THE SUBORDINATION OF SUBSIDIZED GUARDIANSHIP IN CHILD WELFARE PROCEEDINGS

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INTRODUCTION

The passage of the Adoption and Safe Families Act ("ASFA")[1] in 1997 led child welfare agencies to focus on increasing the number of adoptions of children in foster care. Originally referred to as an "adoption promotion" bill,[2] this federal legislative act was a response to the exploding number of children entering the foster care system and a corresponding dearth of exit opportunities to permanent homes. Historically, child welfare agencies and courts have relied heavily on reunification and adoption as pathways out of foster care.[3] Yet, ASFA explicitly recognizes a third "exit alternative"—legal guardianship[4]—which promises to move a substantial number of children out of the formal child welfare system and into permanent homes. To the continuing detriment of children and parents embroiled in the child welfare system, the prevailing opinion among judicial officers, state agencies and child advocates is that permanent legal guardianship is "second best" to adoption in cases where reunification cannot be achieved. Child welfare policy based on this opinion is a failure of law and outdated psychology theories to effectively capture the reality of child rearing and familial structures. Greater funding of adoption has helped to legitimate the preference for adoption over guardianship. With the expansion of *subsidized* guardianship programs, where a family's financial gain can be ruled out as the incentive for choosing adoption over guardianship, and with increasing evidence demonstrating that guardianship programs increase permanency rates, states must reexamine policies that subordinate guardianship to adoption. Children are poorly served when legal and psychological fictions form the basis of policy decisions that affect their lives. At stake is the

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1. 42 U.S.C. § 675 (2000).

2. Adoption Promotion Act of 1997, H.R. 867, 105th Cong.

3. Barbara Needell et al., KSSP and KinGAP: University, State, County, and Advocate Partnership for Kinship Care Policy in California 10 (paper prepared for presentation at the 23rd Annual APPAM Conference, Nov. 1–3, 2001) (on file with author) (citing B. Simmons & R.P. Barth, *Legal Guardianship and Child Welfare in California: An Empirically-Based Curriculum* (University of California at Berkeley, 1995)).

4. 42 U.S.C. § 675(7) (2000).

significant cost to well-being and permanency for thousands of children in foster care.

Part I of this article will challenge the theoretical grounding of the preference for adoption. Part II will describe subsidized guardianship and its use as an adoption alternative. Part III will examine a case study that illuminates the tensions inherent in the adoption/guardianship debate. Part IV will make an argument for the acceptance of subsidized legal guardianship as an equal partner with adoption and encourage legislative changes to enable states to replace the hierarchy of permanency planning with a "continuum" approach that better serves the needs of children in foster care.

I.
A CLOSER LOOK AT THE ADOPTION PREFERENCE

Many have condemned the foster care system for failing to meet the needs of children. Critics express concern over the exploding number of children in foster care and the best way to reduce that number while protecting the welfare of children. Such concerns arise from the core belief that foster care in and of itself does not serve children's needs and may in fact be dangerous.[5]

The preference for adoption as a means of moving foster children who cannot return home into permanent placements was written into law with the passage of ASFA. Facially, this preference mimics the federal constitutional protection of family autonomy that evolved in case law during the first half of the twentieth century. The constitutionally-protected interest at stake in the line of cases finding a fundamental right to family autonomy suggests that state-sponsored indoctrination of youth is of central concern.[6] Child-rearing is largely about value-inculcation. We as a society have chosen to give families a presumptive right to play that value-inculcating role to ensure the diversity of citizenry that is fundamental to our republican democracy.

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5. *See* KATHERINE KORTENKAMP & JENNIFER EHRLE, THE WELL-BEING OF CHILDREN INVOLVED WITH THE CHILD WELFARE SYSTEM: A NATIONAL OVERVIEW (The Urban Institute, New Federalism: National Survey of America's Families, Series B, No. B-43, Jan. 2002) (revealing, in the first national overview of the well-being of children in the child welfare system, pervasive psychological, health, and educational deficits or delays among children in foster care). *See also* Richard Wexler, *Take the Child and Run: Tales From the Age of ASFA*, 36 NEW ENG. L. REV. 129, 137 (2001) ("National data on child abuse fatalities show that a child is more than twice as likely to die of abuse in foster care than in the general population.") (citing CHILDREN'S BUREAU, U.S. DEP'T. OF HEALTH AND HUMAN SERVICES, CHILD MALTREATMENT 1999, 41 (2001)).

6. *See* Prince v. Massachusetts, 321 U.S. 158 (1944) ("It is cardinal with us that the custody, care and nurture of the child reside first in the parents, whose primary function and freedom include preparation for obligations the state can neither supply nor hinder."); Pierce v. Society of Sisters, 268 U.S. 510 (1925) ("The fundamental liberty upon which all governments in this Union repose excludes any general power of the state to standardize its children . . . . The child is not the mere creature of the state; those who nurture him and direct his destiny have the right, coupled with the high duty, to recognize and prepare him for additional obligations."); *cf.* Meyer v. Nebraska, 262 U.S. 390 (1923) (finding the parents' right to engage a teacher to instruct their children was within the liberty interest protected by the 14th Amendment).

In reality, however, the focus on coercively re-forming families through the termination of parental rights and subsequent adoption does a grave injustice to the true diversity of our American society. A nation of immigrants, we are not bound by one common "ideal" of the family; the denial of this reality is perhaps one of the more potent forces driving morality legislation and other attempts by the state to conform families to one particular "norm." I hope to offer an alternate vision of caring for children. This vision respects the diversity of affective care-giving patterns and does not yield to a coercive normalizing force that is both antithetical to true democratic ideals and insensitive to the needs of our children. In addition, it is a vision that respects the caveat that, in granting constitutional protection to the family, the state cannot define family in a way that fails to account for the realities of child-rearing and diverse familial structures.[7]

The "permanency" focus of recent federal legislation and the corresponding emphasis on adoption as the solution to foster care "drift" owe a great deal to the work of three prominent psychologists: Joseph Goldstein, Anna Freud and Albert J. Solnit. In the early 1970s, they proffered a theoretical basis for making child custody decisions that came to be known as "psychological parent" theory.[8] This theory has had remarkable staying power in child welfare debates over the past twenty-five years in part because, on one level it reinforces the common law rule, today a constitutional right, that children should live with and be raised by their parents. Goldstein, Freud and Solnit posited that "children form their primary attachment with a 'psychological parent'—the person that provides day-to-day care for the child, whether or not that person is the biological parent—and their psychological well-being requires a continuous relationship with that person."[9] This contributed a psychologically-grounded

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7. In *Moore v. City of East Cleveland*, the Supreme Court found that a zoning ordinance limiting the occupancy of dwelling units to a narrowly-defined single "family" violated the Due Process Clause of the 14th Amendment. 431 U.S. 494 (1977). The concurring opinion, written by Justice Brennan and joined by Justice Marshall, further noted: "The Constitution cannot be interpreted . . . to tolerate the imposition by government upon the rest of us white suburbia's preference in patterns of family living. The 'extended family' that provided generations of early Americans with social services and economic and emotional support in times of hardship, and was the beachhead for successive waves of immigrants who populated our cities, remains not merely still a pervasive living pattern, but under the goad of brutal economic necessity, a prominent pattern—virtually a means of survival—for large numbers of the poor and deprived minorities of our society." *Id.* at 508 (Brennan, J., concurring).

8. For a general background and discussion on the "psychological parent" theory, see the trilogy written by the psychologists. JOSEPH GOLDSTEIN, ANNA FREUD, ALBERT J. SOLNIT, & SONJA GOLDSTEIN, IN THE BEST INTERESTS OF THE CHILD (1986) (defining the role of child professionals in child placement decisions); JOSEPH GOLDSTEIN, ANNA FREUD, & ALBERT J. SOLNIT, BEFORE THE BEST INTERESTS OF THE CHILD (1979) [hereinafter BEFORE THE BEST INTERESTS] (establishing grounds for intervention); JOSEPH GOLDSTEIN, ANNA FREUD, & ALBERT J. SOLNIT, BEYOND THE BEST INTERESTS OF THE CHILD (1973) [hereinafter BEYOND THE BEST INTERESTS] (establishing guidelines for child placement decisions).

9. Nancy Goldhill, *Ties That Bind: The Impact of Psychological and Legal Debates on the Child Welfare System*, 22 N.Y.U. REV. L. & SOC. CHANGE 295, 297 (1996).

basis for the presumption in favor of the nuclear family model in child custody decision-making. The so-called "attachment focus" lends a superficially child-centered justification to adoption "hawks"[10] and others in the child welfare field who, frustrated by foster care drift, advocate swift termination of parental rights and subsequent adoption.

In challenging the preference for adoption over other permanency alternatives for children in foster care, this Section will examine three weaknesses in the ideological underpinnings of the "psychological parent" theory. First, contemporary understanding of child psychology and development does not support the theory. Second, the theory is often misused because the realities of child welfare practice do not fit the theorists' paradigm. Because the theorists based their model on a singular vision of the American family—the nuclear family model—they failed to adequately consider the extended family network models that are prevalent in many immigrant and minority population contexts. Finally, application of the theory by child welfare professionals and the failure to apply the theory in the private child custody context suggest a potentially discriminatory impact on the poor families of color who disproportionately populate the public child welfare system.

A. Does Psychology Support the Notion that Children Attach to One "Psychological Parent"?

Critics of the "psychological parent" theory contend that, despite its purportedly "child-centered" approach, the theory fails to take account of the complex needs of children, particularly with respect to children's relationships with biological parents.[11] A generation of psychological research contradicts the notion that custodial parents are the only parents who matter from the child's perspective.[12] Psychological and sociological research over the past thirty years has confirmed (1) 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, and (2) the child's ability to maintain multiple emotional bonds simultaneously.[13] In addition, the desirability or even possibility of an idealized, omnipresent mother that is central to the nuclear family model on which the "psychological parent" theory is grounded, have been brought into question.

Child welfare policy, based on the "psychological parent" theory,

10. *See infra* notes 145–152 and accompanying text.

11. Clinical psychologist Matthew B. Johnson suggests that the very term "psychological parent" "juxtaposes two notions of parenthood in a false dichotomy" by obscuring the fact that biological parents are psychologically important to children whether or not the parent and child have an ongoing relationship. Matthew B. Johnson, *Examining Risks to Children in the Context of Parental Rights Termination Proceedings*, 22 N.Y.U. REV. L. & SOC. CHANGE 397, 405 (1996).

12. Marsha Garrison, *Parents' Rights vs. Children's Interest: The Case of the Foster Child*, 22 N.Y.U. REV. L. & SOC. CHANGE 371, 380 (1996) (citations omitted).

13. *Id.* at 380–81.

mistakenly assumes that upon judicial determination that permanent reunification is not possible, children in foster care should "move on" or emotionally detach from birth families.[14] As will be explored further, this affective break serves administrative as well as perceived child development needs. Several studies have shown, however, that "foster youth who have contact with their birth parents while in care have better outcomes than youth who do not maintain these contacts."[15] Cutting a child off from her parents can cause her to have misconceptions about the absent parent(s). For example, absent parents may be idolized, and thus become a barrier to intimacy with other caregivers, or they may be demonized and thus negatively impact the child's self-esteem.[16] Further, if the surrogate caregiver does not support the absent parent, the child may face a "loyalty conflict," further complicating her normal individuation process.[17]

Older children in particular are often forced to break bonds with their biological parents and are encouraged to emotionally detach from their families.[18] Studies have shown that older foster children often resist adoption and that disruption rates are particularly high among older children.[19] Foster youth who have contact with birth parents while in care have better outcomes than youth who do not maintain these contacts. According to Charles and Nelson, "[adolescent] youth seek out relatives and remain connected to foster parents or others they met while in the foster care system. It is these relationships, these emotional connections that will have the greatest impact on the young person's ability to navigate the difficult transactions into adulthood."[20]

Experts have long recognized that permanency planning for adolescents is unique.[21] While it is critical to include children of all ages in the permanency planning process—both to improve the quality of decision-making and to help children accept the reality of their situation—adolescents can often make a

14. Jean Koh Peters, *The Roles and Content of Best Interest in Client-Directed Lawyering for Children in Child Protective Proceedings*, 64 FORDHAM L. REV. 1505, 1547 (1996) ("[B]reaking the tie with the biological family can hamper, rather than enhance, the child's development: 'the disappearing act which is a behavioral consequence of the psychological parenting theory is destructive to the child's developmental needs and utterly disrespectful of the frailties of the human situation under conditions of poverty.'") (citing David Fanshel, *Urging Restraint in Terminating the Rights of Parents of Children in Foster Care*, 12 N.Y.U. REV. L. & SOC. CHANGE 501, 503 (1984)).

15. KRISTI CHARLES & JENNIFER NELSON, PERMANENCY PLANNING: CREATING LIFE LONG CONNECTIONS 11 (2001) (referencing several studies) (citations omitted).

16. Johnson, *supra* note 11, at 408 (citation omitted).

17. *Id.* at 410, 415 (noting that individuation is complicated for children forcibly removed from their families even before they were emotionally prepared for separation).

18. CHARLES & NELSON, *supra* note 15 at 12.

19. *Id.*

20. *Id.* at 11.

21. ANTHONY N. MALUCCIO ET AL., PERMANENCY PLANNING FOR CHILDREN 55 (1986).

particularly valuable contribution to the planning process.[22] Often, however, their contribution will defy adoption proponents' hopes that adolescents become part of a neat, new, nuclear family:

> Data suggest that the official, professional view of what is good for children can sometimes be too tidy and too impatient of tangled relationships to be in the best interests of children. Surrogate parents, social workers, and researchers are not always sympathetic to natural parents, who, though they may seem inadequate by some standards, are involved in a mutually rewarding relationship with their children. Some children clearly can benefit from concurrent relationships with surrogate and natural parents. Pushing these children into adoption might destroy an important source of support.[23]

In addition to raising questions about the wisdom of terminating a child's relationship with her biological parents, adoption forces us to question the "monotropic" view[24] of infant and child bonding, in which the infant or child is assumed to attach only to one person (usually the mother). A consensus has emerged from within the humanities that a child's security "comes not from a single, constant, individual, but from a familiar milieu and a network of attachments.[25] An acknowledgment that multiple bonds are characteristic of most children's emotional and social networks and are, in fact, beneficial, has replaced the monotropic view.[26] Multiple attachments can help children cope with separation anxiety and related stress.[27] A personal attachment to a supportive adult is beneficial in helping the adolescent develop resilience, which facilitates the difficult transition into adulthood.[28] These new studies suggest that a child's sense of psychological security may derive not from an exclusive "psychological parent" but rather from the familiarity of the child's environment and continuity of attachments formed with members of that environment.[29]

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22. *Id.* at 55, 167.

23. *Id.* at 55–56 (citing Malcolm Bush and Andrew C. Gordon, *The Case for Involving Children in Child Welfare Decisions*, 27 SOC. WORK 309, 310–11 (1982)).

24. The Goldstein, Freud, and Solnit psychological parenting model has a monotropic focus of power on a single psychological parent. Peters, *supra* note 14, at 1554.

25. Peggy Cooper Davis, *The Good Mother: A New Look at Psychological Parent Theory*, 22 N.Y.U. REV. L. & SOC. CHANGE 347, 354 (1996). Studies of father-child interactions have proven that children of all ages can have bonds with both of their parents and that both bonds can be important to their emotional well-being. *Id.* at 356 (citations omitted). Evidence also suggests that children of divorced parents fare better when they are able to maintain contact with both parents. *Id.* at 358 (citations omitted).

26. *Id.* at 360.

27. *Id.* at 361 (citing James H. Bray, *Psychological Factors Affecting Custodial and Visitation Arrangements*, 9 BEHAVIORAL SCI. & L. 419, 423 (1991)).

28. CHARLES & NELSON, *supra* note 15, at 13–14 (explaining that resilience is normal development under difficult circumstances—a resilient child is a child who has a sense of self-esteem, self-efficacy, and a repertoire of social, problem-solving approaches).

29. Davis, *supra* note 25, at 361 (citations omitted). *See also* Everett Waters & Donna M. Noyes, *Psychological Parenting vs. Attachment Theory: The Child's Best Interests and the Risks in*

Cross-cultural attachment studies have demonstrated that "children's reactions to everyday separations vary according to whether they have been acculturated to expect multiple caregivers."[30] The new consensus emerging from these studies reasons that, given the inevitability of temporary separations from the caregiver(s), "the optimal rearing context will, from the child's perspective, be made up by more or less stable relationships with several different caregivers who all act as attachment figures."[31] As one psychologist explains, "the optimal caregiving arrangement would consist of a network of stable and secure attachments between the child and both its parents and other persons such as professional caregivers, members of the family, or friends."[32] In an extended rearing context, "a separation from an attachment figure does not automatically imply a separation as perceived by the child: there are a number of caregivers who may provide the same source of security in potentially threatening situations."[33]

Finally, psychological research has called into question the parental function as defined by "psychological parent" theorists—"the valorization of the omnipresent, omnicompetent, almost always maternal, parenting figure."[34] According to "psychological parent" theory, the role of the parent changes little over time; even as the developmental needs of the child change, the parent continues to act as a constant base of security and comfort. New models of "mothering" are built on an acceptance that omnipresence is infeasible and a recognition that infants and children need and want the challenge of interacting with other minds.[35] This interaction with other minds demonstrates to children their own "otherness" because those interactions do not always fulfill their needs. Through this experience, combined with a measure of comfort and security that is often reinforced by a network of attachments, children adapt to the realization of the caregiver's "otherness" by developing resilience, a key

Doing the Right Things for the Wrong Reasons, 12 N.Y.U. REV. L. & SOC. CHANGE 505, 513 (1984).

30. Davis, *supra* note 25, at 358–59 (citations omitted).

31. *Id.* at 361 (citing LOUIS W.C. TAVECCHIO & MARINUS H. VAN IJZENDOORN, *Perceived Security and Extension of the Child's Rearing Context: A Parent-Report Approach*, *in* 44 ADVANCES IN PSYCHOLOGY, ATTACHMENT IN SOCIAL NETWORKS: CONTRIBUTIONS TO THE BOWLBY-AINSWORTH ATTACHMENT THEORY 39–40 (1987) [hereinafter ATTACHMENT IN SOCIAL NETWORKS]).

32. *Id.* (citing MARINUS H. VAN IJZENDOORN & LOUIS W.C. TAVECCHIO, *The Development of Attachment Theory as a Lakatosian Research Program: Philosophical and Methodological Aspects*, *in* ATTACHMENT IN SOCIAL NETWORKS, *supra* note 31 at 3, 6–12).

33. *Id.* (citing LOUIS W.C. TAVECCHIO & MARINUS H. VAN IJZENDOORN, *Perceived Security and Extension of the Child's Rearing Context: A Parent-Report Approach*, *in* ATTACHMENT IN SOCIAL NETWORKS, *supra* note 31, at 39–40).

34. Peters, *supra* note 14, at 1551 (citing letter from Peggy Cooper Davis, NYU School of Law, to Jean Koh Peters, Yale Law School (Oct. 3, 1995) (on file with the Fordham Law Review)).

35. Davis, *supra* note 25, at 365.

ingredient to successful individuation:[36] "It is in the play of intersubjectivity that a child learns to manage separations."[37]

This new body of research and criticism challenges child welfare professionals to fashion creative child placements which support and build upon a child's existing affective bonds. From an administrative perspective this may not prove as easy as matching one child with one family, but ultimately it will better serve children's complex emotional needs.

B. Misuse of the "Psychological Parent" Theory in Permanency Planning for Foster Children

Goldstein, Freud and Solnit advocated removing children from their homes only in extreme situations in order to avoid, wherever possible, the initial trauma of separation.[38] Consistent with their theory, they argued that once a child has been removed from one home and has formed a primary attachment with a new caregiver, preserving the new relationship ought to be prioritized.[39] Their theory was intended to apply equally to all child custody cases, including divorce and foster care.[40] Their theoretical framework, however, has never taken root in private custody disputes.[41]

It has long been a concern of some child welfare experts that Goldstein, Freud and Solnit's views have been selectively embraced and implemented. While the psychologists advocated for an intervention strategy that reserved out-of-home placement for only the most high-risk cases, in practice, poor families are often disrupted without adequate attention to the harms of family separation. The ASFA emphasis on "safety" increases the likelihood of unnecessarily intrusive interventions as the risk calculus is re-adjusted to take federal mandates into consideration.[42] Only once children have been removed from their natural families have the recommendations of Goldstein, Freud and Solnit been

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36. *Id.* at 367.

37. *Id.* This view credits infants with the "ability to recognize, to enjoy, and to grow in reaction to the experience of the mother's subjectivity [; whereas] the expectation that the mother will be omnipotent and subject to the child's will leaves the child in a dominating isolation, with an illusion of 'mastery,' but no sense of otherness." *Id.*, citing Jennifer Benjamin, *The Omnipotent Mother*, *in* REPRESENTATIONS OF MOTHERHOOD 133 (Donna Basin, Margaret Honey & Meryle Mahrer Kaplan, eds., 1994) and Jerome Bruner, ACTUAL MINDS, POSSIBLE WORLDS 59–62, 73–77 (1986).

38. BEFORE THE BEST INTERESTS, *supra* note 8, at 4.

39. *Id.* at 39–41.

40. BEYOND THE BEST INTERESTS, *supra* note 8, at 5.

41. Garrison, *supra* note 12, at 380 (noting that Goldstein, Freud and Solnit's proposal that custodial parents should have complete control over visitation after divorce has not been taken up by a single child advocate, despite the fact that it derives from exactly the same notions of bonding and parental exclusivity that have motivated many to urge easier termination of parental rights).

42. *See* Wexler, *supra* note 5, at 136 (arguing that "ASFA requires putting its version of 'child safety' ahead of 'family preservation,' because Congress failed to realize that family preservation in fact makes children safer. Indeed, the family preservation movement always made child safety its first priority. ASFA effectively equated child safety with child removal . . . .").

faithfully implemented in the child welfare context.[43] Again, ASFA encourages this bias by promoting swift terminations of parental rights and providing generous adoption incentives in the name of "permanence."[44]

There are at least three *practical* reasons to doubt the wisdom of the course that child welfare practice has followed. First, the problems that lead children to be placed into care are overwhelmingly associated with poverty and are thus extremely difficult to remediate, requiring intensive and often expensive services provided over a relatively long period of time.[45] Second, the legal process of "freeing" a child for adoption exacts a high toll; once achieved, the route to adoption remains uncertain. Third, for the majority of children in foster care, the reality is that they have never been raised in nuclear families, but are raised in a variety of non-nuclear care-taking arrangements.

1. Disproportionate Representation of Poor and Minority Children

Foster care first garnered the attention of the federal government in the 1970s. At the time, the chief legislative champion of federal reimbursement to states for foster care services was former senator Walter Mondale.[46] The case that Mondale made on behalf of states receiving federal funding for operating comprehensive child protection systems hinged on the characterization of the problem of child abuse and neglect as a *classless* problem.[47] This strategy obscured two important facts: (1) the overwhelming majority of child neglect cases are linked to poverty; and (2) child abuse is *not* the major reason children are removed from their parents.[48] The result is that child abuse has been characterized as a pathology, and abuse or neglect is considered a matter of individual rather than collective failure.[49] Certainly this characterization has its appeal. Our society has chosen not to make the plight of poor children and their families a national priority;[50] allocating blame at an individual level serves an

43. Davis, *supra* note 25, at 348.

44. *See* Wexler, *supra* note 5, at 145 (noting that ASFA gives states a "bounty" of $4000 to $6000 for every finalized adoption over a baseline number which creates "a perverse incentive for quick-and-dirty, slipshod placements that are more likely to fail. That is because if an adoption of a foster child fails, states do not have to return the bounty. In fact, they can place the same child again and collect another bounty.").

45. Garrison, *supra* note 12, at 390–91.

46. *See* BARBARA J. NELSON, MAKING AN ISSUE OF CHILD ABUSE: POLITICAL AGENDA SETTING FOR SOCIAL PROBLEMS 15, 97–103 (1984).

47. *See* Leroy H. Pelton, *Child Abuse and Neglect: The Myth of Classlessness*, 48 AM. J. ORTHOPSYCHIATRY 608, 609 (1978).

48. *See* DUNCAN LINDSAY, THE WELFARE OF CHILDREN 155 (1994) (arguing that studies demonstrate that "inadequacy of income, more than any other factor, constitutes the reason that children are removed.").

49. *See* Pelton, *supra* note 47. *See generally* JANE WALDFOGEL, THE FUTURE OF CHILD PROTECTION (1998).

50. In 1997, estimates stated that fourteen million children in the United States live below the poverty line. RENNY GOLDEN, DISPOSABLE CHILDREN: AMERICA'S CHILD WELFARE SYSTEM 55 (1997). The United States has the highest child poverty rate of all industrialized nations. Britain,

important scapegoat function.

Moreover, the problems facing the poor are seemingly intractable. The dearth of affordable housing has created a crisis of epidemic proportions for people living in poverty. Removing children to foster care is in many ways simpler and more lucrative[51] for child welfare agencies and states than assisting parents in finding livable affordable housing or, where none exists, creating affordable housing options. Likewise, parents who are unable to earn above poverty-level wages may lose children to the foster care system because of poverty-related conditions, such as the unavailability of child care, inadequate transportation and insufficient income, which adversely impacts their ability to care for their children. A socio-economic system that relies on unemployment and underemployment to depress inflation, inadequately funds public-assisted housing and continually fails to provide adequate community resources for parents, bears equal responsibility.

Because our society is increasingly unwilling to invest in poor families in any meaningful way, the possibility that the conditions resulting in placement will be resolved within the ever-shortening time-frames allotted by child welfare agencies is increasingly slim. Funding programs that create incentives for out-of-home placement exacerbate this dilemma.[52] While some may argue that the complexity of social issues contributing to child neglect reinforces the wisdom of ASFA policy—why should children be forced to bear multiple disruptions and wasted time while their parents repeatedly fail to remedy the problems that put them into foster care?—this argument has far-reaching and profound implications.

There exists a plethora of evidence that the child welfare system is imbued with racial, socio-economic and cultural bias from entry point to exit. As of 1999, forty-five percent of children in substitute care were African American, while African American children comprised only fifteen percent of children in

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France, Sweden and Canada *each* spend two to three times more on poor children and families than does the United States. *Id.* at 55. In a survey of thirty cities, children constituted twenty-five percent of the homeless population. U.S. CONFERENCE OF MAYORS, SUMMARY: A STATUS REPORT ON HUNGER AND HOMELESSNESS IN AMERICAN CITIES 1998 2 (1998). More than eleven million children do not have basic health insurance. U.S. CENSUS BUREAU, U.S. DEP'T OF COMMERCE, HEALTH INSURANCE COVERAGE 1 (1998).

51. Federal reimbursement to states is highest for out-of-home placement of children when compared to other social services, including preservation services provided to intact families. See *supra* note 49, *infra* note 107, and accompanying text.

52. The two primary sources of federal funding for non-removal child welfare programs (including preventive services and counseling)—Title IV-8 and the Promoting Safe and Stable Families program—total just $567 million. By contrast, the federal share of state expenditures for Title IV-E foster care is $3.893 million, and for adoption assistance is $838 million—both programs involving out-of-home care. *See* CORNERSTONE CONSULTING GROUP, CHILD WELFARE WAIVERS (1999), *available at* http://www.aphsa.org/cornerstone/cwwsystem.asp#history [hereinafter CHILD WELFARE WAIVERS] (a study of child welfare waivers in five states and recommendations for future programs) (citing Karen Spar, Federal Child Welfare Financing Policy (Feb. 8, 1999) (paper prepared for a meeting on child welfare financing) (on file with Congressional Research Service, Washington, DC)).

the country.[53] Three National Incidence Studies of Child Abuse and Neglect, conducted by the federal government from 1980 to 1996, found no difference in the incidence of child abuse and neglect across racial groups.[54] When income, family size and family composition are taken into account, African American children are mistreated at lower rates than white children.[55]

Nevertheless, studies establish that doctors are much more likely to suspect child abuse in minority children with broken bones than in white children with similar injuries; as a result, doctors refer minority parents to child welfare authorities more frequently.[56] A black mother is three times more likely to be reported to the authorities than a white mother reporting similar child injuries.[57] White children receive in-home services instead of substitute care seventy-two percent of the time, while African American children are placed in foster care fifty-six percent of the time.[58]

The *Guidelines for Public Policy and State Legislation Governing Permanence for Children*[59] ("Guidelines") note that in addition to a disproportionate entry into foster care, African American and Latino children tend to remain in temporary foster care twice as long as white children and, once legally free for adoption, wait for adoption longer than do white children.[60] Five studies in four states in the 1990s found that white children are four times more likely than African American children to be reunified with their families and

53. Michelle Y. Green, *Minorities as Majority: Disproportionality in Child Welfare and Juvenile Justice*, CHILDREN'S VOICE, *available at* http://www.cwla.org/articles/cv0211minorities.htm (Nov.–Dec. 2002). The most recent Adoption and Foster Care Analysis and Reporting System (AFCARS) statistics, maintained by the United States Department of Health and Human Services, Administration for Children and Families, report that the racial/ethnic breakdown of children in foster care is as follows: 40% black, 38% white, 15% Hispanic, 2% American Indian/Alaskan Native Non Hispanic, 1% Asian/Pacific Islander, 1% Two or More Races Non Hispanic, and 4% Unknown/Unable to Determine, *available at* http://www.acf.dhhs.gov/programs/cb/publications/afcars/report7.htm (Aug. 20, 2002) (statistics based on data submitted through September 30, 2000).

54. Green, *supra* note 53 (citing RACE MATTERS: THE OVERREPRESENTATION OF AFRICAN AMERICANS IN THE CHILD WELFARE SYSTEM (Mark F. Testa & John Poertner, eds., forthcoming 2004) [hereinafter RACE MATTERS]).

55. *Id.*

56. Wendy G. Lane et al., *Racial Differences in the Evaluation of Pediatric Fractures for Physical Abuse*, 288 JAMA 1603 (2002) (concluding that minority children are more likely to be evaluated and reported for suspected abuse, even after controlling for the likelihood of abusive injury).

57. *Id.*

58. Green, *supra* note 53 (citing RACE MATTERS, *supra* note 54).

59. The United States Department of Health and Human Services' Children's Bureau, together with the Department of Justice, convened an interdisciplinary Expert Work Group to establish model guidelines for state legislation to advance the goal of providing children with safe and permanent homes. DONALD N. DUQUETTE & MARK HARDIN, U.S. DEP'T. OF HEALTH AND HUMAN SERVICES, ADOPTION 2002: THE PRESIDENT'S INITIATIVE ON ADOPTION AND FOSTER CARE: GUIDELINES FOR PUBLIC POLICY AND STATE LEGISLATION GOVERNING PERMANENCE FOR CHILDREN, *available at* http://www.acf.hhs.gov/programs/cb/publications/adopt02/02final.htm.

60. DUQUETTE & HARDIN, *supra* note 59, at I-9 (citation omitted).

they are reunified more quickly.[61] In addition, the Guidelines report that close to sixty percent of foster children come from families receiving government support.[62]

The extent to which poverty and race co-exist, interact and confound is unclear. Regardless, it can fairly be said that, in our foster care system, race matters. As the authors of the Guidelines note: "[W]e cannot adequately explain the overrepresentation of poor and minority children in care. Consequently, the challenge posed by diversity in the public child welfare arena remains a critical issue, which has yet to be addressed."[63] At issue are core humanitarian values. When they implement ASFA's adoption incentives, state child welfare agencies engage in social engineering experiments of shocking proportions.[64] Every year, thousands of poor children of color are removed from their homes and placed in communities foreign to them. This practice (even were its benefits to the child clearly established) poses extremely troubling social and ethical dilemmas.[65]

2. The Face of Foster Care: The High "Cost" of Terminations

The legal process of "freeing" a child for adoption often exacts a high toll and, once achieved, the route to adoption remains uncertain. Contested legal proceedings of any kind are disruptive to children and may negatively impact children both directly and indirectly. Occasionally, the trauma of a contested termination proceeding will outweigh the benefits for a child. Where caregivers who are also relatives agree to become adoptive parents, the litigation associated

61. Green, *supra* note 53 (citing RACE MATTERS, *supra* note 54).

62. DUQUETTE & HARDIN, *supra* note 59, at I-9 (citation omitted).

63. *Id.*

64. State policy that sounds well-intentioned to contemporary ears may seem appalling when viewed through history's critical lens. In Australia, from 1930 to 1970, children born to Aboriginal women and white fathers were routinely removed from their mothers, placed in orphanages, and trained to be domestic servants. The Australian government justified its action, in part, by pointing to the bleak and impoverished conditions in which its indigenous people lived. The removal and forced mainstreaming of "half-blood" children was dramatized in the recent film *Rabbit-Proof Fence*, based on a true story told in book form by a survivor of childhood removal and government training. RABBIT-PROOF FENCE (Miramax 2002); DORIS PILKINGTON, RABBIT-PROOF FENCE: THE TRUE STORY OF ONE OF THE GREATEST ESCAPES OF ALL TIME (2002) (previously published in Australia as FOLLOW THE RABBIT-PROOF FENCE (1997)). Today, thirty years after its end, Australia's social engineering as state-sanctioned policy seems shocking and frightening. One wonders how we will view our own child welfare system thirty years from now. We have placed a tremendous amount of resources and faith in a system we know is inherently biased and flawed. History may not treat such social engineering charitably.

65. *See* Martin Guggenheim, *Somebody's Children: Sustaining the Family's Place in Child Welfare Policy*, 113 HARV. L. REV. 1716 (2000) (reviewing ELIZABETH BARTHOLET, NOBODY'S CHILDREN: ABUSE AND NEGLECT, FOSTER DRIFT, AND THE ADOPTION ALTERNATIVE (1999)) (challenging the assertion that children are best served by more aggressive removal and adoption policies, including trans-racial adoptions). *But see* Elizabeth Bartholet, *Reply: Whose Children? A Response to Professor Guggenheim*, 113 HARV. L. REV. 1999 (2000) (arguing that the challenged family preservation policies do great harm to children of color without helping adult communities of color).

with terminating parental rights may destabilize an otherwise functional family system.

The number of children who are "freed" for adoption through termination of parental rights proceedings but are not adopted continues to grow.[66] The result is a new class of legal orphans. These children are prepared for "independent living" by child welfare agencies and then discharged from care with a host of disabilities resulting from their fractured childhoods.[67] Many of the children who have spent years in foster care and then exit care into "independent living" maintain connections with their natural families. Some even return to the homes from which they were removed.[68]

In addition, termination may be unnecessary in cases where a parent suffers from a mental or physical disability that renders her unable to care for her child. Even where a parent is unfit to provide day-to-day care, termination of parental rights may not always serve the child's best interest. On the contrary, the child may benefit from maintaining a relationship with the biological parent while respecting and accepting the parent's limitations.[69]

3. The Face of Foster Care: Non-Nuclear Caretaking Arrangements

Third, children in foster care are increasingly raised outside of the nuclear family context, in joint custody arrangements with divorced parents and their new families, with relatives and, often, with family friends.[70] Shared parenting

66. As of September 30, 1999, 127,000 children were classified as "waiting to be adopted" (children for whom the goal is adoption and/or whose parental rights have been terminated). As of September 30, 2000, that number had increased to 131,000. These numbers do not include those children 16 years and older whose parental rights have been terminated and who have a goal of "emancipation." *See* CHILDREN'S BUREAU, U.S. DEP'T. OF HEALTH AND HUMAN SERVICES, ADOPTION AND FOSTER CARE ANALYSIS AND REPORTING STATISTICS, *available at* http://www.acf.dhhs.gov/programs/cb/publications/afcars/report7.htm (Aug. 20, 2002) (statistics based on data submitted through September 30, 2000).

67. *See generally* KORTENKAMP & EHRLE, *supra* note 5 (discussing the emotional and behavioral problems afflicting children in foster care); Mark E. Courtney, Irving Piliavin, Andrew Grogan-Kaylor, and Ande Nesmith, *Foster Youth Transitions to Adulthood: A Longitudinal View of Youth Leaving Care*, 80 CHILD WELFARE 685 (2001) (detailing a study tracking the experiences of 141 young adults in their first 12–18 months after leaving care).

68. *See generally* CHARLES & NELSON, *supra* note 15, at 14 (citing RONNA COOK, A NATIONAL EVALUATION OF TITLE IV-E FOSTER CARE INDEPENDENT LIVING PROGRAMS FOR YOUTH: PHASE 2 FINAL REPORT (1992)); Richard P. Barth, *Emancipation Services for Adolescents in Foster Care*, 31 SOC. WORK 165, 166–67 (1986) (noting that fifteen percent of a surveyed 607 former foster children were then living with their birth parents); Courtney, Piliavin, Grogan-Kaylor, & Nesmith, *supra* note 67, at 710 (noting that thirty-one percent of former foster children stayed with relatives after aging out of the system).

69. The Department of Health and Human Services regulations, which govern the implementation of ASFA, cite as an example of a compelling reason for choosing "another planned permanent living arrangement . . . the case of a parent and child who have a significant bond but the parent is unable to care for the child because of an emotional or physical disability and the child's foster parents have committed to raising him/her to the age of majority and to facilitate visitation with the disabled parent." 45 C.F.R. § 1356(h)(3)(ii) (2002).

70. Meryl Schwartz, *Reinventing Guardianship: Subsidized Guardianship, Foster Care, and*

responsibilities among kin predominate in part as a hedge against poverty.[71] Goldstein, Freud and Solnit's failure to address culturally diverse care-taking patterns lends their theory to use as a weapon against the low-income families of color who constitute a large proportion of the children in foster care.[72]

Child welfare agencies increasingly place children in relatives' homes in part from a recognition of the importance to children of maintaining family and community ties.[73] In contrast to other foster children, children in kinship homes are already connected to the family caring for them.[74] Studies have shown that foster children cared for in kinship homes experience fewer disruptions in placement than foster children in non-related homes. There is also less stigma attached to the out-of-home placement and the care provided is often more culturally consistent than a stranger foster home.[75] In addition, children may benefit from more frequent and less formal contact with their birth parents facilitated by a kinship care arrangement.[76]

What the explosion of formalized kinship care has meant for permanency planning priorities remains subject to debate. One problem lies in defining "kin." While there are obvious benefits to keeping children in familiar networks of care, restrictive definitions of "kin" do not adequately capture a child's diverse affective bonds. Patterns and practices of care-giving differ across cultures, and bloodlines are not always the only—nor even the best—way of defining kinship relationships. Some states have recognized this reality by enacting legislative provisions that seek to honor a child's affective as well as blood bonds in defining "kin."[77]

A common barrier to adoption in the kinship care context has been the reluctance of many caregivers to cause a relative to lose her parental rights. Care-givers that are relatives are unlikely to share the prevailing notion among

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Child Welfare, 22 N.Y.U. REV. L. & SOC. CHANGE 441, 466 (1996).

71. Peters, *supra* note 14, at 523 (citing Carol B. Stack, *Cultural Perspectives on Child Welfare*, 12 N.Y.U. REV. L. & SOC. CHANGE 539, 540–41 (1984)).

72. *Id. See generally* Davis, *supra* note 25.

73. In a 1999 report by the GAO, kinship care arrangements in California and Illinois had risen sharply since 1990, accounting for over half of the foster care population in both states in 1997. *See* CHILD WELFARE WAIVERS, *supra* note 52, *at* http://www.aphsa.org/cornerstone/cwwtoc.asp.

74. Madeleine Kurtz, *Solomon's Dilemma: Exploring Parental Rights: The Purchase of Families Into Foster Care: Two Case Studies and the Lessons They Teach*, 26 CONN. L. REV. 1453, 1497 (1994).

75. *Id.* at 1471.

76. *Id.* at 1472.

77. *See* MARY LEE ALLEN ET AL., EXPANDING PERMANENCY OPTIONS FOR CHILDREN (2003) (citing Minnesota's Relative Custody Assistance Act, MINN. STAT. § 257.85 (2003) (allowing appointment of a "relative or important friend with whom the child has resided or had significant contact"); New Jersey's Kinship Legal Guardianship Program Statute, 2001 N.J. Laws 250 § 1813 C.3B:12A-1–C.30:4C-88 (defining the kinship relationship to mean a family friend or a person with a biological or legal relationship with the child); North Dakota's statute, N.D. CENT. CODE § 27-20-47, 48.1 (2003) (extending eligibility to an individual recognized in the child's community as having a relationship with the child similar to a kinship relationship)).

child welfare professionals that adoption is necessary to demonstrate or "cement" their commitment to the child in their care. In some cases, resistance to adoption is firmly rooted in deeply held cultural or religious beliefs.[78]

A recent *New Yorker* article[79] presents an especially compelling portrait of deep cultural resistance to the concept of legal adoption. In October 1999, a New York prosthetist, Matthew Mirones, stumbled upon a *New York Times* photo essay on war amputees in Freetown, the capital of Sierra Leone. Amputation was the signature atrocity of the civil war in Sierra Leone, and Mirones was inspired by the photos to embark upon a project to bring a group of mutilated children to New York, fit them with prostheses and send them back to their country as beacons of hope for the survivors in Freetown. A group of Staten Island Rotarians agreed to assist Mirones by coordinating food, housing and transportation for the amputees.

Three months after the children arrived, the project began to fall apart. There was a debate over what should happen to the children. The Sierra Leoneans had been model patients, were adjusting well to their prostheses, and Mirones remained committed to sending them back to Sierra Leone. The Rotarians, on the other hand, had grown to love the children who told them that they wanted to stay in America. The Rotarians wanted to seek political asylum for the children and place them for adoption in the United States. Others involved with the project, including former Peace Corps volunteers, saw the rush to adoption as "well-meaning American arrogance"[80] and countered that the families in Sierra Leone had never agreed to give up their children.

Mirones and the article's author, George Packer, decided to travel to Freetown to learn what the parents wanted. They discovered that all of the parents adamantly wanted their children to remain in America. When Mirones and Packer proceeded to explain what that would mean—that they would lose their parental rights so that the children could be legally adopted by another family—the children's parents were adamantly opposed to this loss of rights. There is no Krio (the language spoken in Sierra Leone) word for "adoption." However:

> [U]se of the Krio word *men*, meaning "to care for," is extremely widespread, as is the practice: a woman other than the biological parent will bring up a child because the parents can't, or because she is childless, or simply because she likes the child. Unlike adoption, there is no loss of legal rights, and it's expected that upon reaching adulthood the child will help support the biological parent.[81]

The Sierra Leoneans remained firm that they could not forfeit their parental

78. *See* Schwartz, *supra* note 70, at 456.

79. George Packer, *The Children of Freetown*, THE NEW YORKER, Jan. 13, 2003, at 51.

80. *Id.* at 57.

81. *Id.* at 60–61.

rights, although they were clear that they wanted the Americans to help their children in terms they could live with—to *men* the children.[82] When considering cross-cultural examples such as this, it is important to note that adoption legislation was never intended to interfere with the practice of extended family or friends caring for children whose parents are unable to care for them.[83]

C. *The Pragmatic and Symbolic Appeal of Adoption*

Based on what we know about the benefits to children of maintaining affective bonds, we must ask why adoption, with its inherently rigid and dramatic legal requirements of termination and severance, is the first choice for agencies and courts.

Law Professor Marsha Garrison posits several *pragmatic* reasons why adoption has had such growing appeal throughout the twentieth century. First, she suggests that as the number of infants available for adoption declined dramatically in the latter half of the twentieth century, the nineteenth century "rescue philosophy" of child welfare, whereby child protection advocates urged separation of children from poor, inadequate birth families, saw a revival.[84] Second, even subsidized adoption is cheaper than foster care from the state's perspective because of dramatic administrative savings that have only increased with the ASFA-imposed case review requirements.[85] Third, adoption is a widely recognized legal concept whereas guardianship, particularly subsidized guardianship, has been slow to take hold in the public custody arena. Fourth, adoption often has greater appeal to prospective adoptive parents who prefer that

82. Today, all of the children have received political asylum and are living in the United States. Three have been placed with families who are seeking legal guardianship. Last August, one of the teenaged boys was sent to Montana to meet with a prospective family, but on the drive from Billings to their ranch the boy became anxious and suffered a flashback to Sierra Leone and having his hands amputated. The mountains reminded him too much of his homeland and the trauma he had suffered. He returned to Staten Island. *Id.* at 61.

83. *See* Schwartz, *supra* note 70, at 449 (noting that adoption was designed to assist individuals and couples who were unable to have a child of their own and to protect the adopting parents' interests by ensuring that the child was "free" of her old family).

84. Garrison, *supra* note 12, at 374–76. Elizabethan poor laws, which were transplanted to American soil in the latter part of the eighteenth and into the nineteenth centuries, included state power to place poor children in "apprenticeships" intended to separate them from their destitute families. This wholesale rounding up of poor children and literally "farming" them out to work in more scarcely populated western communities continued in the early nineteenth century and was predicated on the same notion that children must be removed from their surroundings to have "moral guidance." In short, poverty equaled pestilence and public aid warranted public control. When it comes to the poor, this practice of social engineering has a long history and persists today. It is reflected in the denigration of the single (usually black) welfare mother who is cast as a threat to society as a result of her potential for reproducing poverty.

85. The ASFA case review requirements found in 42 U.S.C. § 675 impose an obligation on state courts to hold more frequent and thorough reviews of child welfare cases; this, in turn, increases the administrative cost to courts and agencies who must supply the necessary social workers, attorneys, preparation and court time to make the review system meaningful.

children not be encumbered with another family.[86]

In addition to these pragmatic concerns, what Professor Garrison terms the "confluence of state and adult interests,"[87] Professor Garrison argues that adoption holds tremendous *symbolic* appeal. Unlike other legal placement alternatives, adoption offers the chance of a legal rebirth. Because adoption superficially involves the replacement of "bad" parents with "good" parents, it also has a uniquely redemptive quality. This good/bad dichotomy is greatly enhanced by the stigma attached to foster care. As a result, each time an adoption is finalized, the involved professionals breathe a collective sigh of relief that one more child is being saved from a state of "limbo."[88] By definition, the rebirth requires the death of past identity and familial bonds.

Professor Garrison notes that society is unwilling to make the trade-off between child well-being and administrative efficiency outside the foster care system (that is, in private custody disputes). She concludes, as any honest observer from inside the system must, that there exists: "a class-based divide—in advocacy, theory, and law—that assumes real differences in children's pain based essentially on the receipt of public benefits. We have expected poor children, and only poor children, to gratefully sacrifice their past lives in order to obtain the benefits it suits us to provide."[89] At the same time, child advocates have been willfully blind to the fact that the symbolic benefits of adoption derive from the same notion of parental rights as "property-like" entitlements that they decry elsewhere.[90]

This article is, in essence, a call to do better by children caught in the child welfare system. Because of adoption's overt symbolism, its "clean break" with a messy past, it avoids recognition of individual children's realities. Most importantly, blind embrace of adoption obscures what a great deal of psychological research has confirmed: that children's expectations of permanence are based on evidence of their caregiver's commitment and intentions, not legal labels.[91] Creative uses of adoption alternatives explicitly recognized by ASFA, such as legal guardianship, may better serve agencies, courts and advocates in forging, or simply recognizing and supporting, cooperative networks of care for children in need.

II.
THE GENESIS OF SUBSIDIZED LEGAL GUARDIANSHIP

ASFA sought to ensure that child safety would be the paramount consideration in all child placement decisions made by public child welfare

86. Garrison, *supra* note 12, at 386–87.
87. *Id.* at 387.
88. *See id.* at 390.
89. *Id.* at 395.
90. *Id.* at 394–95.
91. *Id.* at 378 (citations omitted).

agencies. In addition, ASFA promotes the adoption of children in foster care who cannot be safely reunited with their parents. Seeking to assist states in implementing ASFA, the Guidelines[92] create a hierarchy of permanency outcomes for children in foster care. Adoption is identified as the preferred permanency option for children who cannot return home, followed by permanent legal guardianship. Legal guardianship is defined by ASFA as:

> [A] judicially created relationship between child and caretaker which is intended to be permanent and self-sustaining as evidenced by the transfer to the caretaker of the following parental rights with respect to the child: protection, education, care and control of the person, custody of the person, and decision-making.[93]

The Guidelines note that the hierarchy of permanency options is not inflexible and requires individualized judgments based on the circumstances of each individual child.[94] They recommend that states establish several legal options for permanent placement, including legal guardianship and planned permanent living arrangements, for children who cannot return home and for whom adoption is not appropriate.[95] The authors caution that the decision whether legal guardianship is the most appropriate permanency plan for a child is legally and psychologically complex and should be made on a case-specific basis.[96]

Within the framework laid out by ASFA and further elucidated by the Guidelines, legal guardianship has an important and under-acknowledged role to play in promoting permanency for foster children. There have been two primary barriers to the acceptance of legal guardianship as an equal partner with adoption in permanency planning.[97] The first is a concern that legal guardianship is insufficiently "permanent." The second is the absence of federal reimbursement for guardianships commensurate to that provided in the adoption context.

"Permanency" is defined in the Guidelines as a safe, stable custodial environment in which to grow up, and a life-long relationship with a nurturing caregiver.[98] A "permanent placement" includes the following characteristics: (1) that it is legally intended to be permanent (both to last throughout the child's minority and to establish family relationships that will last for for lifetime); (2) that it is legally secure from modification; (3) that the permanent caregiver has the same legal responsibility for the child as a birth parent; and (4) that the state

92. DUQUETTE & HARDIN, *supra* note 59.

93. 42 U.S.C. § 675(7) (2000).

94. DUQUETTE & HARDIN, *supra* note 59, at II-2.

95. *Id.* at II-2–II-3.

96. *Id.* at II-10.

97. Schwartz, *supra* note 70, at 457 (recounting that legal guardianship was first discussed in the context of foster care in 1935, but continues to be used, though rarely, as a permanency plan for children in foster care).

98. DUQUETTE & HARDIN, *supra* note 59, at I-3.

no longer has legal custody of the child and the permanent caregiver is not subject to continuing State supervision.[99]

Under a legal guardianship arrangement, the guardian assumes the same legal responsibility for the child as a birth parent. The birth parent's rights, however, are not terminated. Instead, the birth parent retains some residual rights and obligations, such as the right to visitation or name change, and the obligation to pay child support and, in some cases, provide medical insurance.[100] Under a legal guardianship arrangement, the state no longer has custody of the child and the permanent guardian is not subject to continuing state supervision.

The most common criticism of legal guardianship as a permanency alternative for children in foster care is that legal guardianship is insufficiently permanent and insufficiently secure from modification. Guardianships can be terminated by a court upon petition by the guardian or any interested party, including the biological parent. Even if the guardian never moves to terminate the guardianship, her powers expire when the child reaches majority. This argument becomes less compelling when one considers that adoptive and biological parents are always vulnerable to custody suits brought by third parties.[101] Further, the relationship between child and guardian can only be disrupted by a court after a finding that modification or termination of the guardianship is in the child's best interest.[102]

The second barrier to the use of legal guardianship as a permanency option on equal footing with adoption is the failure of the federal government to reimburse states for financial assistance to guardians. The Adoption Assistance program, funded through Title IV-E of the Social Security Act, is an open-ended entitlement program designed to assist states in finding adoptive homes for children whom the state has determined would otherwise be hard to place.[103] Specifically, states are partially reimbursed for providing ongoing financial and medical assistance to adopted children deemed "special needs" children.[104]

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99. *Id.* at II-2.

100. *See* ALLEN ET AL., *supra* note 77, at 6.

101. Schwartz, *supra* note 70, at 463 (suggesting that while adoptive and biological parents benefit from a legal presumption that favors custody with a parent, permanent legal guardians who are appointed by a court for a child in foster care would likely benefit from that same presumption, except in relation to a biological parent).

102. *Id.*

103. 42 U.S.C. § 670 (2000).

104. Eligibility for assistance is predicated on whether a child has "special needs" *and* is *either* (1) AFDC-eligible; or (2) eligible for SSI; or (3) the child of a minor parent; or (4) eligible due to prior Title IV-E adoption assistance eligibility. 42 U.S.C. § 673(a)(1)(B), (a)(2) (2000). *See also* CHILDREN'S BUREAU, U.S. DEP'T OF HEALTH AND HUMAN SERVICES, CHILD WELFARE POLICY MANUAL § 8.2B (2003), *available at* http://www.acf.hhs.gov/programs/cb/laws/cwpm/policy.jsp (explaining eligibility requirements in greater detail). In the determination of "special needs" for purposes of adoption assistance, a child must meet *each* of three criteria defined in section 473(c) of the Social Security Act, as follows: (1) the state must determine that the child cannot or should not be returned home; (2) the state must determine that there exists a specific factor or condition that makes it reasonable to conclude that the child cannot be placed with

Adoption assistance is essential to promote permanency for children in foster care. Significantly, the adoptive parents' income is not relevant to the child's eligibility for the program. Instead, the payment rate is based on the needs of the child and the circumstances of the family, as negotiated between the family and state.[105] By allowing adoptive parents to make decisions about expenditures on behalf of the child without further agency oversight once the adoption assistance agreement is signed, the program maximizes family autonomy and promotes the value of adequately supporting families who make a long-term commitment to raise a child not their own.

The assistance provided to adoptive parents through the Adoption Assistance program far outstrips the financial assistance available to biological parents caring for their own children through state and federal welfare grants.[106] In addition, the financial assistance provided to adoptive parents and foster parents far outstrips the funding available to provide services to families seeking to reunify with children in foster care.[107] The result of this funding allocation has been to promote the adoption of children who cannot return home or to keep children in foster care where there is substantially more federal reimbursement available to state agencies. Legal guardianship, with the exception of a limited number of federal demonstration projects, has never been federally reimbursable. Thus, it has historically been underutilized in permanency planning for children in foster care.

Building on what is known about the success of adoption assistance in

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adoptive parents without providing assistance (for example, ethnic background, age or membership in a minority or sibling group, the presence of a medical condition, or physical, mental, or emotional disabilities); and (3) the state must determine that a reasonable but unsuccessful effort to place the child with appropriate parents without providing assistance has been made, unless it would not be in the best interests of the child due to the existence of significant emotional ties with prospective adoptive parents while in the home of such parents as a foster child. § 673(c).

105. 42 U.S.C. § 673(a)(3) (2000); Adoption Assistance Program: Administrative Requirements to Implement Section 473 of the Act, 45 C.F.R. § 1356.40(c) (2002).

106. Schwartz, *supra* note 70, at 465.

107. Whereas appropriations for the Adoption Assistance program for 2001 were estimated at $1,197,600,000, CHILDREN'S BUREAU, U.S. DEP'T OF HEALTH AND HUMAN SERVICES, TITLE IV-E ADOPTION ASSISTANCE, *available at* http://www.acf.dhhs.gov/programs/cb/programs/4eaa.htm (Jan. 17, 2001), the appropriations for the cost of maintaining children in foster care in 2001, allocated through Section 470 of Title IV-E (Title IV-E Foster Care program) were $5,063,500,000. CHILDREN'S BUREAU, U.S. DEP'T OF HEALTH AND HUMAN SERVICES, TITLE IV-E FOSTER CARE, *available at* http://www.acf.dhhs.gov/programs/cb/programs/4efc.htm (Jan. 17, 2001). In contrast, appropriations for preventive intervention services directed at keeping families together or achieving reunification (Section 420 of Title IV-B) in 2001 were only $291,986,000. CHILDREN'S BUREAU, U.S. DEP'T OF HEALTH AND HUMAN SERVICES, CHILD WELFARE SERVICES, *available at* http://www.acf.dhhs.gov/programs/cb/programs/4bcwspl.htm (Jan. 17, 2001). These child welfare services are augmented in part by allocations to the Promoting Safe and Stable Families (PSSF) program, which is designed to prevent the unnecessary separation of children from their families and to ensure permanency for children in foster care. Allocations to the PSSF program in 2001 were estimated at $305,000,000. CHILDREN'S BUREAU, U.S. DEP'T OF HEALTH AND HUMAN SERVICES, PROMOTING SAFE AND STABLE FAMILIES, *available at* http://www.acf.dhhs.gov/programs/cb/programs/fpfs.htm (Jan. 17, 2001).

promoting permanency for children in foster care who cannot return home, an increasing number of states have sought to add subsidized legal guardianship to their permanency options. In 1996, only six states had subsidized legal guardianship programs, and every one of the six used state funds exclusively to support its program.[108] By 2002, 34 states and the District of Columbia had some form of subsidized legal guardianship program for children in foster care.[109] Six of these states have permission from the federal government to operate subsidized guardianship programs as demonstration projects.[110]

A. Subsidized Legal Guardianship Programs: An Introduction

Subsidized legal guardianship programs vary widely across states. Nevertheless, many share common eligibility criteria and program characteristics designed to address a set of fundamental concerns about ensuring the appropriateness of legal guardianship as a permanent plan. This section will briefly outline some of these criteria and elucidate the concerns underlying them.[111]

1. Child Eligibility Criteria

Approximately half the state subsidized guardianship programs limit eligibility to older children, who may be less likely to be adopted, or to otherwise "hard to place" children.[112] "Hard to place" is defined by state law and may include children who belong to a minority race or culture, children who are part of a sibling group or children who suffer from a mental or physical

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108. SHARON L. MCDANIEL & ANTHONY R. SOSSO, A SECOND CHANCE, INC., SUBSIDIZED LEGAL GUARDIANSHIP UPDATE: A PERMANENCY PLANNING OPTION STUDY FOR CHILDREN PLACED IN KINSHIP CARE 1 (1998) (noting the programs in Alaska, Hawaii, South Dakota, Massachusetts, Nebraska, and Washington).

109. ALLEN ET AL., *supra* note 77, at 3, 85–161 (citing Alaska, Arizona, California, Connecticut, Delaware, D.C., Florida, Georgia, Hawaii, Idaho, Illinois, Indiana, Iowa, Kansas, Kentucky, Louisiana, Maryland, Massachusetts, Minnesota, Missouri, Montana, Nebraska, Nevada, New Jersey, New Mexico, North Carolina, North Dakota, Oklahoma, Oregon, Pennsylvania, Rhode Island, South Dakota, Utah, West Virginia, Wyoming).

110. *Id.* at 12 (citing Illinois, Maryland, Montana, New Mexico, North Carolina and Oregon. While the authors include Delaware as a state with Title IV-E Waiver Authority to operate a subsidized legal guardianship program, as of the end of 2002, that Authority had been terminated). "Child welfare waivers, first authorized by Congress in 1994, enable state and local agencies to use their federal resources . . . to protect children and preserve families. Waivers are approved for up to five years. They must be cost neutral to the federal government . . . . Demonstration projects must be rigorously evaluated to determine their efficacy." Jennifer L. Miller, *Child Welfare Waivers: What Are We Learning?*, *in* POL'Y & PRAC. PUB. HUM. SERVICES: J. AM. PUB. HUM. SERVICES ASS'N, Dec. 2000, at 20.

111. This Section of the article is based in large part upon three reports on the use of subsidized guardianship in permanency planning: CORNERSTONE CONSULTING GROUP, *Guardianship: Another Place Called Home* (2001) [hereinafter *Another Place Called Home*]; MCDANIEL & SOSSO, *supra* note 108; and ALLEN ET AL., *supra* note 77.

112. ALLEN ET AL., *supra* note 77, at 46.

disability.[113]

Several states have defined exceptions that explicitly allow an agency to make individualized determinations in certain cases. One exception is designed to keep sibling groups together; thus, if one member of a sibling group meets the eligibility criteria, the criteria that are not met by a sibling may be waived.[114] Another common exception is to allow subsidized guardianship payments to continue until the child is twenty-one (where they would otherwise cease when she turns eighteen) if she is enrolled in a full-time, qualified educational program at age eighteen and remains enrolled until she is twenty-one, or if she suffers from an emotional or physical disability.[115] Laws and policies which enable courts and agencies to make individualized determinations are ultimately more responsive to children's needs.

Almost all the programs require that the child for whom guardianship is sought have been in foster care for a set amount of time before being referred for guardianship.[116] This "waiting period" gives the agency time to rule out reunification as an option and to fully explore the adoption alternative.[117] It is consistent with states' primary obligation to work with families in order to achieve reunification where possible. Nevertheless, where circumstances render a parent unable to care for her child for the foreseeable future, where those circumstances are certain not to change (for example, where she is serving a mandatory minimum sentence), and if the parent consents to guardianship by an identified individual with whom the child has an existing relationship, it may be more appropriate to waive the waiting period to achieve permanency. State laws and policies should allow for individualized determinations in these types of circumstances.

2. Caregiver Eligibility Criteria

The most significant concern underlying the caregiver eligibility criteria is for the permanency of the placement. The greatest determinant of placement

113. Essentially, "hard to place" and "special needs" are used interchangeably to denote children who are believed to be, for whatever mix of reasons, more difficult to place in permanent homes. For the federal definition of "special needs" for purposes of determining adoption assistance, *see* discussion *supra* note 104.

114. ALLEN ET AL., *supra* note 77, at 46.

115. *Id.*

116. *Id.*

117. The Guidelines recommend that the child have been in foster care for at least 12 of the last 18 months before a referral for guardianship can be made. DUQUETTE & HARDIN, *supra* note 59, at II-9. This time frame coincides with the permanency hearing requirement established by ASFA. 42 U.S.C. § 675(5)(C) defines a permanency hearing as the stage in legal proceedings regarding a child in foster care at which the court must (1) make a determination that the agency is making reasonable efforts to achieve the then-existing permanency plan for the child, and (2) approve a permanency plan for the child going forward. 42 U.S.C. § 675(5)(C) (2000). It is at this stage that a goal other than reunification is first judicially approved, and it would be a natural stage at which to at least have the court sanction and order that a legal guardianship petition be pursued.

stability is the strength of the caregiver's commitment to the child and the child's attachment to the caregiver.[118] For this reason, a majority of states require that the child have resided for a set period of time in the caregiver's home prior to qualifying for a subsidized guardianship.[119] While the length of time an individual has been caring for a child may be an indication both of her commitment to the child and of the child's attachment to the caregiver, many strongly committed individuals may lack the financial means to care for a child unless a subsidy is available. At least one state allows the "length of time in caregiver's home" requirement to be waived by a court for good cause.[120] The case of a parent serving a lengthy sentence of incarceration (referenced to above) presents an equally compelling argument in favor of allowing for individualized determinations to prevent the need for unnecessary placement disruptions for the child.

While a majority of states make subsidized guardianship available to children living with any caregiver, including a foster parent who has chosen to care for them permanently,[121] some states have sought to define which caregivers are more likely to make a permanent commitment by considering the title of their relationship to the child. Some states limit eligibility to children living with "kin," which may be defined to include non-related individuals with a close, family-like bond with the child.[122] More restrictive programs, however, limit eligibility to blood relatives within a specified degree of relationship.[123] Again, the argument for allowing individualized determinations is persuasive. Not all cultures or communities delegate or assume child-rearing responsibilities based on blood relations. Where a family has demonstrated a commitment to a child and she is bonded to that family, it is incumbent upon agencies and courts to respect those affective bonds.

A number of states have sought to preserve the permanency of the placement beyond the potential death or disability of the guardian by directing the court to appoint a successor guardian after a guardian dies or becomes unavailable to care for a child.[124] A few states require that a successor guardian be identified *prior* to the need arising.[125] This approach prevents even temporary disruption of the child's care and is particularly important if the

118. Mark F. Testa, *Subsidized Guardianship: Testing an Idea Whose Time Has Finally Come*, SOC. WORK. RES., Sept. 2002, at 145, 147 [hereinafter Testa, *Subsidized Guardianship*].

119. ALLEN ET AL., *supra* note 77, at 46.

120. ARIZ. REV. STAT., § 8-871 (1999). *See also* ALLEN ET AL., *supra* note 77, at 29.

121. ALLEN ET AL., *supra* note 77, at 9.

122. *Id.*

123. *Id.*

124. *Id.*

125. *Id.* at 36. Under the District of Columbia's guardianship program, in the event that a guardian becomes unable to care for the child, a successor guardian, who the guardian has designated and who the court approved when initially approving the guardianship, obtains immediate custody of the child. A court review is held shortly thereafter to approve the placement. D.C. CODE §§ 16-2381–16-2399 (Lexis Supp. 2003).

guardian is of advanced age or suffers from any health-related condition.

3. State Agency Considerations

State agencies have multiple considerations to weigh in deciding whether and when to pursue guardianship. First, federal law requires that, absent extreme circumstances, state agencies work with biological parents toward reunification when a child is placed in foster care.[126] After the child has been in foster care for twelve months, however, state courts are required to hold Permanency Hearings at which alternative permanency options are explored if reunification does not appear to be an imminent possibility. As explained above, the Guidelines have established a hierarchy that state agencies and courts follow in making these alternative permanency decisions. Adoption is first on the list, and a majority of states require that adoption be fully considered before moving on to consider legal guardianship.[127]

The Guidelines express a federal preference, not a federal mandate. They recognize the need for flexibility and individualized determinations in child placement decisions. Accordingly, most states have language that allows the agency or a court to determine, having found that reunification will not occur, that adoption is not "in the best interests of the child" or not "appropriate" in a given case.[128] Different state agencies differ in how they determine whether adoption is appropriate and whom they include in the decision-making process. This inconsistency in ground-level permanency planning belies a fundamental difference of opinion over whether and when guardianship should be valued as an option equal to adoption in making permanency decisions. A more individualized and inclusive decision-making process best serves children's needs.

Some states require that the agency make an effort to obtain the birth parent's consent to guardianship on the theory that obtaining birth parent consent will contribute to the permanency of the placement. Most states, however, allow the agency to proceed without parental consent under certain circumstances.[129] More than half require the agency to consult the child about the proposed guardianship if she is old enough (usually defined as age twelve or over).[130] If parental consent is not obtained, states must respect the constitutionally imposed procedural protections that attach when it seeks to *permanently* terminate a parent-child relationship. While the stakes in pursuing termination of parental rights and legal guardianship are not identical in that the parent retains parental rights in the latter case, the placement *is* intended to be permanent in nature. More stringent procedural protections than those applied in making temporary

126. *See* 42 U.S.C. § 671(a)(15) (2000).
127. ALLEN ET AL., *supra* note 77, at 47.
128. *Id.*
129. *Id.* at 46–47.
130. *Id.* at 47.

custody determinations must be ensured.

Several states have made it more difficult to rescind guardianship once it is established.[131] A court must review any petition to modify or terminate a legal guardianship and decide whether it is in the child's best interest.[132] Most states have not yet adequately addressed what standards to apply when the birth parent petitions the court.[133] If a biological parent's parental rights have not been terminated, she generally benefits from a presumption in favor of custody unless she is unfit to care for her child. The concern is that birth parents will continually challenge guardianship, threatening its stability and permanency. Further, there is concern that the presumption will work to remove children from stable, loving guardianships and return them to biological parents who are thought to be more "fit" parents.

In reality, the concern over biological parents disrupting guardianships is vastly overblown. First, the assurance that no guardianship will be disrupted absent a judicial finding that it is in the child's best interests to do so is a significant protection for the child. Judges exercise extremely broad discretion in making best interests determinations and the attachments of the child and stability of the placement are governing concerns. Second, as discussed above, parents whose children are in the child welfare system oftentimes struggle with multiple disabilities—economic, social, mental and physical. It is unlikely that they will have access to the kinds of legal and social assistance to render legal challenges meaningful. A more relevant concern would be a judicial bias against reversing guardianships even where emotional realities for the child demand it. Finally, as with adoption, adequate preparation of the parties and provision of necessary services and support is the best way to minimize the risk of future disruption to the placement.[134]

4. Payment Level and Source

In order for a guardianship to be subsidized, the application for a subsidy must be made prior to the guardianship hearing.[135] All but two of the guardianship programs in place require the caregiver to obtain legal custody or guardianship before the child is eligible for the subsidy.[136] The subsidy rate

131. *Id.* at 6.

132. *Id.* at 8.

133. *Id.* at 35. North Carolina is the only state that addresses the situation of a birth parent attempting to resume custody in a statute. North Carolina's Juvenile Code prohibits the court from terminating the guardianship or ordering that the juvenile be reintegrated into a parent's home unless the court finds one of the following: (1) that the relationship between guardian and child is no longer in the child's best interest; (2) that the guardian is unfit; (3) that the guardian has neglected his/her duties; or (4) that the guardian is unwilling or unable to continue assuming a guardian's duties. N.C. GEN. STAT. § 7B-600 (West Supp. 2003).

134. ALLEN ET AL., *supra* note 77, at 7.

135. MCDANIEL & SOSSO, *supra* note 108, at 97.

136. ALLEN ET AL., *supra* note 77, at 46.

varies among states, ranging from the Temporary Assistance to Needy Families (TANF) child-only rate to the foster care board rate. Some states award the foster care board rate but subtract any unearned income of the child such as Social Security benefits or child support. Other states make a case-by-case analysis of the family needs and resources. Some states additionally reimburse guardians for the court costs associated with obtaining guardianship.[137]

In addition to financial assistance, post-guardianship support services are provided by some states to ensure the stability of the guardianship, but these services often fall far short of the mark.[138] In some states the services and supports available to legal guardians and their wards mirror those available to adoptive families.[139] These additional services may include child care, therapeutic day care, counseling and support groups, scholarships and educational advocacy. The majority of states provide medical insurance with the subsidy. In order for families, agencies and courts to be able to embrace legal guardianship as an equal partner with adoption in permanency planning for children who cannot return home, it is necessary that the subsidy and assistance available to prospective guardians be commensurate with that available to prospective adoptive parents.

5. Procedure

The procedures that states use to implement legal guardianships vary somewhat, but all follow some general guidelines. The caseworker is charged with making the initial recommendation, which is followed by an internal agency review. Contact with the birth parent, child and prospective guardian is made to discuss the guardianship option. A final decision will be made by agency staff, and then the agency will petition the appropriate court.[140] All but one of the state programs require the agency to conduct a periodic review of the child's guardianship and subsidy.[141]

Finally, state statutes may require court orders establishing a guardianship to specify the residual rights and obligations that a birth parent retains. These most often include visitation arrangements and/or child support payments. Written guardianship agreements between the agency and guardian, which include the birth parent and/or child if appropriate, are also used by some states to clarify

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137. *Id.* at 40.

138. *Another Place Called Home, supra* note 111, at 18 (noting that agencies have been slow to recognize that guardians may need a breadth and range of post-guardianship supports similar to those available to adoptive families).

139. *Id.* at 39.

140. In some states, guardianships are solely within the jurisdiction of the probate court. Preferable, however, are the states that authorize the same juvenile court judge who adjudicates the dependency case to order the guardianship. This "one judge one case" approach streamlines the case review process. ALLEN ET AL., *supra* note 77, at 22–23.

141. ALLEN ET AL., *supra* note 77, at 47. Montana's state guardianship program does not require a periodic review. MONT. CODE. ANN. § 41-3-444 (2001).

each party's rights and obligations.

B. Evaluating the Results: Enhanced Child Well-Being

The state of Illinois operates one of the nation's largest subsidized guardianship programs under authority from the federal government pursuant to a Title IV-E Waiver. Interim findings from the Illinois Subsidized Guardianship Waiver Demonstration Project, published in 2000, three years after the Project began, suggest at least two reasons courts, agencies and advocates should re-examine subsidized legal guardianship. First, the interim evaluations demonstrate a statistically significant increase in permanency rates, at no cost to child safety and well-being, when subsidized guardianship is offered to families as a permanency alternative.[142] Second, there was little evidence that increasing legal permanence improved the longevity of kinship and foster placements. This suggests that the degree of placement stability may be determined by factors independent of the legal relationship between child and caregiver.[143]

On the other hand, Illinois's interim findings suggest that there were fewer adoptions because of the availability of subsidized guardianship.[144] However, I challenge the continuing forfeiture of higher permanency rates in pursuit of more adoptions. At the root of this forfeiture is a fundamental debate over competing definitions of "permanency" and over what each definition means in real terms for the children in whose interest it is being advocated. As with most subsidized guardianship programs, the Illinois program includes a requirement that reunification and adoption be ruled out as neither possible nor appropriate before pursuing subsidized legal guardianship. The evaluators quickly realized that the decision of *when* adoption is not appropriate, and *who* makes the decision, is deeply controversial.[145] The interpretation of this rule-out provision, therefore, becomes a focal point of debate.

On one side of the debate are "the so-called 'adoption hawks' who advocated a strict interpretation that adoption needed to be ruled out independently of the needs of the family."[146] To these "hawks," the rule-out provision should require adoption *wherever possible*, even if it means removing a child from a stable kinship placement to a new home that is willing to adopt. This perspective grants agencies and courts wide latitude to seek the most legally

142. Testa, *Subsidized Guardianship*, *supra* note 118, at 155; ILL. DEP'T OF CHILD AND FAMILY SERVICES, EVALUATION OF THE ILLINOIS SUBSIDIZED GUARDIANSHIP WAIVER DEMONSTRATION: PRELIMINARY FINDINGS 32–34 (1999).

143. Testa, *Subsidized Guardianship*, *supra* note 118, at 155–56; ILL. DEP'T OF CHILD AND FAMILY SERVICES, *supra* note 142, at 34–35.

144. Testa, *Subsidized Guardianship*, *supra* note 118, at 156; ILL. DEP'T OF CHILD AND FAMILY SERVICES, *supra* note 142, at 33.

145. Mark F. Testa & Ronna Cook, The Comparative Safety, Attachment, and Well-Being of Children in Kinship Adoption, Guardian, and Foster Homes 2 (Oct. 2001) (unpublished manuscript, on file with author).

146. *Id.*

binding placement.

On the other side of the debate are the "'guardianship doves' who advocated a looser interpretation that family solidarity should take precedence over legal status."[147] Under this view, the caregiver and her family should be presented with information about each of the permanency alternatives and be allowed to make an informed decision about what arrangement was most comfortable to her family.

The Illinois study revealed that the debate over the application of the "rule-out" provision is a debate over competing definitions of "permanency."[148] The "adoption hawks" adhered to a meaning of permanency, rooted in law, that defines permanency as "'binding': a lifelong commitment that is legally enforceable."[149] This definition resists the use of guardianship as an equal partner with adoption in permanency planning because guardianship is more easily vacated by the caregiver and more vulnerable to challenges by birth parents.[150] The Illinois evaluators found that judicial personnel in particular seemed to adhere to this definition of permanency as legally "binding."[151] By contrast, the "guardianship doves" rely upon the original meaning of permanency, rooted in psychology, which defines it as "'lasting': a lifelong relationship that arises out of feelings of belongingness among persons."[152]

The original concept of permanence as "lasting" grew out of psychological studies of foster care drift and a concern "that in the absence of permanence, particularly during early childhood, many children would develop difficulties with feelings of intimacy, trust, empathy and belonging."[153] A Demonstration Project[154] to develop ways of pursuing permanent plans for children in foster care, conducted in Oregon in the 1970s, defined permanence in terms of four qualities: intent, continuity, belonging and respect.[155] At the time of the Demonstration Project, permanence was achieved primarily through either reunification or adoption.[156] While the four qualities of permanence were assumed to be intrinsic properties of biological families, the expectation was that

147. *Id.*

148. *Id.*

149. *Id.* (citations omitted).

150. *Id.* at 2–3.

151. Testa, *Subsidized Guardianship*, *supra* note 118, at 156.

152. Testa & Cook, *supra* note 145, at 2 (citations omitted).

153. *Id.* at 3–4 (citations omitted).

154. This Demonstration Project was named the Freeing Children for Permanent Placement Demonstration in the State of Oregon (Regional Research Institute for Human Services 1976). *Id* at 3.

155. *Id.* at 4 (defining the four qualities of permanence as follows: *intent*: permanent home not one that is *certain* to last forever but *intended* to last indefinitely; *continuity*: permanent family relationship is one that survives geographical moves and temporal change; *belonging*: belonging to a permanent family is rooted in cultural norms and has definitive legal status; and *respect*: membership in a permanent family brings respected social status for both the child and the family).

156. *Id.*

the legal and social rituals of adoption could bring these same qualities to adoptive families.[157]

With the growth of kinship foster care in the 1990s, the relevance and need for adoption came under increased scrutiny. The subjective qualities of permanence—belonging and respect—were already present in kinship care relationships; being raised by kin is less likely to become a source of identity conflict and social derision.[158] Thus, intent and continuity remained predominant concerns. In most informal, extended family care arrangements, the legal rights and obligations of care, custody and control remain with the birth parent. Therefore, the birth parent can invoke her rights to terminate the caregiving arrangement and reclaim custody at any time.

Although adoption helps to resolve these legal ambiguities by formalizing the caregiving arrangement, many relative caregivers have been unwilling to pursue adoption when doing so requires termination of a relative's parental rights.[159] In addition, some child welfare experts believe that even where adoption is possible, guardianship may be more appropriate in select cases. Because it allows the continued involvement of birth parents in the lives of their children, guardianship might help lessen the trauma, sense of loss and identity conflicts that sometimes develop when children are adopted.[160] The potential for negative emotional impact resulting from termination and adoption may be heightened for children who are old enough to remember their parents or cherish their heritage.[161] Further, guardianships are more in keeping with the custom of informal adoptions by relatives that has long been established in the African-American community.[162]

The principal problem with this guardianship approach is that foster children lose eligibility for federal reimbursement when they were discharged from foster care into legal guardianships.[163] Relatives are then forced to rely on state or TANF assistance which is usually no more than one-third to one-half the foster care/adoption assistance reimbursement rate.[164] An unrelated caregiver, no matter how deeply committed to a child, is not eligible to receive even TANF benefits for the child in their care.

The evaluations from Illinois's Title IV-E Demonstration Waiver Project suggest that little, if anything, is gained for either the family or the child by holding out for the more *legally* binding commitment of adoption over

157. *Id.* at 5. These rituals include the termination and transfer of parental rights by legal proceeding, the altered birth certificates, and sealed records.

158. *Id.*

159. According to Testa, "relatives express discomfort with the idea of terminating parental rights and adopting their own kin." Testa & Cook, *supra* note 145, at 5.

160. *Id.* at 9.

161. *Id.*

162. *Id.*

163. *Id.* at 6.

164. *Id.*

guardianship.[165] On the contrary, children in subsidized legal guardianships fared the same as or better than children in adoptive homes on all four qualities of permanence.[166] Furthermore, the Project revealed "no relevant differences in child safety or well-being to suggest that adoption should be strongly preferred over guardianship, once the family's wishes have been taken into account."[167] Guardians were as likely as adoptive parents to view the arrangement as permanent, and children placed with guardians exhibited levels of permanence and social functioning similar to those of children with adoptive parents.[168] Finally, permanency rates increased at a statistically significant rate under the waiver project.[169]

Maximizing the potential of subsidized guardianship as a tool for achieving permanency requires that professionals come to a consensus about the continuum of permanency options, to value options equally according to individual circumstances, and to have good educational materials to help families understand the many nuances of each option. As Part I demonstrated, reluctance to travel down this road is due to an adoption preference that permeates the child welfare system and affects decision-making in individual cases. The time has come, however, to abandon the hierarchy in favor of a continuum approach to permanency planning. The next section will illustrate this point through use of a case study.

III.
A CASE STUDY[170]

On April 27, 1996, Quintana Hutton[171] was born in Delaware to nineteen year old Terry Hutton who had only one year earlier "aged out" of foster care with no permanent home. Terry had been born into a home where she suffered physical abuse and rape, and was living on the streets with her sister by the age of thirteen when Child Protective Services ("CPS") became involved in her life. CPS placed Terry in a group home where she would reside until she turned eighteen and "exited care." A psychological evaluation of Terry determined that she is suffering from post-traumatic stress disorder and that she exhibits signs of depression. She was diagnosed as mildly mentally retarded based on her IQ of 64, but the evaluation recognized that she functions at a higher level than her cognitive ability.

Shortly after "graduating" from the group home, Terry became pregnant and gave birth to Quintana. Quintana was first removed from Terry's care in June

165. *Id.* at 27.
166. *Id.*
167. *Id.*
168. Miller, *supra* note 110, at 22.
169. Testa, *Subsidized Guardianship*, *supra* note 118, at 155.
170. The author is counsel for the mother in this action which is currently in litigation.
171. All names are pseudonyms to protect identity.

1996 when Terry brought Quintana to the hospital with a dislocated shoulder. Terry and Quintana had no stable housing and were living with Terry's aunt in inadequate conditions. Two months later, Quintana was placed back in Terry's care, with CPS retaining joint legal custody, and Terry and child remained together until December 1996. At this time, Terry began leaving Quintana in the care of a non-relative who worked at Quintana's day care. Quintana was removed from Terry's care and placed with this non-relative after a social worker observed Terry acting harshly toward her.

In February 1997, and again in October 1997, CPS and Terry agreed to try a dual, mother-baby placement that was certified by both CPS and the Division of Mental Retardation. The first placement lasted only one month until Terry left because she was unable to get along with the foster mother, and Quintana was placed in foster care. The second placement required Terry to live in the home without Quintana first and learn to abide by the rules of the placement agreement. Quintana was then placed in the home with Terry and the foster mother in January 1998. Again, this placement was unsuccessful due to Terry's non-compliance with house rules and Terry left the home in June 1998 to move back in with her aunt.

Following this disrupted placement, Quintana was again put into foster care for a short period of time and then placed with her current caregiver, Belinda, the adult daughter of the foster mother. All parties agree that the placement with Belinda provides Quintana with a stable and healthy environment and that Quintana has developed a loving relationship with Belinda, Belinda's teenage children and other extended relatives. Terry also has a good relationship with Belinda, and Belinda has more than once referred to Terry as a "little sister." Belinda has stated that she would consider guardianship or adoption as permanency options for Quintana.[172]

CPS filed a termination of parental rights action against Terry that was adjudicated over three days in December 1999 and February 2000. In order to succeed at trial, the state is required to satisfy a two-prong test: first, they must demonstrate, by clear and convincing evidence, that a statutory ground for termination has been met; and second, they must establish, by clear and convincing evidence, that it is in the child's best interest to terminate parental rights. At trial, Terry conceded that she was unable to care for Quintana despite reasonable efforts by CPS to assist Terry (a statutory ground[173]) but argued that

172. At one point in the case, after the denial of the first termination of parental rights petition when parties were attempting to negotiate a settlement, Belinda agreed to a dual adoption—she would do an adult adoption of Terry at the same time that she adopted Quintana. However, Belinda's legal counsel pointed out that Belinda would then become liable under a "poor man statute" in Delaware for state recovery of public benefits paid to Terry (who, due to her poverty and disability, would undoubtedly rely upon public benefits in the future). Although it is a little known and infrequently used statute, it was sufficient to keep Belinda from agreeing to the dual adoption.

173. DEL. CODE ANN. 13 § 1103(a)(5) (2003).

her parental rights should not be terminated because it was in Quintana's best interest to preserve the relationship with Terry.

In March 2000, the Delaware Family Court issued its opinion denying termination of parental rights on the grounds that termination would not be in Quintana's best interests.[174] CPS appealed this decision to the Delaware Supreme Court, which affirmed the decision in January 2001.[175] The Supreme Court's decision stated that a best interest determination "necessarily depends upon the facts in the context in which the petition is presented"[176] and found that the Family Court decision denying termination of Terry's parental rights was supported by the evidence.

In addition, the Supreme Court decision refuted the contention by CPS that the Family Court had failed to take adequate account of Quintana's need for permanency. Specifically, the Supreme Court noted the Family Court's findings that Belinda is "committed to [the] child and . . . wants that child to be a permanent part of her life" and that Belinda wants Quintana to continue to have some interaction with Terry.[177] Furthermore, the Supreme Court notes, the CPS's own policy guidelines support guardianship when "the child cannot be returned home . . . or when it has been determined that adoption is not . . . in the best interest of the child."[178] The Supreme Court stated: "Adoption is not in the best interest of the child in this case, but a guardianship would provide Quintana with the 'safe, stable, custodial environment' in which to be raised that rises to the level of permanency."[179]

Over two years later, despite this clear directive from the Court, Quintana remains in foster care. In December 2002, CPS again filed to terminate Terry's parental rights. The battle that consumed the intervening two years and is set to be re-fought in the new termination action is, in essence, a battle over competing definitions of permanency. It centers on the question of what form the continuing relationship between Quintana, Terry, and Belinda will take. There is not now, nor has there ever been, a contention by any of the parties that it would be in Quintana's best interest to sever her relationship with her mother. Terry desires meaningful contact with Quintana while also recognizing that it is in Quintana's best interest to live with and be raised by Belinda. Belinda recognizes Terry as a member of her own family and insists that she would never consider cutting Terry out of Quintana's life. She has continued to express an interest in either adoption or guardianship, provided that she is assured the right to care for Quintana until adulthood. Quintana says she has two mothers—

174. Family Court of the State of Delaware in and for New Castle County, No. 98-01-06TN (Del. 2000).

175. Div. of Family Servs. v. Hutton, 765 A.2d 1267 (Del. 2001).

176. *Id.* at 1272, citing Daber v. Div. of Child Protective Servs., A.2d 723, 726 (Del. 1983).

177. *Id.* at 1273.

178. *Id.*

179. *Id.* at 1274.

Belinda and Terry.

The agency on the other hand remains firmly committed to its position that termination of parental rights and adoption is the only acceptable permanency plan in this case. The agency has expressed three primary concerns with agreeing to a legal guardianship for Quintana: (1) that legal guardianship is not sufficiently permanent to satisfy Quintana's needs; (2) that the financial assistance available through adoption assistance subsidies are not available through a legal guardianship; and (3) that allowing a guardianship in a case in which the agency has an adoptive resource will "open the floodgates" to parents seeking to circumvent termination of parental rights by agreeing to guardianships and thereby drive down adoption rates.[180]

The argument that legal guardianship is not sufficiently permanent to meet Quintana's developmental needs is challenged by a wealth of psychological and social science research (outlined in Parts I and II above). The agency's concern that Terry could come back to court and attempt to disrupt the guardianship at some point in the future may, at first blush, be a valid concern. However, Terry has repeatedly represented her willingness to the agency to agree to contractual terms that bar her right to challenge the guardianship after it is finalized. Although the agency has offered Terry an "open adoption,"[181] there is no open adoption statute in Delaware. It is therefore uncertain whether an open adoption agreement could be enforced should Belinda seek to exclude Terry from Quintana's life in the future. Although the strong relationship between Terry and Belinda makes this an unlikely event, a more important concern for Terry with the termination of her parental rights is the tremendous symbolic value it has for her.

Terry grew up certain that her own mother did not love her because of the way she treated Terry and allowed Terry to be treated by others. When she gave birth to Quintana, Terry was determined to ensure that Quintana always knew that she had a mother who wanted what was best for her. Despite Terry's limited cognitive ability and social functioning, she was eventually able to understand and accept that she could never provide the full-time mothering that she believes Quintana deserves. She has seen Belinda provide that care to Quintana and is adamant that Quintana should continue to be raised by Belinda. Nevertheless, it is important to Terry that she retain the role of "Mother" alongside Belinda. She sees herself providing an additional source of love and support to Quintana as she matures, even though she is unable to provide the day-to-day, developmentally-appropriate care that Quintana needs.

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180. While the agency continues to maintain that legal guardianship in Quintana's case is not permitted by its own policies, this contention was rejected by the Supreme Court's decision and does not appear to be supported by any written policy published by the agency.

181. "Open adoption" is a term meant to capture adoptions with provisions which allow biological parents a continuing right to some level of information and/or contact after the adoption is finalized.

The agency's second objection to legal guardianship—the absence of ongoing financial support for Belinda—became the focus of negotiations between the agency and Terry in the time between the denial of the first termination petition and the filing of the second one. Delaware was the first state to be granted a Title IV-E Waiver to provide subsidies to legal guardians. Quintana satisfied the published criteria of the agency's Assisted Guardianship program, but due to the limited funding available for subsidized guardianships, the agency chose to read the criteria restrictively and maintained that Quintana was not an appropriate fit for the program because of her young age and the fact that Belinda was willing to adopt. The parties could not agree on whether the agency had the discretion to effectively read Quintana out of the program without addressing the fact that, by its terms, she was eligible.

A second debate focused on whether Belinda would receive greater benefits through the agency's Adoption Assistance program than through its Assisted Guardianship program. Under both programs, the monthly subsidy was equivalent to the foster care board rate. The difference, according to the agency, was that the Adoption Assistance program would make Belinda eligible for an annual stipend of up to $3000 for exceptional medical or psychological needs, as well as additional counseling and support groups. The language of the Waiver Authority—the state's contract with the federal government establishing the parameters of the Waiver—made clear that there must be parity of financial assistance between the guardianship and adoption assistance programs. It specifically stated: "If the State determines that services of the type usually described as 'post-adoption services' are needed then such services would be made available."[182] Thus, the parties could not agree as to whether financial assistance would in fact be commensurate.[183]

The third concern expressed by the agency is that allowing a guardianship in Quintana's case will open the floodgates to families seeking guardianships to avoid termination of parental rights and that this trend will in turn adversely affect the agency's rate of adoption. Guardianships will be appropriate in select cases, based upon fact-specific inquiries into the relative attachments of the parties and security of the placement. Despite the consensus that the relationship between Quintana and Terry, however unconventional, is a benefit to Quintana, the agency remains committed to the notion that their job is to secure for Quintana the most *legally binding* permanence that they can. This focus on the legal status conferred on Quintana's relationship with Belinda obscures the messy realities of individual and familial relationships that will undoubtedly inform each and every case facing a permanency decision. It is not the first case that demonstrates the fact that the law is a blunt instrument, particularly ill-suited

182. CHILDREN'S BUREAU, U.S. DEP'T OF HEALTH AND HUMAN SERVICES, WAIVER AUTHORITY: DELAWARE 5–6 (June 7, 1996) (on file with author).

183. This section is phrased in the past tense because the Waiver has been discontinued as of the end of 2002.

to the adjudication of family relationships.

This poor fit between bright lines and children's lives was made apparent in the course of negotiations over a permanency goal for Quintana. In testimony at a permanency hearing,[184] the agency suggested that if they were not able to achieve an adoption with Belinda they would be compelled to consider moving Quintana to another pre-adoptive placement. That the agency charged with advocating for what is in the best interest of children in its care is willing to contemplate moving a child from the only home she has ever known—one that is loving and nurturing—to a less familiar home in order to achieve its own vision of legal "permanence" is shocking. In so doing, the agency is betraying the potentially invidious effect that bureaucratic line-drawing, and a concomitant inability to think "outside the box," may have upon its most vulnerable victims: the children it is charged with serving.

The case is currently before the Family Court. The judge has yet to approve or deny the goal that the agency presented at the Permanency Hearing: termination of Terry's parental rights and adoption. Either way, CPS remains committed to litigating its newest termination petition. Once again, the case will most certainly be ultimately decided by the Delaware Supreme Court.

IV.
ACHIEVING PERMANENCY

This Part will suggest a series of policy and legislative changes that will shape child welfare policy and practice to reflect what we know about the importance to children of preserving emotional bonds while securing permanent placements.[185] In some cases, the practice of existing state programs may conform partially or wholly to these recommendations. In other existing programs, implementing these changes will require a fundamental shift in the way subsidized legal guardianship is viewed, as professionals move away from a hierarchical approach toward a continuum-based approach (permanency planning). For states without any subsidized legal guardianship program, the recommendations offer guidance to professionals seeking to enact a program.

First, it is important that states provide a strong statutory framework for subsidized guardianship. The Guidelines recommend that state law authorize the judge at a termination of parental rights proceeding consider the appropriateness of other legal options not requiring termination.[186] Legal guardianship should be

184. This was the first Permanency Hearing held in the matter. After the Supreme Court affirmed the Family Court's denial of the TPR Petition in January 2001, there was no judicial review of Quintana's placement until the Permanency Hearing held over two days in October and November of 2002.

185. *See generally* ALLEN ET AL., *supra* note 77, at 19–48.

186. DUQUETTE & HARDIN, *supra* note 59, at VI-29 (citing as examples the case of developmentally disabled parents who know the new parent or the case of young parents whose

considered a viable permanent option throughout the time that a child is in foster care. Building consideration of subsidized guardianship into the permanency planning process requires state courts and agencies to have a clear direction, and requires clear statement of the program's priorities. The goal is to ensure that subsidized guardianship is considered alongside a range of permanency alternatives with the goal of increasing permanency rates for children in foster care.

At the agency level, this is going to require a shift in practice in many programs as decision-making authority is shared among professionals and family members. The Illinois evaluations suggest that granting the care-giving family a significant role in making the decision is beneficial and that misinformation or lack of information about guardianship is pervasive in their evaluation of caregivers' knowledge and understanding of their permanency options.[187]

In order to make the continuum approach to decision-making effective, it will be necessary to train agency social workers and other professionals charged with assisting the family in making a permanency decision to present the options objectively.[188] This training will be necessary for all who are involved with making and/or reviewing the permanency decision for a child, including agency caseworkers and other administrators, foster care review boards, attorneys for child, parent, and state, and courts and judicial officers. Significantly, Belinda was never able to articulate to the court or to others involved with the case what the difference was between adoption and guardianship. She seized upon the bottom line—that both would allow her to care for Quintana until her age of majority—as the critical factor. While who is going to raise a child is of course the "bottom line" in any permanency decision, there are many nuances to the legal relationships of adoption and guardianship that a rational caregiver might determine important in her decision-making process. The agency's failure to make these nuances comprehensible to Belinda is troubling. It suggests discomfort with the distinctions on the part of the caseworker. It may also signal an attempt to subtly influence the caregiver's decision in conformance to agency priorities.

Second, eligibility criteria should remain as non-restrictive as possible to allow for case-by-case determination. It is preferable to set child eligibility requirements as a matter of agency policy rather than legislation because agency policy is easier to change than state law.[189] This practice recognizes that

relative will care for the child).

187. JESS MCDONALD, ILL. DEP'T OF CHILDREN AND FAMILY SERVICES, ILLINOIS SUBSIDIZED GUARDIANSHIP WAIVER DEMONSTRATION: INTERIM EVALUATION REPORT xvii (Feb. 2000).

188. Connecticut law provides that if adoption is an option for a relative caregiver, the agency is to "counsel the caregiver about the advantages and disadvantages of adoption and subsidized guardianship so that the decision by the relative caregiver to request a subsidized guardianship may be a fully informed one." CONN. GEN. STAT. ANN. § 17a-126(b) (West 2003). This recognition that the options should be presented in a non-hierarchical manner is ideal.

189. ALLEN ET AL., *supra* note 77, at 27.

inflexible eligibility requirements unduly restrict an agency, court, or family's ability to make case-specific determinations of whether guardianship is in a child's best interest. In short, flexible eligibility requirements recognize that these cases are about individual children and will often defy neat categories. Thus, in Quintana's case, the unique confluence of facts would allow for an individualized determination that subsidized guardianship is appropriate in this case, notwithstanding any policies that nominally exclude her from consideration.

States should also consider expanding eligibility provisions to serve a greater number of children. An alternative way to conceptualize subsidized guardianship is to think of it as a prevention tactic: to keep children who are "at risk" from entering the foster care system. The guardianship subsidy would support children already being cared for by non-parents who, without adequate financial and service support, would otherwise be unable to continue caring for the child.[190] The benefit of this approach is that it could potentially preserve an existing caretaking relationship that would otherwise be jeopardized due to poverty, and avoid the disruption and emotional trauma of severed attachment suffered by children placed in foster care.[191]

Third, in determining which caregivers are appropriate prospective legal guardians, states should consider requiring a psycho-social study or attachment assessment to determine the significance of the bond between the child and prospective guardian, and the depth of the caregiver's commitment. While the Illinois findings suggest that relatives are more likely than non-relatives to make the kinds of lasting commitments that result in permanency for the children in their care,[192] in some cultures, those relative-like relationships may not be defined by blood or marriage. Individualized assessments of affective bonds are ultimately a more child-centered approach to selecting appropriate caregivers.

In Quintana's case, when the trial judge was faced with a new petition for termination of parental rights—a case where he had previously denied the petition on grounds that it would not serve Quintana's interest—he was at a loss for how to proceed. The agency alleged between the state Supreme Court's decision and the new petition, the bond between Quintana and Terry had weakened and that the best interests analysis would be different. Terry disputed this, and the judge ordered the parties to submit to a bonding assessment. A trained psychologist who specializes in attachment issues proceeded to meet with Quintana, Terry and Belinda in an effort to assist the court in making its determination whether Quintana and Terry shared a bond that it would be detrimental to Quintana to break. Whether the agency will proceed with its petition, and how it will fare, depends in large part on the outcome of this evaluation.

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190. *Id.* at 26.

191. *Id.*

192. Testa, *Subsidized Guardianship*, *supra* note 118, at 156.

Fourth, in order to adequately address the concern over the permanence of legal guardianships, state legislation should require courts to issue orders that specify the terms and conditions of the permanent guardianship in some detail. An effective way to build these provisions into court orders is to require agencies to submit written agreements which have been executed between the agency, guardian and possibly the birth parent and/or child. The court, after assuring that the parties comprehend and assent to its terms, could incorporate these agreements into its guardianship orders.

Written agreements can protect the permanency of the placement by ensuring a full understanding of respective rights and obligations. The agreement should verify that the guardian has received adequate information about the full range of permanency options and that her decision to become a legal guardian is a fully informed one. The agreement should explicitly recognize the guardian's intent and commitment to provide a permanent home, as well as the child and/or birth parent's preference. The agreement should incorporate any legal grounds for modification or termination of the guardianship.

While the reality is that it is relatively rare for a birth parent to subsequently petition to revoke a guardianship,[193] states should create standards for decisions in these cases. One of the benefits of legal guardianship is that courts retain the authority to limit or expand the legal guardian or parent's rights and obligations as "necessary to best serve the changing needs of individual children, their caregivers and birth parents."[194] In all cases, state legislation must ensure that, where modification or termination is necessary, any changes are in the best interests of the child. Legislation should also require planning for a successor guardian and outline the roles of the agency and court when the child is to be removed from the care of the guardian.[195]

It is essential that written agreements additionally specify the post-guardianship services and benefits that will be provided to the child or guardian, and the effect, if any, that the receipt of these services and benefits may have on the services or benefits the child or guardian receives prior to entering the subsidized legal guardianship agreement.[196] State legislation should ensure that the level and variety of financial assistance and support services available to legal guardians is commensurate with that available to adoptive families. These services and financial support will go a long way toward ensuring the stability and permanence of the placement and eliminate the risk that a family's decision

193. ALLEN ET AL., *supra* note 77, at 30.

194. *Id.* at 5.

195. *Id.* at 17.

196. The Missouri statute requires that a written agreement, executed between the agency and the birth parents, be submitted to the Court specifying the amount and timing of assistance payments and services to be provided, the parent's obligation to inform the agency of any changes in support obligation or income that might affect the subsidy level, and the child's eligibility for Medicaid. MO. REV. STAT. § 453.073 (2002).

in favor of adoption rather than guardianship is made for economic as opposed to child and family centered reasons.

Currently, states fund their subsidized guardianship programs from a number of different funding sources, including Title IV-E Waivers, TANF funds, and state or local funds.[197] As state budget crises hit, at least one state has made creative use of another federal funding stream, the Social Services Block Grant Program (SSBG).[198] States might additionally consider applying for Medicaid Home and Community Based Services Waivers to serve children with disabilities who would otherwise need institutional care. Finally, the Dodd-Miller Act to Leave No Child Behind,[199] a comprehensive children's rights bill currently pending before Congress, includes a proposal that would allow states to use federal Title IV-E funds to establish or expand subsidized legal guardianship programs for children in the care of relatives.[200]

The new evidence regarding the success of subsidized guardianship programs supports a call for federal reimbursement for subsidized guardianships. Guardianship provides much greater benefits in terms of permanency, security and lack of stigma for children whose goal would otherwise be long-term foster care. Aside from the moral obligation to provide better for our children, subsidized legal guardianship has proven far more cost-effective than long-term foster care arrangements, due to considerable administrative savings garnered from the lack of agency and court personnel time at no cost to child safety. Most importantly, the reduced intervention into the family enhances its autonomy and security and, in turn, promotes child well-being.

V.
CONCLUSION

Child welfare agencies, advocates and courts need to develop a more nuanced picture of family definition and family competence. Too often, our impression of individual or group competence is tainted by race, culture and rigid or outmoded conceptions of intelligence. People with mental disabilities who may not be able to parent alone, or full-time, can still play an important and often necessary role in their child's life. Parents who have survived trauma, poverty and neglect in their own lives can be valuable role models. A child's birth parents can play an important role in the child's development even if they are not capable of independently raising the child.

In addition, child welfare agencies, advocates and courts need to develop a

197. ALLEN ET AL., *supra* note 77, at 47.

198. *Id.* (referring to South Dakota).

199. Act to Leave No Child Behind, H.R. 936, 107th Cong. (2003). The Dodd-Miller Act to Leave No Child Behind is not to be confused with the Bush administration's "No Child Left Behind" education bill.

200. ALLEN ET AL., *supra* note 77, at 13.

more nuanced picture of child attachment. "Permanency," as adhered to by lawyers and courts, has lost some of its original meaning. What child psychologists have to teach us is that it is not the normative definitions of "family" that we impose on children in the name of permanence that will help them develop resilience and thereby stand a chance of achieving their potential. Human relationships have defied normative prescriptions for ages, and we can hope that they will continue to defy them for ages to come. It is only when society honors what is real in a child's life—the bonds that they experience as important, whatever our "professional" judgment of them may be (assuming that it is too much to ask that we be judgment-free)—that we will truly be advancing children's interests. The law *must* facilitate justice for children, not impede it. When guardianship can preserve a relationship that is worth preserving, the law should not stand in the way.