No. 20221029-SC

IN THE
SUPREME COURT OF THE STATE OF UTAH

State of Utah, in the interest of A.H., L.H., J.H., J.H., S.H., N.H., and E.H., persons under 18 years of age.

STATE OF UTAH AND THE GUARDIAN AD LITEM
IN THE INTEREST OF A.H., L.H., J.H., J.H., S.H., N.H., and E.H.,
Petitioners,
v.
S.H. (MOTHER) AND N.J.H. (FATHER),
Respondents.

BRIEF OF AMICUS CURIAE NATIONAL ASSOCIATION OF COUNSEL FOR CHILDREN[1]

On appeal from the Fourth District Juvenile Court, Utah County,
Honorable Suchada P. Bazzelle, Case Nos. 1145453,
1145454, 1145455, 1145456, 1145457, 1145458, & 1146856
Court of Appeals Case Nos. 20210353-CA & 20210354-CA

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[1] While this brief discusses issues upon which the court of appeals should be affirmed, it does not formally support or oppose any particular party, and the parties have each consented to its filing.

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Identity and Interest of Amicus Curiae

Founded in 1977, the National Association of Counsel for Children ("NACC"), is a 501(c)(3) non-profit child advocacy and professional membership association that advances children's and parent's rights by supporting a diverse, inclusive community of child welfare lawyers to provide zealous legal representation and by advocating for equitable, anti-racist solutions co-designed by people with lived experience. A multidisciplinary organization, its members primarily include child welfare attorneys and judges, as well as professionals from the fields of medicine, social work, mental health, and education. NACC's work includes federal and state level policy advocacy, the national Child Welfare Law Specialist attorney certification program, a robust training and technical assistance arm, and an amicus curiae program. Through the amicus curiae program, NACC has filed numerous briefs promoting the legal interests of children in state and federal appellate courts, as well as the Supreme Court of the United States. More information about NACC can be found at www.naccchildlaw.org.

Notice, Consent, and Authorship

Timely notice of NACC's intent to file this brief was given to counsel of record for each party to this appeal, and all parties have consented to its filing. Although no part of this brief was written by any party to this appeal or by any party's counsel, counsel for N.H. (Father) was previously employed by the law

firm currently representing NACC, Zimmerman Booher, during earlier stages of this litigation. N.H.'s counsel is now employed by the State of Utah's Indigent Appellate Defense Division. Undersigned counsel for NACC had not previously entered an appearance in this matter. No party, party's counsel, or any other person contributed money that was intended to fund preparing or submitting this brief.

Introduction

Decades of research into the child welfare system have illuminated the key factors that better serve children's best interests. While safety, permanency, and well-being remain an important triad for this analysis, each of these concepts has been enriched by evidence and voices of lived experience experts. Cultural and familial identity, sibling bonds, and increasing rather than reducing a child's relational connections are all now broadly recognized as paramount considerations to any best interest determination.

The court of appeals' decision and Petitioners' briefs discuss concepts such as the difference between adoption and guardianship, the impact of kinship placements, the importance of maintaining connections with siblings in foster care, and attachments formed by children in foster care. Over the years, social scientists have examined these subjects, refining the field's understanding of them and providing evidence-based conclusions about how best to achieve positive outcomes for children. The court of appeals' opinion is consistent with current research.

Research findings demonstrate that the legal status of a child's ultimate permanency plan—e.g., adoption versus guardianship—is not decisive in leading to positive outcomes. Rather, good outcomes are more likely when children's relational connections are preserved, rather than taken away. Similarly, placements with kin lead to better outcomes, and maintaining sibling

relationships is vital to children in foster care. Finally, while attachment theory has value for understanding a child's experience, it comes with inherent risk when applied by courts. When considered simplistically or without the necessary nuance, it can be a misleading framework that overemphasizes one factor to the exclusion of the others that bear on the child's needs and best interests.

Argument

NACC does not take a position on the proper interpretation of Utah law or its application to this specific case. Instead, this brief addresses federal law and summarizes current social science and best practice on a handful of targeted points.

First, federal law does not mandate state courts to apply a preference for adoption over guardianship. In fact, federal policy more recently reflects a trend toward recognizing the improved outcomes resulting from kinship placement, whether through guardianship or adoption.

Second, and relatedly, studies demonstrate the vital importance of kin, particularly sibling relationships. Research shows that placements with siblings—or at a minimum, placements that provide consistent access to siblings—lead to better outcomes.

Third, attachment theory has faced increasing critique. While it certainly is an important area of training and understanding for child welfare law practice, it can be a vague and misleading framework that, when used as a primary basis for

permanency decisions, obscures the full range of factors that bear on the child's best interests.

1. There is No Basis to Categorically Prefer Adoption Over Guardianship

Although adoption was once perceived as a preferred legal option for children and foster care, times have changed. Federal law, federal guidance, research studies, other state courts, and best practices and academic scholarship no longer support the idea that adoption is better, or more permanent, than other legal permanency options such as reunification, guardianship, and custody.

1.1 Federal Law Does Not Mandate a Preference for Adoption

The federal Adoption and Safe Families Act of 1997 (ASFA) says that it is designed to "promote" adoption; it does not purport to establish a mandatory preference for it by state courts. Adoption and Safe Families Act of 1997, Pub. L. No. 105-89, 111 Stat. 2115 (1997). Instead, federal law reflects a preference for kinship placements, but does so without favoring adoption over other placement options. For example, federal law requires that state agencies "consider giving preference to an adult relative over a non-related caregiver when determining a placement for a child, provided that the relative caregiver meets all relevant State child protection standards." 42 U.S.C. § 671(a)(19). When a child is removed from parents, state agencies also are required to exercise due diligence to identify and provide notice to all grandparents, all parents of a sibling of the child when that parent has legal custody of the sibling, and other adult relatives of the child

(including any other adult relatives suggested by the parents). *Id.* § 671(a)(29). The notice must explain that (1) the child has been or is being removed from the custody of their parents, (2) the options the relative has to participate in the care and placement of the child, and (3) the requirements to become a foster parent to the child. *Id.*

Moreover, earlier this year, the Department of Health and Human Services' Administration for Children and Families promulgated a proposed regulation that would remove regulatory barriers for funding kinship placements. The agency noted the widespread preference for kinship placements, which "stems from the knowledge that it is generally best for children to be with family and also from the increasing shortage of qualified foster parents." Separate Licensing Standards for Relative or Kinship Foster Family Homes, 88 Fed. Reg. 9411-01 (Feb. 14, 2023).

Importantly, in promulgating this proposed rule, the agency acknowledged that current federal foster care regulations were developed "before research demonstrated that relative and kinship care is often the best option for children in foster care." *Id.* at 9412. Summarizing that research, the agency notes that kinship placement helps to "preserve children's cultural identity and relationship to their community," leads to "fewer behavioral problems and higher placement stability rates," and is "just as safe, or safer, when compared with children placed with unrelated foster families." *Id.* at 9414.

ASFA imposed deadlines for seeking termination of parental rights in an attempt to limit what is referred to as "foster-care drift," wherein a child is placed in state custody but left to languish, without meaningful or reasonable efforts to achieve legal permanency. To address this problem, ASFA expressly requires state agencies receiving Title IV-E funds to file a petition to terminate parental rights in three circumstances, one of which is when the child has been in state foster care for fifteen of the prior twenty-two months. 42 U.S.C § 671(a)(16); *id.* § 675(5)(E). That requirement codifies a directive to *state grantees* of these funds, not to *state courts* that have independent authority and oversight to review and rule on these petitions. In short, the mere filing of a petition does not, and should not, require the court to automatically grant it; federal law does not dictate the outcome of state courts' and judicial officers' findings, which could include reunification, guardianship, adoption, or some other outcome. That is because it is the judiciary's role to evaluate the information presented by all the parties within the adversarial system, make credibility determinations, and determine the outcome that is in the child's best interests.

Even the above-referenced requirement for state agencies to file a termination of parental rights petition does not apply if "the child is being cared for by a relative." *Id.* § 675(5)(E)(i). Consequently, ASFA expressly recognizes that termination (which is a necessary prerequisite to adoption) is unnecessary so long as the child is living with a relative.

Elsewhere, ASFA's provisions address adoption and legal guardianship as permanency goals that are equally preferable. Section 675(5)(C) establishes minimum requirements for holding permanency hearings to evaluate the permanency goals, including returning the child to their home, adoption, legal guardianship, or some other goal. The statute does not indicate that one of those permanency goals is preferred over another. Similarly, section 671(a)(15)(F) permits state agencies to pursue alternate permanency goals concurrently with reunification efforts, specifically identifying "efforts to place a child for adoption or with a legal guardian," without any indication that adoption is preferred.

Regulations promulgated pursuant to ASFA also acknowledge the multiple forms of permanency goals without expressing a preference for adoption over the others. 45 C.F.R. § 1356.21(b)(2)(i) (2012) (identifying, without preference, permanency goals of "reunification, adoption, legal guardianship, placement with a fit and willing relative, or placement in another planned permanent living arrangement").

Reflecting the lack of any federal mandate favoring adoption, sister state courts have reversed terminations of parental rights where less severe permanency alternatives, such as a guardianship or a custody order, were available that would give the child stability while also preserving the parent-child relationship. *See, e.g.*, *L.M.W. v. D.J.*, 116 So. 3d 220, 225-26 (Ala. Civ. App. 2012) (holding that, given the child's and parent's wishes to maintain a

relationship, termination of parental rights was not in the child's best interest despite the grandparent's preference for adoption); *In re A.K.O.*, 850 S.E.2d 891, 896-97 (N.C. 2020) (reversing termination of parental rights because fifteen-year-old child had a strong bond with her parents and did not consent to adoption, and termination was unnecessary for legal guardianship); *In re R.D.D.-G.*, 442 P.3d 1100, 1113 (Or. 2019) (reversing termination of parental rights and concluding that legal guardianship would preserve the child's relationship with her birth mother and extended family).

Second, federal constitutional limitations disfavor a categorical preference for adoption over other placement options that do not involve termination of parental rights. As the United States Supreme Court has suggested—and multiple federal circuit courts have concluded—children and parents both have a reciprocal right to family integrity. Rachel Kennedy, *A Child's Constitutional Right to Family Integrity and Counsel in Dependency Proceedings*, 72 Emory L.J. 911, 921-32 (2023) (collecting and analyzing cases). Terminating parental rights to facilitate an adoption inherently abrogates the parents' and the child's rights to family integrity. Consequently, a preference for adoption would create conflict between a state agency's placement goals and the fundamental right to family integrity. Instead of relying on categorical preferences, placement decisions should be made on a case-by-case basis, including consideration of the child's constitutionally protected right to family integrity.

As one scholar has persuasively written, federal constitutional law recognizes a suite of multiple rights held by the child that all favor a child welfare system that promotes child safety, kinship placements, and timeliness, but not categorical preferences for the legal status of the child's placement. Barbara J. Elias-Perciful, *Constitutional Rights of Children in Child Protection Cases*, at *1-2, Tex. Lawyers for Children (2020), attached as addendum E.

1.2 Federal Guidance Expresses a Preference for Family Relationships

In 2021, the Department of Health and Human Services' Administration on Children, Youth and Families issued a memorandum describing best practices, resources, and recommendations for achieving permanency in a way that prioritizes the child's well-being. U.S. Dep't of Health & Human Servs., Admin. on Children, Youth & Families, ACYF-CB-IM-21-01 (Jan. 5, 2021), attached as addendum A.

Rather than mandating a preference for adoption, guidance from the federal government instead suggests an evolved understanding about the harms associated with termination of parental rights: "Children in foster care should not have to choose between families. We should offer them the opportunity to expand family relationships, not sever or replace them." *Id.* at 10. In so doing, the agency noted that "[c]hildren do not need to have previous attachments severed in order to form new ones." *Id.* at 12 (citation omitted). The guidance to states emphasizes the "continued focus on the importance of preserving family

connections for children as a fundamental child welfare practice." *Id.* at 2. "Children have inherent attachments and connections with their families of origin that should be protected and preserved whenever safely possible." *Id.* Notably, the foregoing federal guidance has bipartisan support—it was issued by the Trump Administration and has been maintained by the Biden Administration.

1.3 Research Studies Reveal Guardianship Is No Less Secure Than Adoption and May Lead to More Timely Permanency Outcomes

Social science demonstrates that guardianships are as legally stable as adoptions. 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, 528 (2005), attached as addendum B; Sacha Coupet, *"Ain't I A Parent?": The Exclusion of Kinship Caregivers From the Debate Over Expansions of Parenthood*, 34 NYU Rev. L. & Soc. Change 595, 610 (2010). One study concluded that, between adoption and guardianship placements, there are no significant differences "[w]ith respect to the permanency qualities of intent, belongingness, and continuity." Add. B at 528. Instead, factors such as "the degree of genealogical relatedness, sense of family duty, feelings of affection and length of acquaintance" are consequential for achieving stability and avoiding legal disruption. *Id.* at 525. Indeed, one academic evaluated these research findings and warned against incorrectly conflating the critical goal of facilitating a child's sense of psychological and attachment permanence with placement options that

are legally permanent. Cynthia Godsoe, *Permanency Puzzle*, 2013 Mich. St. L. Rev. 1113, 1123 (2013).

Studies show that dissolutions occur in adoptions and guardianships at comparable rates. To illustrate, one study found a dissolution rate for adoptions of between 1-10%. Children's Bureau, *Discontinuity and Disruption in Adoptions & Guardianships*, at 4 (Aug. 2021) (citing Bonni Goodwin & Elissa Madden, *Factors Associated With Adoption Breakdown Following Implementation of the Fostering Connections Act: A Systematic Review*, 119 Child. & Youth Servs. Rev. 105584 (2020)), *available at* https://www.childwelfare.gov/pubs/s-discon/.

Another study found a dissolution rate for guardianships of 1-17%. *Id.* at 4 (citing Kierra M.P. Sattler & Sarah A. Font, *Predictors of Adoption and Guardianship Dissolution: The Role of Race, Age, and Gender Among Children in Foster Care*, 26 Child Maltreatment 216 (2021)). Guardianships usually involve older children. The likelihood of exiting to guardianship increases with the age of the child or youth until approximately age thirteen. Add. A at 530–31 (asserting that the adoption and guardianship stability rates are equal). And because older children's permanency arrangements are more likely to be disrupted, researchers have concluded that this difference accounts for any modest gaps in the dissolution rates between guardianship and adoptions.

Furthermore, "[T]he 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. 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." Josh Gupta-Kagan, *The New Permanency*, 19 U.C. Davis J. Juv. L. & Pol'y 1, 15 (2015) (citation omitted), attached as addendum C. Instead, research has concluded that "the child's well-being" is determined by "the child's and the caretakers' sense of permanence, rather than the legal status of the placement." Add. B at 530.

Interestingly, research suggests that if achieving a timely permanency outcome is a priority, then it may be wise to *disfavor* adoption: "Nationally, the median time from removal to relative custody was 5.7 months. The median time from removal to guardianship was 17.4 months. Both of those legal dispositions take considerably less time to finalize than adoption, which has a median time from removal to discharge of 28.5 months." Vivek S. Sankaran & Christopher E. Church, *The Ties That Bind Us: An Empirical, Clinical, and Constitutional Argument Against Terminating Parental Rights*, 61 Family Ct. Rev. 246, 256-57 (2023), attached as addendum D. "[S]tates that prioritized guardianship not only reduced the time to permanency for children in foster care, they also saved considerable money due to the reduced numbers of days children spent in foster care." *Id.* at 260-61 (citation omitted).

1.4 Guardianship Can Avoid Harmfully Severing Ties with Parents and Affords a Desirable Arrangement for Kinship Placements

There is also ample academic scholarship and guidance about best practices that reject the notion that adoption is preferable to guardianship. In fact, "both legal and social science scholars have described the ways in which [guardianship or third-party custody] serve children at least as well as, if not better than, termination of parental rights and adoption." Ashley Albert & Amy Mulzer, *Adoption Cannot Be Reformed*, 12 Colum. J. Race & L. 1, 4 (2022) (citation omitted).

Just as federal guidance reflects the understanding that guardianship is beneficial because it maintains ties to the child's parents, *supra* section 1.2, scholars have similarly recognized the severe harm associated with severing a child's connections to their parent: "Terminating parental relationships can raise a 'lifetime of questions for children about their identities as members of their families of origin and their degree to which they can ever become "real" members within a foster or adoptive family system.'" Add. D at 258.

"Studies have shown that children whose parents' rights have been terminated experience [something called] ambiguous loss," which is a loss that involves a "lack of clarity about a loved one's physical and/or psychological presence." *Id.* at 257-58. Studies reveal that "ambiguous loss can be the most distressful of losses because 'it is unclear, there is no closure, and without meaning, there is no hope.'" *Id.* at 257 (quoting Monique Mitchell, *The Family*

Dance: Ambiguous Loss, Meaning Making, and the Psychological Family in Foster Care, 8 J. Family Theory & Rev. 361, 362 (2016)).

That is so even when parents are irrefutably unable to raise their 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." Add. C at 12-13 (citation omitted). Similarly, "[p]sychological and sociological research" has demonstrated "the importance of the biological parent-child relationship as a determinant of the child's personality, resilience and relationships with others, regardless of whether the child in fact lives with that parent." Eliza Patten, *The Subordination of Subsidized Guardianship in Child Welfare Proceedings*, 29 N.Y.U. Rev. L. & Soc. Change 237, 240 (2004).

Additionally, guardianships are frequently the preferred choice for individuals willing to care for a family member in foster care. Rob Geen, *Finding Permanent Homes for Foster Children: Issues Raised by Kinship Care*, Urban Inst. (Apr. 2003), *available at* https://webarchive.urban.org/publications/310773.html. Placements that are more favorable for kin lead to better outcomes and are therefore in the child's best interest because "[c]hildren in kinship care are more

likely to feel that they belong with the family they live with than children in non-kinship care." Add. C at 23 (citation omitted).

Unsurprisingly, then, kinship placements tend to be more stable than other placements. *Id.* at 17. In fact, a literature review concluded that studies had shown that placement with grandparents and placements with caretakers who have a close biological connection to the child are both factors that prevent against instability even after an adoption or guardianship has been finalized. *Risk & Protective Factors for Discontinuity in Public Adoption & Guardianship: A Review of the Literature*, Quality Improvement Ctr. for Adoption & Guardianship Support & Preservation, at 5, 13, 15, 26 (Jan. 2017), https://spaulding.org/wp-content/uploads/2021/07/FinalLitReview_2-15-17.pdf.

There is a grave cost to diminishing the value of a kinship placement. Two years ago, the New York Times published a powerful first-hand account of a former foster child's experience, detailing his repeated failed placements with foster families, until he eventually aged out of the system. Years later—well into adulthood—the former foster-child discovered that four of his biological aunts and uncles had been foster and adoptive parents but did not know the child existed. He wrote about discovering "family members who would have taken me in, who I would have loved to have lived with. But the system never thought to find my family." Sixto Cancel, *I Will Never Forget That I Could Have Lived With People Who Loved Me*, N.Y. Times (Sept. 16, 2021).

* * *

In sum, federal law and guidance do not require state courts to favor adoption over legal guardianship. Instead, they promote kinship placements, without regard to whether those arrangements are legally sanctioned via adoptions, legal guardianships, or something else. That preference is consistent with the social science, scholarship, and best practices concluding that kinship placements—and not a particular legal status—minimize harms and lead to better outcomes for children.

2. Maintaining Sibling Relationships is Vital to Achieving Good Outcomes

The benefits of maintaining sibling relationships are clear and documented by research studies, federal law, and best practice guidance. "Psychologists and other child welfare professionals recognize the importance of a foster child's need to have regular access to the child's other siblings," which is "ideally achieved by placing the siblings together." Barbara J. Elias-Perciful, *Constitutional Rights of Children in Child Protection Cases*, at *19, Tex. Lawyers for Children (2020).

2.1 Research Shows the Benefits of Maintaining Sibling Relationships

Like the court of appeals, the research about the benefits of sibling relationships does not distinguish between actual sibling bonds and the potential for sibling bonding. To the contrary, as detailed above, research about the

benefits of kinship placements generally—not just sibling relationships—has found that one of the factors that promotes stability is "the degree of genealogical relatedness." Add. B at 525. In other words, biological connections are inherently beneficial. Even if the court were to consider the distinction between actual and potential sibling relationships, the court should treat even a potential sibling bond as a critical consideration in any best interest determination.

2.2 Federal Law and Guidance Prioritizes Sibling Relationships

Federal law requires state agencies to make reasonable efforts to place siblings removed from their home in the same foster care, adoption, or guardianship placement or, if that is not possible, facilitate visits or ongoing contacts for siblings that, unless it is contrary to the safety or wellbeing of any of the siblings to do so. 42 U.S.C. § 671(a)(31). Indeed, the Administration for Children and Families emphasizes the importance of keeping siblings together as best practice for achieving permanency and well-being, and also urges a focus on relational permanence as opposed to only legal permanence. Add. A at 3, 12.

The agency emphasized that "[p]lacing siblings together is a critical aspect of securing permanency for children and must be prioritized." *Id.* at 9. It noted that there are "lifelong implications of separating siblings" and "[p]ermanency plans that result in severing sibling attachments do not support the lifelong connections and relationships associated with permanency and well-being for children and youth. *It is a grievous consequence of foster care that we must prevent at*

all cost." *Id.* at 9–10 (emphasis added). That is because "kinship placement, early stability, and intact sibling placement are predictors of permanency achievement." *Id.* at 11.

One federal district court concluded, based on United States Supreme Court precedent, that children in foster care have a constitutional right to maintain their sibling relationships through reasonable contact. *Aristotle P. v. Johnson*, 721 F. Supp. 1002, 1004–05, 1007 (N.D. Ill. 1989). Specifically, the court rooted the right in the First Amendment's freedom of association, relying on *Robert v. U.S. Jaycees*, in which the Supreme Court identified "[t]he relationship between two family members" as the "paradigm of such intimate human relationships" protected against undue government intrusion. *Aristotle P.*, 721 F. Supp. at 1004–05 (citing 468 U.S. 609 (1984)). The district court also concluded that the right to maintain sibling relationships was a substantive due process right protected by the Fourteenth Amendment, relying on *Moore v. East Cleveland*, where the Supreme Court recognized that "the Constitution protects the sanctity of the family precisely because the institution of the family is deeply rooted in the Nation's history and tradition." *Aristotle P.*, 721 F. Supp. at 1007 (quoting 431 U.S. 494, 503 (1977)).

2.3 Best Practices Stress the Importance of Maintaining Sibling Relationships

The American Bar Association's Children's Rights Litigation Committee has acknowledged that "[r]esearch shows that the failure to maintain sibling relationships in foster care harms children's ability to form their identities, deprives them of a vital source of support as they grow and develop, and causes lifelong grief and yearning." ABA, "*Sibling Relationships Are Sacred": Benefits of Sibling of Placement and Contact*, at 2 (May 2023), attached as addendum F. On the other hand, "[m]aintenance of sibling bonds increases the likelihood of both adoption and reunification, helps improve each child's mental health, reinforces feelings of stability, shapes identity, and ameliorates educational and adult life competence." *Id.*

Children's best interests typically are served by keeping sibling groups unified, even after removal from their parents. "Being placed with siblings can serve as a protective factor against the adverse experiences associated with placement in foster care, provide continuity and connection to family, and help to expedite the management and delivery of services." *How Are Child Protection Agencies Promoting and Supporting Joint Sibling Placements and Adoptions?*, Casey Family Programs (Aug. 2020), at 1, https://www.casey.org/media/20.07-QFF-SF-Sibling-placements.pdf (citations omitted).

Many studies leading to this consensus view have shown that maintaining sibling relationships is beneficial for at least the following seven reasons: it

(1) mitigates the trauma that results from family separation; (2) is beneficial to the child's mental health; (3) promotes identify formation and stability; (4) reduces placement disruptions; (5) provides a unique source of support and help for the child; (6) increases educational competency; and (7) improves adulthood social skills.

Mitigates Trauma – Placing sibling groups together mitigates the trauma of family separation. Add. F. at 7-11 (citing to Shanta Trivedi, *The Harm of Child Removal*, 43 N.Y.U. Rev. L. & Soc. Change 523, 533, 573–74 (2019); Adam McCormick, *Siblings in Foster Care: An Overview of Research, Policy, and Practice*, 4 J. Pub. Child Welfare 198 (2010) (evaluating the intensified pain, grief, and trauma associated with being separated from siblings); Elizabeth Timberlake & Elwood Hamlin, *The Sibling Group: A Neglected Dimension of Placement*, 61 Child Welfare 545, 549 (1982) ("Given the reciprocal nature of sibling role relationships, [separated siblings] often feel that they have lost a part of themselves, compounding separation and loss issues associated with foster care. Not only are foster children engaged in the grief process over their absent parents and siblings, they are also denied access to a natural support group within which to resolve their grief."); Hon. Leonard Edwards, *Connecting with Siblings*, Judges' Page Newsl. Archive, Nat'l CASA Ass'n (2011)). Specifically, siblings play a critical role in repairing and minimizing the psychological damage that results from removal, such as instability, separation, and trauma. Add. F at 11 (citing

McCormick, *Siblings in Foster Care: An Overview of Research, Policy, and Practice*, 4 J. Pub. Child Welfare 198 (2010); Sigrid James, et al., *Maintaining Sibling Relationships for Children in Foster and Adoptive Placements*, 30 Child. & Youth Servs. Rev. 90 (2008)).

Improves Mental Health – Placing siblings together reduces depression and self-blame. Add. F at 16-17 (citing Rebecca L. Hegar & James A. Rosenthal, *Kinship Care and Sibling Placement: Child Behavior, Family Relationships, and School Outcomes*, 31 Child. & Youth Servs. Rev. 670 (2009); Bilha Davidson-Arad & Adva Klein, *Comparative Well Being of Israeli Youngsters in Residential Care with and Without Siblings*, 33 Child. & Youth Servs. Rev. 2152 (2011); Armeda Stevenson Wojciak et al., *Sibling Relationships of Youth in Foster Care: A Predictor of Resilience*, 84 Child. & Youth Servs. Rev. 247 (2018)). It is also associated with fewer symptoms of anxiety and depression. Add. F at 16-17 (citing Sabrina M. Richardson & Tuppett M. Yates, *Siblings in Foster Care: A Relational Path to Resilience for Emancipated Foster Youth*, 47 Child. & Youth Servs. Rev. 378 (2014); Adam McCormick, *The Role of the Sibling Relationship in Foster Care: A Comparison of Adults with a History of Childhood Out-of-Home Placement* (May 2009) (dissertation, St. Edward's University)).

Conversely, separating siblings is damaging to children's mental health. Add. F at 8 (citing Susan L. Smith, *Siblings in Foster Care and Adoption: What We Know from Research*, in *Siblings in Adoption and Foster Care: Traumatic Separations*

and Honored Connections (Deborah N. Silverstein & Susan L. Smith, eds., 2009)). As adults, children who had been separated from their siblings have lower levels of social support, self-esteem, and income. Add. F at 8 (Adam McCormick, *The Role of the Sibling Relationship in Foster Care: A Comparison of Adults with a History of Childhood Out-of-Home Placement* (May 2009) (dissertation, St. Edward's University)).

Promotes Stability – Placing siblings together promotes resilient families and developmental benefits for the children. Add. F at 9-10 (citing Laurie Kramer, et al., *Siblings*, in *APA Handbook of Contemporary Family Psychology* (2019) ("[F]or adolescents in foster care, sibling relationship qualities, such as support, positively predicted aspects of self-concept including acceptance, self-efficacy, psychological maturity, and activity, with the amount of contact with siblings magnifying the strength of these associations." (citation omitted)); Susan L. Smith, *Siblings in Foster Care and Adoption: What We Know from Research*, in *Siblings in Adoption and Foster Care: Traumatic Separations and Honored Connections* (Deborah N. Silverstein & Susan L. Smith, eds., 2009) (same); Jonathan Caspi, *Sibling Development: Implications for Mental Health Practitioners* 322 (Springer Pub. 2011) (reviewing academic literature and concluding that best practices call for placing siblings together and promoting sibling contact when they cannot be placed together). On the other hand, separating siblings poses troubling challenges to children's identify-formation and sense of stability and belonging.

Add. F at 9 (citing Bjørn Øystein Angel, *Foster Children's Sense of Sibling Belonging: The Significance of Biological and Social Ties*, (Mar. 28 2014)).

Decreases Disruptions – Placing siblings together decreases the likelihood of placement disruptions. Add. F at 14 (citing Kierra M.P. Sattler, et al., *Age-Specific Risk Factors Associated with Placement Instability Among Foster Children*, 84 Child Abuse & Neglect 157 (2018); Sarah A. Font & Hyunn Woo Kim, *Sibling Separation and Placement Instability for Children in Foster Care*, 27 Child Maltreatment 583 (Apr. 2021)).

Provides Unique Support – Siblings in foster care may also look to each other as a unique source of support and help because they can "provide a significant source of continuity throughout a child's lifetime and can be the longest relationships that most people experience." Child Welfare Information Gateway, *Sibling Issues in Foster Care and Adoption*, at 2 (2019), https://www.childwelfare.gov/pubpdfs/siblingissues.pdf. Sibling relationships can be of even greater significance when facing abuse, neglect, and separation from parents. Add. F at 15-16 (citing Adam McCormick, *Siblings in Foster Care: An Overview of Research, Policy, and Practice*, 4 J. Pub. Child Welfare 198 (2010)).

Increases Educational Competence – Placing siblings together improves each child's educational competence. Add. F at 17-18 (citing Sabrina M. Richardson & Tuppett M. Yates, *Siblings in Foster Care: A Relational Path to Resilience for Emancipated Foster Youth*, 47 Child. & Youth Servs. Rev. 378 (2014)).

School performance by children in a placement with all of their siblings outperform children placed alone or with only some of their siblings. Add. F at 18-19 (citing Rebecca L. Hegar & James A. Rosenthal, *Kinship Care and Sibling Placement: Child Behavior, Family Relationships, and School Outcomes*, 31 Child. & Youth Servs. Rev. 670 (2009)). Placement with siblings also reduces behavioral issues in the classroom. Add. F at 18 (citing Brianne Kothari et al., *A Longitudinal Analysis of School Discipline Events Among Youth in Foster Care*, 93 Child. & Youth Servs. Rev. 117 (2018)).

Improves Adulthood Skills – Placing siblings together improves adulthood social skills, such as negotiation and conflict resolution. Add. F at 19 (citing Lew Bank et al., *Intervening to Improve Outcomes for Siblings in Foster Care: Conceptual, Substantive, and Methodological Dimensions of a Prevention Science Framework*, 39 Child. & Youth Servs. Rev. 8 (2014)). It also improves occupational competency, housing competency, and relationship competency, while increasing civic engagement. Add. F at 19 (citing Sabrina M. Richardson & Tuppett M. Yates, *Siblings in Foster Care: A Relational Path to Resilience for Emancipated Foster Youth*, 47 Child. & Youth Servs. Rev. 378 (2014)).

When considering a child's best interest, it is vital for the courts to appreciate and give proper weight to the long-term benefits associated with maintaining sibling relationships.

3. Attachment Theory is an Important but Fraught Concept and Courts Should Guard Against Overreliance on this Framework Alone

As with the foregoing concepts, the child welfare field's understanding of attachment theory has evolved significantly over the years. A critical lesson of our evolving understanding is that children in out-of-home care are likely to be managing multiple attachments at once. Sara McLean, *Children's Attachment Needs in the Context of Out-of-Home Care*, CFCA Prac. Res., Nov. 2016, at 8, *available at* https://aifs.gov.au/sites/default/files/publication-documents/cfca-practice-attachment_0.pdf. Courts should exercise caution when relying on attachment theory and be sure to consider attachment as just one of many non-dispositive factors in a nuanced best interest analysis. *See* Utah Code §§ 30-3-10; -10.2 (providing factors to determine best interests when resolving custody disputes); Child Welfare Information Gateway, *Determining the Best Interests of the Child*, at 1-4 (2020), *available at* https://www.childwelfare.gov/pubPDFs/best_interest.pdf (discussing best interests determinations generally, including multiple guiding principles and multiple relevant factors).

More than twenty years ago, a retired judge and a medical doctor co-authored a publication that summarized the limitations of attachment theory in child welfare proceedings. They wrote, "the term 'attachment' (as usually conceived) is too narrow to be of much use to the court because it focuses primarily on security-seeking on the part of the child." David E. Arredondo,

M.D. & Hon. Leonard P. Edwards, *Attachment, Bonding, and Reciprocal Connectedness: Limitations of Attachment Theory in the Juvenile and Family Court*, 2 J. Ctr. for Fams., Child. & the Courts 109, 109 (2000), attached as addendum G.

As often used in the courts, attachment theory "draws distinctions in black and white," "excludes from its scope the attitudes of adult caregivers[] and those of most children, too," and "is vague." *Id.* at 110–11.

In child welfare proceedings, attachment theory has sometimes been relied on to assert that a removed child has developed a secure attachment to a temporary caregiver and that removing the child again will cause irreparable damage and an attachment disorder. Maleeka Jihad (MJ) & Jessica Handelman, *The Weaponization of Whiteness in Child Welfare*, The Guardian, Vol. 44 No. 3, Fall 2022, at 5, *available at* https://naccchildlaw.org/wp-content/uploads/2023/03/guardian_2022_v44n03_r7_fall.pdf. But it is understood that attachments to caregivers in foster care can be safely transitioned to another caregiver, and such transitions "should be designed to minimize harm to the child. This means gradually building attachments to the new caregivers and maintaining contact to the former caregivers even after the transition is completed, whenever possible." Charles H. Zeanah, M.D., et al., *Foster Care for Young Children: Why It Must Be Developmentally Informed*, 50 J. Am. Acad. Child & Adolescent Psychiatry 1199, 1201 (2011).

Studies have revealed that attachment theory does not provide clear direction for practitioners in terms of how or when to intervene to address attachment needs for children, especially in the child welfare context. Sara McLean, *Children's Attachment Needs in the Context of Out-of-Home Care*, CFCA Prac. Res., Nov. 2016, at 8. Furthermore, terms like attachment disorder, attachment problems, and attachment therapy are increasingly used but have no clear, specific, or consensus definitions. MJ & Handelman, *supra*, at 6.

Attachment theory also is subject to critique when applied without properly considering the "parent or caregiver's unique experiences and perspectives throughout the evaluation process, and the cultural values and traditions important to the family structure." *Id.* at 3. Proper consideration of attachment theory must not only consider the family's culture, but also less obvious forms of the child's cultural identity, such as "religion, history, patterns of relationships, rites of passage, body language, and the use of leisure time." *Id.* at 4. It must also contemplate "forms of culture that require extensive inquiry and observation for an evaluator to understand, such as the meaning of community, notions of leadership, patterns of decision-making, beliefs about health, help-seeking behavior, notions of individualism versus collectivism, and approaches to problem-solving." *Id.*; *see also* Arredondo & Edwards, *supra*, at 112 (attachment theory should consider "a broader range of childhood needs, including interactive verbal and nonverbal communication, responsiveness,

modeling, reciprocal facial expressiveness, social cues, motor development, and other dimensions necessary for normal neurodevelopment.").

Consequently, courts should be wary to accept simplistic assertions about attachments or to myopically rely on them in support of a best-interests analysis.

Conclusion

As described by the foregoing, the court of appeals' decision is consistent with current child welfare law best practice. Informed by a growing body of research, federal law and guidance likewise promote the importance of kinship placements and no longer endorse the notion that adoption is inherently preferable to guardianship. The National Association of Counsel for Children urges this court to give great weight to the long-term considerations impacted by permanency decisions, including the importance of cultural identity, the sacred nature of sibling bonds, and the lifelong value that stems from increasing—rather than terminating—a child's connections to family and community.

DATED this 28th day of August, 2023.

ZIMMERMAN BOOHER

/s/ Dick J. Baldwin
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Attorney for Amicus Curiae National Association of Counsel for Children

Certificate of Compliance

I hereby certify that:

1. This brief complies with the word limits set forth in Utah R. App. P. 25(f) because this brief contains 6,336 words, excluding the parts of the brief exempted by that rule.

2. This brief complies with Utah R. App. P. 21(h) regarding public and non-public filings.

DATED this 28th day of August, 2023.

/s/ Dick J. Baldwin

Certificate of Service

This is to certify that on the 28th day of August, 2023, I caused the *Brief of Amicus Curiae National Association of Counsel for Children* to be served via email on:

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Addendum A

U.S. Dep't of Health & Human Serv., Admin. On Children, Youth, and Families, ACYF-CB-IM-21-01 (Jan. 5, 2021), *available at* https://www.acf.hhs.gov/sites/default/files/documents/cb/im2101.pdf

ACF Administration for Children and Families	U.S. DEPARTMENT OF HEALTH AND HUMAN SERVICES Administration on Children, Youth and Families	
	1. Log No: ACYF-CB-IM-21-01	**2. Issuance Date:** January 5, 2021
	3. Originating Office: Children's Bureau	
	4. Key Words: Title IV-B, Title IV-E, Court Improvement Program	

TO: State, Tribal and Territorial Agencies Administering or Supervising the Administration of Titles IV-E and IV-B of the Social Security Act, and State and Tribal Court Improvement Programs.

SUBJECT: Achieving Permanency for the Well-being of Children and Youth

LEGAL AND RELATED REFERENCES: Titles IV-B and IV-E of the Social Security Act (the Act).

PURPOSE: To provide information on best practices, resources, and recommendations for achieving permanency for children and youth in a way that prioritizes the child's or youth's well-being. Using an analysis of child welfare data, this Information Memorandum (IM) also outlines typical patterns in exit outcomes for children and youth in foster care. This IM reviews the permanency goals of reunification, adoption, and guardianship and emphasizes the importance of state and tribal child welfare agencies and courts focusing on each child's unique needs, attachments, and connections when making permanency decisions.

This IM is organized as follows:

I. BACKGROUND

In previous IMs, the Children's Bureau (CB) provided recommendations for implementing primary prevention networks aimed at strengthening families (ACYF-CB-IM-18-05)[1], ensuring appropriate family time during foster care placement (ACYF-CB-IM-20-02)[2], and utilizing foster care as a support for families (ACYF-CB-IM-20-06)[3]. This IM builds on those best

[1] https://www.acf.hhs.gov/sites/default/files/cb/im1805.pdf

[2] https://www.acf.hhs.gov/sites/default/files/cb/im2002.pdf

[3] https://www.acf.hhs.gov/sites/default/files/cb/im2006.pdf

practices and key principles with a continued focus on the importance of preserving family connections for children as a fundamental child welfare practice. CB believes that efforts to achieve permanency for children and youth must include safe and deliberate preservation of familial connections in order to successfully ensure positive child well-being outcomes. This focus on family connections is imperative in the work done by agencies and courts because it can mitigate the effects of trauma that children and youth in foster care have already experienced and can also reduce further trauma.

Children have inherent attachments and connections with their families of origin that should be protected and preserved whenever safely possible. This is what fuels CB's commitment to two overarching goals: (1) strengthening families through primary prevention to reduce child maltreatment and the need for families to make contact with the formal child welfare system; and (2) dramatically improving the foster care experience for children, youth, and their parents when a child's removal from the home and placement in foster care is necessary. While focused on achievement of permanency, this IM outlines best practices which also influence each of these goals. Emphasizing a child's attachments and connections while ensuring safety, rather than solely prioritizing timeframes in efforts to achieve permanency will serve to strengthen and preserve families; prevent future maltreatment from occurring after permanency is achieved; and significantly improve a child's foster care experience.

We believe there is much to learn from the patterns we see in the data available to CB from the Adoption and Foster Care Analysis and Reporting System (AFCARS), as well practice trends in the qualitative data gathered through the Child and Family Services Reviews (CFSR). Since reunification is the primary goal for nearly all children entering foster care, we are particularly concerned about what the data reveal regarding the likelihood of achieving reunification. An analysis of AFCARS data on exits for children and youth entering foster care, shows us that while over 85 percent of children and youth will eventually achieve permanency through reunification, guardianship or adoption (after four to five years), less than 50 percent will return to their families of origin through reunification[4]. Additionally, data gathered through round three of the CFSR[5] indicate that agencies and courts made concerted efforts to achieve reunification in a timely manner in 49 percent of the applicable cases.

Federal law and regulation clearly emphasize the importance of working to preserve families and for agencies to make reasonable efforts to prevent removal and finalize permanency goals.[6] The law also emphasizes preserving family and community connections for children and youth in foster care. CFSR findings[7] related to these requirements indicate that states need to make improvements in these areas. In order to improve permanency outcomes and preserve

[4] This analysis can be found the "Context Data" that are provided to supplement the Statewide Data Indicators that are distributed semi-annually.

[5] See https://www.acf.hhs.gov/sites/default/files/cb/cfsr_aggregate_report_2020.pdf

[6] "Reasonable efforts" are a title IV-E agency requirement to obtain a judicial determination that the child welfare agency has made efforts: (1) to maintain the family unit and prevent the unnecessary removal of a child from the home, as long as the child's safety is ensured, and (2) to make and finalize a permanency plan in a timely manner (sections 471(a)(15) and 472(a)(2)(A) of the Act).

[7] See https://www.acf.hhs.gov/sites/default/files/cb/cfsr_aggregate_report_2020.pdf

connections for children, it is critical that courts provide active judicial oversight over agency efforts to:

- Thoroughly explore existing familial relationships and maternal and paternal relatives as possible placements (section 471(a)(29) of the Act);

- Safely place children with relatives or fictive kin and people who they know, when determining a placement for a child, provided that the relative caregiver meets all relevant State child protection standards (section 421 and 471(a)(19) of the Act);

- Make all reasonable efforts to keep siblings together unless such a joint placement would be contrary to the safety or well-being of any of the siblings (section 471(a)(31) of the Act);

- Keep children in their communities, including in their schools, and connected to classmates and teachers, if remaining in such school is in their best interests, (section 471(a)(30) and 475(1)(G) of the Act);

- Thoroughly review the status of each child during periodic reviews and permanency hearings, specifically assessing: 1) the safety of the child and the continuing necessity for the child's placement in foster care; 2) progress made toward alleviating or mitigating the causes necessitating placement in foster care; and 3) the extent of compliance with the case plan (including the agency's provision of appropriate services for the child and parents to improve the condition of the parent's home) (sections 475(1)(B), and (5)(B) and (C) of the Act); and

- Apply the exceptions for filing a petition for termination of parental rights when, at the option of the state, the child is placed with a relative/fictive kin, when there is a documented compelling reason not to file based on the best interest of the child (which would include consideration of a child's key attachments), or when the state has not provided such services to the family as the state deems necessary for the safe return of the child to the child's home (section 475(5)(E) of the Act).

These requirements are intended to preserve a child's family connections and support meaningful efforts toward reunification. Data analysis presented later in this IM reveals that children whose parents' parental rights have been terminated may have longer durations in care that may not result in a finalized adoption. Therefore, we must carefully consider on an individual basis for each child and family, whether terminating parental rights is truly in the best interest of the child. This IM seeks to emphasize the importance of safely guarding and protecting family relationships while pursuing permanency for children and youth. Agencies and courts must be certain that termination of parental rights is necessary to achieve what is best for the long-term well-being of children and youth.

As CB continues to advance national efforts to transform the child welfare system into one that promotes primary prevention, family well-being, and healing, we must pause and consider the trajectory we have been on, the outcomes that children and youth are experiencing, and where

course correction may be needed. While we are mindful of the length of time children spend in foster care, and do not want to unnecessarily prolong that, timeliness should not be the primary driver when considering how to best achieve permanency for children and youth. We believe that we will see reunification achieved more often, and with more expedience, by improving efforts to place children with relatives/fictive kin at the onset of foster care placement, nurturing children's relationships with their parent(s) during foster care placement, and making concerted efforts to provide parents with the services and supports they need to achieve reunification. We believe that this will result in improvements in outcomes related to both permanency and child and family well-being. When reunification cannot be achieved safely, focusing on family connections can improve the likelihood that children exit foster care to guardianship or adoption with relatives/fictive kin. When a child's experience in foster care is marked by safety, meaningful family time, preserved and nurtured connections, and high quality, family-centered, trauma-informed service provision, children and youth have a better chance of achieving meaningful permanency in a way that enhances their well-being.

II. Key Data Observations Related to Permanency

Using AFCARS data, CB conducted three separate analyses which are referenced in this IM. All three analyses are based on an entry cohort approach in which all children who enter care within a fiscal year are selected to establish a cohort, and multiple unique entry cohorts are established by identifying entries from multiple fiscal years.

The first set of analyses selected entry cohorts for each year from FY 2013 to FY 2018 (six entry cohorts in total) and follows children in the cohorts from their entry date to their date of discharge, or September 30, 2019 (the end of FY 2019), whichever comes first.[8] Children are not observed beyond FY 2019 because FY 2019 is the most recent year for which we have complete data. The purpose of this analysis is to describe the exit outcomes of children when maximal time is allowed to observe exits, and to observe how these exit outcomes vary.

The second set of analyses selected entry cohorts for FY 2015 to FY 2017 (three entry cohorts in total) and followed each child for exactly two years from their date of entry. In contrast to the first set of analyses that allowed maximal time to observe exits, this approach uses a standard amount of time (two years) so that each entry cohort, and each child in each cohort, is followed for the same amount of time. The purpose of this analysis is to describe the exit outcomes children experience within two years of entry, rather than eventual exit outcomes with maximal time to observe exits.

The third set of analyses selected entry cohorts for FY 2013 to FY 2015 (three entry cohorts in total) and follows children to September 30, 2019, or their date of discharge, whichever comes first. In that respect, it is identical to the first set of analyses. The primary difference in the third set of analyses is that children are distinguished based on whether their parents' parental rights

[8] Each subsequent entry cohort is followed by one fewer full years than the preceding entry cohort because each entry cohort has the same endpoint (September 30, 2019), but the entry cohorts are separated by a year. For example, the 2013 entry cohort is followed for up to seven years, the 2014 entry cohort is followed for up to six years, and so on.

were terminated or not. The purpose of this analysis is to describe the population of children who become legally free and to characterize what their eventual exit outcomes are.

Taken together, the three sets of analyses allow us to make objective statements about the most frequent, or typical, exit outcomes for children who enter foster care when a maximum amount of time is allowed to observe outcomes (the first and third analyses), or when a fixed, abbreviated amount of time is allowed to observe outcomes (the second analysis). These analyses allow us to identify patterns that have been typical for children who have entered foster care in recent years, and to use those patterns to project what we might expect for children who newly enter care. These patterns then provide critical context for the best practice considerations outlined in the next section.

We refer to the first two sets of analyses to establish what exit outcomes have been typical. We focus first on answering the following questions based on allowing for maximal time to observe exits:

- What exit outcomes are most likely for children and youth entering care?
- What differences are observed when the data are disaggregated by age at entry?

Secondly, to examine the typical outcomes within two years of entry, we answer the following question:

- What exit outcomes can be observed within two years or less of entry into care?

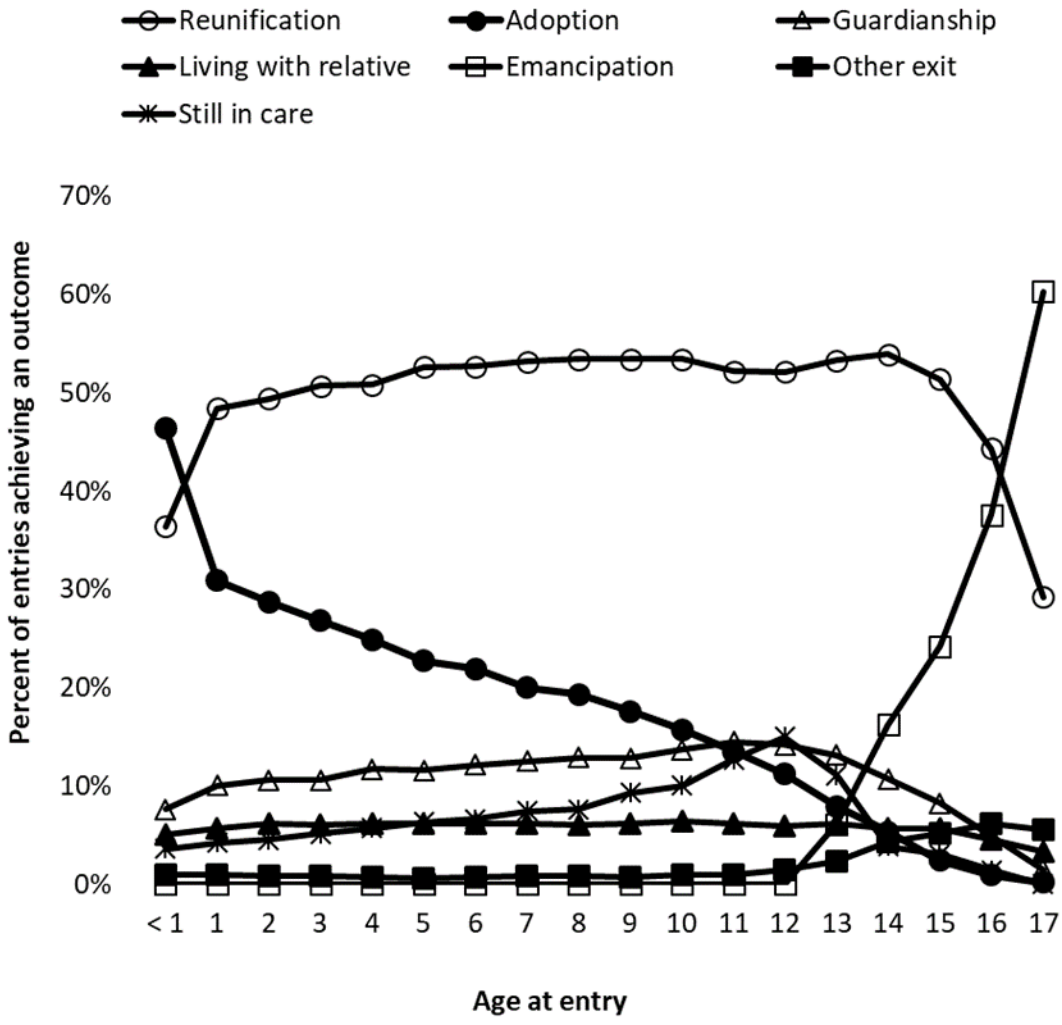
<u>What exit outcomes are most likely for children and youth entering care?</u>

- Typically, just under 50 percent of children and youth who enter care are reunified.
- Typically, just under 25 percent of children and youth who enter care are adopted.
- Typically, about ten percent of children and youth who enter care exit to guardianship.
- Typically, about six percent of children and youth exit to live permanently with relatives other than the ones from whom the child was removed. (These exits could also include guardianship by a relative).
- Typically, about eight percent of all children and youth who enter care are emancipated.

What differences are observed when the data are disaggregated by age at entry?[9]

The graph below displays the outcomes typically experienced by children and youth who entered care in FY 2015 and were followed for up to five years following their entry, displayed by their age at entry.

Figure 1: Exit Patterns for Children/Youth Entering Care in FY 2015, by Age at Entry



Based on what typically happens to children who enter care, we can extrapolate to what is likely to happen to children who enter care. The following observations of likely outcomes are derived from the graph above:

[9] An earlier version of this graph appeared in Beyond Common Sense: Child Welfare, Child Well-Being, and the Evidence for Policy Reform, F. Wulczyn, R.P. Barth, Y.T. Yuan, B.J. Harden, and J. Landsverk, 2005, in which the authors make the case that child welfare outcomes should be understood from a developmental perspective, and child welfare policies should reflect that perspective.

- Generally, reunification is the most likely outcome for children and youth who enter care between the ages of 1 and 16 years.

- Children less than age 1 who enter care are the only group for whom adoption is the most likely outcome. The likelihood of exiting to adoption decreases the older the child is when they enter care.

- The likelihood of exiting to guardianship increases the older the child or youth is when they enter care, until approximately age 13.

- Children and youth most likely to still be in care after four years are those who enter care between the ages of 9 and 13 years.

- For youth who enter foster care between the ages of 13 and 17 years, the likelihood of exiting to emancipation significantly increases the older the youth is when they enter care.

("Other exit" noted in the graph includes discharges to run away, death of child, and transfer to another agency. These are mostly observed at older ages except for death of child, which can occur at any age.)

Turning to the second analysis, which looks to see how many children/youth achieve permanency within two years of their entry, we asked the following question:

<u>What exit outcomes can be observed within two years or less of entry into care?</u>

- Sixty-five percent of children and youth entering care will achieve permanency of some kind within two years.

- Forty-four percent of children and youth who enter care exit to reunification within two years.

- Nine percent of children and youth who enter care exit to adoption within two years.

- Eight percent of children and youth who enter care exit to guardianship within two years.

- Five percent of children and youth who enter care exit to live permanently with relatives within two years.

- Except for adoption, most exits to permanency are achieved within the first 12 to 18 months of entry into care.

Taken together, the first two sets of analysis reveal the following patterns:

- Although permanency was the most frequent outcome, it can take some time. Within two years of entry, 65 percent achieved permanency and 88 percent of entrants achieve permanency within seven years.

- Most reunifications occur within the first two years of entry, after which reunifications became less likely.

- Children who entered foster care between the ages of 9 and 13 who do not reunify within the first two years may stay in foster care longer – either waiting to be adopted or aging out.

- For youth entering at age 16 or older, emancipation is the most likely outcome. Additionally, those who are not reunified within the first year are much less likely to be reunified in subsequent years when compared to younger children who enter care and do not reunify in the first year.

We refer to the third set of analyses to describe the experiences of children whose parents' parental rights were terminated after the child entered care. We answer the following questions based on allowing for maximal time to observe exits.

- How frequently do children and youth who enter foster care have their parents' parental rights terminated and what differences are observed by age at entry?

- What exit outcomes are observed for children and youth who have had their parents' parental rights terminated and what differences are observed by age at entry?

- After entry, how long does it take for children and youth to have their parents' parental rights terminated and what differences are observed by age at entry?

How frequently do children and youth have their parents' parental rights terminated and what differences area observed by age at entry?

- About a quarter of children and youth who enter care have their parents' parental rights terminated.

- Over half of the newborns (0 to 3 months at entry) who enter care have their parents' parental rights terminated.

- Just under a quarter of children who enter between the ages of 6 and 10 have their parents' parental rights terminated.

- Just over 10 percent of the children who enter between the ages of 11 and 16 have their parents' parental rights terminated.

What exit outcomes are observed for children and youth who have had their parents' parental rights terminated and what differences are observed by age at entry?

- Children who enter care and have their parents' parental rights terminated more frequently fail to discharge and stay in care longer than children whose parent's parental rights are not terminated. As the age at entry increases, the likelihood of these children staying in care also increases.

- Typically, 95 percent or more of the infants (under age 1) who have their parents' parental rights terminated are adopted.

- Typically, 90 percent of children who enter care between the ages of 1 and 5, and have their parents' parental rights terminated, are adopted.

- Typically, 85 percent of children who enter care between the ages of 6 and 10 and have their parents' parental rights terminated, are adopted. Those in this age group who are not adopted are most likely to stay in care when compared to younger children or children of the same age whose parents' parental rights are not terminated.

- Typically, 55 percent of children who enter care between the ages of 11 and 16, and have their parents' parental rights terminated, are adopted. And 28 percent of the children and youth in this age group who are not adopted age out of care.

How long does it take for children and youth to have their parents' parental rights terminated and what differences are observed by age at entry?

- Most children and youth who have had their parents' parental rights terminated experienced that within two years of entry.

- Of children who enter care under age 1 and have their parents' parental rights terminated, 32 percent have parental rights terminated within one year. In contrast, of those children who are between the ages of 1 and 5 years at entry, and have their parents' parental rights terminated, 21 percent have parental rights terminated within one year. This pattern continues as age at entry increases.

Placement of Siblings

It is important to note that children may enter foster care as sibling sets, but we are unable to ascertain whether exits to permanency occur in the same way (same goal, same timeframe) for siblings based on current AFCARS data. Placing siblings together is a critical aspect of securing permanency for children and must be prioritized. Data from round 3 of the CFSR[10] indicates that children were placed with their sibling in only 46 percent of the 1,547 applicable cases. While it was determined that a valid reason for separation existed in 65 percent of cases, we urge agencies and courts to consider the lifelong implications of separating siblings and make every

[10] See https://www.acf.hhs.gov/sites/default/files/cb/cfsr_aggregate_report_2020.pdf

effort to reunite siblings, especially in their permanent homes. Permanency plans that result in severing sibling attachments do not support the lifelong connections and relationships associated with permanency and well-being for children and youth. It is a grievous consequence of foster care that we must prevent at all cost.

III. Best Practice Guidance for Achieving Permanency and Well-Being across Permanency Goals – Reunification, Guardianship, Adoption

The term "permanency" is used to define one of three outcomes we aim to achieve for children in foster care. All three interconnected outcomes (safety, permanency and well-being) allow a child to truly thrive; therefore it is important that our efforts to achieve permanency do not sacrifice safety or well-being. For children in foster care, experiencing permanency and well-being should be one and the same. The statute is clear that the best interest of the child is paramount in permanency planning and is a compelling reason not to terminate parental rights in certain circumstances. CB strongly urges agencies and courts to remain mindful of child development needs, and the unique needs of an individual child, and ensure that those needs are not eclipsed by haste to comply with timelines and process. Such haste may be contrary to the best interest of children.

We do not want children to stay in foster care longer than is absolutely necessary to keep them safe, and we also do not believe that it is in a child's best interest to sever parental attachments and familial connections in an effort to achieve "timely permanency." Timeliness is but one of a host of considerations when meeting the needs of children and should not be the lone or primary driver for determining what is best for children. Placing timeliness above the substance of thorough execution of case plans and reasonable or active efforts to achieve them runs the risk of placing process over substance and promoting shortcuts in practice that can be harmful to children and families.

By focusing on preserving a child's connections and nurturing parental attachment while a child is in foster care, we can steward a child's time in foster care in such a way that true healing can occur, and families can be reunited safely. In situations where guardianship or adoption is determined to be the most appropriate goal for a child's long-term well-being, agencies should consider how they can safely preserve the child's original family attachments through adoption or guardianship with relatives/fictive kin.

Children in foster care should not have to choose between families. We should offer them the opportunity to expand family relationships, not sever or replace them. We recognize that reunification is not always possible[11]; however, CB believes that the vast majority of children in foster care have relative or fictive kin relationships that are of great value to them. When we nurture and protect relationships with siblings, family, and fictive kin, we increase the chances for youth to achieve permanency. When these relationships are prioritized, protective factors are increased, which promotes current and future well-being. The most critical factors for

[11] Note that in instances where aggravated circumstances and severe physical/sexual harm exists it may not be appropriate for parental or family involvement to continue as described in this IM. There are also instances of children who are abandoned. Statistically these situations make up a very small percentage of the foster care population.

consideration in permanency planning should be the safety of the family home and a child's key attachments and family connections. These factors, rather than the number of months spent in foster care, or even a child's new attachment to resource parents, should drive permanency decisions. By keeping the focus on what really matters for positive child outcomes, we believe agencies, tribes and courts can dramatically improve the likelihood of reunification and permanency with relatives for the vast majority of children and youth in foster care, reduce the duration of time children and youth spend in foster care and improve the well-being of children and youth during and after foster care.

There are critical aspects of practice that serve to protect and preserve a child's core identity and sense of belonging. These include things like crafting meaningful plans for family time (with siblings and parents) at the onset of placement, conducting exhaustive and ongoing kin searches, doing the difficult work of supporting resource parents to co-parent rather than replace a parent, and making placement decisions that carefully consider a child's connections to their community. When agencies and courts don't invest time and effort in these practices, we prevent children from experiencing true permanency and well-being. Research also indicates that kinship placement, early stability, and intact sibling placement are predictors of permanency achievement.[12] Agencies and courts cannot afford to settle for available placements that separate siblings, or make case plan decisions that take children and youth away from all that they know and love and unnecessarily terminate parent-child relationships.

While children who have had their parents' parental rights terminated no longer have legal parents, they most often still have living parents, other relatives that they are connected to, and fictive kin with whom they have existing relationships. Children and youth in foster care have stories and memories that make up who they are, and they deserve to have all of those things safely preserved for them while they endure the trauma of being removed and displaced from all that they know. This is why Permanency Outcome 2 (and the five items that comprise it) in the CFSR aims to ensure the preservation of connections and continuity of family relationships. It is a child welfare outcome for states to achieve for all children in foster care because of how critically important each practice (shared below) in that outcome is:

- Place siblings together in foster care (CFSR, Item 7);
- Ensure frequent and meaningful family time experiences for children with their parents and with siblings who are placed separately (CFSR, Item 8);
- Preserve key connections such as a child's school, neighborhood, community, faith, extended family, Tribe, and friends (CFSR, Item 9);
- Place children with relatives (CFSR, Item 10); and

[12] Becci A. Akin, Predictors of foster care exits to permanency: A competing risks analysis of reunification, guardianship, and adoption, Children and Youth Services Review, Volume 33, Issue 6, 2011, Pages 999-1011, ISSN 0190-7409, https://doi.org/10.1016/j.childyouth.2011.01.008.

- Make efforts to promote, support, and/or maintain a positive relationship between children and their parents through activities that go beyond visitation (CFSR, Item 11), such as:

    - Encouraging parents to participate in school activities, extracurricular activities, and health appointments (and providing transportation for parents to be able to participate).
    - Providing therapeutic opportunities to help parents strengthen their relationship with their child.
    - Encouraging resource parents to mentor or serve as support role models for parents.
    - Facilitating contact with a parent unable to participate in family time due to distance or other barriers.

These permanency practices are the key to ensuring that children have positive, healthy, and nurturing attachments and relationships with their parents, siblings, and others. These healthy relationships become the foundation for lifelong thriving — we must ensure that all children and youth exit care with this foundation. Over the past four years, through multiple roundtable discussions and meetings, CB leadership has met routinely with young people around the country, to include the recent completion of 12 regional roundtables with young leaders across the United States.[13] We heard directly from young people who described their experience in foster care as missing these critical attachments and relationships. Youth recounted experiences of being separated from siblings, some losing contact altogether. Still others aged out of care only to find that they had relatives and kin living in close proximity to them, yet no efforts were made to preserve those connections. These youth often reference 'relational permanency' as something they need to thrive. Legal permanence alone doesn't guarantee secure attachments and lifelong relationships. The relational aspects of permanency are critically important and fundamental to overall well-being.

We must work to safely preserve children's key attachments and support them as they build new attachments with resource parents and new permanent caregivers. Children do not need to have previous attachments severed in order to form new ones[14]. In fact, they will be better positioned to develop new relationships if we work to preserve their original connections, sparing them from additional grief and loss.

What ultimately matters for permanency are relationships and connections, so we must ensure that our efforts to achieve permanency reflect this understanding. We must work to ensure that the expectations outlined in CFSR Permanency Outcome 2 are put into practice (preserved connections should be routinely assessed in case planning meetings, court hearings and reviews because of the influence they have on achieving permanency and well-being). These practices must not be thought of as 'extra' things that are only applicable for children with a goal of reunification, but they should be viewed as some of the most important things children need to thrive long-term with any permanency goal.

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[13] See CB Letter summarizing roundtables.

[14] Centre for Parenting & Research Research, Funding & Business Analysis Division. (2006). The importance of attachment in the lives of foster children. https://earlytraumagrief.anu.edu.au/files/research_attachment.pdf

CB has been promoting system transformation with the priority of keeping families safely together. This value of preserving families must be present at every stage of the work in our child welfare systems if we want to improve outcomes for children and families. It must be the compass that guides our path to achieving the permanency goals of reunification, adoption, and guardianship so that the well-being of every child is also achieved.

Achieving Reunification

The analysis in section II of this IM indicated that children and youth who enter foster care have a less than 50 percent chance of being reunified. This pattern reveals that our efforts to strengthen and preserve families have been profoundly inadequate. Outside of situations of egregious abuse and neglect to children by their parents, a finding of aggravated circumstances, or abandonment, the goal for a child placed in foster care is most often reunification. Federal law[15] requires title IV-B/IV-E agencies to provide reasonable efforts to make it possible for children to reunify with their parents safely. The qualitative data we gather through the CFSR, which considers the circumstances for the child, and the nature of the efforts made by the agency and courts, also confirms that significant improvement is needed. Round three results[16] of the CFSR found that agencies made concerted efforts to achieve reunification within 12 months of the child's entry into foster care in 49 percent of foster care cases.

As we consider the best practices that are required to achieve reunification, we must start with assessing the parent-child relationship, including attachment, and prioritizing that in services. Some parents working toward reunification may need the support of a trauma-informed counselor or therapist who can help them learn to work through their own past trauma, along with the trauma their children have experienced from abuse or neglect and removal, as they seek to repair and restore parent-child attachments and relationships. Parents love their children deeply, but may not have experienced healthy parent-child attachment for various reasons. Assessing and supporting the parent-child relationship is critical to enable safe and timely reunification, but is often missing from the array of services offered to parents. Round three CFSR[17] results related to service array noted that trauma-informed services, transportation, and visitation services were often insufficiently available.

The analysis in section II of this IM noted that infants have the least opportunity to be reunified as termination of parental rights and adoption are pursued quickly for that population in particular. While we recognize that infants are the most vulnerable to abuse and neglect, we also want to ensure that parents are given every opportunity to reunify with their infant children. For parents struggling with substance abuse in particular, treatment opportunities that allow them to have their children live with them offer the kind of support that parents need to overcome addiction while safely developing and demonstrating their parenting skills. It is critical that parents of infants be given ample opportunities to safely bond with their children and develop attachments that are critical for those children to thrive.

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[15] Section 471(a)(15)(B)(ii) of the Act

[16] https://www.acf.hhs.gov/sites/default/files/cb/cfsr_aggregate_report_2020.pdf

[17] Ibid

The results of our analyses that are descripted in section II suggest that another population that may benefit from focused attention is children and youth who entered care between the ages of 9 and 13 years. This age group is most likely to still be in care after four years, so agencies and courts should ensure that adequate efforts are being made to work toward reunification and ensure connections are being preserved in a meaningful way to support their well-being while they are in care.

This work of repairing and supporting attachment and relationships during foster care takes time, particularly when parents may also be dealing with other issues such as poverty, housing instability, substance use disorders, or domestic violence. But this is the distinctive and challenging work of child welfare. Agencies must emphasize the importance of these efforts at all times and frontline staff must see it as a critical responsibility. Agency culture, policy and practice must be designed and implemented to provide parents the time and resources they need to effectively work through all that is necessary to bring healing to their families. If agencies have done the work to improve the child's experience in foster care, by preserving their connections, implementing meaningful family time, and utilizing foster care as a support for families, then the length of time the child stays in foster care will facilitate healing.

In addition to practices focused on supporting the parent-child relationships, preserving connections. and utilizing foster care as a support for families, there are a few other critical practice areas and systemic processes assessed in the CFSR[18] outcomes and systemic factors that influence concerted efforts to achieve reunification:

- Agencies conducted a comprehensive assessment of parents' needs and provided appropriate services to address needs of parents in 42 percent of foster care cases (Well-Being Outcome 1, Item 12B).

- Children and parents were adequately engaged in case planning in 55 percent of foster care cases (Well-Being Outcome 1, Item 13).

- Agencies conducted frequent, quality caseworker visits with parents in 41 percent of foster care cases (Well-Being Outcome 1, Item 15).

- Two states achieved substantial conformity with the Case Review systemic factor.

    - 37 states received a strength rating for ensuring timely periodic reviews and permanency hearings; however, concerns noted with agency efforts in working with children and parents in Permanency Outcomes 1 and 2 and Well-Being Outcome 1 signal opportunities for courts to improve the quality of reviews and hearings to assess these efforts as required.

States must ensure that parents receive adequate comprehensive assessments of their needs in order to properly inform service planning. Successful engagement of parents is critical for obtaining the information needed to inform a proper assessment of a parent's needs.

[18] Ibid

Engagement must be nurtured through frequent, meaningful worker contact. The very act of assessment also serves to reinforce engagement – as parents are asked to share their stories and workers demonstrate empathy and care in response, trust is built. This trust builds rapport and provides the best foundation for effective ongoing case planning.

Stakeholders interviewed through the CFSR report that some agencies contract out an assessment of parents and, as a result parents, may go months before having any of their needs, their history or their relationships assessed. Many parents have experienced their own trauma, have been in foster care themselves as children, or have compounding needs that leave them feeling overwhelmed. Additionally, CB leadership has met regularly with parents across the country who have lived experience and expertise to share related to having a child involved with the child welfare system. These meetings have reinforced the need for robust parental supports and services to help support parental resiliency, protective capacities, and healing. It is vital that the child welfare workforce be trained, supported, resourced, and equipped to do the work of engaging parents and assessing their needs, even if additional outside assessments are needed. This aspect of case practice is so critical because of its implications for developing a trusting relationship. Outsourcing assessments completely can prevent effective parental engagement from occurring which can negatively impact outcomes.

The initial opening of a case is the most critical time for engaging parents. Agencies should convey to parents that the goal of the agency and court is to keep families safely together, clearly explain what makes their family home unsafe for their child, and share the steps for how they can address those safety threats. Agencies should demonstrate in written case plans and through verbal explanations to parents: 1) why placement is necessary for safety; 2) how foster care will be used as a support for their family; 3) how the agency and court will ensure that they have everything that they need to achieve reunification; 4) how changes in the safety of the home will be assessed; and 5) how family time will be arranged to offer them as much time with their children as safely possible. That approach of clear communication, focused on what matters most, indicates to parents that the agency and court are invested in preserving and supporting their relationship with their child. That can help buffer the grief parents experience due to separation, which often is displayed as anger toward the child welfare agency. Many parents have expressed to CB that when agencies approached them as people who love their children, but are in need of help, rather than treating them punitively and assuming they don't care about their children, they were much more receptive to being engaged.

Ensuring high quality legal representation for parents and children is critical to preventing unnecessary parent child separation, promoting the well-being of children and parents, ensuring that reasonable efforts[19] and active efforts are made, and achieving all forms of permanency when a child or youth becomes known or involved with the child welfare system.[20] Research

[19] "Reasonable efforts" are a title IV-E agency requirement to obtain a judicial determination that the child welfare agency has made efforts (1) to maintain the family unit and prevent the unnecessary removal of a child from the home, as long as the child's safety is ensured, and (2) to make and finalize a permanency plan in a timely manner (sections 471(a)(15) and 472(a)(2)(A) of the Act).

[20] The CB issued Informational Memorandum ACYF-CB-IM-17-02 that provides details on representation concepts, benefits, and resources that are helpful for developing or strengthening legal representation programs. See also,Technical Bulletin on Frequently Asked Questions: Independent Legal Representation for more information.

makes clear that high quality legal representation, particularly multi-disciplinary legal representation,[21] is impactful in helping to achieve and expedite reunification.[22]

Reinstatement of Parental Rights

A review of exits from foster care over the past three years reveals that 15 percent of youth who aged out of care[23] had their parents' parental rights terminated prior to their exit from foster care. The analysis shared in section II on children and youth who have had their parents' parental rights terminated showed that that group is more likely to still be in care than children and youth who have not had parental rights terminated (over 25 percent will go on to age out of care). In many instances, this results in children staying in foster care for long periods of time, often without the important connections to familial support that are necessary for their well-being. Together these data points demonstrate that there are groups of children or youth who will enter care, have their parents' parental rights terminated, and then will have longer stays in care that will end without permanency. As of current AFCARS reporting for 3/31/2020, there are 73,200 children and youth in foster care who have had their parents' parental rights terminated but have still not achieved permanency. For some of these children and youth who are still in foster care, there may be just cause to reconsider reunification with one or both parents. That is, we should consider the possibility that reunification may be a viable option for these children and youth.

Currently, 22 states have laws that allow for reinstatement of parental rights.[24] These statutes are most often grounded in the best interest of the child legal standard and are grounded in the understanding that life circumstances can and do often change for the positive for parents. A parent or parents who may not have been able to safely or adequately care for a child in the past may become a safe and appropriate option in the future.[25] Numerous state statutes also speak to the age and maturity level of children and youth, length of time in care, and failure of agencies to achieve stated permanency goals despite making reasonable efforts.[26] Inherent in these laws is the recognition that the nature of the safety issues that may have existed at the time of termination for a young child may no longer pose the same threats to safety for an older child or youth, or that concerns that existed at the time of termination may no longer exist due to successful parental recovery or other forms of sustained progress. Reinstatement of parental rights and reunification with a parent or parents may be particularly appropriate for older youth in foster care as they are better able to express their preferences and concerns and have better developed protective capacities than younger children.

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[21] See https://familyjusticeinitiative.org/advocacy/high-quality-representation/

[22] An important study conducted in New York City in 2019 provides especially compelling evidence of the effectiveness of the multi-disciplinary approach in achieving reunification. A companion, qualitative study released in 2020 lends further support to the model. See, ACYF-CB-IM-17-02 for a summary of additional research demonstrating the connection between legal representation and reunification.

[23] There are differences across states based on whether children who transition to extended foster care are considered to "age out" when they turn 18, or when they discharge from extended foster care. This figure includes all emancipations, regardless of whether the child was over 18. Of these emancipations, 16 percent were over 18 at the time of emancipation.

[24] See https://www.ncsl.org/research/human-services/reinstatement-of-parental-rights-state-statute-sum.aspx

[25] Id.

[26] Id.

In light of the fact that permanency is focused on relationships and connections, and recognizing that many parents may not have received adequate supports to achieve reunification before termination, while others may have experienced significant positive changes in their life since the time of termination, reinstatement of parental rights and reestablishment of the legal connection is an important addition to the permanency continuum that can promote well-being.

CB encourages states that have such statutes to exercise the option actively when appropriate. CB further strongly encourages states that do not currently have reinstatement of parental rights statutes in place to give thoughtful consideration to crafting and enacting legislation to provide this important permanency option for children and youth.

Achieving Guardianship

Guardianship is an appropriate permanency goal. This is particularly true in cases where parental rights should not be terminated but the best plan for the child based on case circumstance is that he or she not be reunified. This permanency goal legally preserves parental rights while ensuring another caregiver bears the responsibility for direct care and custody of the child. The following parental rights are transferred to the legal guardian per section 475(7) of the Act: protection, education, care and control of the person, custody of the person, and decision making. There are a number of circumstances where parents themselves may decide that guardianship with a relative is best for their child, or a relative caregiver may indicate a desire to pursue this permanency option. For youth who do not want their parents' parental rights terminated, but desire to have another legal caregiver, guardianship may offer just what they need. If safety concerns exist with maintaining parental rights, adoption would be the more appropriate permanency goal to pursue.

Guardianship can be achieved with a relative or non-relative and may include a subsidy[27]. All of these benefits should be discussed with families to determine what would contribute to the best long-term outcome for the child. Whether guardianship occurs with relatives or non-relatives, all guardians should have access to post-guardianship services to ensure that they can meet the needs of the children in their care. Unfortunately, children can still experience instability after guardianship, so concerted efforts must be made to prepare families for this permanency option and offer a range of supportive services that families can access even after guardianship is legalized. Families must be educated about all of the services older youth are eligible for, including eligibility for the John H. Chafee Foster Care Program for Successful Transition to Adulthood and Educational Training Vouchers (section 477 of the Act).

For children with a permanency plan of guardianship, federal law (section 475(1)(E) and (F) of the Act) requires agencies to document, in the child's case plan, the steps the agency is taking to place the child with a legal guardian, and to legalize the guardianship. At a minimum, the law requires that the documentation must include: information about the child-specific recruitment efforts that have been conducted; steps that the agency took to determine that it is not appropriate for the child to be reunified or adopted; reasons why guardianship is in the child's best interests; reasons for any separation of siblings during placement; the child's eligibility for title IV-E

[27] Section 473(d) of the Act

kinship guardianship assistance; efforts made to discuss adoption by relative as a more permanent alternative to guardianship; and efforts made by to discuss with the child's parents the guardianship arrangement. An assessment of these required efforts should occur during periodic reviews and permanency hearings to ensure appropriate progress is being made in achieving the goal.

To ensure successful guardianships, efforts must be made to help potential guardians understand the child's needs, particularly as it relates to the impact of trauma, issues of attachment, and the losses associated with foster care placement (removal, any loss of connections, inability to reunify, etc.) that may impact children differently due to age and circumstances. CB funded the National Adoption Competency Mental Health Training Initiative (NTI)[28] to provide comprehensive training on these issues to child welfare workers, supervisors and mental health practitioners in order to improve outcomes for children being cared for by resource families, adoptive families, and guardianship families. By training the workforce who supports those pursuing guardianship, potential guardians can be better prepared to know how to understand and address behaviors that are likely linked to trauma, attachment or loss.

As with any permanency goal, intentional efforts to preserve a child's key connections can strengthen and support the positive outcomes that can be achieved through guardianship. Visitation with parents, as appropriate, and frequent time with siblings, should be included as part of final guardianship orders to ensure that those connections continue. Post-permanency services and community-based supports are critical to the long-term success of guardianship. Access to those services should also be noted in final orders to ensure that agencies and courts have thoroughly considered and provided all that the family needs.

Achieving Adoption

Adoption is a critically important permanency option for children in foster care who are unable to be reunified with their parents. While child welfare agencies and courts should strive to ensure that children are safely preserved with their own families whenever possible, we acknowledge that there will be circumstances where a child must be permanently removed from harmful family dynamics and unsafe relationships. Adoption provides the permanent security of a new forever home for children who need that.

For children with a permanency plan of adoption, federal law (section 475(1)(E) of the Act) requires agencies to document, in the child's case plan, the steps the agency is taking to place the child with an adoptive family and finalize the adoption. At a minimum, the law requires that the documentation must include information about child-specific recruitment efforts that have been conducted. An assessment of these required efforts should occur during periodic reviews and permanency hearings to ensure appropriate progress is being made in achieving the goal.

Adoption may occur with a child's relatives or with unrelated resource parents. In either case, adoption should be viewed as an opportunity to expand a child's experience of family rather than replace their previous family. Unless safety concerns prevent connections from being preserved,

[28] https://adoptionsupport.org/nti/

adoptive families should acknowledge the child's previous family connections and relationships and work to sustain those. Many state laws (currently 29 states and the District of Columbia)[29] allow for continuing to support relationships with parents through open adoption and post adoption contact agreements and this can include siblings and extended family.

Federal law (section 471(a)(31) of the Act) requires that every effort should be made to have siblings adopted by the same family. When that cannot occur, there should be a clear plan in place for how sibling relationships will be preserved through consistent and quality contact. Ongoing sibling relationships, regardless of the age of the child, should always be preserved for children. Relationships with parents and other extended family may also be preserved when ongoing connection does not pose a threat to safety and preserving those relationships is best for the child. In situations where children had been having regular contact with parents prior to termination, that contact should continue with support from a counselor to help the parents and child adapt to new roles.

Pre-adoptive families who wish to sever the child's family connections for any reason other than safety should receive training and supportive counseling to understand the impact that will have on the child. Decisions for adoption finalization should be contingent upon whether the family will in fact support what is best for the child in preserving connections. Agencies and courts should insist on protecting a child's key connections even if it means losing a potential adoptive family. Agencies must proactively prepare potential adoptive families to understand the importance of connections and the impact that has on child well-being.

Adoptive families have the unique privilege of stewarding a child's past in a way that can promote healing and positive outcomes for their future. By committing to love and nurture a child forever, adoptive families accept all that a child is, including their family history. Honoring that history will look different for each child, depending on case circumstances and the child's needs, but it must be carefully considered.

Similar to guardianship, there are risks to stability in adoption as well. Researchers estimate that between five and 20 percent of children and youth who exit to guardianship or adoption experience some form of instability.[30] To ensure successful adoptions, efforts must be made to help adoptive parents understand the child's needs, particularly as it relates to the impact of trauma, issues of attachment, and the losses associated with foster care placement (removal, any loss of connections, inability to reunify, etc.) that may impact children differently due to age and circumstances. There may be a tendency for adoptive parents to assume that offering to adopt a child and give them a new family will significantly or automatically change a child's sense of connection with their birth families. They must be prepared to understand how attachment and connection works for children so they can have appropriate expectations and know how to best support their child through the transition.

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[29] https://www.childwelfare.gov/pubpdfs/cooperative.pdf

[30] White, K. R., Rolock, N., Testa, M., Ringeisen, H., Childs, S., Johnson, S., & Diamant-Wilson, R. (2018). Understanding post adoption and guardianship instability for children and youth who enter foster care. Washington, DC: Office of Planning, Research, and Evaluation, the Administration for Children and Families, U.S. Department of Health and Human Services.

The National Adoption Competency Mental Health Training Initiative[31] is a tremendous resource for working with adoptive families. All adoptive families should be referred to an adoption competent therapist who can be an ongoing resource as their child experiences developmental changes so they can be prepared to understand and address behaviors that are likely linked to trauma, attachment or loss. Parents who adopt infants and younger children may not see the impact of trauma and attachment issues in behaviors until the child gets older but it's important that they begin to implement parenting techniques that take into account the child's history of trauma and can help form and support healthy attachment.

As the research and related resources for trauma and attachment have continued to grow in recent years, there is growing understanding in the field that many families who adopted children from foster care years ago may not have been provided adequate training and support related to these issues. As a result, CB has heard of situations where parents were left unprepared to handle the significant behaviors that their children experienced. Many of these families have been in crisis with nowhere to turn. Young people from the ACF Youth Engagement Team,[32] in addition to other youth CB has spoken to, have echoed the importance of providing trauma-informed services to adoptive families. It is critical that agencies and courts ensure that families are adequately connected to an array of post-adoption services so that they have access to what they need at any time. These services could include support groups, adoption-competent therapeutic supports, and attachment specialists.

Reinvigorating and Reinvesting in Efforts to Achieve Permanency for Older Youth

To achieve the legal requirements around permanency and well-being, CB urges states to evaluate and invest in their continuum of permanency services. The continuum of services should be centered on supporting and strengthening family and kinship bonds, as well as include services to develop new supportive relationships when needed. The continuum should include services that can be delivered as system prevention services and services that can help maintain permanency following an exit from the system. Given the large numbers of older youth who continue to leave the system without permanency, 20,000 annually[33], and the increasing likelihood, shown in the AFCARS analysis, that youth who enter care at age 15 or older will emancipate, it is crucial that states evaluate their continuum of permanency practices and services to ensure that they are effective for older youth and their families.

All children and youth need the benefit and foundation of family to experience healthy child and adolescent development. All the research available, as well as the voices of young people, demonstrate that permanency is crucial to a successful and secure transition to adulthood. Agencies should evaluate their permanency continuum to ensure that services to support reunification, adoption, and guardianship are tailored to adolescents and young adults, including their families and support networks. This means, first and foremost, listening to young

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[31] https://adoptionsupport.org/nti/

[32] The ACF Youth Engagement Team was developed in 2020 in order to gather expertise from former foster youth in identifying key recommendations for the ALL-IN Foster Adoption Challenge and state and federal efforts toward achieving permanency for all waiting children and youth.

[33] The AFCARS Report https://www.acf.hhs.gov/sites/default/files/cb/afcarsreport27.pdf

people as a group of experts that can guide agencies in improving practice and as individuals in their own cases. Federal law requires that youth 14 and older be consulted about their case plans and have a case planning team (section 475(1)(B) if the Act). The law also requires youth age 14 and older be consulted title about IV-E guardianship (section 473(d)(3)(A)(iv) of the Act).

Young people overwhelmingly say that they want permanency, but they want their voices to be heard about who they care about and who is important to them. Young people want to work towards permanency with skilled professionals who they can build trust with and who will show them respect. Valuing and listening to the voices of young people allows agencies to increase the odds that both legal and relational permanency can be achieved for older youth. As states and agencies evaluate and build their continuum of permanency services, we encourage states to consider the following:

1. Integrate practices that uphold the expectation that permanency must be achieved for older youth and is central to a successful transition to adulthood (communicated across the agency, including by those in leadership positions).
2. Establish processes that provide youth-centered and youth-led permanency and transition planning and that actively engage the community and family the youth identifies.
3. Train caseworkers on how to engage young people in the permanency planning process and the work necessary to achieve permanency. This should at least include: training in insights from adolescent brain development, the impact of trauma on permanency and relationship building; practical strategies for engaging youth in the discussion of permanency; and steps for repairing and building trust and relationships. Agencies should have mechanisms in place to determine if meaningful engagement is occurring, such as surveys, data collection, and youth advisory councils. Youth should be members of leadership committees and workgroups to ensure that engagement is occurring system wide.
4. Provide a wide array of permanency services to young people, including, but not limited to: reunification and family preservation services; family finding and engagement; child specific recruitment that focuses on family; kin and non-kin; grief and loss counseling; family counseling; and post-permanency services.
5. Establish processes, such as case reviews, team meetings and executive approval, to ensure the continued pursuit and finalization of permanency efforts, including reunification, adoption, and guardianship.
6. Establish processes to ensure that the option of having youth reside with a parent or guardian as an allowable supervised independent setting, is being exercised, when that would be the most appropriate option for a young person.[34]
7. Ensure that practices and services are in place to increase the odds that joint placement can occur for siblings, that regular visitation occurs when joint placement is not possible due to safety issues, and that therapeutic supports are provided to nurture sibling relationships when needed.[35]

[34] See CWPM section 8.3A.3 Question/Answer #3

[35] See also sections 473(d)(3)(B) and (e)(3) related to siblings and the title Iv-E adoption assistance and guardianship programs.

8. Schedule ongoing agency-wide planning opportunities for where young people lead and help to develop innovative and effective ways to provide legal and relational permanency to older youth. This planning should build upon existing discussions and work in the field being led by alumni groups. Child welfare agencies and courts are encouraged to take action to make the existing permanency plans (reunification, adoption, and guardianship) more responsive to the needs of adolescents and young adults and to be open to new and creative ways that allow young people to establish and maintain multiple strong, long-lasting, and nurturing relationships that provide them the love, support and family identity they need as they age.

Timeliness

All permanency planning and practices require thoughtful attention to timeliness. The statutory requirements for timelines, most notably, the termination of parental rights timelines[36] (TPR), were established in part to prevent children and youth from remaining in foster care longer than necessary. However, the statute also contains specific provisions allowing for: exceptions to the timelines in the form of aggravated circumstances that allow for expedition in certain circumstances; and documentation of compelling reasons why terminating parental rights is not in the best interest of the child (section 475(5)(E)(ii) of the Act). These options were included in the law in recognition that all families are unique and that there must be flexibility in the law to make prudent decisions based on the individual circumstances of each family and child. While timeliness is essential, and it is critical not to cause undue delay in the lives of children and families, CB cautions agencies not to place timeliness before the substance of what best supports familial relationships and the best interest of the child.

On June 23, 2020, CB issued a letter strongly encouraging all child welfare agencies to thoughtfully consider decisions of whether to file for termination of parental rights in instances where services and supports have been interrupted, are not available to meet specific needs, where family time has been inadequate, or where court operations are unable to offer hearings of needed due to COVID-19.[37] The letter emphasized that such decisions should always be made on the individual child and family's unique circumstances. Although the letter was issued to provide guidance during the COVID-19 pandemic and public health emergency, the legal requirements it highlights are equally important during times of normalcy and times of natural disasters or public health crises. A child welfare agency may choose not to file a petition for termination of parental rights if the agency documents compelling reasons for determining it is not in the best interest of the individual child, including instances where a child is living with a relative (section 475(5)(E)(ii) and (iii) of the Act) or when guardianship would be an appropriate permanency goal. The consistency and availability of services, supports, and family time, and how such availabilities impact parents, children and their relationship, are important factors in decision making.

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[36] Sec 475(5)(E) of the Act. These timelines were first added to statute by Adoption and Safe Families Act (ASFA) Public Law 105-89. Timeliness is also reflected in the requirement that a permanency plan be established within 60 days (see 45 CFR 1356.21(g)).

[37] CB Letter issued June 23, 2020: https://www.acf.hhs.gov/sites/default/files/cb/parental_rights_adoption_assistance.pdf

IV. Conclusion

Child welfare systems have a high duty and legal responsibility to achieve and support improved permanency outcomes for children and youth in foster care. The first step toward improvement requires that stakeholders agree that family relationships and connections are key to child well-being, family relationships and connections directly influence a child's sense of permanency, and that more meaningful efforts toward reunification should be an urgent priority. Child welfare systems must center all work on preserving and creating such relationships as a critical component of child and family well-being. We strongly encourage all title IV-B/IV-E agencies to commit to the practices that ensure the preservation and continuity of family relationships and connections for all children and youth in foster care. Prioritizing those efforts will ensure that we achieve permanency for children in a way that strengthens their connections, healthy attachments, and sense of belonging to support lifelong thriving. To implement this approach successfully, agency and court leaders must mobilize service providers, attorneys, and resource families in every community to promote this view of permanency. We must make every effort to protect and preserve connections for all children and youth in foster care.

Inquiries: CB Regional Program Managers

/s/

Elizabeth Darling
Commissioner
Administration on Children, Youth and Families

Disclaimer: IMs provide information or recommendations to States, Tribes, grantees, and others on a variety of child welfare issues. IMs do not establish requirements or supersede existing laws or official guidance.

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Addendum B

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 (2005)

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Symposium

The State Construction of Families: Foster Care, Termination of Parental Rights, and Adoption
Mark F. Testa, Ph.D. [a1]

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

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.

***500** 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 ***501** 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 ***502** 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 ***503** 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]

***504** 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 ***505** 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]

***506** 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 ***507** 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:

> ***508** 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 ***509** 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 ***510** 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 ***511** 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.

*512 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-
***513** 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
***514** 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 ***515** 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.

***516** 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 ***517** 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.” ***518** 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.

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Figure 1

***519** 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.

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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 ***520** 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 ***521** 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 ***522** 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

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*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 ***523** 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

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* 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 ***524** 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 ***525** 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

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* 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.

***526** Table 4.--Event-History Regression Estimates of Percentage Difference in the Instantaneous Probability of Disruption or Displacement from Care through June 30, 2004

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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 ***527** 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

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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. ***528** 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 ***529** 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 ***530** 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 ***531** 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 ***532** 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 ***533** 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.

***534** 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.

Footnotes

a1 Director and Associate Professor, Children and Family Research Center, School of Social Work University of Illinois at Urbana-Champaign. Paper presented at the interdisciplinary conference "State Construction of Families: Foster Care, Termination of Parental Rights, and Adoption," the University of Virginia School of Law, Charlottesville, VA, October 28-29, 2004. Please direct all correspondence to Mark F. Testa at Children and Family Research Center, University of Illinois, Urbana-Champaign, 1203 West Oregon Street, Urbana, IL 61801, 217-244-1029, mtesta@uiuc.edu.

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).

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)).

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).

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).

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.

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29 Id. at 10.

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31 Id. at 11.

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).

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55 Bartholet, supra note 17, at 159.

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58 705 Ill. Comp. Stat. 405/2-28(2)(E) (2004).

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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.

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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)).

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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.

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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.

85 Testa & Slack, supra note 74, at 93-94.

86 Id. at 94-95.

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.

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).

93 Id.

94 Id.

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

96 See infra p. 520, Figure 2.

97 See supra note 89 and accompanying text.

98 See Bartholet, supra note 17, at 90.

99 See Bartholet, supra note 17, at 90.

100 See infra pp. 525-26.

101 See infra p. 525.

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.

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).

111 Hasseltine B. Taylor, Law of Guardian and Ward (1935).

112 Testa, supra note 109, at 117-18.

113 See infra pp. 500, 508.

114 Making the Adoption/Guardianship Decision (Ill. Dep't of Children and Family Services), Mar. 2001, at 8.

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.

12 VAJSPL 499

Addendum C

Josh Gupta-Kagan, *The New Permanency*,
19 U.C. Davis J. of Juv. L. & Pol'y 1 (2015)

The New Permanency

JOSH GUPTA-KAGAN*

Permanency is a pillar of child welfare law. 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 rather than the state to determine the best legal status for their particular situation, and does not rely 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, and just as many children grow up in foster care as before.

This article is the first to explore Fostering Connections' failure to spark major change. The fault lies in its failure to challenge guardianship's cultural and legal subordination to adoption and the state's power to steer families away from guardianship 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.

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CONTENTS

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,

[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.

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.

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] 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

[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 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).

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 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

[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*

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 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

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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 112–116 and accompanying text.

[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).

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 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,

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[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).

[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).

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 (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

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[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).

[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.

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 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,

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

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]

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, by avoiding a termination, it 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

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

[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.

option over adoption. In the control group—in which a foster or kinship family could only choose adoption—74.9 percent of children were 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 adoption before even discussing guardianship with families, while

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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").

"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 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

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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.

[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

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 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

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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 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.

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 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]

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[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).

[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 225; 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

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, 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

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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).

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

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.

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,

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[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.

[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.

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.

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

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[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* 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).

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 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

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

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 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

[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.").

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 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

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[81] Testa & Miller, *supra* note 14, at 410–11.
[82] *Id.* at 411,
[83] *Infra* notes124–125and 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).

less likely to experience multiple moves from one foster home to another.[88]

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]

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[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 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

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 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.

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.[97] In the same

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positively correlate with permanency outcomes.

[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] *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, 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

years, the percentage of exits from adoptions increased slightly, from 19 percent to 22 percent.[98] 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.[99] 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.[100] 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.[101] The gap between terminations and adoptions shrunk from 29,000 in 2008 to 7,000 in 2012.[102] 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.

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

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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.

[98] AFCARS FY 2008, *supra* note 97, at 4, AFCARS FY 2012, *supra* note 97, at 3.

[99] AFCARS FY 2008, *supra* note 97, at 1, AFCARS FY 2012, *supra* note 97, 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 97, at 4, AFCARS FY 2012, *supra* note 97, 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.

[100] AFCARS FY 2008, *supra* note 97, at 1, AFCARS FY 2012, *supra* note 97, at 1.The permanency plan of "live with other relatives" was similarly unchanged—it was 4 percent in 208 and 3 percent in 2012.

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

[102] *Id.*

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[103] chosen a course of action that continues to subordinate guardianship and elevate adoption.

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.[104] Fostering

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

[104] 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

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,[105] a statute that requires states to follow a list of requirements in exchange for federal child welfare funding.[106] 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.[107] Although the 1980 law recognized guardianship,[108] it framed permanency decisions as binary—reunification or adoption—and that binary has shaped child welfare practice ever since.[109] 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.[110] And Congress placed its money accordingly. As its title suggests, the 1980 Adoption Assistance and Child Welfare Act provided federal funds to

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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.

[105] 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).

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

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

[108] *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 guardianship").

[109] *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").

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

reimburse states for subsidies paid to adoptive parents,[111] while Congress established no such funding for guardianships.

The Adoption and Safe Families Act of 1997[112] (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.[113] ASFA created an exception for when states had placed foster children in homes with a relative[114]—implying that guardianship was only appropriate for relatives.[115] 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.[116] ASFA continued to provide no funds for guardianship subsidies.[117] Still, ASFA did solidify guardianship's place as a permanency option, listing it as a possible "permanency plan" that courts could set,[118] 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."[119]

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."[120] A law enacted in 1994, the Multi-Ethnic Placement Act, would facilitate transracial adoptions.[121]

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[111] Pub. L. 96-272, § 101 (codified at 42 U.S.C. § 673 (1982)).
[112] Pub. L. 105-89, 111 Stat. 2115 (1997).
[113] Pub. L. 105-89, § 103(a) (codified at 42 U.S.C. § 675(5)(E) (2000)).
[114] *Id.* (codified at 42 U.S.C. § 675(5)(E)(i) (2000)).
[115] 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).
[116] Pub. L. 105-89, § 201 (codified at 42 U.S.C. § 673b (2000)).
[117] 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.
[118] Pub. L. 105-89, § 302 (codified at 42 U.S.C. § 475(5)(C) (2000)).
[119] Pub. L. 105-89, § 101(b) (codified at 42 U.S.C. § 675(7) (2000)).
[120] Testa, *New Permanency Strategies*, *supra* note 4, at 116.
[121] *Id.* Pub. L. 103-382, §§ 551-555 (codified at 42 U.S.C. § 671(a)(18)).

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,[122] and have remained roughly level since then.[123] 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.[124] 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).[125]

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 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.[126] 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.[127] 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.[128] Third, Congress renewed and expanded federal financial support for adoption subsidies, without enacting parallel guardianship provisions.[129] Fourth, Congress limited federally supported guardianship

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

[123] 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.

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

[125] *Id.*

[126] 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).

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

[128] *Infra* note199 and accompanying text.

[129] Pub. L. 110-351, §§ 401-403.

subsidies to kinship guardianships, explicitly excluding non-kinship guardianships.[130] These continuing hierarchies reflected the views of some adoption advocates, who endorsed subsidized guardianship only if Congress maintained its subordinate status to adoption.[131]

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 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."[132] 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."[133] 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

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

[131] *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. .

[132] 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).

[133] 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).

permanent home for the child?" even though the empirical research reflect that guardianship is just as permanent as adoption.[134]

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.[135] 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.[136]

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.[137] 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.[138]

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

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[134] *Id.* at 21.

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

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

[137] 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.

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

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.[139] The day is specifically "adoption day"—not "guardianship day" or "permanency day"—underscoring adoption's primacy in public view.[140] 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 and politicians.[141] Gauzy media coverage follows.[142] 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.[143] Biological families—and any remaining connections or visitation rights these children may have with them—are not discussed.[144] 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.[145] And it is presented in such a way that excludes the core reason that guardianships and open adoptions

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

[140] 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.

[141] *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).

[142] 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).

[143] *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.

[144] *See* sources cited *supra* note 143.

[145] *See* Sacha Coupet, *Swimming Upstream Against the Great Adoption Tide: Making the Case for "*Im*permanence,"* 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).

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,[146] a phenomenon that helps explain why the 2008 Fostering Connections Act has not led to increases in the number of guardianships nationally.[147] 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.[148] Many case workers (not to mention lawyers and judges) continue to see guardianship "as a narrow exception for a select group of families who do not fit into the preferred categories of biological or adoptive families."[149] The strength of this stock story leads many to disbelieve the data establishing that guardianship is just as good for children as adoption.[150]

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.[151] The Children's Bureau also reports the total number of guardianships of foster children,[152] 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.[153] These data gaps partly result from congressional directives to report "comprehensive national information" regarding foster care and adoption, but not guardianship[154] (something Fostering Connections did nothing to change). Still, the Children's Bureau has not used its regulatory authority to require states to

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[146] *Infra* Part II.B.
[147] *Supra* notes97-100 and accompanying text.
[148] Cynthia Godsoe, *Parsing Parenthood*, 17 LEWIS & CLARK L. REV. 113, 146–48 (2012), http://law.lclark.edu/live/files/13717-lcb171art3godsoepdf.
[149] *Id.* at 146.
[150] *Id.* at 147.
[151] AFCARS 2012, *supra* note 72, at 4–6.
[152] *Id.* at 3.
[153] TRENDS IN FOSTER CARE AND ADOPTION, *supra* note 30.
[154] 42 U.S.C. § 679(c)(3).

provide additional data, and has only issued regulations to require detailed adoption-related data.[155]

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 planning and termination of parental rights are linked,[156] 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.[157] It also suggests that guardianship is for kinship placements only, despite its availability for non-kin.[158] This casebook compares favorably to other casebooks; one discusses permanency planning, terminations of parental rights, and adoptions, without reference to guardianship.[159] Yet another devotes long chapters to terminations and adoptions, without a single reference to guardianship.[160] 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

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[155] 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).

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

[157] *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.

[158] 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.

[159] 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).

[160] 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.

evidence.[161] The U.S. Supreme Court has described terminations and adoptions as "a unique kind of deprivation"[162] because they are so permanent, and the importance of parental rights so great.[163] States typically have detailed termination and adoption statutory schemes to require proof of ongoing parental unfitness that is unlikely to be remedied, and that the termination is in the child's best interests.[164]

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.[165] Many states have set a lower standard of proof in guardianship cases, requiring only proof by a preponderance of the evidence.[166] 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.[167] 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.[168]

These reduced procedural protections can make guardianship appear attractive. Guardianship promises a "simpler" judicial process,[169] or a way to achieve permanency if the state cannot meet its burden to terminate.[170] 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.[171] 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.[172]

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[161] Santosky v. Kramer, 455 U.S. 745 (1982).
[162] Lassiter v. Dep't of Soc. Servs., 452 U.S. 18, 27 (1981).
[163] *Santosky*, 455 U.S. at 758-59.
[164] *E.g.*, MO. REV. STAT. § 211.447.5&.7 (West 2014).
[165] *See* Katz, *supra* note 41, at 1098–1102 (surveying state statutes and finding only four guardianship statutes that equate guardianship standards with termination standards).
[166] *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).
[167] *In re* A.G., 900 A.2d 677, 680–82 (2006).
[168] *Id.* at 681.
[169] Testa & Miller, *supra* note 14, at 415.
[170] *Supra* note 66 and accompanying text.
[171] *Infra* Part IV.B.
[172] Hardin, *supra* note 4, at 182–83. For example, Missouri guardianship cases are 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

This procedural issue can create 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.[173] 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 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.[174]

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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).

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

[174] U.S. DEP'T OF HEALTH AND HUMAN SERVS., ADMIN. FOR CHILDREN YOUTH AND

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,"[175] and federal regulations even ban federal reimbursements "when a court orders a placement with a specific foster care provider."[176] Agency guidance has suggested some flexibility in applying this regulation,[177] 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.[178] None of the various kinship placement 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.[179] Rather than require anything more than consideration, child welfare law instead concentrates power in child welfare agencies that have discretion to make

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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).

[175] 42 U.S.C. § 672(a)(2)(B) (2010).

[176] 45 C.F.R. § 1356.21(g)(3) (2012).

[177] 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.

[178] 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 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.

[179] 42 U.S.C. § 671(a)(19) (2010).

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.[180] Even six years after Congress granted states greater flexibility to license kinship foster homes, state agencies have reported unfamiliarity with their authority.[181] 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.[182]

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.[183] Many states also choose to place children with kin but without granting the kin a foster care license.[184] The percentage of foster children placed in such unlicensed homes ranged from 0 in several states to 33 percent in Iowa.[185] The decision in many states to use unlicensed kinship 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,[186] which in turn requires placement in a licensed "foster family home."[187] States that elect to place children in unlicensed kinship homes, thus, effectively choose to exclude those families from the benefits offered by Fostering Connections.

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[180] 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.").

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

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

[183] *Id.* at 6–7.

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

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

[186] 42 U.S.C. § 673(d)(3)(A)(i)(II) (2011).

[187] 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).

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."[188] Family courts do have authority to determine if agencies make "reasonable efforts" to achieve the permanency plan that a court has set,[189] and federal funding depends on positive court findings.[190] 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.[191] 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.[192] Agencies and judges will typically apply a preference for permanency with whomever the child has been living throughout foster care.[193] 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.[194] 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.

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[188] 42 U.S.C. § 672(a)(2)(B) (2010).
[189] 42 U.S.C. § 671(a)(15)(B)-(C) (2010).
[190] 45 C.F.R. § 1356.21(b) (2012).
[191] *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].
[192] Hardin, *supra* note 4, at 156.
[193] 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).
[194] 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.

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.[195] Knowing that kinship placements are significantly more stable than other placements,[196] 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 permanency option. This was true before Fostering Connections,[197] 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.[198] 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.[199]

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.[200] When state agencies train staff,

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[195] *Making It Work*, *supra* note 11, at 13.
[196] *Supra* note 88 and accompanying text.
[197] Patten, *supra* note 20, at 260.
[198] *Making It Work*, *supra* note 11, at 13–15; *Synthesis of Findings*, *supra* note 25, at 4, 21–22.
[199] Godsoe, *supra* note 148, at 145.
[200] *Synthesis of Findings*, *supra* note 25, at 22–23.

they communicat their ideological views towards adoption and guardianship.[201]

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.[202] 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."[203] Caseworkers choose not to even inform 267 of the 1197 eligible families that subsidized guardianship was an option, effectively pushing the families toward adoption.[204] Surveys of some relative caregivers reflect that many were not informed by their caseworker that financial subsidies were even available with guardianship.[205] Many others said that they were not involved in permanency discussions with their caseworker at all.[206] 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.[207]

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.[208] 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.[209] 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

[201] *Id.* at 28.
[202] *Id.*
[203] Testa, *Evaluation of Interventions*, *supra* note 24, at 204.
[204] *Id.* at 213.
[205] *Making It Work*, *supra* note 11, at 14.
[206] *Synthesis of Findings*, *supra* note 25, at 22.
[207] *Id.* at 21.
[208] 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.
[209] *Id.*

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.[210]

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 preferences of the individuals whose family relationships are at issue.[211] 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,[212] 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."[213] Over time, "family law follows family life," at least among those families engaged in private family law cases.[214]

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.[215] 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.[216] The foster

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[210] *Infra* Part IV.F.

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

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

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

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

[215] *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).

[216] Children from impoverished families endure significantly more abuse and neglect than their richer counterparts. U.S. DEP'T OF HEALTH & HUMANS SERVS., ADMIN. FOR

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 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

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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).

placements. The District has a well-established office to provide guardian *ad litem* representation for children,[217] parents' attorneys who must apply to and be approved by the court to work in child welfare cases,[218] and a wide set of pro bono attorneys to represent prospective guardians or adoptive parents.[219] In addition, the District has an active foster parent advocacy organization.[220]

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.[221] 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.

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[217] 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.

[218] *Id*.

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

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

[221] 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.

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 other states provides for adoption.[222] The District has also, since 2010, permitted adoptive parents and biological parents and family members to enter into court-enforceable post-adoption contact agreements.[223] District law also permits foster parents to seek subsidized guardianships of foster children.[224] Such subsidies were limited to kin until 2010, when the D.C. Council made both kin and non-kin eligible for subsidies.[225]

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.[226]

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	Permanency plans of guardianship	Permanency plans of adoption	Guardianship-Adoption plans ratio
2013[227]	151	105	1.44	395	290	1.36
2012[228]	111	112	0.99	401	324	1.24
2011[229]	129	105	1.23	378	361	1.44
2010[230]	73	130	0.56	336	415	0.81
2009[231]	88	108	0.81	284	491	0.57
2008[232]	108	119	0.91	256	507	0.50

[222] 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).

[223] 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.

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

[225] 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)).

[226] 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.

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

[228] 2012 D.C. GOV'T CHILD AND FAMILY SERVS. AGENCY ANN. PUB. REP. at 27, 30, 33 (2013), [hereinafter CFSA, 2012 ANNUAL REPORT].

[229] 2011 D.C. GOV'T CHILD AND FAMILY SERVS. AGENCY ANN. PUB. REP. at 20, 26 (2012) [hereinafter CFSA, 2011 ANNUAL REPORT].

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

[231] 2009 D.C. GOV'T CHILD AND FAMILY SERVS. AGENCY ANN. PUB. REP. at 29, 35 (2010).

2007[233]	143	160	0.89	288	519	0.55
2006[234]	184	186	0.99	349	565	0.62

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[235]—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[236]
2013[237]	135	82	1.65	1.25
2012[238]	160	122	1.31	1.45
2011[239]	158	110	1.43	1.17
2010[240]	108	112	0.096	1.00
2009[241]	93	128	0.72	0.71
2008[242]	93	95	0.97	0.55
2007[243]	110	135	0.81	0.57
2006[244]	192	197	0.97	0.57

[232] 2008 D.C. GOV'T CHILD AND FAMILY SERVS. AGENCY ANN. PUB. REP. at 26, 34 (2009).
[233] 2007 D.C. GOV'T CHILD AND FAMILY SERVS. AGENCY ANN. PUB. REP. at 17, 23 (2008).
[234] 2006 D.C. GOV'T CHILD AND FAMILY SERVS. AGENCY ANN. PUB. REP. at 15, 21 (2007).
[235] 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.
[236] 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).
[237] DC Family Court 2013 Report, *supra* note 235, at 58–59.
[238] 2012 D.C. SUPER. CT. FAMILY COURT ANN. REP. 55 (2013).
[239] *Id.*
[240] *Id.*
[241] 2009 D.C. SUPER. CT. FAMILY COURT ANN. REP. 57 (2010).
[242] *Id.*
[243] *Id.*

2005[245]	210	279	0.75	0.48
2004[246]	292	421	0.69	0.65

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

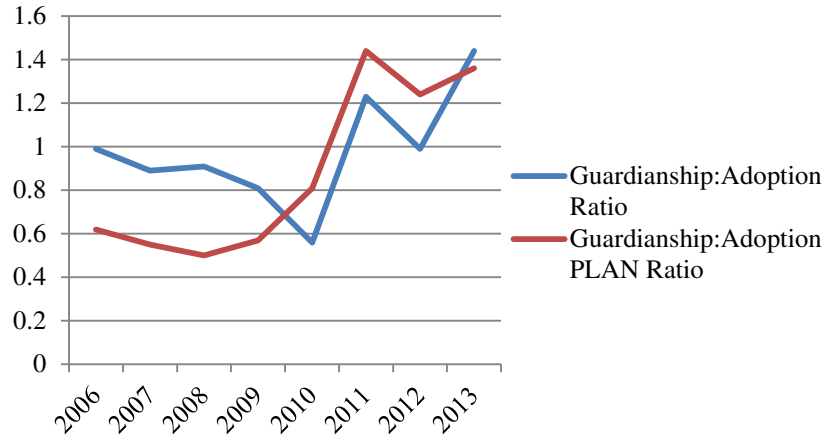
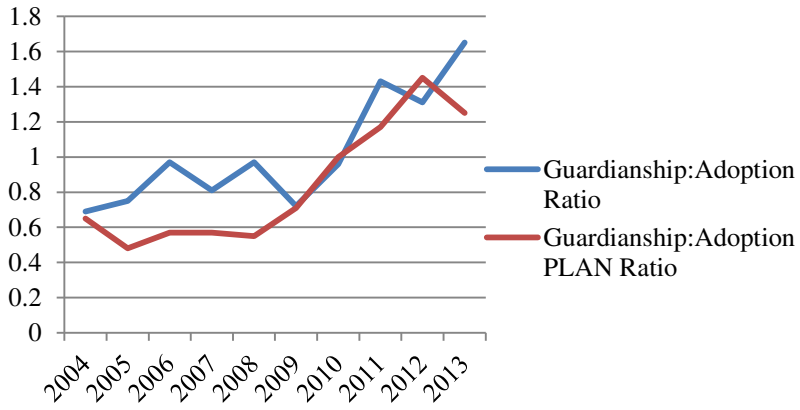


Figure 2: Guardianship to Adoption and Permanency Plan Ratios per judicial data

[244] 2006 D.C. SUPER. CT. FAMILY COURT ANN. REP. 51 (2007).
[245] *Id.*
[246] *Id.*



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[247]), and established post-adoption contact agreements.[248] Perhaps non-kin foster parents were interested in guardianships, and making subsidies available led them to pursue it.[249] 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 adoption and more goals of guardianship, the District of Columbia court system is identifying cases for which a termination is not necessary.[250]

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

[248] 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).

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

[250] 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.

Therefore, the decrease in adoption plans has led to a dramatic decrease in termination cases, reported in Table 3.[251]

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[252]	66
2012[253]	77
2011[254]	67
2010[255]	83
2009[256]	129
2008[257]	161
2007[258]	129
2006[259]	145
2005[260]	248
2004[261]	141
2003[262]	177

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.[263] That figure decreased to 29 percent in 2010 (when

[251] 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].
[252] DC FAMILY COURT 2013 REPORT, *supra* note 235, at 68.
[253] DC FAMILY COURT 2012 REPORT, *supra* note 236, at 63.
[254] *Id.*
[255] *Id.*
[256] *Id.* at 62–63.
[257] *Id.* at 62.
[258] DC FAMILY COURT 2007 REPORT, *supra* note 236, at 64.
[259] *Id.*
[260] *Id.*
[261] *Id.*
[262] *Id.*
[263] DC FAMILY COURT 2013 REPORT, *supra* note 235, at 65.

the District legislation was enacted) and decreased further to 22 percent in 2013.[264] 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.[265] 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,[266] to 1,318 by 2013.[267] 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.[268] Entries have steadily decreased since 2010 and were down nearly 50 percent in 2013 as compared with 2010.[269] 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.[270] 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 of the District.[271] 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

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

appoints successor guardians; unfortunately, the Court does not report what it means by "many instances."[272] 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.[273] Fourth, the District has a high rate of adoption disruptions before finalizations—25 out of every 100 pre-adoptive placements disrupt[274]—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.[275] Data collection that reflects the new permanency would yield even more valuable information about how new permanency laws play out in practice.[276]

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.[277] 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,

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[272] DC FAMILY COURT 2013 ANNUAL REPORT, *supra* note 235, at 67.
[273] *See generally supra* note 67 and accompanying text.
[274] CFSA, 2013 ANNUAL REPORT, *supra* note 50, at 25.
[275] 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.
[276] *Infra* Part IV.D.
[277] *Supra* Part I.B.

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.[278] 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.[279] 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.[280]

The District has established administrative policies and procedures to facilitate kinship placements. First, the District has adopted regulations 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.[281] The District government has issued some policy guidance, identifying foster home regulations that it would consider waiving for kinship placements.[282]

Moreover, the District has a long-standing administrative mechanism to expedite the licensing procedures for kinship foster homes.[283] These policies establish a "preference" for kinship placements

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[278] 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. S*upra* note 88 and accompanying text.

[279] *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).

[280] 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.

[281] 42 U.S.C. § 671(a)(10) (2010).

[282] *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.

[283] 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

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."[284] One result is that children in kinship care in the District live with kin who have foster care licenses,[285] and who are thus eligible for federally reimbursed guardianship subsidies at permanency.[286]

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 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.[287] The meetings' purpose includes exploring the possibility of kinship placements,[288] 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.[289] 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.[290]

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

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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.

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

[285] 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. S*upra* note 283.

[286] 42 U.S.C. § 673(d)(3)(A)(i)(II).

[287] 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.

[288] *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).

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

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

due process checks on agency decisions. A family member who is denied a kinship foster home license may file an administrative appeal.[291] 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.[292] The full application process can take about six months or longer.[293] An administrative appeal can take more than 100 days, not counting time for any judicial appeal.[294] In the meantime, the child is living with another 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.[295]

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.[296] 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.[297] This rule does create a kinship preference when, as is often the case, a parent prefers their child to live

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[291] D.C. MUN. REGS. tit. 29 § 6031.8 (2004).
[292] D.C. MUN. REGS. tit 29 § 6027.8.
[293] 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.
[294] 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.
[295] 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.
[296] CFSA, 2013 ANNUAL REPORT, *supra* note 50, at 11.
[297] *In re* T.J., 666 A.2d 1, 11, 16 (D.C. 1995).

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.[298] 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.[299] The District law is thus similar to statutory preferences in 10 states for placing children in kinship *adoption* homes when adoption is the permanency plan.[300] 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[301] or other family member[302] 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.[303] (The case is now pending

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[298] *Id.* at 4.

[299] *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 (D.C. Sup. Ct. 2003).

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

[301] *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*].

[302] *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).

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

before an *en banc* panel of the Court.[304]) 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 the plan was to reunify the children with their mother.[305] 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.[306] 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.[307]

This case was also notable because the parent and great-aunt's appeal challenged the permanency hearing decision, changing the goal to adoption.[308] 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."[309] 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*

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[304] *In re R.W.*, 91 A.3d 1020
[305] *In re Ta.L.*, 75 A.3d at 125–26.
[306] *Id.* at 126.
[307] *Id.* at 126.
[308] *Id.* at 128–30.
[309] *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 301) (on file with author).

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.[310] 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] care."[311] Federal law rightly suggests that child welfare agencies place siblings together because of the benefits of such placements to children.[312] 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.[313] 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,[314] so it does not get asserted until much time has passed and a permanency decision is all

[310] *In re* Ta.L., 75 A.3d at 126.
[311] *Id.* at 131 n.6.
[312] 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.
[313] *In re* Ta.L., 75 A.3d at 127; *see also id.* 131 & n.6 (same).
[314] S*upra* note 299 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.[315] 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 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

[315] 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.

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.[316] 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.

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.[317] At the very least, Congress should repeal the requirement of an adoption over guardianship hierarchy as a

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

[317] 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.").

condition of federal guardianship subsidy funding. This requirement ossifies the law and prevents states from experimenting with alternative approaches to permanency.[318] 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[319] in favor of one based on research demonstrating that various options along the permanency continuum are equally lasting and beneficial for children.[320]

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.[321] 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 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.[322]

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[318] 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)
[319] *Supra* Part II.B.
[320] *Supra* Part I.A.1.
[321] *Infra* Part IV.E.
[322] S*upra* note 114 and accompanying text (noting such exceptions).

The empirical record discussed above resolves one point of historical dispute—guardianship is just as permanent as adoption.[323] 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.[324] 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[325] with "permanent families day" events. Such small but symbolic efforts can help change the cultural subordination of guardianship discussed in Part II.C.

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

[323] S*upra* notes 39–54 and accompanying text.
[324] *Supra* Part II.E.2.
[325] S*upra* notes 139-145 and accompanying text.

rendering one permanency option generally simpler procedurally than another.[326] Case law that justifies reduced procedural protections because of guardianship's allegedly temporary nature should be reevaluated;[327] 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.[328] 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.[329] Terminations are increasingly reversible (though still not to the same extent as guardianships).[330] And adoptions no longer necessitate removing the title of legal parent.[331] Most fundamentally, the technical differences between adoption and 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,[332] and the result would reduce one of the empirical benefits of guardianship—that children can leave foster care faster.[333] Greater protections are still essential because guardianship represents a severe and lasting limitation on the parent-child relationship, even if such protections slowed permanency.

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[326] *See supra* Part II.D (summarizing procedural differences).
[327] *E.g.* case law discussed s*upra* notes 167–168 and accompanying text.
[328] *See* Gupta-Kagan, *supra* note 32, at __ (describing importance of holding the legal title of "parent").
[329] *Supra* notes74–75 and accompanying text.
[330] 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).
[331] *Supra* notes76–77 and accompanying text.
[332] Testa & Miller, *supra* note 14, at 415.
[333] *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").

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.[334]

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.[335] 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.[336] Third, kinship care likely leads to as good if not better permanency outcomes than non-kinship care.[337]

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

[334] *Supra* notes172–173and accompanying text.
[335] *Supra* notes 85–86 and accompanying text.
[336] *Supra* notes 87–88 and accompanying text.
[337] *Supra* notes 90–92 and accompanying text.

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,[338] 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.[339]

State laws should empower courts to order kinship placements when agencies unreasonably fail to make them. The Indian Child Welfare 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"[340] 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,[341] in particular repealing the regulation prohibiting federal financial support when a court orders a specific placement.[342]

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

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[338] *Supra* note 179179 and accompanying text.

[339] 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.

[340] *Supra* note 178 <<check this>> and accompanying text.

[341] 42 U.S.C. § 672(a)(2)(B) (2010).

[342] 45 C.F.R. § 1356.21(g)(3) (2012). For a discussion of present interpretation of this regulation, *see supra* note 177 and accompanying text.

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.[343]

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 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.[344] Focusing on those positive factors avoids the problem of empowering a parent deemed unfit to control where a child lives.[345]

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.[346] 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.[347] 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.

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[343] 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.
[344] *Supra* notes 310–313 and accompanying text.
[345] *Supra* note 315 and accompanying text.
[346] *Supra* notes 186–187 and accompanying text.
[347] *Supra* notes 151–155 and accompanying text.

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 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.[348] The 2008 federal law providing limited federal funding for guardianship subsidies specifically envisioned that some subsidized guardianships might transform into subsidized adoptions.[349] 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."[350] The Children's Bureau should, therefore, use its authority and insist that states provide data reflecting the new permanency.

[348] *Making It Work*, *supra* note 11, at 12.
[349] 42 U.S.C. § 673(a)(2)(D) (2011).
[350] 42 U.S.C. § 676(b) (2008).

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

Permanency hearings require "momentous" decisions.[351] 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 focuses on the second question,[352] 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.[353] 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

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[351] HARVEY SCHWEITZER & JUDITH LARSEN, FOSTER CARE LAW: A PRIMER 97 (2005).

[352] 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 301. 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.

[353] 42 U.S.C. § 671(a)(15)(C) (2010).

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.

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.[354] 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.[355] 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.[356] 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.[357] 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

[354] Gupta-Kagan, *Due Process Donut Hole*, *supra* note 301.
[355] Sarah Mullin, Reporter, *Foster Care and Permanency Proceedings*, 40 COLUM. J.L. & SOC. PROBS. 495, 500 (2007).
[356] *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.
[357] *Supra* notes 308-313 and accompanying text.

finalized.[358] The disruption rate of pre-adoptive placements is as high as 25 percent for some subpopulations, such as older youth.[359] 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.[360] 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 trust. And in most states, even an adoption can include a post-adoption contact agreement.

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

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

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

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.[361] 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,[362] 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,[363] including much faster paths to both adoption and guardianship. The speed of finalizing adoptions increased 83 percent and guardianship speed skyrocketed 102 percent.[364] 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 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.[365] 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

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[361] *See generally*, Sanger, *supra* note 28 (analogizing negotiating post-adoption contact agreements to plea bargaining).
[362] Missouri v. Frye, 1342 S.Ct 1399, 1407-08 (2012); Lafler v. Cooper, 132 S.Ct. 1376, 1388 (2012).
[363] 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).
[364] *Id.* at 1340.
[365] *Supra* Part III.B.

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,[366] and so has representation after an initial disposition as the parties work towards permanency for foster children.[367] 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.[368]

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. Recognizing the role of foster parents, ASFA required that they be provided notice and an opportunity to be heard in court hearings.[369] 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.[370]

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[366] 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.

[367] *Id.* at 14.

[368] *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).

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

[370] *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).

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.[371] 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,[372] 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.[373]

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.[374]

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.

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

[372] 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.

[373] 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.

[374] 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").

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.

Addendum D

Vivek S. Sankaran & Christopher E. Church, *The Ties That Bind Us: An Empirical, Clinical, and Constitutional Argument Against Terminating Parental Rights*, 61 Family Ct. Rev. 246 (2023), *available at* https://onlinelibrary.wiley.com/doi/epdf/10.1111/fcre.12710

Sankaran & Church (2023), *The Ties That Bind Us: An Empirical, Clinical, and Constitutional Argument Against Terminating Parental Rights*, Family Court Rev., 61(2), 246-264.

The Ties That Bind Us: An Empirical, Clinical, and Constitutional Argument Against Terminating Parental Rights

by Vivek S. Sankaran (University of Michigan School of Law) & Christopher E. Church (University of South Carolina School of Law)

Introduction

In July 2016, Claire took her step-grandson Adam to the emergency room to get him treatment for scabies.[1] Like many American families,[2] Claire was helping raise her grandchildren. At the hospital, the doctor noticed the severity of Adam's scabies and also discovered he had an unexplained fracture, so he called Child Protective Services ("CPS").[3] Claire told the CPS caseworker that Adam was developmentally delayed, his parents were using drugs, and she believed they had not provided appropriate care for Adam in the past.[4] Even though Adam was safe with his grandmother, CPS filed a petition in juvenile court.[5] After a brief stay with strangers in foster care, Adam was permitted by the juvenile court to live with Claire.[6]

Over the next year, Adam remained with his grandmother, while his mother struggled to comply with the State's reunification plan.[7] CPS ultimately filed a

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[1] Facts taken from *A.R. v. D.R.* 456 P.3d 1266, 1272 (Co. 2020); *People in the Interest of A.R.*, 459 P.3d 645, 651 (Co. Ct. App. 2018). Corresponding author served as counsel for *Amicus Curiae* National Association of Counsel for Children; A.R., 456 P.3d at 1270.

[2] *See, e.g.,* Josh Gupta-Kagan, *America's Hidden Foster Care System*, 72 Stan. L. Rev. 841, 861 (2020).

[3] *A.R.*, 456 P.3d at 1272.

[4] *Id.*

[5] *Id.*

[6] *Id.*

[7] *Id.* at 1272-73.

petition requesting the termination of his mother's parental rights.[8] The court scheduled the TPR trial, but after hearing arguments from counsel, decided that "if the Court decided to place the child with … the grandparent [on a long term basis] in this case, that would be a less drastic alternative to termination."[9] This was one of several recognitions by the court that termination was unnecessary because other alternatives were available.

Several months later, the court held another hearing.[10] By this time, CPS had changed its position, asking the court not to terminate parental rights but to instead award custody to Claire.[11] Adam's guardian *ad litem*, however, said his best interests "necessitated termination."[12] The court encouraged the parties to resolve the disagreement, and set another review hearing nine days later.[13] During this hearing, CPS reversed its position and asked the court to issue the TPR order. After an evidentiary hearing, the court signed the order terminating Adam's mother's parental rights.[14] Adam's mother appealed the order.[15]

While the appeal was pending, the court held another review hearing, where it made a stunning admission:

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[8] *Id.* at 1273.
[9] *Id.* at 1274.
[10] *Id.*
[11] *Id.*
[12] *Id.*
[13] *Id.*
[14] *Id.*
[15] *Id.* (more than two years later, the Colorado Supreme Court reversed the TPR decision and remanded the matter back to the trial court).

> The order terminating the parental rights of Respondents is currently on appeal. The Court may have dropped the ball on this case early on. The child has extended family on both sides. There is a less drastic alternative to termination.[16]

The only formal step the court took to acknowledge this was to issue an order stating, "[H]ad court known of extended family, it is likely the court would have denied the motion to terminate mother's parental rights."[17] Of course, this is the very court that placed Adam with his extended family at the outset of the proceedings.[18] So the court did know, but chose to ignore that knowledge.

What is remarkable about this story is how unremarkable it is. Many of the salient facts of Adam's case occur as a matter of routine in America's child protection system. The child protection system ends the legal relationship between children and their parents more than 50,000 times each year.[19] Under the auspices of protecting children, the child protection system terminates parental rights even

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[16] *Id.*

[17] *Id.*

[18] *Id.* at 1272.

[19] CHILD.'S BUREAU, U.S. DEP'T OF HEALTH & HUM. SERVICES, ADOPTION & FOSTER CARE ANALYSIS AND REPORTING SYSTEM (AFCARS) FOSTER CARE FILE, FFY 2010-2019 (2019) [hereinafter 201X FFY AFCARS DATASET]. Unless otherwise noted, data utilized in this Article were made available by the National Data Archive on Child Abuse and Neglect, Cornell University, Ithaca, New York. Data from the Adoption & Foster Care Analysis and Reporting System (AFCARS) are originally collected by state child welfare agencies pursuant to federal reporting requirements. Authors and collaborators at Fostering Court Improvement have analyzed the data and analyses are on file with the corresponding author. Neither the collector of the original data, the Archive, Cornell University, or its agents or employees bear any responsibility for the analyses or interpretations presented here. Data are reported for, and referenced by, the Federal Fiscal Year (FFY), which runs from October 1st in the preceding year through September 30th in the referenced year.

when parents pose no danger, even when children are benefiting from the relationship with their family, and even when the availability of other legal arrangements satisfy the State's *parens patriae* interests in keeping kids safe and providing long-term stability.

For example, despite the court in Adam's case acknowledging "it may have dropped the ball," it did nothing to correct the injustice. This seems to be in part because TPR is part of a broader narrative, predicated on the supremacy of adoption as a permanency disposition,[20] that invites courts to terminate parental rights more often than necessary.[21] TPR is a central feature of the child protection system.

Yet this central feature does not serve the interests of children and their parents, or the system at large. This Article explores this claim from an empirical, clinical, and constitutional lens. Part I explores administrative data related to TPR, which like many child protection metrics, resembles nothing short of a wild west of practices and policies relating to how often and how fast child protection systems terminate parental rights. These data also reveal how TPR can unnecessarily delay legal permanency for children, particularly those children who are living with extended family, and how a State pursuing TPR can drain its own scarce resources, a system perpetually decrying insufficient resources.

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[20] Josh Gupta-Kagan, *The New Permanency*, 19 U.C. Davis J. Juv. L. & Pol'y 1 (2015)

[21] *Id.* at 39-66 (2015); *see also* Ashley Albert & Amy Mulzer, *Adoption Cannot be Reformed*, 12 Colum. J. Race & L. 1, 22-29 (2022).

Part II highlights the clinical research showing the need for children to have relationships with their birth parents, even with those who might be unable to care for them. This section also summarizes the research documenting the trauma experienced by parents who have their parental rights terminated, which might impact the parent's ability to care for other children in the future.

Part III discusses the unconstitutional features of the child protection system's overutilization of TPR. Well-established principles of constitutional law require courts to search for less restrictive alternatives prior to infringing on individuals' fundamental rights, like the right to direct the care of one's child. Still, child protection systems stubbornly persist in terminating parental rights, a thinly veiled effort held out as a means to achieve legal permanency for children despite TPR being neither necessary nor sufficient to achieve legal permanency for children.

The confluence of the clinical research, administrative data, and legal principles envision a child protection system where TPR is exceedingly rare. Of course, TPR is deeply ingrained in the child protection system; it seemingly cannot be untangled from foster care legal proceedings. But our own experience and the experience of those impacted by the child protection system have shown that "the ties that bind us … are tougher than [we can] imagine, or than any one can who has not felt how roughly they may be pulled without breaking."[22] The child protection

[22] ANNE BRONTE, AGNES GREY 187-88 (The Project Gutenberg ed., 1996) (1847) https://www.gutenberg.org/ebooks/767

system has stubbornly pulled at those ties for decades, trying to break them, agnostic to how that might impact children and families. The time for the child protection system to instead honor those ties is overdue.

I. The Wild West of TPR Practices: Exploring the Prevalence of TPR through Administrative Data

Terminating parental rights is the most severe consequence a court can impose on a family during foster care proceedings, as its ramifications are long-term, often final,[23] and can cause irreversible harm and consequences.[24] When a court terminates parental rights, it permanently deprives a parent their right to direct the care of their children, one of the most fundamental and long-standing rights protected by the Constitution.[25] In addition to stripping a parent of that right, it can also lead to a series of collateral consequences including severing sibling relationships, family bonds, and community ties. Because of the severity of its consequences, courts have held that terminating parental rights should be done

[23] Termination of parental rights was long seen as permanent and irrevocable in the child protection system. However, reinstatement statutes and other efforts have emerged to allow a pathway to reinstate parental rights in certain contexts. *See, e.g.,* Lashanda Taylor, *Resurrecting Parents of Legal Orphans: Un-Terminating Parental Rights*, 17 Va. J. Soc. Pol'y & L. 318, 331-344 (2010). Reinstatement statutes and other novel legal arrangements that restore parental rights are not a solution, but evidence of the problem of the child protection's system overuse of termination of parental rights.

[24] *See Helen W. v. Fairfax Cty. Dep't of Hum. Dev.*, 12 Va. App. 877, 883, 407 S.E.2d 25, 28 (1991) (noting that the termination of [residual] parental rights is a grave, drastic and irreversible action); *In re Parental Rts as to N.D.O.*, 115 P.3d 223, 226 (Nev. 2005) ("courts have 'characterized parental rights termination as a "civil death penalty" because legal termination severs the parent-child relationship.'").

[25] *Meyer v. Nebraska*, 262 U.S. 390 (1923).

cautiously, and as a last resort only when needed to protect the safety and stability of children.[26]

Yet TPR remains an all too common feature in the child protection system. Between 2010 and 2015, a period of overall national foster care growth, the child protection system subjected more than 50,000 children each year to TPR.[27] But between 2016 and 2019, despite a decline in the national foster care population, that number increased to at least 60,000 children annually.[28]

There is significant variance across the country as to the prevalence of those TPRs. Relative to its child population, West Virginia's child protection system subjects the most children to TPR: a rate of 51.1 children for every 10,000 children in the population ("per 10K"), more than five times the national rate of 8.9 per 10K.[29]

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[26] *See generally, M.E. v. Shelby Cty. Dep't of Hum. Res.*, 972 So. 2d 89, 102 (Ala. Civ. App. 2007) (noting that "termination of parental rights is a drastic measure and that it is the last and most extreme disposition afforded under the statute [and as such] Alabama reserves termination of parental rights only for *the most egregious cases in which less drastic alternatives are unavailable*.") (emphasis added)

[27] 2010-2015 FFY ACFARS Dataset, *supra* note 19 (2010 FFY n = 52,000; 2011 FFY 51,306; 2012 FFY n = 51,849; 2013 FFY n = 53,564; 2014 FFY n = 56,557; 2015 FFY n = 59,995). Using a linked, longitudinal AFCARS dataset, Fostering Court Improvement created a TPR cohort, which is the dataset utilized in this Article for the referenced year, unless otherwise noted. The TPR cohort for a given year contains the records of all children who experienced their final TPR during the FFY, provided the date of removal preceded the date of TPR, and provided the TPR was the final TPR that resulted in the child having no legal connection to any adult. As to the first criteria, a small number of children with TPR dates had subsequent removal dates, and these children were censored from the dataset, creating an unduplicated TPR cohort. For the 2019 FFY, 327 children's records were censored for this reason, representing one half of one percent of all TPR records in the 2019 FFY. The second criteria typically means the date of TPR represents the date of the second TPR in the dataset, signifying both parents' rights have been terminated.

[28] *Id.* at 2016-2019 FFY (2016 FFY n = 64,724; 2017 FFY n = 65,396; 2018 FFY n = 67,548; 2019 FFY n = 65,139).

[29] *Id.* at 2019 FFY.

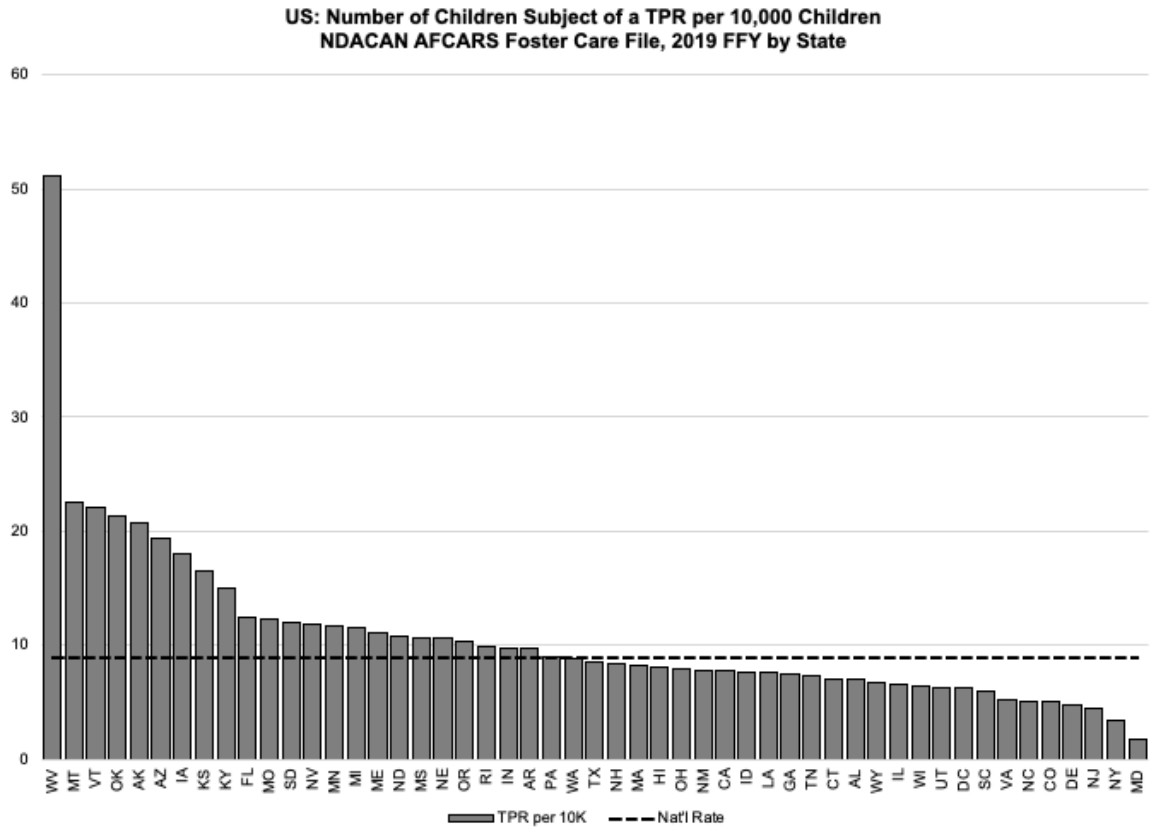

Figure 1: TPR Rate for 2019 FFY, by State

Figure 1 shows TPR rates across all 51 reporting jurisdictions for the 2019 FFY. West Virginia's TPR rate stands so far above the rest primarily because West Virginia boasts the nation's largest foster care population.[30] States like Arizona, Florida, and Oklahoma, for example, have smaller foster care populations than West Virginia, and thus children in those states are less proximate to a potential

[30] *Id.* at 2020 FFYa (as of March 31, 2020, there 7,637 children in foster care in West Virginia, a rate of 214 per 10K, more than three and a half times the national rate of 57.6 per 10K and the highest foster care utilization rate of any jurisdiction).

TPR proceeding initiated by the child protection agency. Still, such states' appetite for TPR concerning children in foster care is strong.[31]

Minority children[32] disproportionately bear the brunt of TPR proceedings. During the 2019 FFY, the rate of TPR for white, non-hispanic children was 8.5 per 10K, compared to 9.4 per 10K for minority children.[33] This imbalance held in 40 of the 51 reporting jurisdictions, with several states reporting minority children experiencing TPR at a rate of three to four times that of white, non-hispanic children.[34]

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[31] *Id.* at 2019 FFY. As a matter of principle, the denominator of any rate should include all children eligible to be in the numerator. Furthermore, child population rates are more stable overtime and are not subject to the influence of the system responsible for initiating TPR proceedings. Thus, this Article uses child population, as opposed to foster care population, as the denominator for TPR rates. However, using the foster care population in this context is illustrative. In Arizona, West Virginia, and Oklahoma, about one in four children in care were the subject of a TPR. Thus, while the authors believe child population is the appropriate denominator, examining the prevalence of TPRs with respect to the foster care population is instructive and adds important context when exploring variance across geographies.

[32] We use the dichotomy of majority v. minority children. In AFCARS, there are 6 options for race and states are encouraged to indicate all that apply. There is also a separate field to indicate hispanic ethnicity. *See* NATIONAL DATA ARCHIVE ON CHILD ABUSE & NEGLECT, AFCARS Foster Care Annual File Code Book, at 22-28 (2021), https://www.ndacan.acf.hhs.gov/datasets/pdfs_user_guides/ afcars-foster-care-file-codebook.pdf. Each year from 2010 FFY to 2019 FFY, white, non-hispanic children represented the majority population (around 55% of the overall population). Thus, in this Article, majority children are defined as those reported in AFCARS as white only and non-hispanic. Minority children are defined as those that selected one or more non-white races and/or indicated hispanic ethnicity.

[33] 2019 FFY AFCARS Dataset, *supra* note 19.

[34] *Id.* (SD TPR'd minority children at a rate of 7.46 times that of white, non-hispanic children. ND was 4.86 times that of white, non-hispanic children. ME was 4.24 times that of white, non-hispanic children. MN was 3.26 times that of white, non-hispanic children. MT was 3.18 times that of white, non-hispanic children. In DC, only one white, non-hispanic child was subject to TPR in 2019FFY).

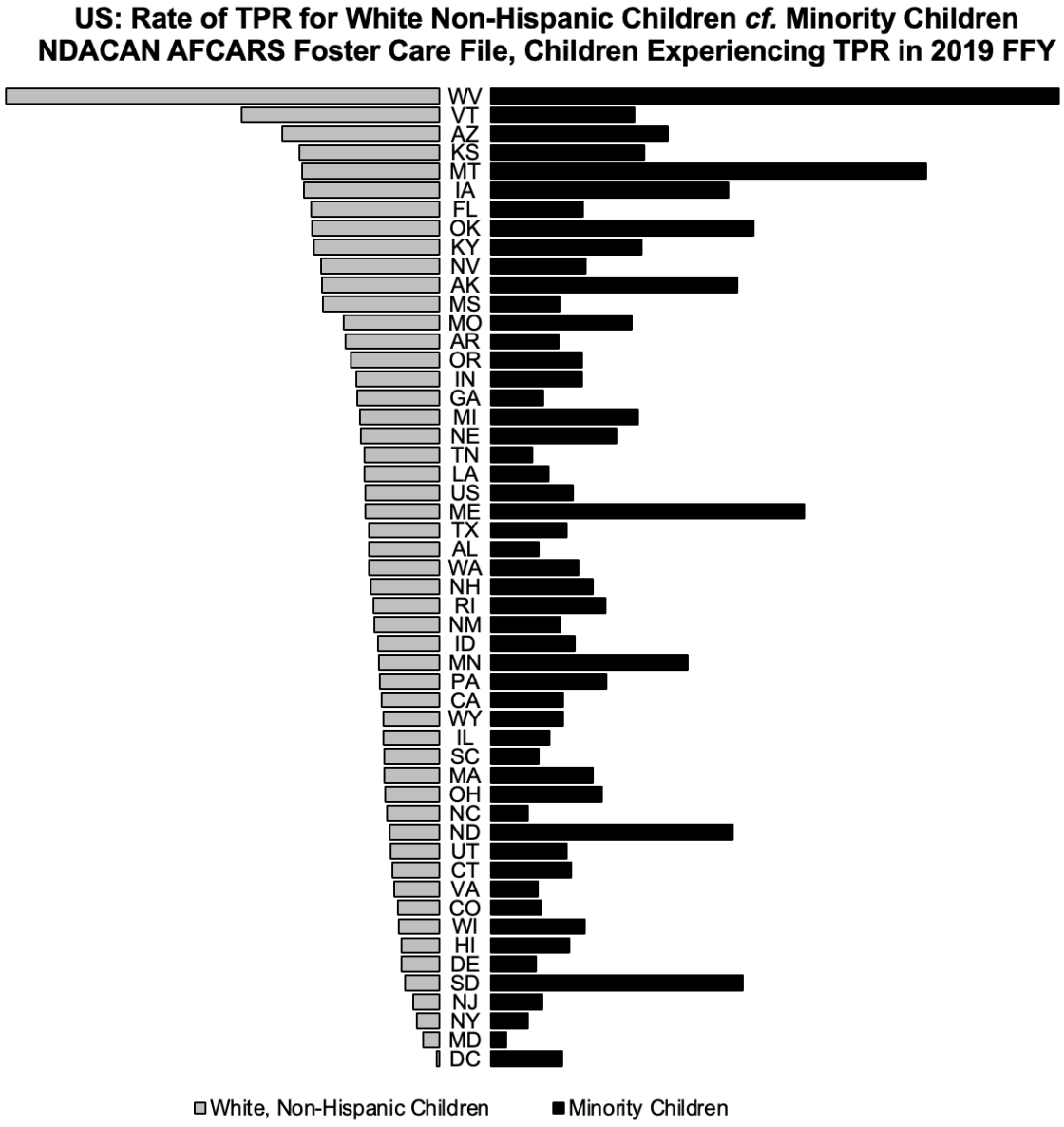

Figure 2: TPR Rate, Majority v. Minority Race

Not only do states vary in how frequently they terminate parental rights, they also vary in how quickly they do so. Among the children experiencing TPR in 2019 FFY, the median time from removal to TPR was just shy of 18 months.[35] As

[35] *Id.*

Figure 3 shows, 72% of TPR's happened within two years of the child's removal and 91% occurred within three years of the child's removal, skewing the distribution towards the first few years of a child's foster care episode.[36] Remarkably, one in four TPRs occurred within one year of a child's removal.[37]

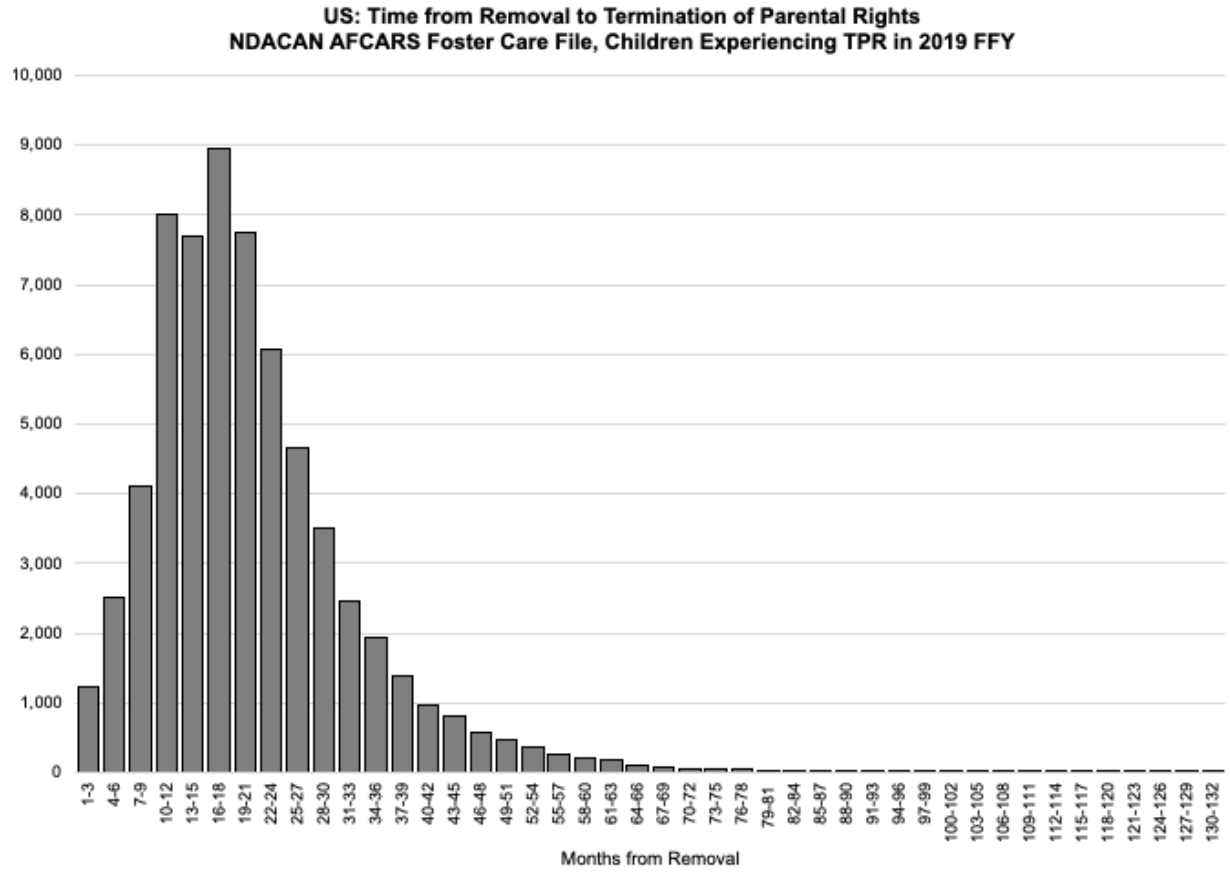

Figure 3: Time from Removal to TPR

Several jurisdictions stand out for the speed at which the State terminates parental rights. Florida and Utah terminate a parent's rights to a significant

[36] *Id.*
[37] *Id.*

number of children at a very accelerated pace. Of the more than 5,000 children in Florida that were TPRd during the 2019 FFY, 114 TPRs occurred within one month of the child's removal, representing 2.2% of all TPRs.[38] This is similar to Utah's rate of 2.93% of TPRs occurring within 30 days of a child's removal.[39] Michigan also TPRs rather quickly, with 6.6% of all TPRs from the 2019 FFY occurring within 90 days of removal, similar to the rate of Florida (5.34%) and Utah (6.36%) for that timeframe.[40] Nationally, only 1.9% of TPRs are completed within 90 days of the child's removal.[41] But Texas, West Virginia, and Utah all completed more than half of their TPRs within one year of the child's removal.[42]

Like many child welfare metrics, whether parental rights are terminated and if so, how quickly it may happen, is significantly impacted by where the family lives. This arbitrariness alone should force advocates to carefully consider why termination of parental rights is necessary to serve the States' *parens patriae* interests.

A. TPR is Neither Necessary nor Sufficient to Achieve Legal Permanency

TPR is frequently justified by actors within state child protection systems as necessary to achieve legal permanency for children in foster care. Adam's GAL

[38] *Id.*
[39] *Id.*
[40] *Id.*
[41] *Id.*
[42] *Id.*

stated this explicitly.[43] This argument fails for two reasons. First, in nearly all state child protection systems, while TPR is necessary to finalize a legal adoption, it is not sufficient.[44] TPR does not guarantee adoption. Of the 52,000 children subject to a TPR during the 2010 FFY, 12% were not adopted as of the 2019 FFY.[45] The outcomes for these children are dire.

Second, there are legal permanency dispositions that do not require TPR as a requisite legal action. These dispositions are creatures of state statute, but common dispositions include custody to a relative or guardianship.[46] Unsurprisingly, states that rely more heavily on these dispositions generally TPR fewer children. For example, as Figure 1 shows, Alabama has the 14th lowest TPR rate nationally, and discharges the most children to relative custody.[47] Wisconsin has the 11th lowest TPR rate and discharges 19% of children to guardianships, nearly double the national rate of 10% and the third most across all states.[48] North Carolina has the sixth lowest TPR rate and discharges the most children to guardianships.[49]

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[43] *A.R.*, 456 P.3d at 1274.

[44] Josh Gupta-Kagan, *Non-Exclusive Adoption & Child Welfare,* 66 Ala. L. Rev. 715, 721-24 (2015).

[45] 2010-2019 FFY ACFARS Dataset, *supra* note 19.

[46] Gupta-Kagan, *The New Permanency*, *supra* note 20, at 12-35; *see, e.g.,* S.C. Stat. § 63-7-20(13)-(16) (defining and distinguishing between legal guardianship of a child and legal custody of a child); S.C. Stat. § 63-7-1700(C)(2) (2022) (outlining permanency plans to include "custody *or* guardianship with a fit and willing relative") (emphasis added)

[47] 2019 FFY ACFARS Dataset, *supra* note 19 (Alabama discharged 30% of children to relative custody, 5 times the national rate of 6%).

[48] *Id.*

[49] *Id.* (22% of children discharged in NC during the 2019 FFY were discharged to Guardianship).

Of course, jurisdictions cannot be so cleanly characterized, and Kentucky represents an interesting counter narrative. Despite discharging the second most children to relative custody (28% of all discharges), Kentucky has the 9th highest TPR rate.[50] Why is Kentucky subjecting so many children to TPR? Not all these children are being adopted: as of March 31, 2020, Kentucky had 2,303 legal orphans in foster care, a rate of 23 per 10K, more than double the national rate of 10 per 10K and the fourth most of any jurisdiction.[51] Unsurprisingly, Kentucky discharges more legal orphans to non-permanent dispositions,[52] such as emancipation.[53]

Although not unique to Kentucky, this highlights a different concern about the child protection system's utilization of TPR, in that it cannot be an end in of itself. As Professor Gupta-Kagan states, the current child protection legal framework "emphasizes terminations as a default pathway to permanency, specifically, to traditional, exclusive adoption."[54] While there is some debate among scholars about how often TPR is needed,[55] that debate assumes TPR is "inextricably linked with permanency."[56] As Kentucky and other state data highlight, this is not

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[50] *Id.* (KY's TPR rate was 15 per 10K children, and 17.3 per 10K for minority children).
[51] *Id.* at 2020 FFYa AFCARS dataset.
[52] *Id.* (of the 1,464 children in Kentucky discharged to a non-permanent disposition (emancipation, runaway, death, transfer to another agency), 9% were legal orphans, more than double the national rate of 4% and the third most across all reporting jurisdictions).
[53] *See* NDACAN, *AFCARS Foster Care Annual File Codebook*, 98 (2021), https://www.ndacan.acf.hhs.gov/datasets/pdfs_user_guides/afcars-foster-care-file-codebook.pdf (defining emancipation as a discharge reason, characterizing children that "reached majority according to the law by virtue of age, marriage, etc.").
[54] Gupta-Kagan, *The New Permanency*, *supra* note 20, at 15.
[55] *Id.* at 15-16.
[56] *Id.*

the case. While the ideological underpinnings of termination of parental rights may be tethered to adoption, the effect of the child protection's system overutilization of TPR is that children languish in foster care as legal orphans, and some even reach adulthood without a legal connection to any adult.[57]

B. A Case Study in Unnecessary TPRs: Relative Adoptions

In the case that opens this Article, Adam is very fortunate. Despite being in foster care, Adam had lived with his grandmother, Claire, for the entire duration of his foster care episode (sans a brief stay in stranger foster care upon removal).[58] Remarkably, nearly a third of all children TPRd during the 2019 FFY were placed with a relative at the time of TPR.[59] In Maryland and Arizona, more than half of all children TPRd were living with a relative at the time of their TPR.[60] For minority children subject to a TPR in 2019 FFY, 54.7% were living with a relative at the time of their TPR. In California, Alaska, New Mexico, Hawaii, and DC, more than 4 out of 5 minority children who were TPR'd were living with a relative at the time of their TPR.[61]

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[57] 2020 FFYa ACFARS Dataset, *supra* note 19 (On March 31, 2020, there were 72,936 legal orphans in foster care. Between April 1, 2019 and March 31, 2020, 2,774 legal orphans were discharged from foster care to a non-permanent disposition, the most common such disposition being emancipation).
[58] *A.R.*, 456 P.3d at 1272.
[59] 2019 FFY AFCARS Foster Care Dataset, *supra* note 19.
[60] *Id.* (Maryland = 62.5% and Arizona = 51.8%).
[61] *Id.* (California = 80.8%, Alaska = 84.3%, New Mexico = 87.1%, Hawaii = 90.1%, and all minority children in DC).

Claire repeatedly affirmed her interest in raising Adam.[62] In addition, a maternal grandmother came forward who was also willing to assume parental responsibilities for Adam.[63] She attempted to formally intervene in the TPR proceeding and informed the court on multiple occasions she was also willing to assume full parental responsibilities.[64] Adam had two caring grandparents willing and ready to assume full-time custody, which did not require terminating the mother's parental rights. Yet the court blithely proceeded to terminate parental rights despite the availability of other options that could have kept the parent-child relationship intact.[65]

As in Adam's case, many relatives who are willing to care for children are pushed towards adoption - which requires a TPR - even though other permanency options are available. During the 2019 FFY, there were nearly 64,000 children discharged from foster care to adoption.[66] Public adoption files contain information on about 54,000 of those children, or 85%.[67] Among those 54,000 children, nearly 20,000 were adopted by a relative, representing 35% of all adoptions.[68] In one out of

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[62] *A.R.*, 456 P.3d at 1273.
[63] *Id.*
[64] *Id.*
[65] *Id.* at 1273-74.
[66] 2019 FFY AFCARS Foster Care Dataset, *supra* note 19.
[67] AFCARS contains separate Foster Care and Adoption datasets for each FFY. Thus far, this Article has relied entirely on the Foster Care file. However, the adoption file contains additional data related to the children that are adopted and the families into which they are adopted. Fostering Court Improvement links these datasets. For the 2019 FFY, Fostering Court Improvement was able to link 85% of the adoption records in the Foster Care file to the Adoption file, hereinafter referred to as the 2019 FFY AFCARS Linked Adoption Dataset.
[68] *Id.*

every three adoptions, actors within child protection systems were terminating the parental rights of a child in one instance - permanently severing ties to their family - and recreating those ties, in part at least, via adoption with a shuffled cast of characters.

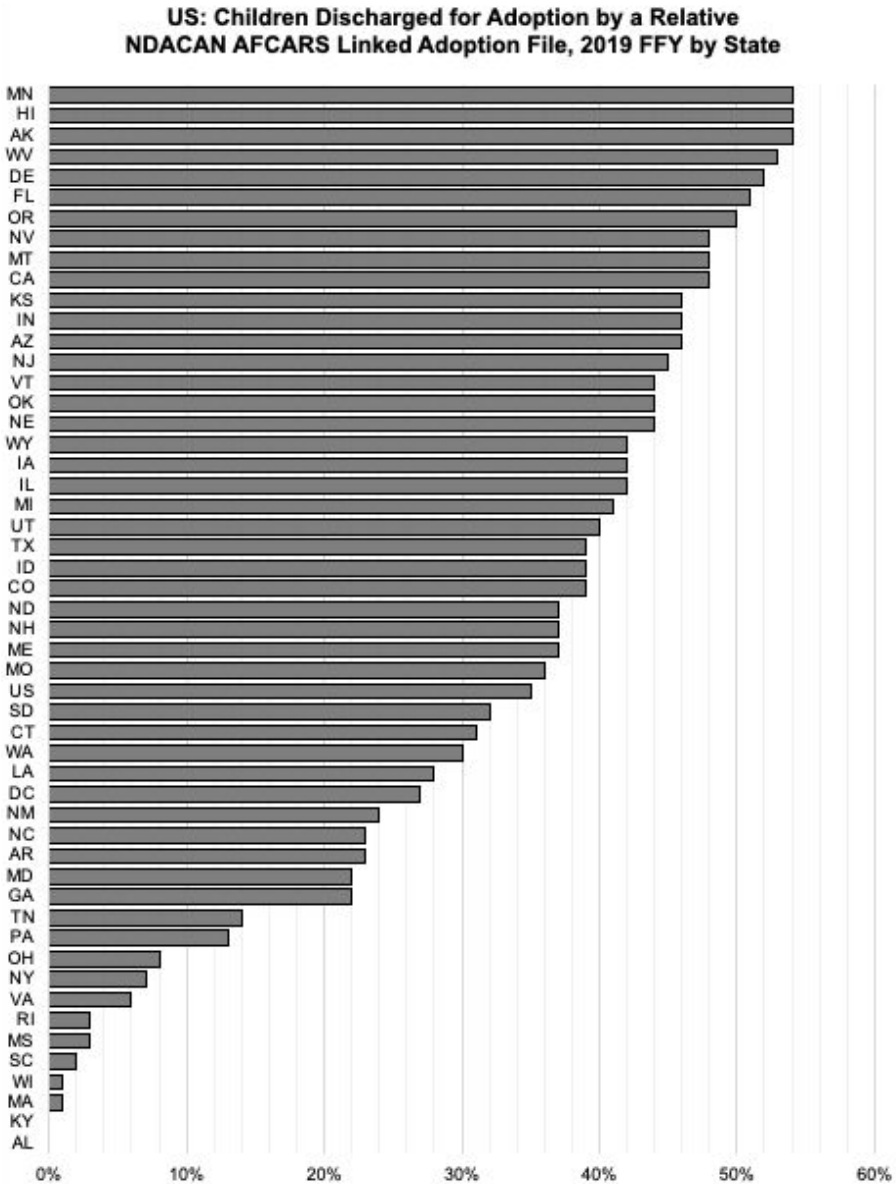

Figure 4: Relative Adoptions

In some jurisdictions, relative adoptions account for more than half of all foster care adoptions.[69] But adoption is not necessary to achieve permanency in these cases: alternatives such as guardianship or relative custody (that do not require a TPR) are available to legally secure the relationship between the child and their kin. Jurisdictions that rely more heavily on dispositions like guardianship or relative custody (that do not require a TPR) do far fewer relative adoptions. As Figure 4 reflects, Alabama and Kentucky reported zero relative adoptions in their public adoption files,[70] but Alabama and Kentucky discharge the most children to relative custody.[71] South Carolina reported that only 2% of adoptions were to a relative of the child, but South Carolina discharges the third most children to relative custody.[72]

Funneling relatives towards adoption as a means to achieve legal permanency for children in foster care is not without its costs. Relative custody and guardianship can both be achieved more timely than adoption. Nationally, the median time from removal to relative custody was 5.7 months.[73] The median time from removal to guardianship was 17.4 months.[74] Both of these legal dispositions

[69] 2020 FFYa AFCARS Linked Adoption Dataset, *supra* note 19 (Alaska, Hawaii, Minnesota = 54%; West Virginia = 53%; Delaware = 52%; Florida = 51%; Oregon = 50%).
[70] *Id.* (71% of AL adoptions and 75% of KY adoptions were able to be linked in the AFCARS Adoption and Foster Care datasets).
[71] *Id.* at 2019 FFYA AFCARS Foster Care Dataset, *supra* note 19. (30% of Alabama discharges and 28% of Kentucky discharges were to the custody of a relative, compared to 6% nationally).
[72] *Id.* (27% of discharges in South Carolina were to relative custody).
[73] 2020 FFYa AFCARS Foster Care Dataset, *supra* note 19.
[74] *Id.*

take considerably less time to finalize than adoption, which has a median time from removal to discharge of 28.5 months.[75] Since adoption requires a court to terminate a parent's rights as a prerequisite, those proceedings might require a contested trial and lengthy appeals.

Returning to Adam's case, it is easy to see how the child protection agency's pursuit of TPR could significantly delay permanency for children. Adam was living with his grandmother, and she was willing to raise him.[76] A second grandmother was also willing to raise Adam.[77] The court had two options that would have allowed Adam to achieve legal permanency, and bring his foster care case to an end.[78] But rather than work with Claire or the other grandparent to finalize legal permanency via guardianship or custody, the child protection agency and guardian *ad litem* focused on pursuing termination of parental rights.[79] That involved drafting and filing a written motion, serving all parties, preparing for trial and litigating the matter: all these efforts take time and require the state to expend resources.[80] Once the child protection agency proved to the court that reunification was not appropriate, Adam could instead have been discharged from foster care to

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[75] *Id.*

[76] *A.R.*, 456 P.3d at 1272.

[77] *Id.* at 1273.

[78] Based on the facts of this case, one could easily argue Adam never had any need for foster care placement. He was being cared for by his grandmother, Claire, an arrangement often called informal kinship care, as is the living situation for millions of children across the nation. At the end of the case, Adam was likely going to remain in her care. It is difficult to pinpoint what state interest the child protection agency advanced by interfering in this family's affairs.

[79] *A.R.*, 456 P.3d at 1273.

[80] Co. St. §§ 19-3-602; 607-610 (2018).

live with Claire.[81] If Claire needed financial assistance to care for Adam, the agency could have supported Claire via state welfare programs such as TANF and more directly with a subsidized guardianship.[82] Within six months of his removal, Adam could have been sent home with Claire via a subsidized guardianship.[83] Instead, the child protection system set its course on terminating parental rights to free Adam for an adoption that was not needed.

The State's emphasis on termination imposed costs on both Adam and the State. Adam entered care in July 2016.[84] About a year later, the child protection agency filed a termination for parental rights.[85] At that time, presumably, reunification had been ruled out. Around July 2017, Adam could have been legally discharged to the custody of Claire, the person he had lived with for quite some time. Instead, the child protection agency and guardian *ad litem* argued it would be in Adam's best interest to stay in foster care while they pursued TPR.[86] Adam's mother's appeal – which successfully overturned the TPR - was resolved in 2020, with proceedings remanded to the juvenile court.[87] From July 2017 until early 2020, Adam remained in foster care. This required that Adam receive monthly caseworker

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[81] Co. St. § 19-3-702(4)(a)(III) (2021).

[82] *See, e.g.,* Co. St. § 26-5-110 (2019).

[83] *Id.* at (2)(a)(II) (to be eligible for a subsidy under Colorado law, a child must have lived with a relative for six consecutive months); *see also, A.R.*, 456 P.3d at 1272 (Claire easily satisfied this criteria at the time the child protection agency indicated to the court it intended to file a motion for termination of parental rights).

[84] *A.R.*, 456 P.3d at 1272.

[85] *Id.*

[86] *Id.* at 1272-73.

[87] *Id.* at 1274.

visits from a caseworker who was almost already certainly stretched too thin due to high caseloads.[88] It also required that Adam be subjected to periodic court reviews involving attorneys, judges, court staff, and other professionals.[89] None of these expenditures of time and resources would have been necessary had Adam been discharged to Claire's custody.

If timely permanency is a core tenet of the child protection system, then legal discharges that minimize the time children spend in foster care should be prioritized. Presumably, adoption takes longer than other dispositions because it requires termination of parental rights as a prerequisite, a procedurally lengthy process that neither relative custody nor legal guardianship require. In fact, the median time from removal to TPR was 18 months, a month longer than the median time from removal to *discharge* to legal guardianship and more than three times the median time to *discharge* to relative custody.[90] In other words, just getting past the procedural prerequisite to adoption - termination of parental rights - takes longer than *finalizing* a permanency plan of relative custody or guardianship. If timely permanency for children is a priority, relative custody and subsidized guardianship can help states achieve it. Every day Adam spent in foster care after around July 2017 - including the pendency of his mother's appeal to protect her fundamental

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[88] *See, e.g.,* Evan Wylode and Christopehr Osher, *Colorado Child Protective Agencies Still Falling Short Despite Pledges to Increase Staffing,* THE DENVER GAZETTE (Jan. 3, 2021), https://www.9news.com/article/news/local/colorado-child-protective-agencies-still-falling-short/73-a29bc65c-74dd-48e3-928a-fabb428b1f6c

[89] Co. St. § 19-3-702.5 (2019).

[90] 2020 FFYa AFCARS Foster Care Dataset, *supra* note 19.

right to maintain a relationship with Adam - represents an unnecessary day in foster care.

The data demonstrate that not only is TPR used inconsistently across the country, pursuing it can delay permanency for children and waste scarce public resources. The next section details the clinical harm that TPR inflicts on families in the system.

II. Unnecessarily Terminating Parental Rights Harms Children, Parents And The Child Protection System

A. Children Often Remain Connected With Parents, Even If Parents Cannot Care For Them.

Each time a court terminates the rights of a parent to a child, it can inflict harm to children and parents. The child suffers the loss of a legally-protected relationship with their parent. But unlike other types of losses – like a death – which bring with them a sense of certainty and finality, terminating parental rights creates "ambiguous loss."[91] Such a loss occurs "when an individual experiences a lack of clarity about a loved one's physical and/or psychological presence."[92]

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[91] TPR has been characterized and referred to as the equivalent of the "civil death penalty." *See, e.g.,* Ashley Albert, et. al., *Ending the Family Death Penalty and Building a World We Deserve*, 11 Columbia J. of Race and L. 861 (2021); Angel Philip & Eli Hager, *The Death Penalty of Child Welfare Cases: In Six Months or Less, Some Parents Lose Their Kids Forever,* Pro Publica (Dec. 20, 2022), https://www.propublica.org/article/six-months-or-less-parents-lose-kids-forever; Stephanie Gwillim, *The Death Penalty of Civil Cases: The Need for Individualized Assessment & Judicial Education When Terminating Parental Rights of Mentally Ill Individuals*, 29 Saint Louis Univ. Public L. Rev. 341, 344 (2009) (using the term throughout and also citing to judicial opinions that invoke thie phrase). The research on ambiguous loss reveals how incorrect this characterization may be, and that TPR perhaps would be more appropriately characterized as far worse than the equivalent of the death penalty for civil cases.

[92] Mitchell, Monique, *The Family Dance: Ambiguous Loss, Meaning Making, And The Psychological Family in Foster Care*. 8 J. of Family Theory and Rev. 361 (Sept. 2016).

Research reveals that an ambiguous loss can be the most distressful of losses because "it is unclear, there is no closure, and without meaning, there is no hope."[93] According to Dr. Pauline Boss, the leading researcher on the topic, "People hunger for certainty.[94] Even certain knowledge of death is more welcome than a continuation of doubt."[95] Thus, Boss theorizes that the inability to resolve situations causes "pain, confusion, shock, distress and often immobilization" and that this pain can become "chronic."[96] It can also lead to "rigidity, denial, black-and white thinking" and externalizing behaviors including "intense expressions of anger" and "bullying."[97] Exacerbating this impact, individuals dealing with these losses must often navigate these feelings on their own because "society does not recognize the loss, lacks rituals to grieve the loss, or there is no end to the uncertainty, and therefore no hope for true closure."[98]

Studies have shown that children whose parents' rights have been terminated experience ambiguous loss. They still maintain "significant psychological ties" to their birth family and grieve their loss even as they bond with

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[93] *Id.* at 362.
[94] *Id.*
[95] *Id.*
[96] *Id.*
[97] Robert E. Lee & Jason B. Whiting, *Foster Children's Expressions Of Ambiguous Loss*, 35 Am. J. Fam. Therapy 419, 425-426 (2007); Pauline Boss, *Ambiguous Loss Research, Theory, And Practice: Reflections After 9/11*, 66 J. Marriage & Fam. 553-554 (2004).
[98] Gina Miranda Samuels, *A Reason, A Season, Or A Lifetime: Relational Permanence Among Young Adults With Foster Care Backgrounds*, Chapin Hall Center for Children 13 (2008).

their adoptive parents.[99] Terminating parental relationships can raise a "lifetime of questions for children about their identities as members of their families of origin and their degree to which they can ever become 'real' members within a foster or adoptive family system."[100] Adoptees who lack access to connecting with their birth families feel that "no matter how they are loved, wanted, and wished for, they understand that a crucial part of them is lost."[101] Stories after stories of adopted children searching for their birth families highlight the connection so many adopted children yearn for. Even when birth parents cannot care for children full-time, children often look to them to "provide emotional support and a sense of relational continuity."[102]

The words of youth adopted out of foster care capture these feelings. One youth stated, "We never felt part of the [adoptive] family. . . . You know, no matter how much they tell you they love you, or how much they treat you . . . you always know that you don't belong."[103] Another noted, "I would drop my life at the drop of a

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[99] Matthew B. Johnson, *Examining Risks To Children In The Context Of Parental Rights Termination Proceedings*, 22 N.Y.U. Rev. L. & Soc. Change 414 (1996); *see also* Margaret Beyer & Wallace J. Mlyniec, *Lifelines to Biological Parents: Their Effect on Termination of Parental Rights and Permanence*, 20 Fam. L.Q., 237-240 (1986) (describing the role of the family of origin as the child's "primary lifeline").

[100] Samuels, Gina Miranda, *Ambiguous Loss of Home: The Experience of Familial (Im)permanence Among Young Adults with Foster Care Backgrounds*, 31 Child. & Youth Serv. Rev. 1229 (2009).

[101] Glaser, Gabrielle, *American Baby* 185 (2021).

[102] Creamer, Kathleen and Lee, April, *Reimagining Permanency: The Struggle for Racial Equity and Lifelong Connections*, Family Integrity and Justice Quarterly, 62, 80 (Winter 2022) *available at* https://publications.pubknow.com/view/752322160/.

[103] Rolock, Nancy and Perez, Alfred G., *Three Sides to a Foster Care Story: An Examination of the Lived Experiences of Young Adults, Their Foster Care Record, and the Space Between*, 17 Qualitative Social Work 208 (2018).

dime if my mother needed me to do anything . . . It's so hard not to think about her or call her and talk to her."[104]

Consistent with these sentiments, one survey showed that only 41% of children over six adopted out of foster care expressed having a very warm and close relationship with their adoptive parent.[105] The same survey noted that a third of children adopted out of foster care had a relationship more difficult than they expected with their adoptive parent.[106] Often, in the words of researcher Monique Mitchell, "they are grieving the loss of their identities and their role within their psychological family."[107] So they experience feelings of fear, anger, abandonment, shame, embarrassment, and low self-esteem.[108]

These challenges are even greater for children whose legal relationship with their parents is terminated, but later "age out" of foster care instead of being discharged to live with a family. Since the enactment of the Adoption and Safe Families Act, more than 200,000 children have had rights to their parents terminated, but never achieved permanency.[109] These children are discharged from

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[104] Sanchez, Reina M., *Youth Perspectives on Permanency* 9 (2004), *available at* http://ocfcpacourts.us/wp-content/uploads/2020/06/Youth_Perspectives_001026.pdf.

[105] ASPE Research Brief, *Children Adopted from Foster Care: Child and Family Characteristics, Adoption Motivation and Well-Being*, (2011) *available at* https://aspe.hhs.gov/reports/children-adopted-foster-care-child-family-characteristics-adoption-motivation-well-being-0.

[106] *Id.*

[107] Mitchell, *supra* note 91, at 369.

[108] Glaser, *supra* note 99, at 186, 189, 270.

[109] Martin Guggenheim, *The Failure to Repeal the Adoption and Safe Families Act Will Long be a Stain on this Period of American History,* Family Integrity & Justice Quarterly 54, 57 (Winter 2022), available at https://publications.pubknow.com/view/752322160.

foster care system without the support of a legal caretaker, and without a tether to anyone; they are often forced into a life of homelessness, incarceration, and unemployment.[110] Without legally secure relationships with caretakers to help guide them, these children are ill-equipped to navigate life on their own.

The federal government, in a 2021 information memorandum, recognized that unnecessarily terminating parental rights can harm children. It observed that "children have inherent attachments and connections with their families of origin that should be protected and preserved whenever safely possible."[111] It further noted that "children in foster care should not have to choose between families."[112] Rather, the system "should offer them the opportunity to expand family relationships, not sever or replace them."[113]

Ironically, for decades, laws governing child custody disputes between parents have recognized the benefits children receive from maintaining relationships with parents, even those who cannot care for them.[114] Many states maintain a presumption that parents will share custody of their children, even if

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[110] *Id.* at 59. *See also*, *Santosky v. Kramer*, 455 U.S. 745, 766, n. 15 (1982) (observing that "termination of parental rights [does not] necessarily ensure adoption."); *New Jersey Div. of Youth & Fam. Servs v E.P.*, 952 A.2d 436, 448 (N.J. 2008) (observing that "[t]ermination of parental rights does not always result in permanent placement of the child" and that "too many children freed up for adoption do not in the end find permanent homes.").

[111] Administration for Children and Families, IM 21-01, *Achieving Permanency For The Well-being Of Children And Youth* 2 (January 5, 2021) *available at* https://www.acf.hhs.gov/media/17507.

[112] *Id.* at 10.

[113] *Id.*

[114] Garrison, Marsha, *Why Terminate Parental Rights*, 35 Stan. L. Rev. 423, 454 (1983).

the parental relationship dissolves.[115] Family courts in private custody matters are very reluctant to deny visitation to a parent, absent exceptional circumstances.[116] Rarely - and only in situations of extreme abuse or abandonment - will a court even consider terminating a parent's rights in the context of a private custody dispute. And yet, in the foster care system, where a child protection agency persuades the court that a parent cannot care for a child, the system pivots to trying to terminate that parent's relationship with their children. There has been very little effort to explain the discordance between the laws and policies governing private custody disputes and those governing foster care.

B. ***Parents Experience Pain And Trauma When Their Rights To Children Are Terminated.***

Not only does terminating parental rights have the potential of harming children, it also inflicts pain on parents. Parents with children permanently removed from their care often experience "disenfranchised grief," or grief not formally recognized and sanctioned by society.[117] One researcher wrote, "Mourners whose grief is disenfranchised are cut off from social supports. With few opportunities to express and resolve their grief, they feel alienated from their

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[115] Gupta-Kagan, *Non-Exclusive Adoption, supra* note 44.
[116] Robert Mnookin & D. Kelly Weisberg, *Child, Family and State: Problems and Materials on Children and the Law* Aspen Publishers, Inc., NY, 962-970 (4th ed. 2000).
[117] McKegney, Sherrie, *Silenced Suffering: The Disenfranchised Grief Of Birth Mothers Compulsorily Separated From Their Children* 36, Thesis, McGill University (2003) *available at* https://www-proquest-com.proxy.lib.umich.edu/docview/305074522?pq-origsite=summon.

community and tend to hold onto their grief more tenaciously than they might if their grief was recognized."[118]

Unsurprisingly, parents report increases in mental illness, substance abuse, anxiety, and depression after they lose rights to their children.[119] The loss of their children also heightens their "structural vulnerability" by increasing risks of housing instability, intimate partner violence, and the initiation of drug use and sex work.[120] A study found that mothers used drugs to numb the pain of their loss and engaged in reckless behaviors because they no longer cared about bad things happening to them.[121] One parent described that permanently losing custody of her children made it difficult to be around any kids, while another stated that it turned her into a "paranoid nut."[122] Another described the headaches and nosebleeds she started to experience while another described her head as "always feeling tight."[123] A third stated that being separated from your children "changes your whole way of thinking, it makes you like a stone inside after. And that is what I feel like now. A

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[118] *Id.* at 36.

[119] Wall-Wieler, Elizabeth, et al., *Maternal Health And Social Outcomes After Having A Child Taken Into Care: Population-Based Longitudinal Cohort Study Using Linkable Administrative Data*, 71 J. Epidemiol. Community Health 1148-1150 (2017).

[120] Kenny, Kathleen, et al., *I Felt For A Long Time That Everything Beautiful In Me Had Been Taken Out: Women's Suffering, Remembering And Survival Following The Loss Of Child Custody*, 26 International Journal Of Drug Policy 1158-1166 (Nov. 2015).

[121] *Id.*

[122] McKegney, *supra* note 114.

[123] Nixon, Kendra, et al., *Every Day It Takes A Piece Of You Away: Experience Of Grief And Loss Among Abused Mothers Involved With Child Protective Services*, 7 Journal of Public Child Welfare 172-193 (2012).

stone."[124] Studies have shown that the physical and emotional manifestations of grief, are not alleviated by a belief that their child might be in a better home.[125] Considering that many of these parents continue to raise other children, the impact of these effects might be felt for generations.[126]

C. Unnecessarily Terminating Parental Rights Harms Extended Family Members, Delays Permanency And Wastes Public Dollars.

The impact of a system that unnecessarily terminates parental rights extends beyond the harm to children and parents. A little over a third of children in foster care live with extended family members, many of whom do not want to terminate the parental rights of their kin.[127] Relying on extended family has long been prevalent in the African-American community, as reflective of both a culture of shared responsibility for children and as a strategy to cope with economic, social and political pressures.[128] As such, millions of children in the United States - outside of the foster care system - live in informal arrangements with relatives.[129]

And yet, when children enter the foster care system and live with kin, often the system forces those kin to adopt the children in their care, thereby necessitating

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[124] McKegney, *supra* note 114, at 62.
[125] Glaser, *supra* note 99, at 270.
[126] McKegney, *supra* note 114, at 65.
[127] Williams, Sarah Catherine and Sepulveda, Kristin, *The Share Of Children In Foster Care Living With Relatives Is Growing*, Child Trends (2019), https://www.childtrends.org/blog/the-share-of-children-in-foster-care-living-with-relatives-is-growing.
[128] Coupet, Sacha, *Ain't I A Parent - Exclusion Of Kinship Caregivers From The Debate Over Expansions Of Parenthood*, 34 NYU Rev. L & Soc. Change 595, 606 (2010).
[129] *Id.* at 603-604.

the termination parental rights. Many kin do not want to initiate TPR proceedings, because they don't want to disrupt family relationships.[130] To some relatives, termination of parental rights is seen as a "bureaucratic imposition," unnecessarily interjecting more adversarialness into an already tense situation that could be dealt with in other ways.[131] Rather than looking to the family to make a decision on what custodial arrangement may best suit their needs, the system often insists on terminating parental rights to facilitate an adoption that the extended family may not even want. As one author concluded, "Kinship caregivers, unlike non-kin adoptive parents, are already related in meaningful ways, and they should not be forced to alter these relations in exchange for access to much needed and deserved benefits."[132] In other words, "some relatives may prefer to retain their extended family identity as grandmother, aunt or cousin rather than become mom or dad."[133]

The adversarialness that is created by the TPR process is not only off-putting to relatives, it also ends up delaying permanency for children and wasting scarce public dollars. As noted in Part I, when the State seeks to terminate parental

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[130] Gupta-Kagan, Non-Exclusive Adoption, *supra* note 44, at 722 (noting reluctance of many kinship caregivers to terminate parental rights).

[131] Statement by Jess McDonald, Director, Illinois Department of Children and Family Services, Hearing Before the Subcommittee on Human Resources, Committee on Ways and Means, House Representatives on H.R. 867, 105th Congress at 38 (April 8, 1997).

[132] Coupet, Sacha, *Swimming Upstream Against the Great Adoption Tide: Making the Case for "Impermanence*, 34 Cap. U. L. Rev. 405, 411 (2005)

[133] 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, 510 (2005).

rights, it often results in a highly contested trial that may last days, weeks, or sometimes months. The trial may drive a wedge in the family and may create even more distance between parents and those caring for their children. If a court terminates parental rights, an appeal may ensue – as it did in Adam's case – which might last several years. During all of this time, children languish in state custody.

In contrast, pursuing a custodial arrangement that does not involve terminating a parent's rights may result in a collaborative, consensual arrangement, like a guardianship. Research reveals that states that prioritized guardianship not only reduced the time to permanency for children in foster care, they also saved considerable money due to the reduced numbers of days children spent in foster care.[134] For example, through a special guardianship waiver program, the Tennessee child protection system found that it had saved one million dollars.[135] Through a similar program, Illinois saved 54 million dollars over five years.[136] Establishing legally secure relationships through dispositions that did not require TPR saved money by expediting permanency for kids.

D. TPR Does Not Lead To More Permanent Placements

The harm that TPR inflicts on families and the system might be worth bearing if it led to more permanent, long-term placements for children. But

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[134] US Dep't of Health and Human Services, Administration for Children and Families, Children's Bureau, *Synthesis of Findings, Subsidized Guardianships, Child Welfare Demonstration Demonstrations* at iv, 18 (2011), *available at* https://www.acf.hhs.gov/cb/report/synthesis-findings-subsidized-guardianship-child-welfare-waiver-demonstrations-2011

[135] *Id.* at 4.

[136] *Id.* at 29.

numerous studies by Mark Testa and others have shown that guardianships - which do not require terminating a parent's rights - are as legally secure as adoptions - which do require termination.[137] Testa found that a caregiver's commitment to the child, the child's sense of belonging, and the length of the placement bore very little relationship to the particular form of legal permanency chosen by the family.[138] Testa found that both guardianships and adoptions were quite stable once achieved and so there was no reason why the child protection system should necessarily favor one option over the other.[139] Based on the research, Testa concluded, "[i]n 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 [federal] requirement that a state" rule out adoption before providing a caregiver with a guardianship subsidy.[140] Even the federal government has conceded that children discharged from foster care with leally secured guardianships have living arrangements just as stable as those in other legal statuses.[141]

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[137] Testa, *supra* note 133, at 528. *Coupet, supra* note 128, at 610.

[138] Testa, supra note 133, at 528. *See also* Katz, Sarah, *The Value of Permanency: State Implementation of Legal Guardianship Under the Adoption and Safe Families Act of 1997,* 4 Mich St. L. Rev. 1079, 1090 (2013) (noting findings that the youth's desire for family connections were a far greater motivating factor in their desire for permanency than any notion of legal permanency.).

[139] *Id.*

[140] Testa, Mark, *Disrupting The Foster Care To TPR Pipeline: Making A Case For Kinship Guardianship As The Next Best Alternative For Children Who Can't Be Reunified With Their Parents*, Family Integrity and Justice Quarterly 74, 76 (Winter 2022), https://publications.pubknow.com/view/752322160/.

[141] United States Dep't of Health and Human Services, *supra* note 131, at ii (noting no significant differences in entry to foster care between children in guardianships and adoptions).

While Testa's research demonstrates that termination of parental rights is unnecessary to afford children permanency, it is also important to note that statistics about the permanency of adoptions are incomplete, as most states do not track or report how many children re-enter foster care after an adoption.[142] Once a child is adopted, most states create a fresh federal identification number for that child.[143] Thus, in most states, it is simply impossible to track when an adopted child re-enters foster care. Only 16 states had federal identification numbers that allowed children from failed adoptions to be linked to prior foster care records.[144] Thus, any public reporting of the number of adopted children who once again enter foster care is likely an underestimate.

Even with these limited data, a recent study found that more than 66,000 adopted children ended up back in foster care between 2008 to 2020, an average of 12 a day.[145] A disproportionate number of those children were black; they faced more than a 50% greater risk of adoption failure than a white child.[146] After those adoptions failed and children re-entered foster care, 40% of those children spent

[142] Bajak, Aleszu, *Broken Adoptions, Buried Records: How States' Adoption Data Is Failing Adoptees*, USA Today (May 19, 2022).
[143] *Id.*
[144] *Id.*
[145] Kwiatkowski, Marisa and Bajak, Aleszu, *Far From The Fairy Tale: Broken Adoptions Shatter Promises To 66,000 Kids In The US*, USA Today (May 19, 2022)
[146] *Id.*

time in group homes or institutional placements, such as a residential treatment facility.[147]

Neither these studies nor this Article is meant to suggest that an adoption is categorically inappropriate to meet the individual needs of children and their caretakers. When children have been severely harmed by their parents, or have been living with extended family for many years and parents have been completely absent, a termination of parental rights and a subsequent adoption might make some sense. But these studies should raise serious concerns about the overuse of TPRs under the false guise that it is necessary to achieve permanency for a child. That assertion is simply incorrect and has been disproven by multiple studies. Given the harms created by TPR and the research establishing the security of alternative custodial arrangements, a legal framework defaulting to TPR whenever reunification is ruled out is untenable.

IV. Unnecessarily Terminating Parental Rights Violates The Constitution

In addition to posing risks to the welfare of both children and parents, terminating a parent's rights also has significant constitutional implications – it erases a parent's constitutional right under the Fourteenth Amendment to direct the care, custody and control of their child. This right, "perhaps the oldest of the fundamental liberty interests recognized,"[148] does not evaporate simply because [the

[147] *Id.*

[148] *Troxel v. Granville*, 530 US 57, 65 (2000) (citing *Meyer v. Nebraska*, 262 U.S. 390, 399 (1923).

parents] have not been model parents or have lost temporary custody of their children to the state."[149] Rather, because "few consequences of judicial action or so grave as the severance of natural family ties,"[150] parents "faced with the forced dissolution of their parental rights have a more critical need for . . . protection [] than do those resisting state intervention into ongoing family affairs."[151]

Typically, when the state seeks to end a fundamental right, its actions are reviewed by courts under strict scrutiny. Under this standard, the state must demonstrate a compelling interest and show that its actions are narrowly tailored to achieve that interest,[152] that is, infringe upon a fundamental right "no more than the exact source of the evil it seeks to remedy."[153] The burden the state bears is an exacting one. To meet this burden, the government must demonstrate that its purpose is both constitutionally permissible and substantial, and that its laws are necessary to the accomplishment of its purpose."[154] Where a statute is too broad, it is not narrowly tailored.[155] Rather, to survive strict scrutiny, it must further the state's compelling interest by the least restrictive means practically available.[156] In

[149] *Santosky v. Kramer*, 455 U.S. 745, 753 (1982).
[150] *M.L.B. v S.L.J.*, 519 U.S. 102, 119 (1996).
[151] *Santosky v. Kramer*, 455 U.S. 745, 753 (1982).
[152] *Citizens United v. Fed Election Comm'n*, 558 U.S. 310, 340 (2010).
[153] *Frisby v. Schultz*, 487 U.S. 474, 485 (1988); *see also Zablocki v. Redhail*, 434 U.S. 374, 388 (1978).
[154] *Fisher v. University of Texas*, U.S. 300, 309 (2013).
[155] *Zablocki*, 434 U.S. 389-390.
[156] *Bernal v. Fainter*, 467 U.S. 216 (1984).

other words, the State cannot burden "more persons than necessary to cure the problem."[157]

While the United State Supreme Court has not had the opportunity to review the constitutionality of grounds for terminating parental rights, numerous state courts have made clear that this standard applies in assessing whether a TPR violates a parent's rights.[158] As stated succinctly by the Alabama Court of Appeals:

> That due-process right requires states to use the most narrowly tailored means of achieving the state's goal of protecting children from parental harm. Roe v. Conn, 417 F. Supp. 769, 779 (M.D. Ala. 1976). Thus, if some less drastic alternative to termination of parental rights can be used that will simultaneously protect the children from parental harm and preserve the beneficial aspects of the family relationship, then a juvenile court ***must explore*** whether that alternative can be successfully employed instead of terminating parental rights.[159] T.D.K. v. L.A.W., 78 So. 3d 1006, 1011 (Ala. Civ. App. 2011) (emphasis added).[160]

Employing a strict scrutiny analysis would render many TPR decisions unconstitutional. Courts have repeatedly acknowledged that the State has compelling interests to keep children safe from unfit parents and to expedite their

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[157] Black's Law Dictionary 1278-1279 (10th ed. 2014).

[158] *In the matte of the appeal in Maricopa County Juvenile Action No JS-7359*, 159 Ariz. 232, 236 (1989); *In re Welfare of C.B.*, 134 Wn. App. 336 (Wash. Ct. App. 2006); *In re Welfare of the Child of R.D.L.*, 853 N.W.2d 127 (Minn. 2014); *Ailport v. Ailport*, 2022 WY 43, (Wy. 2022); *State v. Abigail W.*, 797 N.W.2d 936 (Wisc. Ct. App. 2011); *In Interest of P.S.*, 766 S.W.2d 8331 (Tex. Ct. App. 1989); *In re D.C.D.*, 629 Pa. 325 (Pa. 2014); *Doe v. Doe*, 2017 Miss. App. LEXIS 62 (Miss. Ct. App. 2017); *Pitts v. Moore*, 2014 ME 59 (Me. 2014); *In re Adoption of K.A.S.*, 499 N.W.2d 558 (N.D. 1993); *In re the Adoption of J.K.W.*, 2007 Tenn. App. LEXIS 32 (Tenn. Ct. App. 2007); *Ex parte Beasley*, 564 So. 2d 950 (Ala. 1990); *Johnson v. Johnson*, 2000 ND 170, (N.D. 2000)

[159] *T.D.K. v. L.A.W.*, 78 So. 3d 1006, 1011 (Ala. Civ. App. 2011) (emphasis added).

[160] Numerous appellate courts in Alabama have struck down TPR decisions because other viable alternatives to TPR existed. *See*, *e.g.*, *B.A.M. v. Cullman County Dep't of Human Res.*, 150 So.3d 782 (Ala. Civ. App. 2014); *M.H. v. Calhoun County Dep't of Human Res.*, 848 So. 2d 1011 (Ala. Civ. App. 2002)*Ex Parte State Dep't of Human Res.*, 624 So. 2d 589 (Ala. 1993); Ex Parte Ogle, 516 So.2d 243 (Ala. 1987); *Moore v. Dep't of Pensions and Sec.*, 470 So.2d 1269 (Ala. Civ. App. 1985).

placement into permanent homes.[161] But the key question under this level of review is whether TPR is the least restrictive means available to accomplish the State's objectives. In other words, do any alternatives exist that could provide children with safety and permanency without terminating their parental rights? If so, then terminating that parent's rights would be constitutionally impermissible.

As noted above, research by Mark Testa and others demonstrates that other forms of permanency - mainly guardianships - are as permanent as adoptions but do not require terminating a parent's rights. Courts can order guardianships in a wide array of situations in which a child is living with either kin or non-kin.[162] Additionally, tribal courts have long permitted customary adoptions, which permit caregivers to adopt children while keeping parental rights intact.[163] California, Minnesota, and Washington all have laws permitting state courts to order customary adoptions in cases involving Indian children.[164] There is no reason why that practice could not be extended to all families in the foster care system.

When a child is living with another parent, permanency could be pursued through a private custody order, which again does not require a parent's rights to be terminated. Such orders - once entered into - are difficult to modify and require the

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[161] *See*, *e.g. Santosky v. Kramer*, 455 U.S. 745, 766-767 (noting that the State's interest in a child protection proceeding is to keep a child safe and provide that child with a permanent home).
[162] Gupta-Kagan, *The New Permanency*, at 14-29, *supra* note 20.
[163] Paula Polasky, *Customary Adoptions for Non-Indian Children: Borrowing from Tribal Traditions to Encourage Permanency for Legal Orphans Through Bypassing Termination of Parental Rights*, 30 Law and Ineq. 401 (2012)
[164] *Id.* at 403.

parent who wants to change the order to demonstrate that there has been a substantial and material change of circumstances since the entry of the order and that the modification is in the child's best interests. Appellate courts across the country have developed extensive case law applying this standard.[165]

The Constitution requires the foster care system to develop options that could keep children safe in permanent homes while also preserving parental rights intact whenever possible. For example, the federal government should offer subsidies to anyone who cares for a child long-term via a custody or guardianship arrangement, and not limit subsidies to those who adopt children or to relative caregivers who seek a guardianship, as it does right now.[166] The federal government should also require states, as a condition of receiving federal funding, to demonstrate that termination of parental rights is the least restrictive option to further the State's interest and TPR is necessary to achieve permanency for the child.

Until such a framework is adopted in a jurisdiction, advocates should challenge the constitutionality of TPR statutes, both on substantive grounds concerning a parent's fitness and whether TPR is the least restrictive alternative. For example, advocates have persuaded state courts to invalidate statutes permitting TPRs based solely on a parent's prior TPR,[167] on the fact that a child had

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[165] *See*, *e.g. Vodvarka v. Grasmeyer*, 259 Mich. App. 499, 513 (Mich. Ct. App. 2003) (holding that a custody order may only be modified when "the conditions surrounding custody of the child, which have or could have a significant effect on the child's well-being, have materially changed.").

[166] 42 U.S.C 673(d)(limiting federal guardianship subsidies to kinship caregivers)..

[167] *In re Gach*, 315 Mich. App. 83 (Mich. Ct. App. 2016).

spent a certain amount of time in foster care,[168] or on specific criminal convictions that failed to establish a parent's current unfitness.[169]

Additionally, advocates have succeeded in persuading courts to reverse TPRs where less restrictive alternatives, like a guardianship or a custody order, were available that would serve the state's interests while preserving the parent-child relationship.[170] If advocates have constitutional concerns with the state's actions, they should file a motion in the trial court raising those concerns to preserve issues for appellate review.

V. Conclusion

The child protection system severs the legal relationship between children and their parents in a manner that ignores both the fundamental rights of parents and the emotional needs of children and their families. Actors within the system have become complacent to this reality, blindly accepting the prevalence of TPRs as a necessary component of a functioning system. It is our hope that this Article will cause some to pause and reflect about why the child protection system must

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[168] *In re H.G.,* 757 N.E.2d 864, 874 (Ill. 2001).

[169] *In re S.F.*, 834 N.E.2d 453, 451 (Ill. App. Ct. 2005).

[170] *See, e.g.*, *L.M.W. v. D.J.*, 116 So.3d 220 (Ala. Civ. App. 2012) (holding that given the child's and parent's wishes to maintain a relationship, TPR was not in the child's best interest despite the grandparent's preference for adoption); *Matter of A.K.O.*, 850 S.E.2d 891 (N.C. 2020) (reversing TPR because 15 year old child had a strong bond with her parents, did not consent to adoption and TPR was unnecessary for legal guardianship); *Matter of R.D.D.G*, 442 P.3d 1100 (Or. 2019) reversing TPR concluding that legal guardianship would preserve the child's relationship with her birth mother and extended family).

terminate the relationship between a parent and their child so often. Although admittedly, reflection might not be enough:

> I believe writing can be a moral instrument if it asks you to do more than read. *Do you?* How many times will you witness people being starved or worked to death, driven out of their homelands, the land blasted and lives destroyed, and be only quietly horrified? When will you finally be repulsed enough to throw a wrench in the works? When will you allow curiosity and integrity to tip over into urgency? *I'm asking you.* I'm asking myself to dig deep enough for the truth to flood in.[171]

Thus, our hope can also be characterized as one urging advocates to throw a wrench in the works. Use the law, the data, and the research to demand systemic reforms that will relegate the use of TPR to only those rarest of circumstances when no alternative exists to satisfy the state's interest.

[171] IMANI PERRY, SOUTH TO AMERICA: A JOURNEY BELOW THE MASON-DIXON TO UNDERSTAND THE SOUL OF A NATION, 382 (HarperCollins 2022) (emphasis added).

Addendum E

Barbara J. Elias-Perciful, *Constitutional Rights of Children in Child Protection Cases*, Tex. Lawyers for Children (2020)

CONSTITUTIONAL RIGHTS OF CHILDREN IN CHILD PROTECTION CASES

by:

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I. INTRODUCTION

The United States Supreme Court has long recognized that the United States Constitution protects children. "Whatever may be their precise impact, neither the Fourteenth Amendment, nor the Bill of Rights, is for adults alone." *In re Gault,* 387 U.S. 1, 13 (1967). Furthermore, "Constitutional rights do not mature and come into being magically only when one attains the state-defined age of majority. Minors, as well as adults, are protected by the Constitution and possess constitutional rights." *Planned Parenthood of Central Missouri v. Danforth,* 428 U.S. 52, 74 (1976).

This paper focuses on the rights of children under the U.S. Constitution that can most readily impact obtaining needed relief and services for them in child protection cases. The rights discussed, of course, must be considered in the context of the state's compelling interest in protecting children. Although children have constitutional rights in several other contexts, such as juvenile delinquency cases, free speech, and the right of privacy, including the right to an abortion, those areas are beyond the scope of this paper, as is the child's right to counsel in a child welfare proceeding. This paper also does not address issues regarding litigation of violations of constitutional rights, such as proper parties, qualified immunity, or the standard of liability.

By addressing the nature of the rights and case law supporting the assertion of children's constitutional rights, the author seeks not only to heighten awareness of the importance of safeguarding these rights, but also to promote their use in individual day-to-day child welfare proceedings. The cases cited also can be used in legislative advocacy to ensure that all aspects of the child protection system in each state are funded sufficiently to fully protect the rights of the children in state care. By this paper the author does not seek to promote lawsuits against state child welfare agencies, but rather to encourage judges and attorneys to give the utmost consideration to protecting children's constitutional rights throughout all stages of a child's

involvement in the child welfare system, including post- disposition of the initial child abuse case for those children who remain in the custody of the state.

II. RIGHTS OF FOSTER CHILDREN TO PROTECTION AND PROPER CARE

Overview

The Fourteenth Amendment provides that no State shall "deprive any person of life, liberty or property, without due process of law." The Due Process Clause has a procedural and a substantive component. The procedural component relates to ensuring that fair process is employed when the state seeks to deprive a person of life, liberty, or property. The substantive component "provides heightened protection against government interference with certain fundamental rights and liberty interests." *Washington v. Glucksberg*, 521 U. S. 702, 720 (1997).

Based upon the substantive component of the Due Process Clause, every federal circuit court has determined that children involved in state child welfare systems have a constitutionally protected right to be protected and properly cared for when the state has exercised the requisite degree of control over them to impact their liberty interests. As will be discussed, although the U.S. Supreme Court has intimated that such a right exists for children, it has not addressed this question directly to date. The circuit courts have expressed the basis for this constitutional right in various ways. Broadly put, however, they have found that children "in the system" have a right to protection and proper care that reaches a constitutional imperative. Child advocates can draw upon this right to articulate more precise definitions of what protection and care are constitutionally mandated, such as the right to be protected from abuse, neglect, or other maltreatment in foster and other placements; the right not to deteriorate while in state custody; the right to adequate food, clothing, and shelter; and, the right to adequate medical services. This portion of the paper discusses case law that supports an advocate's position that a constitutional right to proper protection and care for children in the child welfare system exists and how that authority can be utilized to support more

specific relief that the advocate's child client needs.

Discussion of Case Law

The U.S. Supreme Court has not yet addressed the issue of whether a state has an affirmative duty to protect a foster child in its custody. In *DeShaney v. Winnebago Cty. Dept. of Social Servs.*, 489 U.S. 189 (1989), the Supreme Court held that the substantive component of the Fourteenth Amendment's Due Process Clause does not require a state to protect the life, liberty, or property of a child (or any citizen) against invasion by *private actors*. 489 U.S. at 194-95 (emphasis added). Nonetheless, *DeShaney* stands as a basis for many lower court holdings that the Due Process Clause creates a duty to protect children in the state's care.

In *DeShaney*, the child, Joshua DeShaney, was severely beaten by his father after numerous complaints to the child welfare agency (DSS) that he was being physically abused. *Id.* at 192-93. At one point, DSS had even temporarily removed Joshua from his father's custody but later returned him. *Id.* Despite the agency's notice and awareness of the potential abuse, the Supreme Court concluded that the Due Process Clause "is phrased as a limitation on the State's power to act, not as a guarantee of certain minimal levels of safety and security. It forbids the State itself to deprive individuals of life, liberty or property without 'due process of law,' but its language cannot fairly be extended to impose an affirmative obligation on the state to ensure that those interests do not come to harm through other means." *Id.* at 195. Thus, the Court concluded that since Joshua was beaten while in the custody of his father, the state did not have an affirmative duty to protect him. Nonetheless, the Court acknowledged:

> [W]hen the State takes a person into its custody and holds him there against his will, the Constitution imposes upon it a corresponding duty to assume some responsibility for his safety and general well-being . . . . The affirmative duty to protect arises not from the State's knowledge of the individual's predicament or from its expressions of intent to help him, but from the limitation which it has imposed on his freedom to act on his own behalf
> . . . . In the substantive due process analysis, it is the State's affirmative act of restraining the individual's freedom to act on his own behalf—through incarceration, institutionalization, or

> other similar restraint of personal liberty–which is the "deprivation of liberty" triggering the protections of the Due Process Clause, not its failure to act to protect his liberty interests against harms inflicted by other means.

Id. at 199-200.

The Court left open the question of what the state's duty would have been if Joshua had been in its custody:

> Had the State by the affirmative exercise of its power removed Joshua from free society and placed him in a foster home operated by its agents, we might have a situation sufficiently analogous to incarceration or institutionalization to give rise to an affirmative duty to protect. Indeed, several Courts of Appeals have held . . . that the State may be held liable under the Due Process Clause for failing to protect children in foster homes from mistreatment at the hands of their foster parents. [citations omitted]. We express no view on the validity of this analogy, however, as it is not before us in the present case."

Id. at 201 n. 9.

However, both pre- and post- *DeShaney,* numerous federal circuit courts have held that once a state takes a child into its custody, the state has an affirmative duty to guard the child's constitutional right to protection and proper care. The earliest circuit court case on this issue is *Doe v. New York City Dept. of Social Servs.,* 649 F.2d 134 (2d Cir. 1981), after remand, 709 F.2d 782, *cert. denied sub nom.*, *Catholic Home Bureau v. Doe,* 464 U.S. 864 (1983). In *Doe*, the Second Circuit reviewed the case of a child in state custody who claimed a constitutional right not to be abused in a foster care setting. The child, Anna Doe, testified in the lower court that she had been regularly and frequently beaten and sexually abused by her foster father. She claimed that the New York City Department of Social Services and the child-placing agency overseeing her foster home were responsible for her injuries because they had failed to investigate her circumstances even after repeated incidents should have alerted them to the abuse. The lower court entered judgment based on the jury's finding of no liability, but the Second Circuit reversed based on erroneous jury instructions and evidentiary rulings and remanded the case. The Second Circuit stated, "Government officials may be held liable…for a failure to do what is required as well as

for overt activity which is unlawful and harmful." *Id.* The court ruled that "[d]efendants may be held liable…if they…exhibited deliberate indifference to a known injury, a known risk, or a specific duty, and their failure to perform the duty or act to ameliorate the risk or injury was a proximate cause of plaintiff's deprivation of rights under the Constitution." *Id.* at 145.

Similarly, the Eleventh Circuit has held "that a child involuntarily placed in a foster home is in a situation so analogous to a prisoner in a penal institution" that the foster child is entitled to protection under the Fourteenth Amendment. *Taylor ex rel. Walker v. Ledbetter*, 818 F.2d 791 (11th Cir. 1987) (en banc). *cert. denied*, 489 U.S. 1065 (1989). In *Taylor*, a two- year-old child had been placed in a foster home where she was so severely physically abused by her foster mother that she remained in a comatose state. The Eleventh Circuit explained that "[t]he liberty interests in this case are the right to be free from the infliction of unnecessary pain, as that interest is protected by the fifth and fourteenth amendments, and the fundamental right to physical safety as protected by the fourteenth amendment." *Id*. at 794. The court further expounded:

> [I]f foster parents with whom the state places a child injure the child, and that injury results from state action or inaction, a balancing of interests may show a deprivation of liberty…. In this case, the child's physical safety was a primary objective in placing the child in the foster home. The state's action in assuming the responsibility of finding and keeping the child in a safe environment placed an obligation on the state to insure the continuing safety in that environment. The state's failure to meet that obligation, as evidenced by the child's injuries, in the absence of overriding societal interests, constituted a deprivation of liberty under the fourteenth amendment.

Id. at 795.

The court distinguished harm in a foster home from corporal punishment in the public schools by explaining:

> In the foster home setting, recent events lead us to believe that the risk of harm to children is high. We believe the risk of harm is great enough to bring foster children under the umbrella of protection afforded by the fourteenth amendment. Children in foster homes, unlike children in public schools, are isolated; no persons outside the home setting are present to witness and report mistreatment. The children are helpless. Without the investigation, supervision, and constant contact required by statute, a child placed in a foster home is at the mercy of the

> foster parents…. With contemporary society's outrage at the exposure of defenseless children to gross mistreatment and abuse, it is time that the law gives to these defenseless children at least the same protection afforded adults who are imprisoned as a result of their own misdeeds.

Id. at 797.

Likewise, the Seventh Circuit in *K.H. ex rel. Murphy v. Morgan*, 914 F.2d 846 (7th Cir. 1990), found that a foster child has a constitutional "right not to be placed with a foster parent who the state's caseworkers and supervisors know or suspect is likely to abuse or neglect the foster child." *Id.* at 853. In this case, the state had placed the plaintiff in a series of foster homes and had failed "to take steps to prevent the child from deteriorating physically or psychologically as a result of either mistreatment by one or more sets of foster parents or the frequency with which the child is moved about within the foster-home system or, as in this case, both." *Id.* at 851. The court further stated that it should have been obvious that a state could not avoid its responsibilities "merely by delegating custodial responsibility to irresponsible private persons…." *Id.*

Additionally, in *Yvonne L. v. New Mexico Dept. of Human Servs.,* 959 F.2d 883 (10th Cir. 1992), the Tenth Circuit held that foster children have "a clearly established right to protection while in foster care." *Id*. at 892-93. In this case, children in the legal custody of the state were placed in a private foster care facility that was not properly monitored, so they suffered repeated physical and sexual abuse while living there. The court found that the children had a constitutional right to be reasonably safe from harm while in the custody of the state.

More recently, the 10th Circuit held that a social worker violated a child's substantive due process rights by "knowingly placing [the child] in a position of danger and knowingly increasing [the child's] vulnerability to danger." *T.D. v. Patton,* 868 F.3d 1209, 1212 (10th Cir. 2017), *cert. denied, Patton v. T.D.*, 2018 U.S. LEXIS 1591 (2018). In *T.D.,* the social worker was responsible for removing the child from his home, placing him into state custody, and recommending that he

be placed and remain in the custody of his father. Notably, the social worker withheld from the court damaging information about the father's previous criminal history of abuse, as well as his failure to comply with probation requirements. *Id.* at 1215-1216. In addition, the social worker failed to conduct site visits as required by policy and did not adequately investigate outcries of abuse made by the child and concerns expressed by the school. *Id.* at 1217. The social worker expressed that, despite her concerns, she recommended that the father should have custody and withheld or removed contrary information out of a fear of being fired. *Id.* at 1218. After the child was removed from his father's home for sexual contact with a half-brother, the state investigated and found that the child had suffered repeated sexual and physical abuse by his father while in temporary custody. *Id.* at 1218-19. The court found that the social worker's affirmative actions to remove the child from his home and recommend the child's placement with his father, intentional withholding of the father's prior criminal history of abuse from the court, awareness of and failure to investigate potential abuse, and withholding of her own concerns about the child's safety were reckless and "exceeded 'ordinary negligence' or 'permitting unreasonable risks' and rose 'to a degree of outrageousness and a magnitude of potential or actual harm that is truly conscience shocking'" and a reasonable official in the social worker's position would have "understood that her conduct was a constitutional violation." *Id.* at 1230-1231.

The Eighth Circuit has also concluded that children who are placed in a foster home by the state have the right to state-provided medical care, protection, and supervision. In *Norfleet v. Arkansas Dept. of Human Servs.*, 989 F.2d 289 (8th Cir. 1993), a child suffered an asthma attack while in the care of his babysitter, who took the child to a hospital, where the babysitter was arrested for an undisclosed reason. The child was released into the custody of the child welfare agency, which placed the child in a foster home. The child suffered breathing problems and was told by the foster parent to return to bed. The child was later taken to a hospital and pronounced dead. The

Eighth Circuit found a special custodial relationship between the state and the child because the state had taken him from his caregiver and placed him in foster care. The court held that due to the nature of this relationship, the state had an obligation to provide the child with adequate medical care, protection, and supervision. *Id.* at 293.

In *Henry A. v. Willden*, the child-plaintiffs adequately stated a claim for relief based on their "right to be free from harm while involuntarily in government custody and their right to medical care, treatment, and services." *Henry A. v. Willden*, 678 F.3d 991, 1001 (9th Cir. 2012). The Ninth Circuit decided that the plaintiffs had stated enough to allege a violation of their constitutional rights when several plaintiffs had medical complications after mistakes or delay by the county. *Id.* at 997. For example, one child had ten treatment providers while in care and, as a result, his medical records were not transferred properly, which resulted in being hospitalized after receiving the wrong medications and then being hospitalized for the same problem shortly after release. *Id.* Another example in the complaint was that the county delayed in approving necessary surgery to cure a child's impacted colon. *Id.* The child suffered several months of pain before the doctor could declare it an emergency surgery and proceed without the county's consent. *Id.* The last medical treatment allegation was that a foster family did not receive the proper documentation from the county to be authorized to fill prescriptions for the foster child just released from a psychiatric facility, which forced the child to go through withdrawal symptoms. *Id.* Because of these allegations, the court found that the plaintiffs had sufficiently alleged a violation of the children's constitutional substantive due process rights. In doing so, the court stated, "[T]here is no question that a foster child's right to the basic needs identified in *DeShaney* – food, clothing, shelter, medical care, and reasonable safety – was clearly established 'at the time of the challenged conduct'." *Id.* at 1000-01 (internal citation omitted).

In *Braam v. State*, 81 P.3d 851 (Wash. 2003), the Washington Supreme Court cited over

twenty years of precedent affirming that foster children possess substantive due process rights under the U.S. Constitution. The court held that "foster children have a constitutional substantive due process right to be free from unreasonable risks of harm and a right to reasonable safety. To be reasonably safe, the State, as custodian and caretaker of foster children, must provide conditions free of unreasonable risk of danger, harm, or pain, and must include adequate services to meet the basic needs of the child." *Id.* at 856-57.

The Fifth Circuit has acknowledged that a state creates a "special relationship" when it removes children "from their natural homes and place[s] them under state supervision. At that time, [the state] assume[s] the responsibility to provide constitutionally adequate care for these children." *Griffith v. Johnston*, 899 F.2d 1427, 1439 (5th Cir. 1990). Although the court did not find a potential violation of the children's constitutional rights under the claims in this case, the court did acknowledge the existence of those rights.

In a subsequent case, the Fifth Circuit recognized a foster child's substantive due process right to "personal security and reasonably safe living conditions." *Hernandez ex rel. Hernandez v. Texas Dept. of Protective & Regulatory Services*, 380 F.3d 872, 880 (5th Cir. 2004). The question raised in this case was whether the implicated Child Protective Services workers were entitled to qualified immunity after placing a child in a foster home that had multiple prior allegations of abuse and reports of poor living conditions. *See id.* at 876-78. Even though the court ultimately found that qualified immunity and official immunity applied because the conduct did not amount to "deliberate indifference," the court pointed out that the right was established from the "special relationship" between the foster child and the state. *Id.* at 878, 880, 886.

Finally, it is important to note that the circuit courts have articulated a perspective on *DeShaney* and how it impacts a foster child's constitutional right to proper care that does not necessarily turn on the state's exercising a restraint on the child's liberty by taking the child into custody. Instead, all the

circuit courts have also recognized an "exception to *DeShaney* for 'state-created dangers.'" *Jasinski v. Tyler*, 729 F.3d 531, 538 (6th Cir. 2013). In doing so, they point to the *DeShaney* Court's comment: "While the State may have been aware of the dangers that Joshua faced in the free world, *it played no part in their creation, nor did it do anything to render him any more vulnerable to them*." *Id*. at 538. Extrapolating from this statement, the Sixth Circuit articulated this exception as follows:

> [A] plaintiff may bring a substantive due process claim by establishing (1) an affirmative act by the State that either created or increased the risk that the plaintiff would be exposed to private acts of violence; (2) a special danger to the plaintiff created by state action, as distinguished from a risk that affects the public at large; and (3) the requisite state culpability to establish a substantive due process violation.

Id. at 538-39. Accordingly, where a state can be shown to have created the danger – even apart from taking the child into its custody -- the child's substantive due process right to proper protection and care may also arise. *See also Butera v. District of* Columbia, 235 F.3d 637, 648-49 (D.C. Cir. 2001) ("All circuit courts of appeals . . . have by now relied on this passage in *DeShaney* to acknowledge that there may be possible constitutional liability . . . where the state creates a dangerous situation or renders citizens more vulnerable to danger.") (internal quotation marks omitted).

Recently, there have been numerous class action suits brought on behalf of statewide classes of foster children. The Fifth Circuit recently reviewed the following opinion and orders in a Texas class action suit, *M.D. v. Abbott*: Memorandum of Opinion and Verdict ("Opinion"), 152 F.Supp.3d 684 (S.D. Tex. 2015); Interim Order Regarding Special Masters' Recommendations ("Interim Order"), 2017 U.S. Dist. LEXIS 2939 (S.D. Tex. 2017); and, Final Order Case No. 2:11-cv-00084, Doc. 559 (S.D. Tex. 2018) ("Final Order"). In that case, the federal district court named a general class for foster children in the permanent managing conservatorship in Texas (the state's "long-term foster care" designation, otherwise known as "PMC"). 152 F.Supp.3d at 690. The court found that "rape, abuse, psychotropic medication, and instability" were the "norm" for these children and that

they "almost uniformly leave State custody more damaged than when they entered." *Id.* at 828. After hearing testimony from experts and other witnesses and reviewing evidence that outlines the experiences of the named plaintiffs, the court concluded:

> [C]hildren often enter foster care at the Basic service level, are assigned a carousel of overburdened caseworkers, suffer abuse and neglect that is rarely confirmed or treated, are shuttled between placements—often inappropriate for their needs—throughout the State, are migrated through schools at a rate that makes academic achievement impossible, are medicated with psychotropic drugs, and then age out of foster care at the Intense service level, damaged, institutionalized, and unable to succeed as adults. *Id.* at 718.

The court found that the state violated foster children's substantive due process rights under the Constitution to be free from an "unreasonable risk of harm," which includes freedom from both physical and psychological harm. The court concluded that the risk of harm (not proof of actual harm) is sufficient legal injury for a substantive due process claim. *Id.* at 696-97. Following the rationale of *Hernandez*, the court found that the State's action or failure to act despite knowledge of a substantial risk of serious harm establishes proof of deliberate indifference. *Id.* at 699. The court issued an injunction regarding policies and practices that the judge concluded constitute an unreasonable risk of harm and decided to appoint Special Masters to help the State implement the court's listed goals. *Id.* at 823. The Special Masters worked on a plan with the purpose of providing "PMC children 'with the constitutional minimum standards of personal security and safe living conditions so that they are free from an unreasonable risk of harm, both physical and emotional'." Final Order, Case 2:11-cv-00084, Doc. 559 at 2 (S.D. Tex. 2018) (referencing the Special Masters' Implementation Plan).

The recommendations for the plan were made by the Special Masters in November 2016 and were addressed by the court in its Interim Order in January 2017. Although it is outside the scope of this paper, there is an important discussion about children's right to counsel that is worthy of mention. The court held in the Interim Order and confirmed in the Final Order that

children in the PMC of the State are "constitutionally entitled to representation of counsel at each stage of their legal proceedings and at every court hearing" and "at every step of their journey through the Texas foster care system." 2017 U.S. Dist. LEXIS 2939 at 35, 38. The court recognized that the freedom of PMC children is curtailed, especially when children are placed in residential treatment centers without judicial proceedings or adequate due process, where the child may be restrained or medicated, so that the child is essentially "institutionalized and subject to indefinite confinement without the opportunity for review." *Id.* at 35. Citing *Vitek v. Jones,* 445 U.S. 480, 491 (1980), the court determined that the State acts in a similar role when determining the placement of a child as it does when determining placement in a mental health proceeding, especially because the record was "replete with examples of physical restraint, punishment, and overuse of medications" for PMC children and because various placement decisions made regarding children in the State's PMC carry a negative stigma similar to placement in a mental institution. *Id.* at 36-37. According to the court, state custody of a child creates a special relationship that triggers both substantive and procedural due process protections and, because the State cannot describe a rational basis for "making it more difficult for a PMC child to receive procedural due process than persons civilly committed," the Court required, at a minimum that DFPS must request ad litem appointment from any court where a suit is pending to "protect the liberties of Texas' most vulnerable citizens and safeguard their right to be heard when their liberty is placed in jeopardy." *Id.* at 38.[1]

In January 2018, over two years after the initial opinion, the court issued its Final Order, concluding that "[t]wo years and one legislative session later, the foster care system of Texas remains broken." Final Order at 2. Based on the recommendations, the court mandated

[1] It should be noted that the district court's provision granting the right to counsel for children in PMC was deemed invalid by the Fifth Circuit, as the Fifth Circuit found that while this and numerous remedies may represent a "best practice," they are not necessary for constitutional compliance.

specific changes that must take place for PMC children in Texas, including reduction of caseworker workloads, shut-down of certain group homes, appointment of an attorney ad litem, and advancements in recordkeeping to ensure PMC children have access to adequate medical care and are protected from repeated physical and sexual abuse in foster care.

On October 18, 2018, the Fifth Circuit issued its opinion, adding clarification to the court's analysis in determining the cognizable constitutional rights of foster children. In its opinion, the Fifth Circuit restated the right from *Hernandez*, that children in foster care have a "right to personal security and reasonably safe living conditions." *M.D. v. Abbott,* 907 F.3d 237, 250 (5th Cir. 2018). The court further confirmed that this right includes "protection from physical abuse and violations of bodily integrity." *Id.* at 250. What is new from the Fifth Circuit and most notable is that the court discussed psychological or emotional harms and added that a child has a right to be free from *"severe* psychological abuse and emotional trauma," which is "often inextricably related to some form of physical mistreatment or deprivation." *Id.* at 250. In an attempt to give some definition to this right, the court stated that there are "limits on the scope of the right to be free from certain forms of psychological harm." *Id.* at 251. This right does not mean the child has a right to "optimal treatment and services, nor does it afford the right to be free from any and all psychological harm." *Id.* at 251. On the other hand, "egregious intrusions on a child's well-being – such as, for example, persistent threats of bodily harm or aggressive verbal bullying – are constitutionally cognizable." *Id.* at 251. Therefore, while the court found that some actions or inactions of the State of Texas violated constitutionally cognizable rights of children in the PMC of the State, many of the lower court's remedies were vacated because the Fifth Circuit did not find sufficient evidence of the appropriate level of culpability ("deliberate indifference") on the part of the State or a direct causal link between State policy and the constitutional deprivation.

It should be noted that Judge Higginbotham wrote a compelling dissent that would have upheld many of the district court's remedial measures and could be an indicator of more favorable findings in the future.[2]

Practical Application

Often, when a child's attorney is seeking treatments or evaluations that are not on the "laundry list" of the state's child welfare agency services, she will be met with resistance. Policy, practice, and/or funding may be cited by even the best intentioned child welfare agency when the advocate pursues these "off menu" services. Indeed, well-meaning caseworkers (and their counsel) may have their hands tied by the policies and bureaucracy of their agency. On these occasions, the child's constitutional right to adequate care once in the custody of the state can provide the child's attorney with a powerful argument for why the court should order the services that are needed. Likewise, the child's constitutional right to adequate care can be raised when advocating that the child's mental health services must be provided by an appropriately trained, trauma-informed professional who uses trauma-informed treatment modalities. The lack of an adequate pool of trained professionals is frequently cited as the reason for failure to provide one, but raising the constitutional argument can put pressure on the system to develop the necessary pool of trained professionals and can give state legislatures an incentive to require that only appropriately trained mental health professionals treat traumatized children.

Similarly, a caseworker may be following policy and local practice when placing a child with a relative or other placement. If the child's attorney is convinced that the placement is not safe – even if it technically complies with the list of checks and balances that an agency utilizes

[2] Judge Jack's Order in response to the Fifth Circuit opinion was published on November 11, 2018, putting into place the Fifth Circuit's upheld provisions and directing the monitors in their oversight of the order. The Fifth Circuit reviewed the district court's decision on remand on July 8, 2019, further clarifying allowable remedial measures. *M.D. v. Abbott,* 929 F.3d 272 (5th Cir. 2019). The Court Monitors issued their first report on June 16, 2020, finding the State out of compliance with the Court's order and, in some cases, recognizing "substantial threats to children's safety." *See* First Court Monitors' Report 2020, *M.D. v. Abbott,* No. 2:11-cv-84, Doc. 869 at 12 (June 2020).

to assess a placement – raising this constitutional argument can provide more force to the argument to obtain the relief the advocate wants for his client.

In the previously described cases and others following them, the courts have interpreted a child's constitutional right to protection and proper care to include:

- The right not to be abused in a foster care setting
- The right to be free from infliction of unnecessary pain
- The right to physical safety
- The right not to be placed with a foster parent likely to abuse or neglect the child
- The right to have the state take steps to prevent the child from deteriorating physically or psychologically as a result of maltreatment or the frequency of placement changes
- The right to be reasonably safe from harm
- The right to be free from an unreasonable risk of harm
- The right to adequate food, clothing, shelter, medical care, treatment, services, protection, and supervision
- The right to reasonable security and reasonably safe living conditions
- The right to be free from state action that creates or increases the risk of exposure to private acts of violence
- The right to be free from state action that creates a special danger
- The right to be free from *severe* psychological abuse and emotional trauma
- The right to be free from egregious intrusions on the child's well-being

If the advocate's child client's care is being compromised in any of the foregoing ways, asserting this constitutional right when asking the court for needed protections, evaluations, treatment, and services for the child can be very persuasive. Making the court aware that a child's needs have constitutional ramifications can increase the likelihood that the child's needs will be

met.

III. THE RIGHT TO MAINTAIN FAMILY RELATIONSHIPS

Overview

Federal law, state law, and the policies and practices of child welfare agencies generally recognize that family relationships should be maintained, as doing so is more often than not in the best interests of the child. But the right for a child to maintain family relationships when the child welfare system has intervened in his or her life can also be argued to have constitutional dimensions based on the Fourteenth Amendment's Due Process Clause and the First Amendment's Freedom of Association Clause.

Discussion of Case Law

A long line of U.S. Supreme Court authority recognizes the fundamental liberty interest of parents in the care, custody, companionship, and control of their children and that the relationship between parent and child is constitutionally protected. *See, e.g.*, *Meyer v. Nebraska*, 262 U.S. 390, 399 (1923); *Stanley v. Illinois*, 405 U.S. 645, 651 (1972); *Quilloin v. Walcott*, 434 U.S. 246, 255 (1978). However, the U.S. Supreme Court has not specifically addressed a *child's* constitutional right to maintain family relationships. Indeed, in *Michael H. v. Gerald D.*, 491 U.S. 110 (1989), the high court stated, "We have never had occasion to decide whether a child has a liberty interest, symmetrical with that of her parent, in maintaining her filial relationship." 491 U.S. at 130.

Justice Stevens, however, commented on a child's constitutional right to maintain family relationships in his dissenting opinion in *Troxel v. Granville*, 530 U.S. 57 (2000), a case in which grandparents who, relying on a Washington state statute that permitted any person to seek child visitation, sought visitation with their grandchildren born out of wedlock. In the course of his dissent, Justice Stevens observed and opined:

While this Court has not yet had occasion to elucidate the nature of a child's liberty interests

> in preserving established familial or family-like bonds, [citation omitted] it seems to me extremely likely that, to the extent parents and families have fundamental liberty interests in preserving such intimate relationships, so, too, do children have these interests, and so, too, must their interests be balanced in the equation. At a minimum, our prior cases recognizing that children are, generally speaking, constitutionally protected actors require that this court reject any suggestion that when it comes to parental rights, children are so much chattel.

530 U.S. at 88.

In *Smith v. Org. of Foster Families for Equality and Reform, et al.*, 431 U.S. 816 (1977), the appellees, individual foster parents and a foster parent organization, argued that once a foster child has lived in a foster home for a year or more, a psychological bond is formed between the child and foster parents which makes the foster family the true "psychological family" of the child. The appellees further argued that this "psychological family" has a liberty interest, under the Fourteenth Amendment, in its survival as a family. Although the Court found it unnecessary to decide whether foster parents have a constitutionally protected right to familial privacy in the integrity of their family unit, it noted, "There can be, of course, no doubt of appellees' standing to assert this interest, which, to whatever extent it exists, belongs to the foster parents *as much as to the foster children*." 431 U.S. at fn 45 (emphasis added).

In *Franz, et al.*, *v. U.S.*, 707 F.2d 582 (D.C. Cir. 1983), a father brought suit individually and as next friend of his children, against the administrators of a witness protection program alleging, among other things, that the defendants abrogated their constitutionally protected rights to one another's companionship. The Circuit Court for the District of Columbia held that children have a reciprocal right with parents to maintain the companionship of the parent-child relationship. 707 F.2d at 595. The court stated that a parent and child's "stake in one another's companionship must be deemed a 'fundamental liberty interest'," such that the state must have a "very good" reason for abrogating it. *Id.* at 603. Moreover, in this case where permanent termination of the bond was contemplated, the state needed a "compelling objective" to interfere with it. *Id.*

In *Rivera v. Marcus*, 696 F.2d 1016 (2d Cir. 1982), the Second Circuit also described a child's interest in preserving his/her relationship with *extended* family as a liberty interest entitled to protection under the Fourteenth Amendment. At issue in this case was whether an adult half-sibling, who was also the foster parent of her half-brother and half-sister, had procedural due process rights under the Fourteenth Amendment when the children were removed from her care. Plaintiff Rivera, who had cared for her half-siblings even prior to the state's involvement, became the foster parent of her half-siblings (the Ross children) when their mother was institutionalized due to a deteriorating mental condition. After Rivera had cared for the children for six years, the state decided to remove the children without explanation. Rivera was not permitted to communicate with her half-siblings, nor was she informed of the identity or location of the new foster parents. In discussing several U.S. Supreme Court cases, which had affirmed that "family life" is one of the liberty interests protected by the due process clause of the Fourteenth Amendment, the Second Circuit noted that although there had been some disagreement over what constitutes a "family," the parent-child relationship was at the "core of the constitutional notion of 'family'." *Id.* at 1022. The court further noted that when the Supreme Court had extended due process protection to persons not specifically fitting the parent-child mold, it had "focused principally on the biological relationship between the parties…." *Id.* Consequently, the court held that:

> In these circumstances, we find that Mrs. Rivera possesses an important liberty interest in preserving the integrity and stability of her family. We believe that custodial relatives like Mrs. Rivera are entitled to due process protections when the state decides to remove a dependent relative from the family environment.

Id. at 1024-25. The court then went on to comment about the *children's* constitutional rights, saying:

> The liberty interests at stake in this action are rendered more compelling given the important interests that the Ross children maintain in preserving the integrity and stability of their extended family. The courts have long recognized that children possess certain liberty rights and are entitled to due process protection of these rights…. The Ross children surely possess a liberty interest in maintaining, free from arbitrary state interference, the family environment

> that they have known since birth…. If the liberty interest of children is to be firmly recognized in the law, we must ensure that due process is afforded in situations like that presented here where the state seeks to terminate a child's long-standing familial relationship.

Id. at 1026.

Practical Application

A child's interest in maintaining family relationships is often an issue in child protection cases. This constitutional right is implicated by visitations scheduled between the child and parents or other close family members. Although important for children of all ages, adequate visitation time to promote bonding is critically important for children who are 0-3 years old. The constitutional argument may provide more force to overcome claims of inadequate funding to facilitate lengthier visits or to challenge cookie-cutter length of visitation policies. The right also might be argued to support a request for family therapy. Not only does such therapy have the potential to help the participants individually, it can be critical in maintaining a child's relationship with family.

This right is also implicated by the diligence used by the state agency in searching for family members to locate appropriate relative placements that will enable the child to maintain this important interest. The right may also be argued to extend to fictive kin — and the ability to continue relationships with the various important people in a child's life. Similarly, this right is closely related to the child's interest in sibling access, as discussed more specifically below.

IV. THE RIGHT TO SIBLING ACCESS

Overview

Psychologists and other child welfare professionals recognize the importance of a foster child's need to have regular access to the child's other siblings. This is ideally achieved by placing siblings together with a foster family or relative placement. Joint placement, however, is not always possible. In those instances, access through visits, telephone, Skype, and other such means

are other alternatives. In addition to the substantive due process analysis discussed generally with respect to maintaining family relationships, the right to sibling access can also be viewed under the lens of the First Amendment, which guarantees citizens — even child citizens — the right to "freedom of association."

Discussion of Case Law

As with the other issues discussed in this paper, the U.S. Supreme Court has not yet addressed whether minor siblings have a constitutional right to maintain contact with each other once they are placed in foster care by the state. At least one federal district court, however, has concluded that children in foster care have a constitutional right to maintain their relationships with their siblings through reasonable contact under both the associational freedoms of the First Amendment and the substantive due process protections of the Fourteenth Amendment.

In *Aristotle P. v. Johnson,* 721 F.Supp. 1002 (N.D. Ill. 1989), seven foster children ranging in age from one to eighteen, who were under guardianship of the Illinois Department of Children and Family Services (DCFS), brought a class action suit against the Director of DCFS and the Guardianship Administrator, challenging the defendants' practices of placing siblings in separate foster homes or residential facilities and denying them the opportunity to visit their sisters and brothers who were placed elsewhere. In denying the defendants' motion to dismiss the foster children's constitutional claims, the court analyzed the rights at issue.

As to the plaintiffs' claims under the First Amendment, the court agreed with the plaintiffs that the "practice of placing siblings in separate placements and then failing to provide visits among siblings on a reasonable basis violates their right to freedom of association under the First Amendment…." 721 F.Supp. at 1004-05. Quoting the U.S. Supreme Court's decision in *Robert v. U.S. Jaycees,* 468 U.S. 609 (1984), the court explained that under the First Amendment:

Freedom of association…protects "choices to enter into and maintain certain intimate human

> relationships…against undue intrusion by the State because of the role of such relationships in safeguarding the individual freedom that is central to our constitutional scheme." The relationship between two family members is the paradigm of such intimate human relationships. "In this respect, freedom of association receives protection as a fundamental element of personal liberty."

Aristotle P., 721 F. Supp. at 1005 (internal citations omitted). Thus, the court held that "the children's relationships with their siblings are the sort of 'intimate human relationships' that are afforded 'a substantial measure of sanctuary from unjustified interference by the State.'" *Id.* The court found it particularly compelling that foster children's "relationships with their siblings are even more important because their relationships with their biological parents are often tenuous or non-existent." *Id.* at 1006.

The court also agreed that the foster children's relationships with their siblings were a protected liberty interest under the substantive due process clause of the Fourteenth Amendment. Citing *Moore v. East Cleveland,* 431 U.S. 494 (1977), the court determined that "the Fourteenth Amendment embraces a right to associate with one's relatives." 721 F.Supp. at 1007. In *Moore*, the U.S. Supreme Court noted that "the Constitution protects the sanctity of the family precisely because the institution of the family is deeply rooted in this Nation's history and tradition." 431 U.S. at 503. In *Aristotle P.,* the court noted that the defendants' policies resulted in the physical separation of the plaintiffs and their siblings for extended periods of time. In some instances, the foster children were unable to maintain any relationship at all with their siblings, and in others, the children never got to know their siblings who had been taken into the state's custody as infants. The court concluded, "Thus, the defendants' policies have seriously damaged, if not severed, the relationships between the plaintiffs and their siblings…. [T]he plaintiffs have sufficiently alleged the existence of a policy which deprives their liberty interests in their sibling relationships…." 721 F.Supp. at 1008.

The court further based its decision on the fact that the children were involuntarily taken

into the state's custody. The court reviewed the line of cases which have held that once having taken children into its custody, a state owes those children an affirmative duty to assume some responsibility for their safety and general well-being. The court found that "the plaintiffs have a substantive due process right under the Fourteenth Amendment to be free from unreasonable and unnecessary intrusions upon their physical and emotional well-being, while directly or indirectly in state custody, and to be provided by the state with adequate food, shelter, clothing and medical care…." [citation omitted]. *Id.* at 1009. The court held that the plaintiffs had stated a claim for violation of their substantive due process rights by "alleging that the defendants, with deliberate indifference, pursued policies which caused them injuries by impairing their relationships with their siblings." *Id.* at 1010. Significantly, the court noted, "The fact that the plaintiffs' injuries are psychological rather than physical is of no moment…. '[T]he protections of the Due Process Clause against arbitrary intrusions on personal security include both physical and emotional well-being'." *Id.*, citing *White v. Rochford*, 592 F.2d 381, 385 (7th Cir. 1979).

Practical Application

If a foster child's attorney seeks visitation for the child with siblings, and the child protection agency is uncooperative, she should seek relief from the court. If the court denies the request or provides inadequate relief, the attorney should consider whether some form of appellate review or other legal action would be appropriate in order to establish that the child has a constitutional right to preserve the integrity and stability of his/her family. Additionally, confirming the existence of this constitutional right would give state legislatures a greater incentive to make sure that state child welfare agencies have the funding they need to be able to facilitate sibling visits and contact to ensure that foster children are able to maintain their very important relationships with their siblings.

V. THE RIGHT TO BODILY INTEGRITY

Overview

The right to bodily integrity is another constitutionally protected right emanating from the substantive due process clause of the Fourteenth Amendment. However, this is a right possessed by all children, not just those in the custody of the state, although, of course, some state action would be required to base a claim upon this right. The author of this paper has asserted this right in a number of contexts to obtain benefits or relief for her clients and some of those instances will be discussed below.

Discussion of Case Law

All children have a constitutional right to their bodily integrity. In *Doe v. Taylor I.S.D.*, 15 F.3d 443 (5th Cir. 1994) (en banc)*, cert. denied, Lankford v. Doe*, 513 U.S. 816 (1994), plaintiff Jane Doe had been sexually abused by her high school teacher. The Fifth Circuit held, "[S]chool children do have a liberty interest in their bodily integrity that is protected by the Due Process Clause of the Fourteenth Amendment and… physical sexual abuse by a school employee violates that right." 15 F.3d 443 at 445. The right to bodily integrity does not refer only to intrusions on such integrity due to sexual abuse. For instance, in *Jefferson v. Ysleta I.S.D.*, 817 F.2d 303 (5th Cir. 1987), a teacher had lashed a second grade student to a chair for the majority of two school days. The court found that this conduct could have violated the child's substantive due process "right to be free of state-occasioned damage to [her] bodily integrity," as the court had found in previous cases. 817 F.2d at 305 (internal citations omitted). The court was reviewing the denial of a motion to dismiss; therefore, the facts had not been developed.

A majority of circuits, including the Second, Third, Fourth, Fifth, Sixth, Eighth, Ninth, and Tenth recognize a child's constitutional right of bodily integrity. *See United States v. Giordano*, 442 F.3d 30 (2d Cir. 2006); *Kinman v. Omaha Pub. Sch. Dist.*, 171 F.3d 607 (8th

Cir. 1999); *Plumeau v. Sch. Dist. #40*, 130 F.3d 432 (9th Cir. 1997); *Doe v. Claiborne*, 103 F.3d 495 (6th Cir. 1996); *Abeyta v. Chama Valley I.S.D.*, 77 F.3d 1253 (10th Cir. 1996); *Stoneking v. Bradford Area Sch. Dist.*, 882 F.2d 720 (3d Cir. 1989); *Hall v. Tawney*, 621 F.2d 607 (4th Cir. 1980). Two of the remaining circuits, the First and the Eleventh, have recognized a child's liberty interest in his or her bodily integrity within their district courts. *See, e.g., Hackett v. Fulton County Sch. Dist.*, 238 F. Supp. 2d 1330 (N.D. Ga. 2002); *Hinkley v. Baker*, 122 F. Supp. 2d 48 (U.S. Dist. Me. 2000). Arguably, bodily integrity includes the integrity of the mind and protects a child from psychological injury as well.

Practical Application

The right to bodily integrity gives children a right to physical safety in circumstances beyond the foster care setting. Accordingly, children's attorneys can assert this right to protect children from dangers beyond the foster home, provided there is a basis to assert that the conduct at issue constitutes an action of the state.

As noted, the author has asserted the right to bodily integrity in several contexts. In *Bucher v. Richardson Hospital Authority*, 160 F.R.D. 88 (N.D. Tex. 1994), the author filed a motion to quash the deposition of a 15-year-old girl who had been sexually abused by a teacher in a hospital's adolescent psychiatric unit. The motion was premised on the argument that the teenager's constitutional right to her bodily integrity would be violated if she were subjected to the physical and psychological harm that was likely to result from a deposition, especially if certain procedural safeguards were not in place. The federal magistrate granted almost every safeguard requested, including that the deposition be time limited, that the opposing counsel could not ask any questions implying doubt regarding the veracity of the witness, and that the attorneys for the defendant would question the witness outside her presence via closed circuit television. Although the magistrate chose not to address the constitutional issue, the assertion

of the teen's constitutional right heightened the magistrate's concern about the need to be sure that the teenager's psychological well-being was protected during the deposition process.

Additionally, in *Doe v. Eason, et al.*, 1999 U.S. Dist. LEXIS 23392 (N.D. Tex. Aug. 4, 1999), the author represented a plaintiff who had sued anonymously to protect the identity of her daughter, who had been sexually abused. The defendants filed a motion to require the plaintiff to sue under her actual name. In responding, the plaintiff argued that the psychological injury to the child that would result from public disclosure of her identity would violate her constitutional right to bodily integrity. Although the court did not address the constitutional claim, the judge took the issue of potential harm to the child very seriously and concluded that the case fell "within the narrow category of exceptional cases where the need for confidentiality outweighs the strong constitutional interest of openness of judicial proceeding." 1999 U.S. Dist. LEXIS 23392 at 9.

VI. RIGHT TO NOT BE DISCRIMINATED AGAINST BASED ON RACE, RELIGION, SEX, SEXUAL ORIENTATION, OR GENDER IDENTITY

Overview

Child advocates can make arguments based on the Constitution when their child client's right to not be discriminated against based on race, religion, sex, sexual orientation, or gender identity has been violated. Just as with adults, a child's right to non-discrimination is grounded in the Due Process Clause, particularly substantive due process liberty interests. In addition, the right not to be discriminated against may be grounded in the Equal Protection Clause. It is worth noting that beyond constitutional arguments, in connection with issues raising the specter of discrimination, child advocates can also argue for relief based on state and local law violations encompassed in nondiscrimination statutes and policies.

Discussion of Case Law

Many of the cases previously discussed can be relied upon to support arguments for the

constitutional right of children in the child welfare system not to be discriminated against based on race, religion, sex, sexual orientation, or gender identity. If a child is discriminated against or harassed based on race, religion, sex, sexual orientation, or gender identity, arguably her right to protection and proper care has been violated. This is especially true if the discrimination or harassment resulted in mental or physical injury or damage at the hands of state actors or contracted foster parents responsible for the child's protection and care. An advocate can also argue that the right is encompassed under the right to bodily integrity to the extent that right includes the integrity of the mind and protects a child from psychological injury. Psychological injury most certainly can result from discrimination based on race, religion, sex, sexual orientation, or gender identity.

In *Doe v. Bell*, 754 N.Y.S. 2d 846 (N.Y. Sup. Ct. 2003), a male child with Gender Identity Disorder (GID) was prohibited from dressing like a female at his foster care facility and the court found that GID was a "disability" within the meaning of New York's Human Rights Law, which, like federal disability discrimination statutes, requires covered entities to provide "reasonable accommodations" to persons with disabilities. Enforcement by New York City Administration for Children's Services (ACS) of the foster care facility's dress policy barring residents of the all-male foster care facility from wearing skirts or dresses violated the New York Human Rights Law by failing to make reasonable accommodations to the resident minor who suffered from GID. The resident needed to be able to wear feminine clothing as part of his treatment and to avoid psychological distress, and purported safety concerns behind the policy did not provide a rational basis for rejecting accommodation. Although this case was based on state, not federal law, a similar argument could be linked to the U.S. Constitution and federal non-discrimination laws.

In *Connor B. ex rel. Vigurs v. Patrick*, six named plaintiffs representing all children who are now or will be in the foster care custody of Massachusetts Department of Children and Families (DCF) brought constitutional claims against the state. 771 F. Supp. 2d 142 (D. Mass. 2011). The

complaint alleged a number of harms as a result of improper placements and treatment that violated the plaintiffs' substantive due process rights under the Fourteenth Amendment, their liberty interests, privacy interests, and associational rights under the First, Ninth, and Fourteenth Amendments, and their procedural due process rights under the Fourteenth Amendment.

The complaint alleged a variety of particular harms to the representative foster children. As part of those allegations, specific harm was alleged as a result of Massachusetts DCF placing a gay teen in a home intolerant of differences in sexual orientation. Although the court did not analyze this specific allegation, it did deny Massachusetts DCF's motion to dismiss as to the plaintiffs' substantive due process claim. *Connor B.*, 771 F. Supp. 2d at 172.

While *Obergefell v. Hodges*, 135 S.Ct. 2584 (2015), does not specifically address the issues discussed in this paper and stops short of naming those discriminated against on the basis of sexual orientation a "suspect" class, the Supreme Court's rationale and holding can support an argument that a recognized fundamental right (in the case of *Obergefell*, the right to marry) cannot be denied a person based on that person's sexual orientation. In addition, circuit courts have recently begun applying "heightened scrutiny" to cases under the Equal Protection Clause when the state discriminates on the basis of a person's sexual orientation or because the person does not conform to gender stereotypes. *See SmithKline Beecham Corp. v. Abbott Labs.,* 740 F.3d 471, 481-84 (9th Cir. 2014); *Baskin v. Bogan,* 766 F.3d 648 (7th Cir. 2014), *cert. denied, Bogan v. Baskin,* 135 S.Ct. 316 (2014); *Windsor v. United States*, 699 F.3d 169 (2d Cir. 2012), *aff'd*, 133 S.Ct. 2675 (2013); *Glenn v. Brumby,* 663 F.3d 1312 (11th Cir. 2011); *Smith v. City of Salem*, 378 F.3d 566, 572 (6th Cir. 2004).

Practical Application

Legal advocates for children who are experiencing constitutionally prohibited discrimination in their placements should raise their constitutional rights to get the situation remedied. Even some forms of discrimination not yet found to be prohibited by the Constitution

could be addressed under substantive due process principles if the child's right to reasonable care and protection is implicated by the discriminatory treatment. Also, of course, state constitutions or human rights provisions may provide additional protections for youth. For example, based on such provisions, Massachusetts and New York courts have held that a youth has a right to dress in gender non-conforming clothes. *Doe ex rel. Doe v. Yunits*, No. 001060A, 2000 WL 33162199 (Mass. Dist. Ct. Oct. 11, 2000) (allowing a transgender girl to wear girl's clothing in high school based on the plaintiff's likelihood of success on her claims under Mass. Gen. Laws Ch. 76, § 5 and Article I and XIV of the Massachusetts Declaration of Rights, reasoning that "since plaintiff identifies with the female gender, the right question is whether a female student would be disciplined for wearing items of clothes plaintiff chooses to wear") *aff'd sub nom.*, *Doe v. Brockton Sch. Comm.*, No. 2000-J-638, 2000 WL 33342399 (Mass. App. Ct. Nov. 30, 2000); *Doe v. Bell*, 754 N.Y.S. 2d 846 (N.Y. Sup. Ct. 2003) (allowing gender non-conforming dress in foster care facilities because refusing to reasonably accommodate the plaintiff's Gender Identity Disorder was a violation of the New York State Human Rights Law).

VII. USING ONLINE RESOURCES AND COLLABORATION TO HELP PROTECT CHILDREN'S CONSTITUTIONAL RIGHTS

A single impassioned individual or a small group can begin a movement to share information, expertise, and resources on a statewide basis through the internet to assist judges, attorneys, and other advocates in their efforts to protect abused and neglected children from additional harm by safeguarding their constitutional rights. Online resources and collaboration can help fill gaps too often caused by lack of funding. A gold mine that already exists in every state is the expertise of seasoned practitioners who have acquired the knowledge and skills necessary to serve abused and neglected children in the court system very well. There is a way to capture that expertise and share it with others across the state. Five states are using an innovative online system

that was created to do that and more.

Texas Lawyers for Children (TLC) created and operates a unique, interactive Online Legal Resource and Communication Center (Online Center), for judges and attorneys (and other advocates) handling children's court cases, and TLC has replicated the Online Center for California, Florida, Alabama, and Maryland. Each Online Center is a state-specific, one-stop source of critical and cutting-edge legal, medical, and psychosocial resource materials in an easily searchable database. The Online Center also contains innovative communication tools enabling judges, attorneys, and other professionals to discuss novel solutions, share expertise with their respective colleagues, and mentor those with less experience. Additionally, the Online Center provides opportunities for pro bono involvement, as well as access to video-recorded training programs. The Online Center fosters development of a collaborative community that paves the way for change and facilitates system reform by sharing best practice information and innovative ideas. This multifaceted approach builds a brain trust that equips the judges, attorneys, and other advocates within a state to fully address the legal needs of children and ensure protection of their constitutional rights.

VIII. CONCLUSION

Much more than children's constitutional rights are at stake in child protection cases. Every aspect of a child's life and future is impacted by his/her attorney's advocacy and the judge's decisions. If judges and attorneys focus more attention on safeguarding children's constitutional rights, they have another means to help ensure that the best outcome for the child can be achieved in each case, and the child welfare system in this country can be improved one case at a time.

Addendum F

ABA, *"Sibling Relationships Are Sacred": Benefits of Sibling of Placement and Contact*, at 2 (May 2023), *available at* https://www.americanbar.org/content/dam/aba/publications/litigation_committees/childrights/sibling-toolkit/aba-sibling-toolkit.pdf

AMERICANBARASSOCIATION

Litigation Section

"Sibling Relationships are Sacred": Benefits of Sibling Placement and Contact

Social science support for your in-court and out-of-court legal advocacy

A tool for lawyers

This tool was created by the Children's Rights Litigation Committee of the American Bar Association Section of Litigation. Thank you to everyone who contributed to this document including Andrew Cohen, Dir. of Appellate Panel, Massachusetts Committee for Public Counsel Services, Children & Family Law Division; Cathy Krebs, Committee Director, ABA Litigation Section Children's Rights Litigation Committee; Jacob Tarjick, Staff Attorney, Massachusetts Committee for Public Counsel Services, Children & Family Law Division; and DLA Piper. A special thank you to Tisha Ortiz and Lily Colby from With Lived Experience who provided feedback on the toolkit. Tisha and Lily are lived experience professionals who provide training and support to social workers, lawyers and judges on child welfare law and policy.

Information is up to date as of May 2023. To share information to be added to this tool or to provide feedback, please e-mail cathy.krebs@americanbar.org

Benefits of Sibling Connections

I. EXECUTIVE SUMMARY

"Sibling relationships are sacred and must be prioritized in placement and other court decisions." (National Association of Counsel for Children. (2023). *NACC Draft Policy Framework.*) Research shows that the failure to maintain sibling relationships in foster care harms children's ability to form their identities, deprives them of a vital source of support as they grow and develop, and causes lifelong grief and yearning. Further, direct accounts from youth with lived experience in foster care describe how critical sibling relationships are and the trauma of sibling separation. Roughly two-thirds of children in foster care in the United States have at least one sibling, many of them are separated – often forever – and courts rarely consider the damage such separation causes. Counsel for parents and children should advocate for the placement of siblings together and, when siblings cannot be placed together, for frequent visitation in order to maintain the sibling relationship. The sibling bond is often the most enduring relationship in a person's life. Maintenance of sibling bonds increases the likelihood of both adoption and reunification, helps improve each child's mental health, reinforces feelings of stability, shapes identity, and ameliorates educational and adult life competence. Research and lived experience show that continuation of sibling relationships is imperative for children in the child welfare system.

II. HOW TO USE THIS TOOL

How you can use this tool in trial or appellate advocacy will largely depend on your jurisdiction. For example, you may be able to include the clinical summaries below (or your own synthesis/analysis of them) in your:

- Motion for joint sibling placement
- Motion for sibling visitation
- Permanency plan, or opposition to the agency's permanency plan
- Adoption plan, or opposition to an adoption plan
- Administrative appeal regarding agency decisions regarding siblings
- Other motion, petition, or memorandum
- Appellate brief to educate your appellate court on the importance of sibling relationships

There are also other ways, outside of court, you can use this toolkit to affect the outcome of your case or even to effectuate long-term change. For example, you may be able to provide this tool to:

- Your expert
- Your child client's therapist/mental health provider
- Your child client's residential/group home case manager
- A guardian ad litem, CASA, probation officer, or other "neutral" investigator in order to educate (and persuade) them
- The agency social worker or other staff in order to educate (and persuade) them

- Any workgroup or committee in your jurisdiction, including those that include judicial officers, to further educate them on this issue
- Legislators who are considering bills regarding sibling placement or visitation

Further, if you have provided this information to your own expert, you may, depending on the jurisdiction, be able to examine the expert on it. If you have provided it to one or more of the other persons listed above, your jurisdiction may permit you to examine or cross-examine them as to whether they read it and whether they pursued placements where siblings could be together or at least have frequent visits and other forms of contact.

In any event, regardless of jurisdiction, counsel should be able to *speak* to judges and social workers about the benefits of the sibling connection. Decisions in child welfare cases should be guided by social science research.

Please note that, where available, we are including URLs to cited articles. Some URLs link to complete articles; others link to abstracts where the complete article can be ordered from the author or from a proprietary database. If you are having difficulty locating an article, please e-mail cathy.krebs@americanbar.org for assistance.

III. TALKING POINTS FOR TRIAL COUNSEL

Below are key takeaways and talking points from social science research that may help lawyers persuade judges (and the foster care agency) to place children with their siblings. Note that all sources cited in these talking points are discussed, with full citations, in Section V.

A. Children's best interests are served by placing them with siblings after removal from their parents.

- Separating siblings heightens trauma and damages children's mental health. (Trivedi 2019; McCormick 2010; Smith 2009; Timberlake & Hamlin 1982).

- Separating siblings leads to identity-formation problems and a lost sense of stability and belonging. (Angel 2014; Kramer et al. 2019; Smith 2009).

- Placing siblings together reduces trauma caused by removal from parents. (Edwards 2011; McCormick 2010; Laurel et al. 2008).

- Placing siblings together increases the chances of reunification with parents. (Albert & King 2008; Waid 2015; Laurel et al. 2008).

- Placing siblings together increases the chances that children will be adopted. (McCormick 2010; Smith 2009).

- Placing siblings together decreases the likelihood of placement disruptions. (Akin 2011; Sattler et al. 2018; Rolock & White 2016; Font 2021).

- Siblings in foster care may also look to each other as a unique source of support and help. (Child Welfare Information Gateway 2019; McCormick 2010).

- Placing siblings together reduces depression, self-blame, and anxiety. (Hegar 2009; Richardson & Yates 2014; Davidson-Arad & Klein 2011; Wojciak et al. 2018).

- Keeping siblings together improves each child's educational competence and reduces behavioral issues in the classroom. (Richardson & Yates 2014; Kothari et al. 2018; Hegar and Rosenthal 2011).

- Keeping siblings together improves adulthood social skills. (Bank et al. 2014; Richardson & Yates 2014).

B. If siblings cannot be placed together, children's best interests are served by frequent visitation.

- Maintaining sibling relationships requires regular contact when they are not placed together. (Child Welfare Information Gateway 2019; Mass. Sibling Bill of Rights 2012).

- Children desire more contact with siblings after separation. (Helfrich et al. 2013; Smith & Howard 1999; Patton & Latz 1994; Mandelbaum 2011).

- Frequent sibling visitation leads to better mental health, social competence, and sense of stability and belonging. (Family Futures 2019; National Center for Child Welfare Excellence; McBride 2007; Richardson & Yates 2014; Herrick & Piccus 2005).

- Frequent sibling contact leads to better financial circumstances later in life. (Richardson & Yates 2014; Helfrich et al. 2013).

C. Federal statutes require efforts to place siblings together and maintain sibling connections.

- The Fostering Connections to Success and Increasing Adoptions Act of 2008, Public Law 110-351, mandates that states make "reasonable efforts" to maintain sibling connections in order to receive federal funding and either place siblings in the same home or provide for frequent visitation or ongoing contact, unless either of these would be contrary to the safety or well-being of any of the siblings.

- The Preventing Sex Trafficking and Strengthening Families Act of 2014, Public Law 113-183, requires that the parents of a child's siblings be included as persons to be notified when that child needs placement.

- The Family First Prevention Services Act of 2018, Public Law 115-123, permits states to allow the number of foster children in one home to exceed the usual numerical limitation in order to allow siblings to remain together.

D. Many states have statutes requiring or encouraging placement of siblings together.

Thirty-seven states, the District of Columbia, and Guam have statutes requiring agencies to make reasonable efforts to place siblings in the same home, absent documented reasons as to why joint placement would not be in their best interests. Thirty-five states and Puerto Rico also have statutes requiring that siblings not placed together be given opportunities for visits and/or communication. State-specific legislation can be found at: https://www.childwelfare.gov/topics/systemwide/laws-policies/statutes/placement/.

Finally, many states' Foster Care Bills of Rights protect the interests of siblings for co-placement and/or regular contact. Some examples are:

Arizona	Ariz. Rev. Stat. § 8-529(3) (2009)	Foster children have a right to know where their siblings are placed.
Connecticut	Conn. Stat. Ann. 17a-10a	Siblings placed in different foster homes have a right to visitation with one another.
Delaware	Del. Code. tit. 13 § 2522(a)(6)	Foster children have a right to contact and visit their siblings also in foster care, or to be notified as to the reason why such visitation is inappropriate.
Florida	Fla. Stat. § 39.4085(1)(o)	Foster children have the right to visitation with their siblings at least once a week.
Hawaii	Haw. Rev. Stat. § 587A-3.1(5)	Foster children have the right to visitation with their siblings.
Minnesota	Minn. Laws, § 260C.008	Foster children have the right: • to be placed in the same home as their siblings when possible; • to be placed geographically close to one another if not; • to have frequent contact with siblings; • to have regular in-person visitation with siblings; • to have adult siblings considered as custodians.
New Jersey	Bill Text: NJ S1034 | 2022-2023 | Regular Session | Chaptered | LegiScan	Foster children have the right to the best efforts of the applicable department to place the child in the same setting with the child's sibling if the sibling is also being placed outside his home; and to visit with the child's sibling on a regular basis and to otherwise maintain contact with the child's sibling if the child was separated from his sibling upon placement outside his home, including the provision or arrangement of

		transportation as necessary, and to have access to a phone number or computer that allows for virtual visits between face-to-face visits or when face-to-face visits are not feasible.
North Carolina	N.C. Gen. Stat. § 131D-10.1(a)(2), (a)(10)	Foster children have the right to first-priority placement in a home with their siblings and to have regular communication with their siblings in different homes.
Pennsylvania	Pa. Stat. tit. 11, § 2633(10)	Foster children have the right to visit and contact siblings "as frequently as possible" and to have adult siblings given first consideration as custodians.
Texas	Tex. Family Code Ann. § 263.008	Foster children have the right to placement with siblings.

IV. LIVED EXPERIENCE PERSPECTIVES ON SIBLING SEPARATION IN FOSTER CARE

Brothers and Sisters: Keeping Siblings in Foster Care Connected by EPIC 'Ohana, Inc. Brothers and Sisters: Keeping Siblings in Foster Care Connected - YouTube

This 9-minute YouTube video focuses on youth who have spent time in foster care discussing their relationship with their siblings and the impact of being able to live with them or being separated from them.

Brought up in Care and Separated from my Siblings Brought Up In Care And Separated From My Siblings - YouTube
BBC The Social

This 4-minute YouTube video focuses on a young man who grew up in state custody and the impact of his being separated from his siblings.

Sibling Placement and Contact in Out-of-Home Care Sibling Placement and Contact in Out-of-Home Care - YouTube
CREATE

Children and young people in out-of-home care across Australia have told CREATE that living with their brothers and sisters in care is very important and that they are the people they most want to contact when they are not living together. (8-minute YouTube video)

Sibling Connections, by Laticia Aossey Sibling Connections - The Imprint (imprintnews.org)

This short news article by a woman who spent time in foster care describes how her greatest difficulty in the foster care system was being separated from her siblings.

Woman Separated from Brother in Foster Care Wants to Keep Siblings Together Woman Separated From Brother In Foster Care Wants To Keep Siblings Together - YouTube
CBS Colorado

This 3-minute news story highlights the efforts of a woman who was permanently separated from her brother when they were placed into foster care who is now fighting for a sibling bill of rights in Colorado so that other young people do not have to endure the pain that she did.

ReMoved, by Nathaniel Matanick, ReMoved - YouTube

This 13-minute video focuses on the removal of a young girl from her home and placement into foster care, but it also includes the importance of her relationship with her little brother.

V. SOCIAL SCIENCE RESEARCH

1. Children's best interests are served by placing them with siblings after removal from their parents.

a) Separating siblings heightens trauma and damages children's mental health.

- Shanta Trivedi, *The Harm of Child Removal*, 43 N.Y.U. Rev. L. & Soc. Change 523 (2019), https://scholarworks.law.ubalt.edu/cgi/viewcontent.cgi?article=2087&context=all_fac

This article examines the social science research concerning the long-term emotional and psychological consequences of removing children from their parents' care and placing them into foster care. The American Association of Pediatrics noted that family separation "can cause irreparable harm, disrupting a child's brain architecture and affecting his or her short- and long-term health. This type of prolonged exposure to serious stress—known as toxic stress—can carry lifelong consequences for children." *Id.* at 526 (additional citations omitted). As part of this analysis, the article discusses how removal and entry into the foster care system often results in separation of siblings, which heightens the trauma for those children. In particular, the article discusses a study of removed children, which found that "many were reliant on their siblings and upset about being separated from them. One child complained that he had been split up from his brothers and didn't know where they were. Others expressed anger about separation from their absent siblings. While the conversation is usually focused on separating children from their parents, it is important to be cognizant of additional trauma caused by separation from other family members." *Id.* at 533 (internal citations omitted). The author advocates for evaluating the harm of removal as a key part of every child welfare decision and suggests mechanisms to incorporate it as a consideration in existing legal frameworks.

- Adam McCormick, *Siblings in Foster Care: An Overview of Research, Policy, and Practice*, 4 J. of Pub. Child Welfare 198 (2010), https://www.tandfonline.com/doi/full/10.1080/15548731003799662?scroll=top&needAccess=true

This article reviews empirical data on siblings in foster care and provides an overview of the policies and practices that are relevant to sibling placements in the child welfare system. The author notes that "[s]eparating siblings who have been removed from their parents only seems to intensify the pain, grief, and trauma that they have already experienced when they were initially removed from their parents" and can be "considered a form of revictimization." *Id.* at 207. For examples, he cites to a study that compared children placed with a least one sibling to completely separated siblings, which found a "strong negative association between sibling separation and the mental health of siblings, specifically females. Co-resident girls had a lower presence of any mental disorder, as well as fewer ''total problems'' and ''externalizing problems." *Id.* at 211-212.

- Adam McCormick, *The Role of the Sibling Relationship in Foster Care: A Comparison of Adults with a History of Childhood Out-of-Home Placement* (2009) (Dissertation, St. Edward's University in Austin, TX)

This dissertation analyzes the experiences of 50 adults who had out-of-home placements as children (such as a foster care placement), focusing on the correlation between childhood sibling experiences and adult outcomes. In order to assess the strength of childhood sibling relationships and later adult outcomes, the study looked at a number of variables, including age, gender, number of placements, and age at placement. The study ultimately found that those who had greater access to their siblings during their youth had higher levels of social support, self-esteem, and income as adults. The study describes research about the importance of protective sibling relationships for children in out-of-home care, noting that "siblings can play a critical role in repairing and minimizing the psychological damage of instability, separation, and trauma caused by one's parents." *Id.* at 6. The study further notes that "[s]eparating siblings who have been removed from their parents only seems to intensify the pain, grief, and trauma that they have already experienced when they were initially removed from their parents. Many feel that separating children from their siblings can be considered a form of revictimization." *Id.*

- Susan L. Smith, *Siblings in Foster Care and Adoption: What We Know from Research*, in Deborah N. Silverstein & Susan L. Smith, Eds., *Siblings in Adoption and Foster Care: Traumatic Separations and Honored Connections* (Praeger Pub. 2009), https://psycnet.apa.org/record/2009-11027-000

This book chapter discusses research about sibling relationships and implications for child-welfare practices. It notes that, when children are entering the foster care system or other adoption processes, being placed with their siblings "promotes a sense of safety and well-being, while being separated from them can trigger grief and anxiety." *Id.* at 20. In contrast, "a foster youth advisory team described separation from siblings as being like an extra punishment, a separate loss, and another pain that is not needed." *Id.* (internal citations omitted). Next, the chapter analyzes outcomes of siblings placed together and apart, finding those placed together have a much more positive adjustment. While acknowledging the frequent challenges of joint placements for siblings in the child welfare system, the author nonetheless stresses the importance of making exceptional efforts to do so.

- Elizabeth Timberlake & Elwood Hamlin, *The Sibling Group: A Neglected Dimension of Placement*, 61 Child Welfare 545 (1982)

This article discusses the effects of sibling separation on child development as well as how sibling relationships help children in the welfare system cope with losses of parents and familiar surroundings. It examines the specific separation and loss issues that foster children face and how they can be exacerbated when they also lose their siblings: "Given the reciprocal nature of sibling role relationships, [separated siblings] often feel that they have lost a part of themselves, compounding separation and loss issues associated with foster care. Not only are foster children engaged in the grief process over their absent parents and siblings, they are also denied access to a natural support group within which to resolve their grief." *Id.* at 549. The article concludes that keeping sibling groups intact during foster placement can be "viewed as a potential treatment resource for the child welfare worker in helping children cope." *Id.*

b) Separating siblings leads to identity-formation problems and a lost sense of stability and belonging.

- Bjørn Øystein Angel, *Foster Children's Sense of Sibling Belonging: The Significance of Biological and Social Ties*, 4(1) SAGE Open (2014), https://journals.sagepub.com/doi/full/10.1177/2158244014529437

This article examines children's perceived sense of belonging to siblings and how their social and biological ties develop their identities as they move into, and sometimes out of, the foster care system. The majority of children involved in the study said that continued relationships with their biological siblings was important for their identity and sense of belonging. Interviews conducted with children in the study also showed that "[c]aring about biological siblings, rivalry and conflict with biological siblings, or having to compare oneself with the foster parents' own children strengthens the children's perception of themselves and their identity, and a sense of belonging becomes a central feature." The author concludes with several practical implications from his findings. First, he urges child welfare services to acknowledge the importance of getting to know each individual child and his or her sibling relationships, before and during the processing of placing the child in a foster home. Second, he stresses this perspective must be maintained throughout the entire period the child is in foster care.

- Laurie Kramer, et al., *Siblings*, Ch. 29, in B. H. Fiese, ed., *APA Handbook of Contemporary Family Psychology* (2019), https://www.depts.ttu.edu/hs/hdfs/research/sibs/docs/Siblings-APA-Handbook-Contemporary-Families_proofs.pdf

This chapter examines how sibling relationships can help promote resilient families. With respect to placement of siblings in foster care specifically, the authors discuss how growing literature reflects that maintaining sibling relationships through joint placement or other means can provide many developmental benefits, including greater competence in education, occupation, housing, relationships, and civic engagement. "Furthermore, for adolescents in foster care, sibling relationship qualities, such as support, positively predicted aspects of self-concept including acceptance, self-efficacy, psychological maturity, and activity, with the

amount of contact with siblings magnifying the strength of these associations." *Id.* at 5 (internal citations omitted).

- Jonathan Caspi, *Sibling Development: Implications for Mental Health Practitioners* 322 (Springer Pub. 2011)

This article is a review of existing literature. Authors find that siblings can be a source of "significant social and emotional support, especially during difficult circumstances…[and] having access to and shared experiences with siblings may help sustain family continuity and identity after children are removed from their family of origin. Sibling relations may be of special importance to children from minority populations in preserving their ethnic identity, particularly children placed in families or communities that differ considerably from their own heritage." Given the importance and benefits of sibling relationships, the authors note that best practices call for placing siblings together and for promoting sibling contact when they cannot be together.

- Susan L. Smith, *Siblings in Foster Care and Adoption: What We Know from Research*, in Deborah N. Silverstein & Susan L. Smith, Eds., *Siblings in Adoption and Foster Care: Traumatic Separations and Honored Connections* (Praeger Pub. 2009), https://psycnet.apa.org/record/2009-11027-000

This book chapter discusses research about sibling relationships and implications for child-welfare practices. With respect to identify formation, the author states that "[c]ontinuity of sibling relationships through conjoint placements helps children to maintain a positive sense of identity and knowledge of their cultural, personal, and family histories. They provide natural support to each other and some sense of stability and belonging. . . thus validating the child's fundamental sense of self-worth." *Id.* at 20 (internal citations omitted).

c) Placing siblings together reduces trauma caused by removal from parents.

- Hon. Leonard Edwards (ret.), *Connecting with Siblings*, Judges' Page Newsl. Archive, Nat'l CASA Ass'n (2011)

In this article, Judge Leonard Edwards, former Judge-in-Residence at the Center for Families, Children & the Courts, a division of the California Administrative Office of the Courts, discusses the passage of the Fostering Connections to Success and Increasing Adoptions Act of 2008, and how the law prefers siblings to remain together when removed from parental care and to stay connected when separation occurs. Judge Edwards stresses that "positive results flow from keeping siblings together," including that "the trauma related to parental removal is reduced [and] siblings can provide emotional support for one another." *Id.* at 2. He concludes that because the "law now prefers siblings to remain together when removed from parental care . . ., [t]he burden now shifts to us, the professionals working in the foster care system, to ensure that siblings are placed together—or at least that they maintain contact with one another after removal from parental care." *Id.*

- Adam McCormick, *Siblings in Foster Care: An Overview of Research, Policy, and Practice*, 4 J. of Pub. Child Welfare 198 (2010), https://www.tandfonline.com/doi/full/10.1080/15548731003799662?scroll=top&needAccess=true

This article reviews empirical data on siblings in foster care and provides an overview of the policies and practices related to sibling placements in the child welfare system. With respect to how placing siblings together can mitigate the trauma caused by being removed from their parents, the author notes that "siblings can play a critical role in repairing and minimizing the psychological damage of instability, separation, and trauma." *Id.* at 207.

- Sigrid James, et al., *Maintaining Sibling Relationships for Children in Foster and Adoptive Placements*, 30 Child. & Youth Svcs. Rev. 90 (2008), https://pubmed.ncbi.nlm.nih.gov/19122749/

This study examines data from caregivers of 14 foster and adopted children in efforts to better understand the implications of maintaining sibling relationships for child welfare policy and practice. The authors note that children in the welfare system "are considered a population at high risk for adverse outcomes across all domains of functioning . . . [with] rates of emotional and behavioral problems . . . [ranging] from 30 to 80 percent . . . [and] attributed to histories of abuse and neglect, backgrounds of general family dysfunction, parental substance abuse and poverty as well as the potential trauma associated with removal from home." *Id.* at 1 (internal citations omitted). This study includes discussion of the caregivers' decisions in determining whether to keep siblings together. In the majority of joint-placement cases, siblings were viewed as having a positive effect on one another. "One caregiver, who dealt with a difficult and at times violent older sibling, explained that she chose to keep the child in her home to avoid the trauma his removal would cause for the younger siblings, stating: '*He's part of their family; he's what they have left of their family*.'" *Id.* at 9.

d) Placing siblings together increases the chances of reunification with parents.

- Vicky Albert & William King, *Survival Analyses of the Dynamics of Sibling Experiences in Foster Care*, 89 Families in Society 533 (2008), https://journals.sagepub.com/doi/10.1606/1044-3894.3819

This study analyzes reunification rates for sibling groups in foster care and finds that siblings placed completely or partially together reunify at a faster rate than those placed apart. The authors note that, "for the most part and over the long run, intact placement for siblings aids in speeding up the reunification process" and "those placed completely together are less likely to remain in care over the long run than those placed completely apart." *Id.* at 8. The authors thus advocate for practitioners in the child welfare system to base their treatment plans on—in addition to what is best for each individual child—what is best for the sibling unit. The study ultimately concludes that the foster care system would be improved by strengthening efforts to place siblings together, including by providing additional training and monetary incentives to foster parents.

- Jeffrey D. Waid, *Investigating the Impact of Sibling Foster Care on Placement Stability* (2015) (Dissertation, Portland State University), https://pdxscholar.library.pdx.edu/cgi/viewcontent.cgi?article=3488&context=open_access_etds

This dissertation used statistical analysis to investigate how family dynamics and home settings impacted the likelihood of foster care placement changes for a sample study of children. Through this analysis, it provides evidence about how sibling co-placement reduces the likelihood of foster care placement changes and increases the likelihood of reunification. For example, it describes a study that tracked permanency outcomes of children who entered foster care and found that siblings places together had better "reunification, guardianship, and adoption outcomes than siblings who were placed in only partially intact groups, children who were completed separated from their siblings, or children who had no siblings in care." *Id.* at 14. The analysis provides support for policies that prioritize co-placing siblings whenever possible and safe to do so, advocating for practitioners to understand that "sibling relationships are a valuable source of support to a child who has been removed from their family" and "provide the opportunity for continued learning and growth in the substitute care placement." *Id.* at 100.

- Sigrid James, et al., *Maintaining Sibling Relationships for Children in Foster and Adoptive Placements*, 30 Child. & Youth Svcs. Rev. 90 (2008), https://pubmed.ncbi.nlm.nih.gov/19122749/

This study examines data from caregivers of 14 foster and adopted children in efforts to better understand the implications of maintaining sibling relationships for child welfare policy and practices. Regarding the specific data reviewed, the study found that, in the majority of joint-placement cases, siblings had a positive influence over one another. For example, younger siblings looked up to older siblings as role models. Additionally, maintaining sibling relationships was a key factor in maintaining family cohesiveness when working towards reunification. The authors note that their findings, although based on a limited data set, support existing research that joint sibling placement generally is viewed favorably by child welfare professionals and youth themselves. They also discuss how joint sibling placement has been linked to several positive child welfare outcomes, including greater placement stability as well as greater likelihood of reunification and adoption.

e) Placing siblings together increases the chances that children will be adopted.

- Adam McCormick, *Siblings in Foster Care: An Overview of Research, Policy, and Practice*, 4 J. of Pub. Child Welfare 198 (2010), https://www.tandfonline.com/doi/full/10.1080/15548731003799662?scroll=top&needAccess=true

This article reviews empirical data on siblings in foster care and provides an overview of the policies and practices related to sibling placements in the child welfare system. As one example, McCormick notes that research shows children placed with their siblings have more stability in their care compared to those who are separated from siblings. In particular, "[c]hildren who are placed alone either with a history of placement with siblings or with a

history of placement alone, are significantly less likely to be adopted or placed in a subsidized guardianship home, than children who are placed with a consistent number of siblings in all of their placements." *Id.* at 213 (internal citations omitted).

- Susan L. Smith, *Siblings in Foster Care and Adoption: What We Know from Research*, in Deborah N. Silverstein & Susan L. Smith, Eds., *Siblings in Adoption and Foster Care: Traumatic Separations and Honored Connections* (Praeger Pub. 2009), https://psycnet.apa.org/record/2009-11027-000

This chapter discusses research about sibling relationships and implications for child-welfare practices, including placement stability in adoption. The author challenges the view that it is more difficult to place sibling groups with adoptive families compared to single children by citing to a study that came to the opposite conclusion: "A study of over 10,000 children photo-listed for adoption in New York found that members of sibling groups were more likely to be adopted and were placed more quickly than single children. In fact, the time to adoption was decreased by 3.2 months for each additional child in the sibling group." *Id.* at 21-22 (additional citations omitted). After reviewing other studies on adoption disruption, the author finds that—taken as a group—they tend to show reduced disruption risk for siblings who are adopted together.

f) Placing siblings together decreases the likelihood of placement disruptions.

- Becci A. Akin, *Predictors of Foster Care Exits to Permanency: A Competing Risks Analysis of Reunification, Guardianship, and Adoption* (2011) (Dissertation, School of Social Welfare, The University of Kansas), https://kuscholarworks.ku.edu/bitstream/handle/1808/6271/Akin_ku_0099D_10908_DATA_1.pdf?sequence=1&isAllowed=y

This paper discusses a longitudinal study of children in Kansas who were observed for a period of 30 to 42 months, as well as a general overview of the history of foster care and of existing literature. This study was designed to identify which child and placement characteristics were significant predictors of foster care exit to three types of permanency: reunification, guardianship, and adoption. Importantly, the author found that, "sibling placements were beneficial to permanency when all siblings in placement were kept together consistently and continuously throughout an entire placement episode." *Id*. at 103. The data showed that "the lowest reunification rate occurred for children who had siblings in placement but were completely separated (46.5%). Those who had partially intact sibling placements had a slightly higher reunification rate (48.5%). Children without siblings in placement experienced the next highest reunification rate (50.0%), while children who had siblings in placement and who experienced a completely intact placement with their siblings had the highest rate of reunification (60.4%)." *Id*. at 67. Similarly, "[c]hildren that experienced completely intact sibling placements were the most likely to exit to adoption (19.0%), followed by children that experienced partially intact placements (12.9%), and then children who did not have siblings in placement (i.e., no concurrent foster care episode) (12.3%). The lowest rate of adoption occurred for children who were completely separated from their siblings with concurrent foster care episodes (8.1%)." *Id*. at 72-73. In light of these findings, the author suggests that

"[o]rganizational procedures should aim to place children with kin and siblings whenever possible. Efforts to identify relative placement options could be ramped up by implementing intensive search for relatives and kin during a child's first 72 hours in foster care." *Id*. at 103.

- Kierra M.P. Sattler, et al., *Age-Specific Risk Factors Associated with Placement Instability Among Foster Children*, 84 Child Abuse & Neglect 157 (2018), https://www.sciencedirect.com/science/article/abs/pii/S0145213418303004?via%3Dihub

This paper examines the relationship between certain child attributes and case histories with placement disruptions using data relating to approximately 23,700 children in foster care in Texas. Placement disruptions is used to refer to placements that end for reasons associated with the suitability of an existing placement, rather than the desire to place a child in a more policy-preferred setting. The study found that "[p]lacements that have all siblings together had a lower risk of placement mismatch or child-initiated disruption." *Id.* at 13.

- Nancy Rolock & Kevin White, *Post-Permanency Discontinuity*: *A Longitudinal Examination of Outcomes for Foster Youth After Adoption or Guardianship*, 70 Child. & Youth Srvcs. Rev. 419 (2016), https://www.sciencedirect.com/science/article/abs/pii/S0190740916303486

This study analyzes child welfare administrative data relating to 51,567 children in Illinois who exited the foster care system through adoption or guardianship. The analysis showed that children placed with siblings were less likely to leave their legally permanent (adoptive or guardianship) homes prior to becoming adults. The study uses the term "post-permanency discontinuity" to describe children who, after adoption or guardianship, reenter the foster care system or otherwise have their guardianship vacated. Of particular note, the study found that "[c]hildren placed with at least one sibling at the time of legal permanence had about 15% lower hazard of experiencing discontinuity as compared to those not placed with at least one sibling." *Id.* at 425. The authors stated that this "is consistent with extant research on the importance of maintaining sibling bonds. Sibling relationships have been found to be a significant source of support throughout the life cycle and associated with increased stability for children in foster care." *Id.* (internal citations omitted)

- Sarah A. Font & Hyunn Woo Kim, *Sibling Separation and Placement Instability for Children in Foster Care*, 27(4) Child Maltreatment 583 (April 2021), Sibling Separation and Placement Instability for Children in Foster Care - PubMed (nih.gov)

Based on analysis of data on 2,297 children over a multi-year period, this study found that sibling separation is positively associated with placement instability. The authors noted this is largely consistent with the work of prior scholars, who have argued sibling separation may compound other relational losses in foster care. "Siblings exert a significant influence on children's functioning: children may look to older siblings as role models, and—in the case of neglectful or abusive family environments—siblings may be primary attachment relationships." *Id.* at 583. The study focused on whether and to what extent sibling placement reduces what the authors refer to as a "non-progress move"—a move "attributed to an underlying problem with the original foster care placement, such as maltreatment in the placement, a child or caregiver requesting that the placement by changed, or a child requiring a more restrictive setting." *Id.* at

584. The analysis showed that "partial separation (placement with some but not all siblings) is not associated with a non-progress move" and therefore may be helpful to consider when it is not possible to place all members of a sibling group together. *Id.* at 591. The study ultimately concludes that sibling separation is associated with increased risk of placement moves for children in foster care, including non-progress moves (which may indicate problems with children's functioning or connection to caregivers) . . . [and] that separation is especially negative for children who have only one known sibling, and that for larger sibling groups, placement with at least one sibling produces similar benefits as placement with all siblings." *Id.* at 593.

g) Siblings in foster care may also look to each other as a unique source of support and help.

- Child Welfare Information Gateway, *Sibling Issues in Foster care and Adoption* (2019). Washington, DC: U.S. Dep't of Health and Human Servs, Admin. for Children & Families, Children's Bureau, https://www.childwelfare.gov/pubpdfs/siblingissues.pdf

This publication discusses how child welfare professionals can positively affect the wellbeing foster care children by enabling them to maintain connections with their siblings. The authors discuss the importance of sibling relationships, the benefits of placing siblings together, and best practices for keeping them together. In terms of benefits, they note that "[s]ibling relationships can provide a significant source of continuity throughout a child's lifetime and can be the longest relationships that most people experience." *Id.* at 2. Additionally, they highlight that "preserving ties with siblings . . . can help buffer children from the negative effects of maltreatment and removal from the home." *Id.* The benefits of sibling support can extend past the time children exit the foster care system and can include "emotional and spiritual support, guidance about college or other opportunities, assistance required due to physical and developmental disabilities, and information about health concerns or history." *Id.* (internal citations omitted).

- Adam McCormick, *Siblings in Foster Care: An Overview of Research, Policy, and Practice*, 4 J. of Pub. Child Welfare 198 (2010), https://www.tandfonline.com/doi/full/10.1080/15548731003799662?scroll=top&needAccess=true

This article reviews empirical data on siblings in foster care and provides an overview of the policies and practices related to sibling placements in the child welfare system. With respect to the unique support provided by siblings in these environments, the author notes: "Research suggests that the sibling relationship plays a significant role in the lives of children and continues to serve as a source of support and comfort into adulthood. In addition, the sibling relationship can be of even greater significance when children face the unfortunate circumstances of abuse, neglect, and separation from their parents. The sibling relationship is oftentimes the longest lifetime relationship for a person with siblings. In the case of many foster youth, siblings are not only the final remaining family members to lean on for support and comfort, but also the only link to the past." *Id.* at 213. In conclusion, the author urges welfare professionals to "work

towards preserving the only family relationship that many youth in foster care have"—*i.e.*, their sibling relationships. *Id.* at 215.

h) Placing siblings together reduces depression, self-blame, and anxiety.

- Rebecca L. Hegar, *Kinship Care and Sibling Placement: Child Behavior, Family Relationships, and School Outcomes*, 31 Child. & Youth Srvcs. Rev. 670 (2009), https://ideas.repec.org/a/eee/cysrev/v31y2009i6p670-679.html

This study uses data from the National Study of Child and Adolescent Wellbeing (NSCAW) to examine correlations between kinship foster care, sibling placement, and child welfare outcomes. Substantive findings from the study included the following: (1) "From the viewpoint of the youth, being placed with a sibling was significantly related to lower levels of internalizing problems (e.g., depression, self-blame)"; (2) "girls placed in kinship foster care reported lower levels of externalizing behaviors (e.g., anger, aggression) than did girls placed in non-kinship settings"; and (3) "children and youth who are placed with one or more siblings are significantly more likely than others to feel emotionally supported, to feel close to a primary caregiver . . . and to like living with the people in the home." *Id.* at 676.

- Sabrina M. Richardson & Tuppett Yates, *Siblings in Foster Care: A Relational Path to Resilience for Emancipated Foster Youth*, 47 Child. & Youth Srvcs. Rev. 378 (2014), https://adlab.ucr.edu/wp-content/uploads/2014/12/Richardson-Yates-2014.pdf

Using data from 170 recently emancipated youth from the California foster care system between the ages of 17 and 21, this study investigates the correlation between sibling co-placements during foster care with subsequent educational and occupational competence, housing quality, relational adjustment, and civic engagement. It analyzes these outcomes in relation to the proportion of time which a child had spent placed with, versus separated from, his or her siblings. In particular, the authors found that "the presence of a sibling is typically associated with better proximal outcomes in foster care . . . [such as] fewer symptoms of anxiety and depression." *Id.* at 379 (internal citations omitted).

- Bilha Davidson-Arad & Adva Klein, *Comparative Well Being of Israeli Youngsters in Residential Care With and Without Siblings,* 33 Child. & Youth Srvcs. Rev. 2152 (2011), https://ideas.repec.org/a/eee/cysrev/v33y2011i11p2152-2159.html

This study compares the wellbeing and self-esteem of 91 Israeli youth between 12-14 years of age who were placed with their siblings (referred to as "intact care") in residential facilities with those who were placed without their siblings (referred to as "separate care"). As used in the study, the term "wellbeing" refers to the children's "psychological, social, cultural and physical quality of life. Special attention is given to self-esteem in light of claims that being in care with a sibling may alleviate or compensate for the detrimental impact of removal from home to children's self-esteem." *Id.* at 2153. The data used came directly from the children participating in the study through questionnaires they completed. The study ultimately found that those in care with siblings reported greater wellbeing than those in care alone. *Id.* at 2156.

- Adam McCormick, *The Role of the Sibling Relationship in Foster Care: A Comparison of Adults with a History of Childhood Out-of-Home Placement* (2009) (Dissertation, St. Edward's University in Austin, TX)

This dissertation analyzes the experiences of 50 adults who had out-of-home placements as children (such as a foster care placement), focusing on the correlation between childhood sibling experiences and adult outcomes. The study describes existing research about the importance of protective sibling relationships for children in out-of-home care, noting that "siblings can play a critical role in repairing and minimizing the psychological damage of instability, separation, and trauma caused by one's parents." *Id.* at 6. The study further notes that "[s]eparating siblings who have been removed from their parents only seems to intensify the pain, grief, and trauma that they have already experienced when they were initially removed from their parents." *Id.* Moreover, existing studies have shown that at a time children are separated from their parents "when such emotions as fear, confusion, and anxiety are heightened, the presence of a sibling may be the only predictable factor in a child's life" and thus can "play a critical role in reducing the negative effects of parental loss." *Id.* at 26 (internal citations omitted). In this study, in order to assess the strength of childhood sibling relationships and later adult outcomes, the author looked at a number of variables, including age, gender, number of placements, and age at placement. The specific research question he sought to address is whether "adults who had an experience of out-of- home placement as children who report having greater access to and closer relationships with their siblings have more positive outcomes those who do not." *Id.* at 34. The study ultimately found that those who had greater access to their siblings during their youth had higher levels of social support, self-esteem, and income as adults.

- Armeda Stevenson Wojciak, Lenore M. McWey, & Jeffery Waid, *Sibling Relationships of Youth in Foster Care: A Predictor of Resilience*, 84 Child. & Youth Srvcs. Rev. 247 (2018), https://journals.sagepub.com/doi/abs/10.1177/0192513X18758345

Using data from 246 children who attended a non-profit organization's summer camp program, this study investigates the correlation between a positive sibling relationship and resilience for youth in the foster care system. As part of its analysis, the authors discuss another study of resilience within the foster care system, which found that youth with higher resilient adaptation "had higher levels of self-esteem and lower levels of depression." *Id.* at 247-48 (internal citations omitted). The study ultimately found that a "warm sibling relationship" promoted individual resilience for middle childhood and adolescence development periods. Accordingly, the authors stress that this study demonstrates that "more should be done to promote warm sibling relationships for youth in foster care." *Id.* at 253.

i) Keeping siblings together improves each child's educational competence and reduces behavioral issues in the classroom.

- Sabrina M. Richardson & Tuppett Yates, *Siblings in Foster Care: A Relational Path to Resilience for Emancipated Foster Youth*, 47 Child. & Youth Srvcs. Rev. 378 (2014), https://adlab.ucr.edu/wp-content/uploads/2014/12/Richardson-Yates-2014.pdf

Using data from 170 recently emancipated youth from the California foster care system between the ages of 17 and 21, this study investigates the correlation between sibling co-placements during foster care with subsequent educational and occupational competence, housing quality, relational adjustment, and civic engagement. It analyzes these outcomes in relation to the proportion of time which a child had spent placed with, versus separated from, his or her siblings. Evaluation of educational outcomes were based on a youth's attained level of education, GPA, and school conduct, as well as stated educational values and aspirations. Low levels of competence were marked by dropping out without a diploma and with no plans to pursue further education. Moderate levels of competence were marked by a diploma or GED and clear plans to pursue post-secondary education or training. And the highest levels of competence were marked by attendance and success at community college or a four-year university. The study found that "[s]ibling co-placement [was] uniquely associated with higher educational competence," especially for male children. *Id.* at 383.

- Brianne Kothari et al., *A Longitudinal Analysis of School Discipline Events Among Youth in Foster Care*, 93 Child. & Youth Srvcs. Rev. 117 (2018), https://www.ncbi.nlm.nih.gov/pmc/articles/PMC8204670/pdf/nihms-1597058.pdf

This paper discusses a study of school discipline-related problems for students in foster care, evaluating which factors make a student more likely to be disciplined in school. Looking at 315 youth within the Oregon Department of Education, the study found that sibling separation is directly linked to an increase in disruptive behaviors at school, resulting in higher school discipline events for separated siblings. Specifically, the study concluded that "living apart from one's sibling increased the odds of youth experiencing school discipline events by [greater than] 65%." *Id.* at 12. Children in foster care are, on average, three times more likely than their peers to experience discipline events in school. The paper notes that these discipline events can have larger repercussions on a student's education, including dropping out of school, repeating a grade, and becoming engaged in delinquent and criminal behavior. As a result, finding ways to decrease the incidence of disciplinary events that students in foster care experience is important to the students' educational outcomes.

- Rebecca L. Hegar & James A. Rosenthal, *Foster Children Placed with or Separated from Siblings: Outcomes Based on a National Sample*, 33 Child. & Youth Srvcs. Rev. 1245 (2011), https://www.sciencedirect.com/science/article/abs/pii/S0190740911000661?via%3Dihub

This paper discusses a study of children in foster care who have siblings, drawing data from a large, national U.S. database. Using three categories of sibling placement (with all siblings, with some siblings, with no siblings), the study looks at school performance and incidence of behavioral problems, as reported by foster parents, teachers, and the children themselves. The largest impact of sibling placement noted is school performance as rated by teachers. "School performance of children placed with all siblings exceeded" the performance both of children placed alone and those placed with only some siblings. *Id.* at 1250. This study improved on past research by taking a "child-centered" definition of siblings, in which all those whom a child considered to be their siblings were counted as such. It also measured the effect of

partial sibling separation, noting that academic performance was highest for children placed with all of their siblings.

j) Keeping siblings together improves adulthood social skills.

- Lew Bank et al., *Intervening to Improve Outcomes for Siblings in Foster Care: Conceptual, Substantive, and Methodological Dimensions of a Prevention Science Framework*, 39 Child. & Youth Srvcs. Rev. 8 (2014), https://www.ncbi.nlm.nih.gov/pmc/articles/PMC3951129/

This paper provides an interdisciplinary literature review of various studies on the effects of sibling co-placement on general child welfare outcomes. It concludes that, based on a survey of the field, placement of children with their siblings "provide[s] important opportunities for youth to learn and practice social skills and to develop strategies for negotiation, conflict resolution, and cooperative activity in familiar and unfamiliar settings." *Id.* at 2. These in turn improve adulthood skills for foster care alumni. The paper therefore recommends a policy approach that supports a robust focus on supporting siblings in foster care.

- Sabrina M. Richardson & Tuppett Yates, *Siblings in Foster Care: A Relational Path to Resilience for Emancipated Foster Youth*, 47 Child. & Youth Srvcs. Rev. 378 (2014), https://adlab.ucr.edu/wp-content/uploads/2014/12/Richardson-Yates-2014.pdf

Using data from 170 recently emancipated youth from the California foster care system between the ages of 17 and 21, this study investigates the correlation between sibling co-placements during foster care with subsequent adult outcomes. It analyzes these outcomes in relation to the proportion of time which a child had spent placed with versus separated from their siblings. In addition to the educational outcomes, the study addressed the occupational competence, housing competence, relationship competence, and civic engagement of young adults who had recently been emancipated from the foster system. It found that, absent placement with siblings, many children in foster care lack the meaningful relationships that allow them to develop "narrative coherence." *Id.* at 384-85. This skill allows children to contextualize their experiences and emotions into a larger narrative, fostering emotional resilience. Narrative coherence was much higher in male children who had been placed with siblings. In turn, high narrative coherence was strongly correlated with high occupational, housing, and relationship competence, as well as higher levels of civic engagement.

2. If siblings cannot be placed together, children's best interests are served by frequent visitation.

a) Maintaining sibling relationships requires regular contact when they are not placed together.

- Child Welfare Information Gateway, *Sibling Issues in Foster Care and Adoption* (2019), Washington, DC: U.S. Dep't of Health & Human Services, Admin. for Child. & Fam., Children's Bureau, https://www.childwelfare.gov/pubpdfs/siblingissues.pdf

This publication discusses how child welfare professionals can positively affect the wellbeing of children in foster care by maintaining their connections with their siblings. The publication discusses the Fostering Connections to Success and Increasing Adoptions Act of 2008 (Fostering Connections Act), which mandates that States make reasonable efforts to maintain sibling connections. This either means placing siblings in the same home or, when that is not possible, providing frequent visitation and ongoing contact. It also notes that, while the Children's Bureau Guidance on the Fostering Connections Act (available at http://www.acf.hhs.gov/programs/cb/resource/pi1011) "allows agencies to set standards for the frequency of visits," it "designates that these should be at least monthly." *Id* at 6. As such, the majority of States have statutes governing requirements for frequency of visits or other communication between separated siblings. The publication also provides examples of practices to help maintain relationships between separated siblings, including: placing them in the same neighborhood or school district; arranging for other forms of contact such as emails, social media, and phone calls; and planning joint summer or weekend activities.

- Mass. Dep't of Child. & Fam., *Sibling Bill of Rights* (2012), https://archives.lib.state.ma.us/bitstream/handle/2452/680688/ocn983206271.pdf?sequence=1&isAllowed=y

The Massachusetts Department of Children and Families' "Sibling Bill of Rights" recognizes the importance of sibling relationships and is intended to guide practitioners in the foster care system. In particular, it states that: "sibling relationships provide needed continuity and stability during a child's placement"; "sibling separation is a significant and distinct loss that must be repaired by frequent and regular contact"; and "every foster child deserves the right to know and be actively involved in his/her siblings' lives absent extraordinary circumstances."

b) Children desire more contact with siblings after separation.

- Christine M. Helfrich, Lenore McWey & Armeda Stevenson Wojciak, *Sibling Relationships and Internalizing Symptoms of Youth in Foster Care*, 35 Child. & Youth Srvcs. Rev. 1071 (2013), https://www.sciencedirect.com/science/article/abs/pii/S0190740913001448

This study uses data from a nationally representative sample of 152 adolescents in foster care to investigate how sibling relationships can help mediate the relationship between trauma and expression of internalizing symptoms. "[O]f adolescents studied, 73.7% were currently separated from their sibling. Of those who were not living with their sibling, 72.4% saw their sibling monthly or less frequently with 29.5% reporting never having any contact with their sibling. However, 75.0% of the youth reported wanting more contact than they currently have with their sibling." *Id.* at 1073.

- Armeda Wojciak, et al., *Sibling Relationship in Foster Care: Foster Parent Perspective*. 39(9) J. of Family Issues 2590 (2018), https://doi.org/10.1177/0192513X18758345

This qualitative study involves 15 foster parents and examines their views on the importance of the sibling relationship. Overwhelmingly participants felt that siblings should be placed together and they noted negative behaviors when siblings were separated, including increased anxiety.

Participants also noted the importance of sibling visitation if siblings are separated but noted that visits should be unsupervised and kid-led, and that visitation should never be cancelled as a punishment. Participants understood the unique role of siblings and felt that foster parents should "facilitate as many opportunities as possible and build as many informal connections for opportunities or abilities for them to connect." Overall foster parents in this study felt that sibling relationships "should be protected and should be a higher priority in the system" and they offered ideas for promoting sibling relationships including foster parent collaboration, educating foster parents on the history of a sibling relationship, and larger systemic changes.

- Susan Smith & Jeanne Howard, *Promoting Successful Adoptions,* 4 Practice with Troubled Families (Sage Pub. 1999), https://books.google.mg/books?id=2Bs5DQAAQBAJ&printsec=copyright&source=gbs_pub_info_r#v=onepage&q&f=false

This book focuses on adoptive families after the legal finalization of the adoption has taken place and contains many case examples, practice strategies, and resources. The authors incorporate findings from their own research with existing empirical research. One of the chapters focuses in particular on sibling connections and how they are impacted by adoption processes. The authors stress that often the "strongest, most positive attachments that children coming through the child welfare system have experienced are to siblings" with whom they can "form strong bonds of dependence and loyalty." *Id.* at 103. As such, "[e]ven many years after adoption, children may sustain feelings of responsibility or longing for siblings." *Id.* As examples, the authors describe children who "yearned for visits with siblings whom they may not have seen for 8 years or longer" and one child who "ran away trying to locate siblings from whom she had been separated." *Id.* The authors therefore stress the importance of facilitating sibling relationships after adoption.

- William Patton & Sara Latz, *Severing Hansel from Gretel: An Analysis of Siblings' Association Rights*, 48 U. Miami L. Rev. 744 (1994), https://repository.law.miami.edu/cgi/viewcontent.cgi?article=1837&context=umlr

This article emphasizes the need to provide protections to siblings who enter the foster care system or adoptive homes. As part of their analysis, the authors discuss the importance of sibling bonds as well as issues with judicially ordered separate sibling placements. Regarding the power of sibling relationships, the authors note that "siblings provide a family subsystem which lasts a lifetime, often for 60 to 80 years, and grieving over a lost sibling may be lifelong. . . . A sibling relationship can be an independent emotionally supportive factor for children in ways quite distinctive from other relationships, and there are benefits and experiences that a child reaps from a relationship with his or her brother(s) or sister(s) which truly cannot be derived from any other. It is quite telling that more siblings separated from their natural families search for their biological siblings than search for their biological parents. One of the most frequent reasons children run away from foster homes is to visit siblings." *Id.* at 780 (internal citations omitted). The authors conclude by stressing that siblings should not be separated without adequate due processing hearings and without a showing of necessity.

- Randi Mandelbaum, *Delicate Balances: Assessing the Needs and Rights of Siblings in Foster Care to Maintain Their Relationships Post-Adoption*, 41 N.M. L. Rev. 1 (2011), https://digitalrepository.unm.edu/nmlr/vol41/iss1/3/

This article discusses the tension between balancing the importance of permanency for children in the child welfare system (*i.e.*, finding them a new and permanent family) with enabling them to maintain sibling relationships. It outlines: federal and state statutes relating to post-adoption sibling contact; how courts have addressed some of these issues; social science research relating to the issues; and potential reforms for child welfare and adoption laws and policies. In discussing these issues, the author stresses that the importance of sibling relationships do not evaporate after a child is adopted and "psychologists opine that separation without contact leads to curiosity, concern, and longing." *Id.* at 8 (internal citations omitted).

c) Frequent sibling visitation leads to better mental health, social competence and sense of stability and belonging.

- Family Futures Practice Paper Series, *Assessing Sibling Placements* (2019), https://www.familyfutures.co.uk/wp-content/uploads/2019/06/Practice-Paper-Siblings-June-2019.pdf

This paper is authored by Family Futures, a non-profit group in the United Kingdom that has worked with adopted and foster care children for over 20 years. While the authors emphasize that the best way to place siblings according to their needs is to perform individualized assessments of each child and that placements should ultimately be driven by individual circumstances, they maintain that "should siblings be separated, maintaining reasonable levels of contact is essential for the future mental health and wellbeing of the child." *Id*. at 27.

- National Center for Child Welfare Excellence (NCCWE), Practice Component No. 6, *Sibling Visits and Contacts*, http://www.nccwe.org/toolkits/siblings/component-6.html

This publication by the National Center for Child Welfare Excellence (NCCWE) examines the importance of sibling relationships and visitation. While the authors acknowledge there may be valid reasons for not placing siblings together in foster care, they stress that when that happens facilitating regular contact between siblings is critical to their wellbeing. "When children are not placed together, visits and other ongoing contacts can help maintain the attachment to family and lessen the trauma of being placed apart. When visits are regular and frequent, and allow opportunity to connect in a meaningful way, they have many of the same benefits of sibling placement together: less trauma and loss, greater feelings of belonging, and shared history." Additionally, the publication outlines sibling visitation requirements and policies for various U.S. States.

- Rebecca McBride, *Keeping Siblings Connected: A White Paper on Siblings in Foster Care and Adoptive Placements in New York State*, New York State Off. of Child. & Fam. Servs. (2007), https://affcny.org/wp-content/uploads/2008/12/siblingwhitepaper.pdf

This paper discusses how sibling bonds are critical to children's development and emotional well-being because those bonds help shape their identity and sense of belonging in the world. The paper addresses the benefits and challenges of placing siblings together as well as best practices for sibling visitation plans when co-placement is not feasible. When siblings are placed separately in New York, agencies are required to make reasonable efforts to facilitate biweekly in-person contact between siblings, unless it would be harmful to their health or safety or unless precluded by geographic proximity. "When visits are regular and frequent, and allow opportunity to connect in a meaningful way, they have many of the same benefits of sibling placement together: less trauma and loss, feeling of belonging, shared history, opportunity to work through problems." This paper makes recommendations on how to improve these types of sibling visits. *Id.* at 10-14.

- Sabrina M. Richardson & Tuppett Yates, *Siblings in Foster Care: A Relational Path to Resilience for Emancipated Foster Youth*, 47 Child. & Youth Srvcs. Rev. 378 (2014), https://adlab.ucr.edu/wp-content/uploads/2014/12/Richardson-Yates-2014.pdf

Using data from 170 recently emancipated youth from the California foster care system between the ages of 17 and 21, this study investigates the correlation between sibling co-placements during foster care with subsequent educational and occupational competence, housing quality, relational adjustment, and civic engagement. It analyzes these outcomes in relation to the proportion of time which a child had spent placed with, versus separated from, their siblings. In discussing their findings, the authors stress that efforts should be made "to preserve positive sibling connections for foster youth to facilitate youth's narrative meaning making, experiential integration, and, by extension, psychosocial adjustment." *Id.* at 385.

- Mary A. Herrick & Wendy Piccus, *Sibling Connections: The Importance of Nurturing Sibling Bonds in the Foster Care System*, 27 Child. & Youth Srvcs. Rev. 845 (2005), https://www.sciencedirect.com/science/article/abs/pii/S0190740904002646

This paper is authored by two child welfare researchers, who both spent a significant amount of time in foster care in their youth, both together and separated from siblings. From their unique perspective, they examine the positive effect that sibling connections can have on children who enter the system and often experience anxiety, trauma, and loss of identity. In their analysis, the authors note that sibling connections can "provide a way of ensuring that children remain in touch with their past, enhance their sense of belonging, provide them with the framework for developing an identity and increase their sense of self-esteem." *Id.* at 852 (internal citations omitted).

d) Frequent sibling contact leads to better financial circumstances later in life.

- Sabrina M. Richardson & Tuppett Yates, *Siblings in Foster Care: A Relational Path to Resilience for Emancipated Foster Youth*, 47 Child. & Youth Srvcs. Rev. 378 (2014), https://adlab.ucr.edu/wp-content/uploads/2014/12/Richardson-Yates-2014.pdf

Using data from 170 recently emancipated youth from the California foster care system between the ages of 17 and 21, this study investigates the correlation between sibling co-

placements during foster care with subsequent adult outcomes. It analyzes these outcomes in relation to the proportion of time which a child had spent placed with versus separated from their siblings. In addition to the positive correlations with educational and relationship competence already discussed, the study also found positive relations between sibling co-placements and later "housing quality [and] occupational competence" of the siblings as adults. *Id.* at 382.

- Christine M. Helfrich, Lenore McWey & Armeda Stevenson Wojciak, *Sibling Relationships and Internalizing Symptoms of Youth in Foster Care*, 35 Child. & Youth Srvcs. Rev. 1071 (2013), https://www.sciencedirect.com/science/article/abs/pii/S0190740913001448

This study uses data from a nationally representative sample of 152 adolescents in foster care to investigate how sibling relationships can help mediate the relationship between trauma and expression of internalizing symptoms. The authors discuss how facilitating positive sibling relationships for children in foster care can help improve their outcomes when they age out of the system. In particular, they note that sibling support "may offset some of the negative outcomes that youth who age out of the foster care system, such as homelessness, often face." *Id.* at 1075 (internal citations omitted).

Addendum G

David E. Arredondo & Hon. Leonard P. Edwards, *Attachment, Bonding, and Reciprocal Connectedness*, 2 J. Ctr. for Families, Children & the Courts 109 (2000)

Attachment, Bonding, and Reciprocal Connectedness

Limitations of Attachment Theory in the Juvenile and Family Court

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The terms "bonding" and "attachment" are used in legal proceedings to describe critical factors considered in child custody matters. The authors believe these terms have outlived much of their usefulness in the setting of juvenile and family courts. Because both terms point primarily to the responses of one person to another, they place insufficient focus on the *reciprocity* of relationships between persons. That reciprocity, the authors propose, should be the principal area of the court's concern. Furthermore, the categorical nature of attachment relations (as they are currently described) is inadequate to describe the spectrum of human relatedness seen in court. A review of relevant case law reveals that mental health evaluators, attorneys, and courts use the terms

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Family and juvenile court judges are asked daily to determine child custody and visitation issues. These are among the most difficult decisions that judges face. They must consider numerous factors: parental competence to rear children, family dynamics, possibly the wishes of the child, and the overriding concern, the "best interest" of the child.[1]

It is no wonder that many judges turn to mental health experts[2]—psychiatrists, psychologists, marriage and family therapists, and social workers—for guidance in making these decisions.[3] The law permits mental health experts to give opinions on many aspects of a case involving child custody and visitation issues. These include the mental status of family members, which living and visitation arrangements would be in the best interest of the child, and whether a parent-child relationship should be preserved or terminated.[4]

Several mental health concepts have crept into the legal vocabulary. An informal survey of judges in California revealed that many judges rely on mental health experts to give opinions on whether a parent or other caretaker is "bonded" or "attached" to the child and, conversely, whether the child is "bonded" or "attached" to the parent/caretaker.[5] Some courts regularly order bonding studies, and attorneys on occasion ask for them to help guide the court's decision on what the future relationship between a child and a parent/caretaker should be.[6] Bonding studies are also used to assist courts in deciding questions regarding (1) permanency planning, (2) foster care, (3) a parent's capacity to form a nurturing relationship, (4) the advisability of continued group-home care, (5) custody disputes between parents or between a parent and other potential caretakers, (6) the termination of parental rights, and (7) other placement decisions.

The purpose of this article is threefold. First, it reviews the history of the clinical concepts of bonding and attachment. It then introduces the concept of reciprocal connectedness along with its forensic and neurodevelopmental rationale. Second, it presents representative examples of different current legal applications of the concepts of bonding and attachment. It discusses the limitations and pitfalls of using these concepts to make child placement determinations and suggests that the concept of reciprocal connectedness takes better account of the child's overall neurodevelopmental and emotional needs. Third, it offers some suggestions for how judicial officers might best use mental health expertise in child custody cases. In particular, it argues that the term "attachment" (as usually conceived) is too narrow to be of much use to the court because it focuses primarily on security-seeking on the part of the child. The article presents "reciprocal connectedness" as more suitable for judicial use because it comprises both the processes of bonding and attachment and the broader spectrum of human interactions necessary for normal brain and social

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"bonding" and "attachment" loosely and casually. The authors suggest the term "reciprocal connectedness" to denote a construct that describes a spectrum of relationships between children and their caregivers. A summary of the history of attachment theory and a review of recent research in brain development lead to the conclusion that reciprocal connectedness is a broad, accurate, and useful concept. The authors also propose 14 points for consideration to maximize the reliability and usefulness of mental health evaluations in the setting of juvenile and family courts. ■

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development. Its use will enable judges to assess more accurately the true condition of parent-child relationships and, thus, to make better decisions.

RATIONALE AND BACKGROUND

It could be reasonably asked why there is a need to introduce a new term (reciprocal connectedness) into the forensic lexicon. The reasons are multiple, but they can be summarized as follows: Attachment and bonding have evolved as concepts that focus on security-seeking (the desire for proximity to a caretaker) to the relative exclusion of other critically important aspects of human relationships in the context of development. The eminent British child psychiatrist Michael Rutter has perhaps stated this most succinctly:

> One of the major achievements of the initial attachment concept was the careful distinction between attachment qualities and other features of relationships. Unfortunately, the attractiveness of attachment theory has been rather a neglect of these other features, together with an implicit tendency to discuss relationships as if attachment security was all that mattered. Both Sameroff and Emde and Dunn have drawn attention to the evidence that children's relationships with other people are complex and involve a range of different dimensions and functions. These include connectedness, shared humor, balance of control, intimacy, and shared positive emotions. If we are to understand the interconnections between relationships, it will be necessary for us to take into account the range of dimensions that seem to be involved. It seems unlikely that these will be reducible to a single process involving attachment security or any other postulated quality.[7]

Furthermore, once it is clearly understood that children can, do, and should have relationships with more than one caregiver or sets of caregivers,[8] "[t]here is a need both to consider dyadic relationships in terms that go beyond attachment concepts, and to consider social systems that extend beyond dyads."[9]

Modern attachment theory addresses the dyadic nature of relationships but excludes the wider system of relatedness in which most children participate. It draws on historical and experimental psychological theory as its basis. Forensic mental health professionals, however, have extended the concept of attachment beyond its scientific and theoretical basis. When testifying about attachment, experts may thus inadvertently give the false impression that their subjective clinical impressions possess scientific validity. For example, the authors have heard experts declare that because a child was bonded to her foster mother, she could not be bonded to her biological mother.

This position assumes that a child bonds exclusively with one adult, that such bonds admit no degrees, and that the existence and intensity of bonds do not change as the child develops. All of these assumptions are dangerously misguided. Consider that, "[a]lthough secure attachments predominate in most general samples, they are far from universal. In American samples, they average about 60%. It would not seem sensible to regard 40% of infants as showing biologically abnormal development."[10] Yet that is exactly what attachment theory would lead a fact-finder to believe. If he or she accepts the testimony of experts on attachment, the fact-finder may decide that the bonding/attachment or lack thereof conclusively determines the quality of the relationship at issue. It is often the case, though, that the expert may have no insight regarding the actual connectedness between the adult and the child and little information on the *quality* of the child's relationship with that adult.

Forensic testimony based on attachment theory may mislead courts in three ways. First, the concept of attachment draws distinctions in black and white, whereas courts often need to decide questions in the gray areas of human rela-

tions. For heuristic purposes, theoreticians and research scientists classify attachments into four or five rigidly defined categories (secure, insecure-avoidant, insecure-resistant, ambivalent, or disorganized).[11] Though appropriate for research purposes, these categories are insufficiently subtle to describe in a forensic setting the rich and complex spectrum of dimensions of human interrelatedness. Forensic experts need to recognize and openly acknowledge this limitation of their testimony. The full range and complexity of human relationships and the developmentally dynamic context in which they occur do not permit categorization in a manner sufficiently valid to make them useful to juvenile and family court. In a forensic setting, attachment theory is critically limited because it describes attachment in terms of *categories* instead of more accurately conceptualizing interrelatedness as a *spectrum* of continuously distributed variables.[12] The concept of reciprocal connectedness openly acknowledges the difficulty of categorizing human relationships. Instead, it points to a *spectrum* of relatedness.

Second, attachment theory may mislead courts because it excludes from its scope the attitudes of adult caregivers—and those of most children, too. As applied, the concept of attachment implies a unidirectional process: A child bonds *to* an adult, with no action, or even awareness, required on the part of the adult. In addition, attachment theory is linked to a research paradigm with very narrow application.[13] By contrast, the concept of reciprocal connectedness more sensitively characterizes the child-caregiver relationship. It purposely points out the bidirectional or reciprocal nature of a healthy relationship: Not only does the child connect with the caregiver, the latter acknowledges and actively participates in the relationship with the child. In addition, reciprocal connectedness allows recognition of the multifaceted character of a wide range of child-caregiver relationships.

Third, the concept of attachment is vague. As applied in both research and forensic psychology, the terms "bonding" and "attachment" have multiple meanings that sometimes diverge from their ordinary meanings. When several experts and child protection workers testify in court about attachment, each may use the term to mean something different from the others. This failure to converge on a single meaning can confuse and possibly mislead the court.

The new concept is also more compatible with the current state of developmental neurobiology and modern theories of personality and inborn temperaments. "Reciprocal connectedness" is a more apt term for describing contemporary conclusions about the requirement of two-way interaction for normal child development. Developmental neurobiology has shown the importance of both reciprocity and connectedness for normal cognitive, emotional, and social development. It offers a method of approaching those issues that is essential for determining the best interest of a developing child. "Reciprocal connectedness" can help to capture and explain these findings for courts. Fortunately, one does not need to be a neuroscientist to understand it.

BONDING AND ATTACHMENT

As suggested above, "bonding" and "attachment" can possess several different meanings depending on context. One strain of meaning emerged with the development of psychological attachment theory in the mid 20th century. The research actually began by looking at human formation of bonds. For example, John Bowlby, the father of attachment theory, has stated: "Ethological theory regards the propensity to make strong emotional bonds to particular individuals as a basic component of human nature, already present in germinal form in the neonate and continuing throughout adult life into old age."[14]

Tautologically, "bonding" would be the process of forming bonds. Over the years, the term has come to be used synonymously with "attachment." Thus, Bruce Perry and others describe "bonding" as the "process of forming an attachment."[15] They explain:

> The word attachment is used frequently by mental health, child development, and child protection workers but it has a slightly different meaning in these different contexts. … In the field of infant development, attachment refers to … the special bond that forms in maternal-infant or primary caregiver–infant relationships. … In the mental health field, attachment … has come to reflect the global capacity to form relationships.[16]

Sometimes child protection workers, foster parents, and group home providers do not differentiate unhealthy dependency or emotional neediness from healthy "attachment." Failure to differentiate a healthy relationship from an unhealthy one is a principal reason that the term "attachment" (as used in practice) is too vague to be useful to a court. Unhealthy dependency and indiscriminate emotional neediness are two examples of situations that practitioners refer to as "attachments" even though they may reflect thwarted or distorted human development (as in the case of exploitative, neglectful, or grossly abusive relationships).

All primates are born with an instinctive desire to form bonds with available adults.[17] This is a feature of their biological makeup and is independent of any characteristic of those adults.[18] That is, bonding is unidirectional; it occurs independent of any special characteristics, behaviors, or efforts of those adults.[19]

Human infants and children likewise form attachments (bonds) to adults that can be strongly emotionally charged but are independent of the nature or quality of the care provided by those adults.[20] Sometimes these attachments form and are sustained despite the destructive quality of the relationship (as with an abusive parent).[21] As with other primates, these attachments are essentially unidirectional.[22] The biological drive for attachment resides within the child and is not fundamentally determined by the qualities or actions of the adults to whom the child is attached (in the usual and customary sense of the word "attachment").[23] This explains why many children are firmly attached to abusive or neglectful parents.[24]

RECIPROCAL CONNECTEDNESS

"Reciprocal connectedness" paints a more comprehensive and subtle picture of relationships than do "bonding" and "attachment." In the context of decision making in the family court setting, we can define it as a mutual interrelatedness that is characterized by two-way interaction between a child and an adult caregiver and by the caregiver's sensitivity to the child's developmental needs. The concept is more useful than "attachment" to courts because it describes a child's requirements for healthy neurobiological, social, and emotional development and distinguishes them from simple dependency (security-seeking). It more closely approximates the knowledge necessary for a judge to make decisions about the neurobiological best interest of the child. This neurodevelopmental concept describes a phenomenon that does not reside within the child alone but depends on an available adult who interacts reciprocally with the child.[25] Reciprocal connectedness is thus comparable to Bowlby's postulated "cybernetic system, situated within the central nervous system of *each partner*, which [has] the effect of maintaining proximity or ready accessibility of each partner to the other."[26]

The difference between this "cybernetic system" and the concept of reciprocal connectedness is that the latter is not limited to the goal of maintaining proximity (security). It encompasses a broader range of childhood needs, including interactive verbal and nonverbal communication, responsiveness, modeling, reciprocal facial expressiveness, social cues, motor development, and other dimensions necessary for normal neurodevelopment. Reciprocally connected adults sense and respond to the individual needs of developing children for responsive neural interaction *in addition to* proximity (security). These bidirectional, interactive dimensions are essential for the normal development of a child's capacities for empathy, compassion, and other higher-level human emotions and social skills.[27]

THE HISTORY OF BONDING AND ATTACHMENT STUDIES AND THE CONTRIBUTIONS OF MODERN NEUROSCIENCE

Modern bonding studies trace their roots back to a landmark series of studies of "imprinting," "bonding," and "attachment" that began during the 1930s.[28] In one of the most famous of these, Konrad Lorenz demonstrated that, during a particular time of early development (a developmental window), young goslings would "imprint" on cortical structures their impressions of his relationship to them and follow him exactly as if he were their mother.[29] Lorenz also found these results to be generalizable. The goslings would "imprint" to other animals, including his Labrador retriever, which happened to be present during that specific developmental phase.[30] Thus imprinting, a simple form of infant-to-mother bonding, was demonstrated to be an innate and instinctive process with a specific and predictable developmental window for its occurrence.[31] It was also an essentially unidirectional process.

John Bowlby was convinced that disruptions in the mother-child relationship led to psychological problems later in life.[32] Another landmark set of studies regarding the fates of British war orphans led him to conclude that infants raised in institutions without stable and continuous relationships with caregiving adults grew up with deficits in cognition, language, attention, and the capacity for durable interpersonal relationships.[33] These findings were incontrovertibly supported by a 30-year follow-up study of 25 children, half of whom were moved to a more nurturing, stable, and interactive environment before the age of 3.[34] Ongoing, caring relationships, stimulation, and human interactions were demonstrated to be essential for healthy development.[35]

A third extremely influential set of studies carried out by Harry F. Harlow involved infant rhesus monkeys.[36] In these dramatic studies, Harlow separated infant monkeys from their biological mothers and observed their attachment to inanimate surrogate mothers (wire monkey mannequins), demonstrating quite conclusively that in the absence of a living mother (or living mother surrogate), the infant monkeys would become quite attached to the mannequins.[37] In some of the experiments, he attached feeding bottles to some of the mannequins and covered others with terrycloth. Although the infant monkeys would go to the uncovered wire mannequins for feeding, they would return to the terrycloth-covered mannequins to whom they had already become attached. This behavior demonstrated that the monkeys' desire for food was not the determining factor in their attachment to the surrogates. Harlow recognized that it would be extremely important to note what happened to these infant monkeys

as they developed, especially in the context of John Bowlby's observations of British war orphans. The findings were similar—both monkeys and humans deprived of adequate mothering grew up to be grossly socially impaired.[38] Again, attachment to an inanimate surrogate mother was unidirectional. The monkey-child was psychologically attached to its wire mother without any reciprocity or nurturing interaction at all. The effects of this deprivation on subsequent social development were disastrous.

Mary Ainsworth and others carried out another set of studies of human infants during the 1960s and 1970s that supported and extended the work of Bowlby and Harlow.[39] These studies constitute the theoretical and experimental basis for the modern bonding and attachment studies that are most often presented in the context of juvenile and family court litigation.[40] These experiments employed variations of a laboratory paradigm known as the Strange Situation Procedure.[41] In brief, a caregiver and her (or his) 12-to-20-month-old child would sit in a sparsely furnished playroom while a stranger entered and then left. Subsequently, the caregiver would leave and reenter. During the various permutations of presence and absence of caregiver and stranger, the researchers would observe the child for signs of distress, attachment, and exploratory behaviors.[42] Infants were eventually classified into secure, insecure-avoidant, and insecure-resistant categories. In high-risk groups, many children were categorized as insecurely attached. Whether a child falls into a particular category is an "either/or" proposition.

It is important to note, however, that under this paradigm 40 to 50 percent of abused and neglected children were classified as securely attached to their maltreating parent.[43] This indicates that bonding or attachment studies alone are insufficient to differentiate nurturing and reciprocally involved parents from indifferent, abusive, or uncaring parents. A further limitation in the context of the family court is the attempt by some experts to use attachment theory to reduce the entire spectrum of human relatedness into a limited number of discrete categories. However useful this approach is for research (and it *is* useful for research), it is of limited value in the context of the juvenile and family court—especially when the myriad of special-needs children and families are taken into account.

RECENT CONTRIBUTIONS OF DEVELOPMENTAL NEUROBIOLOGY

The last 40 years have seen an exponential increase in our understanding of the human brain and the vicissitudes of its development. David Hubel and Torsten Wiesel did some of the most influential work at Harvard during the sixties and seventies.[44] By meticulously mapping the brain of developing mammals, they demonstrated conclusively that brain development depends heavily on experience and, specifically, that enduring features of the brain depend heavily on early experiences.[45] An example of this phenomenon is the learning of a second language. Before the age of 10, most children can pick up a new language easily.[46] As they grow older, this developmental window gradually begins to close.[47] The window never closes completely, but it becomes more difficult to access the brain's capacity to acquire a new language as the child approaches adulthood. The same holds true for the acquisition of musical, mathematical, verbal, and athletic abilities.[48]

In terms of evolution, the cerebral cortex is the part of the brain that was last to appear and the part that is most quintessentially human. In addition to language and speech (e.g., reading, comprehension, writing), it is home to mathematical abilities. More important to decision makers such as judges, however, is the fact that the cortex is the home of conscience, abstract reasoning, empathy, compassion, moral development, and social skills.

The developing cerebral cortex is exquisitely sensitive to external experiences. In other words, early childhood experiences in interaction with the outside world will, in part, determine the child's subsequent capacities in the higher human faculties. It is the bidirectional interaction (reciprocal connectedness) with a responsive external environment that supports the development of internal brain capacity for higher mental functions such as interpersonal sensitivity, empathy, compassion, and resilience.[49]

DIMENSIONS OF RECIPROCAL CONNECTEDNESS

As discussed above, reciprocal connectedness is a mutual interrelatedness characterized by reciprocity and developmental sensitivity.[50] To assess the health of caregiver-child relationships, the developmental age and particular needs of a child must always be taken into account because developing children have different needs and express their relatedness to caregivers in very different manners. Furthermore, the temperaments of both child and adult must be considered because of the inherent sensitivity of such a relationship. To facilitate accurate assessments of relationship health, reciprocal connectedness is conceptualized as a continuous spectrum of many variables including, but (unlike attachment) not limited to, the child's instinctive search for security and the caregiver's instinct to possess and/or protect.

Dimensions of reciprocal connectedness with younger children include:

- Frequency and quality of eye contact
- Frequency of affectionate touching or soothing

- Spontaneous anticipation of the child's needs or desires
- Empathic response to the needs of the child for attention
- Spontaneous smiling in both directions
- Bilateral initiation of affectionate interactions
- Understanding the child's unique temperament
- Affectionate speech or "cooing"
- Singing, reading, and playing with the child

Dimensions with older children might include:

- Recognition of the child as a unique individual
- Recognition of the particular needs of the developmental stage of the child
- Valuing the child for who he or she is
- Trying to understand the child's world from his or her perspective
- Trying to teach the child
- Trying to learn from the caregiver
- Seeking guidance or comfort from the caregiver
- Sharing positive experiences
- Maintaining a relationship that allows the child some measure of control while setting limits and maintaining boundaries

Of course, all these dimensions must be examined in a context that is familiar with the norms of the familial and larger social culture in which they take place. Put simply, child-caregiver relationships must be considered with sensitivity to cultural and ethnic differences. The connectedness between a truly loving caregiver and child is not based on intellectual understanding and is never forced or contrived. It is easily recognized by anyone who has witnessed a child being lovingly raised.

USES OF BONDING AND ATTACHMENT CONCEPTS IN JUVENILE AND FAMILY COURTS

When faced with decisions involving child custody, lawyers and judges often turn to mental health professionals for assistance. Among the many issues that these professionals address is the quality of the relationship between a parent figure and a child. The quality of the parent-child relationship may determine the nature and extent of the custody or contact that the court will award the parent figure.

The majority of reported cases in which bonding and/or attachment is discussed are in juvenile dependency court. Discussions of bonding/attachment studies can be found when a psychologist testifies to the extent of a child's bond to a parent, a foster parent, or a prospective adoptive parent, and to the potential consequences of placement with or removal from one of these persons. In addition, there are cases in which a different type of professional—a social worker, for example—offers an opinion to the court on whether there is bonding in a relationship. The judge may also state, with or without an explanation, that a parent-child attachment exists.

In some cases, the psychologist or other mental health expert testifies about the significance of bonding/attachment. In a few cases, the legal issue is whether the court erred in ordering or not ordering a bonding study. In others, the court is asked to order a bonding study or the method of conducting the bonding study is under scrutiny. The vast majority of cases involve the court discussing or simply mentioning bonding or attachment with or without explaining what is meant by either term.

CASES INVOLVING PARENT-CHILD RELATIONSHIPS

A series of cases raises the issue whether a parent-child bond or attachment is so significant that, in spite of legal grounds sufficient for termination of parental rights, the court should maintain the parent-child relationship. According to California law, a trial court must terminate parental rights at a permanency planning hearing if it finds that the child is adoptable, unless it also finds one of three exceptions. The most significant of these exceptions is found in section 366.26(c)(1)(A) of the California Welfare and Institutions Code, which states that termination should not take place if the parents have maintained regular visitation and contact with the child and the child would benefit from continuing the parent-child relationship.[51] This exception has been the focus of substantial litigation and appellate case law.

In re Autumn H.

The leading case clarifying the meaning of this section is *In re Autumn H.*[52] In this case, the trial judge changed the permanent plan for the child from long-term foster care to adoption and terminated the father's parental rights. The court found that the child was adoptable and that terminating the father's parental rights would not be detrimental to the child. The court further found that the father did not have a father-daughter relationship with the child, but only a "friendly visitor" relationship.

Autumn had been removed from her father's care in September 1991 because he was seriously physically abus-

ing her. During the reunification period, her father visited Autumn on a weekly basis. At the 18-month review, the father was not in a position to have Autumn returned to his care. The court chose as a permanent plan to place Autumn in long-term foster care. Six months later, in October 1993, the Department of Social Services requested that the judge change the plan for Autumn to adoption.

The father had visited with Autumn 22 times in 1993. A court-appointed advocate who had observed some of the visits testified that the father's interaction with Autumn was that of a family friend. The social worker agreed, stating that the father had not developed a father-daughter relationship with Autumn. The foster mother testified that the father attended about half of the visits offered, that he did not ask her about Autumn's needs but focused on his own problems, and that he was more a playmate for her. The adoption social worker referred to the father as a "friendly visitor." The father testified that he resisted having Autumn for overnight visits because he saw no reason for them.

The Court of Appeal affirmed the trial court's decision, finding that the trial court had properly interpreted the law. First, it examined section 366.26(c)(1)(A), which permits a trial court to forgo the preferred permanent plan of adoption and retain parental rights when "the parents or guardians have maintained regular visitation and contact with the minor and the minor would benefit from continuing the relationship."[53] The Court of Appeal found that those terms were not unconstitutionally vague: "benefit" within the child dependency scheme means that the relationship promotes the well-being of the child to such a degree as to outweigh the well-being the child would gain in a permanent home with new, adoptive parents. The Court of Appeal observed:

> Interaction between natural parent and child will always confer some incidental benefit to the child. The significant attachment from child to parent results from the adult's attention to the child's needs for physical care, nourishment, comfort, affection and stimulation. The relationship arises from day-to-day interaction, companionship, and shared experiences. The exception applies only where the court finds regular visits and contact have continued or developed a significant, positive, emotional attachment from child to parent.[54]

Second, the Court of Appeal found that such an attachment did not exist. It further found that Autumn was "bonded to her foster family" and would suffer if that placement were disrupted.[55]

In re Elizabeth M.

The appellate court in *Autumn H.* set a standard that other California courts have followed. Thus, when determining whether the parent-child relationship is of such a nature that it prevents the termination of parental rights under the California statute, most often the appellate courts follow an analysis similar to that undertaken in the *Autumn H.* case.

For example, in the case of *In re Elizabeth M.*,[56] the juvenile court examined the same question at a termination-of-parental-rights hearing. The mother had regularly visited Elizabeth during most of the reunification period except for the last six months. Several professionals testified that, during the visits, the mother did not occupy a parental role; at best, she occupied a pleasant place in Elizabeth's life. The court found that this relationship was insufficient to invoke the statute and permit the court to find that the "child would benefit from continuing the relationship."[57] The Court of Appeal affirmed the order terminating the mother's parental rights.

In re Zachary G.

Another apt example is *In re Zachary G*.[58] The child had been taken into protective custody at birth because his father had seriously physically abused one of his older siblings. He was placed with his maternal grandmother, and the parents were offered family reunification services. At the six-month review hearing, the mother was homeless and staying with friends. She had an off-and-on relationship with the father, living with him from time to time. The juvenile court continued to offer family reunification services. At the 12-month review, the social worker's report said that the mother was not attending therapy regularly, that her relationship with the father continued, and that a psychologist opined that the mother was unlikely to protect her children. The court terminated services and ordered a permanency planning hearing pursuant to section 366.26.[59]

Just prior to the hearing, the mother filed a petition to modify the juvenile court order terminating her reunification services with Zachary. She alleged in her petition that she had changed her life, that she had been visiting the child regularly, that she had had weekly in-home services for a newborn sibling, and that she had engaged in biweekly therapy sessions. A therapist's report indicated that the mother had shown no inclination to return to the child's father and was capable of caring for and safeguarding the child. The social worker's assessment report indicated that the mother and Zachary enjoyed regular visits, but that Zachary did not look to his mother for his needs. Instead, he turned to the foster parents for his needs 90 percent of the time during supervised visits. The social worker recommended termination of parental rights and adoption.

At the hearing on the petition to modify, the mother filed additional evidence in the form of a bonding study performed by a psychologist, Dr. Jesse, a few days before

the hearing. According to that study, Dr. Jesse had observed the mother's interaction with Zachary during a single office visit and approved of it. She also opined that Zachary showed a psychological bond selective for his mother because of his reactions upon being separated from her. When the mother left the room where the meeting was taking place, Zachary cried and did not seek comfort from the caretaker grandfather. He had no similar reaction when the caretaker left while the mother stayed in the room.

The court denied the motion to modify and terminated parental rights; the mother appealed. The appellate court affirmed the trial court's findings and orders, stating that there was no showing in the motion to modify that the change in plan would have benefited Zachary or that his best interest would have been served.[60] The appellate court did not comment on the procedures followed by Dr. Jesse in conducting the "bonding study" or the weight that should have been given to them.[61]

Cases in Other States

In other states, trial and appellate courts have faced similar issues involving the parent-child relationship. In *O.R. v. State*,[62] the Alaska trial court terminated parental rights based upon parental abandonment. The social worker's testimony was that the child did not have "any attachment [to her parents] other than [as] someone she comes to visit."[63] An expert witness concluded that lack of contact during the first nine months of the child's life "had destroyed the parent-child bond."[64] On appeal, the Alaska Supreme Court affirmed the trial court's decision and agreed with the finding that the parents' lack of contact with the child during the first nine months of the child's life had destroyed the parent-child bond.[65]

In the Maine case of *In re Peter M.*,[66] the trial court terminated the parental rights of the mother, finding that she had been unwilling to take responsibility for her son in a timely fashion and that termination was in the best interest of the child. In affirming the trial court, the Supreme Court of Maine indicated that, in determining whether termination was in the best interest of the child, the trial court should consider "the child's age, the child's attachment to relevant persons, periods of attachment and separation, the child's ability to integrate back into the parent's home and the physical and emotional needs of the child."[67] Examining these criteria, the Supreme Court found that the termination was proper because the child had a strong attachment to the caretaker and virtually no contact with his mother.

In the Nebraska case of *In re D.*,[68] the court terminated the parents' rights with regard to D., finding that the parents were not interested in maintaining contact with their child and not interested in rehabilitative programs offered by the welfare department. Noting that the child had developed a sound, affectionate relationship with his foster parents and only minimal emotional attachment to his parents, the Supreme Court found that termination of parental rights was in the best interest of the child.

In *In re Mr. & Mrs. J.M.P.*,[69] the mother surrendered her child for private adoption. She was assisted by the same attorney who arranged for the adoption with the adopting parents. She appealed her surrender, and the Supreme Court of Louisiana reversed and remanded the case to the trial court. The Supreme Court did not find that the surrender was improper because of the attorney's dual representation; instead it addressed child development considerations, instructing the trial court to consider the psychological relationship between the child and parent or parent figure, stating: "The court should prefer a psychological parent over any claimant (including a natural parent) who, from the child's perspective, is not a psychological parent."[70]

In summary, the court rulings in these cases appear to focus on child development principles as a basis for their decisions. While the terms "bonding" and "attachment" are used throughout the decisions, it appears that the courts are using them in their unidirectional sense. That is, the courts are focusing on the child's relationship to a parent and not on the relationship or reciprocal connection between them. In addition, courts seem to use these terms in an all-or-nothing manner—either the child is bonded or attached or the child is not. They do not acknowledge the spectrum of intensity in relationships. From a neurodevelopmental point of view, the courts' use of these terms is imprecise.

CASES INVOLVING FOSTER PARENT–CHILD RELATIONSHIPS

In proceedings for termination of parental rights, some courts have found that the relationship between the foster or adoptive parent and the child is critical to determining the best interest of the child and whether the child should be removed from the foster or adoptive parents.

In re Colby E.

In *In re Colby E.*,[71] the trial court terminated parental rights even though the parent was not found to have committed any wrongdoing. The child had been in the same foster home for over 40 months, since he was 19 months old. The evidence supported the conclusion that the child would be in jeopardy if removed from the foster home. The Supreme Court affirmed, finding that if removed from the stable foster home environment, the child "would likely suffer severe emotional trauma and be inhibited in his ability to form personal attachments in the future."[72]

In re Guardianship of J.C.

In this case,[73] the trial court terminated the parents' rights because of its finding that the children would be harmed by removal from the foster parent. The trial court had heard extensive psychological testimony concerning the children's bond to their foster parents. The evidence was contradictory, and on appeal the New Jersey Supreme Court reversed, finding that the evidence did not support the statutory and constitutional standards that govern the termination of parental rights. The Supreme Court remanded the case to the trial court so that it could determine whether the children had bonded to the foster parents and, if so, whether breaking such bonds would cause the children serious psychological or emotional harm.

In re J.L.D.

In *In re J.L.D.*,[74] the trial court terminated parental rights and the incarcerated father appealed. The North Dakota Supreme Court affirmed, noting that the child had developed "strong emotional attachments with his foster family,"[75] and that adoption would provide the child with an opportunity to live a normal life in which love and care were provided on a consistent basis. The court noted that continuing foster care indefinitely would only solidify and magnify his attachments to the foster family, making his eventual dislocation more traumatic and placing his later assimilation into a permanent home at greater risk.[76] The Supreme Court concluded that the child would probably suffer serious mental or emotional harm if parental rights were not terminated.

In re Blunk

In the case of *In re Blunk*,[77] the parental rights of the mother of seven children were terminated because of abandonment and failure to provide and because the children had been placed in foster and adoptive homes for two years and had developed attachment and love in those homes. The mother asserted that she had reformed, but the trial court found that that was insufficient given the children's current situation. The Supreme Court of Nebraska affirmed the trial court, indicating that the children's attachment to the adoptive home was sufficient to support the termination of parental rights, stating: "[I]t would be unconscionable to wrench these three children away from their adoptive parents and the other four from the Nebraska Children's Home Society during their impressionable years and restore them to their mother upon the mere representation that she had reformed."[78]

In re J.K.S.

In *In re J.K.S.*,[79] the trial court terminated parental rights and authorized adoption by the caretaking family. In proving a portion of its case, the State established that removing the child from the foster parents would result in serious physical, mental, moral, or emotional harm. The Supreme Court affirmed, noting:

> There was overwhelming evidence that J.K.S. has established strong bonding and attachments to her foster parents and foster brother with whom she has resided for the past five years. … [E]ven a gradual change from the foster home to G.S.T.'s home would be emotionally traumatic to J.K.S. and there would be a very significant risk of permanent emotional damage if J.K.S. were removed from her foster home. That testimony clearly supports the conclusion that J.K.S. would be harmed by the lack of bonding or emotional attachment in G.S.T.'s home.[80]

In re William L.

In the case of *In re William L.*,[81] the trial court terminated the parental rights of one mother to her three sons and another mother to her daughter. Both mothers appealed. In the former case, the mother's inability to raise her sons and long periods of separation from them formed the basis for the termination. In affirming the decision, the Supreme Court pointed out that a biological parent's claim can be weakened by long separation, "causing the parent's relationship with the child to dwindle, while the child develops other, more stable ties."[82] Citing authority, the court stated:

> [A] child will become strongly attached to those "who stand in parental relationship to it and who have tenderly cared for it. Its bonds of affection [may] have become so strong that to sunder them suddenly may result not only in the child's unhappiness, but also in its physical injury. … Nothing could be crueler than the forcible separation of a child from either its real or foster parents by whom it has been lovingly cared for and to whom it is bound by strong ties of affection.[83]

In re Baby Boy Smith

In *In re Baby Boy Smith*,[84] the baby's mother moved to annul her surrender of parental rights. The trial judge denied her motion, finding in part that the child's best interest would be served if he were to remain with the prospective adoptive parents. The testimony at trial included that of Dr. Jepson, who explained that the bonding process occurs during the first six to eight months of life and "lays the groundwork for all future interpersonal relationships,"[85] and that disruption of that process will interfere with interpersonal relationships later in life. Dr. Jepson further testified that he had observed the child with the prospective adoptive mother and that the child had fully bonded with her.[86] Dr. A. James Klein testified further about the bonding process, stating that removal of

the child from the prospective adoptive parents could have catastrophic consequences affecting every aspect of the child's functioning.[87] The Louisiana Supreme Court affirmed the trial court's decision, citing an early decision in which the court said: "[I]f the adoptive parents are fit, and the child has formed a psychological attachment to one or both of them, the adoptive parents should be preferred so as to avoid the grave risk of mental and emotional harm to the child which would result from a change in custody."[88]

In re Ashley A.

In the case of *In re Ashley A.*,[89] the trial court terminated the rights of both parents regarding Ashley and the mother's rights regarding half-siblings. The parents appealed the decision and the Supreme Court of Maine affirmed. The Supreme Court analyzed the statute and found that the best interest of the child "may be determined by considering such factors as the needs of the child, attachment to relevant persons, periods of attachment and separation, ability to integrate into substitute placement or back into parent's home, and the child's physical and emotional needs."[90]

These cases involving the relationship of foster parents to children reflect a judicial consensus on a number of issues:

1. Parental absence can reduce any bond/attachment between that parent and the child.
2. Children can become bonded/attached to foster parents.
3. Children suffer emotional harm by removal from homes in which such bonding/attachment has developed.
4. Removal in some cases can lead to lifelong problems, including the inability to form attachments with others in the future.
5. Reciprocal connectedness is tacitly relevant in determining whether termination of parental rights is appropriate.

As in the parent-child relationship cases discussed above, these courts stress child development consequences in their decisions. They, too, refer to "bonding" and "attachment" as unidirectional concepts, focusing on the child's relation to the caregiver and not on the caregiver's relation (connectedness) to the child. The use of such imprecise language has led to decisions in which important questions about the quality of the relationship between the caretaker and the child have gone unanswered.

PSYCHOLOGICAL/DE FACTO PARENT

The term "psychological parent" first came to prominence in Goldstein, Freud, and Solnit's landmark publication, *Beyond the Best Interests of the Child*.[91] Perhaps no book has had a greater impact on judicial decision making in child custody cases. In the book, the authors focus on child development and its implications within the court system, defining several terms that have become important in child custody litigation. They make a distinction between biological and psychological parents: the former is the parent who biologically produced the child, and the status of the latter is developed through "day-to-day attention to [the child's] needs for physical care, nourishment, comfort, affection, and stimulation."[92] Of course, the same person can be both the biological and psychological parent, but in some situations the biological parent can be a stranger to the child and a different person can be the psychological parent.

The authors explain the psychological complexities of the parent-child relationship. If the parent figure provides care only for the child's bodily needs, the child may remain involved in his own body "and not take an alert interest in his surroundings."[93] When, however, the adult becomes personally and emotionally involved with the child, interaction between the two will occur, focusing the child's attention on the human object and the outside world.[94] These first attachments form the basis for further relationships that meet the child's demands for affection, companionship, and stimulating intimacy. When someone can respond to these needs reliably and regularly, the child-adult relationship can develop and provide a strong basis for emotional, social, and intellectual development.

The authors point out that the parent-child relationship can be very complex: "Children may also be deeply attached to parents with impoverished or unstable personalities."[95] Such relationships may be a threat to the healthy development of the child. Indeed, children may have emotional ties to the "worst" of parents. The authors note that, in extreme cases, state intervention may be necessary. Yet, if there is interference with the child–psychological parent relationship, however unhealthy that relationship may be, it will be emotionally painful for the child.[96]

The concept of psychological/de facto parent developed by Goldstein, Freud, and Solnit has been applied by a number of courts in different types of child custody litigation, including the *Autumn H.* case.[97] It was first recognized in California in the case of *In re B.G.*[98] In that case, the mother sought to regain custody of her children, who had been placed with foster parents after their father had died. The trial court would not permit the caretaking foster parents to participate in the legal proceedings to determine custody. The California Supreme Court acknowledged that the foster parents had legal standing to appear as parties in the proceeding. In making its finding,

the California Supreme Court cited *Beyond the Best Interests of the Child* [99] and observed that biological parenthood

> is not an essential condition; a person who assumes the role of parent, raising the child in his own home, may in time acquire an interest in the 'companionship, care, custody and management' of that child. … We conclude that de facto parents, such as the foster parents in this case, should be permitted to appear as parties in juvenile court proceedings.[100]

Other appellate courts have applied the concept.[101] The California Legislature codified it in 1969,[102] and juvenile courts adopted it in their rules.[103] In juvenile dependency proceedings, the de facto parent has become an important part of the legal process. Substantial case law defines who may be a de facto parent and what is the appropriate level of participation in the legal proceedings by that parent. The leading case on this issue is *In re Kieshia E.*,[104] in which the stepfather who had been found to have sexually abused the minor asked to have the status of de facto parent. He claimed that he had a close bond with the child despite the sexual abuse. An expert witness testified that the sexual molestation might or might not damage the child or destroy the bond, and that while the victim and perpetrator should be separated until the perpetrator stabilized in therapy, the ultimate goal should be reunification. The trial court agreed with his position. On appeal the California Supreme Court reversed the de facto parent finding, stating that any adult who causes the onset of dependency proceedings by sexual or other serious physical abuse has betrayed and abandoned, not embraced, the role of parent. That person lacks the inherent rights of a parent and forfeits any opportunity to attain the legal status of de facto parent.[105]

EXPERT TESTIMONY

In many cases in which the court is asked to make custody decisions, private or court-appointed experts write reports or testify on the child's best interest. An expert witness is one who has specialized knowledge, experience, or training that can assist the trier of fact. Often experts are asked to give opinions about the parent-child or caretaker-child relationship. On occasion, they will refer to bonding and/or attachment or the lack thereof as the basis for their opinions.

One reported case from Illinois stands out as an example of the different developmental theories a court might encounter in deciding whether to terminate parental rights. In *In the Interest of R.B.W.*,[106] the state brought an action to terminate a mother's rights over her child. The trial court denied the action and directed that the child be returned to her mother. On appeal the appellate court reversed the trial court's decision and held that the mother had deserted her child when she sold him and that the trial court should have considered termination of parental rights and adoption.

The appellate court reviewed the extensive expert testimony at trial. Judith Ingram, an adoption specialist, testified about mother-child visitation and her observations of the child with the foster parents. She stated she believed that the child had bonded to the foster parents in that

> R.B.W. gives them preference over anyone else in a group and he calls them mommy and daddy. These are the people to whom R.B.W. shows his insecurities. These are the people he chooses to help him when he falters or when he is hurt. These are the primary people he performs for in the park and from whom he needs recognition. He has an obvious preference for them. He is very comfortable and happy in their presence.[107]

Ingram testified that she saw none of these things in the relationship between the child and his natural mother.[108]

After several experts had testified, Sue Moriearty, a clinical psychologist, testified as an expert in the field of psychology for the purpose of evaluating the testimony and reports previously presented to the court. In addition, she conducted a literature review and interviewed others regarding attachment issues. She gave extensive testimony, quoted in part by the appellate court, stating that children or infants in institutional settings or who experience multiple homes with too many caregivers have difficulties in bonding. Furthermore, she said, children with exposure to too few caregivers may have difficulty adapting to school or other environments when their primary caretaker is absent. In her report, she quoted Mary D.S. Ainsworth, calling her "one of the pioneers in attachment research":

> It is usual for an infant to form more than one attachment even in the first years of life. … [T]he evidence does not necessarily suggest that it is essential or even optimal for mother and child to form an exclusive dyad. Indeed, a spreading of attachment relationships over several figures may be healthy and may, under some circumstances, prove to be highly adaptive. In one sense, "multiple" mothering is an insurance against separation disturbance.[109]

The report also reviewed psychological literature on infant attachment and psychopathology, addressing the concept of infant temperamental variables as a predictor of attachment behavior. It concluded that, based upon the child's ability to form attachments even after two separations, the child's temperament indicated his ability to form other attachments. The report recommended that the child be given the opportunity to develop a relationship with his natural mother while remaining with his current

caregiver. Following the recommendations of the report, the trial court denied the petition to terminate parental rights. On review, the Illinois Court of Appeal reversed the trial court and, focusing instead on timely permanency for the child, ordered that court to consider out-of-home placement and adoption by the foster parents.[110]

In summary, reciprocity of connectedness, the possible desirability of multiple caregivers, and the influence of temperament on relationship formation are significant developmental considerations that properly interest courts and that mental health professionals and expert witnesses should take into consideration.

REQUESTS FOR BONDING STUDIES

Because the parent-child relationship can be critical to determining whether a court will terminate parental rights, some parties in the juvenile dependency process have asked for "bonding studies," expert mental health evaluations addressing that relationship. For example, in the case of *In re Lorenzo C.*,[111] the juvenile court had commenced a permanency planning hearing at which the court was going to determine whether to terminate the parent's rights over the child. The parent asked the court to order a bonding study so that the court could better decide whether the parent-child relationship was so strong that termination of rights should not be ordered. The court denied the motion, stating that once the court has determined that a child is adoptable, it is the burden of the parent to prove that termination of parental rights should not take place by demonstrating a parent-child relationship worthy of preservation. The Court of Appeal affirmed the trial court's denial of the mother's motion for a bonding study, finding that the request was untimely and unnecessary given the clear evidence of the child's bond to the foster parents.

Similarly, in the case of *In re Richard C.*,[112] just prior to the termination of parental rights trial, the mother made an oral motion for a bonding study with an experienced psychologist and offered to pay for the study. The children's counsel opposed the motion, saying that it would be cruel to put the children through psychological testing and a bonding study involving interviews with a stranger. The court denied the motion, finding that the children were bonded to their current foster parents. Later in the proceedings, the mother filed a written motion for a bonding study. Again the court denied the motion, noting that at such a late stage in the proceedings there was no right to develop evidence on the issue.

Some courts regularly ask for expert mental health input at the time when termination of parental rights or another permanent plan is going to be considered. The expert can be asked to give an opinion on the relationship between the child and the parent, the child and the potential caretaker, and/or the mental status of one of the parties. Such information can be useful, particularly if both the expert and the questions to be answered are carefully selected.

EVALUATING MENTAL HEALTH EXPERT TESTIMONY

The court may decide to order a psychological evaluation or may, in the context of the hearing, receive expert mental health evidence. When courts consider mental health studies concerning parent-child relationships as evidence, they should understand the inherent difficulties faced by the evaluator. Many of these difficulties arise from three sources and should never be minimized or trivialized.

First, there are legitimate questions regarding the idea that there is, a priori, a single set of psychological or de facto parents. Current thinking indicates that gradations in attachment and connectedness exist. De facto parenthood in some cases may not be a dichotomous variable—that is, the question of de facto parents is not a question that can always be answered yes or no.[113] There is commonly a spectrum of psychological relatedness not easily articulated in either legal or psychological terms.

Second, a clear distinction must be made between "emotional pain" and "permanent emotional damage." Both "pain" and "damage" are loaded words when they are applied to a child. There is much potential here for rhetoric to displace reason in an emotion-laden context. No one wants to think of a child being hurt, much less "permanently damaged." It is here that an experienced, highly trained, and unbiased mental health expert can be of the most use to the court. The judge should ask specifically if a particular decision will cause permanent emotional damage or (relatively) temporary emotional pain to a child. This question should be followed by a thorough inquiry into how the expert came to his or her opinion. The expert should also be queried about his or her opinion of "hurt versus harm" in every scenario that the court must consider. When possible, both a short and a long view should be considered for each scenario.

Third, while it is quite possible (even likely) that the child is connected to more than one set of caregivers, it is not unusual for young children, when prompted, to call different sets of caregivers "mommy" or "daddy" at different times. Young children have not developed the dualistic "either/or" thinking that characterizes the older child. Sometimes a child's stated preference hinges on the last set of experiences he had with a given caretaker or on fears based on a misunderstanding of adult concepts.[114] It is important not to project adult thinking patterns onto

children, who have a very different set of cognitive abilities and may be operating from cognitive constructs based on childhood distortions.[115] The importance of evaluating the child in a developmental context is critical.

While keeping these concepts in mind, a judge should ask a series of practical questions when evaluating a mental health report:[116]

1. What qualifications and experience does the expert have?

   There are differences in the expertise of a psychologist, a psychiatrist, a social worker, and a marriage, family, and child counselor. For example, only a psychologist can conduct certain tests, and only a psychiatrist can evaluate psychotropic medications. The professional's education and training, licensing and certification, professional work history, publications, status in the profession, and experience, including testimony in prior court cases, will indicate the weight that the court may wish to give to his or her opinions.

   Related to this question is whether the expert is familiar with any of the professional standards that have been developed for child custody evaluations. These standards include the *Practice Parameters for Child Custody Evaluations,* by the American Academy of Child and Adolescent Psychiatry;[117] *Guidelines for Child Custody Evaluations in Divorce Proceedings,* by the American Psychological Association;[118] *A Report of the Task Force on Clinical Assessment in Child Custody,* by the American Psychiatric Association;[119] *Model Standards of Practice for Child Custody Evaluations,* by the Association of Family and Conciliation Courts;[120] and *Specialty Guideline for Forensic Psychologists,* by the Committee on Ethical Guidelines for Forensic Psychologists.[121] These standards recommend best practices in child custody evaluations in both juvenile and family court settings and, if followed, will lead to a higher quality of report in the courtroom.

2. What background information was reviewed, and when was it reviewed?

   The expert must provide the court with a list of all reports and documentation he or she reviewed as well as when the expert reviewed them.

3. Which family members did the expert interview or see, and in what combinations?

   The mental health expert should have face-to-face interviews with all relevant family members. The expert should inform the court about how he or she decided which family members to interview. The court should also be told which family members were not interviewed and why.

   In addition, the expert should tell the court which interpersonal interactions he or she observed and in what settings these observations took place. It is critical to observe adult-child interactions when making evaluations of reciprocal connectedness. Ideally, there should be observations in natural (as opposed to office) settings.

4. What language was used during the evaluation interviews? Was the evaluation conducted in an ethnically sensitive manner?

   The court must know what language the child and parents use between themselves and what language was used during any observations and interviews. If the adult-child or expert–family member communications were in a different language, the court should know what accommodations were made to ensure an accurate transfer of information. The court should be told what allowances were made for ethnic and cultural differences between the expert and those evaluated.

5. How many sessions were there, how long was each session, and where did the sessions take place?

   Evaluating a person or a relationship takes time. Some time is necessary to develop a relationship with the subject. Taking this time is particularly important with a child, for whom several sessions may be necessary. Again, it is preferable to make observations in a natural, as opposed to an office, setting.

6. How did the expert gather information?

   Did the expert make observations of interactions? Were individual temperaments considered (e.g., some children and adults are much more introverted than others)? Did the parties know that the expert was present? Did they know that the observations might be used in court? What questions were asked of whom? Were they age/language/culturally/developmentally appropriate? Did the expert utilize psychological tests? What tests were administered and why were they chosen? Who administered the tests? Who interpreted them? How reliable are they? How subjective is their interpretation? Could they have been interpreted differently?[122]

7. What tools did the expert use?

   Toys, sand trays, drawings, dolls, and other tools are often used in child interviews. Understanding which tools were used, what training the expert had in utilizing them, and the interpretations that can be drawn from them are all important for the court to know. Additionally, the court should inquire about the subjectivity of the interpretations. For example, intelligence testing

is usually considerably less subjective than projective tests such as the Rorschach.

8. What were the questions asked of the expert, who asked them, and how were the conclusions and recommendations reached? Are the conclusions admissible as evidence?

   The court should know what questions the mental health expert was asked and the process by which the expert reached any conclusions or recommendations. Often the expert will answer questions that have not been asked or will misunderstand the questions and answer them differently from the way in which they were posed. If the court was responsible for approving the questions to be addressed, it is in an excellent position to review these issues with the expert.[123]

   In this regard, the practice in Charlotte, North Carolina (Mecklenburg County), is exemplary.[124] In that jurisdiction, the questions to be addressed by the mental health expert are written at a case conference that includes the judge, the attorneys, and the mental health expert. By writing the questions before the evaluation starts, the evaluator can focus on narrowly defined questions that all parties agree are critical to the custody determination.

   In addition, the court should be certain to determine the basis for any expert opinions. In a number of areas, courts must be careful about the conclusions reached by experts based upon certain observed behaviors. For example, a child's play with anatomically correct dolls and a child's disclosure of or failure to disclose sexual abuse[125] may not be admissible as evidence that the child was sexually abused.[126]

9. What were the subject's responses to the interview(s)?

   It is important for the expert to inform the court about the quality of any interview. Was the subject comfortable? Was the expert able to develop any rapport with the subject? This is particularly important when interviewing a child. In this context the court should inquire whether the expert believes that the evaluation was adequate to answer fully the questions posed.

   The court should not assume that the expert is satisfied that the evaluation is thorough enough to be conclusive.

10. What child development concepts did the expert rely upon to form the basis of his/her opinions?

    The "best interest of the child" implies attention to what is the best result for the child from the child's perspective. This necessarily involves attention to child development principles. The court should determine which principles the expert relied upon, how they affected the way in which the evaluation was conducted, and how the developmental stage of the child influenced any conclusions drawn from the interactions. This would include an opinion about the weight given to the desires expressed by the child. In addition, any impact of differences or similarities of temperament should be considered.

11. Were the expert's opinions consistent with the child's interest?

    It must never be forgotten that the purpose of an expert's opinion is to offer to the court a plan to meet the best interest of the *child*.

12. Have the child's relationships with his or her siblings been examined?

    Adults who tend to see the best interest of the child from their own perspective sometimes overlook the importance of sibling relationships in both the short and long term.

13. Who hired the expert? To whom is the expert responsible?

    It is always relevant to determine who hired the expert and who is paying the expert.[127] It is preferable for any mental health expert who appears in juvenile court to be hired and paid for by the court.[128]

14. Is the expert also involved with the child or parent as a therapist?

    Therapeutic and forensic roles are fundamentally incompatible.[129]

By being conscious of these questions and considerations, the court will be able to assess more accurately the weight that should be given to any expert opinion.

CONCLUSION

However useful they may be for research purposes, the terms "bonding" and "attachment" are of limited use in the juvenile and family court. There are several reasons for this:

1. They are terms that are used loosely and with different meanings by different mental-health-care professionals, attorneys, experts, and judges.
2. Attachment theory divides child and caregiver relationships into a limited number of types, which suggests that they are categorical variables. Furthermore, these types are generally treated as "either/or" propositions.
3. They do not explicitly address the issue of different child and caregiver temperaments.

4. The concept of attachment does not differentiate pathological dependency and emotional neediness from developmentally healthy human relatedness. In the authors' experience, this has led to situations detrimental to children. In particular, children have remained in group-home settings longer than necessary or desirable because the counselors mistook their dependence (and hence compliance) for developmental progress. Other situations have arisen in which counselors have mistaken a child's dependence on neglectful, exploitative, or abusive caretakers for "attachment" and weighted it inordinately in custody or visitation decisions. Some of these placement decisions never appear in court for judicial review and thus never appear in case reporters. It is therefore important that other decision makers, including social workers, probation officers, counselors, and placement workers, are aware of the dangers of relying upon "attachment" in making placement decisions.
5. The terms "bonding" and "attachment" refer primarily to the security- or proximity-seeking aspects of a child's relationship to a caregiver. They disregard other important developmental needs.

Reciprocal connectedness is a broader concept, including, but not limited to, security needs. By definition, it refers to a spectrum of interrelatedness that is inherently tied to the developmental stage of the child. It focuses the court on the reciprocity of relatedness that contemporary neurobiology shows us is so critical for healthy child development. Reciprocal connectedness exists as a *spectrum* of interrelatedness and is too broad a concept to be reduced to a limited number of categories. Hence, it more closely approximates the issues that are important to the court: Are the child's neurodevelopmental and emotional needs for reciprocal interactivity being met?

A child bonds or attaches *to* a caregiver. A child reciprocally connects *with* a caregiver. The question then becomes not only "To whom is this child attached?" but also "With whom is this child connected?"

Judges and attorneys need to approach all concepts referring to human relatedness with caution. Terms are not well defined in either statutory or case law, and their use in any case raises a number of questions. The cases reviewed in this article demonstrate that "bonding" and "attachment" are terms used loosely by attorneys, experts, and judges. They are not necessarily of positive valence when they refer to parent-child relationships. Although all language is subject to distortion of meaning, we believe that reciprocal connectedness is a more useful concept for courts to consider when making decisions concerning children and their parents or other caretakers. It affirms the bidirectional nature of relationships between children and caretakers and emphasizes the spectrum of the intensity of those relationships instead of reducing them to the all-or-nothing categories implied by attachment and bonding.

Whether a court should turn to mental health expertise to assist it in making custody decisions is an issue to be addressed on a case-by-case basis. Courts should consider ordering adult-child reciprocal connectedness evaluations only in circumstances where it appears to be necessary. If the parents have visited regularly and appear to have a positive and reciprocal relationship with the child, it may be appropriate to order such a study prior to a hearing to terminate parental rights in order to determine the qualities of those relationships. Whenever an expert opinion is offered, it is hoped that addressing the issues and questions presented in this paper will assist the court in determining the weight to be given to that opinion.

NOTES

1. The focus of a child custody evaluation is "to assess the individual and family factors that affect the psychological 'best interests' of the child." American Psychological Ass'n, *Guidelines for Child Custody Evaluations in Divorce Proceedings*, 49 AM. PSYCHOL. 677 (1994).

2. "If scientific, technical, or other specialized knowledge will assist the trier of fact to understand the evidence or to determine a fact in issue, a witness qualified as an expert by knowledge, skill, experience, training, or education, may otherwise testify thereto in the form of an opinion or otherwise." FED. R. EVID. 702.

In California, a "person is qualified to testify as an expert if he has special knowledge, skill, experience, training, or education sufficient to qualify him as an expert on the subject to which his testimony relates." CAL. EVID. CODE § 720(a) (West 1995).

3. Stephen P. Herman, *Child Custody Evaluations and the Need for Standards of Care and Peer Review*, 1 J. CENTER FOR CHILDREN & CTS. 145 (1999).

4. *See, e.g., In re* Alexander K., 18 Cal. Rptr. 2d 22, 24–25 (Cal. Ct. App. 1993); *see also* George J. Alexander, *The State's Use of Mental Health Experts in Dependency Cases*, 24 PAC. L.J. 1465–83 (1993); Veronica Serrato, Note, *Expert Testimony in Child Abuse Prosecutions: A Spectrum of Uses*, 68 B.U. L. REV. 166 (1988).

5. In the survey, both authors discussed mental health evaluations with a selection of California's juvenile court judges during 1998 and 1999.

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6. John C. Stokes & Linda J. Strothman, *The Use of Bonding Studies in Child Welfare Permanency Planning*, 13 CHILD & ADOLESCENT SOC. WORK J. 347–68 (Aug. 1996).

7. Michael Rutter, *Clinical Implications of Attachment Concepts: Retrospect and Prospect*, *in* ATTACHMENT AND PSYCHOPATHOLOGY 26 (Leslie Atkinson & Kenneth J. Zucker eds., Guilford Press 1997) (citing JUDY DUNN, YOUNG CHILDREN'S CLOSE RELATIONSHIPS: BEYOND ATTACHMENT (Sage Publications 1993); RELATIONSHIP DISTURBANCES IN EARLY CHILDHOOD: A DEVELOPMENTAL APPROACH (Arnold J. Sameroff & Robert N. Emde eds., Basic Books 1989)).

8. Especially as children get older, it is to their social and neurodevelopmental benefit to interact with more than one person.

9. Rutter, *supra* note 7, at 25.

10. *Id*. at 29 (citing Joseph J. Campos et al., *Socioemotional Development*, *in* 2 HANDBOOK OF CHILD PSYCHOLOGY: INFANCY AND DEVELOPMENTAL PSYCHOBIOLOGY 783–915 (Marshall M. Haith & Joseph J. Campos eds., Wiley 4th ed. 1983)).

11. Mary D.S. Ainsworth & B.A. Wittig, *Attachment and Exploratory Behaviour of One-Year-Olds in a Strange Situation*, *in* 4 DETERMINANTS OF INFANT BEHAVIOUR 113–36 (Methuen 1965); Mary Main, *Cross-Cultural Studies of Attachment Organization: Recent Studies, Changing Methodologies, and the Concept of Conditional Strategies*, 33 HUMAN DEVELOPMENT 48–61 (1990); Judith Solomon & Carol George, *The Measurement of Attachment Security in Infancy and Childhood*, *in* HANDBOOK OF ATTACHMENT: THEORY, RESEARCH, AND CLINICAL APPLICATIONS 287–316 (Jude Cassidy & Phillip R. Shaver eds., Guilford Publications 1999).

12. FRANK J. DYER, PSYCHOLOGICAL CONSULTATION IN PARENTAL RIGHTS CASES 178 (Guilford Publications 1999).

13. Indeed, the procedure is invalid when applied to children outside the age range of 12 to 20 months. *See infra* notes 39–42 and accompanying text.

14. JOHN BOWLBY, A SECURE BASE: PARENT-CHILD ATTACHMENT AND HEALTHY HUMAN DEVELOPMENT 162 (Basic Books 1988).

15. Bruce D. Perry, *Bonding and Attachment in Maltreated Children: Consequences of Emotional Neglect in Childhood*, 4 CHILD TRAUMA ACAD. PARENT & CAREGIVER EDUC. SERIES 1–10, at www.bcm.tmc.edu/cta/attach_ca.htm (Oct. 1999) (adapted in part from BRUCE D. PERRY, MALTREATED CHILDREN: EXPERIENCE, BRAIN DEVELOPMENT AND THE NEXT GENERATION (W.W. Norton & Co. forthcoming 2000)).

16. *Id.*

17. Stephen J. Suomi, *Attachment in Rhesus Monkeys*, *in* HANDBOOK OF ATTACHMENT, *supra* note 11, at 181–97 (citing John Bowlby, *The Nature of the Child's Tie to His Mother*, 39 INT'L J. PSYCHO-ANALYSIS 124 (1958)).

18. *Id.* at 181–97 (citing Harry F. Harlow et al., *The Maternal Affectional System of Rhesus Monkeys*, *in* MATERNAL BEHAVIOR IN MAMMALS 254–81 (Harriet L. Rheingold ed., Wiley 1963)); Harry F. Harlow & M.K. Harlow, *The Affectional Systems*, *in* 2 BEHAVIOR OF NONHUMAN PRIMATES 287–334 (Academic Press 1965).

19. Jude Cassidy, *The Nature of the Child's Ties*, *in* HANDBOOK OF ATTACHMENT, *supra* note 11, at 12.

20. Rutter, *supra* note 7, at 21.

21. *Id*. at 29.

22. *Id*. at 21.

23. Cassidy, *supra* note 19, at 12.

24. Charles H. Zeanah & Robert N. Emde, *Attachment Disorders in Infancy and Childhood*, *in* CHILD AND ADOLESCENT PSYCHIATRY: MODERN APPROACHES 490, 494 (Michael Rutter et al. eds., Blackwell 3d ed. 1994).

25. David E. Arredondo, Essential Information on the Developmental Neurobiology of Children: Implications for Social Services, Juvenile Probation, and the Family Court (Apr. 1999) (unpublished paper presented at the Child Abuse Awareness Month Workshop); *see* FUTURES COMMITTEE, TERM, PARENTING ADEQUACY IN CHILD MALTREATMENT CASES: ASSESSMENT, INTERVENTIONS AND RECOMMENDATIONS 25 (TERM, Oct. 1999) (discussing Dr. Arredondo's presentation of the concept of reciprocal connectedness).

26. BOWLBY, *supra* note 14, at 162 (emphasis added).

27. STANLEY I. GREENSPAN, BUILDING HEALTHY MINDS: THE SIX EXPERIENCES THAT CREATE INTELLIGENCE AND EMOTIONAL GROWTH IN BABIES AND YOUNG CHILDREN 85–129 (Perseus Book Group 1999); STANLEY I. GREENSPAN, THE GROWTH OF THE MIND: AND THE ENDANGERED ORIGINS OF INTELLIGENCE 110–32 (Addison-Wesley 1997).

28. BOWLBY, *supra* note 14, at 161.

29. *Id.* (citing KONRAD Z. LORENZ, 83 DER KUMPAN IN DER UMVELT DES VOGELS (1935), *translated in* INSTINCTIVE BEHAVIOR (Claire H. Schiller ed. & trans., International Universities Press 1957)).

30. PSYCHOLOGY: THE STUDY OF HUMAN EXPERIENCE 154 (Robert Ornstein & Laura Carstensen eds., Harcourt

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Brace Jovanovich 3d ed. 1991) (citing ECKHARD H. HESS, IMPRINTING (Van Nostrand Reinhold Co. 1973)).

31. *Id*.

32. Cassidy, *supra* note 19, at 3 (citing John Bowlby, *Forty-four Juvenile Thieves: Their Characters and Home Life*, 25 INT'L J. PSYCHO-ANALYSIS 19–52, 107–27 (1944)).

33. Rutter, *supra* note 7, at 23 (citing JOHN BOWLBY, MATERNAL CARE AND MENTAL HEALTH (World Health Org. 1951)).

34. Zeanah & Emde, *supra* note 24, at 492 (citing HAROLD M. SKEELS, ADULT STATUS OF CHILDREN WITH CONTRASTING EARLY LIFE EXPERIENCES (University of Chicago Press 1966) (Monographs of the Society for Research in Child Development series 105, vol. 31, no. 3)).

35. MICHAEL RUTTER, MATERNAL DEPRIVATION REASSESSED (Penguin 1972).

36. Harry F. Harlow, *Mice, Monkeys, Men, and Motives*, 60 PSYCHOL. REV. 23–35 (1953); Harlow & Harlow, *supra* note 18, at 287–334.

37. Harlow, *supra* note 36, at 23–35; Harlow & Harlow, *supra* note 18, at 287–334.

38. 3 JOHN BOWLBY, ATTACHMENT AND LOSS: LOSS: SADNESS AND DEPRESSION (Hogarth Press 1980); Rutter, *supra* note 7, at 19 (citing BOWLBY, *supra* note 14, at 162).

39. Rutter, *supra* note 7, at 21 (citing MARY D.S. AINSWORTH ET AL., PATTERNS OF ATTACHMENT: A PSYCHOLOGICAL STUDY OF THE STRANGE SITUATION (Erlbaum 1978)).

40. Stokes & Strothman, *supra* note 6, at 347–68.

41. Solomon & George, *supra* note 11, at 289 (citing AINSWORTH ET AL., *supra* note 39).

42. *Id*. at 290 (citing AINSWORTH ET AL., *supra* note 39); Ainsworth & Wittig, *supra* note 11, at 113–36.

43. Zeanah & Emde, *supra* note 24, at 490–504.

44. David H. Hubel, *Effects of Distortion on Sensory Input on the Visual Cortex and the Influence of the Environment*, 10 PHYSIOLOGIST 17–45 (1967); David H. Hubel & Torsten N. Wiesel, *Receptive Fields and Functional Architecture in Two Nonstriate Visual Areas of the Cat*, 28 J. NEUROPHYSIOLOGY 229–89 (1965); *see* Anita M. Turner & William T. Greenough, *Differential Rearing Effects on Rat Visual Cortex Synapses: I. Synaptic and Neuronal Density and Synapses Per Neuron*, 329 BRAIN RES. 195–203 (1985).

45. DANIEL J. SIEGEL, THE DEVELOPING MIND: TOWARD A NEUROBIOLOGY OF INTERPERSONAL EXPERIENCE 1–22, 276–82 (Guilford Publications 1999).

46. Fred R. Campbell & Craig T. Ramey, *Effects of Early Intervention on Intellectual and Academic Achievement: A Follow-up Study of Children From Low-Income Families*, 65 CHILD DEV. 684–98 (1994).

47. *Id*.

48. GREENSPAN, BUILDING HEALTHY MINDS, *supra* note 27, at 2–14.

49. GREENSPAN, THE GROWTH OF THE MIND, *supra* note 27, at 1–53.

50. *See supra* note 25 and accompanying text.

51. CAL. WELF. & INST. CODE § 366.26(c)(1)(A) (West 1998 & Supp. 2000).

52. *In re* Autumn H., 32 Cal. Rptr. 2d 535 (Cal. Ct. App. 1994).

53. CAL. WELF. & INST. CODE § 366.26(c)(1)(A) (West 1998 & Supp. 2000).

54. Autumn H., 32 Cal. Rptr. 2d at 538–39 (citing JOSEPH GOLDSTEIN ET AL., BEYOND THE BEST INTERESTS OF THE CHILD 17, 19 (Free Press 1973)).

55. *Id*. at 539.

56. *In re* Elizabeth M., 60 Cal. Rptr. 2d 557 (Cal. Ct. App. 1997).

57. *Id*. at 560; *see also In re* Brittany C., 90 Cal. Rptr. 2d 737, 742 (Cal. Ct. App. 1999).

58. *In re* Zachary G., 92 Cal. Rptr. 2d 20 (Cal. Ct. App. 2000).

59. CAL. WELF. & INST. CODE § 366.26 (West 1998 & Supp. 2000).

60. Zachary G., 92 Cal. Rptr. 2d at 26.

61. For our view, see *infra* text accompanying notes 113–29.

62. O.R. v. State, 932 P.2d 1303 (Alaska 1997).

63. *Id.* at 1309.

64. *Id*.

65. *Id*.

66. *In re* Peter M., 602 A.2d 1161 (Me. 1992).

67. *Id*. at 1163.

68. *In re* D., 352 N.W.2d 566 (Neb. 1984).

69. *In re* Mr. & Mrs. J.M.P., 528 So. 2d 1002 (La. 1988).

70. *Id*. at 1013.

71. *In re* Colby E., 669 A.2d 151 (Me. 1995).

72. *Id*. at 152; see also *In re* David C., 546 A.2d 694 (Pa. Super. Ct. 1988), in which the trial court concluded that

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a child–great grandmother relationship and bond were so strong that the child's mother could not be permitted to take custody in order for the child to be adopted.

73. *In re* Guardianship of J.C., 608 A.2d 1312 (N.J. 1992).

74. *In re* J.L.D., 539 N.W.2d 73 (N.D. 1995).

75. *Id*. at 79.

76. *Id*.

77. *In re* Blunk, 174 N.W.2d 194 (Neb. 1970).

78. *Id*. at 197.

79. *In re* J.K.S., 356 N.W.2d 88 (N.D. 1984).

80. *Id*. at 92–93.

81. *In re* William L., 383 A.2d 1228 (Pa. 1978).

82. *Id*. at 1241–42 n.22.

83. *Id*.

84. *In re* Baby Boy Smith, 602 So. 2d 144 (La. 1992).

85. *Id*. at 148.

86. *Id*.

87. *Id*.

88. *Id*.

89. *In re* Ashley A., 679 A.2d 86 (Me. 1996).

90. *Id*. at 89.

91. GOLDSTEIN ET AL., *supra* note 54, at 17.

92. *Id*.

93. *Id*. at 18.

94. *Id*. at 18.

95. *Id*. at 19.

96. *Id*. at 20.

97. *In re* Autumn H., 32 Cal. Rptr. 2d 535 (Cal. Ct. App. 1994).

98. *In re* B.G., 523 P.2d 244 (Cal. 1974).

99. GOLDSTEIN ET AL., *supra* note 54.

100. *B.G.*, 523 P.2d at 253–54 & n.18 (citations omitted).

101. *See In re* Kieshia E., 859 P.2d 1290 (Cal. 1993); *In re* Rachael C., 1 Cal. Rptr. 2d 473 (Cal. Ct. App. 1991); *In re* Patricia L., 11 Cal. Rptr. 2d 631 (Cal. Ct. App. 1992). Recently, the New Jersey Supreme Court adopted a 1995 Wisconsin test to define the de facto parenthood relationship. The test requires the petitioner to prove four elements: (1) that the biological or adoptive parent consented to and fostered the establishment of a parent-like relationship with the child, (2) that the petitioner and the child lived together in the same household, (3) that the petitioner assumed the obligations of parenthood without expectation of financial compensation, and (4) that the petitioner as been in a parental role for a length of time sufficient to have established with the child a bonded, dependent relationship parental in nature. *See* V.C. v. M.J.B., 748 A.2d 539 (N.J. 2000).

102. CAL. CIV. CODE § 4600 (West 1990) (repealed 1992 Cal. Stat. 162).

103. CAL. R. CT. 1401(a)(6), 1412(e).

104. *Kieshia E.*, 859 P.2d 1290.

105. *Id*. at 1297.

106. *In re* R.B.W., 548 N.E.2d 1085 (Ill. App. Ct. 1989).

107. *Id*. at 1089.

108. *Id*. at 1089.

109. *Id*. at 1096–97.

110. *Id*. at 1098.

111. *In re* Lorenzo C., 63 Cal. Rptr. 2d 562 (Cal. Ct. App. 1997).

112. *In re* Richard C., 81 Cal. Rptr. 2d 887 (Cal. Ct. App. 1998).

113. *See* Rutter, *supra* note 7, at 26.

114. *Id*.

115. *Id*.

116. The suggestions made in this section of the article borrow heavily from Ian Russ, *Evaluative Issues*, *in* CHILD DEVELOPMENT: A JUDGE'S REFERENCE GUIDE 29–31 (National Council of Juvenile and Family Court Judges 1993).

117. American Acad. Child & Adolescent Psychiatry, *Practice Parameters for Child Custody Evaluations*, 36 J. AM. ACAD. CHILD & ADOLESCENT PSYCHIATRY 57S (Supp. 1997).

118. American Psychological Ass'n, *supra* note 1, at 677.

119. AMERICAN PSYCHIATRIC ASS'N, CHILD CUSTODY CONSULTATION: A REPORT OF THE TASK FORCE ON CLINICAL ASSESSMENT IN CHILD CUSTODY (American Psychiatric Ass'n rev. ed. 1988).

120. ASSOCIATION OF FAMILY & CONCILIATION COURTS, MODEL STANDARDS OF PRACTICE FOR CHILD CUSTODY EVALUATION (Association of Family & Conciliation Courts 1994).

121. Committee of Ethical Guidelines for Forensic Psychologists, *Specialty Guidelines for Forensic Psychologists*, 15 LAW & HUM. BEHAV. 655–65 (1991).

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122. On the general use of psychological testing in child custody evaluations and on the limitations of the tests usually utilized in these evaluations, see Randy K. Otto et al., *The Use of Psychological Testing in Child Custody Evaluations*, 38 FAM. & CONCILIATION CTS. REV. 312–40 (July 2000).

123. This is the procedure utilized in Santa Clara County, California. All mental health evaluation questions are submitted to the court for approval and signature after the parties have reviewed them. Usually this review takes place in open court with all parties present.

124. *See* Jonathan Gould, *An Interdisciplinary Collaborative Model for Developing Psycholegal Questions in Court Ordered Child Custody Evaluations*, 50 JUV. & FAM. CT. J. 43–51 (Winter 1999).

125. For example, an expert opinion that a child's apparently sexualized behavior with an anatomically correct doll showed that she had been sexually abused could not form the basis for a court finding that the child was sexually abused. *See* Daubert v. Merrell Dow Pharmaceuticals, Inc., 509 U.S. 579 (1993)); *In re* Amber B., 236 Cal. Rptr. 623, 625–26 (Cal. Ct. App. 1987) (citing Frye v. United States, 293 F. 1013 (D.C. Cir. 1923)).

126. For cases in which similar expert testimony was admitted into evidence, see People v. Beckley, 456 N.W.2d 391 (Mich. 1990); Keri v. State, 347 S.E.2d 236 (Ga. Ct. App. 1986); People v. Gray, 231 Cal. Rptr. 658 (Cal. Ct. App. 1986); People v. Luna, 250 Cal. Rptr. 878 (Cal. Ct. App. 1988). For cases in which such testimony was not admitted into evidence, see Johnson v. State, 732 S.W.2d 817 (Ark. 1987); Lantrip v. Commonwealth, 713 S.W.2d 816 (Ky. 1986); People v. Bowker, 249 Cal Rptr. 886 (Cal. Ct. App. 1988); State v. Hazeltine, 352 N.W.2d 6723 (Wis. 1984).

127. "The compensation and expenses paid or to be paid to an expert witness by the party calling him is a proper subject of inquiry by any adverse party as relevant to the credibility of the witness and the weight of his testimony." CAL. EVID. CODE § 722(b) (West 1995).

128. Marc J. Ackerman, *American Psychological Association Guidelines for Child Custody Evaluations in Divorce Proceedings*, 8 AM. J. FAM. L. 129–34 (1994) (Guideline 15); Committee on Prof'l Practice & Standards, APA Bd. of Prof'l Affairs, *Guidelines for Psychological Evaluations in Child Protection Matters*, 54 AM. PSYCHOL. 586–93 (1999) (Guideline 16).

129. GERALD H. VANDENBERG, *Qualifications of the Forensic Psychologist*, *in* COURT TESTIMONY IN MENTAL HEALTH: A GUIDE FOR MENTAL HEALTH PROFESSIONALS AND ATTORNEYS 97–98 (Charles C. Thomas Publ. 1993); Committee on Prof'l Practice & Standards, *supra* note 128, at 586–93 (Guidelines 4 & 8); American Psychological Ass'n, *supra* note 1, at 677 (Guideline 7); *see also* Ackerman, *supra* note 128, at 130; Paul S. Applebaum, *Ethics in Evaluation: The Incompatibility of Clinical and Forensic Functions*, 154 AM. J. PSYCHIATRY 44–46 (1997); Association of Family & Conciliation Courts, *supra* note 120, at 2; Theodore Remley, Jr., & Judith Miranti, *Child Custody Evaluator: A New Role for Mental Health Counselors*, 13 J. MENTAL HEALTH COUNS. 334 (July 1991).