed they refused, to participate in inpatient treatment. Respondent-father was anxious about losing his employment and respondent-mother was concerned that after her earlier incarceration, she could not tolerate being "locked up" in inpatient treatment.

In August 2019, respondent-mother apparently entered an inpatient program, but she left after only 26 hours. Respondent-mother was unable to attend an October 7, 2019 review hearing because she allegedly had entered an inpatient detoxification program the night before. Respondent-mother also left this program early. At a March 4, 2020 hearing at which respondents entered pleas of admission to the statutory grounds for termination, respondent-mother testified that she had been admitted to three inpatient treatment programs, but left all three early. At this same hearing, respondent-father acknowledged that his treatment plan required that he participate in inpatient treatment, if requested. He further testified that he entered one program, but left after six days.

The need for inpatient treatment was frequently discussed with respondents during the two years that elapsed while they awaited their requested in-person best-interests hearing. At the review hearing in July 2020, the trial court reminded respondents that inpatient treatment was available. At the January 7, 2021 review hearing, counsel for petitioner noted that respondents had denied continued drug use, but she still questioned whether respondents were in need of an order for inpatient treatment in light of their positive screens. In response, respondent-mother indicated: "I feel like doing the outpatient has been good for me. I really have not used, but I don't know why the screens are where they are." At the April 14, 2021 review hearing, counsel for petitioner again questioned whether respondents required more intensive services in light of the fact that screens continued to be positive for multiple substances. Respondents' reactions were varied. At times, they represented that they were considering or looking into inpatient treatment. Other times, they indicated that they preferred outpatient therapy.

On March 9, 2022, at the conclusion of the initial best-interests hearing, the trial court continued the matter to allow both respondents the opportunity to participate in inpatient treatment. During the six weeks that followed, a caseworker investigated inpatient programs and found respondents' efforts lacking. Each facility required that respondents participate in an admission process, but the respondents were uncooperative. Testimony showed that respondent-father was unwilling to participate in an inpatient program that did not utilize methadone. Respondent-mother claimed that she had insurance issues, but a caseworker clarified that there only was one program that would not accept respondent-mother's insurance; all the others did. In any event, the caseworker then provided respondent-mother with contact information to assist her in securing inpatient treatment covered by her insurance. The caseworker also spoke with respondents' individual therapist who, based on her interaction with her clients, was left with the impression that respondents were unwilling to participate in inpatient treatment. During this grace period provided by the court, respondents continued to regularly test positive for heroin and fentanyl.

When the hearing resumed on April 28, 2022, respondents had yet to enter an inpatient program, despite DHHS's efforts to assist them in securing treatment. Nonetheless, the trial court again granted respondents more time to address their addiction to heroin and fentanyl. Indeed, the best-interests hearing was continued for another three more months. At the July 20, 2022 hearing, drug screens were admitted that demonstrated that both respondents continued to test positive for fentanyl. Respondent-mother still had not enrolled in an inpatient program. Respondent-father did not attend the hearing, but his attorney reported receiving a text message from his client the night before indicating that respondent-father was "on his way to rehab." However, there was no evidence that respondent-father was actually admitted to any inpatient program.

This matter was before the trial court for more than three years. Despite respondents' representations to the contrary, the record confirms that, from the beginning, and on several occasions thereafter, respondents were offered but refused the opportunity to participate in inpatient treatment. Then, when it appeared that respondents were on the precipice of having their parental rights terminated, the trial court, not once but twice, refused to do so and granted respondents even more time to address their serious substance abuse issues. Indeed, they were specifically granted more time to permit them to enter inpatient treatment. Given this record, we reject respondents' suggestion that reasonable efforts were not made toward reunification.

B. BEST INTERESTS

Respondent-father also argues that the trial court erred by finding that termination of his parental rights was in the child's best interests. After reviewing the record, we conclude that the trial court did not err in this regard.

"If the court finds that there are grounds for termination of parental rights and that termination of parental rights is in the child's best interests, the court shall order termination of the parental rights and order that additional efforts for reunification of the child with the parent not be made." MCL 712A.19b(5). The trial court may consider several factors when deciding if termination of parental rights is in a child's best interests, including "the child's bond to the parent, the parent's parenting ability, the child's need for permanency, stability, and finality, and the advantages of a foster home over the parent's home." *In re Olive/Metts,* 297 Mich App 35, 42; 823 NW2d 144 (2012) (internal citations omitted). The trial court may also consider psychological evaluations, the child's age, continued involvement in domestic violence, and a parent's history. *In re Jones,* 286 Mich App 126, 131; 777 NW2d 728 (2009). "The trial court should weigh all the evidence available to determine the children's best interests." *In re White,* 303 Mich App 701, 713; 846 NW2d 61 (2014). In considering the child's best interests, the trial court's focus must be on the child and not the parent. *In re Moss,* 301 Mich App 76, 87; 836 NW2d 182 (2013). Whether termination of parental rights is in a child's best interests must be proven by a preponderance of the evidence. *Id.* at 90. This Court reviews for clear error a trial court's finding that termination of parental rights is in a child's best interests. *In re Jones,* 286 Mich App at 129.

A preponderance of the evidence supports the trial court's finding that termination of respondents' parental rights was in the child's best interests. It is readily apparent that the child would be at risk in respondents' unsupervised care. Both respondents had a longstanding history of substance abuse. They were addicted to heroin and fentanyl. Both received substance abuse counseling from an individual therapist and a drug counselor. They also participated in medication-based therapy through a methadone clinic. Despite these efforts, respondents were unwilling or unable to overcome their drug addictions. Moreover, the trial court reiterated and respondents understood that the use of fentanyl, in particular, carried with it the risk of death. Further, respondent-father admitted engaging in risky behavior when he confessed to buying heroin off the streets with the understanding that it was likely laced with fentanyl. The child would clearly be at risk of harm if left in respondents' care.

Respondent-father argues that he had a strong bond with the child. Indeed, the evidence established that respondent-father consistently visited the child, assisted in his care during parenting time, and contributed financially to his needs. The caseworker further confirmed that a parental bond existed. While a bond may have existed, there was sufficient evidence for the trial court to conclude that this factor did not outweigh the child's need for a safe and stable home that was free from drug abuse and individuals with unresolved substance abuse issues. Given the child's young age, it was critical that he be placed with someone who could provide adequate care and supervision.

The trial court also considered the child's need for permanency, finality, and stability. At the time of termination, the matter had been pending for more than three years. The child had resided with the maternal grandmother essentially since birth. The maternal grandmother had also expressed a willingness to adopt the child. When considering the best-interests factors, a court may consider the advantages of a foster home over the parent's home and the possibility of

adoption. See *In re Olive/Metts,* 297 Mich App at 41-42. It is clearly apparent that the child was placed in a stable home where he was progressing and that this progress could continue because this caregiver, his maternal grandmother, was willing to provide permanency for him. By contrast, neither respondent was in a position to provide the child with stability and permanence.

Respondent-father argues that the trial court failed to appropriately consider and weigh the fact that the child was in relative placement. We disagree. The trial court acknowledged that the child's placement with his maternal grandmother weighed against termination. However, it continued on to properly balance relative placement with other relevant factors. The trial court noted the child's young age, his need for permanency, stability, and finality, and the length of time the child had been in care—more than three years. It also considered the risk to the child in respondents' care considering their addiction to fentanyl. Ultimately, the trial court concluded that termination of parental rights was in the child's best interests. Although placement with a relative weighs against termination, and such a placement must be considered, a trial court may terminate parental rights in lieu of placement with relatives if it finds that termination is in the child's best interests. *Id*. at 43. In this case, the trial court properly balanced relevant factors, and it did not clearly err by finding that termination of respondent-father's parental rights was in the child's best interests despite that he was placed with a relative.

Finally, respondent-father argues that the trial court's best-interests determination was flawed because the court failed to consider a guardianship as an alternative to termination of his parental rights. Again, we disagree. In this regard, we note that during respondent-father's testimony, he requested that his own mother be appointed guardian over the maternal grandmother who had cared for the child his entire life. However, there was no evidence that the paternal grandmother was willing to be the child's guardian. Further, the appointment of a guardian is typically done in an effort to avoid the initiation of termination proceedings. See *In re TK,* 306 Mich App 698, 705; 859 NW2d 208 (2014). "[T]he appointment of a guardian is only appropriate after the court has made a finding that the child cannot be safely returned to the home, yet initiating termination of parental rights is clearly not in the child's best interests." *Id.* at 707. But under any circumstance, a trial court may only appoint a guardian if "it is in the child's best interests to appoint a guardian." *Id*. (citations omitted). The trial court clearly contemplated the possibility of a guardianship. Indeed, while it was giving respondents additional time to participate in an inpatient program, it instructed the parties to explore a guardianship. However, when the best-interests hearing resumed, the trial court ultimately rejected the possibility of a guardianship because it found more compelling the child's needs for stability, permanence, and finality. The child was only three years old at the time of termination, the case had been pending for three years, and respondents had not made any progress in overcoming their longstanding substance abuse issues or demonstrated any sincere willingness to do so. The trial court found that the child needed more permanency than what a guardianship would offer.

Respondent-father suggests that the trial court's finding that respondents could have continued supervised contact with the child after the termination of their parental rights is evidence that a guardianship was more appropriate. We disagree. The trial court did indicate both at the July 2022 hearing and in its written order that respondents could have supervised contact with the child, but it made clear that this would be under the maternal grandmother's discretion. The trial court's comments do not suggest that a guardianship would have been more appropriate, but rather that respondents should not have any control over decisions related to the child's best interests and

well-being. The trial court did not clearly err when it found that the child's need for permanence and finality outweighed respondents' suggestion of a guardianship as an alternative to termination.

III. CONCLUSION

There were no errors warranting relief. We affirm.

/s/ Anica Letica
/s/ Stephen L. Borrello
/s/ Michael J. Riordan

Court of Appeals, State of Michigan

ORDER

In re D N Dailey Minor

Docket No. 363164

LC No. 2019-000790-NA

Anica Letica
Presiding Judge

Stephen L. Borrello

Michael J. Riordan
Judges

The motion for reconsideration is DENIED.

Anica Letica
Presiding Judge

A true copy entered and certified by Jerome W. Zimmer Jr., Chief Clerk, on

June 20, 2023
Date

Chief Clerk

Rel: March 24, 2023

ALABAMA COURT OF CIVIL APPEALS

OCTOBER TERM, 2022-2023

CL-2022-0799 and CL-2022-0800

R.H.

v.

Madison County Department of Human Resources

CL-2022-0813 and CL-2022-0814

A.H.

v.

Madison County Department of Human Resources

Appeals from Madison Juvenile Court
(JU-21-131.02 and JU-21-132.02)

FRIDY, Judge.

In these consolidated appeals R.H. ("the father") and A.H. ("the mother") appeal from judgments of the Madison Juvenile Court ("the juvenile court") terminating their parental rights to N.H. and A.G.H., their two children. We reverse and remand.

Background

When the juvenile court tried these actions on May 31, 2022, the father was twenty-eight years old; the mother was twenty-nine years old; N.H., the older child, was four years old; and A.G.H. was a few months shy of two. The older child is autistic.

The Madison County Department of Human Resources ("DHR") first became involved with the mother and the father's family on February 10, 2021, after it received a report that the residence where the family was living was filthy and unhealthy and that the children did not have proper hygiene. DHR investigated and found that the residence was extremely dirty and cluttered and that the children appeared to be neglected. The father told DHR that he had to work twelve hours a day, that he was too tired to clean the house when he came home from work, and that he had delegated the household chores to the mother. The

mother did not work but appeared to the DHR caseworker to have mental-health issues that prevented her from cleaning the residence and properly caring for the children.

Initially, DHR placed the children with the children's maternal uncle pursuant to a safety plan; however, DHR terminated that safety plan after the maternal uncle tested positive for marijuana. DHR then placed the children in foster care on February 17, 2021. Thereafter, the Huntsville Housing Authority ("the housing authority"), the parents' landlord, evicted them from the residence where they had been living because of the condition of the residence. The housing authority also imposed a charge for damage to the residence, which the parents still owe.

DHR began providing the parents with services and commenced dependency actions regarding the children. DHR provided the parents with psychological evaluations and hired Donnie Thompson, a woman who is an independent service provider, to provide the parents with parenting instruction and assistance in finding housing and in finding employment for the mother. Thompson met with the parents three to four times per month. Thompson testified that the parents were slow to take

any action to obtain stable housing. The mother obtained employment with a company that provides other companies with temporary workers. According to Thompson, the parents did not make much progress in learning parenting skills. Thompson was still working with the parents when the juvenile court tried these actions.

Thompson testified that the parents had found a house that they wanted to rent. A relative of the owner of the house told the parents that they could move in, and they did. However, the owner of the house never executed a written lease granting them the legal right to live in the house, even though the parents paid rent. The parents moved out of the house after approximately six months. Thompson testified that the furniture she had observed in that house when she met with the parents had belonged to a previous occupant of the house and that the parents had no belongings in the house other than their clothes.

Thompson testified that the parents have a bond with the children, that the parents' interactions with the children appeared to be loving, and that she had never witnessed the parents do anything that was detrimental to the children. She said that she had received a report that the mother had said that the father had not gone to one of the parents'

scheduled visitations with the children because, he had said, he did not know what he might do to the children. The father testified that what he had said to the mother on that occasion was not intended to indicate that he might physically or intentionally hurt the children. He testified that he was indicating that he had had a very stressful day at work, that he was in a bad mood as a result, and that he did not want the children to think that they were the cause of his bad mood. He said that his work had been stressful that day because, he said, three different customers had yelled at him. The father testified that he had never committed a violent act and that no government agency had ever investigated an allegation that he had committed a violent act.

The father testified that, on the day of the trial, he and the mother were living in an extended-stay motel; however, he testified that, when he got paid the next day, he would pay the $50 application fee for an application to rent an apartment at an apartment complex. He said that he and the mother had already submitted the application but that the apartment complex would not consider the application until they had paid the $50 application fee.

The father testified that he is employed as an assistant manager at an automobile-rental company. He said that he works twelve hours per day on four days of each week, that he works thirteen hours on one day each week, and that he works eight hours on one day of each week. He earns $15 per hour for the first forty hours that he works each week and earns $22.50 per hour for all hours that he works after the first forty. He testified that his boss is the only person who can cover for him if he misses work.

The father testified that, after the housing authority evicted him and the mother from the residence that they were renting in 2021, he and the mother had not been able to obtain housing through the housing authority.

The father testified that, because of his work schedule, the only time he could visit the children was on Sunday nights after he got off work at 5:00 p.m. The father testified that he loves his children very much, that he has a bond with them, and that they always smile when they see him coming.

The father testified that the mother had damaged their only automobile when she hit a concrete culvert; that they had not then had

enough money to pay for repairs to the automobile; that, consequently, he had had to rent transportation from the automobile-rental company where he works; that the only vehicle he could rent was a cargo van that was not suitable for transporting the children; and that he still owed $1,500 for the rental of the cargo van. The parents were eventually able to pay for the repairs to their automobile.

The father testified that the older child, who is autistic, has a habit of hitting people and things. The father testified that, when the older child does that, the father talks to him and tells him that he should not hit people and things. If the child persists, the father puts him in time out for three to five minutes. The father testified that the younger child's behavior is not normal but that she has not been formally diagnosed with a disorder.

The mother testified that, when she was a teenager, she had been diagnosed with ADHD and depression and had been prescribed medication. She said that the medications had helped her but that, when she was nineteen, she thought she knew better than the doctors and stopped taking the medications. She testified that she had not taken any medication for her mental-health problems from the time she stopped

taking them at age nineteen until DHR became involved in February 2021. She testified that, after DHR became involved, she had seen a psychiatrist, who prescribed medication that had greatly improved her mood and her ability to function. She said that the psychiatrist had changed her medication several times and that, when these actions were tried, she was taking trazadone and bupropion. She testified that, before she started taking the medications that the psychiatrist had prescribed, she had had difficulty waking up in the morning and staying awake; however, the medication had alleviated those problems. She said that her interactions with the children had also improved since she began taking medication. She testified that she and the father have good relationships with the children and that she wanted to keep working on herself so that she could regain custody of them. She admitted that she and the father still had not obtained stable housing.

C.P., the children's foster parent, testified that she had known the mother before DHR became involved with the mother and father's family; her daughter was married to the mother's brother for a period, although they are now divorced. C.P. was not licensed as a foster parent when DHR

first became involved; she obtained a license to act as a foster parent for the specific purpose of serving as the children's foster parent.

C.P. testified that spending time with the mother and the father makes the children happy; that, in her opinion, the children need the mother and the father to remain involved in their lives; that the mother and father's continued involvement in the children's lives would benefit the children; and that, regardless of whether the juvenile court terminated the mother's and the father's parental rights, she would allow the mother and the father to remain involved in the children's lives.

After the trial, the juvenile court, on June 17, 2022, entered essentially identical judgments terminating the mother's and the father's parental rights to both of the children. The judgments contained extensive findings of fact. Regarding the issue whether there were viable alternatives to terminating the mother's and the father's parental rights, the judgments stated:

> "[DHR] has made reasonable efforts to identify and locate suitable relatives in order to determine whether such relatives might provide care for the child[ren], thus avoiding the necessity of terminating parental rights. Neither [DHR], the Court, the guardian ad litem, nor the parents have been able to identify any relative who might assume custody of either child. Relatives who were considered were either

> unwilling or unable to assume custody and provide permanency for them.
>
> "....
>
> "Neither [DHR] nor this Court believes that there is any alternative less drastic than termination of parental rights available to serve the best interests of the [children]. Placement alternatives which were considered were determined not to be in [the children's] best interests. Despite a diligent search, [DHR] has been unable to locate a suitable relative to assume custody of the [children]."

Neither parent filed a postjudgment motion. The mother timely appealed on June 24, 2022, and the father timely appealed on June 30, 2022.

Standard of Review

Appellate courts must apply a presumption of correctness in favor of the juvenile court's findings based on ore tenus evidence presented in a termination-of-parental-rights action and will reverse a juvenile court's judgment terminating parental rights only if the record shows that the judgment is not supported by clear and convincing evidence. J.C. v. State Dep't of Hum. Res., 986 So. 2d 1172, 1183 (Ala. Civ. App. 2007). "This court does not reweigh the evidence but, rather, determines whether the findings of fact made by the juvenile court are supported by evidence that the juvenile court could have found to be clear and convincing." K.S.B. v. M.C.B., 219 So. 3d 650, 653 (Ala. Civ. App. 2016). Clear and convincing

evidence is evidence that, "when weighed against evidence in opposition, will produce in the mind of the trier of fact a firm conviction as to each essential element of the claim and a high probability as to the correctness of the conclusion." § 6-11-20(b)(4), Ala. Code 1975. "Proof by clear and convincing evidence requires a level of proof greater than a preponderance of the evidence or the substantial weight of the evidence, but less than beyond a reasonable doubt." Id.

Analysis

Under well-settled law, a juvenile court may terminate a parent's parental rights if the party seeking the termination (1) proves, by clear and convincing evidence, that one of the grounds for termination specified in § 12-15-319(a), Ala. Code 1975, exists and (2) proves, by clear and convincing evidence, that no viable alternative to terminating the parent's parental rights exists. See, e.g., J.C.L. v. J.B.L., [Ms. 2200841, Aug. 5, 2022] ___ So. 3d ___ , ___ (Ala. Civ. App. 2022). Section 12-15-319(a) provides that grounds for terminating parental rights exist if clear and convincing evidence supports a finding that the parents "are unable or unwilling to discharge their responsibilities to and for the child, or that the conduct or condition of the parents renders them unable to properly

care for the child and that the conduct or condition is unlikely to change in the foreseeable future." Section 12-15-319(a) also specifies factors for a juvenile court to consider in determining whether grounds for termination exist.

The second part of the test for determining whether parental rights can be terminated is whether there is clear and convincing evidence indicating that no viable alternative to termination exists. If there is another viable alternative that will protect the child and is less drastic than termination, termination would violate the parent's due-process rights. See Ex parte T.V., 971 So. 2d 1, 9 (Ala. 2007) ("The need to consider all viable alternatives is rooted, in part, in the recognition that the termination of parental rights is a drastic step that once taken cannot be withdrawn and that implicates due process.").

On appeal, the mother and the father make several arguments challenging the judgments terminating their parental rights; however, we find that the dispositive issue is whether DHR proved by clear and convincing evidence that there was no viable alternative to termination of their parental rights. Based on this court's holdings in A.B. v. Montgomery County Department of Human Resources, [Ms. 2210106,

Aug. 19, 2022] ___ So. 3d ___, ___ (Ala. Civ. App. 2022), and P.M. v. Lee County Department of Human Resources, 335 So. 3d 1163, 1172 (Ala. Civ. App. 2021), we conclude that DHR did not prove by clear and convincing evidence that there was no viable alternative to termination of the mother's and the father's parental rights. "As we explained in P.M. [v. Lee County Department of Human Resources, 335 So. 3d 1163, 1172 (Ala. Civ. App. 2021)], when foster parents are amenable to continued contact between the child and the parent and when the evidence suggests that such contact is beneficial for the child, maintenance of the status quo or permanent placement with the foster parents can be a viable alternative to the termination of a parent's parental rights." A.B., ___ So. 3d at ___.

In the present case, C.P., the children's current foster parent, who had had a relationship with the mother that preexisted DHR's involvement, testified that spending time with the mother and the father made the children happy; that, in her opinion, it was important that the mother and the father remain a part of the children's lives; that, in her opinion, the children needed the mother and the father; and that, regardless of whether the juvenile court terminated the mother's and the

father's parental rights, she would allow the mother and the father to remain active and engaged in the children's lives. Thompson, the independent service provider, also testified that the parents have a bond with the children and that their interactions with the children appear to be loving. The mother testified that she and the father have good relationships with the children and that she wanted to keep working on herself so that she could regain custody of them. In addition, the father testified that he loves his children very much and that he has a bond with them. Thus, like in A.B. and P.M., the foster parent in the present case was amenable to continued contact between the children and the parents, and the evidence indicated that such contact benefited the children. Consequently, like in A.B. and P.M., maintaining the status quo or permanent placement with the foster mother was a viable alternative to terminating the mother's and the father's parental rights.

DHR argues that the mother has not argued in her appellate brief that maintaining the status quo was a viable alternative to terminating her parental rights; however, on page 24 of her appellate brief, the mother argues:

> "Even if there is a finding of dependency, a trial court 'also must find by clear and convincing evidence that there are

> no viable alternatives to the termination of parental rights.' Ex parte T.V., 971 So. 2d 1, 7 (Ala. 2007). A viable alternative to termination of a person's parental rights is for a child to remain in the safe and stable home of a foster parent who is willing to allow the continued contact between a parent and child. A.B. v. Montgomery County Department of Human Resources, [Ms. 2210106, Aug. 19, 2022] ___ So. 3d ___ (Ala. Civ. App. 2022). Based on the testimony of the foster parent, that viable alternative exists in this matter."

Accordingly, we find no merit in DHR's argument that the mother has not argued in her appellate brief that maintaining the status quo was a viable alternative to terminating her parental rights.

DHR also argues that the parents failed to preserve their argument that maintaining the status quo constituted a viable alternative to terminating their parental rights because, DHR says, the parents did not present that argument to the juvenile court. DHR bore the burden of proving by clear and convincing evidence that there was no viable alternative to terminating the parents' parental rights. See Ex parte Ogle, 516 So. 2d 243, 247 (Ala. 1987) (holding that the party attempting to terminate a parent's parental rights has the burden to prove, by clear and convincing evidence, that there is no viable alternative). Thus, the issue whether DHR met its burden of proof is a sufficiency-of-the-evidence question. In pertinent part, Rule 52(b), Ala. R. Civ. P., provides:

> "When findings of fact are made in actions tried by the court without a jury, the question of the sufficiency of the evidence to support the findings may thereafter be raised whether or not the party raising the question has made in the court an objection to such findings or has made a motion to amend them or a motion for judgment or a motion for a new trial."

In Ex parte Vaughn, 495 So. 2d 83, 87 (Ala. 1986), our supreme court explained:

> "Rule 52(b) [, Ala. R. Civ. P.,] provides an exemption from the requirement of invoking a ruling by the trial court on the issue of evidentiary insufficiency when written findings of fact are made. The trial court's ruling on the sufficiency of the evidence is implicit in a decree in which the trial judge is the trier of the facts. Moreover, by making written findings of fact, the trial judge has had the additional opportunity to reconsider the evidence and discover and correct any error in judgment which he or she may have made upon initial review. Thus, when written findings of fact are made, they serve the same useful purpose as does an objection to the trial court's findings, a motion to amend them, a motion for a new trial, and a motion to dismiss under [former] Rule 41(b), [Ala. R. Civ. P.[1]] -- to permit the trial judge an opportunity to carefully review the evidence and to perfect the issues for review on appeal."

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[1]When Ex parte Vaughn was decided, Rule 41 allowed a defendant in a nonjury case to move to dismiss an action for failure of proof. See Ex parte Vaughn, 495 So. 2d at 86 n.4. Rule 41 was amended in 1995, and that matter is now covered by Rule 52(c), Ala. R. Civ. P. See Committee Comments to October 1, 1955, Amendment to Rule 41 ("This amendment deletes the provision for dismissal by the court in a nonjury case for a failure of proof. This matter is now covered by Rule 52(c).").

In the present case, the juvenile court, in its judgments, made specific findings of fact regarding whether there was a viable alternative to terminating the parents' parental rights. Consequently, the sufficiency of the evidence to support those findings was preserved for appellate review.

Because DHR failed to prove by clear and convincing evidence that there was no viable alternative to terminating the parents' parental rights, we reverse the juvenile court's judgments and remand the causes to the juvenile court for further proceedings consistent with this opinion.

CL-2022-0799 -- REVERSED AND REMANDED.

CL-2022-0800 -- REVERSED AND REMANDED.

CL-2022-0813 -- REVERSED AND REMANDED.

CL-2022-0814 -- REVERSED AND REMANDED.

Thompson, P.J., and Moore, Edwards, and Hanson, JJ., concur.

OVERVIEW

The primary goal for children in the foster care system is permanency. Children need a safe, stable home in which to live and grow, including a life-long relationship with a nurturing caregiver. Permanency planning involves the caseworker's efforts to move the child from a temporary foster care placement to a stable and permanent home. It is essential for the child that permanency is established in a timely manner.

Federal Law

The Adoption and Safe Families Act (ASFA) of 1997, PL 105-89

The act redefines reasonable efforts and requires termination petitions in certain circumstances. The act requires that permanency planning begin as soon as possible in the foster care case, with quality services being provided to families in a timely manner.

State Law

Juvenile Code, 1939 PA 288, MCL 712A.19a

Explains permanency planning hearing requirements.

FEDERAL PERMANENCY PLANNING GOALS

The only allowable permanency planning goals are the permanency goals recognized by the federal government. The goals, in order of legal preference are:

- Reunification; see FOM 722-07B, Permanency Planning - Reunification.
- Adoption; see FOM 722-07D, Permanency Planning - Adoption.
- Guardianship; see GDM 600, Juvenile Guardianship.
- Permanent Placement with a Fit and Willing Relative (PPFWR); see FOM 722-07F, Permanency Planning, Permanent Placement with a Fit and Willing Relative (PPFWR).

- Another Planned Permanent Living Arrangement (APPLA); see FOM 722-07F, Permanency Planning - Another Planned Permanent Living Arrangement (APPLA).

Reunification is the process of reuniting the child with his/her parents and is widely recognized as the initial objective in foster care. When, for reasons of safety or other considerations, children cannot return to their homes, adoption or a permanent legal guardianship offer opportunities for long-term stability with relatives, adoptive families or foster parents. Adoption must be ruled out in order to pursue guardianship. If there are barriers to adoption or guardianship, the goals of permanent placement with a fit and willing relative (PPFWR) or another planned permanent living arrangement (APPLA) may be established under consistent standards that demonstrate the appropriateness and the permanency of the placement. It is critical that children move to permanency through these goals in the shortest time possible while ensuring safety and positive adjustment.

Process for Achieving Permanency

Throughout the life of the case, the caseworker must continue to assess the appropriateness of the permanency goal. The structured decision-making tools help guide that process; see FOM 722-09A, Permanency Planning Decision Tree.

Most foster care cases will start with the goal of reunification. Additionally, the caseworker must concurrently consider a second permanency goal for the child if reunification cannot occur. The practice of concurrent planning can help achieve timely permanency outcomes for children; see FOM 722-07A, Permanency Planning - Concurrent Permanency Planning.

The permanency goal must be reviewed and determined to be appropriate during monthly case consultations and upon approval of each case service plan; see FOM 722-06H, Caseworker Contacts with Supervisor, and FOM 722-09, Supervisory Approval. Permanency for children must be achieved within the established time frame; see FOM 722-07A Permanency Planning-Reunification.

The supervising agency must seek to achieve the permanency planning goal for the child within 12 months of the child being removed from his/her home. The court must hold a permanency

planning hearing within those 12 months to review and finalize the permanency plan. Subsequent permanency planning hearings must be held within 12 months of the previous hearing; see FOM 722-10, Court Review.

For permanency planning for American Indian/Alaska Native children; see NAA 245, Permanency Planning.

Standards for Achieving Permanency when Reunification is Not an Option

If termination of parental rights occurs, adoption should be the preferred goal with legal guardianship as an alternate goal if in the best interest of the child. If a determination has been made that termination of parental rights is not in the best interest of the child, legal guardianship should be the goal. Adoption and guardianship both offer the child legal permanency, a sense of security and family attachment and allow the adoptive parent or guardian to make decisions on the child's behalf.

The New Permanency

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Permanency is a pillar of child welfare law; children generally do better with legally permanent caretakers than in temporary foster care. Historically, when foster children cannot reunify with their parents, states have sought to terminate parental rights and find adoptive families. But recent legal reforms have created a continuum of permanency options, many of which permit ongoing legal relationships with biological parents and do not require termination of biological parents' rights. Research has demonstrated that such options are as lasting as adoption, and can help more children leave foster care to legally permanent caretakers. This continuum promises to empower families—especially children and their new permanent caregivers—to determine the best legal status for their particular situation. It also challenges a reliance on terminations of parental rights as the default tool to achieve permanency. This is the new permanency.

A milestone in the development of this new permanency was the 2008 Fostering Connections to Success and Increasing Adoptions Act ("Fostering Connections"), which provided federal funds for kinship guardianship subsidies. Yet six years after Fostering Connections, the number of guardianships nationally has not increased - just as many children grow up in foster care, and in many states families have no greater ability to choose the best option for them.

This article is the first to explore the reasons for Fostering Connections' failure to spark major changes. The fault lies in Fostering Connections' failure to challenge the deep cultural and legal subordination of guardianship to adoption and the discretion child welfare agencies have to make core decisions in a case without significant court oversight.

This article also explores a jurisdiction in which the new permanency is close to reality. The District of Columbia has seen the number of guardianships surpass the number of adoptions, with more children reaching permanency, and fewer unnecessary terminations. The District thus represents an extreme version of what the new permanency could do nationally—although it also illustrates the problems with overly wide agency discretion regarding kinship placements.

This article proposes a set of reforms that would help fully implement the new permanency nationwide. These reforms would rid the law of a hierarchy among permanency options, establish a stronger and more consistent preference for kinship placements, and empower families, not the state, to select the permanency option that best fits their situation, through more rigorous procedures and better provision of quality counsel than current law provides.

Permanency is a pillar of child welfare law. It has long been agreed that children generally do better with legally permanent caretakers, rather than in foster care, which is by definition a temporary legal status. For the past several decades, permanency options have mostly been assumed to be limited to reunification with biological parents or adoption by new parents. Adoption has been understood to require termination of biological parental rights and of all legal relationships between biological parent and child.

That binary—reunify or terminate and adopt—has faced significant criticism for overly relying on terminations, creating legal orphans,[1] and unnecessarily excluding permanency options which maintain a legal relationship between parent and child or seek to place children permanently with caretakers who did not want to adopt. Assuming permanency required terminating parental rights, many states terminated many thousands of parents' rights, but failed to find adoptive families for all children whose legal relations with their parents were severed. This created legal orphans, and critics complained that states served these children poorly – states raise these children in foster care, then "emancipate" them when they reach majority, and these children fare poorly on important life outcomes.[2] Critics explained how child welfare law subordinated permanency options such as guardianship to adoption and demonstrated empirically that guardianships are just as stable and lasting as adoptions. Simultaneously, child welfare agencies began placing increasing numbers of children with extended family members, many of whom did not want to terminate their relative's parental rights, even if the kinship caregivers would raise them to adulthood. And research demonstrated that kinship care provided foster children with more stable placements and facilitated better permanency outcomes.

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[1] A legal orphan is a child whose biological parents remain alive, but who has no legal parents because state action has terminated their biological parents' rights and the state has not formed a new parent-child relationship via adoption. Martin Guggenheim coined the term. Martin Guggenheim, *The Effects of Recent Trends to Accelerate the Termination of Parental Rights of Children in Foster Care—An Empirical Analysis in Two States*, 29 FAM. L.Q. 121, 122 (1995).

[2] *See, e.g.*, MARK E. COURTNEY, ET AL., MIDWEST EVALUATION OF THE ADULT FUNCTIONING OF FORMER FOSTER YOUTH: OUTCOMES AT AGE 26, 6 (2011) (summarizing the "disquieting" conclusion that youth who emancipate from foster care are "faring poorly . . . [a]cross a wide range of outcome measures, including postsecondary educational attainment, employment, housing stability, public assistance receipt, and criminal justice system involvement . . . ."), *available at* http://www.chapinhall.org/sites/default/files/Midwest%20Evaluation_Report_4_10_12.pdf.

The result has been significant changes in permanency policies and, less significantly, in practice. Today, when foster children cannot reunify with parents, their permanency choices fall along a continuum: children can be adopted and have their legal relationships with birth parents terminated; children can be adopted and have court-enforceable rights to visit with birth parents; children in one state can be adopted without terminating birth parents' rights (non-exclusive adoption); children can live with a permanent guardian—either a family member or close family friend ("kinship guardianship" in child welfare jargon) or with others (non-kinship guardianship). This continuum represents a dramatic shift in permanency law and should lead to dramatic shifts in practice. Many options along this continuum do not require terminations of parental rights and so this continuum challenges reliance on terminations. Choosing among those options requires delicate decision-making, and should empower families—especially children and their new permanent caregivers—to determine the best legal status for their particular situation. This is the new permanency.

A milestone in the development of this new permanency was the 2008 Fostering Connections to Success and Increasing Adoptions Act ("Fostering Connections"). Through Fostering Connections, Congress provided federal funds to reimburse states for kinship guardianship subsidies. This reform rectified a long-standing inequity in child welfare law—the federal government had helped states pay adoption subsidies for foster children since 1980, but had not done so for guardianship. But as the permanency continuum developed in the intervening decades, and as research firmly established that guardianship was just as lasting and stable as adoption, this inequity was increasingly untenable.

In an ideal world, Fostering Connections would have ushered in the new permanency. Adoption and guardianship would be treated as equal permanency options, which research predicts would, most importantly, lead to improved permanency outcomes overall as more children leave foster care to guardianships. There may also be somewhat fewer adoptions, because families would have a greater ability to choose which legal status best suited their situation, and some families would choose guardianship over adoption. Such private family choice should be viewed as a normative good—respecting the private ordering of family life as preferable to state agencies or the law imposing their preferences on families.

This ideal world has not been realized. Six years after Fostering Connections, the number of guardianships and adoptions remain roughly

the same as they were in 2008. Permanency outcomes have not improved, and in many states families have no greater ability to choose the best option for them than before 2008.

This article is the first to explore the reasons for Fostering Connections' failure to spark major practice changes, to explore a jurisdiction in which the expected changes appear to be taking shape, and to propose further legal reforms to achieve Fostering Connections' promise. Fostering Connections failed to have as broad of an impact as possible because of problems built into its structure. It provides federal funding for guardianship, but only for kinship caregivers—even though non-kin caregivers may be just as willing to choose guardianships. It requires states to rule out adoption before being eligible for a guardianship subsidy, and thus establishes a permanency hierarchy that subordinates guardianship to adoption. This provision reinforces an ideology that permanency requires something legally binding and that adoption is more binding than guardianship because it is legally hard to undo. This argument, however, ignores the empirical reality that adoption and guardianship are equally permanent.

The permanency hierarchy also reinforced a child welfare legal culture that continues to subordinate guardianship to adoption. Family courts nationally celebrate "Adoption Day"—not "Guardianship Day" or "Permanent Families Day." State and federal agencies track detailed data regarding adoptions, but only limited data regarding guardianship. Reports about adoptions, but not guardianship, are emphasized in policy briefs. Adoption remains the focus in law school casebooks which describe guardianship as something less than permanent, if they address it at all. And the hierarchy is reinforced every time a case is litigated to conclusion via adoption or guardianship. Adoption cases involve terminations of parental rights, which trigger a host of procedural protections due to the seriousness of the issues at stake. Guardianships, in contrast, are treated as lesser cases, often with lower standards of proof, less clear statutory guidance, and often procedures from probate court rather than family court.

Present law has also placed immense authority in child welfare agencies. They determine when they will place children with kin or with strangers, under what conditions they will pay guardianship subsidies, and when they will inform families that guardianship is an option. Court oversight of these decisions is weak. Agencies' wide discretion permits them to continue practicing under the old permanency—without giving

due deference to kinship placement possibilities and continuing to subordinate guardianship as a permanency option.

The District of Columbia provides a partial counter-narrative. The District has more fully embraced equity between adoption and guardianship, especially since it enacted legislation in 2010 providing guardianship subsidies both for kin and non-kin. Since then, the number of annual guardianships has surpassed the number of adoptions, the number of termination of parental rights filings has sharply declined, and the number of foster children who emancipate from foster care rather than leave to permanent families has declined. District foster children appear to be getting better permanency outcomes to fit their particular situations, with fewer unnecessary terminations. The District thus represents the promise of what the new permanency could do nationally, albeit with a somewhat extreme balance between guardianships and adoptions.

The District, however, also illustrates one national obstacle to the new permanency—the wide agency discretion and limited judicial review of kinship placement decisions early in cases. This has led to a series of cases reversing adoption decrees due to the child welfare agencies' failure to consider a potential kinship placement adequately. Because agency placement decisions are not easily challenged early in cases, these cases have undone adoptions granted after children lived for years in one foster home—a result that would be unnecessary if the issue were resolved early in a case.

This article proposes a set of reforms that would help fully implement the new permanency nationwide, achieving the benefits and avoiding the pitfalls evident in the District of Columbia. First and most obviously, the law should no longer impose a hierarchy among permanency options and should instead treat adoptions and guardianships as equal. Adoption should not need to be ruled out before guardianship subsidies are provided. When reunification is not an option, all potential permanent caregivers should understand the full continuum of permanency options available to them. The law should provide similar procedural and substantive protections to the parent-child relationship before guardianships as are provided before adoptions. And agencies and policy makers should track adoption and guardianship data more equitably.

If any hierarchy exists, it should reflect the better outcomes that children have in kinship rather than stranger foster care. The law should establish a strong kinship care preference, requiring agencies to place children with kin unless the agency can establish good cause why that would be unsafe or otherwise detrimental to the child. And children and

parents should be able to challenge that decision in court early in a case, rather than leaving the issue to nearly unfettered agency discretion. Such reforms could increase the number of children benefitting from kinship care, resolve disputes over kinship care placements early, and avoid the litigation challenges evident in the District.

The law should also place greater emphasis on the selection of permanency plans to ensure the best option is chosen. Making that choice correctly is essential because it will shape the negotiating field that will lead many parents and caregivers to reach agreement on one option along the permanency continuum. More effective procedures—including evidentiary hearings in appropriate situations and the right to an expedited appeal of permanency hearing decisions—will achieve this goal.

Finally, to facilitate all of the above, a greater emphasis on quality counsel for parents, children, and, once reunification is ruled out, potential permanent caregivers is essential. Quality representation for parents and children can speed permanency by helping parties negotiate permanency agreements by consent, and by ensuring all options on the permanency continuum are explored. The same is true for counsel for caregivers, who can ensure that all caregivers are aware of all possible permanency outcomes, even if individual caseworkers are loath to share such information with foster families.

I. The New Permanency: A Continuum of Permanency Options, with an Emphasis on Kinship Care, and with a Relatively Limited Need for Terminations of Parental Rights

Foster care is by definition temporary, and the law now recognizes that permanent legal connections between children and their caregivers lead to better outcomes. Such connections protect the bonds that develop between children and caregivers, and permit those bonds to strengthen, while simultaneously protecting children from the risks inherent in temporary foster care—such as frequent placement disruptions. It is thus essential that foster children leave foster care to some permanent legal status quickly. That status is most frequently reunification, in which children return home to a parent or parents, whose full custody rights are restored. But when that cannot occur, some kind of permanent legal status with a non-parent is required; child welfare law explicitly disfavors any other option.[3]

[3] Federal law has long disfavored any plan that would lead to long-term foster care, now known in child welfare jargon as "another planned permanent living arrangement." In fall 2014, Congress banned such long-term foster care plans as a condition of federal funding

The central importance of permanency has been codified in federal child welfare law since 1980.[4] When children and parents cannot reunify, the law has long recognized adoption and guardianship (or some other form of custody) as the available permanency options.

Between those permanency options, however, lies an increasingly complicated continuum that is difficult to reduce to a simple choice of adoption or guardianship. Subsidized guardianship—in which a foster parent gains permanent custody of a child and receives a subsidy from the child welfare agency to help support the child, and the parent retains a right to visit with the child and the legal identity as the child's parent—is a permanency option that does not necessitate termination of parental rights. Subsidized guardianship is available in a majority of states for kinship foster parents, and in many states for all foster parents. Adoption comes with increasing variations—traditional exclusive adoption, adoption with post-adoption contact agreements (in the majority of states), and even now non-exclusive adoption (in California), in which no termination is required.

This continuum is the core of the new permanency, and it should be embraced for multiple reasons. First, research shows that more permanency options will help more children leave temporary foster care to legally permanent families. Second, more choices help families select the legal status that best fits their situation. Different legal statuses can better reflect the variety of relationships that foster children have with their biological parents. When such parents are so harmful that any ongoing relationship will damage the child, their rights should be terminated. But in many cases, children's ongoing bonds should be preserved, counseling against terminations of parental rights and in favor of ongoing contact rights. Relatedly, more permanency choices can help limit the overuse of terminations and thus the creation of legal orphans. Third, the permanency continuum can shift power from child welfare agencies to families to determine which legal status is best for them—following the welcome

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to states for all children under 16. Preventing Sex Trafficking and Strengthening Families Act, Pub. L. No. 113-183, § 112 (codified at 42 U.S.C. § 675(5)(C)(i) (2011)).

[4] For a brief history of the "permanency planning" movement leading to this codification, *see* Mark Testa, *New Permanency Strategies for Children in Foster Care*, *in* CHILD WELFARE RESEARCH: ADVANCES FOR PRACTICE AND POLICY 108, 111–12 (Duncan Lindsey & Aron Shlonsky eds., 2008) [hereinafter "Testa, *New Permanency Strategies*"]; Mark Hardin, *Child Protection Cases in a Unified Family Court*, 32 FAM. L.Q. 147, 151–52 (1998).

trend in family law of empowering families to order their private relationships.[5]

This section will explore the permanency continuum, including the varieties of guardianship and adoption, and the rigorous research establishing the benefits of guardianship. It will then explore the connection between these expanded permanency options and the growth of kinship foster care; research into kinship care identifies a close relationship between kinship care and good permanency outcomes—making the process for placing foster children with kin particularly important for achieving these outcomes.

A. The Permanency Continuum

When a foster child cannot reunify with a parent, the permanency discussion is no longer simply a matter of terminating parental rights and finding an adoptive family. Rather, a continuum of permanency options now exists.[6] All options endow a new caretaker with day-to-day control of the child and authority to make decisions for the child, but vary in whether the caretaker is legally considered a parent (as in adoption) or not (as in guardianship). The options vary in what relationship, if any, they maintain between children and their biological parents. In some cases, biological parents retain the legal status (but not the authority) of a parent, visitation, or other contact rights, while traditional exclusive adoption severs the entire legal relationship between parent and child, including all contact rights.

This permanency continuum can help shift focus on the proper role of terminations of parental rights. Present law emphasizes terminations as a default path towards permanency, specifically, to traditional, exclusive adoption.[7] For at least three decades, there has been a vigorous debate about the policy wisdom of this focus. Does it create legal orphans? Does it help more children be adopted? Some scholars challenged the notion that terminations should be a widely used tool at all, even if children

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[5] *Infra* Part II.E.3.

[6] The phrase "permanency continuum" is now used within the child welfare field. *E.g.*, National Resource Center for Permanency and Family Connections, *Re-Visiting the Adoption-Guardianship Discussion: Helping Caseworkers Better Understand and Communicate the Permanency Implications of Adoption and Guardianship*, Feb. 20, 2014, Slide 2, http://spaulding.org/wp-content/uploads/2014/09/Re-VisitingTheAdoptionGuardianshipDiscussion.pdf (last visited 10 Nov. 2014).

[7] Present law requires states to file termination cases when children have been in foster care for a certain amount of time and sets adoption as the default permanency plan after reunification. *Infra* notes 113–117 and accompanying text.

cannot reunify.[8] Others argued that increasing terminations would likely create more legal orphans.[9] Other scholars argued that present law does not encourage enough terminations—leaving too many exceptions, and giving unfit biological parents with poor rehabilitation prospects too much time to seek reunification.[10] Embedded in this debate was the assumption that terminations were inextricably linked with permanency.

The permanency continuum has complicated the connection between terminations and permanency. Rather than "permanency" being code for terminating parental rights and adoption, the field now has begun to recognize a "permanency continuum."[11] This continuum involves a variety of options to achieve permanency, some of which require termination and some of which do not. Empirical research has demonstrated that options which do not require terminations lead to caregiving relationships that last just as long as traditional adoptions. This continuum of equally permanent options suggests that moving to permanency should not by default require terminations.

This section will survey the options within the new permanency. It will also explore the evidence establishing the widespread attraction of those options to many families. Moreover, this section will explore the

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[8] *E.g.*, Marsha Garrison, *Why Terminate Parental Rights?*, 35 STAN. L. REV. 423 (1983).

[9] Martin Guggenheim found that as authorities in New York and Michigan increased the speed and frequency with which they terminated parental rights, adoptions increased, but that the number of terminations and legal orphans increased even more. Guggenheim, *supra* note 1, at 126–34. More recent studies have similarly found that, since the 1997 Adoption and Safe Families Act (ASFA), the number of legal orphans created every year has increased to roughly 20,000. Richard Barth, *Adoption from Foster Care: A Chronicle of the Years After ASFA*, in INTENTIONS AND RESULTS: A LOOK BACK AT THE ADOPTION AND SAFE FAMILIES ACT 64, 65 (Center for the Study of Social Policy, Urban Institute, 2009), http://www.urban.org/UploadedPDF/1001351_safe_families_act.pdf. The number of adoptions of foster children also increased in the years after ASFA, but multiple critics have argued that faster terminations of parental rights have not resulted in that. *E.g.*, Brenda D. Smith, *After Parental Rights Are Terminated: Factors Associated with Exiting Foster Care*, 25 CHILD. & YOUTH SERVS. REV. 965, 979 (2003); Richard P. Barth et al., *The State Construction of Families: Foster Care, Termination of Parental Rights, and Adoption: From Anticipation to Evidence: Research on the Adoption of Safe Families Act*, 12 VA. J. SOC. POL'Y & L. 371, 397 (2005).

[10] ELIZABETH BARTHOLET, NOBODY'S CHILDREN: ABUSE AND NEGLECT, FOSTER DRIFT, AND THE ADOPTION ALTERNATIVE 193–96 (1999).

[11] Children's Defense Fund, Child Trends, American Bar Association Center on Children and the Law, Casey Family Programs, Child Focus, and Generations United, *Making It Work: Using the Guardianship Assistance Program (GAP) to Close the Permanency Gap for Children in Foster Care*, 3 (2012) [hereinafter *Making It Work*], *available at* http://www.childrensdefense.org/child-research-data-publications/data/making-it-work-using-the.pdf (last visited Feb. 10, 2014).

evidence establishing that guardianships provide permanency that is just as secure, lasting, and safe for children as adoption. These empirical realities suggest the contours of a new permanency—in which terminations are not a default option, and in which families have freedom to choose which legal status fits them best.

1. *Permanency Without Termination: Expansion of Guardianship*

Guardianship grants legal custody to a non-parent—typically, the foster parent or other custodian who has raised the child for some period of time—without terminating the legal relationship between parent and child. The parent typically retains a right to visit with the child, and some other residual rights such as the right to determine the child's religion.[12] Like a custody case between parents, the parties can later move the court to modify or terminate the guardianship due to significant changed circumstances.[13]

Guardianships have long been an option in child welfare cases. They use a legal concept with a longer American legal history than adoption, and which has been cited in child welfare literature since at least the 1930s.[14] The two major modern federal child welfare funding statutes, the Adoption Assistance and Child Welfare Act of 1980 and the Adoption and Safe Families Act of 1997, both recognize guardianship.[15]

Despite this history, guardianships were infrequently used until the 1990s, especially because neither states nor the federal government offered subsidies to guardians. In contrast, adoptive parents could obtain subsidies, creating strong financial incentives to pursue adoption and not guardianship.[16] That funding difference flowed from a policy preference

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[12] *E.g.*, D.C. CODE § 16-2389(c) (2001).

[13] *E.g.*, D.C. CODE § 16-2395(a) ("Any party may move the court to modify, terminate, or enforce a guardianship order . . . ."), § 16-2395(d) (2001) (requiring proof of "a substantial and material change in the child's circumstances . . . and that it is in the child's best interests to modify or terminate the guardianship order").

[14] Mark F. Testa & Jennifer Miller, *Evolution of Private Guardianship as a Child Welfare Resource*, *in* CHILD WELFARE FOR THE 21ST CENTURY: A HANDBOOK OF PRACTICES, POLICIES, AND PROGRAMS 405 (Gerald P. Mallon & Meg McCartt Hess, eds. 2005).

[15] Pub. L. 96-272, § 101(a)(1) (1980) (codified at 42 U.S.C. § 675(5)(B) (2011)), requiring states to regularly review cases to determine when "the child may be returned to . . . the home or placed for adoption or legal guardianship"); Pub. L. 105-89, §§ 101(b) & 302 (1997) (defining guardianship and listing guardianship as a possible permanency plan).

[16] *See* Meryl Schwartz, *Reinventing Guardianship: Subsidized Guardianship, Foster Care, and Child Welfare*, 22 N.Y.U. REV. L & SOC. CHANGE 441, 457 (1996).

(discussed in Part II) for adoption as somehow more permanent than, or otherwise preferable to, guardianship.[17]

Guardianship became more popular in the 1990s, nearly doubling in number.[18] Child welfare agencies faced dramatically larger numbers of foster children living with kinship caregivers, many of whom resisted adopting the children out of opposition to terminating their family member's parental rights. Agencies turned to guardianship to help such children leave foster care.[19] Many states began offering guardianship subsidies without federal assistance, and several received federal waivers to allow them to use federal dollars to help pay for such subsidies. The number of states with subsidized guardianship increased from only six in 1996 to more than 30 in 2004.[20] Finally, in 2008, Congress enacted Fostering Connections, which provided federal support to states offering kinship guardianship subsidies.[21]

Fostering Connections signaled a new prominence for subsidized guardianship. At least 37 states plus the District of Columbia now offer a subsidized kinship guardianship.[22] Eight of those states have established new programs since Fostering Connections,[23] and the federal funds provided by Fostering Connections make it easier for the other states to offer subsidized guardianship. The intervening years should, therefore, have seen a significant increase in the number of guardianships or in the ratio of guardianships to adoptions—but that has not occurred nationally. I will address that phenomenon in Part II, and focus here on what options now exist.

Subsidized guardianship has several benefits. Most importantly, it increases the number of children who leave foster care to permanent families. Several jurisdictions have studied their guardianship programs rigorously, with families randomly assigned to either a control group (in which subsidized guardianship was not an option) or a demonstration group (in which subsidized guardianship was an option).[24] Each found a

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[17] Testa & Miller, *supra* note 14, at 407–08.

[18] Testa, *New Permanency Strategies*, *supra* note 4, at 116. Just as the number of guardianships increased, so did the number of children discharged from foster care to live with relatives, often via custody or some legal status like guardianship. *Id.*

[19] *Infra* Part I.B.

[20] Eliza Patten, *The Subordination of Subsidized Guardianship in Child Welfare Proceedings*, 29 N.Y.U. REV. L. & SOC. CHANGE 237, 257 (2004).

[21] Fostering Connections to Success and Increasing Adoptions Act, Pub. L. 110-351, § 101(a) (codified at 42 U.S.C. § 673(d) (2012)).

[22] *Making It Work*, *supra* note 11, at 3.

[23] *Id.* at 6.

[24] The jurisdictions are the states of Illinois and Tennessee, and Milwaukee, Wisconsin.

significant increase in the overall permanency rate—that is, the proportion of foster children who leave temporary foster care to a legally permanent family—ranging from 5.5 percent to 19.9 percent.[25]

A second benefit of guardianship is that it does not require termination of parental rights, or of the legal relationship between parents and children.[26] Both children and foster parents who supported guardianship cited the ongoing relationship with biological parents as a reason to choose guardianship over adoption.[27] Many biological parents, of course, prefer a permanency option that does not terminate their legal relationship with their children.[28] Much social science and legal research has concluded that terminating a legal relationship between parent and child harms the child—even when parents are so dysfunctional that they cannot raise the child. Research has concluded that children with strong, ongoing bonds with parents, especially older children, benefit from ongoing relationships with their parents; and that children can bond closely with their caretaker without severing their relationship with parents—strong bonds with multiple caregivers is not only possible, but healthy and normal.[29]

Although subsidized guardianship is available in many more jurisdictions, *supra* note 16, I focus on these states because of the rigor of their experimental design. For the importance of relying on rigorously designed evaluations, *see* Mark F. Testa, *Evaluation of Child Welfare Interventions*, *in* FOSTERING ACCOUNTABILITY: USING EVIDENCE TO GUIDE AND IMPROVE CHILD WELFARE POLICY 195 (Mark F. Testa & John Poertner eds. 2010) [hereinafter Testa, *Evaluation of Interventions*]. Less rigorous evaluations lead to similar results. For instance, a study of guardianship in California tentatively concluded that guardianship lead to "substantially greater" numbers of children leaving foster care to permanent families. CALIFORNIA DEP'T OF SOCIAL SERVS., REPORT TO THE LEGISLATURE ON THE KINSHIP GUARDIANSHIP ASSISTANCE PAYMENT PROGRAM, 5 (2006).

[25] The difference was 5.5 percent in Illinois. Testa, *Evaluation of Interventions*, *supra* note 24, at 199. The difference was 19.9 percent in Milwaukee, Wisconsin, and 15.1 percent in Tennessee. *Id.* at 201. *See also* U.S. Dep't of Health and Human Servs., Admin. for Children and Families, Admin. on Children, Youth and Families, Children's Bureau, *Synthesis of Findings: Subsidized Guardianship Child Welfare Waiver Demonstrations*, 15–16 (2011) [hereinafter *Synthesis of Findings*], *available at* http://www.acf.hhs.gov/sites/default/files/cb/subsidized_0.pdf (summarizing data).

[26] *Making It Work*, supra note 11, at 3 (listing "[d]oes not require the termination of parental rights for children who have relationships with parents who cannot care for them" as one of several "benefits" to guardianship).

[27] *Synthesis of Findings*, *supra* note 25, at 24.

[28] Carol Sanger, *Bargaining for Motherhood: Postadoption Visitation Agreements*, 41 HOFSTRA L. REV. 309, 321–22 (2012).

[29] Patten, *supra* note 20, at 240–44 (collecting and discussing research).

Avoiding unnecessary terminations of parental rights also avoids state-created legal orphans—children who have no legal parent (because the state terminated their birth parents' rights) and who grow up in foster care without adoption by new parents. State data has consistently shown that states terminate parental rights to thousands more children every year than are created through adoptions.[30] Empirical research has also shown that termination-focused policies significantly increase the number of legal orphans.[31] A permanency option like guardianship that does not require termination does not, by definition, risk creating legal orphans.

Procedurally, the absence of termination plays out in two ways. First, avoiding termination may induce biological parents to consent to a guardianship petition, and thus lead to a faster and less contentious legal process. This both leads to faster permanency and, more importantly, avoids the harm that can come from ongoing litigation—both anxiety imposed on the child and family and tensions between adults, all of whom may maintain a relationship with the children.[32] Second, the lack of a termination has led many states to provide fewer procedural protections for parents who do not consent to a guardianship than they provide to parents in termination and adoption cases.[33]

Guardianship also helps families select the best option for their situation. The empirical record shows that offering guardianship causes a substitution effect—some families that would have adopted foster children if adoption were the only option instead choose guardianship. The longest study to date followed Illinois families for ten years and showed for nearly 15 percent of families, offering guardianship led them to choose that option over adoption. In the control group—in which a foster or kinship family could only choose adoption—74.9 percent of children were

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[30] *See* U.S. DEP'T OF HEALTH AND HUMAN SERVS., ADMIN. FOR CHILDREN AND FAMILIES, ADMIN. ON CHILDREN, YOUTH AND FAMILIES, CHILDREN'S BUREAU, TRENDS IN FOSTER CARE AND ADOPTION (FFY 2002-FFY 2012) 1 (2013) [hereinafter TRENDS IN FOSTER CARE AND ADOPTION], *available at* http://www.acf.hhs.gov/sites/default/files/cb/trends_fostercare_ adoption2012.pdf (reporting total numbers of terminations and adoptions of foster children for the previous decade).

[31] Martin Guggenheim, *The Effects of Recent Trends to Accelerate the Termination of Parental Rights of children in Foster Care—An Empirical Analysis in Two States*, 29 FAM. L.Q. 121, 132-34 (1995).

[32] Josh Gupta-Kagan, *Non-Exclusive Adoption and Child Welfare*, 67 ALA. L. REV. (forthcoming 2015); *see also* Patten, *supra* note 20, at 248 ("Contested legal proceedings of any kind are disruptive to children and may negatively impact children both directly and indirectly.").

[33] *Infra* Part II.D.

adopted.[34] But in the experimental group—in which families could choose adoption or guardianship—only 60.2 percent of children were adopted.[35] A controlled experiment in Tennessee revealed a larger impact, with 24.6 percent fewer adoptions in the group of families for whom guardianship was an option.[36]

Such a substitution effect ought to create no concerns, given guardianship's record both in helping more children leave foster care to permanent families, and in creating families that are just as permanent as adoption. It suggests that not offering guardianship pushes families into a legal status that they view as less desirable than guardianship.

Presenting families with both adoption and guardianship as options has instrumental benefits as well. Research reveals that families felt "more comfortable about broaching the topic of permanence when both adoption and guardianships were put on the table than when termination of parental rights was posed as the only alternative to reunification."[37] Giving families the choice between permanency options thus likely leads to greater investment from family members in whatever choice they ultimately make. For families who ultimately desire adoption but are hesitant, guardianship can serve as a stepping stone; such caregivers first become guardians and later adopt.[38]

Historically, guardianship faced concerns that it would prove less permanent for children because, unlike adoption, it was subject to modification motions.[39] "Adoption hawks" insisted on a clear rule-out of

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[34] Testa, *Evaluation of Interventions*, *supra* note 24, at 204. *See also* Mark F. Testa, *The Quality of Permanence—Lasting or Binding? Subsidized Guardianship and Kinship Foster Care as Alternatives to Adoption*, 12 VA. J. SOC. POL'Y & L. 499, 519–20 (2005) (describing Illinois results) [hereinafter Testa, *Quality of Permanence*].

[35] Testa, *Evaluation of Interventions*, *supra* note 24, at 204.

[36] *Id.* In Milwaukee, Wisconsin, the group offered guardianship had 2.4 percent more adoptions. *Id.* But in Milwaukee the foster care agency declined to tell families already moving towards adoption that guardianship was even an option—thus depriving those families of the information necessary to produce a substitution effect. Mark F. Testa, *Subsidized Guardianship: Testing the Effectiveness of an Idea Whose Time Has Finally Come* 20 (2008) [hereinafter Testa, *Subsidized Guardianship*], *available at* http://www.nrcpfc.org/is/downloads/SG_Testing%20Effectiveness%20(Testa%202008).pdf (last visited 10 Nov. 2014).

[37] Testa, *New Permanency Strategies*, *supra* note 4, at 116–17.

[38] *Making It Work*, *supra* note 11, at 12–13.

[39] *See* U.S. DEP'T OF HEALTH AND HUMAN SERVS., ADMIN. FOR CHILDREN AND FAMILIES, ADMIN. ON CHILDREN, YOUTH AND FAMILIES, CHILDREN'S BUREAU, REPORT TO THE CONGRESS ON KINSHIP FOSTER CARE (2000) (describing concerns about guardianship's long-term stability and how choosing guardianship over adoption "may be seen as less than a total commitment to permanency").

adoption before even discussing guardianship with families, while "guardianship doves" objected to any such hierarchy.[40] The empirical record unequivocally rejects this concern; one scholar concludes there is now "overwhelming agreement from child-welfare experts that legal guardianship is a promising permanency outcome."[41] In a rigorous study with a large sample size and randomized control and experimental groups, Mark Testa, a leading social work scholar of guardianship, found that only 2.2 percent of 6,820 children living with guardians had a placement disruption or otherwise had their guardianship terminated, and some of these children left their guardians to reunify with their parents.[42] Offering guardianship to families does not affect the likelihood that a child's placement with a family will disrupt either while the child is formally a foster child or after a court enters a guardianship or adoption order.[43] Matching families in the experimental group who chose guardianship to similar families in the control group who pursued adoption, Testa found "no evidence of any adverse impact on the long-term stability of the living arrangement" from guardianship.[44] A California study reported slightly larger, but still small levels of guardianship disruptions—nothing to undermine the "substantially greater" permanency rates that guardianship catalyzed, as compared with offering only adoption as a permanency option.[45] Summarizing all available data in 2011, the federal government wrote that children in guardianships have living arrangements just as stable as in other legal statuses, and that no significant differences existed in the number of children who re-entered foster care.[46]

Pursuing adoptions in place of guardianships is no guarantor of stability. Like guardianships, adoptions are quite stable if achieved—one study found only 3.3 percent of all adopted children to have spent any time

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[40] Testa, *Subsidized Guardianship*, *supra* note 36, at 6–7.

[41] Sarah Katz, *The Value of Permanency: State Implementation of Legal Guardianship Under the Adoption and Safe Families Act of 1997*, 2013 MICH. ST. L. REV. 1079, 1090 (2013).

[42] MARK F. TESTA ET AL., ILLINOIS SUBSIDIZED GUARDIANSHIP WAIVER DEMONSTRATION: FINAL EVALUATION REPORT 50 (2003). These figures exclude guardianships, which ended due to the death or incapacitation of the guardian.

[43] Testa, *Quality of Permanence*, *supra* note 34, at 526–27.

[44] Testa, *Subsidized Guardianship*, *supra* note 36, at 23–24, 25.

[45] CALIFORNIA DEP'T OF SOC. SERVS., REPORT TO THE LEGISLATURE ON THE KINSHIP GUARDIANSHIP ASSISTANCE PAYMENT (KIN-GAP) PROGRAM 5 (2006). The study found that 5.9 percent of children who left foster care to subsidized guardianship subsequently re-entered foster care. The study cautioned that some of these re-entries might be "positive"—such as a re-entry to facilitate reunification with a parent. *Id.* at 15.

[46] *Synthesis of Findings*, *supra* note 25, at 18–20.

in foster care in the four years since a court finalized their adoption.[47] But adoption disruptions—in which a child leaves a pre-adoptive home before finalization—occur with more frequency.[48] Different studies have quantified disruption rates differently, with most ranging from 9 to 15 percent.[49] Disruptions of pre-adoptive placements are as high as 25 percent in at least one jurisdiction.[50] Reviewing the literature, Trudy Festinger notes that disruption rates have increased in recent decades as the number of adoptions—especially those of older children and children with special needs—has increased;[51] and that the disruption rate for older children is "roughly 25 percent."[52] These disruption statistics should only suggest the obvious point that it is difficult for foster care agencies to place children with greater needs permanently, and that working towards an adoption—especially an adoption with a new family—is no panacea for many foster youth.

The empirical record also shows no significant differences in well-being—measured by school performance and risky behaviors—between children who leave foster care to guardianship and to adoption.[53] The differences that exist are between children who remain in foster care and those who leave to permanent families; the legal status of permanent families does not appear to affect child well-being.[54]

a. Kinship and Non-kinship Guardianship

Guardianship is an option for both kinship and non-kinship foster families, but is most frequently discussed as a permanency option appropriate for kinship placements. Fostering Connections codified this kinship focus by limiting federally supported guardianship subsidies to kin.[55] Federal law permits an exception to the rule requiring termination of

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[47] Trudy Festinger, *After Adoption: Dissolution or Permanence?*, 81 CHILD WELFARE 515, 527 (2002).

[48] Trudy Festinger, *Adoption Disruption: Rates, Correlates, and Service Needs*, *in* CHILD WELFARE FOR THE 21ST CENTURY 452, 452–53 (Gerald P. Mallon & Peg McCartt Hess eds. 2005) [hereinafter Festinger, *Adoption Disruption*].

[49] *Id.* at 453–56 (summarizing studies).

[50] The District of Columbia reports a 0.25 to 1 ratio of placement changes to total placements for pre-adoptive placements. 2013 D.C. CHILD AND FAMILY SERVS. AGENCY ANN. PUB. REP. 25 (2014) [hereinafter CFSA, 2013 ANNUAL REPORT].

[51] Festinger, *Adoption Disruption*, *supra* note 48, at 456.

[52] *Id.* at 457.

[53] *Id.* at 20.

[54] *Id.*

[55] 42 U.S.C. § 673(d). Under administrative guidance from the federal Children's Bureau, states have wide discretion to define the term "relative" broadly, and to include "fictive kin" such as godparents, family friends, former step-parents (or step-grandparents), and

parental rights motions after 15 months in foster care for relative placements only—implying that other placements are not good candidates for this exception, even if such placements are eligible for guardianships and, thus, do not require terminations.[56] And the academic and policy discourse has generally framed guardianship as a permanency option for kin.[57] There is a real connection between kinship placements and permanency, for reasons explored throughout this article.[58] Historically, subsidized guardianship developed in part as a response to large numbers of foster children in kinship care.[59] And children placed with kin have more stable placements and are more likely to leave foster care to some kind of legally permanent status.[60]

Despite the focus on kinship guardianship, guardianship statutes are generally not limited to kin, so any foster parent can seek guardianship.[61] Obtaining subsidized guardianship presents a more mixed picture across the states. Federal law does limit *federally* supported

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the like. U.S. DEP'T OF HEALTH AND HUMAN SERVS., ADMIN. FOR CHILDREN AND FAMILIES, CHILDREN'S BUREAU, ACYF-CB-PI-10-11, PROGRAM INSTRUCTION 14 (2010) [hereinafter PROGRAM INSTRUCTION 10-11], *available at* http://www.acf.hhs.gov/sites/default/files/cb/pi1011.pdf. Still, even such a broad definition would likely exclude a foster parent with whom the child and family have no relationship prior to the child's placement.

[56] 42 U.S.C § 675(E)(i).

[57] Mark Testa, one of the leading scholars of and policy advocates for guardianship, has framed the issue as between adoption and "legal guardianship *by kin*." Testa, *Quality of Permanence*, *supra* note 34, at 528 (emphasis added). *See also id.* at 509–10 (describing discussions regarding Illinois' guardianship waiver program as related to kinship placements). *See also* CLARE HUNTINGTON, FAILURE TO FLOURISH: HOW LAW UNDERMINES FAMILY RELATIONSHIPS 129 (2014) ("Guardianship is particularly appropriate for older children who do not want to sever ties with their parents but who cannot return home and for kinship caregivers who, for a variety of reasons, do not want to adopt."). Many advocacy organizations explicitly link guardianship and kinship care, even though guardianship is available more broadly, and did so leading up to the Fostering Connections Act—ignoring non-kinship guardianship as an option for federal advocacy. *E.g.*, Child Welfare League of America, *Kinship Care and Assisted Guardianship* (2007), *available at* http://66.227.70.18/advocacy/2008legagenda08.htm (last visited 17 Nov. 2014); Jim Casey Youth Opportunities Initiative, *Subsidized Guardianship and Kinship Care*, http://jimcaseyyouth.org/subsidized-guardianship-and-kinship-care (last visited Oct. 26, 2014).

[58] *E.g.*, *infra* Parts I.B & II.E.

[59] *Infra* Part I.B.

[60] *Id.*

[61] The federal statutory definition of guardianship is not limited to kin. 42 U.S.C. § 675(7). States with foster care specific guardianship statutes generally are not limited to kin. *E.g.*, D.C. CODE § 16-2382(a)(4) (2001) (defining "permanent guardian" without a kinship limitation). The same is true in states that use guardianship statutes in their probate codes. *E.g.*, MO. REV. STAT. § 475.010(7) (West 2014) (same).

guardianship subsidy payments to guardians identified by state child welfare agencies as kin.[62] But many states and the District of Columbia (26 by one count) offer guardianship subsidies with state funds to families that do not qualify for federal funds,[63] and most of these offer subsidized guardianship to non-kin.[64]

These non-kinship subsidies reflect a core purpose of guardianship—to avoid terminations of parental rights and thereby respect the ongoing relationships between foster children and their biological parents. It may also help non-kinship foster parents retain their identity, and prevent unnecessary termination litigation. One child whom I represented in the District of Columbia left foster care to a non-kinship guardianship shortly after the District extended guardianship subsidies to non-kin guardianship. His foster parents had refused to adopt him. They were in their young sixties and my client (in his pre-teens) called them "grandma" and "grandpa." They explained that they felt that these were the right names for them, and that they simply did not see themselves as "mom" and "dad."[65] When non-kinship subsidized guardianship became they law, they jumped at the chance. My client's parents, knowing they would likely face (and lose) a termination petition, consented to the foster parents' guardianship petition. My client soon had legal permanency that respected both his ongoing relationship with his mother and other biological family members, and his guardians' identity.

Still, non-kinship guardianship is not emphasized on par with either adoption or kinship guardianship. Testa has suggested that kinship guardianship and adoption are equally good permanency options, but argues differently for non-kin. "Adoption is the conventional means of establishing a kinship relationship in the absence of blood ties," he argues,

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[62] *Supra* note 555521, at 14.

[63] *Making It Work*, *supra* note 11, at 7.

[64] Patten, *supra* note 20, at 259. Such states include: the District of Columbia, which opened guardianship subsidies to non-kin in 2010, *infra* note 226; Illinois, 89 ILL. ADMIN. CODE § 302.410(c)(2); Iowa, IOWA ADMIN. CODE R. 441-204.2(1)(e)(2); Michigan, MICH. COMP. LAWS § 722.874(Sec. 4)(2); Montana, MONT. DEP'T OF PUB. HEALTH AND HUMAN SERVS., CHILD AND FAMILY SERVS., POLICY MANUAL: LEGAL PROCEDURE STATE SUBSIDIZED (GENERAL FUND) GUARDIANSHIP, http://www.dphhs.mt.gov/cfsd/cfsdmanual/407-3.pdf, at 1–2; Washington, WASH. REV. STAT. **13.36.090.**

[65] My client's foster parent's self-identification as permanent caregivers other than parents is consistent with the kinship guardianship literature, which reports many kinship caregivers who wish to "retain their extended family identities" rather than adopt the legal identity of a parent. Testa, *Quality of Permanence*, *supra* note 34, at 505; Jesse L. Thornton, *Permanency Planning for Children in Kinship Foster Homes*, 70 CHILD WELFARE 593, 597 (1991).

so unless it is necessary to respect older children's desires or if there are no legal grounds to terminate parental rights, non-kinship guardianship is inappropriate.[66] This argument ignores core values of guardianship, which apply equally to non-kin—the preservation of valuable parent-child relationships, respect for foster parents' identities regarding the child, and avoidance of unnecessary termination litigation. Which legal status is "conventional" does not define what is best for a particular family. Moreover, adoption is the conventional means of establishing kinship ties only because the law, child welfare agencies, and family courts made it so throughout the 20th century, and that convention is not sacrosanct.

More open attitudes to non-kinship guardianship would likely find a receptive audience, as the empirical record suggests non-kinship foster parents are likely to be as attracted to guardianship as kinship foster parents. In Illinois—which offers subsidized guardianship to kinship and non-kinship foster parents, more kinship foster parents obtained guardianship than non-kin. Yet when studies controlled for differences between children placed with kinship and non-kinship foster parents—such as age, race, disability, etc.—the differences shrank. Kinship foster parents were still more interested in guardianship than non-kinship foster parents, but the difference was not statistically significant.[67] Interest levels in guardianship need not be equal between kin and non-kin to make the point—significant numbers of non-kin foster parents are interested in guardianship, and that permanency option is an important element of the new permanency.

This conclusion has potentially far-reaching implications because guardianship is presented in federal law and much policy discourse as an option for kin only.[68] Recognizing that non-kinship foster parents may also have interest in guardianship could significantly increase the number of children who leave foster care to guardianship. This may help explain recent trends in the District of Columbia, discussed in Part III.

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[66] Testa, *Quality of Permanence*, *supra* note 34, at 531.

[67] Testa, *Evaluation of Interventions*, *supra* note 24, at 208.

[68] Federal law limits guardianship subsidies to kin, 42 U.S.C. § 673(d), and creates an exception to the 15 of 22 month termination rule for relative placements only—implying that other placements are not good candidates for guardianships and thus require terminations. 42 U.S.C § 675(E)(i). The academic and policy discourse has also focused on guardianship as related to kin only. *Supra* note 5757.

2. *A Permanency Continuum Even Within Adoption*

Although child welfare policy makers tend to discuss adoption as a singular topic, adoptions now exist on a continuum, with the option of pursuing a traditional closed adoption, an adoption with contact agreement, or, in California, a non-exclusive adoption. This adoption continuum remains inadequately appreciated in child welfare law.

Historically adoption was viewed as the statutory formation of families—especially infertile couples adopting infants. The law was structured to make adoptive families as similar as possible to "natural" families—going so far as to require the legal fiction of printing new birth certificates claiming that adoptive children were born to the adoptive parents, and writing the birth parents out of the child's legal history, relegating them to sealed court or agency files.[69] In the child welfare setting, this view of adoption meant adoptions and terminations of parental rights were inextricably linked, and no ongoing role for the biological parents was envisioned.

Adoption is quite dramatically different now, especially as adoption occurs in the child welfare system. Most fundamentally, adoption is more open, with dramatically more contacts between adopted children, adoptive parents, and biological parents. Almost 40 percent of all non-kinship adoptive parents report that their child had some post-adoption contact with birth families.[70] This fairly high rate occurs for both ideological and demographic reasons. Ideologically, our society has recognized a growing "consensus . . . that greater openness offers an array of benefits for adoptees."[71] Demographically, many foster child adoptions involve older children[72] or trans-racial adoptions[73]—both scenarios in which the legal fiction of replicating a biological family is not viable.

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[69] Burton Z. Sokoloff, *Antecedents of American Adoption*, 3 THE FUTURE OF CHILDREN 17, 21–22 (1993), http://futureofchildren.org/futureofchildren/publications/docs/03_01_01.PDF.

[70] U.S. DEP'T OF HEALTH AND HUMAN SERVS., CHILDREN ADOPTED FROM FOSTER CARE: CHILD AND FAMILY CHARACTERISTICS, ADOPTION MOTIVATION, AND WELL-BEING 8 (2011), *available at* http://aspe.hhs.gov/hsp/09/nsap/Brief1/rb.pdf.

[71] ADAM PERTMAN, ADOPTION NATION: HOW THE ADOPTION REVOLUTION IS TRANSFORMING AMERICA 4–5, 11 (2000).

[72] About 20 percent of all foster care adoptions involve children 10 years of age or older. An additional 31 percent of all foster care adoptions involve children between 5 and 9. U.S. DEP'T OF HEALTH AND HUMAN SERVS., ADMIN. FOR CHILDREN AND FAMILIES, ADMIN. ON CHILDREN, YOUTH AND FAMILIES, CHILDREN'S BUREAU, THE AFCARS REPORT, PRELIMINARY FY 2012 ESTIMATES AS OF NOVEMBER 2013, 5 (2013) [hereinafter AFCARS 2012], *available at*

This increased openness is not merely a matter of social changes, but of formal and enforceable legal agreements. At least 26 states plus the District of Columbia now by statute recognize post-adoption contact agreements, in which adoptive and biological parents can enter enforceable agreements to maintain some form of contact between the child and biological family.[74] This option still requires a termination of the biological parent-child relationship, though the contact agreement allows that relationship to functionally continue through whatever visitation or other contact is provided.[75]

Substantively, post-adoption contact agreements maintain the link between terminations and adoptions; the biological parent's rights are terminated (with the exception of whatever contact rights are agreed to) and that parent ceases to be a legal parent. But procedurally, post-adoption contact agreements separate terminations and adoptions. Such agreements require the involvement of biological parents and some discussion between them and adoptive parents about the details of post-adoption contact. Such involvement is difficult if not impossible if the state has terminated parental rights before the adoptive parents are identified. Earlier terminations would stop parent-child visits and remove biological parents from the court case, and make any later post-adoption contact agreement highly unlikely. Accordingly, the possibility of such agreements suggests that such early terminations are appropriate when such agreements would not serve children's interests.

California has gone further, enacting a statute in 2013 permitting non-exclusive adoption; if the adoptive and biological parents agree, then new parents can adopt a child without terminating the legal relationship between the child and the biological parents.[76] Non-exclusive adoption has

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http://www.acf.hhs.gov/sites/default/files/cb/afcarsreport20.pdf.

[73] The federal government has reported that more than one quarter of foster child adoptions are "transracial, transethnic, or transcultural." U.S. DEP'T OF HEALTH AND HUMAN SERVS., *supra* note 70, at 7. This data is of all foster child adoptions, including kinship adoptions, which are less likely to be transracial. The proportion of transracial adoptions among non-kin foster adoptions are thus likely higher.

[74] Sanger, *supra* note 28, at 319. For an overview of state statutes, see U.S. DEP'T OF HEALTH & HUMAN SERVS., ADMIN. FOR CHILDREN & YOUTH, CHILDREN'S BUREAU, POSTADOPTION CONTACT AGREEMENTS BETWEEN BIRTH AND ADOPTIVE FAMILIES (May 2011), *available at* https://www.childwelfare.gov/systemwide/laws_policies/statutes/cooperative.pdf. On the enforceability being subject to a child's best interests, *see id.* at 4; D.C. CODE § 4-361(b)(1) (2001).

[75] Gupta-Kagan, *supra* note 32, at 22 (Pt II language explaining PACAs are still exclusive).

[76] S.B. 274, § 8 (2013) (codified at CALIF. FAM. CODE § 8617), *available at*

the potential to provide an entirely new permanency option that obviates the need for terminations of parental rights, and which may serve important interests of some foster children.[77]

The availability of multiple options in the adoption continuum complicates the practice significantly. Traditional adoption—involving a termination of the biological parent-child legal relationship and the creation of an adoptive parent-child relationship to replace it—left little room for discussion among the parties. Biological parents could relinquish their rights or fight a termination trial; there was no middle ground over which to negotiate. That historical discussion has dramatically changed, and negotiation between adoptive and biological families is now inherent in any decision between traditional closed adoption, adoption with a contact agreement, and, at least in California, non-exclusive adoption.[78]

In the child welfare context, such negotiations can occur along at least two planes. First, in complicated cases in which there are multiple adoption petitions, biological parents may seek to shape the outcome by consenting to one petitioner over another. This may be true even when parents recognize that their child will be adopted; the likelihood of losing one's parental rights does not mean the question of who will obtain parental rights to their children is not important to biological parents. These parents may have strong opinions regarding which prospective adoptive family would be best for their children, and may also seek adoption by a family that would provide the most respect for their past role in raising their children and perhaps even permit the most ongoing contact. Biological parents might prefer to consent to an adoption petition by kin over non-kin, for instance, or by a foster parent they have come to trust over someone they do not know as well. Second, biological parents might negotiate their consent in exchange for contact rights. Biological parents have some modest leverage in that they can insist on a trial over termination of parental rights if they do not consent to an adoption; such litigation, like any litigation, can be costly, time-consuming, stressful, and unpredictable for the parties.

This is not to suggest that such negotiation always serves children's interests; as with any negotiation, the parties must determine whether the zone of possible agreements are acceptable. In some cases, parents pose such a severe ongoing physical or emotional threat to

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http://www.leginfo.ca.gov/cgi-bin/postquery?bill_number=sb_274&sess=CUR&house=B&author=leno.

[77] Gupta-Kagan, *supra* note 32.

[78] For a discussion of these negotiation dynamics, *see* Sanger, *supra* note 28, at 319.

children that no ongoing relationship is appropriate; in such cases, termination and adoption proceedings are fully appropriate. At the other end of the spectrum, in some cases, parents have rehabilitated or are likely to soon rehabilitate and maintain a strong bond with their children; in such cases motions to restore custody and legal efforts to fight any efforts towards permanency with a non-parent remain appropriate. At both extremes, litigation is preferable to any negotiated adoption with contact.

B. Expansion and Establishment of Kinship Care

While the permanency continuum discussed above was developing, a parallel development changed the makeup of foster care placements—and thus the permanency options that would follow.[79] Kinship care—foster care provided by relatives or family-like individuals, rather than by foster parents previously unknown to children—emerged as a dramatic force in the 1980s and has grown since.

The percentage of foster children placed with kin increased from 18 to 31% between 1986 and 1990, and did not change much since then.[80] The timing is important to understand this growth; foster care rolls expanded in the late 1980s as child protection agencies removed more children in the wake of the crack-cocaine epidemic. Facing the "limited capacity of the child welfare system to recruit an adequate supply of licensable foster homes, particularly in inner city neighborhoods," from where disproportionate numbers of children were removed, these agencies turned to extended families to provide foster homes.[81] This growth in kinship placements triggered the policy question of how to achieve permanency for the growing number of children in kinship foster care, especially those children who could not reunify and whose kin did not wish to terminate parental rights. The result was an increased focus on

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[79] There is, of course, a "strong correlation" between foster home a child lives in and the permanency plan that is most appropriate for that child. Cynthia Godsoe, *Permanency Puzzle*, 2013 MICH. ST. L. REV. 1113, 1117 (2013).

[80] Testa & Miller, *supra* note 14, at 410. Although state-by-state data differences make it impossible to calculate a national average, the best data suggests that 30 percent of foster children continue to live with kin. U.S. DEP'T OF HEALTH AND HUMAN SERVS., ADMIN. FOR CHILDREN AND FAMILIES, ADMIN. ON CHILDREN, YOUTH AND FAMILIES, CHILDREN'S BUREAU, REPORT TO CONGRESS ON STATES' USE OF WAIVERS OF NON-SAFETY LICENSING STANDARDS FOR RELATIVE FOSTER FAMILY HOMES 5 (2011) [hereinafter CHILDREN'S BUREAU, REPORT TO CONGRESS], *available at* http://www.acf.hhs.gov/sites/default/files/cb/report_congress_statesuse.pdf ("For the 32 States that reported percentages based on *all* children in foster care, an average of 16 percent of children were placed in licensed relative foster homes and 14 percent in unlicensed relative foster homes.").

[81] Testa & Miller, *supra* note 14, at 410–11.

guardianship as a permanency option,[82] and eventually an increase in children who left foster care to guardianship or some other permanency option with kin.[83]

At the same time, child protection agencies developed a set of policies and practices designed to facilitate kinship foster care placements. Many agencies applied flexible standards to kin seeking foster care licenses, held family group conferencing meetings and made other efforts early in cases to help identify kinship placement options—though significant variation remains between different agencies.[84]

Even if initially created to meet a pressing need for foster placements, policies favoring kinship placements are justified by a body of empirical research showing their value to children. Social science research establishes that children often have strong bonds with individuals beyond primary caretakers. So even if a grandparent or uncle was not the child's primary caretaker, child welfare decisions should respect the bond with those individuals if the child cannot live with the primary caretaker.[85] Strong extended family bonds are particularly common among the low-income families overrepresented in foster care because it serves "in part as a hedge against poverty."[86]

The strong bonds that precede a placement in kinship foster care likely lead to many of the well-documented positive outcomes associated with kinship care. Children in kinship care are more likely to feel that they belong with the family they live with than children in non-kinship care.[87] Children in kinship care have significantly greater placement stability—they are less likely to have their initial placement disrupted, and less likely to experience multiple moves from one foster home to another.[88]

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[82] *Id.* at 411,

[83] *Infra* notes125–126and accompanying text.

[84] For a discussion of such licensing and meeting efforts in one jurisdiction, *see infra* Part III.B. For a discussion of agency variation in kinship placement policies and practices, *see infra* Part II.E.1.

[85] Patten, *supra* note 20, at 240-41.

[86] *Id.* at 250.

[87] Eun Koh & Mark F. Testa, *Propensity Score Matching of Children in Kinship and Nonkinship Foster Care: Do Permanency Outcomes Still Differ?*, 32 Social Work Research 105, 115 (2008).

[88] *E.g.*, Eun Koh, *Permanency Outcomes of Children in Kinship and Non-kinship Foster Care: Testing the External Validity of Kinship Effects*, 32 CHILDREN & YOUTH SERVS. REV. 389, 390 (2010) (collecting studies); *id.* at 393 & 396 (reporting findings in his five-state study with matched samples); Koh & Testa, *supra* note 87, at 112 (reporting results from study of matched and unmatched samples). Such stability is evident in both aggregate numbers and in comparing matched samples of children in kinship care to

Historically, these benefits were balanced by a fear that kinship foster care would lead to relatively poor permanency outcomes, and multiple studies found that kinship foster care correlated with worse adoption outcomes.[89] These studies had two core failings—first, guardianship was not an option for all families, thus diminishing the permanency outcomes for kinship families in particular. Second, they failed to control adequately for differences between children placed in kinship and non-kinship homes.

A key element in the new permanency is a recognition that historical fears about kinship care and permanency are unfounded, and that, if anything, kinship care correlates with improved permanency outcomes. Positive results should be expected because kinship caregivers are highly committed to taking care of children, as evidenced in the higher rates of placement stability, and children are more likely to feel that they belong with kinship caregivers. Recent studies have identified such results. These studies have tried to rectify problems with earlier studies, and account for the development of permanency options other than adoption. Studies that have rigorously controlled for differences between kinship and non-kinship placements "disconfirm the previous perception that kinship foster homes are not as effective as non-kinship foster homes in promoting children's legal permanence."[90] For instance, in a review of five states' data, Eun Koh found three states in which kinship care led to stronger permanency outcomes, two states in which it had no statistically significant effect, and no states in which kinship care had negative outcomes.[91] Another study of Illinois foster care cases found that children placed in non-kinship foster care were more likely to exit to adoption or guardianship within the first three years of foster care, but that kinship foster care led to better permanency rates over a longer period of time.[92] Permanency law—and, specifically, the creation of the permanency continuum—has shaped these more positive results. Before guardianship was available, kinship foster care correlated with better permanency

children in non-kinship care. Koh & Testa, *supra* note 87, at 111–12, 114; *see also* Marc A. Winokur, et al. *Matched Comparison of Children in Kinship Care and Foster Care on Child Welfare Outcomes*, 89 FAMILIES IN SOCIETY 338, 341–42 (2008).

[89] Andrew Zinn, *Foster Family Characteristics, Kinship, and Permanence*, 83 SOC. SCIENCE REV. 185, 189 (2009).

[90] Koh *supra* note 88, at 395.

[91] *Id.*

[92] Koh & Testa, *supra* note 87, at 109. Another Illinois study found no statistical significant between adoption and reunification rates in kinship and non-kinship foster families. Zinn, *supra* note 89, at 208–09. Coupled with the greater likelihood of kin to seek guardianship, the Illinois finding suggests that kinship placements on the whole positively correlate with permanency outcomes.

outcomes, a result that changed when guardianship became an option.[93] That positive statistically significant results are seen in some states but not others merely reflects that significant variation in policies and practices continue to exist across states.[94]

II. Guardianship's Continued Subordination[95] to Adoption

Congress offered states federal dollars to support guardianship subsidies in 2008, taking a big step towards fiscal equity between adoption and guardianship. After Fostering Connections, eight states began offering subsidized guardianships, and more than thirty others began receiving federal funding to support their existing guardianship subsidies—giving them the financial ability to expand guardianship programs. As discussed in Part I, research into states that began offering subsidized guardianship revealed that guardianship rates increased, overall permanency rates increased, and that adoption rates decreased modestly as some families that would have adopted chose guardianship instead.[96] So, in the six years since Fostering Connections, one might expect a sizable increase in the number of guardianships nationally, an improvement in overall permanency outcomes (the number of adoptions and guardianships combined, or as compared with children growing up in foster care), or an increase in the ratio of guardianships to adoptions in the intervening six years. Indeed, one leading family law scholar has assumed that Fostering Connections helped cause an increase in the use of guardianships.[97]

Yet national data shows no significant changes—the adoption hierarchy remains in effect, and the permanency increases found in states that offered guardianship through federal waivers before Fostering Connections do not appear to have been replicated nationally. Guardianships accounted for 7 percent of all exits from foster care in fiscal year 2008, and 7 percent of all exits in fiscal year 2012.[98] In the same

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[93] Koh & Testa, *supra* note 87, at 106, 112, 114.

[94] *See infra* Part III.E (describing variations between states in kinship placement and guardianship policies and practices).

[95] By using the term "subordination," I echo Eliza Patten's pre-Fostering Connections critique of child welfare practice, "The Subordination of Subsidized Guardianship in Child Welfare Proceedings." Patten, *supra* note 20.

[96] *Supra* Part I.A.1.

[97] Clare Huntington, *The Limits of Determinacy*, 77 L. & Contemp. Probs. 221, 241 (2014).

[98] *Compare* U.S. DEP'T OF HEALTH AND HUMAN SERVS., ADMIN. FOR CHILDREN AND FAMILIES, ADMIN. ON CHILDREN, YOUTH AND FAMILIES, CHILDREN'S BUREAU, THE AFCARS REPORT: PRELIMINARY FY 2008 ESTIMATES AS OF OCTOBER 2009 4 (2009) (hereinafter AFCARS FY 2008), *and* U.S. DEP'T OF HEALTH AND HUMAN SERVS., ADMIN. FOR CHILDREN AND FAMILIES, ADMIN. ON CHILDREN, YOUTH AND FAMILIES,

years, the percentage of exits from adoptions increased slightly, from 19 percent to 22 percent.[99] Overall permanency rates remain constant; the percentage of foster care exits to "emancipation" (meaning children have grown up in foster care and never left to a permanent family) remained steady between 2008 and 2012.[100] The percentage of foster children with permanency plans of guardianship and adoption also appear unchanged. In 2008, 24 percent of all foster children had a permanency plan of adoption while 4 percent had a plan of guardianship, and the federal government reported identical figures for 2012.[101] So, despite a big step toward funding equity, the permanency hierarchy has remained in practice.

There is one recent trend that, on the surface, suggests an effect from new permanency policies—the number of terminations has declined and, as the number of adoptions has remained relatively steady, the number of new legal orphans has also declined.[102] The gap between terminations and adoptions shrunk from 29,000 in 2008 to 7,000 in 2012.[103] One would expect a greater reliance on guardianships to lead to this result because guardianships do not require terminations. Yet with neither the number of guardianships nor the number of guardianship permanency plans increasing, it is hard to discern how new permanency policies caused the decrease in terminations. A different, or at least more complicated, set of causes likely exists.

CHILDREN'S BUREAU, THE AFCARS REPORT: PRELIMINARY FY 2012 ESTIMATES AS OF NOVEMBER 2013 3 (2013) (hereinafter AFCARS FY 2012). The federal government also reports exits from foster care to "living with other relatives," and this category accounted for 8 percent of all exits in both years. *Id.* AFCARS reports for these and intervening years are available at http://www.acf.hhs.gov/programs/cb/research-data-technology/statistics-research/afcars.

[99] AFCARS FY 2008, *supra* note 98, at 4, AFCARS FY 2012, *supra* note 98, at 3.

[100] AFCARS FY 2008, *supra* note 98, at 1, AFCARS FY 2012, *supra* note 98, at 1. During this time period, the absolute numbers of adoptions and guardianships declined slightly. Adoptions declined from 54,284 in 2008 to 51,225 in 2012, and guardianships from 19,941 to 16,418. AFCARS FY 2008, *supra* note 98, at 4, AFCARS FY 2012, *supra* note 98, at 3. This decrease likely follows from the dramatic decline in the overall foster care population, from 463,792 in 2008 to 397,122 in 2012. AFCARS 2012, *supra* note 72, at 1. That decline results largely from a decrease in the number of children removed annually from 280,000 in 2008 (and somewhat higher in the preceding years) to the low 250,000s in the four years that followed. TRENDS IN FOSTER CARE AND ADOPTION, *supra* note 30, at 1. Accordingly, I look at the percentage of exits to each legal status.

[101] AFCARS FY 2008, *supra* note 98, at 1, AFCARS FY 2012, *supra* note 98, at 1.The permanency plan of "live with other relatives" was similarly unchanged—it was 4 percent in 208 and 3 percent in 2012.

[102] *See* TRENDS IN FOSTER CARE AND ADOPTION, *supra* note 30 (reporting total numbers of terminations and adoptions of foster children for the previous decade).

[103] *Id.*

It is important to note two limitations on these statistics. First, these are national statistics that do not tell an accurate story for every jurisdiction; Part III will analyze one jurisdiction, the District of Columbia, in which guardianships have become more frequent since Fostering Connections. Second, it is possible that a more rigorous evaluation of post-2008 data could discern some subtle effect of Fostering Connections.

Why, then, has the Fostering Connections Act failed to achieve the results that research into guardianship would suggest? One factor may be financial; Fostering Connections was enacted in fall 2008, just as the great recession imposed tremendous fiscal pressures on state budgets. Many states may have used the infusion of federal funds to shore up other child welfare services rather than expand guardianship. But those same states are able to see the fiscal benefits of a robust guardianship program—if permanency outcomes are improved, and the federal government contributes to guardianship subsidies, then states will save significant costs on foster care with a guardianship expansion. So more complicated factors than the great recession are at work.

Fostering Connections' failure (so far) to change permanency outcomes has a complex set of causes. The first is legal—the law maintains a hierarchy of permanency options with adoption above guardianship. The second is cultural—the various forces within family court systems that reinforce adoption's primacy, and guardianship's subordination, despite funding provided through Fostering Connections and research demonstrating its benefits to children. The third is the concentration within child welfare agencies of immense discretion regarding some of the most relevant decisions. These agencies determine, as a matter of policy, how flexible their kinship licensing and placement standards are, whether to take federal dollars for guardianship subsidies and, if so, whether and what restrictions to place on guardianships. In individual cases, agency caseworkers have immense discretion whether to place children with kin, and whether to offer guardianship as an option to foster families—or even disclose that guardianship is an option. Agencies—as a matter of both policy and case worker practice—have largely[104] chosen a course of action that continues to subordinate guardianship and elevate adoption.

[104] This statement is a generalization about agencies nationally. Certain exceptions apply, and one is explored in depth in Part III.

A. Legal Structure Creates a Hierarchy

Fostering Connections provides federal funding for guardianships, but conditions that funding on states following a permanency hierarchy that subordinates guardianship. Eligibility for federal dollars requires states to rule out adoption before considering guardianship.[105] Fostering Connections thus leaves in place adoption's primary role—and guardianship's secondary role—when reunification will not occur; and also leaves intact child welfare law's historic focus on terminations of parental rights and adoptions as the default option when a child cannot reunify with parents.

This structure dates back to the Adoption Assistance and Child Welfare Act of 1980,[106] a statute that requires states to follow a list of requirements in exchange for federal child welfare funding.[107] This federal funding law provides most of the core requirements of modern child welfare practice. When children remain in foster care for a certain amount of time, state family courts must hold hearings to determine if reunification is likely and, if not, how the child might achieve permanency. The 1980 legislation required states to hold a "dispositional hearing" for all foster children who did not reunify quickly, with the purpose of "determin[ing] the future status of the child," defined as whether "the child should be return[ed] to the parent," "should be placed for adoption," or should remain in foster care.[108] Although the 1980 law recognized guardianship,[109] it framed permanency decisions as binary—

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[105] The legislative history does not state why Congress made this policy choice. It likely resulted from coalition politics among those advocating for the bill. The Congressional Record includes a long list of advocacy organizations which endorsed the bill, some of which are explicitly adoption focused—such as the Adopt America Network, the American Academy of Adoption Attorneys, and Children Awaiting Parents, to list several with adoption-focused names. 154 CONG. REC. H8304-01 (17 Sept. 2008) (listing signatories to a letter of support for the bill). Many of these coalition members likely subscribed to the adoption ideology discussed in Part II.B, thus making any legislative steps to attack adoption's primacy politically difficult.

[106] Legal articles soon after the 1980 legislation reflected this view. For instance, Marcia Robinson Lowry decried leaving children who could not reunify with parents in foster care for too long, and framed the problem as how to get such children adopted—not how to choose the best permanency option for them. Marcia Robinson Lowry, *Legal Strategies to Facilitate Adoption of Children in Foster Care*, in FOSTER CHILDREN IN THE COURTS 264 (Mark Hardin ed. 1983).

[107] Pub. L. 96-272, 94 Stat. 500 (1980).

[108] Pub. L. 96-272, § 101 (codified at 42 U.S.C. § 675(5)(C) (1982)).

[109] *Supra* note 1515. *See also* Pub. L. 96-272, § 103 (codified at 42 U.S.C. § 627(a)(1) & (a)(2)(C) (1982)) (appropriating funding for state child welfare agencies to provide services to "facilitate" reunification "or the placement of the child for adoption or legal

reunification or adoption—and that binary has shaped child welfare practice ever since.[110] This hierarchy reflected the emergence in the 1970s of the "permanency planning" movement, which focused on reunification or adoption. Despite some academics urging inclusion of guardianship, and its inclusion in at least one state's federally funded child welfare demonstration, guardianship was nowhere near the center of the debate.[111] And Congress placed its money accordingly. As its title suggests, the 1980 Adoption Assistance and Child Welfare Act provided federal funds to reimburse states for subsidies paid to adoptive parents,[112] while Congress established no such funding for guardianships.

The Adoption and Safe Families Act of 1997[113] (ASFA) reinforced the primacy of adoption and termination of parental rights when children cannot reunify. First, ASFA required states to file termination of parental rights cases and recruit adoptive families whenever children have been in foster care for 15 of the most recent 22 months.[114] ASFA created an exception for when states had placed foster children in homes with a relative[115]—implying that guardianship was only appropriate for relatives.[116] And nothing in ASFA (or in the pre-existing federal law) provided any preference for kinship placements generally, so there was no push to place children with relatives in the first instance. If child welfare agencies placed children with non-kinship foster homes, then the termination of parental rights exception would not apply—even if viable kinship placements existed. Second, ASFA expanded adoption subsidies, creating new adoption incentive payments that would flow directly to state governments that increased the number of foster child adoptions.[117] ASFA continued to provide no funds for guardianship subsidies.[118] Still, ASFA did solidify guardianship's place as a permanency option, listing it as a

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guardianship").

[110] *See* Huntington, *supra* note 57, at 87 ("In the child-welfare system, a parent must regain custody of the children or face termination of parental rights").

[111] Testa & Miller, *supra* note 14, at 406–07.

[112] Pub. L. 96-272, § 101 (codified at 42 U.S.C. § 673 (1982)).

[113] Pub. L. 105-89, 111 Stat. 2115 (1997).

[114] Pub. L. 105-89, § 103(a) (codified at 42 U.S.C. § 675(5)(E) (2000)).

[115] *Id.* (codified at 42 U.S.C. § 675(5)(E)(i) (2000)).

[116] Other exceptions exist, but are used rarely – if the state determines some "compelling reason" exist to not terminate parental rights, or if the state acknowledges that it has not made reasonable efforts to facilitate reunification. 42 U.S.C. § 675(5)(E)(i)&(ii) (2000).

[117] Pub. L. 105-89, § 201 (codified at 42 U.S.C. § 673b (2000)).

[118] ASFA was enacted in 1997, before studies demonstrated guardianship was as lasting as adoption. The prevailing view of the federal government was that guardianship was less permanent than and thus inferior to adoption. *Supra* note 39 and accompanying text.

possible "permanency plan" that courts could set,[119] and defining guardianship to mean any legal status that grants physical and legal custody to an adult, other than a parent, "which is intended to be permanent."[120]

Policymakers expected that ASFA's push for speedier permanency hearings and termination cases would lead to more adoptions; foster children would be "freed" for adoption, and child welfare agencies could "tap into the presumably large pool of middle-class families who were able and willing to adopt minority children from foster care but were previously discouraged from doing so."[121] A law enacted in 1994, the Multi-Ethnic Placement Act, would facilitate transracial adoptions.[122]

The results, however, revealed a far more complicated story. The number of foster child adoptions increased from about 36,000 in 1998 to about 53,000 in 2002,[123] and have remained roughly level since then.[124] Certainly some of this increase resulted from faster terminations and more adoptions by foster parents. But a large proportion of this increase—accounting for about 7,000 of the 17,000 increase—was from more kinship adoptions.[125] And even greater permanency improvements came from a near doubling of foster child guardianships in the same period, and an increase in other discharges from foster care to kinship placement (many of which involve custody or other analogs to guardianship).[126]

Fostering Connections did recognize this growth in guardianships and provided federal funding for kinship guardianship subsidies for states that chose to provide such subsidies. Providing federal funds for the first time rectified a tremendous imbalance in federal funding for various permanency options.

Congress nonetheless left intact adoption's primacy over guardianship. First and foremost, Congress established an explicit

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[119] Pub. L. 105-89, § 302 (codified at 42 U.S.C. § 475(5)(C) (2000)).

[120] Pub. L. 105-89, § 101(b) (codified at 42 U.S.C. § 675(7) (2000)).

[121] Testa, *New Permanency Strategies*, *supra* note 4, at 116.

[122] *Id.* Pub. L. 103-382, §§ 551-555 (codified at 42 U.S.C. § 671(a)(18)).

[123] Testa, *New Permanency Strategies*, *supra* note 4, at 116.

[124] Between fiscal year 2003 and 2012, total numbers of foster child adoptions fluctuated between 49,629 and 57,185. Most recently, in FY 2012, there were 52,039. U.S. DEP'T OF HEALTH AND HUMAN SERVS., ADMIN. FOR CHILDREN AND FAMILIES, ADMIN. ON CHILDREN, YOUTH AND FAMILIES, CHILDREN'S BUREAU, ADOPTIONS OF CHILDREN WITH PUBLIC CHILD WELFARE AGENCY INVOLVEMENT BY STATE FY 2003-FY2012, 3 (2013), *available at* http://www.acf.hhs.gov/sites/default/files/cb/children_adopted.pdf.

[125] Testa, *New Permanency Strategies*, *supra* note 4, at 116.

[126] *Id.*

hierarchy of permanency options with adoption above guardianship. To obtain federal dollars for guardianship subsidies, states had to first rule out adoption as a permanency plan.[127] The federal government had included this rule-out requirement as a condition of waivers granted to several states that had, prior to 2008, used federal funds to support guardianship experiments.[128] Congress did not say how states had to rule out adoption—leaving state agencies with discretion over how to do so. As we will see in Part II.E, many agencies and caseworkers have used that discretion to decline to even present guardianship as an option to kin. Similarly, Congress included no language requiring states to provide comparable guardianship and adoption subsidies—allowing states to continue incentivizing adoptions more than guardianships, as some states have done.[129] Third, Congress renewed and expanded federal financial support for adoption subsidies, without enacting parallel guardianship provisions.[130] Fourth, Congress limited federally supported guardianship subsidies to kinship guardianships, explicitly excluding non-kinship guardianships.[131] These continuing hierarchies reflected the views of some adoption advocates, who endorsed subsidized guardianship only if Congress maintained its subordinate status to adoption.[132]

The titles of the major federal financing statutes illustrate the modest step taken in 2008. The Adoption Assistance and Child Welfare Act of 1980 and the Adoption and Safe Families Act of 1997, as their names suggest, place adoption atop the permanency hierarchy. The full name of the 2008 legislation—the Fostering Connections to Success and Increasing Adoptions Act—slightly deemphasizes adoption, but makes clear that adoption, and not guardianship or broader "permanency" remains federal law's preferred goal.

B. A "Binding" Ideology

A subtle ideological shift in judges' and agencies' understanding of permanency also contributes to adoption's continued primacy. Leading up to ASFA's passage, the federal government convened a work group to issue "Guidelines for Public Policy and State Legislation Governing

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[127] 42 U.S.C. § 673(d)(3)(A)(ii) (2011). Congress also required states to document how they ruled out adoption. *Id.* at § 675(1)(F)(i) (2011).

[128] Mark F. Testa, *Quality of Permanence*, *supra* note 34, at 500–01.

[129] *Infra* note200 and accompanying text.

[130] Pub. L. 110-351, §§ 401-403.

[131] Pub. L. 110-351, § 101(b) (codified at 42 U.S.C. § 673(d)(1)(A) & (d)(3)(A)).

[132] *E.g.*, National Council for Adoption, *Adoption Advocate No. 5: Guardian Adoption While Subsidizing Guardianship* (2008), *available at* https://www.adoptioncouncil.org/publications/2007/09/adoption-advocate-no-5. .

Permanency for Children." The resulting guidelines, issued in 1999, defined permanency as a physical and legal arrangement that gives children a good home in which to grow up, lasting relationships with nurturing caregivers, and "stability and continuity of caregivers" in a home "that is legally secure."[133] The next year, the National Council of Juvenile and Family Court Judges published their own "Adoption and Permanency Guidelines," and made an important change. Stable caregivers and a "legally secure" home were not enough; rather, permanency, according to the Council, requires a "legal relationship that is *binding* on the adults awarded care, custody and control of the child."[134] The Guidelines continue by recommending that judges ask a series of questions before approving a permanency plan of guardianship; these questions differ from those recommended before approving a plan of adoption, and underscore the concern about a less binding legal status. The questions include "What is the plan to ensure that this will be a permanent home for the child?" even though the empirical research reflect that guardianship is just as permanent as adoption.[135]

The emphasis on a *binding* commitment required a preference for adoption, because adoption is more legally binding than guardianship. Adoptions can only be terminated in the same narrow circumstances in which biological parent-child relationships can be terminated, while guardianships are subject to modifications or terminations upon motion by any party. This difference is easily exaggerated. First, guardianship modifications still require proof of some significant changed circumstance and that modifying the guardianships would serve children's best interests.[136] Second, adoption's more legally binding nature has not made it more lasting or permanent in fact, as the guardianship studies discussed in Part I.A establish. Nonetheless, the push for the more binding commitment—regardless of whether there is reason to think this difference affects actual outcomes for children—has defined the debate about the permanency hierarchy for years.[137]

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[133] U.S. DEP'T OF HEALTH AND HUMAN SERVS., ADMIN. FOR CHILDREN AND FAMILIES, ADMIN. ON CHILDREN, YOUTH AND FAMILIES, CHILDREN'S BUREAU, ADOPTION 2002: THE PRESIDENT'S INITIATIVE ON ADOPTION AND FOSTER CARE: GUIDELINES FOR PUBLIC POLICY AND STATE LEGISLATION GOVERNING PERMANENCE FOR CHILDREN I-3 (1999).

[134] NAT'L COUNCIL OF JUVENILE AND FAMILY COURT JUDGES, ADOPTION AND PERMANENCY GUIDELINES: IMPROVING COURT PRACTICE IN CHILD ABUSE AND NEGLECT CASES 14 (2000) (emphasis added).

[135] *Id.* at 21.

[136] *E.g.*, D.C. CODE § 16-2395(d) (2001).

[137] Testa aptly titled one article on the topic "The Quality of Permanence—Lasting or Binding?" Testa, *Quality of Permanence*, *supra* note 34.

The emphasis on legally binding commitments has never been fully justified, especially in light of the strong empirical record establishing that guardianship creates real ties that bind child and caregiver just as long and just as effectively as adoption. The Council's Guidelines offer no clear explanation for the "binding" emphasis. Later documents from the Council repeat the "binding" definition, but without any clear ideology.[138] And it remains controversial, with many legal and mental health commentators defining permanency by children's "feelings of belongingness" in an "enduring relationship" rather than legal status.[139]

The continued insistence on "binding" commitments diminishes the effect of Congress's 2008 decision to make federal funding available for guardianship subsidies. Even with policies that come closer to funding parity for the two permanency options, differences in how binding they are remain, allowing many courts and agencies to continue preferring adoption, and acting accordingly in individual cases.

C. Adoption's Ideological and Cultural Primacy

Adoption's primacy over guardianship is endemic through family court culture. Family courts nationwide celebrate "Adoption Day" every fall.[140] The day is specifically "adoption day"—not "guardianship day" or "permanency day"—underscoring adoption's primacy in public view.[141] Judges and court officials publicly describe the value and importance of adoption, and finalize foster care adoptions in front of a pool of local press

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[138] NAT'L COUNCIL OF JUVENILE AND FAMILY COURT JUDGES, FOREVER FAMILIES: IMPROVING OUTCOMES BY ACHIEVING PERMANENCY FOR LEGAL ORPHANS 18 (2013). This is the most detailed publication from the Council since Fostering Connections. It acknowledges that guardianship might be appropriate for some legal orphans (provided, of course, adoption is ruled out first), and that extended foster care for children whose parent-child relationships have been terminated by the state leads to poor outcomes. *Id.* at 4–5. Yet the publication maintains a grudging attitude towards guardianship, suggesting that it is only appropriate when adoption is ruled out and "if [guardianship] has the characters of legal permanency," including a "binding" nature. *Id.* at 17–18. The Council does not clarify what would make one guardianship binding but another not, or why extended foster care would be better than permanency through guardianship.

[139] Godsoe, *supra* note 79, at 1114 & n.4.

[140] *See* NATIONAL ADOPTION DAY, http://www.nationaladoptionday.org/ (last visited Oct. 25, 2014).

[141] Notably, efforts have begun to balance adoption day with "National Reunification Month," to celebrate the many families separated by foster care who subsequently reunify. *National Reunification Month*, AMERICAN BAR ASS'N, http://www.americanbar.org/groups/child_law/what_we_do/projects/nrd.html. No such efforts have been made, however, to balance adoption day with other forms of permanency.

and politicians.[142] Gauzy media coverage follows.[143] This coverage presents adoption as providing a positive "forever home" for earnest and appealing children, and certainly better than the temporary status of foster care.[144] Biological families—and any remaining connections or visitation rights these children may have with them—are not discussed.[145] The public image of permanency is thus presented simplistically—a good family provides a good home to a good child and, implicitly, a bad family and the bad foster care system is left behind.[146] And it is presented in such a way that excludes the core reason that guardianships and open adoptions have become prominent—the ongoing connections that many foster children have with biological families.

This simplistic image goes deeper than the media, and likely explains why many agencies and caseworkers do not even inform many families about the possibility of guardianship,[147] a phenomenon that helps explain why the 2008 Fostering Connections Act has not led to increases in the number of guardianships nationally.[148] Cynthia Godsoe concludes that many system actors harbor deep-seated biases in favor of simpler "stock stories" about good adoptive families taking the place of bad biological families.[149] Many case workers (not to mention lawyers and judges) continue to see guardianship "as a narrow exception for a select

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[142] *E.g.*, Kathryn Alfisi and Thai Phi Le, *New Families Created at Annual Adoption Day Event*, DISTRICT OF COLUMBIA COURTS, http://www.dccourts.gov/internet/documents/2013-01-01_New-Families-Created-at-Annual-Adoption-Day-Event.pdf (last visited Oct. 25, 2014) (describing the District of Columbia's 2013 Adoption Day, and noting remarks by presiding judges and the mayor).

[143] For a selection of such coverage, *see DC Adoption Day in the News*, DISTRICT OF COLUMBIA COURTS, http://www.dccourts.gov/internet/media/adoptionday/main.jsf (last visited Oct. 25, 2014).

[144] *E.g.*, WNEW, *Adoption Day Celebrated at D.C. Courthouse*, DISTRICT OF COLUMBIA COURTS (Nov. 23, 2013), http://www.dccourts.gov/internet/documents/Adoption-Day-2013-WNEW.pdf; Luz Lazo, *Adoptions Finalized During Annual Adoption Day Celebration in the District*, WASH. POST (Nov. 23, 2013), http://www.dccourts.gov/internet/documents/Adoptions-finalized-during-annual-Adoption-Day-celebration-in-the-District-Post.pdf.

[145] *See* sources cited *supra* note 144.

[146] *See* Sacha Coupet, *Swimming Upstream Against the Great Adoption Tide: Making the Case for "Impermanence,"* 34 CAP. U. L. REV. 405, 410 (2005) ("[C]hild welfare policy . . . continues to laud adoption as the singularly ideal 'happy ending' in the sad tale of foster care."); Marsha Garrison, *Parents' Rights vs. Children's Interest: The Case of the Foster Child*, 22 N.Y.U. REV. L. & SOC. CHANGE 371, 386–87 (1996) (describing adoption's emotional appeal).

[147] *Infra* Part II.B.

[148] *Supra* notes98-101 and accompanying text.

[149] Cynthia Godsoe, *Parsing Parenthood*, 17 LEWIS & CLARK L. REV. 113, 146–48 (2012), http://law.lclark.edu/live/files/13717-lcb171art3godsoepdf.

group of families who do not fit into the preferred categories of biological or adoptive families."[150] The strength of this stock story leads many to disbelieve the data establishing that guardianship is just as good for children as adoption.[151]

This stock story's continued hierarchy of adoption over guardianship is reinforced in multiple ways throughout the child welfare profession. Federal agencies charged with reporting national child welfare statistics emphasize adoptions over guardianship. The federal Children's Bureau—a sub-division of the Department of Health and Human Services—publishes detailed annual data on the number of adoptions of foster children and the number of children waiting to be adopted, including their numbers, their types of placements, their race, their age, and their length in care.[152] The Children's Bureau also reports the total number of guardianships of foster children,[153] but provides nowhere close to the statistical detail provided for adoptions. Other federal data reports display decade-long trends of the number of children who entered foster care, exited foster care, were subject to termination of parental rights orders, and were adopted—omitting guardianships or any other permanency outcome besides adoption.[154] These data gaps partly result from congressional directives to report "comprehensive national information" regarding foster care and adoption, but not guardianship[155] (something Fostering Connections did nothing to change). Still, the Children's Bureau has not used its regulatory authority to require states to provide additional data, and has only issued regulations to require detailed adoption-related data.[156]

Law schools also reinforce adoption's primacy and guardianship's subordination. As awkward as the existing law is—in which guardianship exists as a less preferred option to adoption—law school casebooks suggest an even worse reality in which guardianship is not permanency or, worse yet, does not even exist. One leading casebook (updated in 2014, six years after Fostering Connections) makes clear that permanency

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[150] *Id.* at 146.
[151] *Id.* at 147.
[152] AFCARS 2012, *supra* note 72, at 4–6.
[153] *Id.* at 3.
[154] TRENDS IN FOSTER CARE AND ADOPTION, *supra* note 30.
[155] 42 U.S.C. § 679(c)(3).
[156] 45 C.F.R. § Pt. 1355, App. B, Adoption Data Elements. No similar regulations exist for guardianship. The statute provides that "Each State shall submit statistical reports as the Secretary may require," thus authorizing the Children's Bureau to require far more data than currently collected. 42 U.S.C. § 676(b).

planning and termination of parental rights are linked,[157] but does not discuss guardianship in reference to permanency planning. Rather, the casebook discusses guardianship as a "type[] of *placement*" within foster care—misleadingly suggesting that guardianship is not a form of permanency or of leaving foster care.[158] It also suggests that guardianship is for kinship placements only, despite its availability for non-kin.[159] This casebook compares favorably to other casebooks; one discusses permanency planning, terminations of parental rights, and adoptions, without reference to guardianship.[160] Yet another devotes long chapters to terminations and adoptions, without a single reference to guardianship.[161] While emphasizing termination of parental rights cases may be understandable, excluding guardianship presents a misleading view of the law.

D. Procedural Differences Reinforce the Hierarchy

As a corollary to adoption's present place at the top of the permanency hierarchy, adoption triggers the most stringent procedural protections afforded in child welfare. Terminations of parental rights—a prerequisite to an adoption—must be proven by clear and convincing evidence.[162] The U.S. Supreme Court has described terminations and adoptions as "a unique kind of deprivation"[163] because they are so permanent, and the importance of parental rights so great.[164] States typically have detailed termination and adoption statutory schemes to

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[157] DOUGLAS E. ABRAMS, ET AL., CHILDREN AND THE LAW: DOCTRINE, POLICY, AND PRACTICE 455 (5th ed. 2014).

[158] *Id.* at 522–31. Chapter 5, Section 6 discusses "Types of Placements," including foster care placements of foster parents, institutional care, and independent living, alongside guardianship.

[159] The casebook introduces guardianship as appealing to a "kinship foster parent" and that for such children for whom adoption is not feasible, the best option may be guardianship "by a relative." *Id.* at 522. No mention is made of non-kinship guardianship.

[160] LESLIE J. HARRIS, ET AL., CHILDREN, PARENTS, AND THE LAW: PUBLIC AND PRIVATE AUTHORITY IN THE HOME, SCHOOLS, AND JUVENILE COURTS 688–728 (3d ed. 2012).

[161] SAMUEL M. DAVIS, ET AL., CHILDREN IN THE LEGAL SYSTEM: CASES AND MATERIALS (4th ed. 2009). This casebook devotes a full chapter to terminations, *id.* at 742–89, and to adoptions, *id.* at 790–848, and notes that foster parents sometimes seek an adoptive placement preference. *Id.* at 734. But the casebook contains nary a mention of guardianship; the term does not even appear in the index. *Id.* at 1231.

[162] Santosky v. Kramer, 455 U.S. 745 (1982).

[163] Lassiter v. Dep't of Soc. Servs., 452 U.S. 18, 27 (1981).

[164] *Santosky*, 455 U.S. at 758-59.

require proof of ongoing parental unfitness that is unlikely to be remedied, and that the termination is in the child's best interests.[165]

In contrast, guardianships do not trigger as many procedural protections, which courts have justified by emphasizing their allegedly temporary nature. States vary in the substance of what must be proven, with many establishing less rigorous standards than exist for terminations and adoptions.[166] Many states have set a lower standard of proof in guardianship cases, requiring only proof by a preponderance of the evidence.[167] Courts have approved this lower standard of proof on the theory that guardianship "terminat[es] only some of a parent's rights to his or her child," and, unlike terminations, can be modified at a later time.[168] Tellingly, one court asserted that the statute creating "permanent guardianship" contained a "lack of permanency"—that is, the allegedly temporary nature of guardianship as compared with termination of parental rights and adoption justified fewer procedural protections.[169]

These reduced procedural protections can make guardianship appear attractive. Guardianship promises a "simpler" judicial process,[170] or a way to achieve permanency if the state cannot meet its burden to terminate.[171] These attractions, however, are difficult to justify in light of data showing that guardianships are just as permanent as adoptions; that similarity calls for similar protections.[172] Moreover, the lower procedural protections underscore guardianship's continued subordination, and may do more to discourage agencies from pursuing guardianships and courts from approving permanency plans of guardianship.

Finally, guardianship cases are often not even heard in family courts. Many states use guardianship provisions of their probate code to adjudicate foster care guardianship cases, thus excluding guardianships from some unified family courts, and providing a far less detailed statutory structure than exists for terminations.[173] This procedural issue can create

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[165] *E.g.*, MO. REV. STAT. § 211.447.5&.7 (West 2014).

[166] *See* Katz, *supra* note 41, at 1098–1102 (surveying state statutes and finding only four guardianship statutes that equate guardianship standards with termination standards).

[167] *E.g.*, L.L. v. Colorado, 10 P.3d 1271 (Colo. en banc 2000); D.C. CODE § 16-2388(f) (2001); WASH. REV. CODE. § 13.36.040(b) (2010). Other states have set higher standards of proof. *E.g.*, W. VA. CODE § 44-10-3(f) (2013). *See* Katz, *supra* note 41, at 1097–98 (collecting state statutes).

[168] *In re* A.G., 900 A.2d 677, 680–82 (2006).

[169] *Id.* at 681.

[170] Testa & Miller, *supra* note 14, at 415.

[171] *Supra* note 66 and accompanying text.

[172] *Infra* Part IV.B.

[173] Hardin, *supra* note 4, at 182–83. For example, Missouri guardianship cases are

real-life obstacles to using guardianships, displaying terminations and adoptions—which typically fall in the family court's jurisdiction—as the paths of less jurisdictional resistance.[174] At the very least, using a statute designed for a different purpose—assigning guardianship of orphans—and assigning cases to the probate court communicates guardianship's continued lesser status.

E. Child Welfare Agencies Hold Tremendous Authority at Key Junctures, with Only Weak Court Oversight

Child welfare agencies and their individual case workers hold tremendous discretion to shape the key permanency decisions. Despite complex judicial procedures, including regular permanency hearings, two core decisions are effectively granted to agencies in the first instance. Agencies determine where the child lives—and, especially, whether the child should live with kin or not—and in many jurisdictions they determine whether options other than adoption are even presented to families.

1. *Child Welfare Agency Power over Whether to Make a Kinship Foster Home Placement*

The available methods for placing foster children with kin focus authority on child welfare agencies. When family members seek to be a placement, child welfare law gives agencies discretion to determine whether to issue a foster care license—and, often, whether to waive licensing standards that require a minimum amount of square footage in a home or disfavor certain past criminal convictions. The federal

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handled through its probate code, MO. REV. STAT. § 475.030 (West 2012), not its juvenile code. MO. REV. STAT. § 211.011 *et seq.* (West 2012). Family court jurisdiction does not include probate actions. MO. REV. STAT. § 487.080 (West 2012). In such states, guardianship cases must be heard in the probate court, or at least referred from the probate court for consolidation with a family court case—a process which takes time and unnecessarily delays permanency. Other states assign guardianship cases to family courts, but direct those courts to apply probate court procedures. New York is an example. N.Y. FAM. CT. ACT. § 661(c) & (a) (McKinney 2011). Probate court standards are less rigorous than termination of parental rights statutes. *Compare* N.Y. SURR. CT. PROC. ACT §§ 1706-1707 (McKinney 2011) *and* N.Y. FAM. CT. ACT §§ 614, 622, 623 & 625 (McKinney 2011). Exceptions to this statement apply in states with statutes specifically governing guardianship of foster children. *E.g.*, D.C. CODE § 16-2381 *et seq.* (2001); N.J. STAT. ANN. 3b:12a-1 *et seq.* (2002). Probate code provisions tend to be far sparser in terms of the substantive findings required and procedures to be followed. *Compare, e.g.*, MO. REV. STAT. § 475.030 (West 2012) *and* § 211.447 (West 2012).

[174] Hardin, *supra* note 4, at 183.

government has summarized state statutes as generally providing some form of preference for kinship placements, but focusing such preferences on agencies rather than courts. Agencies are required to determine that prospective kinship caregivers are "fit and willing," granting agencies significant discretion in determining whether to place children with kin.[175] And agencies retain the authority to determine where a child is placed; federal funding law requires that the state agency, and not the court, have "placement and care . . . responsibility,"[176] and federal regulations even ban federal reimbursements "when a court orders a placement with a specific foster care provider."[177] Agency guidance has suggested some flexibility in applying this regulation,[178] but the statute and regulation are worded clearly enough to send a strong caution to courts seeking to order a specific kinship placement over an agency objection.

The weakness of laws regarding kinship foster care is evident in comparing federal child welfare law with the Indian Child Welfare Act (ICWA), which governs child welfare cases involving Indian children. ICWA creates a preference absent "good cause to the contrary" for foster care, pre-adoptive, and adoptive placements with any member of the child's extended family.[179] None of the various kinship placement

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[175] U.S. DEP'T OF HEALTH AND HUMAN SERVS., ADMIN. FOR CHILDREN YOUTH AND FAMILIES, ADMIN. FOR CHILDREN AND FAMILIES, CHILDREN'S BUREAU, PLACEMENT OF CHILDREN WITH RELATIVES 2-3 (2013) [hereinafter PLACEMENT OF CHILDREN WITH RELATIVES], *available at* https://www.childwelfare.gov/systemwide/laws_policies/statutes/placement.cfm (last visited May 27, 2014).

[176] 42 U.S.C. § 672(a)(2)(B) (2010).

[177] 45 C.F.R. § 1356.21(g)(3) (2012).

[178] The federal government has suggested that so long as a court "hears the relevant testimony and works with all parties, including the agency with placement and care responsibility, to make appropriate placement decisions, we will not disallow the payments." U.S. DEP'T OF HEALTH AND HUMAN SERVS., ADMIN. FOR CHILDREN, YOUTH AND FAMILIES, ADMIN. ON CHILDREN AND FAMILIES, CHILDREN'S BUREAU, CHILD WELFARE POLICY MANUAL, § 8.3A.12 (June 23, 2003), *available at* http://www.acf.hhs.gov/cwpm/programs/cb/laws_policies/laws/cwpm/policy_dsp.jsp?citID=31. It is not clear what it means for a court ordering a placement over an agency's objection to "work[] with" that agency. Nor is it clear how this policy guidance can trump the plain language of the regulation.

[179] 25 U.S.C. §§ 1915(a) (adoptive placement preference) & 1915(b)(i) (foster and preadoptive placement preference). ICWA also includes a preference for a non-kinship Indian foster home over a non-kinship non-Indian foster home. 25 U.S.C. § 1915(b)(ii)-(iii). My focus is only on the kinship placement preference, and not on those broader tribal preferences. ICWA, enacted in 1978, Pub. L. 95-608, (Nov. 8, 1978), does not include language regarding guardianship, but applying a preference for kinship guardianship would be consistent with its other kinship preference provisions. At least one state requires that a *judge* (not an agency) place a child with kin unless the judge

provisions applicable in non-ICWA cases creates such a clear legal preference for kinship placements. At most, federal financing law requires states to "consider" giving priority to kinship placements.[180] Rather than require anything more than consideration, child welfare law instead concentrates power in child welfare agencies that have discretion to make a kinship placement if they so choose, but no obligation to use that discretion or justify a decision to not do so.

As a result, significant variation exists when it comes to licensing kinship foster homes and placing children in such homes.[181] Even six years after Congress granted states greater flexibility to license kinship foster homes, state agencies have reported unfamiliarity with their authority.[182] Even among states that understand their flexibility apply it quite differently—some states might waive certain licensing requirements that others would not. The federal government reported that in 2009, 15 states prohibited licensing waivers entirely and 11 states lacked "the infrastructure" to report accurate numbers of licensing waivers—suggesting the absence of consistently applied policies in those states. Of the remaining states, the number of waivers granted over a year varied from 1 to 274.[183]

In addition to these policy variations, significant differences exist in the actual number of children that agencies place with kin in each state. In 2009, for instance, the percentage of foster children who states place with kin varied from a low of 2 percent in Alabama to 46 percent in Hawaii.[184] Many states also choose to place children with kin but without granting the kin a foster care license.[185] The percentage of foster children placed in such unlicensed homes ranged from 0 in several states to 33 percent in Iowa.[186] The decision in many states to use unlicensed kinship

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finds such a placement contrary to the child's welfare. LA. CHILD CODE ANN. art. 683(B). That statute is the exception that proves the rule for reasons discussed throughout this subsection.

[180] 42 U.S.C. § 671(a)(19) (2010).

[181] The variation between states is a starting point of social science research into kinship care. *E.g.*, WINOKUR, ET AL., *supra* note 88, at 339 ("[A] great disparity still exists in state policies and practices regarding the assessment, selection, certification, and monitoring of kin caregivers.").

[182] *Making It Work*, *supra* note 11, at 19. *See also* Koh, *supra* note 88, at 195–96.

[183] CHILDREN'S BUREAU, REPORT TO CONGRESS, *supra* note 80, at 5.

[184] *Id.* at 6–7.

[185] PLACEMENT OF CHILDREN WITH RELATIVES, *supra* note 174, at 3.

[186] *Id.* Several states did not report the number children in kinship placements as a percentage of total placements, and instead reported "the percentages of children in licensed and unlicensed relative care as a proportion of children in relative care only." *Id.* at 6 n.2. Significant variation exists among these states as well—the ratio of licensed to

care limits permanency options. If children are to be eligible for federally reimbursed guardianship subsidies, Fostering Connections requires them to live in homes receiving foster care maintenance payments,[187] which in turn requires placement in a licensed "foster family home."[188] States that elect to place children in unlicensed kinship homes, thus, effectively choose to exclude those families from the benefits offered by Fostering Connections.

Courts generally lack authority to order an agency to issue a foster care license; issuing a license is an administrative decision, and federal law requires state agencies, not courts, have "placement . . . responsibility."[189] Family courts do have authority to determine if agencies make "reasonable efforts" to achieve the permanency plan that a court has set,[190] and federal funding depends on positive court findings.[191] But there are no court findings regarding the reasonableness of efforts to identify and place a child with kin, or regarding the reasonableness of an agency decision to not place a child with kin. Agencies may unreasonably fail to place a child with kin upon removal and then, at a permanency hearing one year later, rely on bonds formed with the non-kinship foster family to argue that the child's permanency plan should be adoption with that family, rather than permanency with the kin. Courts lack power to directly check agencies' placement errors. Some courts can order specific placements in an unlicensed kinship home, but use such power sparingly.[192] Without a foster care license, such placements will not be eligible for federally supported subsidies.

The placement decision is of immense importance. Decisions early in the case—such as whether to place a child with kinship caregivers or with strangers immediately upon removal—can shape later permanency outcomes.[193] Agencies and judges will typically apply a preference for

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unlicensed kinship care ranged from a high of 87:13 in Idaho to 4:96 in Florida.

[187] 42 U.S.C. § 673(d)(3)(A)(i)(II) (2011).

[188] 42 U.S.C. § 672(a)(2)(C) (2010). The federal statute defines "foster family home" as a licensed foster home. 42 U.S.C. § 672(c) (2010).

[189] 42 U.S.C. § 672(a)(2)(B) (2010).

[190] 42 U.S.C. § 671(a)(15)(B)-(C) (2010).

[191] 45 C.F.R. § 1356.21(b) (2012).

[192] *E.g.*, D.C. CODE § 16-2320(a)(3)(C) (2001). The District's foster care agency reports very few children placed through this statute—only 2 of 809 children who entered foster care in FY 2010, the last year in which the agency reported this data. 2010 D.C. GOV'T CHILD AND FAMILY SERVS. AGENCY ANN. PUB. REP. at 23 (2011) [hereinafter . CFSA, 2010 ANNUAL REPORT].

[193] Hardin, *supra* note 4, at 156.

permanency with whomever the child has been living throughout foster care.[194] Even most non-kinship adoptive parents began as foster parents; less than one-quarter of non-kinship adoptive parents were recruited to adopt without having first served as a foster parent.[195] The key decisions in many cases are to place particular children in particular foster homes rather than in others (or rather than in kinship homes); whoever the foster parent is will be the most likely candidate for permanency if reunification fails.

An agency decision to deny a potential kinship placement could also undermine permanency later, especially when no other adult is willing to become an adoptive parent or guardian for the child.[196] Knowing that kinship placements are significantly more stable than other placements,[197] the child will be at relatively high risk of placement disruptions, and, thus, may not be a strong candidate for a permanent caregiver if that becomes necessary. And the agency will have already rejected a kinship candidate. The agency will then be faced with a particularly difficult task—recruiting a permanent caregiver for a foster child who may bear the scars both of underlying maltreatment and of an unstable time in foster care. This task, while possible to achieve, is far harder than achieving permanency for a child placed appropriately in the first instance.

2. *Child Welfare Agency Discretion over Whether to Offer Guardianship*

Once it is time to discuss permanency options with a foster parent (kinship or not), agencies and caseworkers then have discretion to push families towards one permanency option over another, typically adoption over guardianship, and even to conceal the availability of guardianship from some families. Here too, significant variation exists from one agency to another and even from one caseworker to another—with the result that children and caregivers lack uniform access to guardianship as a

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[194] When reunification is not possible, the National Council of Juvenile and Family Court Judges has adopted a preference for "adoption by the relative or foster family with whom the child is living." NAT'L COUNCIL OF JUVENILE AND FAMILY COURT JUDGES, ADOPTION AND PERMANENCY GUIDELINES: IMPROVING COURT PRACTICE IN CHILD ABUSE AND NEGLECT CASES 14 (2000).

[195] U.S. DEP'T OF HEALTH AND HUMAN SERVS., CHILDREN ADOPTED FROM FOSTER CARE: CHILD AND FAMILY CHARACTERISTICS, ADOPTION MOTIVATION, AND WELL-BEING 6–7 (2011), http://aspe.hhs.gov/hsp/09/nsap/Brief1/rb.pdf.

[196] *Making It Work*, *supra* note 11, at 13.

[197] *Supra* note 88 and accompanying text.

permanency option. This was true before Fostering Connections,[198] and remains true today. States differ in how difficult they make it to rule out adoption before considering guardianship, whether children of all ages are eligible for guardianship, and whether foster parents are eligible for guardianship subsidies.[199] States differ in the subsidies offered to guardians; some offer the same subsidies to adoptive parents and to guardians while others offer significantly more to adoptive parents, creating a financial incentive for foster parents to choose adoption over guardianship.[200]

When child protection agencies have the authority to determine whether to offer and implement certain permanency options, the assignment of caseworkers to particular families—and their individual beliefs about permanency—can be outcome determinative. Individual case worker opinions vary significantly, and many states report that case workers can even determine whether to make a foster family aware of the full continuum of permanency options.[201] When state agencies train staff, they communicat their ideological views towards adoption and guardianship.[202]

The bottom line, according to the federal government, is that "[r]egardless of a State's official policy, caseworkers exercise a fair amount of control over the rule-out process," specifically whether to tell foster families about guardianship and whether and how to involve them in ruling out adoption.[203] Surveys of caseworkers in jurisdictions offering subsidized guardianship found that 30 to 56 percent of caseworkers disagree with the statement "guardianship is just as permanent as adoption."[204] Caseworkers choose not to even inform 267 of the 1197 eligible families that subsidized guardianship was an option, effectively pushing the families toward adoption.[205] Surveys of some relative caregivers reflect that many were not informed by their caseworker that financial subsidies were even available with guardianship.[206] Many others said that they were not involved in permanency discussions with their

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[198] Patten, *supra* note 20, at 260.
[199] *Making It Work*, *supra* note 11, at 13–15; *Synthesis of Findings*, *supra* note 25, at 4, 21–22.
[200] Godsoe, *supra* note 148, at 145.
[201] *Synthesis of Findings*, *supra* note 25, at 22–23.
[202] *Id.* at 28.
[203] *Id.*
[204] Testa, *Evaluation of Interventions*, *supra* note 24, at 204.
[205] *Id.* at 213.
[206] *Making It Work*, *supra* note 11, at 14.

caseworker at all.[207] Unsurprisingly, an agency's or caseworker's decision to tell caregivers that guardianship was an option had a significant impact on whether those caregivers sought guardianship or adoption. For instance, nearly three times as many Tennessee caregivers who were not informed about guardianship sought adoption than those who did.[208]

Even when caseworkers describe both adoption and guardianship to foster parents, that does not mean that caseworkers explain the options fully, without pressure (subtle or otherwise) to choose adoption over guardianship. Eliza Patten tells of one case in which a foster parent knew that both adoption and guardianship would let her raise her foster child until majority, but could not explain any differences between the two.[209] Patten suggests that the caseworker did not help the foster parent understand that adoption required termination of the parent-child relationship while guardianship did not, or that guardianship would guarantee a right to parent-child contact, while adoption would only do so with a post-adoption contact agreement.[210] It is not hard to imagine how caseworkers could inform foster parents of all permanency options while still steering them to the agency-preferred option. In addition, such caseworker counseling could breeze over differences between adoption with and without a post-adoption contract agreement, or push a family to accept whichever option the agency preferred or thought would lead to the speediest resolution, rather than what the family thinks truly best. The complexity of the options suggests the need for counseling by someone familiar with the legal options and legal procedures for obtaining those options, and who can talk confidentially with the foster parent about which option best suits their goals. In other words, it requires counseling by a lawyer for the foster parent, not a state actor.[211]

3. *Children and Families Should Have a Greater Say*

The above analysis suggests that in many cases, child welfare agencies effectively determine what permanency arrangement best serves children's needs. That reality is problematic. Absent data showing different outcomes based on legal status, the law should defer to the

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[207] *Synthesis of Findings*, *supra* note 25, at 22.
[208] *Id.* at 21.
[209] Patten, *supra* note 20, at 272. Patten wrote in 2004, before Fostering Connections. Nothing in that law or anywhere else suggests that this scenario does not repeat itself today.
[210] *Id.*
[211] *Infra* Part IV.F.

preferences of the individuals whose family relationships are at issue.[212] Indeed, the trend in family law more generally is to respect the autonomy of individuals to order their family relationships. The law now respects and enforces pre-nuptial (and even post-nuptial) agreements. Many states enforce surrogacy agreements. The Supreme Court has cast doubt on laws that seek to enforce a particular vision of a proper family life in favor of family arrangements that develop for sociological reasons,[213] and has more broadly cautioned "against attempts by the State, or a court, to define the meaning of the relationship or set its boundaries absent injury to a person or abuse of an institution the law protects."[214] Over time, "family law follows family life," at least among those families engaged in private family law cases.[215]

Perpetuating government agency control over which permanency option should apply perpetuates the unfortunate divide between "middle class family law" and poor people's family law.[216] Middle and upper class families benefit from the trends permitting them to define their own legal arrangements, with minimal interference from the state. Families with children in foster care are overwhelmingly poor.[217] The foster families who take care of foster children (especially kinship families) have low enough income that the government provides foster care subsidies to enable them to take care of the children, and adoption and guardianship subsidies to incentivize permanency.

When determining whether adoption or guardianship is most appropriate, families—including the child's caregiver, the child's parents, and (as is age appropriate) the child—deserve the same respect to choose the arrangement that best suits their needs as middle class families have. If we are going to trust someone to raise a child in state custody through

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[212] *See* Testa, *Quality of Permanence*, *supra* note 34, 531 (concluding "that the preferences of children and kin" should shape decisions between adoption and guardianship).

[213] Moore v. City of East Cleveland, 431 U.S. 494, 504-06; *id.* at 507-10 (Brennan, J., concurring) (1977).

[214] Lawrence v. Texas, 539 U.S. 558, 567 (2003).

[215] JOANNA L. GROSSMAN & LAWRENCE M. FRIEDMAN, INSIDE THE CASTLE: LAW AND THE FAMILY IN 20TH CENTURY AMERICA 2 (2011).

[216] *Id.* at 2 (distinguishing "middle-class family law" from poor people's family law); Jill Hasday, *Parenthood Divided: A Legal History of the Bifurcated Law of Parental Relations*, 90 GEO. L.J. 299 (2002).

[217] Children from impoverished families endure significantly more abuse and neglect than their richer counterparts. U.S. DEP'T OF HEALTH & HUMANS SERVS., ADMIN. FOR CHILDREN & FAMILIES, OFFICE OF PLANNING, RES., AND EVALUATION, FOURTH NATIONAL INCIDENCE STUDY OF CHILD ABUSE AND NEGLECT (NIS-4) REPORT TO CONGRESS 5-11–5-12 (2010).

adulthood and make all the decisions inherent in raising a child, surely we should trust that person enough to at least have a strong voice regarding what legal status would be best for the child. Concentrating authority in child protection agencies undermine this principle.

III. District of Columbia: A Case Study Illustrating the New Permanency

Adoption does not need to continue subordinating guardianship. Full implementation of the new permanency would likely lead to significantly different permanency outcomes, with fewer children growing up in foster care, more guardianships, and likely fewer adoptions. These results should be embraced because they would lead to more children leaving foster care to permanent homes, and provide more flexible options to best reflect each child's situation, and in particular, their ongoing relationship (if one exists) with biological parents and other family members. The empirical record should silence any concerns that expanded guardianship would somehow lead to less safe or less lasting options. Yet, as discussed in Part II, the national child welfare system still has not fully implemented the new permanency, and Congress's significant step towards the new permanency in 2008 seems to have no discernible effect across the country.

The District of Columbia provides a counter-example to that national trend, and illustrates how permanency might look if other jurisdictions fully embraced the new permanency. The District offers a wide range of permanency options, including subsidized kinship and (since 2010) non-kinship guardianship and post-adoption contact agreements. The District has a long-standing administrative structure to facilitate kinship placements, and the vast majority of its kinship placements are in licensed foster homes. Moreover, the District's legal services structure can help ensure that most (if not all) families are familiar with all permanency options and can be counseled regarding the best option for them, and that some advocacy exists for kinship placements. The District has a well-established office to provide guardian *ad litem* representation for children,[218] parents' attorneys who must apply

[218] The Children's Law Center provides guardian *ad litem* representation for 500 children annually. *Michael Fitzpatrick: Director, Guardian Ad Litem Program*, CHILDREN'S LAW CENTER, http://www.childrenslawcenter.org/profile/michael-fitzpatrick (last visited Oct. 25, 2014). In full disclosure, the author worked at the Children's Law Center from 2005-2011. Attorneys who have been approved by the court to work in child welfare cases provide the remainder of guardian *ad litem* representation. District of Columbia Courts: *CCAN Practitioner*, http://www.dccourts.gov/internet/legal/ccan.jsf.

to and be approved by the court to work in child welfare cases,[219] and a wide set of pro bono attorneys to represent prospective guardians or adoptive parents.[220] In addition, the District has an active foster parent advocacy organization.[221]

Permanency outcomes in the District reflect what research into guardianship would predict, but which has not happened nationally since Fostering Connections. In the District, there has been a steady decline in the importance of termination of parental rights proceedings, and a steady increase in the use of guardianships—which now exceed adoption as the most frequent permanency option when children cannot reunify with their parents.[222] Given a range of options, a majority of families now choose something other than a termination and adoption. And the District's data suggests that overall permanency outcomes have improved, although these statistics are less definitive.

The District's experience also reveals the need for further reforms to better make decisions among various permanency providers and legal statuses. Despite a variety of permanency options that appear to both help more foster children leave foster care to permanent families and to do so via the legal arrangement that best suits their families' needs, the absence of clear legal mechanisms to decide kinship placement disputes, and the absence of adequate permanency hearing procedures to determine what permanency goal best serves children's interests has led to a series of cases presenting difficult and unnecessary disputes. In these cases, biological families assert that a prospective kinship caregiver was wrongly denied placement early in a case, but those families only challenge the denial when appealing an adoption by a non-kin foster parent years after the crucial placement decision.

A. District of Columbia Permanency Options and Outcomes

When a foster child cannot reunify with a parent, the District offers a range of permanency options, including all options discussed in this article except for non-exclusive adoption. District law, like the law of all

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[219] *Id.*

[220] The Children's Law Center: Pro Bono Attorney FAQs, http://www.childrenslawcenter.org/content/pro-bono-attorney-faqs#Types_of_cases.

[221] FOSTER AND ADOPTIVE PARENT ADVOCACY CENTER, http://www.dcfapac.org (last visited Oct. 25, 2014).

[222] I do not suggest that any particular ratio between guardianships or adoptions should occur nationally, or even that one should be more prevalent than the other. Rather, I suggest that legal changes providing for a continuum of options should lead to a greater reliance on the newer options available.

other states provides for adoption.[223] The District has also, since 2010, permitted adoptive parents and biological parents and family members to enter into court-enforceable post-adoption contact agreements.[224] District law also permits foster parents to seek subsidized guardianships of foster children.[225] Such subsidies were limited to kin until 2010, when the D.C. Council made both kin and non-kin eligible for subsidies.[226]

Since the D.C. Council expanded subsidized guardianship to include both kin and non-kin, guardianship has become the more frequently chosen permanency option, as revealed in both administrative and judicial statistics.[227]

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[223] D.C. CODE § 16-301 *et seq.* (2001). As is the national norm, District provides that an adoption extinguishes all legal relationships between a foster child and his or her biological family, and creates new relationships through the adoptive parents. D.C. CODE § 16-312 (2001).

[224] Adoption Reform Amendment Act of 2010, D.C. Law 18-230 (codified at D.C. CODE § 4-361 (2001)). In full disclosure, as an attorney at the D.C. Children's Law Center at the time, I helped draft portions of this legislation and advocated for its passage.

[225] D.C. CODE § 16-2381 *et seq.* (2001).

[226] D.C. CODE § 16-2399 (2001) provides for guardianship subsidies. D.C. Law 18-230, § 502(b) (2010) (repealing D.C. CODE § 16-2399(b)(3)).

[227] Somewhat disturbingly, the District's child welfare agency and family court report different numbers of both guardianships and adoptions. Nonetheless, the overall numbers and trends are sufficiently similar that both data sets support this section's discussion.

Table 1: Adoptions, guardianships, and permanency plans of adoption or guardianship, per District of Columbia administrative data, FY 2006–FY 2013

Year	Guardian-ships	Adoptions	Guardianship-Adoption ratio
2013[228]	151	105	1.44
2012[229]	111	112	0.99
2011[230]	129	105	1.23
2010[231]	73	130	0.56
2009[232]	88	108	0.81
2008[233]	108	119	0.91
2007[234]	143	160	0.89
2006[235]	184	186	0.99

Table 1: Adoptions, guardianships, and permanency plans of adoption or guardianship, per District of Columbia administrative data, FY 2006–FY 2013 (continued)

Year	Permanency plans of guardianship	Permanency plans of adoption	Guardianship-Adoption plans ratio
2013	395	290	1.36
2012	401	324	1.24
2011	378	361	1.44
2010	336	415	0.81
2009	284	491	0.57
2008	256	507	0.50
2007	288	519	0.55
2006	349	565	0.62

[228] CFSA, 2013 ANNUAL REPORT, *supra* note 50, at 17, 23.

[229] 2012 D.C. GOV'T CHILD AND FAMILY SERVS. AGENCY ANN. PUB. REP. at 27, 30, 33 (2013), [hereinafter CFSA, 2012 ANNUAL REPORT].

[230] 2011 D.C. GOV'T CHILD AND FAMILY SERVS. AGENCY ANN. PUB. REP. at 20, 26 (2012) [hereinafter CFSA, 2011 ANNUAL REPORT].

[231] CFSA, 2010 ANNUAL REPORT, *supra* note 191, at 21, 27.

[232] 2009 D.C. GOV'T CHILD AND FAMILY SERVS. AGENCY ANN. PUB. REP. at 29, 35 (2010).

[233] 2008 D.C. GOV'T CHILD AND FAMILY SERVS. AGENCY ANN. PUB. REP. at 26, 34 (2009).

[234] 2007 D.C. GOV'T CHILD AND FAMILY SERVS. AGENCY ANN. PUB. REP. at 17, 23 (2008).

[235] 2006 D.C. GOV'T CHILD AND FAMILY SERVS. AGENCY ANN. PUB. REP. at 15, 21 (2007).

Judicial statistics report an even more pronounced increase in guardianship cases—from 14 percent of all cases closed in 2009 to 28 percent in 2013[236]—and a simultaneous increase in the ratio of guardianship permanency plans to adoption permanency plans.

Table 2: Adoptions and guardianship per District of Columbia judicial data, FY 2004-2013

Year	Cases closed to guardianship	Cases closed to adoption	Guardian-ship to Adoption ratio	Guardian-ship to Adoption plans ratio[237]
2013[238]	135	82	1.65	1.25
2012[239]	160	122	1.31	1.45
2011[240]	158	110	1.43	1.17
2010[241]	108	112	0.096	1.00
2009[242]	93	128	0.72	0.71
2008[243]	93	95	0.97	0.55
2007[244]	110	135	0.81	0.57
2006[245]	192	197	0.97	0.57
2005[246]	210	279	0.75	0.48
2004[247]	292	421	0.69	0.65

[236] 2013 D.C. SUPER. CT. FAMILY COURT ANN. REP. 58–59 (2014) [hereinafter DC FAMILY COURT 2013 REPORT]. The Court reports 617 cases that closed after an initial disposition, 78 percent of which—481 cases—closed via some form of permanency (and not to the child emancipating from foster care). *Id.* at 58. Of those cases, 28 percent—135 cases—closed to guardianship and 17 percent—82 cases—closed to adoption. *Id.* at 59.

[237] The court's annual reports list the permanency plans as a percentage of the plans in all open cases. They do not list the absolute numbers of cases with each permanency plan. *E.g.*, *id.* at 54. I thus list only the ratios, calculated by dividing the percentage of cases with guardianship plans by the percentage of cases with adoption plans. Raw numbers are found at *id.* at 54, 2012 D.C. SUPER. CT. FAMILY COURT ANN. REP. 48 (2013); 2011 D.C. SUPER. CT. FAMILY COURT ANN. REP. 51 (2012); 2010 D.C. SUPER. CT. FAMILY COURT ANN. REP. 57 (2011); 2009 D.C. SUPER. CT. FAMILY COURT ANN. REP. 49 (2010); 2008 D.C. SUPER. CT. FAMILY COURT ANN. REP. 56 (2009); 2007 D.C. SUPER. CT. FAMILY COURT ANN. REP. 50 (2008); 2006 D.C. SUPER. CT. FAMILY COURT ANN. REP. 46 (2007); 2005 D.C. SUPER. CT. FAMILY COURT ANN. REP. 50 (2006); 2004 D.C. SUPER. CT. FAMILY COURT ANN. REP. 40 (2005).

[238] DC Family Court 2013 Report, *supra* note 236, at 58–59.

[239] 2012 D.C. SUPER. CT. FAMILY COURT ANN. REP. 55 (2013).

[240] *Id.*

[241] *Id.*

[242] 2009 D.C. SUPER. CT. FAMILY COURT ANN. REP. 57 (2010).

[243] *Id.*

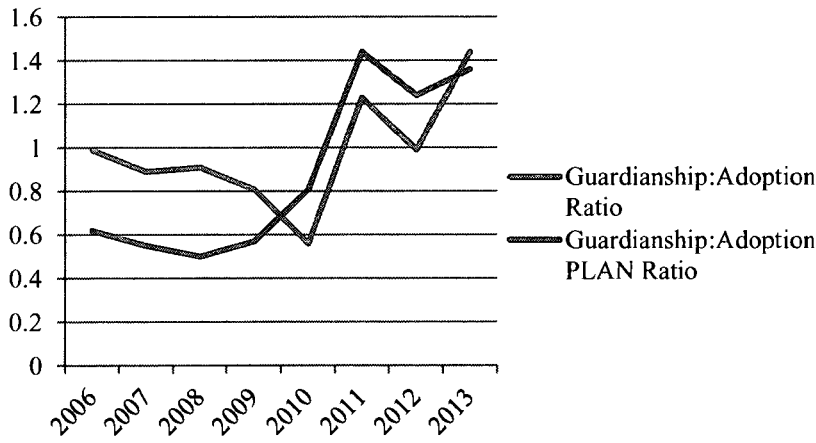
[244] *Id.*

[245] 2006 D.C. SUPER. CT. FAMILY COURT ANN. REP. 51 (2007).

[246] *Id.*

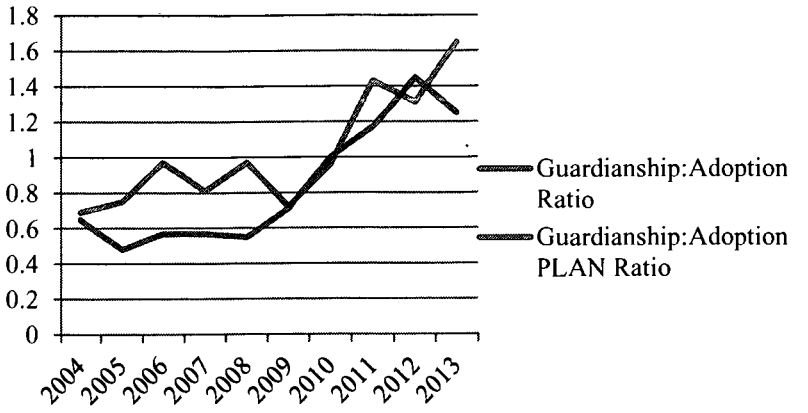
Strikingly, both the agency and court data reflect a significant increase in the ratio of guardianships to adoptions, and guardianship permanency plans to adoption permanency plans—both over the past decade, and with a sharp increase that coincides with the 2010 addition of subsidized non-kinship guardianship as a permanency plan. Through this legislation, the District took advantage of federal dollars provided by Fostering Connections (which reimbursed the District for the kinship guardianship subsidies it had been providing for years) to expand guardianship subsidies and thus provide a particularly wide range of permanency options. Such expansion of subsidized guardianship is precisely what Fostering Connections enabled for the majority of states that had offered such subsidies with their own dollars before 2008. Both data sets reflect a sharp increase from 2010, when the legislation was enacted, to 2011, the first full year it was in effect. Those increases are evident in the below graphs.

Figure 1: Guardianship to Adoption and Permanency Plan Ratios per administrative data



[247] *Id.*

Figure 2: Guardianship to Adoption and Permanency Plan Ratios per judicial data



The 2010 legislation appears to have shifted the permanency balance towards guardianship. The 2010 legislation expanded guardianship subsidies to non-kin, extended adoption and guardianship subsidy eligibility from 18 to 21 (to coincide with foster care eligibility in the District[248]), and established post-adoption contact agreements.[249] Perhaps non-kin foster parents were interested in guardianships, and making subsidies available led them to pursue it.[250] Or perhaps foster parents of older children—who might be more inclined towards guardianship—were particularly affected by extending subsidy eligibility until age 21.

These statistics also reflect a significant change in the paths cases take towards permanency. One of the most striking figures is the sharp decline in the number of cases with a permanency plan of adoption. Nearly 250 fewer cases had a permanency goal of adoption in 2012 than in 2006, and the ratio of adoption goals to guardianship goals moved from nearly twice as many adoptions to somewhat more guardianship goals.

The permanency plan statistics are noteworthy because they suggest changes in how child abuse and neglect cases are handled before an actual permanency trial occurs, which has a significant impact on the frequency of termination of parental rights cases. By setting fewer plans of

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[248] *See* D.C. CODE § 16-2303 (2001) (providing that Family Court jurisdiction over a youth extends until s/he turns 21).

[249] Adoption Reform Amendment Act of 2010, D.C. Law 18-230 §§ 101 (post-adoption contact agreement), 501 (extending adoption and guardianship subsidy eligibility to age 21), & 502(b) (repealing provision limiting guardianship subsidy eligibility to kin).

[250] *See supra* note 67 and accompanying text (discussing non-kin foster families' interest in guardianship).

adoption and more goals of guardianship, the District of Columbia court system is identifying cases for which a termination is not necessary.[251] Therefore, the decrease in adoption plans has led to a dramatic decrease in termination cases, reported in Table 3.[252]

Relatedly, these changes do not appear to have changed the number of actual adoptions, which have remained relatively steady. Rather, the growth of guardianship plans has much more significantly reduced the number of cases with a *plan* of adoption, and the termination of parental rights cases that often followed. It seems that the courts used to set adoption goals that were never achieved, and are now making more accurate permanency plan decisions, as well as avoiding unnecessary termination filings.

Table 3: Termination cases, per judicial data, FY 2003-FY 2012

Year	Termination of parental rights cases filed
2013[253]	66
2012[254]	77
2011[255]	67
2010[256]	83
2009[257]	129
2008[258]	161
2007[259]	129
2006[260]	145
2005[261]	248
2004[262]	141
2003[263]	177

[251] There is a direct connection between the permanency goals set and the number of termination cases filed. The child protection agency in the District of Columbia required its attorneys to file a termination motion within 45 days of the Family Court setting a permanency plan of adoption. DC FAMILY COURT 2012 REPORT, *supra* note 236 at 63.

[252] The fluctuation in the number of termination motions filed in the mid-2000s results from efforts to reduce a backlog of cases in which the agency sought a termination—leading to higher numbers of cases in 2005 and a fall off in 2006. SUPERIOR COURT OF THE DISTRICT OF COLUMBIA, FAMILY COURT 2007 ANNUAL REPORT 65 (2008) [hereinafter DC FAMILY COURT 2007 REPORT].

[253] DC FAMILY COURT 2013 REPORT, *supra* note 235, at 68.

[254] DC FAMILY COURT 2012 REPORT, *supra* note 236, at 63.

[255] *Id.*

[256] *Id.*

[257] *Id.* at 62–63.

[258] *Id.* at 62.

[259] DC FAMILY COURT 2007 REPORT, *supra* note 236, at 64.

[260] *Id.*

[261] *Id.*

[262] *Id.*

Fostering Connections and the 2010 legislation also appear to have coincided with six years of steady overall improvement in permanency outcomes. The percentage of children emancipating from foster care (rather than leaving foster care to a reunification or a new permanent family) peaked in 2008 (when Fostering Connections was enacted) at 34 percent of all exits.[264] That figure decreased to 29 percent in 2010 (when the District legislation was enacted) and decreased further to 22 percent in 2013.[265] At the same time, there has been a small overall increase in the number of children who could not reunify yet who left foster care to a new permanent family instead of remaining in foster care until they emancipated. The combined number of adoptions and guardianships decreased from 2006 to a nadir in 2008 or 2009 (depending on whether one relies on the agency or court data), and subsequently increased to a new peak in 2013.[266] Those recent increases are more impressive when considered in the context of a dramatic and steady decrease in the overall foster care population from 2,313 in 2006,[267] to 1,318 by 2013.[268] Still, more time is likely needed to determine if the permanency increase is lasting. There is a lag time between entries into foster care and adoptions and guardianships, most of which occur more than 24 months after the agency first places children in foster care.[269] Entries have steadily decreased since 2010 and were down nearly 50 percent in 2013 as compared with 2010.[270] It remains to be seen whether the permanency numbers will decline, and if so by how much, as those smaller cohorts of foster children reach the stage of their cases in which adoption or guardianship would be considered.

The District data does give some pause about the growth of guardianship by reporting that a quarter or more of all guardianships disrupt within a few years of finalization, while comparable statistics for adoptions are negligible.[271] These statistics are grounds for caution, but do not prove that adoptions are more stable than guardianships for several reasons. First, they undercount adoption disruptions due to unique features

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[263] *Id.*
[264] DC FAMILY COURT 2013 REPORT, *supra* note 235, at 65.
[265] *Id.*
[266] *Supra* Tables 1 and 2.
[267] CFSA, 2010 ANNUAL REPORT, *supra* note 191, at 21.
[268] CFSA, 2013 ANNUAL REPORT, *supra* note 50, at 15.
[269] *E.g.*, *id.* at 34.
[270] CFSA, 2013 ANNUAL REPORT, *supra* note 50, at 15.
[271] *See* DC FAMILY COURT 2013 REPORT, *supra* note 235, at 66 (listing adoption and guardianship disruption rates).

of the District.[272] Second, they over count guardianship disruptions—the Family Court reports that "[i]n many instances these guardianship placements disrupt due to the death or incapacity of the caregiver," which leads to brief foster care orders until the court formally appoints successor guardians; unfortunately, the Court does not report what it means by "many instances."[273] Third, and perhaps most importantly, the District data does not describe differences between foster children who are adopted and those who leave foster care to live with guardians. Older children and children with greater behavioral health and other problems are more likely to suffer disruptions from either adoptions or guardianships. Controlling for such differences is essential for accurate comparisons, especially because children who leave to guardianship tend to be older. Controlling for such differences in other rigorous studies found no statistically significant differences.[274] Fourth, the District has a high rate of adoption disruptions before finalizations—25 out of every 100 pre-adoptive placements disrupt[275]—suggesting that troublesome adoptive placements occur but disrupt before adoption finalization, while troublesome guardianship placements occur but do not disrupt until after finalization.

The District's available data does not answer other questions conclusively. The data does not distinguish between kinship and non-kinship guardianships or adoptions, and does not count the number of adoptions that occurred with or without a post-adoption contact agreement. The law that governs the District's data collection and reporting has, unfortunately, not kept up with developments in the District's permanency law.[276] Data collection that reflects the new

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[272] Many, if not most, adoptions are with families who live in the District's Maryland or Virginia suburbs. If such adoptions disrupt, children would enter foster care in their new home state, not the District, and, thus, would not show up in the District Family Court data. In one extreme case, Renee Bowman adopted three District of Columbia foster children and lived with them in Maryland. Bowman murdered two of them, and the third escaped and was placed in Maryland foster care. Dan Morse, *Adoptive mom accused of killing kids and freezing bodies goes on trial in Md.*, WASH. POST, (Feb. 18, 2010) http://www.washingtonpost.com/wp-dyn/content/article/2010/02/17/AR2010021705194.html. The surviving child would not be counted as re-entering District foster care, though her adoptive home quite obviously disrupted.

[273] DC FAMILY COURT 2013 ANNUAL REPORT, *supra* note 235, at 67.

[274] *See generally supra* note 67 and accompanying text.

[275] CFSA, 2013 ANNUAL REPORT, *supra* note 50, at 25.

[276] D.C. CODE § 4-1303.03(b)(10) (2001) requires that the Agency publish an annual report with certain data. That data includes statistics regarding exits from foster care and permanency plan cited in this section, but do not include breakdowns of kinship and non-kinship guardianships and adoptions, or adoptions with and without contact agreements.

permanency would yield even more valuable information about how new permanency laws play out in practice.[277]

B. The District's Agency-focused Kinship Placement Procedures

When the District of Columbia Child and Family Services Agency removes children from their parents, it, like any other child protection agency, must determine where to place the children. This decision includes evaluating possible kinship options. District data and District administrative procedures suggest a strong value on kinship placements.

District-specific data suggests kinship care for District foster children leads to similar positive outcomes as studies from around the country would suggest.[278] Agency data consistently shows that children placed with kin are several times more likely to have stable placements than children in any other category of placement. For instance, in 2013, children in kinship foster homes had 19 placement disruptions for every 100 placements. The figures were 33 for specialized foster homes (which are usually used for children with developmental disabilities or severe medical conditions), 40 for independent living programs, 53 for non-kinship foster care, and 77 for group homes.[279] In other words, kinship foster placements are more than two and a half times more stable than non-kinship foster placements. Similar statistics have been reported for years.[280] An analysis of District data also demonstrates that foster children placed with kin are 31.7 percent more likely to leave foster care for adoption or guardianship than other foster children.[281]

The District has established administrative policies and procedures to facilitate kinship placements. First, the District has adopted regulations

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[277] *Infra* Part IV.D.

[278] *Supra* Part I.B.

[279] CFSA, 2013 ANNUAL REPORT, *supra* note 50, at 25. This data does not control for differences among children; children placed in kinship foster homes may have less difficult behaviors, thus decreasing the likelihood of placement disruptions. The District data is nonetheless consistent with academic studies that do control for such variables. *Supra* note 88 and accompanying text.

[280] *See* CFSA, 2012 ANNUAL REPORT, *supra* note 228, at 35 (18 disruptions per 100 kinship foster home placements, compared to 60 for non-kinship foster homes); *see also* CFSA, 2011 ANNUAL REPORT, *supra* note 229 at 28 (16 disruptions per 100 kinship foster home placements, compared to 60 for non-kinship foster homes); CFSA, 2010 ANNUAL REPORT, *supra* note 191, at 29 (21 disruptions per 100 kinship foster home placements, compared to 60 for non-kinship foster homes).

[281] MARY ESCHELBACH HANSEN & JOSH GUPTA-KAGAN, EXTENDING AND EXPANDING ADOPTION AND GUARDIANSHIP SUBSIDIES FOR CHILDREN AND YOUTH IN THE DISTRICT OF COLUMBIA FOSTER CARE SYSTEM: FISCAL IMPACT ANALYSIS 10 (2009), http://academic2.american.edu/~mhansen/fiscalimpact.pdf.

to create more flexibility in determining whether to grant particular family members foster care licenses. Federal law permits states to waive "non-safety standards (as determined by the State)" for kinship foster homes.[282] The District government has issued some policy guidance, identifying foster home regulations that it would consider waiving for kinship placements.[283]

Moreover, the District has a long-standing administrative mechanism to expedite the licensing procedures for kinship foster homes.[284] These policies establish a "preference" for kinship placements and articulate how kinship placements can "reduce the trauma of separation from parents" and "provide children with an environment that maintains family and cultural connections and provides for familiarity, stability, and enduring loving relationships."[285] One result is that children in kinship care in the District live with kin who have foster care licenses,[286] and who are thus eligible for federally reimbursed guardianship subsidies at permanency.[287]

In addition to foster care licensing policies, the District also utilizes family team meetings (known by other names, such as family group conferencing, in other jurisdictions) to identify kinship placement options. In these meetings, family members, social workers, other professionals, and sometimes lawyers or advocates discuss whether a

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[282] 42 U.S.C. § 671(a)(10) (2010).

[283] *See generally* District of Columbia Child and Family Servs. Agency, *Temporary Licensing of Foster Homes for Kin, Attachment B: List of Potentially Waivable Requirements*, (2011), http://cfsa.dc.gov/sites/default/files/dc/sites/cfsa/publication/attachments/Program%20-%20Temporary%20Licensing%20of%20Foster%20Homes%20for%20Kin%20(final)(H)_1.pdf.

[284] D.C. CODE MUN. REGS. tit. § 6027; District of Columbia Child and Family Servs. Agency. *Temporary Licensing of Foster Homes for Kin* (2011), http://cfsa.dc.gov/sites/default/files/dc/sites/cfsa/publication/attachments/Program%20-%20Temporary%20Licensing%20of%20Foster%20Homes%20for%20Kin%20%28final%29%28H%29_1.pdf. The District has also established a procedure to provide temporary licenses—and, thus, expedited placements—for kin who live in Maryland, a particularly large population given the District's unique geography. District of Columbia Child and Family Servs. Agency, *Administrative Issuance CFSA 08-4* (2008), http://cfsa.dc.gov/sites/default/files/dc/sites/cfsa/publication/attachments/AI%20-%20Emergency% 20Kinship%20Placements%20in%20Maryland%28final%29.pdf.

[285] *Temporary Licensing of Foster Homes for Kin*, *supra* note 283, at 1.

[286] In 2009, the District reported that 13 percent of its foster children were placed in licensed kinship homes and 4 percent in unlicensed kinship homes. Children's Bureau, *Report to Congress*, *supra* note 80, at 6. The reported unlicensed kinship homes are likely kin who have been temporarily approved pending full licensure. *Supra* note 284.

[287] 42 U.S.C. § 673(d)(3)(A)(i)(II).

foster care placement is necessary and what type of placement is most appropriate. These meetings are held early in a case and so, like a kinship foster home licensing decision, can shape future outcomes. Meeting coordinators are charged with identifying extended family members who can participate.[288] The meetings' purpose includes exploring the possibility of kinship placements,[289] and the District explicitly connects kinship placement identification with "the identification of permanency resources" and lists that as a core purpose of family team meetings.[290] Guardians *ad litem* and other lawyers are often invited and can ensure that kin preferred by their clients are invited to these meetings and considered as placement and permanency options.[291]

Taken together, these administrative policies establish a general preference for kinship placements and focus authority and discretion in the agency to make kinship placement decisions, without providing significant due process checks on agency decisions. A family member who is denied a kinship foster home license may file an administrative appeal.[292] The family member would have no right to counsel to file such an appeal, a significant obstacle for a low-income individual. And the family member would have to wait until the agency denies a full foster home license application; the expedited approval process is not appealable.[293] The full application process can take about six months or longer.[294] An administrative appeal can take more than 100 days, not counting time for any judicial appeal.[295] In the meantime, the child is living with another

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[288] DISTRICT OF COLUMBIA CHILD AND FAMILY SERVS. AGENCY, FAMILY TEAM MEETING (FTM) 3 (2013) [hereinafter CFSA, FAMILY TEAM MEETING], http://cfsa.dc.gov/sites/default/files/dc/sites/cfsa/publication/attachments/Program%20-%20Family%20Team %20Meeting%20%28FTM%29%28final%29.pdf.. *Id.* at 6-7.

[289] *Id.* at 11. *See also* CFSA, 2013 ANNUAL REPORT, *supra* note 50, at 9–10 (describing the "KinFirst initiative" to identify kinship placement options through family team meetings and other steps).

[290] CFSA, FAMILY TEAM MEETING, *supra* note 287, at 1.

[291] *Id.* at 2 (directing agency staff to invite guardians *ad litem*) & 7 (encouraging attorneys to attend family team meetings).

[292] D.C. MUN. REGS. tit. 29 § 6031.8 (2004).

[293] D.C. MUN. REGS. tit 29 § 6027.8.

[294] The agency has 150 days—about five months—to decide to grant or deny a license. D.C. MUN. REGS. tit. 29 § 6028.5 (2012). That timeline is triggered by the applicant beginning foster parent training; delays in the training could thus trigger a longer licensing decisionmaking period.

[295] The applicant has 30 days to file a fair hearing request. *Id.* at § 5903.4 (2002). A fair hearing must be scheduled within 45 days of that request, but can be extended for good cause. *Id.* at § 5908.3. The hearing examiner then has an additional 30 days to render a decision. *Id.* at § 5910.3.

foster family and the reality of that living arrangement may shape future decisions in the child's case. Unsurprisingly, very few such appeals are filed.[296]

The agency's power regarding kinship care is evident in recent increases in the number of children placed with kin. In recent years, the agency administration has made a concerted push to use the administrative tools described here more effectively, and this effort has led to an increase in the percentage of foster children in kinship care—up from 16 percent of all foster children in 2012 to 24 percent in 2013.[297] There was no new rule of law applied in court, only a greater administrative focus on kinship care. A 50 percent increase in kinship placements driven by agency policies underscores the power held by agencies—and not courts—to control how many foster children live with kin.

C. *The Inability to Resolve Kinship Placement Issues Early Leads to Difficult Permanency Litigation*

No provision of District law governing judicial decisions explicitly creates a preference for kinship placements. Yet, the District of Columbia Court of Appeals has long required courts to give "weighty consideration" to a parent's preferred *permanent* custodian, and a competing petitioner must prove by clear and convincing evidence that the parental preference is contrary to the child's best interests.[298] This rule does create a kinship preference when, as is often the case, a parent prefers their child to live with kin rather than non-kin. Indeed, the rule arose when a child's great-aunt, preferred by the mother, sought custody of a foster child while the child's non-kinship foster parents sought to adopt him.[299] At least, it creates such a preference at the end of a case—the appellate cases applying this rule have uniformly done so in challenges to adoption or termination orders; the rule has not been applied at earlier stages of a case.[300] The District law is thus similar to statutory preferences in 10

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[296] A Westlaw search on May 20, 2014 for "'Child and Family Services Agency' & foster & (care or home) & license & appeal" yielded no appeals of agency denials of foster home licenses.

[297] CFSA, 2013 ANNUAL REPORT, *supra* note 50, at 11.

[298] *In re* T.J., 666 A.2d 1, 11, 16 (D.C. 1995).

[299] *Id.* at 4.

[300] *See In re* Ta.L., 75 A.3d 122, 128 (D.C. 2013) (reaffirming rule and citing six cases applying it). The *T.J.* court wrote that "Our discussion applies, of course, . . . to the placement of" a foster child. *In re T.J.*, 666 A,.2d 1, 10 n.4 (D.C. 1995). The D.C. Court of Appeals has not decided whether the "weighty consideration" rule applies to a foster care placement decision or only at permanency. One trial court decision has declined to apply the rule at a pre-permanency stage of the case. *In re* P.B., 2003 WL 21689579

states for placing children in kinship *adoption* homes when adoption is the permanency plan.[301] The District case law permits late-stage challenges to agency case work to identify and investigate potential kinship placements early in a case.

This body of case law reveals several core points. First, decisions made well before a termination, adoption, or guardianship case is litigated—where to place a foster child, and what permanency plan to set—have tremendous impacts on the ultimate permanency outcome. Second, when these decisions are made wrongly, they lead to unnecessarily difficult decisions about whether to move children from the family they have lived with for years to live with a non-offending parent[302] or other family member[303] whose requests for custody were denied earlier in a case, without an evidentiary hearing or clear findings to support that denial. These problems illustrate the importance of improved procedures for kinship placement and permanency plan decisions earlier in a case.

Most recently, in *In re* Ta.L., the D.C. Court of Appeals overturned an adoption by non-kinship foster parents in 2013 because the trial court failed to give adequate weight to the parents' preference that the children live with and be adopted by their great-aunt.[304] (The case is now pending before an *en banc* panel of the Court.[305]) The facts reveal inadequate consideration of multiple kinship placements from the first days of the case. Two days after removing the children in 2008 from their parents, the agency identified two extended family members as potential placements, the children's adult sister and great-aunt. The family decided that the sister would pursue a placement first, but her husband, the children's brother-in-law, failed the background test. The agency never contacted the great-aunt, and the great-aunt did not contact the agency after she was told that

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(D.C. Sup. Ct. 2003).

[301] *Placement of Children with Relatives*, *supra* note 174, at 4.

[302] *In re* S.M., 985 A.2d 413 (D.C. 2009) overturned an adoption ordered despite no finding that the father was unfit. The record reflected various problems with the decision to set a permanency plan of adoption rather than reunification with the father. *See* Josh Gupta-Kagan, *Filling the Due Process Donut Hole: Abuse and Neglect Cases between Disposition and Permanency*, 10 CONN. PUB. INT. L.J. 139, 170 (2010) [hereinafter Gupta-Kagan, *Due Process Donut Hole*].

[303] *In re* T.W.M., 964 A.2d 595 (D.C. 2009), overturned an adoption because the mother's preferred caregiver, a family member, was not given adequate consideration. *See also In re* D.M., 86 A.3d 584 (D.C. 2014) (vacating an order granting an adoption and remanding for consideration of mother's preferred custodian, her mother-in-law).

[304] *In re* Ta.L., 75 A.3d 122, 125 (D.C. 2013).

[305] *In re R.W.*, 91 A.3d 1020

the plan was to reunify the children with their mother.[306] These facts raise a number of questions about kinship placement. First, why did the brother-in-law fail the background test, and should the agency have waived whatever background issue that existed? Was his conviction for a violent or non-violent crime, and did he pose a real risk to the children? As the sister was going to serve as the children's primary caretaker, could she have mitigated any risk posed by the brother-in-law? Second, why did concurrent planning for permanency not include outreach to the great-aunt as soon as the agency ruled out the sister?

Most fundamentally, the background to *In re* Ta.L. raises the question: why did the law not provide the children—who should be expected to have done better living with family members than with strangers—with greater protections before ruling out kinship placements? The case reached a permanency hearing in 2009, and the court changed the children's goal to adoption with the non-kinship foster parents; a goal of guardianship or adoption with either kinship placement option was not broached.[307] Termination and adoption litigation ensued within a month, and only then did a social worker reach out to the great-aunt and initiate visits between her and the children.[308]

This case was also notable because the parent and great-aunt's appeal challenged the permanency hearing decision, changing the goal to adoption.[309] The court recognized the "compelling case" that permanency hearing decisions ought to be appealable because "a right to appeal at this stage is necessary in order to ensure that this court will have the opportunity to timely address alleged trial court errors that could significantly impact the ultimate outcomes in permanency cases."[310] Indeed, better procedures earlier in the case could have avoided the unnecessary conflict in *In re* Ta.L. In that case, the great-aunt in *In re* Ta.L. was an excellent candidate for kinship placement. The child welfare agency granted her a therapeutic foster home license, and a social worker deemed her home fit.[311] She was raising the children's half-sibling and the trial court found that the sibling "has done very well in [the great-aunt's]

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[306] *In re Ta.L.*, 75 A.3d at 125–26.
[307] *Id.* at 126.
[308] *Id.* at 126.
[309] *Id.* at 128–30.
[310] *Id.* at 130 n.4. The Court cited to an amicus brief making this argument. In full disclosure, that brief cited a similar argument that I made. Brief of *Amicus Curiae* Legal Aid Society 7, 18, 19, (citing Gupta-Kagan, *Due Process Donut Hole*, *supra* note 302) (on file with author).
[311] *In re* Ta.L., 75 A.3d at 126.

care."[312] Federal law rightly suggests that child welfare agencies place siblings together because of the benefits of such placements to children.[313] The trial court concluded that the aunt "ably direct[s] the children's play, set[s] appropriate limits, ha[s] a nice manner with the children, and [i]s attuned to their needs," and expressed no doubts about her fitness.[314] The only factor possibly outweighing a placement with the aunt were the bonds that formed with the non-kinship foster home—bonds that never would have existed had the agency and courts followed a strong kinship preference early in the case.

In re Ta.L. is illustrative of a set of District of Columbia cases with two themes in common. First, the legal errors at issue occurred early in a case, potentially setting the case on a bad course that did not come to appellate courts' attention until after a termination or adoption decree was entered. Second, the legal errors involved the courts and the agency giving inadequate deference to kinship placements. Coupled with the court's recent acknowledgement that permanency goal decisions shape the ultimate outcome of the case, these themes illuminate why stronger legal rules prioritizing placement with kin, and stronger legal remedies to enforce such rules at earlier stages of the case are essential. Otherwise, courts will choose the wrong permanency plan and start a course towards an unnecessary termination.

In re Ta.L. also demonstrates how existing law is inadequate to address these problems. As discussed above, the District has a body of law designed to facilitate kinship foster care placements—but this law gives discretion to the child welfare agency to decide whether to make such placements without giving the family court a meaningful check on such decisions. The rule applied in *In re* Ta.L.—that parents' choice of permanent caregivers must be granted weighty consideration does not provide such a check. Such a right is framed only in reference to permanency decisions, not earlier placement decisions,[315] so it does not get asserted until much time has passed and a permanency decision is all

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[312] *Id.* at 131 n.6.

[313] 42 U.S.C. § 671(a)(31) (2010), Godsoe, *supra* note 79, at 1124. Congress recently strengthened the federal law's push for considering sibling placement by requiring states to notify the parents of a child's siblings when the state first places that child in foster care. Preventing Sex Trafficking and Strengthening Families Act, Pub. L. No. 113-183, § 209 (codified at 42 U.S.C. § 671(a)(29). It is not clear from the reported panel decision if the sibling was placed in the great-aunt's home before or after the older two children were placed in the non-kinship foster home.

[314] *In re* Ta.L., 75 A.3d at 127; *see also id.* 131 & n.6 (same).

[315] *Supra* note 300 and accompanying text.

but final—after the children at issue have bonded with the prospective adoptive family.

In addition, the parents' rights-based rule applied in *In re* Ta.L. provides an awkward path towards a kinship preference. Parents who cannot raise their children surely have an interest in with whom their children live and whether they would retain any rights to be considered the child's parent or to contact or visit the child. Nonetheless, a rule focused on the parents' wishes is easily criticized for relying on the judgment of a parent found unfit.[316] Moreover, parents' placement choices may not always further a policy preference for kinship placements; a parent with a fraught relationship with a family member who is closely bonded to the child may hesitate before endorsing that family member's desire to have the child placed in her custody. The parent may worry that she is more likely to lose custody permanently if the child is placed with kin. Or a parent may prefer placement with one family member over another for reasons relating to the parent's relationship with those family members rather than their relationship with the child.

A kinship placement preference should exist because such preferences are generally better for children, especially (although not exclusively) when the kin at issue have an existing bond with the child. Such a preference should not depend on the parents' wishes. Such a preference should apply at the earliest stages of a case, to mitigate the emotional difficulty inherent in removing children from their parents, and to avoid the unnecessary dilemmas inherent in determining a later custody fight between a family member improperly excluded from consideration as a kinship placement and a non-kinship foster family that has bonded to the child.

IV. Implications of the New Permanency and Areas for Legislative and Practice Reform

Families and courts now face a continuum of choices in determining which legal status will best serve a child when reunification is

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[316] Brief of amici curiae law professors James G. Dwyer, J. Herbie Difonzo, Jennifer A. Drobac, Deobrah L. Forman, William Ladd, Ellen Marrus, and Deborah Paruch in Support of Appellees, *In re* Ta.L., 13–14 (2014) (on file with author). Still, parents who are unfit to have physical custody are not necessarily unfit to offer decisive input regarding who should have such custody. Indeed, in private adoptions, the trend has been to increase the authority of birth mothers relinquishing custody of their children to select adoptive parents. Sanger, *supra* note 28, at 315. Many (certainly not all) such birth mothers may relinquish custody because they are unfit to raise the child, yet still maintain the right to select parents.

not possible; that continuum is a core feature of the new permanency. How to implement it remains unresolved. Will child welfare law continue to subordinate guardianship and fail to take advantage of all options on the continuum? Or will the national practice tend more toward what has occurred in the District of Columbia and what studies of guardianship programs predict, with a greater proportion of cases leading towards guardianship, significantly fewer terminations, and overall improvements in permanency outcomes? The latter would enable more children to leave foster care to permanent families, help children maintain relationships with their biological families when appropriate, and respect the wishes of foster and biological families to choose the best legal option for their particular needs. The national statistics, however, show that despite the Fostering Connections Act's federal funding for subsidized guardianship, we remain far from full implementation of the new permanency.

Full implementation will require treating adoption and guardianship as comparably permanent legal statuses – which they are, according to the empirical record discussed in Part I. Congress has recently taken a small step to reduce inequities between adoptions and guardianships. Until 2014, the federal government had given states financial incentives to increase the numbers of adoptions. Under 2014 legislation, those incentives are now available for states that improve the rates of children reaching permanency through both adoption and guardianship.[317] Congress unfortunately left the other disparities between adoption and guardianship discussed throughout this article intact. But Congress' willingness to erase one disparity shows the possibility of erasing others in both state and federal law.

This section will propose other reforms essential to fully implement the new permanency. First, deciding which permanency option to pursue should be based on the individual child and family dynamics at issue in a case—and not by any imposed hierarchy of permanency options. Second, procedural protections for all individuals should be on par with the real-world results of each permanency option. Third, kinship preferences should be made more explicit and enforceable in court early in cases. Fourth, permanency hearings are essential steps and should have procedural protections commensurate with their importance. Fifth, these protections should include quality legal counsel for all relevant parties—including, once a permanency plan is changed away from reunification, counsel for likely permanency resources.

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[317] Preventing Sex Trafficking and Strengthening Families Act, Pub. L. No. 113-183, 202.

A. *The Permanency Hierarchy Is Obsolete, and All Families Should Have Equal Access to the Full Continuum of Permanency Options*

Congress and state legislatures should abolish the hierarchy between adoption and guardianship.[318] At the very least, Congress should repeal the requirement of an adoption over guardianship hierarchy as a condition of federal guardianship subsidy funding. This requirement ossifies the law and prevents states from experimenting with alternative approaches to permanency.[319] Courts should first determine if reunification remains an appropriate permanency plan. If not, courts should determine which permanency plan serves the child's best interests—and any general preference for one permanency plan over another should not be a permissible consideration. By rejecting a hierarchy of permanency goals, this statutory reform would reject the ideology that the best permanency option is the most legally binding one[320] in favor of one based on research demonstrating that various options along the permanency continuum are equally lasting and beneficial for children.[321]

To ensure full equality among permanency options, subsidies provided by the state and federal governments should be equal across these options. Congress and state legislatures should repeal limitations on guardianship subsidies to kin and should ensure that agencies provide comparable subsidies to adoptive parents and guardians so that no financial incentive exists to choose one permanency option over another.

If legislatures remove the legal hierarchy of permanency options, family courts will be faced with difficult decisions about what permanency plan to select for each child. Those decisions are very important, and will be discussed below.[322] Most importantly for this section, courts should not make these decisions by using short cuts based on disproven assumptions regarding one permanency option being more permanent than another.

Relatedly, removing the legal hierarchy will require renewed focus on when terminations of parental rights are necessary. Rather than presume that the length of time in foster care suggests a need for termination and adoption, law and practice should presume that such facts only calls for a close analysis of what permanency plan is best for an

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[318] I am not the first to recommend this step. *E.g.*, Godsoe, *supra* note 79, at 1135 ("My final recommendation is the elimination of the adoption rule-out.").

[319] Vivek Sankaran, *Innovation Held Hostage: Has Federal Intervention Stifled Efforts to Reform the Child Welfare System?*, 41 U. MICH. J.L. REFORM 281 (2007–2008)

[320] *Supra* Part II.B.

[321] *Supra* Part I.A.1.

[322] *Infra* Part IV.E.

individual child. Terminations should logically be reserved for when they are truly necessary—that is, when all permanency options not requiring terminations have been excluded, and the parties (especially foster parents and biological parents) have explored the possibility of agreeing to some consensual arrangement. At the least, this means expanding exceptions to the rule requiring termination filings to include any case with a permanency plan of guardianship, even if the child is not living with relatives.[323]

The empirical record discussed above resolves one point of historical dispute—guardianship is just as permanent as adoption.[324] In light of that evidence, there is no compelling justification for continuing to place adoption over guardianship in a permanency hierarchy. Requiring any rule out of adoption before establishing a guardianship does not further children's permanency because adoption is no more permanent than guardianship. Rather, this hierarchy skews decision-making, and directs courts and agencies to determine permanency plans based on the hierarchy rather than each child and family's individual situation.

The hierarchy also interferes with the families having meaningful choices among permanency options by empowering agencies to hide the availability of subsidized guardianship from families, or to pressure them to choose adoption over guardianship.[325] That absence of choice is a problem by itself, as families should have the ability to select the most appropriate legal status for their situation. It may also interfere with a core benefit of the new permanency—increasing the number of children who leave foster care to permanent families by offering those families a greater variety of legal statuses. Removing the hierarchy would eliminate the need for any kind of rule-out procedure, and thus remove one core area in which the law permits agency and case worker discretion to prevent caregivers from learning about all permanency options; case workers could no longer justify failing to discuss subsidized guardianship by noting that adoption had not been ruled out.

State agencies and courts should take steps to ensure family court events reflect the equality of various permanency options. For instance, courts should replace their annual "adoption day" events[326] with "permanent families day" events. Such small but symbolic efforts can help change the cultural subordination of guardianship discussed in Part II.C.

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[323] *Supra* note 115 and accompanying text (noting such exceptions).
[324] *Supra* notes 39–54 and accompanying text.
[325] *Supra* Part II.E.2.
[326] *Supra* notes 140-146 and accompanying text.

B. Procedural Protections Before Establishing Guardianships Should Be on Par with Their Permanency

A key pillar of this article's argument is the strong data showing that guardianships are just as stable and permanent as adoptions. This data shows why the law should not impose a general hierarchy between adoption and guardianship, and should instead defer to families' choices about which legal status best serves their needs. This pillar also supports a related proposition: because guardianships are similarly permanent to adoptions, the procedural rights applied to them should be more analogous to adoptions than they are in current law. Just as no hierarchy should exist presenting adoption as generally preferable, no hierarchy should exist rendering one permanency option generally simpler procedurally than another.[327] Case law that justifies reduced procedural protections because of guardianship's allegedly temporary nature should be reevaluated;[328] although the legal possibility of undoing guardianships exists, the statistical improbability of such developments counsels strongly against providing weaker procedural protections.

Some might argue that terminating parental rights—often called the "civil death penalty"—remains so much more severe than guardianship that different procedural protections may reasonably apply. This argument has some force because terminations remove all parental rights permanently; while guardianships leave some contact rights intact, are subject to modification, and do not take the title of legal parent away from biological parents.[329] But this argument ought not be exaggerated, especially in light of the evolution of the permanency continuum. Adoptions (which, of course, usually require terminations) can also preserve a birth parent's contact rights.[330] Terminations are increasingly reversible (though still not to the same extent as guardianships).[331] And adoptions no longer necessitate removing the title of legal parent.[332] Most fundamentally, the technical differences between adoption and

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[327] *See supra* Part II.D (summarizing procedural differences).

[328] *E.g.* case law discussed *supra* notes 168–169 and accompanying text.

[329] *See* Gupta-Kagan, *supra* note 32, at __ (describing importance of holding the legal title of "parent").

[330] *Supra* notes74–75 and accompanying text.

[331] Lashanda Taylor, *Resurrecting Parents of Legal Orphans: Un-Terminating Parental Rights*, 17 VA. J. SOC. POL'Y & L. 318 (2010). Taylor identified seven states which had adopted restoration of parental rights statutes. *Id.* at 332–34. A 2012 survey identified nine such states. National Conference of State Legislatures: Reinstatement of Parental Rights, http://www.ncsl.org/research/human-services/reinstatement-of-parental-rights-state-statute-sum.aspx (last visited 12 May 2014).

[332] *Supra* notes76–77 and accompanying text.

guardianship simply do not amount to any empirical differences in how long the action will limit the parent's care, custody, and control of their child.

One might object that stronger procedural protections for biological parents in guardianship cases may weaken or remove one of the appeals of guardianship over adoption. Guardianship provides a "simpler judicial process" because no termination is required,[333] and the result would reduce one of the empirical benefits of guardianship—that children can leave foster care faster.[334] Greater protections are still essential because guardianship represents a severe and lasting limitation on the parent-child relationship, even if such protections slowed permanency.

But even with heighted protections, guardianship should still lead to faster permanency in many cases. An incentive in most cases should exist to pursue the permanency option that can win the consent of a child's birth parents; such consent will obviate the need for a trial and thus lead to a simpler judicial process. A consent guardianship should facilitate a better ongoing relationship between guardians and parents, which generally benefit the child. A simpler judicial process through consent of the parties differs from a simpler judicial process through reduced protections. Consent reflects an agreement of the parties to a solution they believe parties can best serve the family, rather than a flawed policy judgment about a hierarchy of permanency options.

Accordingly, procedural protections for guardianship should be enhanced so that they are roughly on par with similarly permanent terminations and adoptions. Guardianships should require proof of parental unfitness and proof that the guardianship would serve the child's best interests. The standard of proof should be clear and convincing evidence. Guardianship cases should be heard in family court, under statutes designed to adjudicate foster care and child maltreatment cases—not in probate court under probate statutes.[335]

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[333] Testa & Miller, *supra* note 14, at 415.

[334] *See* Testa, *Subsidized Guardianship*, *supra* note 36, at 10 (noting that children with guardianship as an option spent many days fewer on average in foster care "[b]ecause of . . . the shorter time it takes to finalize legal guardianships than adoptions because parental rights do not need to be terminated").

[335] *Supra* notes 173–174 and accompanying text.

C. *Establish Stronger and More Enforceable Kinship Placement Preferences*

A strong policy base exists for preferring kinship care to non-kinship care. First, such a preference respects existing bonds that children have with family members.[336] This factor both accords respect for bonds that form organically, and reflect caution about the state's ability to forge better bonds through a state-created non-kinship care foster family than those that form naturally with kin. A kinship care preference limits the severity of state intervention in families and is, thus, consistent with the law's general hesitance to permit such intervention. Second, kinship care helps children obtain important well-being outcomes, especially improved placement stability and feelings of belongingness.[337] Third, kinship care likely leads to as good if not better permanency outcomes than non-kinship care.[338]

Yet current law creates no enforceable placement hierarchy, and this weakness is an important area for reform. Child welfare agencies have some discretion regarding kinship placements, but vary widely in their willingness to use them. And the District of Columbia's experience demonstrates that such discretion can lead to unnecessarily difficult permanency conflicts, even in a jurisdiction that embraces other elements of the new permanency.

The law should enforce a specific kinship placement preference that is binding on state agencies and can be litigated in juvenile court. Federal funding laws should not merely require states to "consider" a kinship care preference,[339] but should require states to apply such a preference. Federal officials should include such a preference in their regular reviews of states' child welfare performance, on which federal funding depends. States that have unusually small percentages of foster children living with kin should feel pressure to improve such outcomes.[340]

State laws should empower courts to order kinship placements when agencies unreasonably fail to make them. The Indian Child Welfare

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[336] *Supra* notes 85–86 and accompanying text.
[337] *Supra* notes 87–88 and accompanying text.
[338] *Supra* notes 90–92 and accompanying text.
[339] *Supra* note 180180 and accompanying text.
[340] Nationally, agencies place an average of 30 percent of foster children with kin. *Supra* note 80. At least four states have rates below 15 percent—Alabama (2 percent), Arkansas (12 percent), Georgia (11 percent), South Carolina (7 percent)—and many states have not reported data. Children's Bureau, *Report to Congress*, *supra* note 80, at 6–7. A federal push to improve performance would be indicated there.

Act may provide a simple model for such a statute: just as an Indian foster child has the right to live with kin unless a child protection agency can demonstrate "good cause to the contrary"[341] to a court, so should any non-Indian foster child. This reform would empower family courts to serve as more meaningful checks on agency discretion regarding kinship placement decisions. Courts could determine if, for instance, an agency's concern about a family member's partner's five-year-old drug conviction is sufficient to overcome that child's bonds with her family member. This balancing of power between branches of government might also trigger other reforms—such as requiring a more flexible interpretation of statutory provisions requiring agencies (not courts) to maintain "responsibility" for a child,[342] in particular repealing the regulation prohibiting federal financial support when a court orders a specific placement.[343]

Such reforms would lead to earlier resolution of kinship placement issues and thus help avoid the difficult disputes that have occurred in District of Columbia cases discussed in Part III.C. Consider cases in which the safety of a kinship placement is disputed because of a family member's criminal background. Under current law, the family cannot timely challenge the agency's refusal to place the child with this family member. If the dispute lingers, it could lead to contested guardianship or adoption litigation years into the case. But if a judge must decide early in a case whether the criminal background amounts to good cause to overcome the kinship placement—and if this decision was appealable at the initial disposition—then such difficult litigation could be avoided. If the kinship placement is best, that would be resolved faster and the child placed with family sooner—rather than after long litigation that unnecessarily creates and then breaks bonds with a non-kin family. If the kinship placement is not best, then that also would be established sooner, effectively preventing the kin from mounting a later challenge.[344]

A rule establishing a preference for kinship placements would frame the issue as one of children's rights to live in placements indicated by research to be generally preferable, rather than as a parental right to choose where the child lives. That frame is more consistent with the

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[341] *Supra* note 179 <<check this>> and accompanying text.

[342] 42 U.S.C. § 672(a)(2)(B) (2010).

[343] 45 C.F.R. § 1356.21(g)(3) (2012). For a discussion of present interpretation of this regulation, *see supra* note 178 and accompanying text.

[344] The kin might technically be able to file a competing guardianship or adoption petition, but would have a hard time winning that if the courts had already determined that the kin could not provide a safe placement.

reasons for a kinship preference—that kinship care is better for children. Recall *In re* Ta.L., the case involving unnecessary permanency litigation because of a missed opportunity to achieve a kinship placement; the great-aunt in that case would have been a good placement for the children because she was a good caregiver who could provide a home for the entire sibling group—not because the children's parent's wanted the children living with her.[345] Focusing on those positive factors avoids the problem of empowering a parent deemed unfit to control where a child lives.[346]

To leverage the strong connection between kinship placements and permanency outcomes, states should ensure that children placed with kin are eligible for the full range of subsidized permanency options available. That will require states to more consistently use licensed kinship placements to better take advantage of federally subsidized guardianships.[347] That will require more effective use of kinship licensing flexibility, and limiting unlicensed placements to exceptional cases. When courts order children placed with kin, the law should grant standing to parties supporting such a placement (frequently the child and the parents) to fight for the kin to obtain a foster care license, including filing an appeal of any agency decision to deny such a license.

D. Record Data to Study New Permanency Options

State and federal governments should report data that reflects the new permanency, rather than the simplistic and adoption-focused world reflected in Children's Bureau reports.[348] The Children's Bureau should require states to report all relevant data to make sense of the new permanency landscape. States should, ideally, start tracking this data on their own initiative.

Relevant data should include, at a minimum, statistics regarding the full continuum of permanency options. States should not merely report the number of foster child adoptions every year, but distinguish adoptions along at least two planes. First, states should report varying types of adoptions—traditional exclusive and closed adoptions, adoptions with post-adoption contact agreements, and non-exclusive adoptions. Second, states should report the number of kinship and non-kinship adoptions. The data should reflect the intersection of these two planes—so that the number of closed kinship adoptions and non-kinship adoptions with

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[345] *Supra* notes 311–314 and accompanying text.
[346] *Supra* note 316 and accompanying text.
[347] *Supra* notes 187–188 and accompanying text.
[348] *Supra* notes 152–156 and accompanying text.

contact agreements are publicly reported. Similarly, guardianship data should be reported, with clear data regarding kinship and non-kinship guardianships identified.

Data should also include the long-term stability of various permanency options so it is clear how frequently adoptions and guardianships disrupt, for what reasons, and with what result (renewed foster care, reunification with a biological parent, placement with a successor guardian, or something else). With such data, scholars could seek to confirm (or refute) findings discussed in this article that guardianships are just as stable as adoptions, and policy makers would have a much wider body of knowledge on which to make decisions.

Moreover, the state and federal governments should track and report adoption and guardianship data on an equal footing. The Children's Bureau should cease publishing adoption-only publications and instead publish data on permanency more generally, thus presenting a more accurate picture of child welfare practice.

Finally, to better understand the interaction between guardianship and adoption, states should report the number of guardians who become adoptive parents. Several states have indicated that for some families guardianship has "become a bridge" between foster care and adoption.[349] The 2008 federal law providing limited federal funding for guardianship subsidies specifically envisioned that some subsidized guardianships might transform into subsidized adoptions.[350] The number of such adoptions should be specifically tracked.

No federal legislation is required for such reforms. Existing law provides that "[e]ach State shall submit statistical reports as the Secretary [of Health and Human Services] may require."[351] The Children's Bureau should, therefore, use its authority and insist that states provide data reflecting the new permanency.

E. More Rigorous Permanency Hearing Procedures to Better Choose Between Permanency Options

Permanency hearings require "momentous" decisions.[352] At these hearings, held after children have been in foster care and not reunified for one year, courts must answer two core questions. First, is reunification viable? Second, if not, what is the best permanency option? This article

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[349] *Making It Work*, *supra* note 11, at 12.
[350] 42 U.S.C. § 673(a)(2)(D) (2011).
[351] 42 U.S.C. § 676(b) (2008).
[352] HARVEY SCHWEITZER & JUDITH LARSEN, FOSTER CARE LAW: A PRIMER 97 (2005).

focuses on the second question,[353] and getting it right is essential to put children on the best path towards permanency. The proper permanency goal can lead a case toward prompt and decisive litigation, and avoid unnecessary litigation that can unduly stress children and harm relationships between adults who will remain in children's lives. A permanency plan decision often determines which track a case will follow. An adoption plan will likely trigger a termination filing and negotiations between prospective adoptive parents and biological parents about any post-adoption contact or, in the one state that currently permits it, whether a non-exclusive adoption is best. A guardianship plan will not trigger such litigation, but should lead relatively quickly to a guardianship petition and negotiations between the prospective guardian and parents about parental visitation arrangements in a guardianship.

The permanency plan selected will shape the negotiation dynamic tremendously between parents and a prospective permanent caretaker—illustrating why it is so important to select the correct permanency plan. An adoption plan will place significant pressure on biological parents to consent to the adoption to avoid an involuntary termination and perhaps to win limited post-adoption contact rights—even if the parent would prefer to fight to regain custody. Conversely, a guardianship plan will pressure the caregivers to agree to some post-permanency contact between parent and child—even if the caregivers believe such contact is detrimental to the child.

The permanency plan also serves to hold all parties accountable for achieving a final permanency order that will let a child leave foster care to a permanent family. Most formally, the child welfare agency must make reasonable efforts to achieve the permanency plan set by the court.[354] Permanency plans can also serve to hold foster parents accountable; a foster parent who says he is willing to become an adoptive parent or guardian to a foster child should be expected to act on that pledge reasonably promptly after a permanency plan is changed to adoption or guardianship. If they do not, it is an opportunity to explore any problems in the placement or obstacles to permanency, or, if necessary, seek out alternative placements.

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[353] I have previously argued that the importance of the first question—whether reunification is viable—requires permanency hearings to be evidentiary as a matter of due process and appealable as a matter of good policy. Gupta-Kagan, *Due Process Donut Hole*, *supra* note 302. For purposes of this article, I focus on cases in which reunification is not viable and thus when only the second question—what permanency plan is best—is the only contested issue.

[354] 42 U.S.C. § 671(a)(15)(C) (2010).

More rigorous permanency hearings are essential. Far too many hearings are hasty affairs with little formal evidence or procedure, and predictably haphazard results on these essential questions.[355] When the permanency plan is contested, these hearings should be evidentiary hearings addressing both the viability of reunification and, if that is not viable, which permanency option would best serve a child.[356] Family courts should use tools like pre-hearing conferences to ensure all necessary issues will be adequately addressed in each permanency hearing, and that all-too-common problems like a late agency report, or an absent case worker does not delay or prejudice the hearing.[357] And permanency plan decisions should be promptly appealable so a dispute between a permanency plan of guardianship or adoption, or of permanency with one foster family over another can be promptly adjudicated.

The District of Columbia cases discussed in Part III.C illustrate the problems which result from inadequate permanency hearing procedures. Consider *In re* Ta.L. – a permanency hearing set a plan of adoption with the non-kinship foster parents without consideration of the two potential kinship placements that had been raised with the child protection agency.[358] Years then passed before ultimate resolution of the dispute between the potential permanent placements – creating an unnecessarily difficult situation for all involved, especially the children, who lived and bonded with the non-kinship foster parents during the litigation. More rigorous procedures that accounted for all such options, and permitted expedited appeals of the decisions would prevent the harms that such protracted litigation can cause.

One practice should be explicitly disallowed at permanency hearings: courts should not be able to settle on a particular permanency plan based on an abstract hierarchy between permanency options, for all of the reasons discussed throughout this article. Such hierarchies are particularly dangerous at the permanency hearing stage for certain groups of children, such as older children, and children with disabilities. Such children are particularly likely to be subject to an adoption disruption—being forced to leave a prospective adoptive home before the adoption in

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[355] Gupta-Kagan, *Due Process Donut Hole*, *supra* note 302.

[356] Sarah Mullin, Reporter, *Foster Care and Permanency Proceedings*, 40 COLUM. J.L. & SOC. PROBS. 495, 500 (2007).

[357] *Id.* at 500–01. The problem of late agency reports has long been noted, with one commentator describing obtaining timely reports as a core judicial task. Hardin, *supra* note 4, at 163.

[358] *Supra* notes 309-314 and accompanying text.

finalized.[359] The disruption rate of pre-adoptive placements is as high as 25 percent for some subpopulations, such as older youth.[360] Any decision between whether to set a permanency plan of adoption or guardianship should weigh the comparative chance for a lasting placement that each option provides—and the risk that a prospective permanent placement might disrupt. Setting a goal of adoption for children at high risk of such disruptions could set such children up for a harmful tour through multiple foster homes, without any strong empirical record to support an adoption plan. Such a path should only be chosen after a more individualized assessment of the child's situation.

F. Legal Services for Parents, Children and, When Reunification Is Ruled Out, Caregivers

The new permanency comes to the fore of a child protection case after a court has found the parent unfit, placed the child in foster care, and subsequently determined that reunification is no longer the most appropriate permanency plan. The legal practice then becomes a form of plea bargaining with multiple parties. The state, the parent, the child and/or the child's lawyer or best interest advocate, and the foster parent(s) or other possible permanency resources engage in negotiation about what permanency plan to pursue. This practice is fundamentally different than the one envisioned by the old permanency binary. There, lawyers are charged with litigating a termination of parental rights case—agency lawyers prosecute, parents' lawyers defend, and children's lawyers advocate for either side depending on the facts of the case and the wishes of their clients. Foster parents who might become adoptive parents or guardians do not play a role until after the core decisions are made. The new permanency requires more complicated and nuanced lawyering on behalf of all parties.

The work of lawyers for parents is crucial at this stage. Parents who cannot reunify with their children have lost most of their parental rights. But many parents will see a significant difference in a permanency option that continues their status as a legal parent and one that does not.[361] And, regardless of the legal status, there is a significant difference to parents in who raises their child—even if guardianship is not possible, many, if not most parents, will prefer adoption by someone they know and trust to permit ongoing contact over adoption by someone they do not

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[359] Festinger, *Adoption Disruption*, *supra* note 48, at 460.

[360] *Supra* notes 50–51 and accompanying text.

[361] On the importance of the legal title of "parent," *see* Gupta-Kagan, *Non-Exclusive Adoption*, *supra* note 32, at Part III.A.

trust. And in most states, even an adoption can include a post-adoption contact agreement.

These options create an essential negotiation opportunity for parents, which their counsel can assist with. As in criminal plea bargaining, parents can trade their procedural rights to contest or delay permanency in exchange for an agreement to pursue guardianship rather than adoption, or to agree to a formal or informal visitation agreement.[362] Such agreements are not always possible, and not always good ideas from the perspective of different clients. Just as effective plea bargaining (and client counseling during plea bargaining) is now considered essential to minimally effective criminal defense,[363] permanency negotiation is an essential element of good lawyering for parents.

What little empirical data exists on the effect of lawyers suggests that quality parents' lawyers will improve permanency outcomes. In one of the rare studies to use control and experimental groups, Mark Courtney and Jennifer Hook found that quality parent representation caused "very impressive" increases in the speed of achieving permanency outcomes,[364] including much faster paths to both adoption and guardianship. The speed of finalizing adoptions increased 83 percent and guardianship speed skyrocketed 102 percent.[365] We can intelligently speculate about what factors caused these changes. First, higher quality legal representation likely helped more parents negotiate acceptable solutions—for instance, parents might agree to consent to a guardianship rather than adoption, leading to a relatively quick case closure. Such negotiations include several factors—starting with helping the client understand in appropriate cases that reunification may be unlikely and that their best option may be adoption or guardianship with some contact agreement, and including building some consensus for such options with other parties.

Second, good lawyers likely help ensure parents have all meaningful opportunities to reunify, and that kinship placements are adequately investigated. These steps might lead to faster rulings against parents when they have failed to take advantage of those opportunities. Improved investigation of kin would, ideally, identify kinship

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[362] *See generally*, Sanger, *supra* note 28 (analogizing negotiating post-adoption contact agreements to plea bargaining).

[363] Missouri v. Frye, 1342 S.Ct 1399, 1407-08 (2012); Lafler v. Cooper, 132 S.Ct. 1376, 1388 (2012).

[364] Mark E. Courtney & Jennifer L. Hook, *Evaluation of the impact of enhanced parental legal representation on the timing of permanency outcomes for children in foster care*, 34 CHILDREN & YOUTH SERV'S REV. 1337, 1343 (2012).

[365] *Id.* at 1340.

guardianship or adoptive placements that facilitate faster exits from foster care. Even if unsuccessful, improved kinship investigations could prevent the kind of litigation challenging later adoptions that has occurred in D.C.[366] For instance, in *In re* Ta.L., a potential kinship resource attended a family team meeting at the beginning of the case, yet was never contacted by the agency; the parent's lawyer should have counseled her client about the value of pursuing a kinship placement and advocated with the agency to place the children with kin – and, if necessary, presented a case for establishing a permanency goal with that kinship placement at the permanency hearing.

Children's lawyers are essential for many of the same reasons. When reunification is not possible, children's lawyers should often seek negotiated solutions that will achieve permanency for their clients through a legal status that meets their client's individual wishes and family circumstances, and when possible avoids unnecessary risks from litigation itself. Such negotiation has long been recognized as part of children's lawyer's jobs,[367] and so has representation after an initial disposition as the parties work towards permanency for foster children.[368] Throughout a case, children's lawyers should serve as a check on agency discretion—including, when necessary, challenging agency decisions regarding kinship placements and permanency plans. Many children's lawyers already fulfill this role, which is one reason research has shown that such lawyers expedite permanency for their clients.[369]

Finally, an important role can be played by counsel for prospective adoptive parents and guardians – after a court has ruled that a child protection agency should no longer work towards reunification. Foster parents and other potential permanency resources have important roles in planning for foster children's future – after all, if a foster parent is willing to pursue guardianship but not adoption, or vice versa, that should affect the selection of a permanency plan and litigation steps following that plan.

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[366] *Supra* Part III.B.

[367] AMERICAN BAR ASSOCIATION, STANDARDS OF PRACTICE FOR LAWYERS WHO REPRESENT CHILDREN IN ABUSE AND NEGLECT CASES 10 (1996), *available at* https://www.afccnet.org/Portals/0/PublicDocuments/Guidelines/AbuseNeglectStandards.pdf.

[368] *Id.* at 14.

[369] *See, e.g.*, ANDREW ZINN & JACK SLOWRIVER, EXPEDITING PERMANENCY: LEGAL REPRESENTATION FOR FOSTER CHILDREN IN PALM BEACH COUNTY, CHAPIN HALL CENTER FOR CHILDREN AT THE UNIVERSITY OF CHICAGO 14-15 (2008), *available at* http://www.chapinhall.org/sites/default/files/old_reports/428.pdf (finding that legal representation for children correlates with significantly higher rates of permanency, especially adoption and long-term custody, which is equivalent to guardianship).

Recognizing the role of foster parents, ASFA required that they be provided notice and an opportunity to be heard in court hearings.[370] And commentators have long called for foster parents to have a strong voice in permanency planning and for agency caseworkers to build trust with foster parents more effectively and meaningfully engage them in important decisions.[371]

Yet much reason for caution exists when considering counsel for foster parents. Most cases lead to reunification, and counsel for foster parents—especially foster parents interested in serving as adoptive parents or guardians—could impede that process. Foster parents should be expected to assist with reunification, especially in early stages of a case. Moreover, any rights that foster parents have are constitutionally subordinate to the rights of parents and children.[372] Providing foster parents with counsel is therefore inappropriate when the court has ordered parties to work towards reunification.

But when a court changes a child's permanency plan away from reunification,[373] the foster parent is in a delicate position calling for independent advice. The court, the agency, the child's lawyer (and the child, if s/he understands the legal status of their case), and the parent will look to the foster parent for an indication of the foster parent's willingness to pursue permanency, and if so, through what legal status. If the foster parent is not interested, the agency will seek to recruit someone else. If the foster parent is interested, the parties will seek either a negotiated or litigated solution. Foster parents need independent advice at this stage for multiple purposes. The foster parent should know which permanency option might best serve their goals, and would benefit from counseling regarding the best means to obtain that permanency option, including the likely results of negotiation and litigation. This decision-making is precisely the type of confidential counseling that good lawyers provide.[374]

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[370] Pub. L. 105-89, § 104 (codified at 42 U.S.C. § 675(5)(G) (2000)).

[371] *E.g.*, SCHWEITZER & LARSEN, *supra* 351, at 38–39; Sandra Stukes Chipungu & Tricia B. Bent-Goodley, *Meeting the Challenges of Contemporary Foster Care*, 14 FUTURE OF CHILDREN 75, 85–86 (2004).

[372] Smith v. Org. of Foster Fam. for Eq. & Ref., 431 U.S. 816 (1977).

[373] This statement presumes, of course, that rigorous procedures described in Part IV.G are followed, and permanency plan changes are subject to expedited appellate review.

[374] Other possibilities exist. Child protection agencies could create divisions of social workers to advise foster parents on permanency options, for instance. But such workers, as agency employees, could not be truly independent. Or local bar associations could organize pro bono attorneys to provide brief advice and counseling to foster parents.

Unfortunately, existing law is not structured to provide such attorneys. Federal financing statutes provide state agencies with $2,000 to support the costs of finalizing guardianships (at least those eligible for subsidies under existing federal law) and adoptions—costs that frequently include counsel.[375]

State courts should make a practice of appointing attorneys for foster parents who are considering becoming adoptive parents or guardians if the court has changed a child's permanency plan away from reunification. This will ensure such parties are aware of all permanency options and pursue one that achieves what they think best for the child.

V. Conclusion

The new permanency holds great promise. A range of permanency options can improve permanency outcomes by, first, helping more foster children leave temporary state custody to live with legally permanent families. Second, it can give those families (including the permanent caregiver, the child, and the biological parents) choices for the best legal status that fits their situation—they can determine how important it is to have the legal title of "parent," and what ongoing contact between the parent and child would be best. Third, it can reduce the number of unnecessary terminations and the legal orphans that such terminations create.

These outcomes require more reforms than existing efforts have created. They require accepting the powerful research showing all options on the permanency continuum as equally lasting, and letting that conclusion guide statutory reforms and agency practices. They require recognizing the connection between kinship placements and permanency, and prioritizing kinship care early in a case. They require changing child welfare's professional culture to value all forms of permanency equally, and empowering families (and not only agencies) to choose among the various permanency options. They require more rigorous procedures to reach the best decisions early in a case and provide a strong check on agency discretion. These reforms are all possible, and strongly implied by the steps already taken to create the permanency continuum.

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[375] These costs are deemed "nonrecurring" expenses in federal law and are explicitly envisioned to include legal fees for adoptions. 42 U.S.C. § 673(a)(6)(A) (2011). Similar provisions exist for guardianships. *Id.* at § 673(d)(1)(B)(iv). *See also, e.g.*, CODE OF MD. REGS. § 07.02.12.15-1(C)(2)(a) (providing "one-time-only subsidy is deigned to cover . . . legal costs").

THE QUALITY OF PERMANENCE – LASTING OR BINDING? SUBSIDIZED GUARDIANSHIP AND KINSHIP FOSTER CARE AS ALTERNATIVES TO ADOPTION

Mark F. Testa, Ph.D.*

I. INTRODUCTION

The reaffirmation of legal guardianship as a permanency goal in the Adoption and Safe Families Act of 1997 (ASFA)[1] has prompted a reconsideration of the meaning of permanence. On the one hand, the original meaning rooted in the psychology of attachment defines permanence as "lasting": an enduring relationship that arises out of feelings of belongingness.[2] On the other hand, a newer meaning rooted in law defines permanence as "binding": an enduring commitment that is legally enforceable.[3] With the growing availability of subsidized guardianship under federal waiver authority[4] and Temporary Aid to Needy Families (TANF),[5] the newer legal meaning of permanence is increasingly coming to the fore and challenging the older psychological meaning for preeminence as the overriding principle of permanency planning.

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1 Pub. L. No. 105-89, sec. 302, § 475(5)(C), 111 Stat. 2115, 2128-29 (codified as amended at 42 U.S.C. §675(5)(C) (2005)). *See also* 42 U.S.C. § 675(7) (defining "legal guardianship").

2 ARTHUR EMLEN ET AL., REG'L. RESEARCH INST. FOR HUMAN SVCS. PORTLAND STATE UNIVERSITY, PUB. NO. 78-30138, OVERCOMING BARRIERS TO PLANNING FOR CHILDREN IN FOSTER CARE 10 (1978).

3 NAT'L COUNCIL OF JUVENILE AND FAMILY COURT JUDGES, ADOPTION AND PERMANENCY GUIDELINES: IMPROVING COURT PRACTICE IN CHILD ABUSE AND NEGLECT CASES 14-15 (2000).

4 *See* 42 U.S.C. § 1320a-9 (2005) (providing federal authority to authorize state demonstration projects for child welfare services).

5 *See* 42 U.S.C. § 601 et. seq. (2005) (providing increased flexibility to states in their operation of programs to assist needy families which enable children to be cared for in their homes or in homes of relatives).

The purpose of this paper is to examine the legal, theoretical, and empirical dimensions of this growing challenge. My analysis draws from participant observations, survey interviews, and administrative data gathered for the evaluation of one of the largest federal IV-E waiver demonstrations in the country, the Illinois Subsidized Guardianship Waiver Demonstration.[6] In September of 1996, the Illinois Department of Children and Family Services (IDCFS) received approval of a federal waiver application to conduct a five-year demonstration of federally subsidized private guardianship as a supplementary permanency option to subsidized adoption.[7] Implementation of the waiver between May of 1997 and March of 2002 resulted in the transfer of 6,822 children from the public guardianship of IDCFS to the private guardianship of relatives and foster parents.[8]

Under the terms and conditions of the waiver, the IDCFS agreed to a hierarchy of preferred permanency goals that required "rule-out" before a family could qualify for subsidized guardianship: "the program will only be available to children after efforts to explore other permanency goals, especially adoption, and return home, has [sic] been ruled out."[9] Although not considered controversial at first, the rule-out provision became the subject of debate during the second and third years of the waiver's implementation.[10] On one side stood the so-called "adoption hawks," who argued for a strict interpretation that adoption needed to be ruled out independently of the preferences of the family.[11] Some perceived this strict interpretation as permitting the removal of a child from a stable kinship arrangement if the relative was unwilling to adopt

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6 *See generally* Mark F. Testa, *Subsidized Guardianship: Testing an Idea Whose Time Has Finally Come*, 26 SOC. WORK RES. 145 (2002) (presenting findings from the third year of the Illinois Subsidized Guardianship Waiver Demonstration).

7 U.S. CHILDREN'S BUREAU, *Initiatives: Illinois Assisted Guardianship/Kinship Permanence*, *at* http://www.acf.hhs.gov/programs/cb/initiatives/cwwaiver/il1.htm (last visited Feb. 12, 2005).

8 *Id.*

9 U.S. DEP'T OF HEALTH AND HUMAN SVCS., ADMIN. FOR CHILDREN AND FAMILIES, WAIVER TERMS AND CONDITIONS: ILL. CHILD WELFARE WAIVER DEMONSTRATION PROJECT, § 2.2 (1996) (on file with author).

10 Leslie Cohen, *How Do We Choose Among Permanency Options? The Adoption Rule Out and Lessons from Illinois, in* USING SUBSIDIZED GUARDIANSHIP TO IMPROVE OUTCOMES FOR CHILDREN 19, 21 (Mary Bissell & Jennifer L. Miller eds., 2004), *available at* http://www.childrensdefense.org/childwelfare/kinshipcare/default.asp.

11 *Id.* at 21 (citing Mark Testa & Ronna Cook, The Comparative Safety, Attachment, and Well-Being of Children in Kinship, Adoptions, Guardian and Foster Homes, Presented at Association for Public Policy, Analysis, and Management (November 3, 2001) (remarks on file with author)).

and another family could be found that was willing to adopt.[12] On the other side stood the "guardianship doves," who argued that family preferences take precedence.[13] They urged that kin should be informed of all their permanency options and then be permitted to select the one that best fits their cultural norms and notion of family solidarity.[14]

The emphasis on legally binding commitments is a recent innovation in permanency planning. Since its origins in the early 1970s, the permanency planning movement in the United States has promulgated a concept of permanence as lasting with the goal to find a foster child a home that is intended to last indefinitely, in which the sense of belonging is rooted in cultural norms, has definitive legal status, and conveys a respected social identity.[15] The newer concept of permanence as legally binding demotes guardianship in the permanency hierarchy because legal guardianship is more easily vacated and vulnerable to legal challenge than natural guardianship by birth or adoption.[16]

While there is consensus that permanency commitments should not be casually broken, not much is known about the extent to which the newer concept of permanence as legally binding confers value beyond the original meaning of permanence as lasting. The hawks believe that the experiences and outcomes of foster children adopted by kin or others will be different from those of children who are discharged to the legal guardianship of kin or remain in stable kinship foster care.[17] They believe that strict adherence to a hierarchy of permanency preferences

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12 "The inescapable conclusion is that guardianship is not 'permanency' in the eyes of the Department of Children and Family Services, which I suspect is not the case. In this matter, regarding the four-year old, the [related] foster parent is under the impression that, if he doesn't adopt, the Department will move this girl out of the home – in which she is well settled and loved – into a home which will adopt her, should rights be terminated." Letter from David L. DeThorne, Office of the Public Defender, Champaign County, Illinois, to Jess McDonald, Director, State of Illinois, Department of Children and Family Services 6 (June 4, 2002) (on file with author).

13 Cohen, *supra* note 10, at 21 (citing Mark Testa & Ronna Cook, The Comparative Safety, Attachment, and Well-Being of Children in Kinship, Adoptions, Guardian and Foster Homes, Presented at Association for Public Policy, Analysis, and Management (November 3, 2001) (remarks on file with author)).

14 *Id.*

15 EMLEN, *supra* note 2, at 10-11.

16 *See* NAT'L COUNCIL OF JUVENILE AND FAMILY COURT JUDGES, *supra* note 3, at 14; Marianne Takas & Rebecca L. Hegar, *The Case for Kinship Adoption Laws*, *in* KINSHIP FOSTER CARE: POLICY, PRACTICE, AND RESEARCH 58 (Rebecca L. Hegar & Maria Scannapieco eds., 1999).

17 *See generally* ELIZABETH BARTHOLET, NOBODY'S CHILDREN 90-93 (1999) (discussing concerns with quality of kinship foster care).

improves results.[18] Alternatively, the doves warn that rigid rule-out processes may disrupt stable kinship placements and unnecessarily delay permanence for children who might benefit from permanency options like legal guardianship, which preserve some role for birth parents and other biological kin in the children's upbringing.[19] This study addresses these issues by attempting to answer the following four questions: (1) Are more children discharged to permanent homes if caregivers are given the choice of subsidized adoption or guardianship as compared to caregivers offered subsidized adoption alone? (2) Do the intentions of raising a child to adulthood differ for caregivers who can choose between adoption and guardianship as compared to caregivers who can select only adoption? (3) Do children express any lesser sense of belonging in families that adopt or become guardians as compared to families that only adopt? (4) Are the homes of guardians and adoptive parents any more likely to disrupt than the homes of caregivers who can only become adoptive parents? Understanding the practical contributions that adoption, private guardianship, and family foster care arrangements make to the quality of permanence for children and families is important for deciding how much preference one permanency option should be given over another.

II. BACKGROUND

In the 1950s, child welfare professionals began championing the right of every child to guardianship of the person, either natural guardianship by birth or adoption or legal guardianship by the court.[20] Their interest was sparked by the discovery that many dependent and neglected children as well as child beneficiaries of federal cash assistance programs lacked the basic protection of either a natural or legal guardian to safeguard the child's interests, make important

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18 *Id.*

19 *See* Cohen, *supra* note 10, at 21 (citing Mark Testa & Ronna Cook, The Comparative Safety, Attachment, and Well-Being of Children in Kinship, Adoptions, Guardian and Foster Homes, Presented at Association for Public Policy, Analysis, and Management (November 3, 2001) (remarks on file with author)).

20 *See, e.g.*, ARTHUR SMITH, THE RIGHT TO LIFE 122 (1955); IRVING WEISSMAN, GUARDIANSHIP: A WAY OF FULFILLING PUBLIC RESPONSIBILITY FOR CHILDREN 176 (Children's Bureau, Publ'n No. 330, 1949).

decisions in the minor's life, and form a personal relationship with the child.[21]

The problem came into the national spotlight with the publication of Maas and Engler's *Children in Need of Parents*.[22] The book called attention to the plight of children drifting aimlessly in foster care without a plan for permanence.[23] Several treatises underscored the concern by warning of the psychological damage inflicted on children who grow up without secure attachment relationships to parents or substitute caregivers.[24]

The fact of foster children's lack of legal permanence and the growing awareness of children's need for secure attachments came together in the pioneering work of Victor Pike and his colleagues on the Freeing Children for Permanent Placement Demonstration in Oregon.[25] The purpose of the demonstration was to develop ways of pursuing permanent plans for children who otherwise risked staying indefinitely in foster care, often until they reached adulthood.[26]

A. The Qualities of Permanence

The Oregon demonstration defined permanence in terms of four qualities: intent, continuity, belongingness, and respect.[27] With regard to intent, the developers emphasized that a permanent home is not one that is certain to last forever, but one that is *intended* to last indefinitely.[28] Continuity refers to the fact that a permanent family relationship is one that survives geographical moves and temporal change.[29] A sense of belonging to a permanent family is rooted in cultural norms and has definitive legal status.[30] Finally, membership in a permanent family brings respected social status for both the child and the family.[31]

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21 Irving Weissman, *Legal Guardianship of Children? in* THE SOC. WEL. FORUM 74, 76 (1950).

22 HENRY S. MAAS & R.E. ENGLER, CHILDREN IN NEED OF PARENTS (1959).

23 MAAS & ENGLER, *supra* note 22, at 356-362.

24 1 JOHN BOWLBY, ATTACHMENT AND LOSS: ATTACHMENT xi-xv (1969); JOSEPH GOLDSTEIN ET AL., BEYOND THE BEST INTERESTS OF THE CHILD 31-34 (1973).

25 VICTOR PIKE ET AL., PERMANENT PLANNING FOR CHILDREN IN FOSTER CARE: A HANDBOOK FOR SOCIAL WORKERS (U.S. Dep't of Health, Educ., and Welfare, Publ'n No. 77-30124, 1977).

26 PIKE, *supra* note 25, at i.

27 EMLEN ET AL., *supra* note 2, at 10-11.

28 *Id.* at 10 (emphasis in original).

29 *Id.* at 10.

30 *Id.* at 10.

31 *Id.* at 11.

Congress codified the permanency framework in the federal Adoption Assistance and Child Welfare Act of 1980 (AACWA).[32] Although AACWA recognized legal guardianship as a permanency goal,[33] it made no special provision for guardianship assistance payments similar to the assistance made available to the adoptive parents of foster children. As a consequence, legal guardianship took a backseat to efforts to conserve foster children's natural guardianship through family preservation and reunification, and when this was not possible, to replicate the nuclear family through adoption.[34]

At the time of AACWA's enactment, most children formally removed from their birth parents were placed in foster homes unknown to them.[35] When reunification with birth parents was not possible, child welfare authorities pursued adoption as the next-best alternative because it is the conventional means by which kinship ties are established between persons who are biologically unrelated to one another. While the four qualities of permanence emphasized in the Oregon demonstration were assumed to be intrinsic properties of families constituted by blood, the expectation was that the legal and social rituals of formal adoption, including termination and transfer of parental rights, altered birth certificates, and sealed adoption records, [36] could engender these same qualities in families constituted through adoption.

With the rapid growth of kinship foster care in the 1990s, however, the capacity of subsidized adoption alone to meet the permanency needs of all children in long-term foster care came into question.[37] While federal adoption assistance was available to grandparents, aunts, and other relatives, the legal and cultural definitions of formal adoption

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32 Pub. L. No. 96-272, § 475, 94 Stat. 500 (codified as amended at 42 U.S.C. § 675 (2005)).

33 "[T]he status of each child is reviewed periodically . . . to project a likely date by which the child may be returned to the home or placed for adoption or *legal guardianship*." § 475, 94 Stat. at 511 (codified as amended at 42 U.S.C. § 675(5)(B)) (emphasis added).

34 Takas & Hegar, *supra* note 16, at 57.

35 *See* James P. Gleeson, *Kinship Care as a Child Welfare Service: What Do We Really Know? in* KINSHIP CARE: IMPROVING PRACTICE THROUGH RESEARCH 3, 3-4 (James P. Gleeson & Creasie Finney Hairston eds., 1999).

36 KATARINA WEGAR, ADOPTION, IDENTITY, AND KINSHIP: THE DEBATE OVER SEALED BIRTH RECORDS 29 (1997).

37 *See* Jill Duer Berrick & Barbara Needell, *Recent Trends in Kinship Care: Public Policy, Payments, and Outcomes for Children, in* THE FOSTER CARE CRISIS 152, 152-53 (Patrick A. Curtis et al. eds., 1999).

made this choice difficult for some kin to accept.[38] The sense of family solidarity and accepted social standing that adoption brings to persons unrelated to one another strike some kin as superfluous because their affinity and status are already supported by the cultural norms of American kinship.[39] Living with aunts, uncles, and grandparents may raise some eyebrows, but it is rarely a source of identity confusion or focus of school-yard taunts. What these arrangements typically lack are the definitive legal status and financial supports that adoption and federal subsidies confer. To bridge this gap, social workers, lawyers, and policymakers have increasingly looked to subsidized legal guardianship as a permanency planning option that can address many of the concerns that some relatives express about adopting their own kin.[40]

B. Legal Guardianship as a Child Welfare Resource

Unlike adoption, guardianship does not recast kinship relations into the nuclear family mould of parent and child. Guardians can retain their extended family identities as grandparents, aunts, and uncles. It does not require the termination of parental rights, which legally estranges children not only from their birth parents but also from their un-adopted siblings. Under guardianship, unless parental rights are terminated, birth parents hold on to certain residual rights, such as the rights to visit and consent to adoption.[41] If circumstances change, parents can petition the court to vacate the guardianship and return the children to their custody, unlike adoption in which the birth parents' rights to regain custody are permanently extinguished.[42] Lastly, guardianship limits the financial liability of guardians for the upkeep of their wards, whereas adoption reassigns these financial obligations fully to the adoptive parents.[43]

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38 Jesse L. Thornton, *Permanency Planning for Children in Kinship Foster Homes*, 70 CHILD WELFARE 593, 597–598 (1991); Denise Burnette, *Grandparents Raising Grandchildren in the Inner City*, 78 FAMILIES IN SOCIETY: J. OF CONTEMPORARY HUMAN SERVICES 489, 496 (1997).

39 *See generally* DAVID M. SCHNEIDER, AMERICAN KINSHIP: A CULTURAL ACCOUNT 107 (1968) (describing American cultural definition of kinship).

40 Hasseltine B. Taylor, *Guardianship or Permanent Placement of Children*, 54 CAL. L. REV. 741 (1966); Bogart R. Leashore, *Demystifying Legal Guardianship: An Unexplored Option for Dependent Children*, 23 J. OF FAM. LAW 391, 397 (1984-85); Carol C. Williams, *Expanding the Options in the Quest for Permanence*, *in* CHILD WELFARE: AN AFRICENTIRC PERSPECTIVE 266, 276-78 (Joyce E. Everett et al. eds., 1991).

41 Leashore, *supra* note 40, at 392.

42 *Id.* at 396, 398.

43 Williams, *supra* note 40, at 277.

The Omnibus Budget Reconciliation Act of 1993 was the first federal legislation after AACWA to reaffirm legal guardianship as a valid permanent planning goal.[44] The legislation authorized family preservation services designed to help children: "(i) where appropriate, return to families from which they have been removed; or (ii) be placed for adoption, with a legal guardian, or, if adoption or legal guardianship is deemed not to be appropriate for a child, in some other planned, permanent living arrangement."[45] Four years later, Congress gave even greater prominence to legal guardianship in ASFA by adding the following definition:

> The term "legal guardianship" means a judicially created relationship between child and caretaker which is intended to be permanent and self-sustaining as evidenced by the transfer to the caretaker of the following parental rights with respect to the child: protection, education, care and control of the person, custody of the person, and decisionmaking. The term "legal guardian" means the caretaker in such a relationship.[46]

Congress also deleted language that condoned foster care on a permanent or long-term basis as a valid permanency goal and instead clarified that a permanency plan includes the following:

> [W]hether, and if applicable when, the child will be returned to the parent, placed for adoption and the State will file a petition for termination of parental rights, or referred for legal guardianship, or (in cases where the State agency has documented to the State court a compelling reason for determining that it would not be in the best interests of the child to return home, be referred for termination of parental rights, or be placed for adoption, with a fit and willing relative, or with a

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44 Pub. L. No. 103-66, sec. 13711, § 431(a)(1)(A)(ii), 107 Stat. 312 (codified as amended in scattered sections of 42 U.S.C. (2005)).

45 Pub. L. No. 103-66, sec. 13711, § 431(a)(1)(A)(i)-(ii), 107 Stat. 312 (codified as amended in scattered sections of 42 U.S.C. (2005)).

46 Pub. L. No. 105-89, sec. 101, § 475, 111 Stat. 2115, 2128-29 (codified as amended at 42 U.S.C. § 675(7) (2005)).

> legal guardian) placed in another planned permanent living arrangement.[47]

Despite ASFA's reaffirmation of legal guardianship as a permanency goal, the 1997 legislation did not make special provisions for federal guardianship assistance like the 1980 AACWA had made adoption assistance a federal entitlement. Instead, it expanded the United States Department of Health and Human Services' (USDHHS) authority to grant federal IV-E waivers to support state experimentation in the delivery of child welfare services, including subsidized guardianship.[48]

A few years prior to ASFA, Congress authorized child welfare waivers under Section 1130 of the Social Security Act.[49] It permitted up to a total of ten states to conduct demonstrations of new approaches to the delivery of child welfare services.[50] In 1995, the Children's Bureau invited applications for subsidized guardianship demonstrations, "which would allow children to stay or be placed in a familial setting that is more cost effective than continuing them in foster care."[51] Initially six states received waivers to mount subsidized guardianship demonstrations.[52] An additional four were approved after the limit on state demonstrations was increased to ten per year.[53] As of March 2005, another seven states have submitted waiver applications to authorize the use of IV-E funds for subsidized guardianship demonstrations.[54]

The availability of subsidized guardianship under federal waivers and the perception that ASFA put legal guardianship and other permanency options on equal footing with adoption provoked protests from some adoption advocates. Elizabeth Bartholet in her 1999 publication *Nobody's Children* vividly summarized the chief concerns as follows:

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47 Pub. L. No. 105-89, sec. 302, § 475(5)(C), 111 Stat. 2115, 2128-29 (codified as amended at 42 U.S.C. § 675(5)(C) (2005)).

48 *Id.*

49 Pub. L. No. 103-432, § 1130, 108 Stat. 4398, 4458 (1994).

50 *Id.*

51 Administration for Children and Families, 60 Fed. Reg. 31478, 31483 (June 15, 1995).

52 Delaware, California, Illinois, Maryland, North Carolina, and Oregon.

53 Montana, New Mexico, Minnesota, and Wisconsin.

54 Alaska, Iowa, Maine, Michigan, New Jersey, Tennessee, and Virginia. Telephone interview with Gail Collins, Senior Child Welfare Program Specialist, U.S. Children's Bureau (Feb. 17, 2005).

> How many will be placed in high-risk permanent homes? How many will in fact be living with the very parents from whom they were supposedly removed, as the mothers or fathers move in with the grandparents who are officially denominated the guardians? How will the CPS system that has given up any monitoring role know what it going on? And how many children would do better in permanent *adoptive* homes, with parents who have assumed full parenting rights and responsibilities? It's impossible to answer these questions in the abstract. But it seems likely that children would do better if adoption was established as the presumptive placement for all children who could not live with their parents of origin, leaving child welfare workers and the courts to choose another form of permanency only on the basis of an individualized determination that it would better serve a child's interests.[55]

It is important to note that ASFA did not establish adoption as the presumptive best placement for children who cannot be reunited with their birth parents. The federal law requires only that the state document to the state juvenile or family court a compelling reason that it is not in the child's best interests to return home, be referred for termination of parental rights, be placed for adoption with a fit and willing relative, or be placed with a legal guardian before approving another planned permanent living arrangement such as long-term foster care or independent living.[56] In spite of the absence of a clear ranking in the law, all of the subsidized guardianship waivers granted by the USDHHS since 1997 have made rule-out of both reunification and adoption a pre-condition for approving guardianship assistance agreements.[57]

C. Hierarchy of Preferred Permanency Options

The Illinois General Assembly passed conforming legislation in 1997 that implemented the rule-out requirement.[58] It established a hierarchy of permanency goals that ranks private guardianship above the

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55 BARTHOLET, *supra* note 17, at 159.

56 42 U.S.C. § 675(5)(C) (2005).

57 *See* U.S. Children's Bureau, *Summary of IV-E Child Welfare Waiver Demonstration Projects, May 2004, at* http://www.acf.hhs.gov/programs/cb/initiatives/cwwaiver/summary.htm (last visited Feb. 12, 2005).

58 705 ILL. COMP. STAT. 405/2-28(2)(E) (2004).

goal of independence but below the goals of reunification and adoption.[59] In selecting any permanency goal, state courts are instructed to indicate in writing the reasons a specific goal was selected and why the higher ranked goals were ruled out.[60]

The hierarchy of preferred permanency options and the concept of permanence as binding also came to dominate judicial thinking in the early 2000s. The National Council of Juvenile and Family Court Judges (NCJFCJ) issued *Adoption and Permanency Guidelines* that added to the original four qualities of lasting permanence "[a] legal relationship that is binding on the adults awarded care, custody and control of the child; . . .[b]iological parents cannot petition the court to terminate the relationship."[61] This new concept of permanence as binding ranks legal guardianship much lower in the hierarchy of preferred permanency options than the older concept of permanence as lasting. This thinking is reflected in the following permanency ranking promulgated in the NCJFCJ *Guidelines*:

> The first preferred option for permanency is reunification with the biological parents. The next preferred option is adoption by the relative or foster family with whom the child is living. The next preferred option is adoption by an appropriate family with whom the child has a positive existing relationship (but is not living with) – i.e., a relative, former foster parent or adopting family of a sibling. The next preferred option is recruitment of a new family who will adopt the child. Permanent guardianship or permanent custody is the final preferred option for permanency when adoption is not possible or exceptional circumstances exist, but only if the relationship meets the legally secure components described [under permanency characteristics noted above].[62]

Prior to the reformulation of the concept of permanence from lasting to binding, most permanency workers accepted the principle that kin should fully explore and carefully consider the option of adoption before

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59 *Id.*
60 705 ILL. COMP. STAT. 405/2-28(2)(G).
61 NAT'L COUNCIL OF JUVENILE AND FAMILY COURT JUDGES, *supra* note 3, at 14-15.
62 *Id.* at 14.

settling upon legal guardianship as a permanency plan.[63] In fact, research conducted in Illinois in the early 1990s showed that many more relatives were willing to consider adoption than conventional wisdom had believed.[64] Despite the growing acknowledgement of kin's willingness to adopt, the issue of who should have the final say about what form of legal permanence should be pursued for the child remains an open question.

Some older wards are firmly opposed to the termination of parental rights and hope to preserve a role for their parents in their upbringing.[65] Some relatives are willing to raise their minor kin to adulthood but are hesitant about becoming embroiled in a legal contest that pits family members against one another.[66] Some relatives prefer to retain their extended family identity as grandmother, aunt, or cousin rather then become mom or dad, even if parental rights are already terminated.[67]

Should such family preferences be honored by child welfare agencies and the courts in the selection of permanency options? Under the hierarchy of permanency options in the NCJFCJ *Guidelines*,[68] few of these preferences would seem to qualify as compelling enough to rule out adoption, especially if the child is deemed potentially adoptable by another family. When this question was debated in Illinois, the opposing factions of adoption hawks and guardianship doves sharply divided over the question of who should have the decisive say on which permanency option to pursue. The doves argued that the kinship network is in the best position to determine whether adoption or guardianship is in keeping with their family's sense of belonging, cultural norms, and understandings of social identity.[69] Their belief was consistent with the original psychological definition of permanence as lasting. On the other side, the hawks argued that adoption must be ruled out by the courts

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63 *See* Taylor, *supra* note 40, at 746.

64 Mark F. Testa et al., *Permanency Planning Options for Children in Formal Kinship Care*, 75 J. OF THE CHILD WELFARE LEAGUE OF AMERICA, INC. 451, 453 (1996); James P. Gleeson, *Kinship Care as a Child Welfare Service: Emerging Policy Issues and Trends, in* KINSHIP FOSTER CARE: POLICY, PRACTICE, AND RESEARCH 28, 34 (Rebecca L. Hegar & Maria Scannapieco eds., 1999).

65 Susan L. Brooks et al., *A Better Option?* 41 TENN. BAR J. 16, 17 (2005).

66 *See id.*

67 Thornton, *supra* note 38, at 597.

68 NAT'L COUNCIL OF JUVENILE AND FAMILY COURT JUDGES, *supra* note 3, at 14.

69 *See* Cohen, *supra* note 10, at 21 (citing Mark Testa & Ronna Cook, The Comparative Safety, Attachment, and Well-Being of Children in Kinship, Adoptions, Guardian and Foster Homes, Presented at Association for Public Policy, Analysis, and Management (November 3, 2001) (remarks on file with author)).

beyond a shred of a doubt before guardianship can be offered as an option.[70] Their belief was consistent with the newer legal definition of permanence as binding. In circumstances where the child is young and another foster family expresses a willingness to adopt, some adoption hawks argued that rule-out required removing the child from the stable care of a relative foster parent and placing the child in an unrelated adoptive home.[71] When pressed for justification, they offered an explanation similar to the following sentiment that Bartholet expressed about kinship foster care in *Nobody's Children*:

> [T]here are many reasons for concern about the quality of the parenting some children receive in kinship foster care. In the first place, kinship foster care is by definition *not* permanent: as a legal matter foster parents have no permanent obligations to the children; they may choose not to foster the children until adulthood, even if fostering is needed. From the child's perspective, you cannot count on foster parents to be there in the future the way you can count on adoptive parents. Many kinship fostering arrangements prove in fact to be temporary, with the children moving on to other foster homes after a period of time.[72]

Whether the newer legal definition of permanence as binding will eventually supercede the older psychological definition of permanence as lasting in federal statute should depend, to some extent, on how important the obligatory aspects of caregiving are relative to the relational aspects in supporting the continuity and stability of family care. In the following section, I present a theoretical framework for developing and testing hypotheses about the differences between adoption, legal guardianship, and other substitute care placements in ensuring children a permanent family life.

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70 *Id.*
71 *Id.*
72 BARTHOLET, *supra* note 17, at 90.

III. THEORETICAL FRAMEWORK

The theoretical framework I apply to the study of permanence builds on the concept of the "gift relationship."[73] The concept refers to acts of beneficence, such as blood donation, charitable contribution, and foster care, which have the character of a gift from the viewpoint of the recipient and the risk structure of a social dilemma from the perspective of the donor.[74]

A social dilemma involves a particular type of risk structure, such that if all group members engage in reciprocal altruism everybody gains resources, whereas for each individual member there is a strong temptation to behave selfishly and withhold his or her cooperation.[75] Although unrequited gift relationships can endure for a short period, chronic or widespread defections from norms of cooperation and reciprocity undermine the relationships of commitment and trust that families and other groups rely upon to achieve collective goals of public health, safety, and welfare.[76]

In contemporary social science parlance, a gift relationship is a form of "social capital."[77] Investments in social capital also have the character of a gift and the risk structure of a social dilemma.[78] Unless reinforced by reciprocal acts of altruism directly by the recipient (restricted gift exchange) or indirectly by a third-party to whom the recipient and donor are linked socially (generalized gift exchange), a community's stock of social capital will tend to diminish.[79] In Titmuss' example of a generalized exchange system of voluntary blood donation, he acknowledges the "unspoken assumption of some form of gift-

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73 *See generally* RICHARD M. TITMUSS, THE GIFT RELATIONSHIP: FROM HUMAN BLOOD TO SOCIAL POLICY (1971) (discussing the gift relationship in the context of blood donations).

74 Mark F. Testa & Kristen S. Slack, *The Gift of Kinship Foster Care*, 24 CHILDREN AND YOUTH SERVICES REVIEW 79, 79 (2002).

75 Toshio Yamagishi & Karen S. Cook, *Generalized Exchange and Social Dilemmas*, 56 SOC. PSYCHOL. Q. 235, 236 (1993).

76 *See* Jane J. Mansbridge, *On the Relation of Altruism and Self-Interest*, *in* BEYOND SELF INTEREST 133, 133-34 (Jane J. Mansbridge ed., 1990).

77 *See generally* Pierre Bourdieu, *The Forms of Capital*, *in* HANDBOOK OF THEORY AND RESEARCH FOR THE SOCIOLOGY OF EDUCATION 241 (John G. Richardson ed., 1986) (describing economic, cultural, and social capital); JAMES S. COLEMAN, FOUNDATIONS OF SOCIAL THEORY 300-321 (1990) (discussing social capital).

78 *See generally* Alejandro Portes, *Social Capital: Its Origins and Applications in Modern Sociology*, 24 ANNUAL REVIEW OF SOCIOLOGY 1 (1998) (reviewing definitions of social capital).

79 COLEMAN, *supra* note 77, at 315-318.

reciprocity, that those who give as members of a society to strangers will themselves, or their families, eventually benefit as members of that society."[80] As such, voluntary blood donation, like other forms of generalized gift exchange, is a public good and hence subject to the "free rider" problem, meaning that it is self-rational for each individual to receive without contributing his or her fair share.[81] The possibility of "free-riding" in systems of generalized exchange requires a basic social dilemma to be resolved in favor of reciprocal altruism in order for individual investments to continue and for the benefits to flow to the community as a whole.[82]

Foster care is a gift relationship that substitutes for the parental investments that children normally rely on from birth to meet their physical, emotional, and material needs.[83] Because of the lengthy immaturity and dependency of human children, the extended investments required of caregivers are particularly costly and susceptible to defection from norms of parental altruism. In this sense, children are natural-born "free riders," and caregivers must either be predisposed to invest altruistically in the extended care of children or communities must devise systems of generalized gift exchange to shoulder some of the costs and burdens of childrearing.

Foster care is a system of generalized gift exchange that must be maintained in the absence of full reciprocity by the recipients (children) and other restricted exchange partners (parents). Game theorists hypothesize three factors that reinforce the maintenance of gift relationships in the absence of full reciprocity: empathy, duty, and payment.[84] Foster care is motivated by some combination of all three. Because foster care is, by definition, a commitment of limited liability, it is susceptible to defection by foster parents at any time as a result of variation or abrupt changes in any of the factors that tend to reinforce gift relationships. For example, a study by Testa and Slack demonstrated that children whose parents were reported as regularly

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80 TITMUSS, *supra* note 73, at 215.

81 The free-rider problem is defined as: "A situation commonly arising in public goods contexts in which players may benefit from the actions of others without contributing (they may free ride). Thus, each person has incentive to allow others to pay for the public good and not personally contribute." GAMETHEORY.NET DICTIONARY, *at* http://www.gametheory.net/Dictionary/FreeRiderProblem.html (last visited April 5, 2005).

82 Yamagishi & Cook, *supra* note 75, at 236.

83 *See* Testa & Slack, *supra* note 74, at 81-84.

84 Mansbridge, *supra* note 76, at 134-36.

visiting and working toward regaining custody (reciprocity) were more likely to be reunified and less likely to be re-placed than children whose parents were reported as non-cooperative with visitation and service plans.[85] Controlling for reciprocity, children were also less likely to be re-placed if caregivers retained a full foster care subsidy (payment), reported a good relationship with the child (empathy), and attended church regularly (duty).[86]

Foster care commitments of limited liability are functional in systems of generalized child exchange so long as the intention is to restore the children to the natural guardianship of birth parents. But once reunification is determined not to be in the best interests of the children, the state should integrate the children into more lasting relationships of commitment and trust that they can rely on until they reach adulthood. Placement with kin (empathic solution), adoption or guardianship (dutiful solution), and long-term care in higher-cost specialized foster or group care (payment solution), or some combination of all three, are analytically distinct solutions to the dilemma of maintaining children in lasting gift relationships. The amount of social capital already invested in the relationship as measured by the length of time in the relationship or a commitment to stay together is also important. The critical empirical question is whether the biological bonds and social attachments of kinship are sufficiently lasting to ensure a relative's intention of raising a child to adulthood, or whether the commitment must be made legally binding through adoption to give a child a life-long family. In the next section, I discuss the study design for assessing the practical differences between family foster care, guardianship, and adoption with respect to the four qualities of intent, continuity, status, and sense of belonging that families bring to these arrangements.

IV. STUDY DESIGN

In January of 1997, the IDCFS began randomly assigning kinship and foster homes with eligible children to statistically equivalent control and experimental groups. Assignment to the demonstration required that: (1) the child had been in the legal custody of the state for at least two years, and (2) the child had been residing continuously with the

85 Testa & Slack, *supra* note 74, at 93-94.
86 *Id.* at 94-95.

relative or foster parent for at least one year.[87] Homes assigned to the experimental group were eligible for both subsidized guardianship and adoption, while homes assigned to the control group were eligible for subsidized adoption only.[88] Children under the age of twelve were eligible for subsidized guardianship only if they resided with kin.[89]

The survey firm, Westat Inc. of Rockville, Maryland, conducted two rounds of interviews in 1998 and 2000 with probability samples of caregivers and children aged nine and older. First round interviews were completed with 2,265 eligible caregivers with a response rate of sixty-seven percent.[90] A total of 1,211 children whose caregivers had also completed a survey were interviewed with a response rate of eighty-seven percent.[91] Westat conducted the interviews with the children using the novel technology of Audio Computer Assisted Self-Interviews (ACASI) on a touch-screen, computer laptop. The audio feature of ACASI overcomes the problems associated with varying reading abilities among school-aged children and, with the use of earphones, offers greater privacy.

This study links the survey responses with IDCFS administrative data to measure the continuity of family relationships and changes in the legal status of the child. The administrative data are drawn from the IDCFS Integrated Database that the Chapin Hall Center for Children maintains for the Department. The database tracks key administrative events in child and family cases, such as placement changes, permanency planning goals, and discharge dates. For the present study, administrative case records were extracted from the Integrated Database for the sample of children whose caregivers completed the CAPI and the sub-sample of children who completed the ACASI. Administrative data for these sampled children were extracted from the IDCFS Integrated Database for the period from the date of assignment until case closing or June 30, 2004, whichever came first.

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87 U.S. CHILDREN'S BUREAU, *supra* note 7; Mark F. Testa et al. in collaboration with Westat, *Illinois Subsidized Guardianship Waiver Demonstration: Final Evaluation Report*, (State of Illinois Dept. of Children & Family Services, Springfield, IL) (revised May 2003), *at* http://cfrcwww.social.uiuc.edu/pubs/pdf.files/sgfinalreport.pdf (last visited February 12, 2005). Information about study design described in Part IV of this article is contained in the Final Evaluation Report.

88 Testa et al. in collaboration with Westat, *supra* note 87, at 1.

89 *Id.* at 4.

90 *Id.* at App. D, 1-9.

91 *Id.* at 8.

This study uses caregivers' responses to both the ACASI and the CAPI to measure subjective qualities of permanence, such as intent and belonging. With respect to intent, caregivers were asked how much longer the child would be living with them. The response "until child is an adult" is taken as an indicator of the caregiver's intent for the home to be the child's lasting home. The ACASI measured a child's sense of belonging with the question: "Do you feel like you're part of this family." The child could touch one of five responses: "all of the time, most of the time, sometimes, hardly ever, or never." The first two categories were collapsed into a binary variable and contrasted with the last three categories to form the measure of belongingness.

The continuity of a child's family situation and a child's legal status are measured with IDCFS administrative records that were linked to the child through the IDCFS identification number. Because the payment of foster boarding allowances and subsidies is tied to specific providers, the administrative history of provider changes provides a fairly reliable record of the stability of a child's living arrangements. For this study, continuity is defined as a child's residing as of June 30, 2004 with the same caregiver as they lived with at the time of assignment to the demonstration. Because ninety-eight percent of the wards who are adopted or taken into guardianship in the waiver demonstration also receive some form of subsidy, it is possible to track the continuity of adoption and guardianships in this manner as well. The computer programming is slightly more complicated for adoptions because the child's IDCFS identification number and often the child's name will change after the adoption has been legally finalized. Because secrecy is less of an issue, this is not the practice for guardianship.

The stability of the placements with caregivers at rounds one and two is also tracked using administrative data. For sake of convenience and comparability with national standards, the study adheres to the definition promulgated by the United States Children's Bureau.[92] This definition excludes from the counts of disruption and displacement temporary absences from the child's ongoing foster care placement and certain temporary living conditions, such as visitation with siblings, hospitalization for medical treatment, acute psychiatric episodes or diagnosis, respite care, day or summer camps, trial home visits, and

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92 U.S. CHILDREN'S BUREAU, *Child Welfare Policy Manual, Section 1.2B.7 Administration for Children and Families, Data Elements and Definitions, Foster Care Specific Elements, Placements, at* http://www.acf.hhs.gov/programs/cb/laws/cwpm/index.jsp (last visited March 1, 2005).

runaways.[93] It includes certain emergency placements, such as shelter care, treatment facilities, and juvenile detention centers.[94]

To ascertain the children's permanency status at the time of interview, the study used caregiver responses to a series of questions about permanency options and plans. The CAPI based skip patterns for permanency questions on pre-programmed codes from the IDCFS administrative records rather than on respondent self-reported legal status. Because some of the changes in legal status had not yet been posted to the IDCFS computer system by the day of the interview, some respondents were incorrectly asked about permanency plans even though they had already adopted or taken the child under their guardianship. IDCFS administrative records were subsequently checked to classify correctly the children's permanency status at the time of interview into one of five categories: (1) already adopted; (2) already taken into guardianship; (3) plan to become permanent caregiver; (4) unwilling or undecided about becoming permanent caregiver; and (5) not asked about permanency options.

Because of the rapid growth of kinship foster care, child welfare research must now take into account the biological relationship of the children to their foster parents. Some relatives and foster parents who have adopted will report their relationship to the child as mother or father, while others who have adopted will use grandparent, aunt, uncle, cousin, or other kinship terms. To handle this variability, this study recodes caregiver responses to a series of questions about kinship relationships to the child and to the child's birth mother into an index of genealogical relatedness that spans five categories: (1) grandparents, (2) aunts and uncles, (3) more distant relatives, and (4) non-relatives.

To capture the gift reinforcement factor of empathy, this study computes scales from caregiver responses to a series of questions about displays of affection and encouragement to the child: "In the last 30 days, how often have you, (1) Showed (him/her) that you liked to have (him/her) around?; (2) Made (him/her) feel loved?; and (3) Praised (him/her) for doing something really well?" Response categories were never, sometimes, and often. To measure duty, the study relied on a response to how strongly the caregiver agreed or disagreed with the following statement: "Families have a moral duty to take care of their own kin regardless of whether government pays for the cost of care."

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93 *Id.*
94 *Id.*

Response categories were strongly agree, agree, disagree or strongly disagree. Finally, data on government subsidies were collected from caregiver reports of the amount of money the family received last month in adoption or guardianship subsides, foster care boarding payments, and day care assistance from IDCFS.

A. Permanence and Intent

Panel A of Figure 1 displays the permanency status for age-eligible children as reported by their caregiver and corrected by administrative data at the initial round of interviews conducted in 1998. Consistent with the goals of the demonstration, Panel A shows that the offer of subsidized guardianship to families in the experimental group boosted legal permanence by 8.3 percentage points over and above the level of adoptions in the control group. A test of statistical significance of this size difference indicates that only two times out of a thousand (sig. = .002) would it be erroneous to infer that this difference is greater than zero. This net gain in permanence is composed of 6.7 percentage points that guardianship added to the level of permanence and an additional 1.6 percentage points that increased adoptions added to the level of permanence in the control group. Thus at the first round of interviews the offer of subsidized guardianship boosted adoptions in the experimental group as well as provided an additional pathway to permanence through legal guardianship. Caregiver intentions, however, foreshadowed that this adoption boost was likely to be short lived.

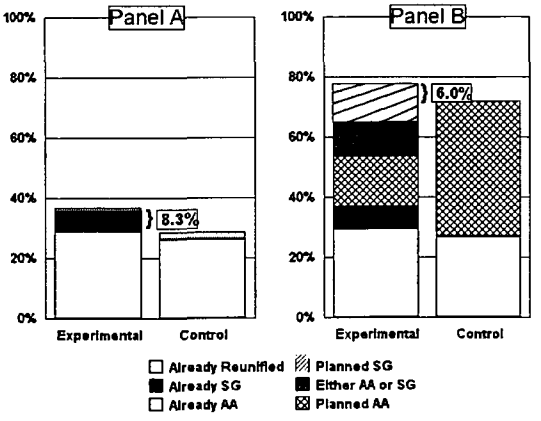

Figure 1

Caregivers who had not already made a permanency commitment were also asked at round one whether they planned to become the adoptive parents or permanent guardians of the child under their care. Panel B of Figure 1 shows that if all of the caregivers followed through on their stated intentions, the experimental group's permanency advantage would gradually dwindle to six percent. Although a statistical test still suggests that this difference is likely greater than zero, the net gain would now come at the expense of forgoing some adoptions that would have likely happened in the absence of the waiver. That is, the adoption rate potentially could rise to seventy-two percent in the control group and level out at a little below sixty percent in the experimental group, assuming that the caregivers in the experimental group who agreed to either adoption or guardianship were eventually to choose adoption.

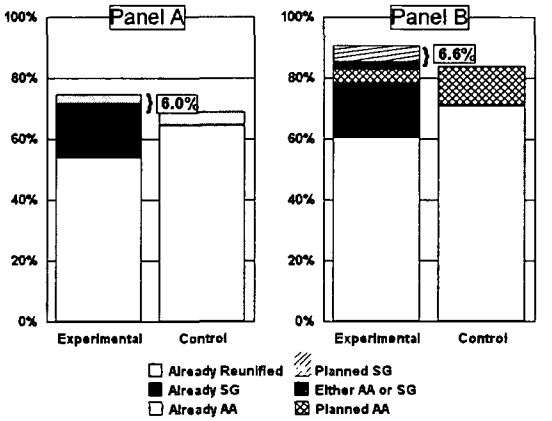

Figure 2

Figure 2 updates the permanency status for age-eligible children at the second round of interviews in 2000. Panel A shows that caregiver intentions at round one were a remarkably accurate predictor of permanency status at round two. Adoptions in the control group rose to sixty-five percent, while the combined adoption and guardianship rate in the experimental group topped out at seventy-one percent. As a result, the permanency advantage in the experimental group diminished to six percentage points. We can estimate the percentage of legal guardianships in the experimental group that might have converted into

adoptions in the absence of the waiver by subtracting the adoption rate in the experimental group (fifty-four percent) from the adoption rate in the control group (sixty-five percent) and dividing the difference by the guardianship rate (seventeen percent). This calculation suggests that perhaps as many as two-thirds (sixty-five percent) of the completed guardianships might have eventually converted into adoptions if subsidized guardianship were not available as a permanency option. Panel B shows that taking into account round two intentions and subtracting the combined completed and planned guardianships (twenty-three percent) from the projected loss of adoptions in the experimental group would still leave a net permanency gain of 6.6 percentage points. The critical policy question is thus whether this projected net gain in permanence is worth the potential loss in adoptions.

B. Counterfactual to Adoption

The answer to this question of trade-off ought to depend, to some degree, on whether there are meaningful differences in the qualities of permanence between a foster child being adopted and him or her being taken into legal guardianship. If there are no differences in outcomes then the trade-off may be worth it. It is impossible of course to observe what might happen if a child were adopted and then compare the counterfactual outcomes if that same child were then taken into private guardianship. Simply comparing adopted children to children taken into legal guardianship will yield biased estimates of the differences between the groups because they tend to differ with respect to many other factors that are related to child welfare outcomes, such as age, prior residence with caregiver, and special child needs. Estimating a regression model of the factors that determine the outcomes and using this model to predict the counterfactual can eliminate some of the selection bias, but the adequacy of this method depends on the unknowable presumption that no important factors have been omitted from the regression model. A better approach for approximating the counterfactual is to use random assignment to eliminate systematic observable and unobservable differences between the two groups.

Two random samples of children were assigned to the experimental and control groups in the Illinois Subsidized Guardianship Waiver Demonstration. Since the two groups were statistically equivalent, on average, at the start of the demonstration,[95] if there are significant

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95 Testa et al. in collaboration with Westat, *supra* note 87, at 17.

differences at the end it is reasonable to infer that the experimental intervention was the cause of the differences. In this instance, we shall take advantage of the fact that significantly more children in the control group were adopted as a result of their being denied the option of subsidized guardianship. The question we shall attempt to answer in the next section is whether the more binding features of adoption have substantively different implications for the qualities of permanence for the eighty-four percent of children in the control group whose caregivers at round two had adopted (seventy-one percent) or indicated their intention to adopt (thirteen percent) than for the ninety percent of children in the experimental group whose caregivers at round two had either already become permanent caregivers (sixty-one percent adoption and eighteen percent guardianship) or planned to adopt (six percent) or take private guardianship (five percent) in the near future.[96]

V. FINDINGS

Whether the lower proportion of adoptions despite higher overall permanence in the experimental group truly matters for the quality and stability of children's care may be examined statistically by looking at differences in permanency outcomes for children after they were assigned to the experimental and control groups. Table 1 reports the percentage differences in the outcomes of achieved, planned, and intended permanence, expressed in terms of differences in odds estimated from the (logistic) regression of these outcomes against selected predictor variables including the indicator for experimental and control group assignment. For example, with respect to the child's permanency status at round one, the percentage difference for group assignment shows that the odds of age-eligible children achieving permanence were seventy-two percent larger in the experimental group than in the control group. Evaluated at the mean permanency rate of twenty-eight percent for the control group, this estimated difference in odds translates into an eleven percent permanency advantage for the experimental group at round one.

The regression estimates of the percentage difference in odds for degree of relatedness point to kinship's strong effect on permanence. However, the kinship estimates for eligible children are exaggerated because children under twelve are not automatically eligible for

96 *See infra* p. 520, Figure 2.

subsidized guardianship if they are residing with non-kin.[97] Looking at all children obscures the experimental effect but corrects for the selection bias: the odds of permanence are fifty-four percent lower for children living with non-related foster parents than children living with grandparents, and thirty-four percent lower for children living with aunts and uncles. The permanency odds for children living with other relatives are not statistically different from those living with grandparents.

Table 1.—Logistic Regression Estimates of Percentage Difference in Odds of Achieved, Planned and Intended Permanence, Round One Interviews

Predictor Variables	Achieved Permanence		Planned or Achieved		Intend to Raise Child to Adulthood	
	Estimate	Sig.	Estimate	Sig.	Estimate	Sig.
	Eligible Children					
Experimental (v. Control)*	72%	0.001	52%	0.026	4%	--
	All Children					
Experimental (v. Control)	46%	0.003	23%	0.099	-4%	--
Degree of relatedness:						
Grandparent	0		0		0	
Aunt or uncle	-34%	0.030	-17%	--	-1%	--
Other relative	-26%	--	-27%	--	-30%	--
Non-relative	-54%	0.000	-68%	0.000	-70%	0.000
Child's age	-2%	--	-11%	0.000	-2%	0.079
Caregiver's age	-1%	--	-2%	0.042	-1%	--
Caregiver working	-14%	--	-21%	--	-16%	--
Household income	1%	--	0%	--	1%	0.007
Event % (weighted)	30.81%		73.84%		79.75%	
N (unweighted)	2,928		2,928		2,893	

*Includes controls for degree of relatedness and other predictor variables.

The logistic regression estimates follow a more linear pattern when caregivers' plans are considered. The odds of achieved and planned permanence decline the farther the genealogical distance between the caregiver and the child. This pattern holds up in the presence of statistical controls for the ages of the child and caregiver. Degree of genealogical relatedness is also predictive of caregivers' intention to raise the child to adulthood. The farther the degree of relatedness, the

97 *See supra* note 89 and accompanying text.

less likely caregivers are to signal their intent to provide a lasting home for the child.

Unlike the results for achieved and planned permanence, assignment to experimental and control groups has no bearing on caregivers' intentions of raising a child to adulthood (top two lines, Table 1). The logistic regression estimate is statistically indistinguishable from zero (sig. < .174). This suggests that the intention to provide a stable home for a child is independent of the permanency options that are available to the families. This inference is further reinforced by the results presented in Table 2, which updates the regression estimates of percentage difference in odds at round two. Again, achieved and planned permanence differ between assignment groups, but there is no statistically significant difference between the groups in the length of time caregivers said the child will be living with them. At round two, 90.6% of caregivers in the control group and 91.6% in the experimental group said that they think the child will be living with them until he or she is an adult.

Table 2.—Logistic Regression Estimates of Percentage Difference in Odds of Achieved, Planned or Intended Permanence, Two Interviews

Predictor Variables	Achieved Permanence		Planned or Achieved		Intend to Raise Child to Adulthood	
	Estimate	Sig.	Estimate	Sig.	Estimate	Sig.
	Eligible Children					
Experimental (v. Control)*	72%	0.001	120%	0.000	27%	--
	All Children					
Experimental (v. Control)	42%	0.006	72%	0.003	22%	--
Degree of relatedness:						
Grandparent	0		0		0	
Aunt or uncle	-23%	--	-21%	--	-16%	--
Other relative	-30%	--	-46%	0.005	-52%	0.043
Non-relative	-68%	0.000	-76%	0.000	-79%	0.000
Child's age	-12%	0.000	-20%	0.000	-10%	0.000
Caregiver's age	-1%	--	-2%	0.016	-2%	0.096
Caregiver working	-43%	0.004	-34%	0.040	-19%	--
Household income	1%	--	0%	--	0%	--
Event % (weighted)	72.29%		85.63%		90.69%	
N (unweighted)	2,298		2,298		2,287	

* Includes controls for degree of relatedness and other predictor variables.

When those caregivers were asked if it is okay if the child stays with them until he or she reaches adulthood, virtually all respondents in both groups replied that the child was welcome to stay for that amount of time or longer. This lack of a group difference suggests that the more

binding feature of adoption may not be as consequential for intent as is often taken for granted. If it were, one might have expected intent to weaken in the experimental group relative to the control group given that only seventy percent of the caregivers in the experimental group at round two elected or planned to become adoptive parents compared to almost eighty-five percent in the control group. The fact that there is no difference in intent suggests that the additional choice of guardianship doesn't adversely affect caregivers' expectations that the child will remain with them indefinitely.

A. Belongingness and Continuity

Although caregivers' intent may not be affected, some adoption advocates express the worry that children will feel less a part of the family in the absence of adoption and that caregivers' altruism will flag unless the family makes a more legally binding commitment than guardianship.[98] The results reported in Table 3 from the sample of interviewed children aged nine and older indicate that there are little grounds for the concern. Children in the experimental group were no less likely to report that they felt part of the family with whom they were living at round two than children in the control group. The odds of feeling a part of the family are three times as high for foster children living with grandparents, aunts and uncles as compared to foster children living in unrelated foster homes. The odds are twice as high for children living with other relatives.

The same holds true for continuity of family care, which is measured by whether or not the child is residing at the same home in which he or she was initially living at the date of assignment to the demonstration. The odds of remaining in the same home are higher the closer the degree of genealogical relatedness, but there are no differences between experimental and control groups. Between the dates of assignment and the round one interview, one percent of children turned 18, four percent returned to the home of their biological parent, and one percent of children were reported as not currently residing in the respondent's home. There were no differences on this measure by assignment group. Of the remaining ninety-four percent, 7.6% of the children in the control group and seven percent in the experimental group had been moved to another home. By round two, 13.8% of the children in the control group and 14.6% in the experimental group had moved. Neither the round one

98 *See* BARTHOLET, *supra* note 17, at 90.

nor round two differences in movements is significant, statistically or otherwise. Again the fact that there is no divergence between the two groups suggests that the additional choice of guardianship does not adversely affect the family's capacity to survive geographical moves and temporal change.

Table 3.—Logistic Regression Estimates of Percentage Difference in Odds of Permanence, Belongingness, and Continuity, Round Two Interviews

Predictor Variables	Permanence		Belongingness		Continuity	
	Estimate	Sig.	Estimate	Sig.	Estimate	Sig.
	Eligible Children					
Experimental (v. Control)*	90%	0.003	0%	--	-2%	--
	All Children					
Experimental (v. Control)	57%	0.038	-22%	--	-5%	--
Degree of relatedness:						
Grandparent	0		0		0	
Aunt or uncle	-27%	--	8%	--	-28%	--
Other relative	-53%	0.026	-48%	--	-61%	--
Non-relative	-78%	0.000	-64%	0.004	-80%	0.000
Child's age	-16%	0.003	-12%	0.031	-10%	--
Caregiver's age	-1%	--	-1%	--	5%	0.000
Caregiver working	-61%	0.000	51%	--	-41%	--
Household income	0%	--	0%	--	1%	--
Event % (weighted)	67.47%		90.61%		84.25%	
N (unweighted)	898		898		898	

* Includes controls for degree of relatedness and other predictor variables.

B. Stability of the Gift Relationship

The results presented thus far indicate that caregiver's intent, children's sense of belonging, and family continuity are independent of the permanency options chosen by families. The odds difference estimates suggest that the form of legal permanence – adoption or guardianship – may be less consequential for family stability than extra-legal factors, such as the degree of genealogical relatedness, sense of family duty, feelings of affection and length of acquaintance. Each of these factors is hypothesized to influence the caregiver's willingness to invest in the gift of care.

Table 4.—Event-History Regression Estimates of Percentage Difference in the Instantaneous Probability of Disruption or Displacement from Care through June 30, 2004

Predictor Variables	Model 1		Model 2		Model 3	
	Estimate	Sig.	Estimate	Sig.	Estimate	Sig.
Experimental (v. Control)	-6%	--	-3%	--	1%	--
Degree of relatedness:						
Grandparent	0%		0%		0%	
Aunt or uncle	50%	0.0310	34%	--	14%	--
Other relative	65%	0.0019	66%	0.0020	19%	--
Non-relative	338%	0.0000	349%	0.0000	104%	0.0001
Child's age	16%	0.0000	17%	0.0000	13%	0.0001
Caregiver's age	0%	--	0%	--	0%	--
Caregiver working	-14%	--	-17%	0.0604	-15%	--
Household income	-1%	0.0029	-1%	0.0022	-1%	0.0325
Gift reinforcers:						
Affection scale			-29%	0.0001	-22%	0.0001
Subsidy amount			-12%	0.0374	-9%	--
Family duty scale			12%	0.0746	11%	--
Social capital investment:						
Prior yrs. with caregiver					-17%	0.0001
Raise child to adulthood					-81%	0.0001
Event % (weighted)	8.72%		8.68%		8.72%	
N (unweighted)	6,503		6,060		6,021	

Considering these effects, Table 4 presents event-history regression estimates of the percentage difference in the instantaneous probability of disruption or displacement from care following the round one interview and updated with administrative data through June 30, 2004. The results reconfirm previous findings. Model 1 shows that the risk of removal from the caregiver's home both prior to and after discharge from public custody is unrelated to assignment group but strongly associated with the degree of genealogical relatedness, the child's age, and amount of household income. Model 2 adds indicators of empathy, payment, and duty that are hypothesized to reinforce the gift relationship. The percentage difference estimates are consistent with the expectations that affection and government subsidy reduce the likelihood of disruption and displacement. The finding for family duty runs opposite to hypothesized expectations, but the percentage change estimate is barely significant at the .10 level. Lastly, Model 3 includes indicators of social capital investment as measured by the stock of social capital already invested in the relationship (years of residence prior to round one) and the intention of future investment (expectation of raising the child to adulthood). The substantial attenuation in the kinship effect after the

introduction of these indicators suggests that accumulated and projected time spent together may be as critical as blood ties in engendering the feelings of commitment and trust that bind children and adults into a permanent family. Also the loss of statistical significance for the gift reinforcers of government subsidy and family duty suggest these factors are largely mediated by prior and anticipated social capital investments.

Table 5.— Event-History Regression Estimates of Percentage Difference in the Instantaneous Probability of Disruption or Displacement from Care through June 30, 2004

Predictor Variables	Model 3a		Model 3b		Model 4a		Model 4b	
	Raise Child to Adulthood				Raise Child to Adulthood			
	Yes		No		Yes		No	
	Estimate	Sig.	Estimate	Sig.	Estimate	Sig.	Estimate	Sig.
Experimental (v. Control)	-9%	--	3%	--	8%	--	15%	--
Degree of relatedness:								
Grandparent	0%		0%		0%		0%	
Aunt or uncle	50%	0.0712	-32%	--	28%	--	-23%	--
Other relative	23%	--	13%	--	14%	--	13%	--
Non-relative	109%	0.0001	115%	0.0005	62%	0.0063	92%	0.0022
Child's age	17%	0.0001	8%	0.0001	9%	0.0001	7%	0.0001
Caregiver's age	1%	--	-1%	--	0%	--	-1%	--
Caregiver working	-32%	0.0054	1%	--	-32%	0.0031	-4%	--
Household income	0%	--	-1%	0.0505	0%	--	-1%	0.0362
Gift reinforcers:								
Affection scale	-15%	0.0784	-25%	0.0002	-11%	--	-26%	0.0001
Subsidy amount	-4%	--	-22%	0.0195	-2%	--	-25%	0.0063
Family duty scale	5%	--	24%	0.0389	5%	--	27%	0.0217
Social capital investment:								
Prior yrs. with caregiver	-19%	0.0001	-17%	0.0001	-11%	0.0003	-13%	0.0006
Legal status:								
Public custody					770%	0.0001	875%	0.0001
Legal guardianship					1%	--	49%	--
Adoption					0%		0%	
Event % (weighted)	5.36%		27.10%		5.36%		27.10%	
N (unweighted)	5,091		930		5,091		930	

The importance of familiarity and intention is further demonstrated in Table 5. Because of the significant interaction between caregiver intent and other predictor variables, Models 3a and 3b report separate percentage change estimates for caregivers who say their intention is to raise the child to adulthood and those who expect to look after the child for a shorter time period. Only 5.4% of children whose caregivers expected to raise them to adulthood experienced a disruption or displacement of care as of June 30, 2004, as compared to 27.1% of children whose caregivers expressed shorter-term commitments.

In both models, assignment to the control or experimental groups exhibited no effect on the likelihood of disruption or displacement.

Furthermore, Model 3b shows that the gift reinforcers of affection, duty, and payment exhibit statistical significance only among caregivers who believe the children will stay with them for a limited time. The effects are negligible among children whose caregivers expect the children to remain with them into adulthood. This suggests that foster care poses a social dilemma chiefly among the small percentage of kinship and foster caregivers who are unable or unwilling to make a more lasting commitment. That is, caregivers who express commitments of limited liability are less likely to defect from norms of caregiver altruism to the extent they feel greater affection for the child or receive a larger check from the government. Lastly, making a permanency commitment to the child appears to matter for disruption and displacement but whether the type of commitment is adoption or guardianship does not matter. The results reported under Models 4a and 4b, which add time-varying indicators of legal status, show large differences in stability rates if the child remains in the legal custody of the state but no significant difference whether the child is discharged to the home of either an adoptive parent or a legal guardian.

VI. DISCUSSION

Recent efforts to promote a permanency planning hierarchy that ranks adoption above legal guardianship by kin are premised on the assumption that the more binding quality of adoptions improves outcomes for children.[99] There is little evidence from this study, however, that much is gained for either the child or the extended family by withholding guardianship assistance in the hopes of encouraging families to make the more legally binding commitment of adoption rather than legal guardianship. With respect to the permanency qualities of intent, belongingness, and continuity there are no significant differences between children assigned to the control group and those assigned to the experimental group.[100] Children in the control group fared and felt about the same with regard to belonging to their family as children in the experimental group.[101]

The significance of genealogical relatedness and the lack of an experimental effect on the stability and continuity of care in the Illinois

99 *See* BARTHOLET, *supra* note 17, at 90.
100 *See infra* pp. 525-26.
101 *See infra* p. 525.

Demonstration suggest that the bonds of kinship are sufficiently lasting to ensure the permanence of family relationships. The underlying importance of kinship is repeatedly upheld in logistic and event-history regressions models. In every case, the index of relatedness is a significant predictor: the closer the degree of genealogical relatedness, the more likely caregivers are to express their intent to raise the child to adulthood, make a permanent commitment, and provide a lasting and stable home.[102] The fact that neither adoption nor guardianship makes much practical contribution over and above the bonds of kinship to the continuity of these family relationships, however, does not argue for retaining children in kinship foster care. There are far too many other advantages, including financial and social,[103] for moving foster children into legally permanent homes.

This study attempted to explain the importance of kinship by estimating regression models of correlated indicators of gift reinforcement and social capital investment on the stability and continuity of substitute care. The results show that prior investment and caregiver intent explain much of the kinship effect. Among caregivers who reported at rounds one and two that they thought their foster child would be living with them until adulthood, there were no differences in subsequent stability rates among relatives of all degrees of relatedness and a significantly diminished rate among unrelated foster parents.[104] Only the length of prior residence with the caregiver and the age of the child exhibited strong effects on stability for this group of children.[105] In contrast, there were strong effects of caregiver affection and amount of state subsidy among caregivers who did not expect the child to stay for very long.[106] It appears that the reinforcement factors of empathy and payment sustain the gift of care chiefly in the absence of caregiver expectations of the child's remaining in the home until adulthood.

Contrary to prior expectations, however, agreement with the obligation to look after kin regardless of government subsidy was associated with higher rather than lower rates of disruption and displacement.[107] This unexpected finding requires further examination but may indicate that caregivers who are motivated by a diffuse sense of

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102 *See infra* pp. 523-24.
103 Leashore, *supra* note 40, at 400.
104 *See infra* pp. 526-29.
105 *See id.*
106 *See infra* p. 529.
107 *See infra* pp. 528-29.

family duty may be quicker to withdraw from a caregiving relationship than caregivers who expect some financial remuneration for their labors. At the same time, family duty appears to be of little consequence for the majority of caregivers who express the intention of raising the child to adulthood.[108]

The inclusion of time-varying indicators of legal permanency status in the regression model showed that discharging a child to the custody of an adoptive parent or legal guardian greatly increases stability as compared to the child's remaining in public custody. The statistical association between stability and legal permanence, however, appears to be less a matter of causal influence given the lack of a difference in stability despite higher permanence in the experimental group. Rather, the difference probably arises from other factors that are unmeasured in the model, such as child behavior problems or special needs, which are negatively correlated with caregivers' decisions to adopt or assume private guardianship. While the lack of a significant difference between adoption and guardianship is subject to the same limitation, the bias goes against a finding of no difference. For example, children who become private wards are older on average than children who are adopted.[109] So it is safe to infer that among children whose caregivers expressed the expectation of the child's staying until adulthood, there are no differences in stability rates based on whether adoption or guardianship is chosen. This finding replicates a conclusion reached in a follow-up study to the Oregon project over twenty-five years ago: the child's and the caretakers' sense of permanence, rather than the legal status of the placement, is most closely related to the child's well-being.[110]

The lack of a significant difference between adoption and guardianship cautions against taking too hard a line in enforcing adoption rule-out. The Illinois Demonstration shows that far more kin are choosing to adopt than prior research suggested likely. The trend toward kinship adoptions will most probably continue. That is because the circumstances under which adoption by kin are viewed as possible and appropriate have vastly changed since Hasseltine Taylor first

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108 *See id.*

109 Mark F. Testa, *When Children Cannot Return Home: Adoption and Guardianship*, 14 THE FUTURE OF CHILDREN 115, 122 (2004), *available at* http://www.futureofchildren.org/usr_doc/7-teeta.pdf.

110 Anthony N. Maluccio et al., *Beyond Permanency Planning*, 59 CHILD WELFARE 515, 518-19 (1980).

introduced the idea of legal guardianship as a child welfare resource seventy years ago.[111]

Changes in adoptability, parental motivation, and cost have helped to remove many of the social barriers that impeded adoptions by kin in the past.[112] The growing availability of subsidized guardianship under federal IV-E waivers and TANF programs has also removed the principal financial barrier to legal guardianship.[113] With child's age, fertility history of the prospective caregivers, and the affordability of both adoption and guardianship mattering much less nowadays than before, there are fewer social and financial constraints to keep relatives from choosing one permanency option over another. Given the absence of practical differences between the two options with respect to the permanency qualities of intent, belongingness, and continuity, it seems appropriate that the preferences of children and kin rather than the opinions of caseworkers and judges should carry greater weight in the choice of a permanency option.

At the same time, there will always remain a need for rule-out, especially when the caregiver is unrelated to the child. Adoption is the conventional means of establishing a kinship relationship in the absence of blood ties. In only a few instances, such as the lack of grounds for terminating parental rights or the wishes of older children, should guardianship by non-relatives be pursued as an alternative to adoption. Establishing kinship ties through adoption, of course, is not an issue with relatives. Grandparents, aunts and uncles may prefer to leave the rights of the biological parents undisturbed and instead become the child's legal guardian rather than an adoptive parent. Even when parental rights are terminated, some relatives may prefer to retain their extended family identity as grandparent, aunt or uncle rather then become the child's mom or dad. Still other families may be willing to assume additional financial burden beyond the subsidy as the legal guardian but shy away from assuming the full child support obligation as an adoptive parent. Whether such family preferences for limited legal and financial liability should be honored by child welfare agencies and the courts gets to the crux of an unspoken dispute over adoption rule-out.

In Illinois, legal guardians can petition the court to be relieved of their responsibility at any time, but adoptive parents cannot so easily

111 HASSELTINE B. TAYLOR, LAW OF GUARDIAN AND WARD (1935).
112 Testa, *supra* note 109, at 117-18.
113 *See infra* pp. 500, 508.

surrender their parental rights without risking a finding of child neglect. As stated in an IDCFS booklet, "[a]n adoptive child would have to be found by the court to be abused, neglected, or dependent in order to have DCFS again assume legal responsibility for the child."[114] Threatening to file neglect reports on adoptive parents who relinquish their child-caring responsibilities, as is done with birth parents, enforces the binding quality of adoption in a way that cannot be done for legal guardianship.

Equating the duties of adoption with the legally binding obligations of natural parenthood is sound policy. But should all forms of permanency commitment be forced into this mould? What about permanence for the medically complex child or the older ward with severe emotional problems? Should caring families be saddled with the full financial responsibilities for meeting their future medical and mental health needs?

The introduction of subsidized guardianship as a supplementary permanency alternative to adoption helps bring to the surface many of the hidden tensions inherent in the push for permanence. Child welfare agencies and the courts may want to work towards reconciling the older concept of permanence as lasting with the newer concept of permanence as binding. Reconciliation could be accomplished first by clarifying the obligations of private guardianship so that vacating this responsibility is more solemn than simply picking up the phone. Second, agencies and the courts should develop procedures for private guardians to access post-permanency services, which may also help to improve access for adoptive parents who sometimes feel abandoned by the state after the papers have been finalized. Once these unspoken conflicts over the division of public and private responsibilities are resolved, then maybe attention can return to the task of helping committed caregivers make an informed choice about whether adoption or guardianship best fits their family's desires for permanence and continuity.

VII. CONCLUSION

The recent effort to expand the concept of permanence beyond its original meaning of lasting to encompass the quality of legally binding demotes the ranking of legal guardianship in the hierarchy of preferred

114 *Making the Adoption/Guardianship Decision* (Ill. Dep't of Children and Family Services), Mar. 2001, at 8.

permanency options. Judicial guidelines[115] and the terms and conditions of federal IV-E waiver demonstrations[116] require that reunification and adoption be ruled-out before a family can qualify for subsidized guardianship. Some guidelines can be interpreted as sanctioning the removal of children from stable kinship placements if another family can be found who is willing to adopt.[117] This study examined the legal, theoretical, and empirical dimensions of these recent developments.

Analysis of the Illinois Subsidized Guardianship Waiver Demonstration shows that the offer of subsidized guardianship to a random sample of related and non-related foster parents boosted the overall level of permanence in the experimental group, but at the expense of adoptions that might have occurred in the absence of the waiver. The issue of whether the gain in overall permanence was worth the loss in adoptions was considered by examining longitudinal survey and administrative data for differences with respect to the permanency qualities of intent, belongingness, and continuity. The findings are that the intentions of caregivers to raise a foster child to adulthood do not differ for families who can choose between adoption and guardianship as compared to families who can select only adoption. Also, children do not express any lesser sense of belonging in families that adopt or become guardians as compared to families that only adopt. Finally, the homes of guardians are no more likely to disband than the homes of caregivers who can only become adoptive parents.

The lack of an experimental effect on the permanency qualities of intent, belongingness, and continuity suggest that legal status may be less important for lasting family relationships than extra-legal factors, such as kinship and prior time spent together. In this study, kinship appears to be the common denominator underlying caregivers' intent to raise a child to adulthood, children's sense of belonging, and the continuity and stability of care both before and after legal permanence. In general, the closer the degree of genealogical relatedness, the more lasting and stable is the home. Statistical modeling suggests that these qualities of permanence may be more a matter of learned attachment and familiarity rather than biological relatedness per se.

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115 NAT'L COUNCIL OF JUVENILE AND FAMILY COURT JUDGES, *supra* note 3, at 14.

116 U.S. Children's Bureau, *supra* note 57. *See, e.g.*, U.S. DEP'T OF HEALTH AND HUMAN SERVICES, *supra* note 9, at § 2.2.

117 *See supra* note 12 and accompanying text.

In conclusion, this study finds little advantage in agencies and courts delaying private guardianships in the hopes of encouraging kin to adopt or of finding an alternative home to adopt. Most relatives are choosing adoption on their own. Under the original meaning of permanence as lasting, families are in the best position to assess whether adoption or guardianship best fits their cultural norms of family belonging, respects their sense of social identity, and gives legal authority to their existing family commitments. Under the newer legal meaning of permanence as binding, agencies and the courts gain the upper hand because they reserve the right to decide whether the child should be left with kin or removed to another home for adoption. From the evidence reviewed in this study, there seems to be little benefit, and potentially some harm, in applying a stringent adoption rule-out standard to the conversion of kinship foster homes into legally permanent families.

Disrupting the Foster Care to Termination of Parental Rights Pipeline:

Making a Case for Kinship Guardianship as the Next Best Alternative for Children Who Can't Be Reunified with their Parents

Mark F. Testa

The Adoption and Safe Families Act of 1997 (ASFA) staked out a policy position on the termination of parental (TPR) rights, which remains controversial to this day. The law shortened the period for holding a permanency (dispositional) hearing from 18 to 12 months after the child enters foster care. It further stipulated that a state shall file a petition to terminate the rights of all parents of a child who had been in state custody for 15 of the most recent 22 months. It permitted states to apply the accelerated timetable even if there were no identified homes available to adopt the child.

Critics of ASFA alleged that the changes stacked the deck against family reunification by setting unrealistic time frames for parents to resolve the problems that prompted their child's removal from the home. Speeding up the foster care to TPR pipeline before finding a home willing to adopt, they warned, risked adding to the number of adolescents who age out of foster care without any lawful ties to parents, siblings, and grandparents.

Champions of ASFA countered that the risks were a tolerable trade-off compared to the harms of retaining children in long-term foster care. Freeing children quickly for adoption, especially infants, while simultaneously abolishing the traditional practice of matching caregivers to children based on their race, color, or national origin (which in the distant past both enforced prohibitions against transracial adoptions and helped shroud same-race adoptions in secrecy), would enable states to tap into the presumably large reservoir of families willing to welcome a racially diverse group of dependent and neglected children permanently into their homes.

Looking back, the best available evidence indicates that the permanency designs of ASFA were mostly realized. A majority of states doubled the number of adoptions from foster care over their respective baseline (1995–1997) in at least one of the years between 1998 and 2002.[1] The number of children in foster care for longer than three years declined 65 percent from 182,600 in 1998 before plateauing at an average of 63,600 children between 2014 and 2019 . In spite of these accomplishments, most states still struggled to clear their waiting lists of children "freed" for adoption. Nationally, the number of children waiting for adoption whose ties to all living parents were legally severed never dipped below 58,000 and in recent years has climbed back up from 58,240 children in 2012 to 71,335 children in 2019.[2]

The rise in the number of so-called "legal orphans" was foreseeable at the time of AFSA's passage, but alternative solutions were largely

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[1] U.S, Children's Bureau. *The AFCARS Report, Final Estimates for FY 1998 through FY 2002 (12)*. U.S. Department of Health and Human Services. AFCARS Report #27. [42]Roberts, *Shattered Bonds*, pp. 254–257.

[2] *Id*. AFCARS Report #27.

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overlooked.[3] In framing the issue narrowly as a binary choice between reunification or adoption, both critics and champions of ASFA deflected attention away from an alternative permanency option that did not require TPR and was more in keeping with traditional multifamily identities than formal adoption.[4] The option was kinship guardianship.

Kinship Guardianship

ASFA reaffirmed legal guardianship as a permanency goal, which it defines as "a judicially created relationship between child and caretaker which is intended to be permanent and self-sustaining as evidenced by the transfer to the caretaker of the following parental rights with respect to the child: protection, education, care and control, custody of the person, and decision-making."[5] Even though ASFA widened the pathway to *family unification*, which like reunification preserves both parental and extended family ties, it left the option financially unaffordable for most kinship caregivers by restricting federal permanency assistance to adoption alone. The law appropriately excused placements with kin from the accelerated TPR timetable, but this exemption conveyed the misleading impression to the field that there was little urgency to addressing the permanency needs of the thousands of children languishing in long-term, kinship foster care.

The U.S. Congress sought to rectify some of ASFA's permanency deficiencies by creating the Guardianship Assistance Program (GAP) in

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[3] Martin Guggenheim forewarned of the potential risks before ASFA was passed based on trends he observed in Michigan and New York. *See* Guggenheim, Martin. "The Effects of Recent Trends to Accelerate the Termination of Parental Rights to Children in Foster Care – An Empirical Analysis in Two States." *Family Law Quarterly*, vol. 29, no. 1, 1996 1995, pp. 121–40.

[4] Robert B. Hill. *Informal Adoption among Black Families*. National Urban League, Research Department, 1977.

[5] 42 U.S.C. § 675(7)

2008. GAP offers federal permanency stipends to relatives without requiring the severance of parental ties and recasting of extended family identities in the nuclear family mold of parent and child. The widening of the pathway to family unification, however, was cut short by the law also requiring guardianship assistance to be offered only after the state determined that being adopted was not an appropriate permanency option for the child. The rationale for the law's ranking of preferences was that adoption was "more permanent" than guardianship.[6]

The purpose of this paper is to assess the rationale for and empirical adequacy of the federal preference for adoption over guardianship where a relative is the intended guardian. It cites research showing that subsidized legal guardianship is just as lasting as subsidized adoption when kinship guardianships are appropriately compared to what might have happened if subsidized legal guardianship was unavailable as a permanency option. In light of the absence of meaningful differences between guardianship and adoption for a child's sense of belonging and continuity of care, it is untenable to retain the requirement that a state determines that adoption is not an appropriate permanency option as an eligibility condition for receiving GAP payments. Eliminating the adoption rule-out provision and opening up GAP to children already in safe and stable kinship foster care, regardless of the home's licensing status, can help bring the benefits of multifamily permanence to thousands of children who face the prospect of aging out of foster care without a family they can permanently claim as their own.

Demotion of Kinship Guardianship as a Permanency Goal

Prior to ASFA, many practitioners and scholars accepted kinship guardianship as the next best alternative to reunification with parents.[7] The child psychiatrist, Marilyn Benoit, noted that: "In such a setting, the children will best experience a sense of belonging (by reason of kinship) and permanence rather than a feeling of expendability."[8] The U.S. Children's Bureau later departed from this viewpoint. It maintained that child welfare agencies must first determine adoption is either inappropriate for or unavailable to the child before deciding that guardianship is the appropriate plan of choice for a child.

A slightly more stringent "adoption rule-out" version became the boiler-plate requirement of the IV-E waivers that HHS granted states between 1996 and 2008 to test the impact of subsidized legal guardianship.[9] The language was subsequently softened for the GAP legislation. It stipulated that states must first determine that adoption is not an appropriate permanency option for the child. The rationale for the Children's Bureau's preference for adoption over guardianship was foreshadowed in the 2000 Report to Congress on Kinship Foster Care that ASFA instructed the U.S. Secretary of Health and Human Services to prepare.[10] It acknowledged that legal guardianship enables kin to assume permanent care of the child, but inserted the following qualification: "However, guardianship does not provide the same protections against later, unexpected changes in custody that adoption does and may be seen as less than a total commitment to permanency."[11]

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[6] 42 U.S.C. § 675(1)(F)(v).

[7] Leashore, Bogart R. "Demystifying Legal Guardianship: An Unexplored Option for Dependent Children Legal Essay." *Journal of Family Law*, vol. 23, no. 3, 1985 1984, pp. 391–400.

[8] Marilyn B. Benoit. "The Quality—Not the Category—of Care." *When Drug Addicts Have Children*, edited by Douglas J. Besharov, Child Welfare League of America and American Enterprise Institute, 1994, p. 246.

[9] In Illinois, the stipulation was that subsidized guardianship will be offered "only when other permanency goals, including returning home and adoption, have been ruled out as acceptable alternatives." See Section 2: Implementation, 2.0, U.S. Children's Bureau, *Waiver Authority, State: Illinois*, 1997.

[10] ASFA mandated the Secretary to prepare the report to Congress based on the comments submitted by an advisory panel established by the Secretary in consultation with the chairs of the House Committee on Ways and Means and the Senate Committee on Finance. I was one of the members of the 26-person advisory panel.

[11] U.S. Department of Health and Human Services. Report to Congress on Kinship Foster Care. U.S. Department of Health and Human Services, 2000, p. 50.

In previous writings, I have characterized the reordering of permanency preferences as shifting the meaning of permanence from its original child-based definition of "lasting" (i.e., an enduring relationship that arises out of feelings of belongingness) to a newer caregiver-based definition of "binding," (i.e., an enduring commitment that is legally enforceable).[12] The original definition, as disseminated through the pioneering work of Victor Pike and his colleagues on the Oregon Freeing Children for Permanent Placement Demonstration, emphasized four qualities of permanence: continuity of relationship across space and time, belongingness rooted in familiarity and cultural identity, respected social status for both the child and the family, and the intent for the relationship to last indefinitely.[13]

When the National Council of Juvenile and Family Court Judges (NCJFCJ) issued its best practice guidelines in 2000, it added a fifth quality: "a legal relationship that is binding on the adults awarded care, custody, and control of the child."[14] Even though NCJFCJ's addition can be interpreted as augmenting rather than displacing the other four qualities, the experiences of professionals responsible for implementing the rule-out provision suggest the provision has sometimes been misused to manipulate family choice. As recounted by Leslie Cohen, who monitored the implementation of the IV-E waiver demonstration in Illinois, caseworkers who refrained from disclosing the full range of permanency alternatives contended that the waiver's rule-out provision required that "each goal be presented in a sequential fashion and that they cannot discuss guardianship until they are absolutely confident the family will not accept adoption."[15] Further muddying the waters were accusations that caseworkers, who did engage in full disclosure, were coaching kin in how to circumvent adoption rule-out provisions: "Some officers of the court felt that preserving family relations was too flimsy a justification and blocked efforts to achieve permanency through guardianship. They felt that adoption was still possible, if not with the current family, then with other families, including non-relatives, who should be approached about their interest in adoption."[16]

The Re-Formalization of Permanency Planning Practice and Policy

There are several plausible explanations for the shift in the meaning of permanence from a lasting relationship to a binding commitment. The most straightforward is it was an outgrowth of the *re-formalization* of permanency planning, in terms that are more reliably communicable to judges than the concepts of psychological attachment and relational continuity upon which the original meaning of permanence was built.

Prior to the passage of the Adoption Assistance and Children Welfare Act (AACWA) of 1980, the NCJFCJ guidelines noted, court involvement in child welfare cases was often just a "rubber stamp" for plans and recommendations made by social workers and psychologists. Assessing and making predictions about the continuity, respect, belongingness, and intent of family relationships was very much in their bailiwick. With the implementation of AACWA, however, juvenile and family court judges became accountable for the *collective agency*

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[12] Testa, Mark F. "The Quality of Permanence-Lasting or Binding? Subsidized Guardianship and Kinship Foster Case as Alternatives to Adoption." *Virginia Journal of Social Policy & the Law*, vol. 12, no. 3, 2005, pp. 499-534.

[13] Pike, Victor, et al. Permanent Planning for Children in Foster Care : A Handbook for Social Workers. Washington : Dept. of Health, Education, and Welfare, Office of Human Development Services, Administration for Children, Youth and Families, Children's Bureau, 1977.

[14] National Council of Juvenile and Family Court Judges. *Adoption and Permanency Guidelines: Improving Court Practice in Child Abuse and Neglect Cases*. 2000 at 14.

[15] Leslie Cohen. "Rule Out." *Using Subsidized Guardianship to Improve Outcomes for Children: Key Questions to Consider*, edited by Mary Bissell and Jennifer L. Miller, Cornerstone and Children's Defense Fund, 2004, pp. 19-25 at 21.

[16] *I d* at 21-22.

Mark F. Testa

of all professionals involved in the permanency planning process.[17] The formality of clearly defined timetables, sequential rule-out procedures, timely filing of TPR petitions, and impartial review of the grounds for terminating parental rights was in keeping with the court's obligation to ensure that agency recommendations and plans were set apart from the personal feelings, subjective biases, and power imbalances of everyday life. Based on the formal criteria of adequacy and communicability, guardianship indeed sounds "less permanent" in the sense that it is more easily vacated and more vulnerable to subsequent legal challenges than TPR and adoption. But with respect to the criterion of improvability, the question that needs answering is whether TPR and adoption, in fact, improve upon the less formal and less restrictive practice of kinship guardianship.[18]

Is Adoption by Relatives Truly More Permanent than Guardianship?

Answering this question requires an act of imagination that is difficult to approximate in actual practice. Called "counterfactual reasoning," it involves imagining the difference in permanency outcomes for a child whose relative caregivers are offered the choice of subsidized legal guardianship compared to what might have happened if that same family was offered only adoption assistance or remaining in long-term foster care. This imaginary scenario is, of course, impossible to implement in the real world. The same child and their caregivers cannot simultaneously be observed under both intervention and comparison conditions. However, it is possible to approximate the desired experiment at the aggregate level by randomly assigning a large number of families to the two conditions and then tracking their individual-level outcomes over time. In the absence of randomization, comparing the outcomes for a group of

[17] The concept of collective agency draws from the writings of the psychologist, Albert Bandura, who specifies three levels of human agency: personal, proxy, and collective. Applied to child welfare, minor children lack the personal agency to act independently and to make their own free choices. Therefore, they must rely on the proxy agency of parents, extended kin, and other community members to act in their best interests. If these informal agents lack the material resources or parenting competencies that the community deems appropriate for raising a child to adulthood, community members can call on the collective agency of the state to intervene. Whenever possible, formal intervention begins with supplementing the home with needed resources and social supports, but it may escalate to reassigning proxy agency temporarily to relatives, foster families, and child-care institutions if adverse conditions in the home remain unchanged. As a last resort, proxy agency may be reassigned permanently to legal guardians or adoptive parents if the children cannot be reunited with their birth families. From an agentic perspective, the child welfare department is accountable for the oversight of proxy agency relationships on the child's behalf and the juvenile or family court is accountable for the coordination of collective agency interventions that support, supplement, or substitute for those relationships. See Bandura, Albert. "Social Cognitive Theory: An Agentic Perspective." *Annual Review of Psychology*, vol. 52, no. 1, Annual Reviews, Feb. 2001, pp. 1–26.

[18] The sociologist, Arthur Stinchcombe, defines a practice as formal to the extent that it is cognitively adequate to the situations it governs (adequacy), it is communicable to the agents who must act in those situations (communicability), and it is improvable and in fact improving upon alternative or less formal practices (improvability). See Stinchcombe, Arthur L. *When Formality Works : Authority and Abstraction in Law and Organizations*. Chicago : University of Chicago Press, 2001.

adopted children to a group of guardianship children can be misleading. It is likely the adopted group differs in important ways from the guardianship group. For example, adopted children are younger, on average, than children taken into legal guardianship. If it were later learned that a greater percentage of the children discharged to guardianship had exited their homes a year later than the adopted group, it would be imprudent to infer that the primary reason for the difference is that adoption is "more permanent" than guardianship. Instead, the fact that older children are generally more difficult than younger children to control, more likely to run away, and more liable to get in trouble with the law would first need to be taken into account before concluding that adoption is superior to guardianship in ensuring family permanence.

Randomized controlled trials (RCTs) help avoid some of the pitfalls of uncontrolled observational studies by increasing the likelihood that the intervention and comparison groups are statistically similar within the bounds of chance error. Not only does randomization help ensure that the groups are similar on readily recordable measures such as age at removal and genealogical relationship to the caregiver but also on less quantifiable characteristics such as affection for the caregiver and early childhood trauma.

Randomization is the method that was used to evaluate the IV-E waiver demonstrations in the states of Illinois, Tennessee, and Wisconsin. The central finding was that the offer of subsidized guardianship boosted the percentage of children discharged to permanent homes over what could have been expected if their options were limited to reunification, adoption, or staying in foster care. In Wisconsin, the boost translated into a 20 percent point higher rate of overall permanence, 15 percent points higher in Tennessee, and 6 percent points higher in Illinois.

In the states of Illinois and Tennessee, proportionately fewer children in the intervention group were discharged to adoptive homes (60 percent and 32 percent, respectively) compared to the comparison group (75 percent and 56 percent, respectively). In Wisconsin, there were no significant differences in adoptions between the intervention and comparison groups (31 percent versus 29 percent, respectively). Considering that in both Illinois and Tennessee, a significantly lesser proportion of children in the intervention group were adopted than in the comparison group, the expectation is that family relationships would be longer lasting in the comparison group if adoption were indeed more permanent than guardianship.

After two years of follow-up in Tennessee, there was no significant difference in the percentage of children who were not residing in the home in which they were living at the time of random assignment: 11 percent in the intervention group (N= 264) versus 14 percent in the comparison group (N= 227). Similarly, in Illinois, after 10 years of follow-up, there was no significant difference: 30 percent in the intervention group (N = 1,197) versus 32 percent in the comparison group (N= 1,228). Follow-up interviews in Illinois with children aged nine and older showed that the lower rate of adoption in the intervention group did not result in their feeling any less part of the family. In the intervention group, 90.3 percent of the youth (N = 489) answered that they felt like they were part of the family either most of the time or all of the time compared to 90.5 percent (N = 501) in the comparison group—about as close to perfect agreement as you can expect in a statistical sample.

The above results suggest that the particular type of legal permanence may be less consequential for lasting family relationships than some caseworkers and judges typically believe. An observational study conducted by Nancy Rolock and Kevin White helps shed light on the possible reasons for the perception of adoption as being more lasting than guardianship, contrary to the best available evidence.[19] Their study compared a sample of subsidized adoption cases to a sample of subsidized guardianship cases. They tracked the two samples for a minimum of 10 years and recorded if the children re-entered foster care or stopped receiving a

[19] Rolock, Nancy, and Kevin R. White. "Continuity for Children after Guardianship versus Adoption with Kin: Approximating the Right Counterfactual." *Child Abuse & Neglect*, vol. 72, Oct. 2017, pp. 32-44.

subsidy payment. Payments stop if a child leaves the home for another reason besides re-entering care. Whereas 6 percent of the adopted sample re-entered foster care or stopped receiving payments, 11 percent of the guardianship sample experienced an interruption of care or cancellation of payment. Clearly, the adoption sample experienced fewer interruptions than the guardianship sample. But as noted above, this raw comparison doesn't take into account other potentially confounding factors such as age differences. In fact, the adoption sample profiled 1.4 years younger, on average, than the guardianship sample. Another complicating factor is that a large fraction of the guardianship cases would not have been adopted and instead would have stayed in long-term kinship care. Omitting them from the comparison and ignoring their placement interruptions in kinship foster care understates the discontinuity of care that they would have endured. Matching guardianship cases to the combined samples of adopted children and kinship foster care cases help balance the groups on age, race, and other characteristics and better approximates the right counterfactual of how the guardianship cases would have fared if adoption and long-term foster care were their only alternatives. After matching the samples, Rolock and White found no difference in discontinuities of care between the groups. The result replicates the findings from the more rigorous RCTs conducted in the waiver sites. Because people can't make the sorts of statistical adjustments in their heads that researchers can make on their computers, the day-to-day experiences of caseworkers and judges reinforce the belief that adoption is more permanent than guardianship in spite of scientific evidence to the contrary.

A Multifamilial Concept of Permanence

RCTs are useful for generating statistical inferences about the causal impact of a promising intervention, like subsidized guardianship, but they provide only partial insight into the qualities of permanence that matter most to children— Am I loved here? Will these relationships last? Are my family circumstances respected by others? Will there always be space for me if I need to return home? To understand these qualities more fully, it is helpful to ask open-ended questions of youth and analyze their responses using an interpretative framework. Gina Samuels conducted such a study in 2008 using a convenience sample of 29 youth, aged 17 to 26 years old, who had transitioned from foster care without establishing a permanent family relationship authorized by the court. Even though the number of participants is small, the composition of the sample is well suited for the purpose of examining the case for kinship guardianship. The participants plausibly represent the kinds of youth in the comparison group who might reject adoption but agree to legal guardianship if it were available to them and their families at the time.

Samuels reported that 20 of the 29 youth (69 percent) stated they had not wanted to be adopted. Some of the youth felt that being adopted was a symbolic betrayal of their families of origin and could cause them to permanently lose this family identity. One of the youths explained their rejection of adoption because it would rearrange personal allegiances and make it impossible to belong to more than one parent and family system at a time. Samuels interpreted these and other rejections of adoption as a response to the child welfare system's portrayal of adoptive parents as a potential replacement family rather than as an added resource to a child's existing family ties. Even when birth parents cannot function as the day-to-day parent, they can provide emotional support and a sense of relational continuity. Kinship guardianship allows youth to retain a "multifamily identity"—one that acknowledges "varied levels of family identity and membership (i.e., legal biological, relational) within more than one family unit."[20]

Concluding Remarks

Both the quantitative and qualitative evidence presented above suggests there is little to be gained from formalizing the preference for

[20] Samuels, Gina Miranda. "Ambiguous Loss of Home: The Experience of Familial (Im)Permanence among Young Adults with Foster Care Backgrounds." *Children and Youth Services Review*, vol. 31, no. 12, Elsevier Science, Dec. 2009, p. 1229.

TPR and adoption over kinship guardianship. There may still be a case for retaining the requirement for non-relatives because adoption is the accepted means of establishing a kinship relationship in the absence of blood ties. However, because GAP applies only to pre-existing kinship relationships, the formal preference for TPR and adoption should be stricken from the law. Instead, the choice should be left to the proxy agency of adult family members and the personal agency of children according to their age and maturity.[21] As I have written previously, family members "are in the best position to assess whether adoption or guardianship best fits their cultural norms of family belonging, respects their sense of social identity, and gives legal authority to their existing family commitments."[22] At a minimum, the law should be value-neutral about the choices that relatives make. At the same time, recognizing the entrenched beliefs about the improvability of kinship relationships through TPR and adoption and the greater restrictiveness they impose on family ties, it may be worth considering whether the formal hierarchy of preferences should revert back to the more traditional acceptance of kinship guardianship as the next best alternative for children who can't be reunified with their parents. Where a relative is the intended permanent caregiver, the default would be kinship guardianship unless the relative expressed a preference for adoption or termination was necessary to ensure the safety of the child. The precise language would need to be crafted by legislators, but in general, it could instruct the child welfare agency to describe the reasons for the relative's preferences for termination of parental rights and adoption as the more appropriate permanency alternative for them.

Even though it is often assumed that relatives will be "soft" on their close kin, research shows most relatives choose adoption on their own when fully informed of their choices.[23] Placing faith in the competency and wisdom of kinship caregivers to make a responsible and informed choice—most of whom have already been caring for the child for months or even years—is a constructive step that child welfare systems can take to restore the community trust that has been eroded by historical injustices and current disparities in the outcomes experienced by oppressed and marginalized communities.

As I write these remarks, I am mindful that there is little that is groundbreaking or new in the recommendations offered in this paper. Bogart Leashore articulated the case for legal guardianship as a child welfare resource over three decades ago, and Josh Gupta-Kagan several years back called for eliminating the hierarchy of the preferences that favored TPR and adoption.[24] Nonetheless, the findings from the IV-E waiver experiments bear repeating as well as the call for a multifamily concept of permanence. The latest data show that GAP continues to fall short of expectations. The U.S. Administration for Children and Youth sought to bolster optimism by noting that GAP growth resembled the early years of the IV-E adoption assistance program.[25] The latest numbers for 2018, however, show GAP continues to lag behind adoption assistance. Whereas in the ninth year of the program's operation (FY 1989), states were paying adoption subsidies on behalf of a monthly average of 40,000 children, in the ninth year of GAP (FY 2018), states were paying guardianship subsidies on behalf of a monthly average of 32,100 children. If GAP growth had kept pace with the early growth in adoption assistance, states would now be paying guardianship subsidies on behalf of 75,300 children instead of the 45,800 children that the Office of Management and Budget (OMB) estimates will be served in FY 2022.[26] This represents a decrease from the average of 46,300 per month, which OMB projected for FY 2021.

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[21] See supra note 18 for definitions of the italicized words.

[22] Testa, supra note 7, at 534.

[23] Testa MF, et al. "Permanency Planning Options for Children in Formal Kinship Care." Child Welfare, vol. 75, no. 5, Child Welfare League of America, Oct. 1996, pp. 451-70.

[24] Leashore, Bogart R. "Demystifying Legal Guardianship: An Unexplored Option for Dependent Children Legal Essay." *Journal of Family Law*, vol. 23, no. 3, 1985 1984, pp. 391-400. Gupta-Kagan, Josh. "The New Permanency." *UC Davis Journal of Juvenile Law and Policy*, vol. 19, no. 1, 2015, pp. 1-83.

[25] Administration for Children and Families. Title IV-E GAP Programs: A Work in Progress. U.S. Department of Health and Human Services, 2018, https://aspe.hhs.gov/sites/default/files/migrated_legacy_files//179696/GuardianshipBrief.pdf.

[26] Office of Management and Budget. *Appendix, Budget of the U.S, Government, Fiscal Year 2022*. The White House, 2021.

In order for subsidized kinship guardianship to replicate the results from the IV-E waiver experiments, it will be necessary to rid GAP of the eligibility restrictions that weren't part of the original terms and conditions of the waivers. GAP restricts subsidies to only kinship homes that meet foster home licensing standards. This restriction cuts off too many safe and stable kinship placements from receiving guardianship assistance because of the limited availability of bedroom space, the arrest histories of household members, and other standards that disproportionately disqualify low-income families from being licensed by the state. Because licensing is not a requirement for placing children with kin, the law permits, intentionally or not, the build-up of children in unlicensed kinship care that supports homes at only a fraction of the cost of maintaining them in licensed foster care. Not only does kinship foster care deprive relatives of the personal and proxy agency to make their own free choices, but it also holds over their heads the constant threat of separation if a caregiver or parent violates any number of bureaucratic restrictions, such as limits on parental visits, unauthorized travel out-of-state, and sleepovers at a neighbor's home that was not previously subjected to a criminal background check. As long as a relative has safely and stably cared for the child for at least six months or longer while under the supervision of the child welfare agency, the family should qualify for GAP regardless of the home's licensing status. Eliminating the adoption rule-out provision and opening up the foster care to guardianship pipeline to children in safe and stable, unlicensed kinship foster homes should go a long way towards bringing the benefits of an inclusive form of family permanence to thousands more children for whom kinship guardianship is the more appropriate permanency alternative than TPR and adoption.

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IN THE MICHIGAN SUPREME COURT

IN RE D N DAILEY MINOR

Supreme Court Case No. 165889

Court of Appeals Case No. 363164

Wayne Circuit Court Family Division
Case No. 2019-000790-NA

APPENDIX TO APPELLANT-FATHER'S SUPPLEMENTAL BRIEF

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INDEX

to be registered with a Native American Indian Tribe?

MS. MOOTISPAW: No.

THE COURT: All right. Petitioner, can you stand and take the oath?

THE COURT CLERK: Do you swear or affirm the testimony you're about to give is the truth so help you God?

MS. WILLIAMSON: Yes.

THE COURT CLERK: State your name for the record.

THE WITNESS: Porsha Williamson.

THE COURT: Mr. Karoub.

MR. KAROUB: Thank you.

PORSHA WILLIAMSON

At 11:03 a.m., sworn as a witness, testified as follows:

DIRECT EXAMINATION

BY MR. KAROUB:

Q. Ms. Williamson, you're the Petitioner that filed this petition?

A. Yes.

Q. And you're asking the Court to take temporary custody of these children (sic)?

A. Yes.

Q. Now, the child is currently placed where?

A. With maternal grandmother.

Q. And that placement is sufficient to meet the child's needs?

A. Yes.

Q. And is it contrary to the welfare of this child to be placed with either parent today?
A. Yes.
Q. All right. And why is it contrary to the welfare of the child to be placed with the Mother?
A. Well, on March 21st, we received a Complaint for Ms. Mootispaw. She gave birth to Dakota Dailey. Ms. Mootispaw tested positive to opiates upon her admission to the hospital. She also admitted having a history of using heroin before her pregnancy and during her pregnancy.

CPS received the meconium results that he was positive for opiates and his urine screen was also positive for opiates, morphine. He also –- Dakota also experienced withdrawals after birth and administered morphine until April 4th to control his withdrawals. Ms. Mootispaw admitted that she continued to use heroin during her pregnancy because she felt that it would have hurt the baby more if she had stopped completely.

She –- Ms. Mootispaw also completed a drug screen for CPS on April 4th and she was positive for opiates, six (sic). I don't know how to pronounce this word, I'm sorry. Heroin metabolite, she was positive for morphine, feterline (sic), and norphentaline (sic).

Q. Okay. So, you're saying fentanyl?
A. Yes, sorry.

Q. All right. So, the Mother has a substance abuse problem and that's not under control at this time?
A. Correct.
Q. All right. And Father was living with the Mother at the time of this investigation?
A. Correct.
Q. And he was aware of Mother's substance abuse --
MR. BOYD: Your Honor, I'd object to hearsay. I sorry, leading.
BY MR. KAROUB:
Q. All right. Was the Father living with the Mother at the time of this investigation?
A. Yes.
Q. All right. And have you determined whether or not the Father was aware that the Mother was abusing substances during this pregnancy?
A. He reported that he was unaware.
Q. Now, the Father, does he have any substance abuse issues that you're concerned with?
A. Mr. Dailey did inform CPS that he was taking a Percocet drug due to his crushed foot that he did not have a prescription for. He did allow CPS to do two drug screens on him. The first one was on March 22nd and he tested positive for the fetinol (sic).
Q. Fentanyl?

A. Fentanyl; yes, sorry. And northenteri (sic). He also completed another drug screen on April 8th, he tested positive for opiates, heroin, that's metabolite, and morphine, and felonthine (sic).
Q. Okay. So, the Father said he was taking Percocet for some type of foot injury?
A. Yes.
Q. And have you determined through your checks with the lab whether or not the drugs he was testing positive would result from a person who's taking Percocet?
A. I did not confirm that, no.
Q. All right. But in any event, he wasn't prescribed Percocet?
A. Correct.
Q. So, you have some concerns he might also be abusing substances?
A. Correct.
Q. So, at this point, it would be contrary to the welfare to try to place with either parent based on some active substance abuse concern?
A. Correct.
Q. Are there any other issues with regard to these two parents that would warrant not placing the child with them at this time?
A. No.
Q. Now, the child is with the grandmother, all the needs are

being met, are you asking the Court for Special Orders with this child today?
A. Infant Mental Health.
Q. That's it?
A. We did a referral for Early On already.
Q. And if the Court authorizes removal of the child from the parents, are you asking the Court to authorize supervised visits for both parents?
A. Correct.
Q. All right. And that could be with agency or designee?
A. Correct.
Q. All right. And are you aware of any Native American heritage for either parent?
A. No.

MR. KAROUB: I have nothing else.

THE COURT: On behalf of the child?

CROSS EXAMINATION

BY MS. RABIOR:
Q. Did Mother receive prenatal care?
A. Yes, I believe so.
Q. Does Dakota have any special needs?
A. No.
Q. Is the plan to continue Dakota in the home of the maternal grandmother?
A. Yes.

want for these folks with their child?

THE WITNESS: They can continue the same visitation, grandmother, the designee supervisor.

THE COURT: So, Grandma's able to handle them?

THE WITNESS: Yes.

THE COURT: And they can come over every single day, if Grandma says it's okay, and make food, and make bottles, and clean Grandma's house, and cut the lawn, and whatever needs to be done because somebody else is raising their baby, right?

THE WITNESS: Yes.

THE COURT: And, in fact, you would encourage that?

THE WITNESS: Yes.

THE COURT: Okay. You asked for Infant Mental Health?

THE WITNESS: Yes.

THE COURT: Do you know what Infant Mental Health is?

THE WITNESS: Not 100 percent sure.

THE COURT: Okay. What office are you out of?

THE WITNESS: North Central.

THE COURT: Do you know who your Infant Mental Health supervisor is?

THE WITNESS: No.

THE COURT: Okay. Is Andrea Stewart at that office

Parents, Baby Court is for people who have children -- a child under the age of three and it's for people that want to get their child back as quick as possible. We meet every four to six weeks instead of every three months, which is all that's required of the rest of the docket. And it is a way to try to get you assistance and get you clean, if that's what the incident (sic) is, to have you live in the home where the child is placed, if that's possible. We explore all type of things, but the best part about Infant Mental Health is you're going to get an Infant Mental Health therapist, who is the person that's going to provide you all of your services so that if, in fact, jurisdiction is taken, you don't have to go to parenting classes one day, and visit on a different day, and have counseling on a different day, and have visitation on a different day.

She comes to you or you go where the baby is placed and you have Infant Mental Health service. We know that Infant Mental Health cases, specifically Baby Court Docket, that children are reunified about 50 percent faster, they don't return to care, less than one percent of children in the Baby Court Docket ever come back to care. And it would encourage and enhance your relationship in terms of your ability to parent your child.

So, I hope you do it. I think a lot of parents that have substance abuse -- the reason I asked if you're

BY MR. BOYD:

Q. Sir, state your name.

A. Eric Dailey.

Q. Is that Eric Lee Dailey?

A. Yes, sir.

Q. Your date of birth?

A. [redacted].

Q. Okay. And you're the father to [redacted] [redacted] Dailey with a date of birth of [redacted] [redacted] [redacted]; is that correct?

A. Yes, sir.

Q. Okay. And you know the mother of the child, Ms. Mootispaw?

A. Yes, sir.

Q. Were the two of you living together when your son Dakota was born?

A. Yes, sir.

Q. And how long have you been living with Ms. Mootispaw?

A. Three years.

Q. So, you would have been living with the Mother during her pregnancy of Dakota, correct?

A. Yes, ma'am. Yes, sir.

Q. And would that be at [redacted] in Detroit, Michigan?

A. Yes, sir.

Q. And zip code 48227?

A. Yes, sir.

Q. Does that continue to be your residence?
A. Yes, sir.
Q. And do you and the Mother have a plan to continue to plan together?
A. Yes, sir.
Q. Okay. Now, you have tested positive, when CPS got involved, for illegal substances?
A. Yes.
Q. Did you test positive for fentanyl?
A. Yes.
Q. And did you test positive for morphine?
A. Yes.
Q. And do understand other -- strike that.
Did you test positive for various forms of heroin metabolites?
A. Yes.
Q. Did you have a prescription for that?
A. No.
Q. And do have you -- would you agree that you have a substance abuse issue?
A. Yes.
Q. And what is the substance of choice for you that you're addicted to?
A. Opiates.
Q. Any particular opiates?

MS. MOOTISPAW: Yeah, we go every day. We make sure we also buy his formula, and diapers, and stuff like that that he needs. We always ask mom what he needs, if she needs anything before we come.

THE COURT: Excellent, she can also apply for the grant, financial support.

MS. HUBER: Relatives now get foster care payments.

THE COURT: So, does she know about that?

MS. HUBER: Yes. Once our funding been (inaudible) our end, her payments will be beginning and that should be any day now.

THE COURT: And you've seen Dakota?

MS. RABIOR: I saw Dakota the last time at court and I will see him prior to Disposition.

THE COURT: All right. Excellent.

We will see you then. Welcome to Baby Court.

That completes the hearing.

(At 11:40 a.m., the hearing is completed.)

inpatient.

A Yes.

Q If it is, we'll work around them. Right?

A Yes.

Q You can have that IMH at the inpatient treatment if that's necessary.

A Yes.

Q Is mom working?

A Not right now. She gave birth about eight weeks ago now.

MR. CARLESIMO: Speak up a little bit.

THE WITNESS: Sorry. Ms. Mootispaw is not working right now because she gave birth about eight weeks ago. Her insurance was cut off. So, they are waiting to get new insurance to get a doctor's note to clear her to work again.

BY THE COURT:

Q All right. So, we don't even have an IMH therapist. So, coming back in a month isn't gonna help us. We need a little more time so that we can get those services in place. Get the assessment started and find out where it all shakes out. Is that fair?

A Yes.

Q How are they visiting?

A They visit supervised at Ms. Mootispaw's house.

Q And that's okay with them.

A Yes.

Q And is this a case where either parent can reside where the child is placed?

A Not at this time.

Q Okay. So, we need to work on sobriety and mental health and then maybe that's something we can talk about at a later date.

A Yes.
Q Are parents planning together?
A As of now. Yes.
Q All right. And how's the baby doing?
A He is doing really good. He was in the hospital at the beginning of May due to not gaining weight quick enough. However, they have switched his formula and he is gaining weight rapidly.
Q All right. Is there anything else you need today by way of a court order?
A No.

THE COURT: Any questions on behalf of the Department?

MR. SILVER: No, Your Honor.

THE COURT: On behalf of the child.

MS. RABIOR: No questions.

THE COURT: On behalf of the father.

MR. BOYD: Briefly.

CROSS-EXAMINATION

BY MR. BOYD:

Q As it relates to the father, one of the things you wanted him to do -- you testified to is to get medical insurance. Is that correct?
A Yes.
Q And that'd be for the purpose of seeking prescription drugs or pain medication under a doctor's care. Would that be fair to say?
A Yes.
Q Okay. If he test clean and stops taking substances that he's not prescribed that wouldn't necessarily be a requirement. Correct?

Q And you want discretion for visitation.
A It's to remain supervised at this time until -- by designee or DHHS.
Q So, if I add discretion for unsupervised you don't have to utilize it, but you'd have it in the event something happened, and mom and dad are doing great. And we expect that to happen in this reporting period. They've shown a willingness. You don't have to use it, but in the event it's appropriate -- if I put it in the order, are you okay with that?
A Yes.
Q Okay. So, has mother been -- had a medical assessment at all? She's been diagnosed with Post-partum or what is the concern there?
A I believe that there --.
Q A history.
A -- there -- there is a trauma history.
Q So, I know we don't do trauma assessments on adults, but if she has a mental health assessment that'll come out.
A Yes.
Q Okay. And the child is doing well in the relative's home and the relative can monitor visitation and that's been fine.
A Yes.
Q How often are the parents seeing this beautiful child, Dakota?
A Day have been visiting almost every day.
Q Which is what we want to hear. Correct?
A Yes.
Q So, that shows a commitment by grandma and a commitment by mom and dad to make sure that Dakota grows up knowing who her (sic) parents are. Right? Or is it a him?
A Him.

Q Him -- his parents. Okay. So, you want that to continue. Grandpa -- Grandma will let you know if it's a problem.

A Correct.

Q But right now parents are visiting. They're helping grandma. They're cleaning. They're feeding. They're washing. Doing the things that we want them to do.

A Yes.

Q And then the Infant Mental Health, is that gonna take place in grandma's home. Is that the plan?

A That would be the home. Yes.

Q And she's in Oakland County.

A Yes.

Q Where do the folks live? Different county.

A Yes. Wayne County.

THE COURT: All right. Anything further from -- any objection to authorization of the Treatment Plan as identified?

(witness excused)

MR. SILVER: No, Your Honor.

MR. BOYD: No.

MS. RABIOR: No, Your Honor.

THE COURT: Me either. Sounds good. Grandma, everything okay.

MS. C. MOOTISPAW: Everything's fine.

THE COURT: You can reign these two folks of yours. They speak so much. I'm just worried about them.

MS. C. MOOTISPAW: --.

THE COURT: Are they helping you out at the house?

MS. C. MOOTISPAW: Yes. They do.

THE COURT: Okay.

MS. C. MOOTISPAW: They've been buying things and bringing it. Anything that I need, they --.

THE COURT: And have you looked into the relative's payment that's available to you?

MS. C. MOOTISPAW: Yes.

THE COURT: Okay.

MS. C. MOOTISPAW: They're working on that.

THE COURT: All right. And the baby has insurance.

MS. C. MOOTISPAW: Yes.

THE COURT: Okay. And you understand the LGAL's gonna come visit Dakota on occasion.

MS. C. MOOTISPAW: Yes.

THE COURT: Okay. And she's delightful gal.

MS. C. MOOTISPAW: Oh yeah.

THE COURT: You're okay mom. You good.

MS. MOOTISPAW: Yes.

THE COURT: Have any questions?

MS. MOOTISPAW: No ma'am.

THE COURT: How you feeling?

MS. MOOTISPAW: I'm okay.

THE COURT: You're tired.

MS. MOOTISPAW: No.

THE COURT: You look like you're tired. Just -- I know it's no fun to be here.

health and substance abuse I gather.

MS. MOOTISPAW: Yes. I think we're working on -- so, we have been working on it though.

THE COURT: Okay.

MS. MOOTISPAW: And -- and it's taking a minute because of Blue Cross Complete and I'm trying to get that wished because when I just got it back; there's not -- my caseworker's not answering so that I can have it switched from Blue Cross Complete to something else that would cover a lot more things than the Blue Cross Complete coverage.

THE COURT: Okay.

MR. CARLESIMO: Can I ask a question? Does she have to have insurance for these programs? I mean is -- isn't there a -- a -- so, she's got to pay for it or have insurance --.

THE COURT: You have to have insurance. How's Dakota? We've kind of left the child out of this whole testimony. How's the child?

MS. HUBER: Doing so well. He's growing. He's meeting his developmental milestones. I will say this about the parents, when they visit, they are very attentive to Dakota. Recently, visits just moved back to my office this week and the two visits I have watched, they -- I told them that's their saving grace right now. Is that they are very well with their child. They're able to read his cues. He responds to them as well. He smiles and laughs with them.

THE COURT: Could we put Maternal Infant Mental Health into the grandma?

MS. HUBER: I could look into that.

THE COURT: And it's a relative placement and then if the parents -- if they are to benefit from it, but it's not at least Dakota and grandma would get Maternal Infant

A. Yes.
Q. All right. So, you're now following through on your initial recommendation and you're asking that this child remain in its current placement, that the parents be ordered to comply with the same directives as previously ordered by the Court, but you are not asking that the case be removed from the Baby Court Docket, you don't no longer (sic) think it's appropriate for this docket?
A. Correct.
Q. All right. In addition to the report with that recommendation, what else have you attached in a summary fashion?
A. I have submitted about 25 drugs screens for parent. All 25 for each parent are positive for various drugs. Fentanyl and heroin are on every drug. Some have codeine, some have morphine. As well as the therapy reports from Dr. Vida (sic) and supportive visitation reports.
Q. Okay. So that we're clear, the parents, are they prescribed any drugs as part of any type of ability to become clean from any addictive drugs?
A. No.

MR. KAROUB: All right. Thank you. I don't have any further questions.

THE COURT: Are you offering the document for admission as Exhibit 1?

MR. KAROUB: Yes. Thank you, your Honor.

(At 1:52 p.m., DHHS Exhibit No. 1 offered.)

THE COURT: Do I have -- let me make sure I have it.

For the record, this offered exhibit is Ms. Huber's court report, followed by Mr. Dailey's drug collection screens. Eleven from Mr. Dailey. Ms. Mootispaw, pardon me, 13 screens. Followed by the Family Foster Care Supportive Visitation Assessment for Mother and for Father. The weekly progress report for in-home care and education for Mother and Father. The visitation progress report, reports for Mother and Father. The Counseling Services Assessment and Treatment Plan report for both parents.

Any objection to death of the forest being admitted as Exhibit 1?

MR. BOYD: No.

MS. RABIOR: No objection.

THE COURT: No?

MR. CARLESIMO: No objection.

(At 1:53 p.m., DHHS Exhibit No. 1 admitted.)

THE COURT: Counsel, any questions of Ms. Huber?

MR. CARLESIMO: No.

THE COURT: On behalf of Father?

MR. BOYD: Briefly. She's been sworn, correct?

THE COURT: Yes.

CROSS EXAMINATION

BY MR. BOYD:

Q. Okay. The Father is visiting, correct?

A. Yes.

Q. So, he's in compliance in that regard?

A. Yes.

Q. And the visits go well?

A. Yes.

Q. There appears to be attachment and a bond?

A. Yes.

Q. And Father's also in therapy, correct?

A. Yes, the supportive visitation as parenting, yes.

Q. And it's your understanding that Dr. Vida is recommending that the Father go to inpatient treatment?

A. Yes.

Q. And it's also your understanding that the Father has communicated to you that it's his intent to go into an inpatient facility, correct?

A. Yes.

Q. And if he did that and completed that, that would demonstrate compliance, correct?

A. Yes, as long as he benefits.

MR. BOYD: I understand.

Thank you, I have no further questions.

THE COURT: On behalf of the child, Ms. Rabior, any questions?

THE COURT: Is any party making a Judge Demand?

MR. CARLESIMO: Yes, Your Honor. My client -- I've instructed her what her options are, and she's elected to exercise her right to have a Judge -- Judge hear the case.

THE COURT: Okay. My understanding Mr. Carlesimo is that Judge Szymanski is gonna hear this for a Pretrial on January 27th at nine o'clock in the morning. Before we went on the record the Court had a deputy come and personally serve the mother and father with a copy of the Petition. The signed Summons, indicating both mother and father have been personally served has been provided to the Court at this time. It's been signed by the mother. It's been signed by the father. It will be made pat of the court file.

Your next hearing is going to be a Pretrial before Judge Szymanski. Again, it's gonna be January 27th of 2020 at nine o'clock in the morning. If any party disagrees with any recommendation, I'm making today you can file a Petition for Review before Judge Szymanski within seven days or appeal to the Michigan Court of Appeals within 21 days and we're off the record.

(At 10:51 a.m., court concluded)

it's not in the best interest of your child to have your rights terminated today. Is that right?

THE WITNESS: (MS. MOOTISPAW) Yes sir.

THE COURT: That's a yes. All right. So, I am going to take the specific factual admission. Mr. Chedraue did you want to ask your client about that?

MR. CHEDRAUE: If the Court wants me to, yes, I can.

THE COURT: Yes.

(cross-examination of witness Dailey by Mr. Chedraue)

CROSS-EXAMINATION

BY MR. CHEDRAUE:

Q Okay. Mr. Dailey please state your full name for the record.

A Eric Lee Dailey.

Q And you're the father of Dakota Nathaniel Lee Dailey.

A Yes sir.

Q Date of birth.

A Mine.

Q No. Dakota's. I'm sorry.

A Oh. [redacted]

Q Of what year.

A [redacted]

Q So, the child is under a year old at this time. Is that correct?

A Correct.

Q Sir is it correct that on March -- excuse me, May 13, 2019, in front of the Referee the Court -- that Referee took jurisdiction of the child?

A Yes.

Q And on March 30th, a Treatment Plan was given to you. Is that correct?

A Correct.

Q A Treatment Plan that you were expected to comply with. Is that correct?

A Correct.

Q Is it true sir since that time to the present time or til the Petition was filed in this Permanent Custody Petition, that you had continued to use substances -- illegal substances?

A Yes.

Q And the substances being Heroin.

A Yes.

Q Cocaine.

THE COURT: Wait a minute.

THE WITNESS: No.

THE COURT: Slowdown counsel. I'm trying to catchup here. Just give me a minute. So, I'm sorry Mr. Chedraue just being caught up to where we're at. You were having your client admit to certain substances that he was using.

MR. CHEDRAUE: That's correct Your Honor.

THE COURT: Is that right? And that would be --.

MR. CHEDRAUE: Heroin

THE COURT: You said Heroin --.

MR. CHEDRAUE: Fentanyl and Morphine.

THE COURT: And Morphine.

MR. CHEDRAUE: The main ones are the Heroin and the Morphine -- excuse me, the Fentanyl.

THE COURT: All right. And you admit that you've been using those sir.

THE WITNESS: Yes. I do.

THE COURT: You've continued to use them since the Court took jurisdiction.

Is that fair to say?

THE WITNESS: Yes sir.

THE COURT: All right. Off the record for one second.

(At 11:19 a.m., court recess)

(At 11:19 a.m., court reconvene)

THE COURT: Mr. Chedraue.

BY MR. CHEDRAUE:

Q Is it also correct sir that you were required to call regularly to your -- DHH -- foster care worker concerning the testing?

A Yes.

Q And that you did not in a regular manner call the worker to know if you were supposed to be testing.

A I didn't call for two months, prior to that yes.

Q Okay. Is it also correct that you was supposed to go -- if requested to enter into an inpatient substance abuse treatment center?

A Yes.

Q And you did go to a couple of those. Is that correct?

A Correct.

Q But you did not stay there for more than a couple days each time.

A No. I stayed six days.

Q Okay. And you left without their permission. Would that be correct sir?

A Correct. Signed into the Rainbow Clinic the very next day.

MR. CHEDRAUE: Anything else, Ms. Attorney General.

MS. MEGYESI: I don't have anything.

MR. CHEDRAUE: Thank you. No further -- nothing else unless the Court

has questions of my client Your Honor.

THE COURT: Sir each of these centers, you left after no more than six days.

THE WITNESS: Correct.

MR. CHEDRAUE: One more question if I may Your Honor.

THE COURT: Yes. Please.

BY MR. CHEDRAUE:

Q Sir would it be correct that after the filing of this Petition you were still using the drugs that were stated in --.

A Yes.

Q -- Fentanyl, Heroin, Things of that nature.

A Yes.

MR. CHEDRAUE: Thank you. No further questions.

THE COURT: All right. And you admit that impairs your ability to parent your children -- your child. Correct?

THE WITNESS: Yes sir.

THE COURT: All right. All right.

MR. CHEDRAUE: Thank you.

(witness excused)

THE COURT: Mr. Carlesimo, I'll let you --.

MR. CARLESIMO: Thank you, Your Honor. Thank you.

THE COURT: Proceed with your mother.

CARLLINA MOOTISPAW

(recalled as a witness, previously sworn, testified as follows)

CROSS-EXAMINATION

BY MR. CARLESIMO:

obviously addicted to it. And I went on to other Opiates.
Q And did you have an injury that causes this --?
A I crushed --.
Q What was the injury?
A -- my feet. I crushed my feet.
Q Crushed your feet.
A I fell off the top of a train while working and it crushed both of my heels.
Q You worked for the railroad.
A I did at the time. Yes.
Q Which railroad?
A NWC.
Q Which one is that?
A It's in Flat Rock --.
Q Okay.
A I was a railcar driver. I was the one that put the cars up on the train cars that shipped to the next -- so on and so forth.
Q And you -- and as part of that you would be on top of railcars.
A At the time I was putting my last car on, and it was at the very top tier of the railcar and when I swung around to come down it had just started raining. And when I swung around all my weight shifted and I fell off the top of the railcar landed like I'm standing right now, and it crushed my heels. And they said I was lucky I didn't paralyze myself.
Q And so, this is the top of a normal size railcar?
A Yes. About --.
Q All right.
A -- 20 feet or so.

Q I use to work for the railroad. So -- and they gave you -- what did they -- what did they medicate you with?
A Percocet.
Q Percocet. How long was it that you were prescribed the Percocet?
A Up until June of 2019.
Q So, is that like three, four months. I'm just wondering how --.
A Three and a half months, four months almost.
Q Okay. Til when did you say?
A January 3rd. Didn't give it to no more of 2019.
Q Of 2019. And that's -- but you said you had this issue for three years. Oh, so you're saying it started with the prescription drug -- Percocet. And were you taking more of Percocet than was prescribed?
A At the time, yes.
Q Okay. So, it started with abuse of prescribed drugs.
A Yes sir.
Q All right. Do you still have pain issues?
A Everyday. If I stand on my feet more than eight hours my feet swell up really big. It hurts me a lot.
Q So --.
A I try to get hi-lo jobs so I can sit down most of my days.
Q So, do you have work now?
A I just -- I did have a job that I was getting ready to start for -- Fosters in Canton, but I went to work my first day and they told me I couldn't work there because my background check because I have a trafficking on my background from eight years ago. So, it's -- they terminated me right there on the spot, but they hired me --.

THE COURT: Okay. All right. So, well you know I'm gonna -- I'm not quite finish, but I'm gonna get our next hearing date and we can do the rest of this off the record.

CLERK: Full day or half a day.

THE COURT: No. So, what do we need a half day once we get the clinic?

MS. MEGYESI: Yes, Your Honor.

THE COURT: All right. So, lets move this out -- lets me this -- off -- off the record. Are we up -- lets go off the record. Are we beyond guide --?

(At 11:54 a.m., court recess)

(At 11:55 a.m., court reconvene)

THE COURT: I'm gonna continue this til May 15, 2020, at 10:00 a.m. for the best interest hearing. I am gonna order a Clinic and everyone understandings that when we come back for the best interest hearing I'm gonna wanna get testimony and records and whatever else I need to determine what level of compliance the parents have been able to establish during that time. All right. do the -- have the parents signed releases for information from the Methadone Clinic?

MR. CHEDRAUE: The father has signed Your Honor.

MS. MEGYESI: He signed a Release form the Methadone Clinic. He needs a DHS Release which Ms. Michael will have.

THE COURT: Okay. All right. All right. So, we'll -- we'll go off the record, but I just wanted to finish up so that my court staff could take a break, but so ma'am I'm trying to think of what --.

(At 11:56 a.m., court concluded)

having been sworn and testified as follows:

DIRECT EXAMINATION

BY MS. MEGYESI:

Q. Ms. Michael, the child is placed where?

A. He is placed with his maternal grandmother.

Q. Does he have any special needs?

A. No.

Q. Are his needs being met?

A. Yes.

Q. Is he receiving any services at this time?

A. He receives early on services.

Q. Dakota is how old?

A. He's one.

Q. Okay. And are the parents visiting?

A. Yes.

Q. And how are those visits occurring?

A. They are supervised by maternal grandmother Ms. Mootispaw. She supervises with her daughter and Mr. Dailey. He just started visits in the community supervised by DHHS.

Q. And have there been any concerns during visits?

A. No concerns.

Q. Okay. And parents, you said the screening has restarted?

A. Yes.

Q. And did the parents have any questions about that screening restarting they can contact you?
A. Yes.
Q. They have your contact information?
A. Yes.
Q. Mother is engaging in services right now?
A. Yes.
Q. What services is she participating in?
A. She has substance abuse therapy that she engages in, individual she speaks with him twice a week.
Q. What about father?
A. Father, he engages with substance abuse services once a week.
Q. Okay. Do you need any, do you have to make any re-referrals for services?
A. No re-referrals.
Q. Do you have to do a home assessment?
A. I did one virtually.
Q. Okay. What about income, is that verified for both?
A. For Mr. Dailey he started employment in April. I was provided with one pay stub for April. I'm going to ask him to provide more. Ms. Mootispaw, she's not employed.
Q. Okay. So the outstanding issue is really we need to see clean screens and continued participation with

substance abuse; is that correct?
A. Yes.
Q. Okay. And you did submit or e-mailed me screened documents that I did forward to the attorneys today. Parents did screen pre-pandemic both of them twice in the month of March, correct?
A. Yes.
Q. And both parents screened positive for multiple substances, including fentanyl and opiates and methadone in those screens, correct?
A. Yes.

MS. MEGYESI: Okay. Judge, I don't have any additional questions at this time.

THE COURT: All right. Did anyone else have anything?

MR. JONAS: Just briefly, your Honor.

CROSS-EXAMINATION

BY MR. JONAS:

Q. Ms. Michael, your understanding that the paternal grandmother placement is trying to get her foster care license but is running into an issue based on identification or name?
A. Yes, I'm aware.
Q. Okay. Is that something that you can help move that

Q. Are visits consistent?
A. Yes, they visit just about every evening. The only concern that the foster parent has is that they are nodding off and she doesn't know the reason for their nodding off. She doesn't know if it's substances or them being tired. She's saying it's early in the day and they're doing it.
Q. When you're talking, when you say the foster parent you're talking about the relative caregiver, the foster mother?
A. Correct.
Q. In terms of the parents, we have mother is screening but screening positive and missing screens, correct?
A. Correct.
Q. Is father screening at all?
A. He sent me two screens or three screens that I think I did on 20th of December, the 1st and the 4th of January. They weren't random screens. One I any was positive for methadone. The other two was negative, which don't make sense because it should show methadone in them. I explained to him that those weren't negative screens, but he's not screening at the sight he's supposed to screen at.
Q. Has he given any explanation as to why he is not?
A. The one time he said that he had to work, which I

THE COURT: Go ahead. And if you want to give a brief summary and then if you have any questions, Ms. Megyesi.

MS. MEGYESI: So I'm going to give a summary and then Ms. Walker after I give the summary I'm going to ask if you have any corrections or if I've misstated anything?

Judge, it's my understanding that the child is placed in the relative placement with the grandmother. It's my understanding the parents are visiting the grandmother is allowed to supervise visits. It's my understanding from the two JAC reports that I received that both parents are participating in therapy and the therapy would address substance use abuse, part of it would. It's my understanding Ms. Mootispaw does not have a source of income but she relies on Mr. Dailey for a source of income.

In terms of housing I believe, and I have to follow up with Ms. Walker though that Mr. Dailey and Ms. Mootispaw live together in suitable housing, but again, I need to follow-up with Ms. Walker about that. The concern becomes, again, your Honor, the drug screens. And we've acknowledged this time and time again and the

A. That's correct.
Q. Okay. But you rely on the maternal grandmother for information; isn't that true?
A. Yes. She sends me weekly reports of every, every visit for everyday.
Q. Thank you. And there have been no negative reports that the last one that I recall was that the parents were falling asleep?
A. Yeah, that's just been pretty much the same thing or that mom will leave or something and then or not come back or come back at the end of the visit and then they'll leave together.
Q. There's been a recommendation by who for additional parenting classes?
A. That was, I don't know if it said additional. I just know that it was on the psychological as far as the recommendation toward the end they list a lot of things that the parents should partake in, okay, they've done this, they've done this. Like I said, I don't know if they should redo it or not. That was something they recommended so I wanted to include that in the court report.
Q. I understand. I understand.

And there's a recommendation that the mother have a psychiatric evaluation to see if

We're holding a hearing today here via yeah Zoom, I understand there's no objection to that. And I do have a court report marked as Exhibit 1, which I will admit.

(Exhibit 1 admitted)

THE COURT: We have a lot of -- we have a number of screens, I think we're going to schedule a hearing to discuss the screens in the future. Why don't we admit what screens we need at that time. All right. And with that, let me hear from Ms. Megyesi.

MS. MEGYESI: Sure. Judge, in terms of the DRH and the child in progress, where we stand is that the child remains placed with the maternal grandmother. Parent -- as always been the case consistently visit with the child, and my understanding is they visit as frequently as possible.

They are attending therapy. Therapy reports were attached also to an e-mail. But the therapy reports that they are making progress.

The concern remains, and I'm going to be hesitant in terms of this regard as to what to say, because we are going to have a hearing on it.

They are testing at different facilities; cutoff levels and samples are different. Parents are adamant that they're not using Fentanyl at all.

They are testing positive for Methadone, which

MR. CHEDRAUE: That's better. Much better.

MR. CARLESIMO: All right.

THE COURT: All right.

MR. CHEDRAUE: Thank you

THE COURT: All right.

BY MR. CARLESIMO:

Q Okay. Ms. Walker I'm assuming you're familiar with where the child is placed.

A Correct.

Q Where is the child placed?

A In the maternal grandparents' home -- grandmother.

Q Grandmother. Okay. So, the child lives with the mother's mother.

A Yes.

Q And who lives in that house?

A The foster parent, Dakota, and Katie -- Calen (sp), the cousin.

Q Okay. All right. And now the child has been there since birth essentially. Correct?

A To my understanding. Yes.

Q Okay. All right. Now, do you describe -- are you -- are you familiar with the visits between the mother and her child?

A Yes.

Q Okay. Have -- have you been there while those visits have taken place?

A I have not.

Q Okay. But you know they take place at grandmother's house.

A Yes.

Q All right. Do you know how frequent the visits are?

A They're -- they're normally every day.

Q So, do you know how long each day? How long -- how much -- how much of the day do the visit go?

A Anywhere from an hour to three.

Q Okay. And the mother participates in caring for her child.

A Yes.

Q All right. And that's been consistent throughout the Court's involvement. Isn't that true?

A Since I've been on the case, yes.

Q Okay. Do you know how mother and her mother get along?

A I have a general idea. Yes.

Q Okay. So, tell -- tell -- tell me what is your impression of their relationship.

A It appears that they are normally -- you know cordial with one another. I think that they have a good relationship. It's sometimes where they may bump heads and conflicts when it comes to Dakota or things that the mother may or may not be doing.

Q Okay. All right. Well --.

MS. MEGYESI: Judge, I don't mean to interrupt -- I have no objection to his line of questioning. I just -- I don't have any intention on calling the maternal grandmother as a witness. I, however, don't know if the Court will. And if she -- and if the Court does, she should be sequestered.

MR. CARLESIMO: Well, I -- I --.

THE COURT: Well, if -- if -- I mean are people requesting that I sequester the grandmother?

MR. CARLESIMO: I -- I didn't ask for that Judge.

MS. MEGYESI: Okay.

THE COURT: If nobody's asking for it, I'm gonna -- but -- but understanding that I won't allow her to testify if nobody's asking for her to be excluded.

MR. CARLESIMO: No. I don't have a problem. If somebody wants to call her Judge, that's fine.

THE COURT: Mr. Chedraue.

MR. CHEDRAUE: I'm not sure if I'm gonna be calling -- probably not, but I think in the interest she should be sequestered.

THE COURT: All right. All right. So, Ms. Mootispaw I'm gonna just put you in the waiting room and we'll bring you in at the appropriate time. Okay. Continue.

MR. CARLESIMO: Okay. Thank you Judge.

BY MR. CARLESIMO:

Q They get along is what you're saying. Now did they have the normal disagreements that people have. Right?

A Right.

Q Okay. But in general, the mother is supportive of her mother. Correct?

A Yes.

Q And she's appreciative of the fact that her child is with her mother, family, as opposed to some stranger. Is that's --?

A Correct.

Q Okay. And can you describe for us what mother does when she's there at the house with her child.

A In regard to the -- the information that I receive from the visits every week, mom is assisting with feeding, bathing, clothing, learning, playing, interacting with her son.

Q Okay. All right. And do you know ma'am if there's any bond or relationship between this child and my client?

A To my understanding their bond has strengthened.

Q They've got a strong bond. Is that correct?

A It has strengthened since the concerns were raised that it wasn't as strong. I believe that was three reporting periods ago.
Q So, it's strengthened.
A Yes.
Q Okay. But it's -- it's -- is it a strong bond or you don't know?
A It's hard for me to say how strong. I know it's -- it's improved is what I'm saying. I know that it has improved.
Q Correct. Well, have you received any reports as to the child's reaction to being when mom goes home, and do you know what happens -- what does the child do if anything when mom says I got to go now? What does the child do? If you know.
A I believe she said before he was -- he would get sad when they would leave. Now he's getting use to the you know the routine. So, it's not as it was before.
Q All right. But this child has been outside the care of his mom and dad since birth. Right?
A Right.
Q Okay. Now, has -- has you had any conversation with grandma -- maternal grandma about the permanency plan?
A Yes.
Q All right. Have you discussed with her the possibility of a guardianship?
A Yes.
Q Okay. Does she understand as far as you understand the difference between a guardianship and adoption?
A I believe so. Yes.
Q Okay. Have you discussed that with her?
A Yes.
Q And what is the difference ma'am that you -- you understand?

A One's permanent.
Q One is permanent.
A Correct.
Q Which one is permanent?
A Adoption is permanent.
Q Okay.
A Guardianship is temporary, and the court remains involved.
Q Okay. All right. All right. So, the difference is the court's involvement. Is that what you're saying or --?
A I'm --.
Q Well --.
A In an adoption, the parental rights are terminated. The child goes up for adoption whether it be with the maternal grandmother or another family member or a licensed foster parent.
Q Understood.
A Then they become that child's guardian -- their parent as if they gave birth to them. They get a Birth Certificate with their name on it --.
Q Okay.
A -- as if that were their child.
Q Gotcha. And so, they're in the eyes of the law they're considered a parent.
A Correct.
Q But it's permanent unless the court changes it. Isn't that true?
A Yeah.
Q Okay. Now, do you think it would be beneficial to this child that somebody -- I'm not saying this will happen, but lets assume if somebody were to say well, you know mom and dad, or mom can't see this child no more. Would that be good for that child? Miss, can you give us

Q Well, all right. All right. They're positive, but when they visit their child, have you received reports that they appear at grandma's house in a inebriated, high, or you know acting crazy, or -- have you received any reports like that recently?

A Not recently, but yes, I have received those reports.

Q Okay. All right. What agency are you with?

A Vista Maria.

Q Vista Maria. Okay. And you -- and Vista Maria's been on this case from the beginning as far as you know?

A No.

Q Oh, they have not.

A No.

Q Okay. Now, do you know that grandma supervises the visits regularly?

A Yes.

Q Okay. You don't participate in the visits every time. Correct?

A Correct.

Q You rely on grandma's reports.

A Correct.

Q All right. And so, miss given that this child is with the grandma -- given that he's with his grandma, how -- and well cared for. Right?

A Yes.

Q What - why -- why would it be in the child's best interest to cutoff his parental rights to mom and dad? How would that serve his interest?

A Because he needs permanency.

Q He needs permanency.

A Correct.

supposed to except for a few little things. Would that be correct?
A That's correct.
Q In all reality the only issue that we have here is the father's use of drugs. Would that be correct?
A That's correct.
Q And you have heard him deny that he's using drugs. Is that correct?
A Yes.
Q But there are test results. You saw those test results. Is that correct?
A Which test results?
Q For the father from different places where he was required to go drop.
A Yes.
Q Okay. Now, father works. Correct?
A Yes.
Q Supports the child. Correct?
A Yes.
Q He has a home. Is that correct?
A Yes.
Q Is it big enough for the child to be there with him and the mother?
A For now, yes.
Q Okay. He's done the parenting classes.
A Yes.
Q The Clinic Evaluation. Correct?
A Yes.
Q What other therapy that you've asked him to do and other things you've asked him to do. Is that correct?

A Yes.
Q Okay. Now, your reason -- you're asking for termination of both parents is because of their drug use. Is that correct?
A Yes.
Q Can you tell us how the drug use is interfering for the father? How is the drug use interfering with him taking care of his child?
A The child can't be in the home with him --.
Q Is that it?
A -- that's how it interferes.
Q How is -- what is the -- is he abusing the child when the father comes to the house to see his child? Is he abusing him?
A I have not gotten any reports of physical abuse. No.
Q And you indicated he supports his child. Is that correct?
A Yes.
Q And everything else he's doing except again for his drug use. My question to you is simple, how is that use of drugs interfering with him taking care of his child? Because if I read your report, I don't see any -- anything that he's done wrong except for his use of the drugs. Would that be correct?
A Yes.
Q So, I'll ask the question again. How is that interfering with him taking care of his child?
A The child cannot be in the home -- that's how it's interfering. The child cannot get -- it can't be reunified with this person if this is still an ongoing issue as to why he was brought into care in the first place.
Q So because the parents came to court through their drug use. Correct?
A Yes.

Q And there were other drugs that they were using at that time. Is that correct?
A It's still the same.
Q Still the same drugs.
A Yes.
Q Same amount?
A I cannot say the amount.
Q Well -- well, if you need to look at your report or drug reports, would that help you?
A I would have to go back and as far as when the child came into care which is before the we had the case to compare the amount of drugs their using to today's amount.
Q Do you know if the father is using -- if he's testing positive, it's a lower amount then it was when he first came into the system two and a half years ago?
A I didn't have this case when he first came into the system.
Q What's that? I could not --.
A I did not have his case when he first came into the system.

THE COURT: Mr. Chedraue I don't -- I don't think that screens indicate you know -- provide any information. This worker isn't gonna have anymore information than what's provided with the results. And I don't think they even indicate whether it's higher or lower or the same.

MR. CHEDRAUE: I understand Your Honor, but if she reviewed the case, I thought she might have reviewed the files when she was appointed to do this at some place. She might have but might not remember.

THE WITNESS: I see -- the results that I see are the ones that I look for as of when I had his case. So, I can't go back to each single screen that he has done and say it was .5 on this or 2.5 on this one or if it was 3.5 on that one. I can't tell you.

BY MR. CHEDRAUE:

Q Okay. Now, You indicated that one of the biggest issues is exposure to drugs for a parent. Is that correct?
A Yes.
Q And a few minutes ago the mother's attorney asked you about drugs in the house. Are there drugs in the house or at the grandparents -- the maternal grandparents where the child is?
A Are you saying are the grandparents -- foster parents have drugs on them?
Q Well, the grandmother -- only grandmother. Yeah. Is the foster parent?
A No.
Q Are there drugs?
A No. She did not have drugs in the home.
Q Or anybody in that house?
A Not to my understanding. No.
Q Has the parents -- either of the parents indicated to you something about drugs in the house?
A No.
Q Now, you're saying it's in the child's best interest to terminate the father's rights to his son?
A Yes.
Q Is there a bond between the father and the son?
A Yes.
Q And the father visits a lot. Does he not?
A Yes.
Q In fact the father takes the child out places. Does he not?
A Not -- not outside of the apartment. No. If they're not altogether with the foster parents, then no.
Q Okay. With the foster -- the grandmother, does the father take the child to the park sometimes?

A Yes.
Q Have you ever seen any of these visits?
A I have not been to see visits. No.
Q So, you're relying on the grandmother to report to you. Is that correct? Has she ever reported that the father did anything wrong during those visits?
A Outside of getting frustrated or yelling, no.
Q Okay. Frustrated. Who's getting frustrated, the child, or the father, or the grandmother?
A She indicated that the dad has done anything wrong in the visits outside of being frustrated or yelling. No.
Q Okay. Is that a normal, or no? Frustrated at the child sometimes or what?
A That is normal. Yes.
Q Okay. You're not faulting the father for yelling at the child every once in a while. Are you?
A No.
Q Okay. Has the maternal grandmother ever reported that the father did anything negative? Assaulted the child or used drugs in front of the child or anything of that nature?
A No.
Q But you believe because of the times that the child has been in care which almost his entire life. Correct?
A Correct.
Q In fact his birthday's next week. Correct?
A Correct.
Q Because of that the father's rights should be terminated. Would that be correct?
A Yes.
Q Even though according to you there's a good bond between father and child. Is that correct?
A Yes.

Q The -- the grandmother ever report to you the child was happy to see his father go because he didn't want to visit with the child -- with the father?
A No.
Q So, the father -- the child looks forward to visiting his father.
A Yes.
Q Again when cutting off this tree --cutting off the father -- and I guess to the mother, wouldn't that be somewhat harm -- harmful to this young man?
A Somewhat, yes.
Q I know you have a job to do and it's not easy questions to ask you though. Okay. But do you think that maybe either a guardianship or -- let me backup. Your agency believes that children under a certain age should not have guardianship.
A Correct, as well as the State.
Q Okay. Well, I will indicate to you that we have guardianship -- children here under the age of five.

(guttural utterance)

Q So, it's not the State. It's sometimes for certain circumstances. Do you believe that again terminating instead of providing a guardianship when a child has been at for the last three years; wouldn't that be a better solution?
A No.
Q Why not?
A Because there's no guarantee that the problem will be rectified and then we're still in the same place.
Q Okay. And if the Court terminates the father's parental and something happens to the guardian, what do we do then?
A Look for other relatives.

Q Okay. But they have a living room with a couch or something like that. Right?
A Yes.
Q Okay. In terms of -- have you talked to either parent recently about drug screens?
A Yes.
Q Okay. Do they -- does Ms. Mootispaw -- has she recently maintained that she is not using any illegal substances?
A Yes.
Q What about Mr. Dailey, has he recently maintained that he is not using any illegal substances?
A Yes.
Q Okay. And when I say recently, when is the last time you would've had such a conversation with the parents?
A We had an FTM --.

MR. CARLESIMO: Do you -- do you want to get up there?

THE WITNESS: -- and those were discussed during the FTM.

BY MS. MEGYESI:

Q Which would've been when?

THE COURT: And when was that?

THE WITNESS: I believe last month and then every time I -- usually every time I get their updated screens, I send them copies of their screens.

BY MS. MEGYESI:

Q Okay. Did they mention -- have they recently mentioned their screens at Rainbow to you?
A No.
Q All right. Do you know if they're receiving therapy still through Rainbow?
A They stated that they weren't.

MR. CHEDRAUE: May it please this Honorable Court, George Chedraue, P41732 on behalf of the father, Mr. Eric Dailey.

Your Honor, when it's time, I will put on the record why my client is not there.

THE COURT: All right. This is Judge Szymanski. We are continuing this Best Interest portion of this trial. And I know all the attorneys, of course, we've been here many times on this case – which we actually started, we were discussing this off the record I believe in March of 2020. So we're two years into this hearing.

So, just making that observation as we start. I scheduled today for us to be – you know, with the idea that we were going to be able to finalize the adjudication on this Petition.

We've discussed this in the break-out room. And so I do understand the father, he's always here so I recognize his absence is an aberration. This is not a – you know, maybe the first hearing he's ever missed as far as I can recall.

So, Mr. Chedraue, go ahead. I'll let you make a statement for the record.

MR. CHEDRAUE: Your Honor, last night approximately 6:43 in the evening, I received a text from Mr. Dailey saying that he is now in his way to rehab. That

he was supposed to go a month ago, but there were some issues, family problem issues in Ohio. He went there, came back, and he is finally at QBH, I do not know what that stands for, a rehab center and he is there. It is in Detroit, that's all I can tell you, Your Honor.

THE COURT: All right. And that's information that he gave you what, by text last night?

MR. CHEDRAUE: Yes, a text message that he sent me, Your Honor.

THE COURT: All right. All right, well, you're an officer of the Court, and I'll accept your representation that he provided you with that information. So, you know, I'll make that part of the record. I'm not making any other specific finding on that particular issue.

But as I indicated in the break-out room, I am still directing that we are going to proceed. So, and I understand, Ms. Megyesi has some update for us from the last time that we were here. Why don't I hear from her next and I'll hear from anyone else. Go ahead.

MS. MEGYESI: Yes, Judge.

I did supply all the attorneys and the Court with two screens, one for Ms. Mootispaw, one for Mr. Dailey. The collection date of June 29th, 2022. This is through Forensic Fluids. And Mr. Dailey tested positive for Fentanyl, 41.3 nanograms. Ms. Mootispaw tested positive for

A Yes, sir.
Q And you want to get better, don't you?
A Yeah, I do.
Q Okay. So, ma'am, if the Court were to consider it, would you consent to a Guardianship with your mother?
A Yes, I would if she would be willing and father would be willing.
Q Great. All right.

MR. CARLESIMO: Thank you very much. I have no more questions.

THE COURT: Mr. Chedraue, any questions of the witness?

MR. CHEDRAUE: No, Your Honor.

THE COURT: Mr. Jonas?

MR. JONAS: No questions, Your Honor.

THE COURT: Ms. Megyesi?

CROSS-EXAMINATION

BY MS. MEGYESI:

Q Ms. Mootispaw, I just want for clarification of the record, what health concerns do you have at this time?
A Right now I have a major wound on my left arm. It takes up almost my whole full arm. It's very graphic. I don't have it bandaged right now so I could show the Court, but it is horrible looking and disgusting so.

But I also have what is called a bile leak.

there's a grandmother who's willing to take care of the child for a period of time if the parents get it together, again, the father. They could still be in the child's life with a Guardianship.

Understand that the Guardianship is temporary, could be temporary but they have to come in front of you to terminate that Guardianship. And I don't think that you're going to say well, gee, you're doing better, let me terminate the Guardianship. You don't have to do anything. There's still going to be a treatment plan that you would require them to do.

My client, as I indicated earlier, is in rehab at the present time. He finally went in. Hopefully he's doing what he's supposed to -- I have no proof just his statement, but he's always been honest to everybody, so I believe that he is in rehab.

And I would like to see him get a chance to do his rehab before we terminate. But I can also understand that the Court, and even the AG, and the child's attorney have bent over backwards to help both of these parents.

So it's a sad day that I really would like to say let the father have a chance. To the other degree, the Court has given him a chance.

And I guess the question is: Is Guardianship better or is termination better or waiting to see if the

father gets it together – and maybe just for his own life to get it together – because grandma is not going to cut him out of the life of the child.

I mean, we have seen pictures of the father and the child. There is great love between them. And I hate for him to lose that child, but he's still going to be involved in the child's life.

I don't think grandmother is going to be mean or nasty and not let the father see the child. If everything's going well, I assume the Court would set parameters as to what type of visits can be and things of that nature. At this point, obviously if she had adopts, than she can set the parameters as to what type of visit it should be.

But, Your Honor, it's one of those cases that if we had terminated a long time ago, we wouldn't be in this quandary saying what should we do? Because the Court did give the father numerous chances. Hopefully for his own sake, he turns his own life around. Thank you.

THE COURT: Thank you. All right, Mr. Carlesimo, let me hear from you.

MR. CARLESIMO: thank you, Your Honor.

My screen keeps telling me my Internet connection is unstable. Hopefully, you can hear me throughout. I'll try to be brief, Your Honor.

a time, and eventually grandma, will determine. And we know that she's going to do what's best fo this child.

Your Honor, a Guardianship is permanent. Technically, legally, under the right circumstances, it can be dissolved. But the mere fact that that's true doesn't mean that it's temporary. It's not.

Now, Your Honor, I think that the law allows you even under -- even if everything is perfect for a termination, the law permits you to not terminate when the child is with a relative.

And that's the case here. You do not have to terminate here, Judge. We're not here to punish these people for being drug abusers. This child is going to be where the child is going to be no matter what you do. We'll come back every so often if there's a Guardianship. The Court is going to have to take time to look at it.

But, Your Honor, I think grandma is the type of person, she's proven to me that she's the type of person that if she sees that her daughter can take care of this child, she'll be the first one to tell you. And if she doesn't believe that my client can take care of this child, she's not going to -- you know, she's not going to be fooled.

So, Your Honor, this child, the best interest of this child – that there's options available to this child

THE COURT: All right. Thank you.

Any rebuttal?

MS. MEGYESI: No, thank you.

THE COURT: All right.

So, well, while we've been here, you know, this child is three years old now by my calculation and grandmother has raised the child. Parents have been consistent in visiting, consisting in supporting the child, I certainly want to acknowledge that. I also am deeply concerned that they continue to test positive you know, not for marijuana or cocaine, but for Fentanyl. Fentanyl is a -- I mean, that's something that could kill either one of them tomorrow. And so that's concerning.

And I remember when we got started on this case, it's very unfortunate. My understanding is these parents both got hooked through the use of prescription medication. That that started their problem, and that is just so sad.

And it's one of the reasons that these drug manufacturers are paying billions of dollars now for the way they marketed these drugs. And I think we could have gotten by, I think, you know, people can get by with other pain medications and it's unfortunate. And I'm not blaming the parents for whatever they were prescribed by whoever prescribed it.

But they're dealing with the consequences of it. And you know, I mean it's fairly clear to me that – you know, we've been at this for three years. And for me to expect that another three months is going to provide a different result is –

You know, and I understand – you know, at this point, in terms of the father, I have, you know, his representation with absolutely no support just, you know, a text. He didn't even talk to Mr. Chedraue. He just sent him a message, and said well, here is where I'm at. And there's no way to even confirm it because the information that Mr. Chedraue was given is so sketchy.

So, you know, let me say this. I'm not here to punish anybody, all right. And I do consider substance abuse to be an illness. I know it's a crime, too, but I don't – you know, I'm not sitting here in a criminal Court; and I don't agree that people should be prosecuted for being addicted to these substances.

I think it's tragic, extremely tragic. Because I have no doubt and everybody's commented on this, that these parents love Dakota, that they want to do what they can for Dakota and I agree, that to some extent, they should have some, you know, they should be able to have some continued contact with Dakota.

But when I look at -- I've got a three year

old who as a practical matter, the grandmother, Ms. Mootispaw, she's the only real parent that this child has known because this is the person that puts her (sic) to bed every night, gets her up every morning, you know; that handles every aspect of raising the child. That needs to be recognized at this point.

So, you know, I am going to do what I've done in cases where I've had similar situations. I am going to issue an Order that I'm going to make a finding that it is in the best interest of Dakota Dailey to terminate the rights of the mother and the father. But I'm going to put in the Order that I have no objection to the parents continuing to have supervised contact with Dakota. I think that's good for Dakota. I think that the grandmother can do that and there won't be any harm.

I recognize that technically the MCI superintendent will be the one that has the authority to specifically rule on this up until the time of the adoption, which I expect that the grandmother is going to -- you know, I understand that she wants to plan long term for Dakota; wants to be able to adopt Dakota if that's the direction that the Court goes in. And that is the direction that I'm indicating at this time.

And as the attorneys have pointed out, once that adoption's final, then that level of contact is also

Did I put you there? Oh, you're right, I did. I'm sorry. Not you. Okay. Zoom user, you should be in room two with Mr. Carlesimo.

THE CLERK: Yes, Judge, this was a Judge Demand.

THE COURT: All right. So why don't you get a date 45 days out for Referee Kerman.

THE CLERK: Okay.

So, Ms. Mootispaw, they'll be an adoption worker appointed. They will reach out to you. I presume that the parents are going to appeal. Nothing will be -- you won't be able to adopt until such time as that Appeal is resolved. And, of course, if I'm reversed, then, you know, the case will come back and, you know, we'll have to figure out, you know, what to do then.

I don't really anticipate that, but I don't have the final say. So, and I'm going to put in my Order that I have no objection to you allowing ongoing supervised contact with the parents. I don't have a problem if they want to come over every day and help you with Dakota, you know, as long as you're there.

So and I want to thank you. I'm sure this has been a challenge for you, too. And, you know, I know my aunt and uncle raised a child as a result of a situation like this, they raised a grandchild. And to be honest, I

STATE OF MICHIGAN

COURT OF APPEALS

In re D. N. DAILEY, Minor.

UNPUBLISHED
May 18, 2023

Nos. 363163; 363164
Wayne Circuit Court
Family Division
LC No. 2019-000790-NA

Before: LETICA, P.J., and BORRELLO and RIORDAN, JJ.

PER CURIAM.

In these consolidated appeals, respondent-mother and respondent-father appeal as of right the trial court's order terminating their parental rights to the minor child pursuant to MCL 712A.19b(3)(c)(*i*), (g), and (j). Respondents both argue that the trial court erred in terminating their parental rights because petitioner, the Department of Health and Human Services ("DHHS"), failed to make reasonable efforts toward reunification. In addition, respondent-father argues that the trial court erred when it found that termination of his parental rights was in the child's best interests. For the reasons set forth below, we affirm in both appeals.

I. FACTUAL BACKGROUND

Respondents met and began their relationship in 2016 while residents of half-way houses following their respective incarcerations. Both have lengthy substance abuse histories. Respondent-mother admitted that she has abused drugs, on and off, for more than 10 years. Respondent-father served the last six months of his criminal sentence in an inpatient rehabilitation program. Regarding their substance use, both claimed that they became addicted to prescribed pain medication. Both shared a similar story of becoming addicted to prescribed medication and then turning to street drugs after they could no longer obtain their pain medication by prescription. Their drug of choice included heroin.

In March 2019, respondent-mother gave birth to the minor child. At the time, both she and the child tested positive for opiates and morphine. The child experienced severe withdrawal symptoms after his birth. He remained hospitalized for almost three weeks while he was administered morphine to control his withdrawal symptoms. During the Children's Protective Services ("CPS") investigation that followed, respondent-mother admitted that she used heroin

before and during her pregnancy. CPS requested that respondent-father be drug tested as well. His March 2019 screen was positive for fentanyl and norfentanyl.

In April 2019, CPS requested that respondents submit to another drug screen. Both again tested positive for opiates, heroin metabolites, morphine, and fentanyl. During a family team meeting, a safety plan was developed in anticipation of the child's discharge from the hospital. Shortly thereafter, the child was placed in the care of his maternal grandmother, where he would remain throughout this case.

In April 2019, DHHS filed a petition requesting that the trial court assume jurisdiction over the child. Respondents entered pleas of admission in which they admitted that the child was born with drugs in his system, that they continued to abuse heroin, and that their continued drug use impaired their ability to care for the child. The trial court accepted the pleas and found statutory grounds to assume jurisdiction over the child. During the dispositional hearing that followed, respondents were ordered to comply with a treatment plan designed to address their substance abuse issues and improve their parenting skills.

During the six months that followed the May 2019 adjudication, respondents regularly attended substance abuse therapy, visited the child every day in the home of his maternal grandmother, participated in the care of the child during this parenting time, and contributed financially to the child's care. However, respondents also continued to consistently test positive for heroin, fentanyl, and morphine. In November 2019, the permanency plan was changed from reunification to adoption. Consistent with this change, in January 2020, DHHS filed a supplemental petition seeking termination of respondents' parental rights.

At a hearing on March 4, 2020, both respondents entered pleas of admission and stipulated that statutory grounds existed to support termination of their parental rights under MCL 712A.19b(3)(c)(*i*), (g), and (j). Respondents both admitted that they continued to abuse heroin, fentanyl, and morphine. Respondent-mother also admitted to using cocaine. Respondents admitted that their drug use impaired their ability to parent the child. The trial court accepted their pleas, considered the parties' stipulations, and found clear and convincing evidence to terminate respondents' parental rights under MCL 712A.19b(3)(c)(*i*), (g), and (j). The matter was scheduled for a contested best-interests hearing in May 2020, but the hearing was delayed approximately two years because of the COVID-19 pandemic and respondents' requests for an in-person hearing. Eventually, the best-interests hearing commenced in March 2022 and concluded in July 2022. At that time, the trial court found that termination of respondents' parental rights was in the child's best interests. These appeals followed.

II. ANALYSIS

A. REASONABLE EFFORTS

Respondents argue that DHHS failed to make reasonable efforts toward reunification, which precluded the trial court from terminating their parental rights. We disagree.

At the outset, we note that both respondents have waived any argument related to the adequacy of the services offered and the existence of statutory grounds to terminate their parental rights. Challenges to the adequacy and reasonableness of the case service plan relate to the

sufficiency of the evidence in support of a statutory ground for termination. See *In re Rood,* 483 Mich 73, 89; 763 NW2d 587 (2009). In the trial court, both respondents entered pleas of admission and stipulated that statutory grounds existed to support termination of their parental rights. They then elected only to proceed to a contested hearing regarding the child's best interests. Neither respondent claims any irregularity with the plea process, nor have they sought to withdraw their pleas. Accordingly, through their unchallenged pleas, respondents have waived any claim of error related to the reasonableness of DHHS's efforts toward reunification or the existence of statutory grounds for termination of their parental rights. See *In re Hudson,* 294 Mich App 261, 264; 817 NW2d 115 (2011); *In re Fried,* 266 Mich App 535, 541; 702 NW2d 192 (2005).

Even if it were appropriate to consider the issue, respondents' claim that DHHS failed to make reasonable efforts toward reunification is not supported by the record. Reasonable efforts to reunify the child and family must be made in all cases except those involving the circumstances delineated in MCL 712A.19a(2), which are not applicable here. *In re Mason*, 486 Mich 142, 152; 782 NW2d 747 (2010). Respondents assert that they required intensive treatment to adequately address their serious substance abuse issues. According to respondents, the trial court wasted two years referring them for various insufficient services when it should have referred them to an intensive inpatient rehabilitation program.

The record does not support respondents' position that two years elapsed before inpatient treatment was contemplated. Indeed, the record demonstrates that, at the outset, both respondents were offered, but refused, more intensive services that could have assisted in their efforts to overcome their addictions to heroin and fentanyl.

DHHS filed the petition for temporary custody in March 2019. At the beginning, it was readily apparent that respondents' drug addiction was the most significant barrier to reunification. Both respondents admitted an addiction history dating back at least 10 years. Additionally, several years earlier, both respondents had actually participated in inpatient programs. Initially, respondents were granted the opportunity to have their case moved to the specialized "baby court" docket, which offered an opportunity for more frequent review hearings at shorter intervals, more centralized services, and assistance through the Infant Mental Health program. By June 2019, respondents' need for inpatient drug rehabilitation services was recognized and discussed between the trial court and the parties. Both respondents immediately expressed reluctance, indeed they refused, to participate in inpatient treatment. Respondent-father was anxious about losing his employment and respondent-mother was concerned that after her earlier incarceration, she could not tolerate being "locked up" in inpatient treatment.

In August 2019, respondent-mother apparently entered an inpatient program, but she left after only 26 hours. Respondent-mother was unable to attend an October 7, 2019 review hearing because she allegedly had entered an inpatient detoxification program the night before. Respondent-mother also left this program early. At a March 4, 2020 hearing at which respondents entered pleas of admission to the statutory grounds for termination, respondent-mother testified that she had been admitted to three inpatient treatment programs, but left all three early. At this same hearing, respondent-father acknowledged that his treatment plan required that he participate in inpatient treatment, if requested. He further testified that he entered one program, but left after six days.

The need for inpatient treatment was frequently discussed with respondents during the two years that elapsed while they awaited their requested in-person best-interests hearing. At the review hearing in July 2020, the trial court reminded respondents that inpatient treatment was available. At the January 7, 2021 review hearing, counsel for petitioner noted that respondents had denied continued drug use, but she still questioned whether respondents were in need of an order for inpatient treatment in light of their positive screens. In response, respondent-mother indicated: "I feel like doing the outpatient has been good for me. I really have not used, but I don't know why the screens are where they are." At the April 14, 2021 review hearing, counsel for petitioner again questioned whether respondents required more intensive services in light of the fact that screens continued to be positive for multiple substances. Respondents' reactions were varied. At times, they represented that they were considering or looking into inpatient treatment. Other times, they indicated that they preferred outpatient therapy.

On March 9, 2022, at the conclusion of the initial best-interests hearing, the trial court continued the matter to allow both respondents the opportunity to participate in inpatient treatment. During the six weeks that followed, a caseworker investigated inpatient programs and found respondents' efforts lacking. Each facility required that respondents participate in an admission process, but the respondents were uncooperative. Testimony showed that respondent-father was unwilling to participate in an inpatient program that did not utilize methadone. Respondent-mother claimed that she had insurance issues, but a caseworker clarified that there only was one program that would not accept respondent-mother's insurance; all the others did. In any event, the caseworker then provided respondent-mother with contact information to assist her in securing inpatient treatment covered by her insurance. The caseworker also spoke with respondents' individual therapist who, based on her interaction with her clients, was left with the impression that respondents were unwilling to participate in inpatient treatment. During this grace period provided by the court, respondents continued to regularly test positive for heroin and fentanyl.

When the hearing resumed on April 28, 2022, respondents had yet to enter an inpatient program, despite DHHS's efforts to assist them in securing treatment. Nonetheless, the trial court again granted respondents more time to address their addiction to heroin and fentanyl. Indeed, the best-interests hearing was continued for another three more months. At the July 20, 2022 hearing, drug screens were admitted that demonstrated that both respondents continued to test positive for fentanyl. Respondent-mother still had not enrolled in an inpatient program. Respondent-father did not attend the hearing, but his attorney reported receiving a text message from his client the night before indicating that respondent-father was "on his way to rehab." However, there was no evidence that respondent-father was actually admitted to any inpatient program.

This matter was before the trial court for more than three years. Despite respondents' representations to the contrary, the record confirms that, from the beginning, and on several occasions thereafter, respondents were offered but refused the opportunity to participate in inpatient treatment. Then, when it appeared that respondents were on the precipice of having their parental rights terminated, the trial court, not once but twice, refused to do so and granted respondents even more time to address their serious substance abuse issues. Indeed, they were specifically granted more time to permit them to enter inpatient treatment. Given this record, we reject respondents' suggestion that reasonable efforts were not made toward reunification.

B. BEST INTERESTS

Respondent-father also argues that the trial court erred by finding that termination of his parental rights was in the child's best interests. After reviewing the record, we conclude that the trial court did not err in this regard.

"If the court finds that there are grounds for termination of parental rights and that termination of parental rights is in the child's best interests, the court shall order termination of the parental rights and order that additional efforts for reunification of the child with the parent not be made." MCL 712A.19b(5). The trial court may consider several factors when deciding if termination of parental rights is in a child's best interests, including "the child's bond to the parent, the parent's parenting ability, the child's need for permanency, stability, and finality, and the advantages of a foster home over the parent's home." *In re Olive/Metts,* 297 Mich App 35, 42; 823 NW2d 144 (2012) (internal citations omitted). The trial court may also consider psychological evaluations, the child's age, continued involvement in domestic violence, and a parent's history. *In re Jones,* 286 Mich App 126, 131; 777 NW2d 728 (2009). "The trial court should weigh all the evidence available to determine the children's best interests." *In re White,* 303 Mich App 701, 713; 846 NW2d 61 (2014). In considering the child's best interests, the trial court's focus must be on the child and not the parent. *In re Moss,* 301 Mich App 76, 87; 836 NW2d 182 (2013). Whether termination of parental rights is in a child's best interests must be proven by a preponderance of the evidence. *Id.* at 90. This Court reviews for clear error a trial court's finding that termination of parental rights is in a child's best interests. *In re Jones,* 286 Mich App at 129.

A preponderance of the evidence supports the trial court's finding that termination of respondents' parental rights was in the child's best interests. It is readily apparent that the child would be at risk in respondents' unsupervised care. Both respondents had a longstanding history of substance abuse. They were addicted to heroin and fentanyl. Both received substance abuse counseling from an individual therapist and a drug counselor. They also participated in medication-based therapy through a methadone clinic. Despite these efforts, respondents were unwilling or unable to overcome their drug addictions. Moreover, the trial court reiterated and respondents understood that the use of fentanyl, in particular, carried with it the risk of death. Further, respondent-father admitted engaging in risky behavior when he confessed to buying heroin off the streets with the understanding that it was likely laced with fentanyl. The child would clearly be at risk of harm if left in respondents' care.

Respondent-father argues that he had a strong bond with the child. Indeed, the evidence established that respondent-father consistently visited the child, assisted in his care during parenting time, and contributed financially to his needs. The caseworker further confirmed that a parental bond existed. While a bond may have existed, there was sufficient evidence for the trial court to conclude that this factor did not outweigh the child's need for a safe and stable home that was free from drug abuse and individuals with unresolved substance abuse issues. Given the child's young age, it was critical that he be placed with someone who could provide adequate care and supervision.

The trial court also considered the child's need for permanency, finality, and stability. At the time of termination, the matter had been pending for more than three years. The child had resided with the maternal grandmother essentially since birth. The maternal grandmother had also expressed a willingness to adopt the child. When considering the best-interests factors, a court may consider the advantages of a foster home over the parent's home and the possibility of

adoption. See *In re Olive/Metts,* 297 Mich App at 41-42. It is clearly apparent that the child was placed in a stable home where he was progressing and that this progress could continue because this caregiver, his maternal grandmother, was willing to provide permanency for him. By contrast, neither respondent was in a position to provide the child with stability and permanence.

Respondent-father argues that the trial court failed to appropriately consider and weigh the fact that the child was in relative placement. We disagree. The trial court acknowledged that the child's placement with his maternal grandmother weighed against termination. However, it continued on to properly balance relative placement with other relevant factors. The trial court noted the child's young age, his need for permanency, stability, and finality, and the length of time the child had been in care—more than three years. It also considered the risk to the child in respondents' care considering their addiction to fentanyl. Ultimately, the trial court concluded that termination of parental rights was in the child's best interests. Although placement with a relative weighs against termination, and such a placement must be considered, a trial court may terminate parental rights in lieu of placement with relatives if it finds that termination is in the child's best interests. *Id*. at 43. In this case, the trial court properly balanced relevant factors, and it did not clearly err by finding that termination of respondent-father's parental rights was in the child's best interests despite that he was placed with a relative.

Finally, respondent-father argues that the trial court's best-interests determination was flawed because the court failed to consider a guardianship as an alternative to termination of his parental rights. Again, we disagree. In this regard, we note that during respondent-father's testimony, he requested that his own mother be appointed guardian over the maternal grandmother who had cared for the child his entire life. However, there was no evidence that the paternal grandmother was willing to be the child's guardian. Further, the appointment of a guardian is typically done in an effort to avoid the initiation of termination proceedings. See *In re TK,* 306 Mich App 698, 705; 859 NW2d 208 (2014). "[T]he appointment of a guardian is only appropriate after the court has made a finding that the child cannot be safely returned to the home, yet initiating termination of parental rights is clearly not in the child's best interests." *Id.* at 707. But under any circumstance, a trial court may only appoint a guardian if "it is in the child's best interests to appoint a guardian." *Id*. (citations omitted). The trial court clearly contemplated the possibility of a guardianship. Indeed, while it was giving respondents additional time to participate in an inpatient program, it instructed the parties to explore a guardianship. However, when the best-interests hearing resumed, the trial court ultimately rejected the possibility of a guardianship because it found more compelling the child's needs for stability, permanence, and finality. The child was only three years old at the time of termination, the case had been pending for three years, and respondents had not made any progress in overcoming their longstanding substance abuse issues or demonstrated any sincere willingness to do so. The trial court found that the child needed more permanency than what a guardianship would offer.

Respondent-father suggests that the trial court's finding that respondents could have continued supervised contact with the child after the termination of their parental rights is evidence that a guardianship was more appropriate. We disagree. The trial court did indicate both at the July 2022 hearing and in its written order that respondents could have supervised contact with the child, but it made clear that this would be under the maternal grandmother's discretion. The trial court's comments do not suggest that a guardianship would have been more appropriate, but rather that respondents should not have any control over decisions related to the child's best interests and

well-being. The trial court did not clearly err when it found that the child's need for permanence and finality outweighed respondents' suggestion of a guardianship as an alternative to termination.

III. CONCLUSION

There were no errors warranting relief. We affirm.

/s/ Anica Letica
/s/ Stephen L. Borrello
/s/ Michael J. Riordan