REINVENTING GUARDIANSHIP: SUBSIDIZED GUARDIANSHIP, FOSTER CARE, AND CHILD WELFARE

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INTRODUCTION: THE FOSTER CARE CRISIS

There are too many children in foster care. Too many are entering and staying in the system for too long. Too few within the system are able to obtain the services and support they need.

In 1990, there were roughly 400,000 children in foster care in the United States.[1] Despite tremendous national attention to reducing the foster care population in the last several years, the number of children in out-of-home care grew by 45% since 1985 when there were 276,000 children in foster care.[2] Similarly, despite efforts to reduce the number of years children spend in foster care, the average length of stay is two years — virtually the same as it was twelve years ago.[3]

The present crisis, however, is not simply one of volume. The problems that the child welfare system most often confronts have changed over the last several decades. There are more infants with special medical needs,[4] more sibling groups to be placed together,[5] and many more African-American and Hispanic children.[6] The crisis in foster care today is as much about the limitations of foster care and adoption in the face of contemporary problems, as it is about the sheer volume of children in care.

This paper examines the possibility of making greater use of guardianship as a part of a strategy to reduce the numbers in foster care and to protect the welfare of children. Guardianship is hardly a new legal device, but child welfare agencies in the United States are only beginning to explore ways of making substantial use of guardianships, and there are varieties of guardianship that have yet to be tried as a program anywhere.

Traditional child welfare policy presents parents and their children with an all-or-nothing proposition. If a child's parent is not fully capable of caring for the child, the child is removed from the parent's care. For a time, the child is placed in foster care while the parent is assisted by a social

1. HOUSE COMM. ON WAYS AND MEANS, 102D CONG., 2D SESS., OVERVIEW OF ENTITLEMENT PROGRAMS, 1992 GREEN BOOK 903 (Comm. Print 1992) [hereinafter OVERVIEW OF ENTITLEMENT PROGRAMS]. Published data on the number of children in the national foster care population are not available after 1990. National data on foster care must be viewed with caution as there is currently little uniformity in state reporting. For example, reports for the number of children in foster care in 1980 vary from estimates of 300,000 to over 500,000, depending on the source.

2. *Id.*

3. SELECT COMM. ON CHILDREN, YOUTH AND FAMILIES, 101ST CONG., 1ST SESS., NO PLACE TO CALL HOME: DISCARDED CHILDREN IN AMERICA 6 (Comm. Print 1989).

4. *Id.* at 912.

5. *Id.* at 913-14.

6. *Id.* at 911-12.

worker, but all parties are repeatedly warned that this is a temporary arrangement. Either the parent will become capable and the child will be returned, or the parent will not become capable and the child will be "freed" for adoption. If the parent cannot do it all, the parent-child relationship is completely severed.

In contrast, guardianship recognizes the possibility that children can benefit from having more than one adult, if appropriate, play a role in their upbringing. Guardianship is a permanent relationship between guardian and ward, but appointment of a guardian over a child does not require the formal termination of parental rights, so a relationship between child and parent can continue. Where it serves a child's interest, the formal responsibilities of the guardian can even be shared by a parent and another adult as co-guardians.

The dependence of the child welfare system on foster care and adoption has long had its critics, but they have become louder in recent years as more professionals have come to recognize the increasingly complex problems of children in care and the cultural traditions within which they live.[7] Open adoption and kinship foster care represent two very different attempts to reduce the rigidity in the current system: the first by allowing a partially capable parent to retain a relationship with a child after adoption, the second by permitting a child to remain with relatives during a foster care placement. Neither, however, fully reconciles the contradictions between the continued role of the child's original family and the assumptions inherent in adoption or foster care, and both remain controversial.

Can guardianship arrangements form the basis of stronger, more coherent family structures within which children can thrive? Can they help reduce the rigidity of the present system without undue risks or costs? It seems so, but there are significant obstacles — both practical and theoretical — that would have to be overcome if guardianships were to be used widely.

This paper explores both the promise and the problems of using guardianships in this way. Section One analyzes the reasons that adoption, even when it comes with a subsidy, is an inappropriate goal for an increasing number of children in foster care. Section Two examines the advantages and disadvantages of subsidized guardianship as an alternative goal for many children in foster care, drawing on the experience of ten states that are operating subsidized guardianship programs. Finally, Section Three explores the law of guardianship in greater detail, identifying features that might prove useful if the experiments in subsidized guardianship were to be expanded beyond those ten states or into other parts of the child welfare system.

7. *See* discussion *infra* part I detailing the problems of foster care.

I.
THE LIMITS OF ADOPTION AND FOSTER CARE AS PERMANENCY PLANS FOR CHILDREN WHO CANNOT RETURN HOME

A. The Value of Permanence

As long ago as 1930, participants in a White House conference on children agreed that every child in foster care should have "the right to a permanent home."[8] Standard child welfare practice, however, rarely realized the ideal of permanency. Rather, children who had been removed from their homes faced lengthy stays in foster care.[9] By the 1970's, advocates for reform argued that children were harmed by, among other things, separation from their parents and the instability of multiple placements.[10] They urged the foster care system to formulate permanent plans for children to "live in families that offer continuity of relationships with nurturing parents or care-takers and the opportunity to establish life-time relationships."[11]

As a result of these efforts, the child welfare system shifted its orientation towards permanency planning.[12] Along with that shift came a commitment to use foster care as a temporary placement.[13] The newly adopted philosophy anticipated that while children received care out of home, child welfare workers would be expected to make efforts to return children to their parental homes or, when that was not possible, to locate other permanent placements.[14] Today, each child in foster care is given a permanency goal that expresses the hopes of child welfare workers for where the child will permanently live. Typically, children enter the system with a goal of return to parent; but if efforts at reunification are unsuccessful, the goal will likely be changed to adoption.[15]

For some children who cannot be returned home, adoption is not a realistic goal, but there are other possibilities. Children who have reached adolescence and appear unlikely to be adopted, are kept in foster care and taught skills that will allow them to live independently when they reach

8. THELMA F. BAILY & WALTER H. BAILY, CHILD WELFARE PRACTICE 108 (1983) (citing J. Calhoun, *Developing a Family Perspective*, 9 CHILDREN TODAY 2, 4 (1980)).

9. Margaret Beyer & Wallace Mlyniec, *Lifelines to Biological Parents: Their Effect on Termination of Parental Rights and Permanence*, 20 FAM. L.Q. 233, 233-35, 235 n.6 (1986) (citing CHILDREN'S DEFENSE FUND, CHILDREN WITHOUT HOMES (1978)).

10. *See* Robert H. Mnookin, *Foster Care: In Whose Best Interests?*, 43 HARV. EDUC. REV. 599, 622-26 (1973); Michael S. Wald, *State Intervention on Behalf of "Neglected" Children: A Search for Realistic Standards*, 27 STAN. L. REV. 985, 993-96 (1975).

11. ANTHONY N. MALUCCIO, EDITH FEIN & KATHLEEN A. OLMSTEAD, PERMANENCY PLANNING FOR CHILDREN 5 (1986) (citing Anthony N. Maluccio & Edith Fein, *Permanency Planning: A Redefinition*, 62 CHILD WELFARE 195, 197 (1983)).

12. The national response is embodied in the Adoption Assistance and Child Welfare Act of 1980, 42 U.S.C. § 670 (1995). For further discussion, see *infra* notes 46-50 and accompanying text.

13. *See* discussion *infra* part I.

14. *See* discussion *infra* part I.

15. *See* discussion *infra* part I.

adulthood. The permanency goal for these children is called "independent living," although the plan is for them to remain in foster care.[16]

Other children have such serious emotional or physical disabilities that adoptive parents — even if offered a cash subsidy — are unlikely to be able to assume their care without the ongoing support of a child welfare agency. For these children, the permanency plan may be to keep them in foster care where they can receive therapeutic services and specialized social work. The permanency goal for these children will be "long term foster care."[17]

Still other children are unlikely to be adopted because adoptive parents cannot be located for them. Adoption might be unlikely because of the cultural and ethnic preferences of available adoptive parents, the age or health of the children, or the children's own desire not to be adopted.[18] When a child welfare agency finds that a child is difficult to place in an adoptive home, it may stop trying. In these cases, the permanency goal may continue to be listed as "adoption," but it is effectively "long term foster care" or an acceptance of the current state of affairs.

The goal of the majority of children, roughly 58%, is return to parent. Of the remainder, about a third have a goal of adoption and the rest have a goal that is some form of long-term foster care.[19] However, a goal is nothing more than a social worker's expression of intent. For some children with the goal of return to parent or adoption, that goal is never realized. Despite the longstanding commitment to the right of children to a permanent home and more than a decade of federally mandated permanency planning, a significant number of children in foster care today will remain in foster care until they reach majority.[20]

Foster care can mean many different things. Children in foster care may live in institutions, in group homes, or with families. Those in family foster care can live with families who see themselves only as short-term custodians, with families who hope someday to adopt their foster children, or with relatives who serve as kinship foster parents. Despite their differences, however, all of these arrangements carry an unhealthy tension between the child welfare system's desire to keep the placement brief and the knowledge that the children may be there until adulthood. Some long-term family foster care placements reduce this tension, but none eliminate it.

16. *See, e.g.*, N.Y. FAM. CT. ACT § 754(2)(ii) (McKinney 1995) (requiring that a judge make orders ensuring that services be rendered to children over the age of 16 to assist in the transition from foster care to independent living).

17. *See infra* note 51 and accompanying text.

18. *See infra* notes 68-83 and accompanying text.

19. In 1988, 29 states reported that 57.6% of the children in substitute care had a permanency goal of family reunification while 12.4% had a goal of long-term foster care, 13.8% had a goal of adoption, 7% had a goal of independent living, 3% had a goal of guardianship and 2.9% had a goal of care and protection in substitute care. OVERVIEW OF ENTITLEMENT PROGRAMS, *supra* note 1, at 915.

20. *Id.* at 911.

B. The Limits of Long Term Foster Care

The term "long term foster care" requires some explanation. In some states, it is a legally recognized permanency plan and in others it is a status by default.[21]

Some states have created a permanency plan, by statute or regulation, called long term foster care or permanent foster care.[22] In these states, the juvenile court is typically empowered to approve a plan that indefinitely continues a child in foster care as a disposition in a child protective proceeding or in a foster care review proceeding. Placement in long term foster care may change the nature of the foster care relationship by eliminating annual court review over the placement,[23] or giving the foster parent more expansive decision-making powers on behalf of the child.[24] Some states only permit the use of long term foster care after parental rights have been terminated.[25] Whatever the particulars of the statute, by its existence the state has acknowledged that some children will not return home, will not be adopted and will therefore have to remain in care until they reach majority.

In other states, long term foster care is a status by default.[26] It is a collection of the children who have another stated permanency goal, for example adoption or reunification, but may never attain that goal because the agency has failed to make sufficient efforts or because the goal is not realistic or possible. Despite the description contained in their permanency plans, these children are effectively in long term foster care.[27]

Whether it is created by statute or a status by default, foster care can be a problematic home for some children who must remain there on a long-term basis. It is particularly problematic in those states where the long-term placement is treated like an ordinary foster care placement, subject to regular agency supervision where foster parents have limited powers to act

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21. *See, e.g.*, N.Y. FAM. CT. ACT § 1055-a (McKinney 1995) (indicating that no authority for placement in a status called long term foster care exists, but instead calls for periodic review of all foster care placements).

22. *E.g.*, KAN. STAT. ANN. § 38-1584(b)(2) (Supp. 1994); MINN. STAT. § 260.242(2)(d) (Supp. 1995); NEV. REV. STAT. § 432B.600 (1994); N.J. REV. STAT. § 30:4C-26.10 to 26.19 (Supp. 1995); OHIO REV. CODE ANN. § 2151.353(A)(5) (Anderson 1994); OKLA. STAT. tit. 10, § 7003-5.6(A)(2) (Supp. 1995); VA. CODE ANN. § 63.1-206.1 (Michie 1995). In Wisconsin, Long term foster care is called sustaining care. *See* WIS. STAT. § 48.428 (1995).

23. *E.g.*, MINN. STAT. § 260.242 subd.2(d); NEV. REV. STAT. § 432B.600(1).

24. *E.g.*, N.J. REV. STAT. § 30:4C-26.16(a); VA. CODE ANN. § 63.1-206.1(B); WIS. STAT. § 48.428(3).

25. *E.g.*, KAN. STAT. ANN. § 38-1584. Statutes that require the termination of parental rights as a condition for placement in long term foster care do not recognize that some children cannot be adopted precisely because termination of parental rights is not in their best interests. These statutes therefore fail (like adoption) to make this a useful permanency option. *See* discussion *infra* note 63 and accompanying text.

26. *See* N.Y. FAM. CT. ACT § 1055-a (containing no authority for placing a child in a status called long term foster care, but rather providing for periodic review of all foster care placements).

27. *Id.*

on behalf of the child. This type of placement is also known as "substitute care."[28]

Generally, when a child is in substitute care, the child is in the custody of the state or a licensed child welfare agency. The power to make decisions on behalf of the child is divided between the child welfare agency, which has legal custody, the parents, who retain guardianship, and the foster parents, who have physical custody.[29] Foster parents act at the behest of the child welfare agency. Without prior approval from the agency, however, they cannot make any decisions beyond those to feed and clothe the child.[30] Consequently, the relationship between foster parent and foster child is restricted, both practically and possibly psychologically, by the foster parents' inability to exercise real decision making power.[31]

Moreover, when a child is in foster care, the child welfare agency is required to continue to monitor the foster child and the foster family.[32] Monthly caseworker visits can be intrusive, they remind the child and the foster family that they are not a "real" family. No placement in foster care is "permanent" even if the agency is unable to remove the child without a court order.

Long term foster care is also expensive. Children who remain in care because there is no other viable permanency option continue as wards of the state. Government continues to incur the costs associated with the child welfare agency's monitoring of the placement, along with those of the courts, which must conduct periodic reviews of the appropriateness of the placement.[33] Additionally, foster families receive monthly subsidies for the child's support.[34]

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28. *Id.*

29. *See* Smith v. Organization of Foster Families for Equality & Reform, 431 U.S. 816, 826-28 (1977) (describing the New York system of foster care).

30. *Id.* at 827 n.18.

31. Whether lengthy stays in foster care have harmful psychological effects on children is a well debated question beyond the scope of this paper. The reader is referred to the following voluminous writings: JOSEPH GOLDSTEIN, ANNA FREUD, & ALBERT J. SOLNIT, BEYOND THE BEST INTERESTS OF THE CHILD (rev. ed. 1979); *see also* DAVID FANSHEL & EUGENE B. SHINN, CHILDREN IN FOSTER CARE: A LONGITUDINAL INVESTIGATION 482 (1978) (observing the potential psychological significance for a child who knows she is in a more permanent placement rather than in transient foster care); Marsha Garrison, *Child Welfare Decisionmaking: In Search of the Least Drastic Alternative*, 75 GEO. L.J. 1745, 1777-95 (1987) (explaining that there may be no damage to a child based on the conditional nature of foster care); Symposium, *The Impact of Psychological Parenting on Child Welfare Decision-Making*, 12 N.Y.U. REV. L. & SOC. CHANGE 485 (1984) (collecting works addressing the impact of psychological parenting).

32. *See, e.g.*, N.Y. SOC. SERV. LAW § 409-a (McKinney 1996) (requiring monitoring and service provision by child welfare agency officials); *see also* N.Y. SOC. SERV. LAW § 358-a (McKinney 1996).

33. *See* Child Welfare Act of 1980, 42 U.S.C. § 675(5)(C) (Supp. 1995) (requiring a dispositional hearing no later than 18 months after placement and not less frequently than every 12 months thereafter where the future status of the child is to be determined).

34. *E.g.*, N.J. REV. STAT. § 30:4C-26.17. The expense of monthly subsidies continue with other permanency options as well. Adoption subsidies and guardianship subsidies are

Some long term foster care statutes minimize these problems by both expanding the powers of the foster parents and reducing those of the child welfare agency and courts.[35] A long term foster care statute that meets the above concerns would place a child in long term foster care when neither reunification nor adoption are possible without requiring the termination of parental rights. Such a statute would allow ongoing visitation with the biological parents. Foster parents would be invested with significant decision-making power, while oversight by the child welfare agency and the courts would be reduced. This scheme would allow a case worker to recognize that although reunification is not in the best interest of the child, continued contact with a parent is, and adoption would preclude that possibility.[36]

Unfortunately, long-term foster care in most states is really the same as ordinary foster care.[37] It remains subject to the same criticisms raised almost 20 years ago that foster care was not serving the needs of the children it intended to protect. Tension continues to exist in a system designed for the temporary out of home care of children and one being used to provide permanent care for the same children.

The remaining question is if long term foster care does not meet the needs of children who cannot return home, and adoption is a better arrangement, why is adoption unavailable to so many children in foster care? By looking at the limits of adoption and long term foster care, can we design a new permanency goal that meets the needs of children stuck in the system?

C. The Marriage of Adoption and Foster Care

Throughout history and across cultures, people have informally assumed the responsibility to raise abandoned, neglected, or orphaned children.[38] However, the legal concept of adoption is relatively new. Massachusetts enacted one of the earliest statutes in 1851, but only since 1929 has legal adoption been possible throughout the United States.[39]

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necessary for children who require ongoing support in order to leave foster care. Unlike long term foster care, these options eliminate the ongoing costs for agency supervision and court review.

35. *See, e.g.*, N.J. REV. STAT. § 30:4C-26.11 to 26.19 (providing for long-term foster care placements to remain in effect until the child's eighteenth birthday, unless the court takes action and expands the foster parents' right to consent for the child).

36. Such a statute would eliminate the administrative cost to the state for maintaining the placement and continue its eligibility for federal reimbursement for the monthly foster care subsidy.

37. *See* N.Y. FAM. CT. ACT, § 1055-a (making no distinction between long-term and ordinary foster care).

38. ERVA ZUCKERMAN, CHILD WELFARE 118-19 (1983).

39. *Id.* at 119. By legal adoption, I mean a judicial proceeding in which a judge transfers all of the powers and duties of a child's biological parents to one or two substitute parents.

Adoption legislation was not intended to interfere with the practice of relatives and friends assuming responsibility for children without parents.[40] Rather, these laws were crafted to assist individuals and couples who, unable to have families of their own, sought to adopt an unrelated child in need of a home.[41] These laws, although concerned with the care of children, were principally designed to protect the rights of adopting parents.

In practice, foster care and adoption have become as tightly intertwined as supply and demand. From the perspective of child welfare agencies, adoption represents the best way to give a child who cannot return home a permanent place to live. For potential adopters, the foster care system provides a source of children. Critics of this relationship decry what they see as the commodification of children and policies that try to manage the foster care system for the benefit of adopting parents. Others, equally committed to children's best interests, argue that adoption continues to best provide for the healthy development of an abandoned or neglected child who cannot return home. Despite these views, the marriage between adoption and foster care is breaking down.

Between 1957 and 1970, the annual number of legal adoptions in the United States tripled from 57,000 to 175,000.[42] The largest group of children adopted during that period were those born out of wedlock, followed by abandoned, abused, and neglected children.[43] Since 1970, however, the total number of adoptions in the United States has steadily declined,[44] causing concern among child welfare professionals who are coping with a growing number of children in foster care in need of adoptive homes. The child welfare problem is exacerbated by a rising number of foster children who were harder to adopt because of their age, race, or disabilities.[45]

D. Federal Response to Adoption's Decline

In 1980, Congress passed the Adoption Assistance and Child Welfare Act, re-affirming the high value placed on providing every child a permanent home. The Act made federal reimbursement of state expenditures for foster care contingent upon states first attempting to prevent foster care placements when possible. When placements are necessary, the Act requires states to arrange for those children to find a permanent home as soon as possible.[46]

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40. *Id.*
41. *Id.*
42. *Id.*
43. *Id.*
44. *Id.*
45. *Id.* at 120.
46. 42 U.S.C. § 670 (1980). This is the seminal piece of legislation for discussion of foster care since 1980. For a discussion of the Act and its impact on foster care, see Mary L. Allen, Carol Golubock & Lynn Olson, *A Guide to the Adoption Assistance and Child Welfare Act of 1980*, *in* FOSTER CHILDREN IN THE COURTS 575-609 (Mark Hardin ed., 1983).

The Act recognized a number of different ways in which a state could provide a child with permanence, but it focused on adoption as the most favored goal for children who cannot live with their own parents.[47] Responding to the falling number of adoptions and the inability of many families to adopt children with special needs without financial assistance, the Act provided federal reimbursement to states for cash subsidies to families adopting children who were considered hard to place.[48]

In 1981, the year that federal reimbursement became available, 165 children received federally reimbursed subsidies.[49] By 1986 that number had grown to 22,000, and by 1991 it was over 54,000.[50]

E. When Adoption Subsidies Aren't Effective

Federal support of adoption subsidies has helped make adoption possible for some children who would not otherwise be adopted,[51] but subsidies have not made adoption possible for many children in foster care. Subsidies alone are not enough to help place some children less likely to be adopted because of special needs that anticipate high costs in upbringing. Born with fetal alcohol syndrome, AIDS, or an addiction to cocaine, they appear likely to require special medical and psychiatric care throughout their lives. Subsidies also fail to support placement of other, healthy children who are members of sibling groups that must be adopted together. Despite federal subsidies, not enough families are willing to adopt many of these children. The limits of subsidy effectiveness leave states to provide long-term foster care and specialized services.

Still other children remain in foster care not because of special circumstances, but because of the nature of adoption itself. For these children, subsidized guardianship may prove more appropriate than subsidized adoption.

F. The Nature of Adoption: Leaving Biological Parents Out

Before a child can be adopted, the existing parent-child relationship must be severed by a court terminating parental rights.[52] Although state

47. *See* 42 U.S.C. § 670.

48. *See* HOUSE COMM. ON WAYS AND MEANS, 97TH CONG., 2D SESS., BACKGROUND MATERIAL AND DATA ON MAJOR PROGRAMS WITHIN THE JURISDICTION OF THE COMMITTEE ON WAYS AND MEANS 202 (Comm. Print 1982)(showing that in order to encourage adoption, 44 states and the District of Columbia provided subsidies to some adoptive parents prior to 1980). New York, for example, began providing adoption subsidies in 1968. The number of subsidies provided before 1980, however, was very small. *Id.*

49. OVERVIEW OF ENTITLEMENT PROGRAMS, *supra* note 1, at 848 (showing that many states subsidize adoptions for certain children who do not meet the federal guidelines, suggesting that the total number of subsidized adoptions nationally is somewhat higher).

50. *Id.*

51. ZUCKERMAN, *supra* note 38, at 29.

52. Michael S. Wald, Termination of Parental Rights 3-4 (1991) (on file with the *N.Y.U. Review of Law and Social Change*).

statutes authorizing termination vary substantially, courts generally will terminate parental rights when the child welfare agency can show that the parent is unfit to resume custody despite reasonable efforts of the agency to reunite the family, and it is unlikely that the child will be able to return home in the near future.

The most common grounds for termination of parental rights are abandonment of the child,[53] mental illness or disability of the parent,[54] prolonged incarceration of the parent,[55] chronic abuse or neglect of the child,[56] or severe abuse of alcohol by the parent,[57] or chemical dependency of the parent.[58]

Most experts in child development agree that these are good reasons not to return children to the care of their parents and that children in these circumstances should be provided a permanent home as quickly as possible.[59] But experts do not agree about the need to terminate parental rights in these circumstances in order to promote healthy emotional development.[60] Some child development experts argue that the total separation of children from parents inevitably leaves psychological scars.[61] Parental rights are terminated, not because termination of the relationship is viewed as necessary for the child, but because the law of adoption, crafted to protect the interests of the adopting parents, requires that a child be "free" for adoption through the termination of parental rights.

There are at least two distinct ways in which the requirement that parental rights be terminated prevents children from enjoying the permanency that adoption would offer. First, the severity of termination of parental rights has led courts, legislatures, and executive agencies to erect substantial procedural safeguards designed to avoid inappropriate terminations. Second, there are circumstances in which children and their intended adoptive parents themselves resist the termination of parental rights.

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53. *Id.*
54. *Id.*
55. *Id.*
56. *Id.*
57. *Id.*
58. *Id.*
59. *Id.*
60. *See* Peggy C. Davis, *Use and Abuse of the Power to Sever Family Bonds*, 12 N.Y.U. REV. L. & SOC. CHANGE 557 (1984); Marsha Garrison, *Why Terminate Parental Rights?*, 39 STAN. L. REV. 423 (1983). *See also* Katherine T. Bartlett, *Rethinking Parenthood as an Exclusive Status: The Need for Legal Alternatives When the Premise of the Nuclear Family Has Failed*, 70 VA. L. REV. 879 (1984) (suggesting that even those children separated from their parents because of abuse or neglect, nevertheless derive some benefit from remaining in contact with their biological parents, and citing a study on foster children as support for this suggestion).
61. *See* Davis, *supra* note 60, at 568 (advocating the need for children to resolve rather than to repress their feelings about separations from biological parents); Bogart R. Leashore, *Demystifying Legal Guardianship: An Unexplored Option for Dependent Children*, 23 J. FAM. L. 391-94 (1984) (describing identity loss problems when children are placed with unrelated foster or adoptive parents).

G. *Procedural Safeguards Slowing the Termination of Parental Rights*

The same federal law that promotes adoption for children who cannot return home requires that child welfare agencies must make reasonable efforts to reunite families before filing a petition to terminate parental rights.[62]

A recent study by the U.S. Department of Health and Human Services (HHS)[63] found that in most states, the primary obstacle to implementing permanency plans of adoption, where parents oppose the petition to terminate their rights, was the inability of the state to get beyond this first requirement. The report's author, the Inspector General of HHS, found that child welfare agencies repeatedly failed to provide sufficient services and supports to permit state courts to conclude that reunification was impossible and termination therefore appropriate.[64] The investigators further found the same reluctance among judges to grant terminations on the evidence presented because they consider termination so solemn an act.[65]

Even when agencies have made appropriate efforts, parents can oppose the termination for a number of reasons, beyond the reasonable efforts requirement, to prevent their children being freed from them.[66] Moreover, after juvenile courts terminate parental rights, parents can appeal, delaying the termination for months. Consider, for example, the following case:

> Sarah P. is five years old and has been in foster care, with the same family, since birth. Her mother, Ms. P., is mildly retarded and has suffered from AIDS-related illnesses since Sarah's birth. Throughout the five years, Ms. P. has visited Sarah on a weekly basis and has maintained a good relationship with the foster mother.
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> One year ago, because Ms. P. was unlikely ever to be able to take care of Sarah, the child welfare agency changed Sarah's permanency goal from reunification to adoption. Five months later, the court approved the change. Two more months passed before the agency filed its petition to terminate Ms. P.'s parental rights.
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> In the five months since the agency filed its petition, the parties have been to court six times. Ms. P. wants to continue visiting with Sarah, so she is opposing the petition in order to preserve an enforceable right to visitation. Visitation is her sole concern. Despite the six court appearances, the court has not yet begun to

62. Child Welfare Act of 1980, 42 U.S.C.A. § 671(a)(15) (West Supp. 1995).

63. OFFICE OF INSPECTOR GEN., U.S. DEP'T OF HEALTH AND HUMAN SERVICES, BARRIERS TO FREEING CHILDREN FOR ADOPTION 11-14 (1991).

64. *Id.*

65. *Id.* at 15-16.

66. *See* Wald, *supra* note 52, at 3-4.

hear testimony, which itself is expected to take three days. If she loses, Ms. P. plans to appeal.[67]

It will be a long time before Sarah will be free for adoption — perhaps not until after her mother is dead. Until then, Sarah will remain in foster care. Although Sarah lives with the family that hopes to adopt her, child development experts would say that she does not currently have the permanence that she needs for her own healthy development. Sarah is technically in the custody of the child welfare agency, not her foster parents, so the foster parents must ask the agency for permission before making medical, educational, or even travel decisions, and the entire family lives without the certainty that Sarah will be placed permanently in their care.

For Sarah, the agency, her mother, and her foster parents, the choices themselves are simply inadequate to cope with their needs. The requirement that Ms. P.'s rights be terminated before Sarah can be adopted has transformed the reasonable needs and desires of these people into competing claims.

H. More Dilemmas

Older foster children who know their parents, frequently resist adoption in order to retain the relationship with their biological families.[68] Indeed, many social workers are reluctant even to plan adoptions for older children.[69] Yet child development experts believe that these children, too, would benefit from the permanence that would come with adoption. The resulting dilemma is illustrated in the following case:

> Jose S. is fourteen years old. For the first nine years of his life he lived with his mother; but, five years ago, his mother's chronic abuse of alcohol led a court to place him in foster care.
>
> During his first two years in foster care, Jose was placed in four different foster homes. The last of these worked well and he has remained there for the last three years. Although he is happy with his foster family, he remembers his biological mother fondly and still thinks of her as his real mother. His mother visits him three or four times a year, and he is not willing to give up on her. Jose understands that she cannot take care of him, but he hopes to maintain a relationship with her — particularly when he gets

67. This case study is based upon an actual case before the Family Court in New York City.

68. Malcolm Bush & Harold Goldman, *The Psychological Parenting and Permanency Principles in Child Welfare: A Reappraisal and Critique*, 52 AM. J. ORTHOPSYCHIATRY 223, 232 (1982).

69. Marianne Berry & Richard P. Barth, *A Study of Disrupted Adoptive Placements of Adolescents*, 69 CHILD WELFARE 209, 211 (1990).

older. His foster family has asked to adopt him but Jose has refused.[70]

Because Jose is fourteen, his consent would be necessary in most states for the adoption to proceed.[71] Under such a scenario, the likely result is that Jose will remain in long-term foster care, residing with his foster family (or somewhere else if he is moved again), seeing his mother, and continuing to resist adoption.

For children like Sarah and Jose, adoption is impossible or inappropriate. If open adoptions were widely available, the needs of these children and their biological parents might be met by adoption. An open adoption is one in which prior to finalization, the biological parents and the adoptive parents enter into an enforceable written agreement allowing continued contact between the families.[72] Parental rights are terminated, but ties are not completely severed. However, despite a growing interest in its use, open adoption is permissible in only a limited number of states.[73]

Opponents of open adoption maintain that children need to recognize a single family as their own and continued contact with the biological family thwarts that goal. The confidentiality of a closed adoption protects the adoptive family from intrusion and firmly places the new parents at the center of the child's life. Advocates of open adoption contend that while closed adoptions may be more secure for adoptive parents, it is increasingly unclear that they meet the needs of children.[74]

Potential adoptive parents may also resist adoption, especially when they are relatives of the biological parent. In the last decade, child welfare agencies have increasingly turned to relatives to provide foster care as part

70. This anecdote is an amalgam of several advocates' confidential client stories.

71. *E.g.*, ALA. CODE § 26-10A-8 (1994); ALASKA STAT. § 25.23.040 (1995); ARIZ. REV. STAT. ANN. § 8-106 (1995); ARK. CODE ANN. § 9-9-206 (Michie 1995); DEL. CODE ANN. tit. 13, § 907 (1995); D.C. CODE ANN. § 16-304 (1995); FLA. STAT. ch. 63.062 (1995); HAW. REV. STAT. § 578-2 (1994); N.M. STAT. ANN. § 32A-5-17 (Michie 1995); N.C. GEN. STAT. § 48-3-601 (1995); WASH. REV. CODE § 26.33-160 (1995).

72. *See generally*, N.M. STAT. ANN. § 32A-5-35 (Michie 1995) (open adoption agreement).

73. For example, Maryland permits open adoptions when the adopting parent is a stepparent, relative or other individual exercising physical care and custody over a child. The law permits the adoptive parent and the biological parent to enter into an enforceable visitation agreement if the biological parent opposes the adoption and continued visitation is in the child's best interest. *See* MD. CODE ANN., FAM. LAW § 5-312(e) (1995); Winschel v. Strople, 466 A.2d 1301, 1305 (Md. Ct. Spec. App. 1983); *see also* IND. CODE ANN. § 31-3-1-13 (Burns 1995) (providing for parental visitation in the interest of the child); N.M. STAT. ANN. § 32A-5-35 (Michie 1995)(permitting open adoptions); WIS. STAT. § 48.925 (1995) (enforcing open adoptions).

74. Lawrence W. Cook, *Open Adoption: Can Visitation with Natural Family Members Be in the Child's Best Interest?*, 30 J. FAM. L. 471, 475 (1992); *see also* Carol Amadio & Stuart L. Deutsch, *Open Adoption: Allowing Adopted Children to "Stay in Touch" with Blood Relatives*, 22 J. FAM. L. 59 (1983-1984) (discussing the benefits of open adoption).

of "kinship foster care" programs.[75] Some states even require their child welfare agencies to search for relatives each time a child enters foster care, and to place that child with a relative when reasonable to do so.[76]

Since the extensive use of kinship foster care is a relatively recent phenomenon, there is little research on its interaction with permanency planning. Statistically, all that can be said is that the length of kinship foster care placement is somewhat longer than for children living with unrelated foster parents.[77]

Interviews with kinship foster parents, however, reveal the outline of a looming problem for children who cannot return home: the reluctance of these kinship foster parents to adopt children to whom they are already related. For example, a grandmother caring for her grandchild may not want to be considered the catalyst of her own child losing parental rights. These kinship foster parents carry the hope that someday that parent will be able to care for the child. Unlike foster parents who hope to adopt their foster children, these foster parents cannot imagine being complicit in the final termination of the parent's rights. Moreover, these kinship foster parents find adoption a confusing proposal. A grandmother is already a grandmother, an aunt an aunt; even if they were to remain the child's custodian and provider, they cannot understand the necessity for them to become the child's mother.[78]

One researcher recently found that 85% of a relatively small sample of kinship foster parents did not want to adopt their related foster children. Most of these explained that there was no reason to adopt, as they were already related to the child.[79] The remainder indicated that they believed adoption would cause conflict with the parent to whom they were related. Social workers interviewed for this same research agreed that kinship foster parents are not interested in adoption.[80] It is the view of some social

75. Kinship foster care programs place children who have been removed from their parents because of abuse, neglect or maltreatment in the homes of relatives who act as foster parents in the same way that unrelated individuals do. *See* Marianne Takas, *Kinship Care: Developing a Safe and Effective Framework for Protective Placement of Children with Relatives*, 13 CHILDREN'S LEGAL RTS. J. 12, 12-19 (1992) (reasoning that growth in kinship placements reflects both a growing consensus that an extended family alternative represents the best possible choice for children removed from their parents and an inadequate supply of foster parents in light of the increased demand of children in need).

76. OFFICE OF INSPECTOR GEN., U.S. DEPT. OF HEALTH AND HUMAN SERVICES, STATE PRACTICES IN USING RELATIVES FOR FOSTER CARE (1992) [hereinafter STATE PRACTICES].

77. Fred H. Wulczyn & Robert M. Goerge, *Foster Care in New York and Illinois: The Challenge of Rapid Change*, 66 SOC. SERV. REV. 278, 290 (1992).

78. RODNEY CHRISTOPHER, LISA DOWNING, BRANDEE GALVIN, GILLIAN PERSAUD, & ADRIENNE ROBINSON, STRATEGIES FOR SOLVING THE PROBLEMS IN NEW YORK CITY'S KINSHIP FOSTER CARE SYSTEM 15 (1991)(unpublished manuscript on file with the author).

79. Jesse L. Thornton, *Permanency Planning for Children in Kinship Foster Homes*, 70 CHILD WELFARE 593, 597-98 (1991).

80. *Id.*

workers, however, that more kinship foster parents might choose to adopt if they were better informed about adoption.[81]

While it is certainly important to inform kinship foster parents fully about adoption, their resistance to adoption is often deeply rooted in valued cultural traditions. Many Native Americans consider adoption, under any circumstance, completely inconsistent with their tradition if it severs the child's relationship with the biological parents. Hawaiians and Eskimos reject anything other than an informal, open adoption in which the biological parents are completely known to and involved with the child.[82] Many African-Americans have relied over generations on extended family networks for child rearing, with grandparents, aunts and uncles raising children when parents are unable to care for them for financial or other reasons.[83] Often these related caregivers have no legal authority to act on behalf of the children; nevertheless, they manage to provide both long-term and short-term respite care in place of absent, overburdened or sick parents. In none of these cultural traditions, is the biological parent intentionally alienated or exiled.

I. A Compromise in Subsidized Guardianship

For a growing group of children in foster care, the termination of parental rights that must accompany adoption is itself an obstacle to securing a permanent home. The limits of adoption become more pronounced as the number of parents who seek to continue some form of relationship with their children grows, the number of older children in foster care rises, and the use of kinship foster care increases. In states where all three trends are apparent, the number of children locked into long-term foster care will continue to rise unless something else is done.

Guardianship presents another option. It is available in most states and is recognized by the 1980 Adoption Assistance and Child Welfare Act.[84] Yet, guardianship remains virtually unused as a permanency plan for children in foster care. It appeared as a goal in only about three percent of the cases in twenty-nine states surveyed by the U.S. Department of Health and Human Services in 1988.[85] The primary reason guardianship is not used is the lack of a subsidy to support children under the plan.[86]

81. *See* TASK FORCE ON PERMANENCY PLANNING FOR FOSTER CHILDREN, KINSHIP FOSTER CARE: THE DOUBLE EDGED DILEMMA 15 (Maryjane K. Link ed., 1990) [hereinafter KINSHIP FOSTER CARE] (noting that relatives would, in some cases, be more willing to adopt if adequately informed of the possibility of an adoption subsidy providing the necessary financial support).

82. Amadio & Deutsch, *supra* note 74, at 64-65.

83. ELMER P. MARTIN & JOANNE M. MARTIN, THE BLACK EXTENDED FAMILY 9 (1978).

84. *See supra* note 46 and accompanying text.

85. OVERVIEW OF ENTITLEMENT PROGRAMS, *supra* note 1, at 915.

86. *Id.*

II.
SUBSIDIZED GUARDIANSHIP AS A PERMANENCY GOAL FOR CHILDREN IN FOSTER CARE

The appointment of a guardian for a child is not a new idea. It has been discussed in the context of foster care since as long ago as 1935.[87] In 1949, the Social Security Administration's Children's Bureau devoted an entire publication to the subject.[88] The Adoption Assistance and Child Welfare Act of 1980 lists guardianship as a permanency goal for children needing long term out of home care, second only to adoption.[89] Indeed, the specific child welfare laws of some states provide for the use of guardianship as a final disposition in a child protective proceeding.[90] Nevertheless, guardianship is rarely used for children in foster care.[91]

The primary reason that guardianship is not widely used is the lack of a subsidy to support the children after they are discharged from foster care.[92] In the small number of states that properly subsidize it, guardianship provides an additional path to permanence for children in foster care who cannot be reunited with their parents. As the experience of these states shows, subsidized guardianship can provide a useful alternative to both long-term foster care and adoption; one responsive to the needs of children, parents and caregivers.

A. What Is Subsidized Guardianship?

Subsidized guardianship can provide a permanent home for children in foster care who cannot be reunited with their parents and for whom adoption is an inappropriate goal. A guardian can meet a child's need for a stable and legally secure relationship in a family-like setting.

The guardian can be a relative or other suitable individual, including a foster parent. Once appointed by a court, the guardian has legal authority to make virtually all decisions on behalf of a child.[93] A guardian is said to stand in the shoes of the parent and is charged with protecting the child's health and welfare.[94]

87. *See* HASSELTINE B. TAYLOR, LAW OF GUARDIAN AND WARD 52-59 (1935) (discussing the appointment of guardians for children under common law and the Uniform Veterans' Guardianship Act).

88. IRVING WEISSMAN, U.S. CHILDREN'S BUREAU, GUARDIANSHIP, A WAY OF FULFILLING PUBLIC RESPONSIBILITY FOR CHILDREN (1949).

89. *See* 42 U.S.C. § 675(5)(B) (1994) (establishing periodic review of foster children for return to home, adoptive placement, or legal guardianship).

90. *See* Carol W. Williams, Legal Guardianship: A Permanency Option for Children 3 (July 18-21, 1991) (paper presented to conference: Protecting the Children of Heavy Drug Users, Washington, D.C.: American Enterprise Institute) (on file with the author).

91. *Id.* at 2.

92. Foster Care Maintenance Payments Program, 42 U.S.C. § 671 (Supp. 1995) (providing no subsidy for guardianship).

93. Williams, *supra* note 90, at 3-4.

94. *Id.* at 3, 6.

Appointment of a guardian does not require the termination of parental rights.[95] Transfer of guardianship from parents to another adult relieves the parents of their right to custody and their obligation of care, but parents retain the right to visit, and to consent to adoption. They are also responsible for child support.

The appointment of a guardian for a child who is in foster care, relieves the agency of its authority over the child, unless a new complaint of abuse or neglect is made at a later time. The dissolution of the relationship between foster child and foster parent, and the substitution of the relationship between guardian and ward ends the oversight of both the court and agency, even if the new guardian was the foster parent. A foster parent who becomes the child's legal guardian no longer has to take time off from work to go to court when the placement is reviewed and is freed from the monthly visits of a caseworker. The substitution of guardianship for foster care should relieve the stress inevitable in a temporary relationship and allow a deeper bond to grow.

In essence, guardians are substitute parents. They have complete control over the care and custody of their wards including responsibility for their health, welfare and education. Unlike foster parents, they need not ask an agency for permission to vaccinate the child or to visit the zoo in a nearby county. In contrast to long-term foster care, guardianship cements the bond between the child and the caregiver, localizes authority over the child, and endows the relationship with an expectation of continuity.[96]

In the only formal evaluation of any subsidized guardianship program in the United States, researchers in Massachusetts found that guardians who had been foster parents before appointment, felt increased commitment, affection and responsibility towards the child.[97] The guardians also reported that the children felt a greater sense of stability, affection and security with the transition from foster care to guardianship.[98]

The court has tremendous flexibility in issuing letters of guardianship allowing the judge to consider the individual circumstances of the case before it.[99] The court can award custody and guardianship to the caregiver and structure the terms of ongoing visitation between the parent and the child.[100] A court can also limit or expand the powers of the guard-

95. *Id.* at 4.

96. *Id.* at 8, 10.

97. FRANCES WHEAT & JULIA HERSKOWITZ, AN EVALUATION, MASSACHUSETTS DEP'T OF SOCIAL SERVICES, THE MASSACHUSETTS GUARDIANSHIP PROGRAM — AN INNOVATIVE APPROACH TO PERMANENCY PLANNING 18-19 (1986).

98. *Id.*

99. *See* Wald, *supra* note 52, at 4; *see also* Mark Hardin, *Legal Placement Options for Children in Foster Care*, *in* FOSTER CHILDREN IN THE COURTS 154-61 (Mark Hardin ed., 1983).

100. For a description of the various practices in different states, see STATE PRACTICES, *supra* note 76 (state by state analysis of guardianship and foster care by relatives). *See* Hardin, *supra* note 99, at 158-59.

ian.[101] It can include an order of protection if necessary, or require the guardian to seek the court's guidance before making certain decisions about the child's upbringing.[102] For example, courts sometimes require the guardian to seek approval before permitting the child to move out of the state.[103]

Unless parental rights are terminated, parents remain responsible for the support of their children. The appointment of a guardian does not disturb that obligation. A child with a guardian can still share in the parent's estate, receive Social Security or Veterans payments or any other benefits available to dependents. Guardians typically do not assume an obligation to support the child under their care. However, because few parents pay child support on behalf of their children in foster care, it is safe to assume that most of these children will need a reliable source of income to guarantee their support.[104]

The subsidy in a subsidized guardianship plays the same role that it does in a subsidized adoption: it allows potential guardians to give children permanent homes that they could not or would not provide without the subsidy. Where it is authorized, subsidized guardianship is used only for children already in foster care, and frequently, it is the foster parents who become the guardians. The availability of the subsidy eliminates the disincentive to the foster parents to become guardians and lose the maintenance stipend provided for the child's support while in foster care. Many foster parents are unable to assume guardianship without a subsidy, which would result in children having to remain in foster care. Where a parent is financially able to provide support, such payments are used to offset the cost of the subsidy. If the child support payments exceed the monthly subsidy, there is no public expense incurred for the child's continued care.[105]

Finally, subsidized guardianship gives legal recognition to family patterns common within African-American, Latino and Native American cultures — the cultures heavily represented within the nation's foster care systems.[106] Within these cultural traditions, members of extended families commonly make informal arrangements among themselves for the care of children during difficult times. Although these caregivers rarely have legal

101. Hardin, *supra* note 99, at 154-55.

102. *Id.* at 160-61.

103. *Id.* at 161.

104. *See* OFFICE OF INSPECTOR GEN, U.S. DEP'T OF HEALTH AND HUMAN SERVICES, CHILD SUPPORT FOR CHILDREN IN IV-E FOSTER CARE 5 (1992) (showing that in a recent study, the Office of the Inspector General of HHS found that child support was collected on behalf of only 5.9% of IV-E eligible foster children included in the study sample).

105. *Id.*

106. NATIONAL COMM'N ON FAMILY FOSTER CARE, A BLUEPRINT FOR FOSTERING INFANTS, CHILDREN AND YOUTHS IN THE 1990s 24 (1991).

authority to act on behalf of the children, they assume much of the practical responsibility of parents who are absent, overburdened or sick.[107] By recognizing these relationships and endowing them with legal authority, subsidized guardianship legitimizes and reinforces methods of protecting and caring for children already familiar to, and culturally valued by, substantial numbers of the families involved in foster care systems nationwide.

B. When Is Subsidized Guardianship the Appropriate Permanency Plan?

Subsidized guardianship, like subsidized adoption, should be considered only when it has become clear that a child in foster care will be unable to return home in the foreseeable future and a different permanency plan is needed. For many children at this stage, the search for an adoptive home makes sense; but for others, procedural or psychological barriers may make termination of parental rights impractical or inappropriate. When a child appears to fit within this second group and is living with a foster parent who is willing and able to continue to provide affection and care on a permanent basis, subsidized guardianship might be an appropriate and practical goal.

Subsidized guardianship would be inappropriate, however, as an alternative to efforts aimed at reunification. Child welfare agencies are sometimes criticized for failing to provide meaningful services to prevent foster care placements or to reunite families after removal. The introduction of subsidized guardianship should not be permitted to legitimize these practices. Subsidized guardianship should not weaken the presumption in federal law and in the laws of many states that the best place for children to grow up is their parents' home. Subsidized guardianship might appear to provide an easy way to get children off foster care caseloads, but it should not be used to avoid reunification or adoption when these are appropriate.

The choice between adoption and guardianship may not always be clear, especially if there is a foster parent willing to adopt, as in the case of Sarah P. discussed earlier.[108]

Sarah's mother opposed the termination of her parental rights because she wanted to continue a relationship with Sarah. Although she was unable to assume full responsibility for the child, the mother's opposition had delayed the action for more than a year, with the proceeding likely to take another year, while Sarah remained in foster care.

Subsidized guardianship could have proven to be both an appropriate and a practical alternative to adoption in the case of Sarah P. Because the guardianship would not have required the termination of Ms. P.'s parental rights, Ms. P. might not oppose the guardianship, allowing Sarah's permanency plan to be implemented on a single court date. Ms. P could continue

107. CHILD WELFARE, AN AFRICENTRIC PERSPECTIVE 68-70 (Joyce E. Everett, Sandra S. Chipungu, & Bogart R. Leashore eds., 1991).

108. *See supra* note 67 and accompanying text.

her weekly visits with Sarah, and if the guardian interfered with those visits, Ms. P. could obtain court enforcement. The new guardians would be freed from the constraints of foster care and be could make all decisions on Sarah's behalf. They would no longer need to go to court or be involved with the child care agency. Upon Ms. P.'s death, the guardians could initiate adoption proceedings or leave the arrangement as it stood.

Similarly, subsidized guardianship may be more appropriate than adoption when children want to continue relationships with parents who will not be able to care for them. In such circumstances, commentators have noted that a child's need for permanency includes a need to keep hold of the past.[109] For example, Jose S., whose case was discussed above,[110] was happy to live permanently with his foster family but refused to consent to an adoption because he did not want to abandon his biological mother. A subsidized guardianship might suit both Jose and his foster parents. His foster parents would become his guardians while Jose maintained a meaningful relationship with his mother. His new guardians would be relieved of the burden of going to court, consulting the child care agency before making decisions, and worrying that a social worker might someday decide to take Jose away from them. Guardianship, more than adoption, respects this child's need and desire to maintain a connection with his mother while providing Jose with a permanent home.[111]

Subsidized guardianship is increasingly attractive to jurisdictions that have large numbers of children in kinship foster care because it relieves the tension created when relatives are asked to adopt their kin. A relative who becomes a child's guardian does not displace the parent. A grandmother is not asked to replace her daughter as the child's mother and cause the real mother to lose the chance to care for the child again. Although little research has been done on the effectiveness of permanency planning for children in kinship care, several studies of kinship care have concluded that the current permanency options are not sufficient and that subsidized guardianship should be added to the options available for these children.[112]

Even in the situations described here, there will be instances when subsidized guardianship is an inappropriate plan. There will be some children who need special medical or psychological services that are only available to them within the foster care system. Other children will require that

109. Katherine T. Bartlett, *Rethinking Parenthood As an Exclusive Status: The Need for Legal Alternatives When the Premise of the Nuclear Family has Failed*, 70 VA. L. REV. 879, 902-03 (1984).

110. *See supra* note 70 and accompanying text.

111. Leashore, *supra* note 61, at 394.

112. *See* Marianne Takas, *Developing Child Protection Systems with Extended Family Strengths*, 13 CHILDREN'S LEGAL RTS. J. 12 (1984) (stating that the U.S. Department of Health and Human Services believes that the same cost-benefit arguments which apply to adoption subsidies may also apply to subsidized guardianship); *see also* GEORGE GABEL, NYC CHILD WELFARE ADMIN., PRELIMINARY REPORT ON KINSHIP FOSTER FAMILY PROFILE 3-4 (1992).

parental visitation be supervised by a professional. Because guardianship ends the involvement of foster care agencies with the child, these would be inappropriate circumstances for subsidized guardianship.[113]

The relationship between the prospective guardian and ward must also be capable of sustaining itself. Mutual affection and commitment need to be strong and shared with all members of the prospective guardian's household. If the prospective guardian has resisted adoption, the reasons for that reluctance should be probed to assure that they would not apply to guardianship as well. Additionally, the relationship between the proposed guardian and the biological parent must be amicable if parental rights are to be preserved.

C. *Criticisms of Subsidized Guardianship*

Although guardianship has been discussed since the early twentieth century, and subsidized programs began to appear in the early 1980s, only a handful of states use it as a permanency plan.[114] Several criticisms of subsidized guardianship have been voiced over these years, limiting enthusiasm for its use. The advantages of subsidized guardianship for today's foster care population, however, suggest that it is time for these criticisms to be reexamined.

1. Is guardianship really permanent?

The most enduring criticism of guardianship as a permanency plan is that it does not really provide a child with a permanent solution.[115] Guardianship arrangements, unlike adoption, can be terminated at any time by the court at the request of the guardian or of any interested party, including a biological parent. The presumption that the guardian is unwilling to adopt suggests, to critics, that the guardian is not genuinely devoted to the child and will be quick to terminate the relationship.

Even if the guardian never moves to end the relationship, a guardian's power expires when a child reaches majority. Critics contend that this leaves children reaching majority without a network for support in the difficult years after becoming independent.[116]

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113. Adoption advocates have begun to lobby for greater access to specialized services for families who have adopted children with special needs, and the same could be done for people who become guardians. In New York state, the New York State Citizens' Coalition for Children, Inc. has urged the expansion of post-adoption services, and the same arguments made for supporting expansion could be made for providing services to children in guardianship.

114. *See* OVERVIEW OF ENTITLEMENT PROGRAMS, *supra* note 1 and accompanying text.

115. Leashore, *supra* note 61, at 395.

116. *Id.* at 395-97.

Finally, some critics are concerned that the biological parents might, years later, seek to regain custody of their children.[117] Indeed, biological parents are always free to make such a request to the court. This group of critics argue that, even if the biological parent could then care for the child satisfactorily, the return of the child to the parent would shake the confidence of all wards and guardians in the permanence of their relationship and that such confidence is psychologically necessary for the child's development.

It is undeniable that the psychological impact of adoption and of guardianship are different for both the child and the adults involved. Adoption has always been considered more secure, providing a child with a family for life. Guardianship is less secure and potentially less durable. Thus, if guardianship were to displace adoption as the best plan when children cannot return to their parents, critics would have a strong argument.

Proponents of guardianship, however, do not urge replacing adoption, rather only using guardianship as an alternative when adoption is inappropriate or impractical for a child.[118]

Guardianship, while not as secure as adoption, is still more secure than long-term foster care. Once appointed by the court, a guardian is the permanent caregiver in the eyes of the law.[119] The relationship between guardian and ward can only be disrupted with the approval of the court after a finding that the change is in the child's best interests.[120] Guardians can ask a court to dissolve the guardianship, but adoptive parents, similarly, can disrupt or dissolve an adoption.[121] Guardians, adoptive parents, and biological parents are always vulnerable to custody suits brought by third parties. While biological and adoptive parents benefit from a presumption in favor of parental custody, a guardian would likely benefit from a similar presumption, except in a dispute with a biological parent.

Guardians can ask the court to relieve them of the ward and appoint a successor. Some critics cite this possibility in suggesting that guardianships should be limited to relatives because, they argue, an unrelated individual's unwillingness to become an adoptive parent renders the level of commitment to the child suspect.[122]

In practice, however, the emotional commitment of guardians to their wards seems to be quite strong. In an evaluation of a subsidized guardianship program in Massachusetts where most of the guardians were not related to their wards, researchers found that the commitment of guardians to their wards increased in the years after their transformation from foster

117. *Id.* at 398.
118. *Id.* at 400.
119. *See* Williams, *supra* note 90, at 6-10.
120. *Id.* at 6.
121. *Id.* at 4.
122. Wald, *supra* note 52, at 10.

parents to guardians.[123] In the same research, no guardianships were reported to have ended prematurely.[124]

While there is no published data permitting a comparison of the rate of disruption of guardianships with that of adoptions, conversations with child welfare administrators in states using subsidized guardianship confirm the findings in Massachusetts that the level of disruption is very low.[125] Guardianship, moreover, is frequently recommended for teenagers, the group of foster children who experience the highest rate of disrupted adoptions.[126]

The prospect of biological parents seeking to reclaim their children from guardians years later raises more difficult issues. In situations where good faith efforts have failed to permit reunification of child and parent within twelve or eighteen months, some believe that parental rights should be terminated in the child's interest because the child's psychological need for permanency is paramount.[127] Others put a higher value on reunification and argue that whenever parents can demonstrate an ability to care for their children, courts should permit them to regain custody.[128]

Subsidized guardianship does not resolve this debate, but it does provide a useful middle ground between those who give primacy to permanence and those who give primacy to reunification. Today, this middle ground is probably all that can be achieved, as resolving the debate itself seems impossible. The difficulty is illustrated by proposals to use kinship adoption in place of subsidized guardianship. Kinship adoption is an open adoption by a relative, permitting visitation by biological parents and even continued participation by the parent in educational or medical decisions where appropriate, but it precludes a return of custody to the parent. This proposal is sweetened by the current availability of federal funds for the kinship adoption subsidy.[129] Among its problems, however, are its failure to deal with children who might live with unrelated guardians and its failure to address the evidence that many relatives resist adoption precisely because it precludes the biological parents from resuming their role. With compromise between permanence and reunification advocates so difficult

123. Wheat & Herskowitz, *supra* note 97, at iii, 18.

124. *Id.* at 4, 18-21.

125. Telephone interview with Duane Jenner, Program Specialist, Office of Child Protection Services, South Dakota Department of Social Services (1993); Telephone interview with Lisa Rollin, Adoption Coordinator, Alaska Department of Health and Social Services(1993); Telephone interview with Mary Dyer, Adoption Specialist, Nebraska Department of Social Services (1993).

126. *See* Marianne Berry & Richard Barth, *A Study of Disrupted Adoptive Placements of Adolescents*, 69 CHILD WELFARE 209 (1990) (discussing studies on the dissolution of adoptions after finalization).

127. Wald, *supra* note 52, at 6.

128. *Id.* at 7.

129. Takas, *supra* note 75, at 12-13.

to achieve, the middle ground of subsidized guardianship has become increasingly attractive. To both camps, subsidized guardianship usually would be preferable to long-term foster care.

2. Is a subsidy appropriate when relatives care for children?

The subsidies currently paid to adoptive parents and to foster parents, including kinship foster parents, are much higher than the public cash assistance paid to a child's biological parents. Across the United States, the average monthly payment provided by Aid to Families with Dependent Children (AFDC) for a child is $191.34 while the average foster care maintenance payment is $297.26 — an extra subsidy of $105.92 each month.[130]

Foster care and adoption subsidies are even larger for children with special needs.[131] There is little criticism of this subsidy in principle except when it is paid to relatives of the child. In cases of kinship foster care and, by extension, kinship guardianship, critics worry that the payment of subsidy encourages biological parents to leave their children with relatives and undermines the social responsibility of families to sacrifice, when necessary, for their children. These critics agree with proponents that children removed from their homes are best placed with relatives, but they object to the payment of subsidies to these relatives.[132]

As long as the placement of children with parents, relatives, or strangers is perceived as a matter of parental choice, the subsidies make little sense. In our society, parents are expected to make certain sacrifices for their children and adoptive parents are expected to make similar sacrifices when they choose to adopt. Foster parents are not expected to make similar sacrifices because they are considered to be agents of the state: playing an important role in the protection of children, but with no personal stake in the child. As a result, the state subsidizes the full cost of caring for children in foster homes.

In recent years, however, the state has found it necessary, for its own purposes, to expand the number and range of caregivers for children whom the state has removed from their homes. These new caregivers — kinship foster parents and families receiving a subsidy to adopt children with special needs — are acting at the request of the state to solve a state problem, not merely out of a sense of personal obligation or choice. Indeed, the

130. STATE PRACTICES, *supra* note 76, at A-1, 2. In Alabama the average AFDC grant is $59.00. The foster care maintenance (FCM) payment is $198.67 — a difference of 236.72%. *Id.* at 4. Georgia - AFDC $145.42; FCM $300.00 — a difference of 106.30%. *Id.* at 16-17. Maryland - AFDC $165.54; FCM $465.67 — a difference of 181.30%. *Id.* at 28-29. New Mexico - AFDC $143.41; FCM 269.67 — a difference of 88.04%. *Id.* at 41. Ohio - AFDC $181.06; FCM $257.67 — a difference of 42%. *Id.* at 46. Pennsylvania - AFDC $195.85; FCM $322.67 — a difference of 64.75%. *Id.* at 50.

131. BACKGROUND MATERIAL AND DATA ON MAJOR PROGRAMS, *supra* note 48, at 202.

132. KINSHIP FOSTER CARE, *supra* note 81, at 17.

adoption subsidy demonstrates the resourcefulness of government when it needs to find a supply of caregivers for children. Adoption subsidies are paid because the alternative, long-term foster care, is both expensive and potentially psychologically harmful.[133] The same is true for guardianship subsidies.

Finding the subsidy justifiable does not preclude the possibility that it acts as an incentive to parents to leave their children in care. Any additional subsidy might have this result, but does it?

No research has concluded that parents leave their children in care because they are motivated solely by financial interest.[134] Although some parents might use the subsidy to console themselves for their loss of custody, and others might include the subsidy as part of their understanding of why their children are better off with someone else, there is no published research demonstrating a deliberate effort by parents to avoid return of their children for the sake of the subsidy. If there were such evidence in any specific case, the obligation would rest with the child welfare agency and the court to assure that the children were reunited with their parents if their parents were capable of caring for them.

3. Does guardianship erode the strength of the nuclear family?

Some critics oppose any arrangement that eases the pain of having one's children removed because that pain provides the strongest incentive for a parent to seek return of a child.[135] Reducing that incentive, they argue, further erodes an already fragile family unit.[136]

Kinship foster care is criticized in this way because the placement with relatives as opposed to strangers may reduce the trauma felt by the parent.[137] Subsidized guardianship would be open to such criticism because it invites parents to remain involved with their children outside of the nuclear family.

In practice, however, many of these children have not been raised in nuclear families and insisting on permanency goals that try to create one might not be in their best interest. Increasingly, children live with single parents, in joint custody arrangements with divorced parents and their new families, with relatives and family friends. Limiting the situations children can live in, in an attempt to influence their parents' behavior, punishes children with questionable impact on their parents. Indeed, many children grow up as members of extended family networks where both children and

133. GOLDSTEIN, FREUD, & SOLNIT, *supra* note 31, at 25-26, 137.

134. *See generally* Howard Dubowitz, *Kinship Care: Suggestions for Future Research*, 73 CHILD WELFARE 553, 560 (1994) (describing the need for research on the effects of different levels of payment to caregivers).

135. GOLDSTEIN, FREUD, & SOLNIT, *supra* note 31, at 16-17.

136. *Id.* at 18-19.

137. KINSHIP FOSTER CARE, *supra* note 81, at 12.

their parents are accustomed to living arrangements that successfully rely on an array of adult caregivers.

D. The Costs of Moving Children from Foster Care to Subsidized Guardianship

When a state adds a subsidized guardianship program to its array of permanency options it reduces public expenditures for foster care.[138] The fiscal savings result from eliminating the administrative costs, casework in particular, associated with ongoing care.[139] There may also be some savings in direct payments, although in most cases foster care maintenance payments are replaced by the guardianship subsidy. In states where foster care caseloads are growing, the program may make additional hiring unnecessary. In states with stable foster care populations, the reduction in administrative costs may permit new programs to be funded or caseloads to be reduced.

Reducing the number of children in foster care produces another less tangible benefit. If a child is harmed while in foster care, due to the negligence of the child welfare agency, including its selection or supervision of foster homes, the state will generally be held liable.[140]

Harm to children in the custody of the state also has political costs when it becomes a matter of public interest. Once children are discharged from foster care, as they are after an adoption is finalized, these risks are greatly reduced. Similarly, once a subsidized guardianship is complete, the state no longer has custody of the child and therefore is not responsible for any harm that might befall a child while in the care of the guardian.[141]

Finally, judicial resources are saved when custody of the child switches from the state to the guardian.[142] Children in long-term foster care must return to court periodically to have the placement reassessed and extended. A judge, three attorneys and a caseworker, all generally paid at public expense, attend these hearings. Once a guardian is appointed, judicial review usually ends.[143] The costs of judicial proceedings are saved and judges are free to devote more time to their remaining cases.

Experience suggests that these savings are real. Those states that have already enacted subsidized guardianship programs report that the total cost of the program is sufficiently offset by savings, both administrative and in foster care maintenance payments, to justify implementation.[144]

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138. *See supra* note 34 and accompanying text.

139. *See supra* note 34.

140. Leashore, *supra* note 61, at 396.

141. *Id.*

142. OVERVIEW OF ENTITLEMENT PROGRAMS, *supra* note 1, at 841.

143. STATE PRACTICES, *supra* note 76, at 1.

144. *See id.* at 11 (indicating that subsidized guardianship may end court supervision, thus implying lower costs).

The overall savings, however, are not necessarily distributed in the same way as the costs of foster care because payments to guardians, unlike foster care maintenance payments and adoption subsidies, are not now reimbursed by the federal government. This absence of federal reimbursement may actually increase the financial burden on some states and localities that introduce subsidized guardianship, while saving the federal government its share of the foster care payments that are eliminated. The fiscal benefit to the state depends on its administrative costs, as the following two examples illustrate:

> STATE A: The cost of maintaining in foster care a ten year old with special needs is $40 a day. Foster care maintenance payments are $23 per day and total administrative costs are $17 per day. Because foster care costs are divided among federal, state and local governments 50%, 25%, and 25% respectively, the $40/day cost is split: $20 federal, $10 state and $10 local. If this child is discharged from foster care to a newly appointed guardian with a subsidy of $23/day split evenly between the state and locality, the federal government saves $20/day; while the state and locality each have an increase of $1.50/day.
>
> STATE B: The cost of maintaining the same child in foster care is $50 per day. Only $19 is paid directly to the foster family for maintenance of the child; the remaining $31 covers administrative costs. Each day the child remains in foster care, the federal government pays $25, the state $12.50 and the locality $12.50. If a guardian is appointed with a subsidy of $19 per day, the federal government saves $25 and the state and locality each save $3/day.

Because the federal government would have substantial savings with subsidized guardianship, it might want to encourage its use by agreeing to reimburse the guardianship subsidy like the adoption subsidy. Even in the absence of federal reimbursement, states with high administrative costs may find that subsidized guardianship saves them money or is cost-neutral.

There are other strategies that a state could use to shift some of the cost of the guardianship subsidy to the federal government. For example, a state could structure the subsidy as an AFDC grant with a supplement that covers the difference between the AFDC rate and the foster care rate. Under this scheme, the federal government would reimburse the state for half of the cost of the AFDC grant.[145] Alternatively, states could use their Social Services Block Grant funds, Title XX, or their Child Welfare Services funds, Title IV-B, to offset the cost of the state subsidy. Unfortunately,

145. Reimbursement would come under Title IV-A of the Social Security Act. The subsidy would have to be carefully constructed so it is not considered AFDC countable income to the recipient family.

these funds are limited and are in some cases already committed to other vital child welfare programs.

Another strategy to reduce the fiscal burden of a subsidized guardianship program is to set the subsidy rate slightly lower than the foster care rate but higher than the AFDC rate. Some policy makers suggest that relatives might be willing to accept a smaller amount of assistance in return for the end of governmental intrusion into their homes.[146]

All of these approaches assume that the children in subsidized guardianships are eligible for AFDC. Some children in foster care, and for whom subsidized guardianship might be appropriate, are not eligible for AFDC.[147] In states with general assistance programs these children might be eligible to receive state financed assistance.

Another potential cost of moving children from foster care to guardianship is medical assistance. All children receiving federal foster care payments are eligible for federally reimbursed Medicaid, but a child living with a guardian subsidized by the state loses that automatic eligibility. The child may be financially ineligible for Medicaid or receive a reduced benefit based upon the size of the subsidy and the child's age. Some states already fund medical assistance for some residents who are ineligible for federally reimbursed coverage, but adding these wards to the state programs will increase costs.[148] Other states may have no coverage at all to offer these children.

For a child with special medical needs, the loss of coverage could eliminate guardianship as an option. Even if the potential guardian has private medical insurance through an employer, many packages do not consider wards as dependents and do not permit them to be added to an employee's policy.

Federal reimbursement for payments to guardians would make the guardianship option more attractive to state legislators. The Inspector General of the Department of Health and Human Services recently called for a study to determine the potential costs and benefits of providing subsidies to relatives who assume guardianship for special needs children in their care.[149] The provision of this kind of federal subsidy to both related and unrelated caregivers would provide a powerful incentive for states to introduce or expand a subsidized guardianship program.

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146. KINSHIP FOSTER CARE, *supra* note 81, at 16.

147. *See, e.g.*, Curry v. Dempsey, 701 F.2d 580 (6th Cir. 1983) (holding that a child who is unrelated to his or her caretaker, or related but is not within the degree of consanguinity required by federal law cannot receive federally reimbursed public cash assistance); Sadler v. Atkins, 597 F. Supp. 1204 (D. Mass. 1984) (stating that the exclusion of the guardian-ward relationship from qualification for AFDC is not unconstitutional).

148. The District of Columbia is one example. *See, e.g.*, STATE PRACTICES, *supra* note 76, at 14-15.

149. *Id.* at i.

E. The Long-Term Costs of Subsidized Guardianship

Even if federal reimbursement were available for the subsidy, there is also the problem that the costs of subsidizing guardians might increase exponentially overtime. The concern is that most guardians, once appointed, will provide care until the child reaches the age of majority. A child who is five at the time of the guardianship will be eligible for subsidy until the age of eighteen in most states. As the number of children in the program grows, particularly if younger children are involved, the annual cost could skyrocket. If, on the other hand, that five-year old child remained in long-term foster care, there would always be a possibility of discharge to parents, to relatives, or to adoptive parents without a subsidy.

The fear that the costs will increase exponentially is actually a fear that guardianship will be used instead of other permanency options rather than in conjunction with them. The government already mandates that child welfare agencies determine whether or not a child can return home or be adopted at the outset of the permanency planning process.[150] If agencies plan properly, only children who would otherwise remain in long-term foster care would be considered for guardianship. For these children, it is clear that the state and county would have to contribute to their care until they reach the age of majority. Discharging some of them to subsidized guardianships at least offers the government the opportunity to save the administrative costs associated with long-term care.

Another approach to solving this problem is to place limits on children's eligibility for subsidized guardianship. Subsidies could be limited to children who would otherwise be eligible for the adoption subsidy or children above a certain age. However, any constraints on eligibility would deny the benefits of guardianship to some children.

F. Models of Subsidized Guardianship Already in Use

At least ten states use subsidized guardianship as a permanency goal for children in foster care despite the lack of federal reimbursement.[151] In each of the ten, subsidized guardianship is considered for children who cannot return home and who cannot be adopted.[152] It is generally regarded as a superior permanency plan to long-term foster care except where the child needs continued services or supervision.[153] No two programs are identical, and none is a perfect model. Anyone considering creating a new program

150. *See* 42 U.S.C.A. § 622(b) (West Supp. 1996).

151. We are aware of subsidized guardianship or adoption programs in the following states: Alaska, California, Colorado, Hawaii, Illinois, Massachusetts, Nebraska, New Mexico, South Dakota and Washington State. *See* ALASKA STAT. § 13.26.045-62 (1995); CAL. WELF. & INST. CODE § 1619 (West 1994); COLO. REV. STAT. § 26-7-102 (1995); ILL. REV. STAT. ch. 23, para. 5005 (1973); N.M. STAT. ANN. § 32A-5-45 (Michie 1995); S.D. CODIFIED LAWS ANN. § 28-7-3.1 (1995); WASH. REV. CODE § 74.13.106 (1971).

152. *See supra* note 151 and statutes cited therein.

153. *See supra* note 151 and statutes cited therein.

or modifying an existing one may find useful lessons in what has been tried in other jurisdictions.

Two similar themes emerge from a review of the different program designs. Subsidized guardianship is used to address the problem of older children who resist adoption and where potential adoptive parents resist adoption for cultural reasons.

Massachusetts started its program as a regional demonstration to provide a sense of permanence to teenagers living in stable foster homes who could not be adopted or did not want to be adopted.[154] The Massachusetts program is ordinarily limited to children over the age of twelve. In rare situations, in order to keep a sibling group together, the child welfare agency will support a guardianship for a younger child.

Upon evaluating the project data, three years into the demonstration, researchers found the majority of children thriving with their guardians and concluded that the program was a success.[155] Alaska, South Dakota and Illinois also limit their programs to older children.[156]

Seven other states, concentrated in the West, have subsidized guardianship programs which recognize the reluctance, rooted in specific cultural traditions, of potential adoptive parents to adopt children of living parents. Five of these states — Colorado, Nebraska, New Mexico, South Dakota, and Washington — have significant Native American populations with such traditions, while the other two — Alaska and Hawaii — have their own, unique populations with similar cultural concerns.[157]

In none of the ten states do officials describe their programs as responses to difficulties in finding permanent homes for children in kinship foster care. Instead, they describe subsidized guardianship simply as another permanency goal available to children living with related or unrelated caregivers.[158]

However, once their program was in place, officials in Illinois did notice the potential usefulness of their subsidized guardianship program for reducing the numbers of children in long-term kinship foster care.[159] In 1991, they decided to transfer approximately 2,000 children in kinship homes in Cook County from foster care to subsidized guardianship;[160] but before they implemented the plan, the limitations of their program became clear. The principal difficulty was the loss of federal funding for medical

154. WHEAT & HERSKOWITZ, *supra* note 97, at i, 11-12.

155. FRANCES I. WHEAT, A REPORT: REGION II GUARDIANSHIP PROGRAM 2 (1983); WHEAT & HERSKOWITZ, *supra* note 97, at i-iii.

156. *See, e.g.*, ILL. REV. STAT. ch. 23, para. 5005.

157. Telephone interview with Mary Dyer, Adoption Specialist, Nebraska Department of Social Services (1993); Telephone interview with Duane Jenner, Program Specialist, Office of Child Protection Services, South Dakota Department of Social Services (1993).

158. Telephone interview with Dana Korman, Illinois Department of Social Services (1993).

159. *Id.*

160. *Id.*

insurance that the transfer would have caused.[161] The children remain in foster care while administrators consider alternative sources of funding.[162]

All ten of these states consider subsidized guardianship for a child in foster care only after they conclude that the child cannot return home or be adopted. However, the states require different minimum periods of time in care — from six months in South Dakota to eighteen months in New Mexico — before a subsidized guardianship can be established.[163]

Once the foster care agency has approved the plan for subsidized guardianship, either the prospective guardian or the agency requests the probate or the juvenile court to appoint the guardian. Although it is not required, most programs prefer to proceed with parental consent.[164] None of these programs require that parental rights be terminated. Indeed, avoiding termination of parental rights is the principal benefit of the program.[165]

In each of these programs, the guardians assume almost complete responsibility for the children. They are generally authorized to consent to medical care or treatment, to oversee education, and to consent to marriage and enlistment in the armed forces when parental consent would ordinarily be necessary.[166] Biological parents typically retain the right to consent to adoption and retain a right to visit.

Once the court appoints the guardian under these programs, the child welfare agencies no longer supervise the families, except in California, Colorado and Washington, where the agency supervises on a limited basis.[167] In some states, guardians are required to file an annual accounting with the court or to apply to the court prior to making certain decisions.[168] All require annual contact with the child welfare agency to renew the subsidy agreement.[169]

Subsidies are available in all ten programs, but not as of right.[170] Some states limit subsidies to children considered "hard to place," relying on criteria similar to those used for an adoption subsidy.[171] Others pay

161. *Id.*

162. *Id.*

163. *See supra* note 151 and statutes cited therein.

164. *See supra* note 151 and statutes cited therein.

165. *See supra* note 151 and statutes cited therein.

166. *See, e.g.*, COLO. REV. STAT. ANN. § 19-1-103(15) (West 1996); N.M. STAT. ANN. § 32A-5-45.

167. STATE PRACTICES, *supra* note 76, at 9 (California), 11 (Colorado), 61 (Washington).

168. *See, e.g.*, COLO. REV. STAT. § 26-7-102; N.M. STAT. ANN. § 32A-5-45.

169. *See supra* note 151 and statutes cited therein.

170. STATE PRACTICES, *supra* note 76, at 6 (Alaska), 9 (California), 11 (Colorado), 18 (Hawaii), 21 (Illinois), 31 (Massachusetts), 37 (Nebraska), 42 (New Mexico), 54 (South Dakota), 61 (Washington).

171. *See* STATE PRACTICES, *supra* note 76, at 3 (table summarizing various state practices in relative foster care context).

only to children above a certain age.[172] Still others provide payment only where the guardian is unable to support the child otherwise, despite the fact that guardians historically do not assume a duty to support their wards.[173] One state, California, only pays subsidies to unrelated guardians.[174]

Only five of the states provided data on the number of guardianships that they have put in place, and in each the number is low — certainly lower than the number in subsidized adoptions.[175] These numbers are low undoubtedly because of the lack of federal reimbursement for guardianship as a permanency plan.

Despite the low numbers, people who run the programs generally speak of them with satisfaction. Staff members state that for some children, subsidized guardianship is the only appropriate permanency plan and that it provides a suitable middle ground between adoption and long-term foster care.

III.
THE LEGAL SIGNIFICANCE OF GUARDIANSHIP

Historically, guardianship is a probate concept. A guardian acts on behalf of a child after the death of both parents or when the parents are incapable of providing the child with proper care. A guardian stands in the shoes of a parent and can make most decisions in a child's life. Parents, if living, retain limited authority and few rights with respect to their children.

With the invention of special juvenile courts as part of child welfare legislation in the early twentieth century, probate courts lost exclusive jurisdiction over guardianship. In some states, the juvenile courts were granted concurrent jurisdiction with the probate courts to appoint guardians for minors;[176] in others, the juvenile courts were not given any power to appoint guardians.[177] Only the juvenile courts, however, currently exercise jurisdiction to place children in foster care, so these courts must participate in any transfer of children from foster care to subsidized guardianship

172. *See* STATE PRACTICES, *supra* note 76, at 3.

173. *See* STATE PRACTICES, *supra* note 76, at 3.

174. CAL. EDUC. CODE § 8263 (West 1995).

175. Alaska has 50 children in subsidized guardianships; Illinois has 7; Massachusetts has 786; Nebraska has 98, and South Dakota pays subsidies for 35 children living with guardians. *See supra* note 151.

176. 2 SIR FREDERICK POLLOCK & FREDERIC W. MAITLAND, THE HISTORY OF ENGLISH LAW BEFORE THE TIME OF EDWARD I 444 (2d ed. 1968).

177. *Id.* at 444-45.

A. The Guardian in Probate

The legal relationship of guardian to ward developed to protect the interests of children with property. Because infancy itself is a legal disability, a child under the age of majority cannot enter into a binding agreement.[178] Children with assets, therefore, cannot manage their own property; they must rely on guardians to do so for them.

At common law, until this century, a father was the natural guardian of his child and had the power to manage the child's estate as well as make decisions about his or her upbringing.[179] Upon the death or incapacity of a child's father, an ecclesiastical court would often appoint a guardian to look after the child's interests.[180] The law of guardianship was not concerned with the unpropertied child who would not inherit.[181]

Modern day probate law emerges from this history.[182] While it has abandoned its male privileges, modern probate law retains its historical emphasis on the appointment, powers, and duties of guardians over the property of a minor. Modern probate law also typically provides for the appointment of a guardian over the person of a minor.[183]

Today, both parents — rather than fathers — are the natural guardians of their children and are free to rear them as they see fit so long as they do not abandon, abuse or neglect them.[184] When these natural guardians are

178. *Id.* at 438.

179. *Id.* at 436-37.

180. *Id.* at 444.

181. *Id.*

182. Historically, the powers and duties of a guardian were described by courts and not statutes. These "common law" interpretations over time evolved into the doctrine of guardianship. *Id.* at 52. Subsequent legislative enactments, "probate codes," either left the common law intact or replaced it with standard definitions. *E.g.*, ALA. CODE § 26-2A-20; ARIZ. REV. STAT. ANN. § 14-5201 (1995); CAL. PROB. CODE § 372 (West. 1995). Many states continue to rely upon common law definitions, while others have enacted detailed codes describing the power and duties of a guardian over a minor. *See, e.g.*, ALA. CODE § 26-2A-78 (1995) (detailing the statutorily prescribed powers and duties of a guardian); IOWA CODE § 633.559 (1994) (explaining that the common law and this statute are similar in that parents are recognized as legitimate natural guardians of their children); ME. REV. STAT. ANN. tit. 18A, § 5-209 (West 1995) (explaining that at common law the father was the natural guardian of his child while the statute is now gender neutral and specifically states the duties of the guardian). The Uniform Guardianship and Protective Proceedings Act, a part of the Uniform Probate Code, was approved by the National Conference of Commissioners on Uniform State Laws and the American Bar Association in 1982. UNIF. PROB. CODE, 5 U.L.A. 101-505 (1983). It is a model code containing a detailed description of the role of the probate court in appointing a guardian over the person of a minor and the role, power and duties of the guardian.

183. *See, e.g.*, Wentzel v. Montgomery Gen. Hosp., 447 A.2d 1244, 1252-53 (Md. 1982), *cert. denied*, 459 U.S. 1147 (1983) (holding that the legislature's failure to delineate the powers of a guardian over the person of a minor in statute evidenced its intention to leave it to the courts to adopt standards consistent with the child's best interests).

184. There is no natural guardianship right to control a child's property. If a child has significant property, either real or personal, a court will appoint a suitable guardian to manage the estate until the child reaches the age of majority. P. M. BROMLEY & N. V. LOVE, BROMLEY'S FAMILY LAW 349 (7th ed. 1987). The court may appoint the parents or a third

unable to carry out their responsibilities, a third party may attempt to gain custody and control of the children, but may not legally act on the child's behalf until a court has invested them with formal authority.[185] Appointment of a probate guardian over the person of a minor confers the legal authority necessary for a third party to act like a parent.[186]

Probate courts generally appoint guardians over the person of a minor child upon the death of both parents or when a child is otherwise in need of parental authority. In addition, probate courts in some states continue to appoint guardians when parents are deemed by the court to be unfit.[187] However, in states following the Uniform Probate Code, the probate court is typically without jurisdiction to appoint a guardian on the grounds of parental unfitness.[188] The Uniform Probate Code restricts the power of probate courts to appoint guardians over the person of a minor with living parents to situations where parental rights of custody have been terminated or suspended by circumstances or prior court order.[189] In effect, the Code requires that non-probate courts take primary responsibility for determining parental fitness.[190]

In the majority of states, the probate court can appoint a guardian over the objection of the natural guardians. Where the parents oppose the appointment, the court will hold a hearing to decide the issue. Many states

party. *See* W. VA. CODE § 44-10-7 (1995) (indicating that either a third party or a parent may act as a guardian); *see also* ALA. CODE § 26-2A-73 (1995)(explaining that third party guardians can be appointed but that a parent is the so-called "natural guardian"). If a third party is appointed, the parent usually retains natural guardianship rights over the person.

185. *See, e.g.*, ILL. REV. STAT., ch. 110 1/2, para. 11-13 (1995) (explaining that before a guardian of a minor may act, the guardian shall be appointed by the court of the proper county).

186. This paper is not concerned with modern guardianships other than those over minor children. There are many types of guardians discussed in probate law, including: natural guardians, testamentary guardians, guardians over the property of a minor, guardians over the person or property of an incapacitated person, guardians in socage, and guardians ad litem. The overwhelming numbers of children interacting with the child welfare system are poor and do not have property or assets of their own. *See* Garrison, *supra* note 60, at 432 (explaining that historically and currently the foster care system serves poor children). Protection of the children's property is generally not at issue. For those children who have property, the probate court can appoint a guardian over the property, sometimes called a conservator, to look after those interests. The guardian over the person and the guardian over the property may be, but need not be, the same individual. BROMLEY & LOVE, *supra* note 184, at 349, 358-59.

187. *See* VT. STAT. ANN. tit. 14, § 2645 (1995) (stating that guardianship may be granted to a third party "when the parent is . . . shown to be incompetent or unsuitable").

188. *See, e.g.*, N.M. STAT. ANN § 32-1-58 (Michie 1995); *see also* In re Guardianship of Sabrina Mae D., 114 N.M. 133, 835 P.2d 849 (1992) (stating that guardianship proceedings are not a proper means to involuntarily terminate a parent's rights).

189. UNIF. PROB. CODE § 5-201.4A (1995).

190. *See* ALA. CODE § 26-2A-73 (1995); GA. CODE. ANN. § 15-9-30(a) (1995); N.M. STAT. ANN. § 45-5-204 (Michie 1995). In Georgia, the probate court must first ascertain and declare that the parent's natural guardianship rights have been relinquished or forfeited. *See* Whitlock v. Barrett, 279 S.E.2d 244, 246 (Ga. App. 1981) (citing Robison v. Robison, 116 S.E. 19 (Ga. App. 1922)).

express a strong preference for custody and control remaining with a parent who is fit, so those courts give parents priority in custody disputes. A contested guardianship proceeding is essentially a custody dispute, so parental preference will likely be applied, and, if the parents are fit, a court will usually uphold natural guardianship rights. If the court finds the parents unfit, it will award guardianship to a third person over the objection of the parents. Even in these contested cases, appointment of a guardian does not terminate all parental rights. Absent the parent's voluntary surrender of those rights or a judicial termination of parental rights, parents retain the duty to support, the right to visitation, and the power to consent to adoption.

Guardians owe a fiduciary duty to their wards, including an obligation to care and protect. A guardian is responsible for providing for the child's health, education and maintenance. To carry out these duties, the guardian is given the power to make decisions a parent would otherwise make. It is said that a guardian stands *in loco parentis* to a child and is entitled to decide where and with whom the child should live. Probate guardians can make decisions on medical or professional treatment or care, approve of marriage, consent to enlistment in the armed forces, and make educational decisions. The choice of the child's religion is usually left to the parents. The most significant power remaining with the parents is the power to consent to adoption, although where the biological parent's rights have been terminated, a guardian may be authorized to give or withhold such consent.[191]

Although a guardian will ordinarily have physical custody of the child, the court could award physical custody to another party if to do so would be in the best interest of the child. For example, a grandparent might be made guardian over the person, responsible for making all important decisions for the child, but the court might direct that the child live with an aunt who would have the power to make ordinary decisions.

Courts can sometimes limit the scope of a guardian's power or appoint a guardian on a temporary basis.[192] The court can also appoint co-guardians over the person of a child. For example, both an uncle and a grandparent might be made jointly responsible for determining the child's future. A child might have two guardians each with a separate sphere of power. Children with substantial assets might have a trust company or a bank as the guardian of their property while a relative serves as guardian over the person.

191. In Alabama permanent guardians can consent to adoption. ALA. CODE § 26-2A-78(c)(5) (1995).

192. Ohio specifically provides for the creation of a limited guardian. OHIO REV. CODE ANN. § 2111.02(B)(1) (Anderson 1995). Georgia includes authorization for a temporary guardian. GA. CODE ANN. § 29-4-4.1 (1995).

Guardians generally do not have a fiduciary duty to support their wards. Unless parental rights have been terminated, a child's parents remain liable for child support. If the child has an estate and there is no parental support, a guardian of the property can petition the court to use the child's assets. Guardians for children without property do not have to use their own funds to care for the child. If otherwise eligible, the child can receive public assistance.[193]

The letters of guardianship appointing the guardian can contain specific visitation arrangements. Since guardianship is a private proceeding, child welfare agencies do not supervise or monitor compliance with the visitation provisions. If the guardian blocks parental visitation, the parent must go to court to ask for enforcement.

Anyone seeking the appointment of a guardian must typically therefore give notice to the child's parents, to the person having custody of the child, and to the child if the child is more than fourteen years old. In addition, some states require notice to be given to designated relatives.

Once these parties are notified, probate courts are required to appoint guardians who will act in the best interests of the wards. Minors over 14 generally can choose their own guardians, unless the court finds that the proposed guardian will not be capable of protecting the child's interest. Some states give preference to guardians who are of the same religion or who are relatives of the child.[194]

Some states disqualify a proposed guardian who is a drunkard, a felon, or incompetent.[195] Other states require the court to determine whether or not a proposed guardian has a record of child abuse.

Following the appointment, probate courts retain jurisdiction over the guardians, but there is little supervision by the court. In contrast to guardians over the estate of a minor, who are required to file an annual accounting with the court and to seek the court's guidance when certain transactions are contemplated, guardians over the person of the child are rarely required to inform the court of their actions or to regularly file reports.

The guardianship is automatically terminated when the ward marries, reaches the age of majority, or dies. It also terminates, if the court removes the guardian, if the court permits the guardian to resign, or if the guardian dies.

Any interested person can ask the court to review the suitability of the appointment at any time and to revoke the letters in the best interest of the

193. A child living with an unrelated guardian may not be eligible for Aid to Families with Dependent Children. *See* KINSHIP FOSTER CARE, *supra* note 81, at 15.

194. *See, e.g.*, 20 PA. CONS. STAT. § 5113 (1995); GA. CODE ANN. § 29-4-8 (1995).

195. *See, e.g.*, N.Y. SURR. CT. PROC. ACT LAW § 707 (McKinney 1994) (stating that certain people are ineligible to be fiduciaries).

child. In states where parental rights are not terminated before the appointment of a guardian, a parent can ask for the guardian to be removed.

B. Guardians & Custodians in Juvenile Courts

In several states, the legislation creating juvenile and family courts gives judges of these courts jurisdiction to appoint guardians over the person of a minor.[196] Other states leave guardianship exclusively to probate. All states, however, give their family or juvenile courts authority to name custodians for children. This particular allocation of jurisdiction will determine how a state can establish a subsidized guardianship program among the permanency options available for children in foster care.

1. Guardians

Where they have jurisdiction to do so, juvenile or family courts appoint guardians in much the same way as the probate courts. The court can act on a petition to appoint a guardian for a child who lacks parental authority. Any interested person, including a child over fourteen, can initiate the proceeding on behalf of a child who has been abandoned or whose parents are considered unfit. A parent can consent to the appointment of a guardian, and thereby relinquish natural guardianship rights, while retaining the duty to support, the right to visit and to consent to adoption.

Similarly, in the course of a child protective proceeding brought by a child welfare agency, the court may appoint a guardian to care for a child who must be placed outside the home. In crafting a dispositional order after finding that a child has been abused or neglected, the court is typically confronted with the following choices. It can a) permit the child to live with the parent with or without supervision; b) award temporary legal custody of the child to a licensed child caring agency (foster care), or c) award custody or guardianship to a relative or other suitable individual.[197] Thus, courts with jurisdiction to appoint a guardian might do so at the first dispositional hearing. The use of guardianship at this stage, however, would be unusual because initial dispositions are usually temporary while a child welfare agency works to reunify the family; guardianship is meant to be

196. *See* Hardin, *supra* note 99, at 154-55. Guardians are mentioned in child welfare statutes in three other contexts not relevant to this paper. First, the court can appoint a guardian ad litem to represent a child in a juvenile court proceeding. Second, in most states a court can appoint either a child care agency or an individual as guardian of a child as an interim step towards adoption. Finally, where there has been an allegation of abuse or neglect, guardians are among the people from whom a child can be removed — just like removal from a parent. *Id.*

197. In many states after the court has awarded legal custody of a child to a public or private child caring agency, the agency will place the child with a relative who becomes the foster parent. Foster parents who are not related to the child do not have legal custody over the child and can only act at the direction of the agency, unlike a relative to whom the court has directly given custody. *See id.* at 158-61.

permanent and therefore might be premature at the first dispositional hearing.

For children for whom reunification is not possible, courts can appoint a guardian as a final disposition. Typically, when the child welfare agency determines that reunification is not likely, the agency constructs a new permanency plan for the child. At a subsequent hearing, the court is asked to ratify this plan, which might include any of the following options: a) termination of parental rights in contemplation of adoption; b) placement of custody or guardianship in a relative or other suitable individual, or c) long-term foster care. If the court appointed a guardian for the child at this stage, the guardian would assume the same powers as the guardian in probate and the parent would retain the limited rights to consent to adoption and to visitation along with the obligation to provide support.[198]

2. Custodians

Although many states permit their family or juvenile courts to appoint guardians, they do not list the appointment of a guardian as a dispositional alternative in a child protective proceeding. Other states do not invest their family courts with jurisdiction over guardianship at all. All juvenile courts, however, determine custody questions.

Custody determinations are typically made in disputes between parents, between parents and third parties, and between parents and the state in child protective proceedings. When juvenile courts appoint custodians, the custodians must have some authority to act on behalf of the children in order to care for them, and any power given to a custodian necessarily limits the right of parents to control their child's care.

A custodian, typically, has a duty to care for and protect the child and a responsibility to make ordinary medical and educational decisions. Parents retain the rights to visitation, to consent to adoption, to consent to marriage, to consent to enlistment in the armed forces, and to determine the child's religion. Parents also retain the duty to support.[199]

When a child is placed in foster care, the court transfers legal custody from the parents to the commissioner or director of the local child welfare agency, who is authorized to place the child in a licensed home to receive daily care. Foster parents act as the agents of the head of the child welfare agency, without rights of their own.

If the child welfare agency, after making reasonable efforts to return the child home, determines that reunification is unlikely, it can ask the court to ratify a permanency plan that shifts legal custody from the agency to a relative or other person, in some states, including the people who have been serving as foster parents. In some states, the courts simply give the

198. *See, e.g.*, N.M. STAT. ANN. § 32A-4-3(1) (Michie 1995).

199. *See, e.g.*, ALA. CODE § 12-15-1(23) (1995); GA. CODE ANN. § 15-11-43 (1995); OHIO REV. CODE ANN. § 2151.01.1 (Anderson 1995).

new custodians the same powers that the agency possessed as custodian. In others, courts terminate parental rights and award permanent custody to a relative or other suitable individual with greater powers of control over the child. These permanent custodians generally receive the additional powers to control all medical care and to consent to marriage, enlistment in the armed forces, and adoption.[200]

3. *The Difference Between a Guardian and a Custodian*

The distinction between the powers of a guardian and those of a custodian is a common source of confusion. A guardian has greater power to act on behalf of a child than a custodian. In addition to determining physical custody and control, a guardian can make almost all important decisions for the child. A custodian maintains physical custody and can make only ordinary decisions, subject to the residual rights of the parent and/or a legal guardian.[201]

The power of the foster care agency over a child in foster care provides a good illustration. When a child is first placed in foster care and the agency is working towards reunification, the court generally gives the agency custody subject to the parent's residual rights. Parents, although they have lost physical custody, are consulted prior to authorizing medical treatment, travel or other significant decisions. If parental rights are then terminated, the parents lose their natural guardianship over their children and the court transfers the remaining rights to the child welfare agency, to a guardian, to a permanent custodian, or to someone seeking adoption.

Courts with the power to appoint custodians and guardians may choose between them to permit different levels of parental involvement. A court wanting a parent to retain a significant role in a child's life would award only custody; but a court wanting to divest a parent of most decision-making, would award guardianship.[202]

In states with statutes explicitly defining the powers of permanent custodians, these powers may look very much like those of probate guardians. In these states, a custodian may be as permanent as a guardian. The only distinction may be that courts can only appoint permanent custodians following the termination of parental rights.[203]

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200. *See, e.g.,* GA. CODE ANN. § 15-18-90 (2)(c) (1995).

201. A guardianship of the person, like a custody award, should be enforceable in another state under the Uniform Child Custody Jurisdiction Act. Hardin, *supra* note 99, at 128, 161.

202. *Id.* at 155.

203. For example, in Alabama and Georgia, the probate guardian of the person is virtually identical to the juvenile courts permanent custodian, but to appoint a permanent custodian, the court must first terminate parental rights. *See* ALA. CODE § 26-18-8 (1995); GA. CODE ANN. § 15-11-90 (1995).

C. *Using Guardians or Custodians as Long-Term Caregivers*

The goal of permanency planning is to provide a child with a secure relationship consistent with the child's best interests. Guardianship is certainly a more secure relationship than ordinary custody. Except in states that provide for permanent custody without termination of parental rights, guardianship is a superior relationship. Guardianship relieves the caregiver of the burden of consulting with the parent in order to make significant decisions in the life of the child.

In the view of many child psychologists, the additional strength of the guardian is good for the child, because children need a secure relationship with clear lines of authority to promote healthy emotional development. If the parent is unable to care for the child, the permanent caregiver should be unrestrained. Parents, although retaining the power to visit and the duty to support, should not be able to hold up medical care or educational decisions because they disagree with the caregiver or simply because they cannot be located.

Appointment of an ordinary custodian may leave the caregiver vulnerable to the later appointment of a guardian by another court. A probate court might be asked, for example, to appoint a guardian a year or two after the juvenile court has awarded custody to someone else. Although the probate court should consider the prior order before it acts, it may decide that the child's best interests are served by appointing a guardian to make decisions while leaving custody with the person appointed by the juvenile court or it might to decide to overturn the custody decree. In either case, the permanency plan worked out by the child welfare agency would be altered, possibly without the agency's involvement, subjecting the child to another disruption.

The actual appointment of a guardian or long-term custodian for a child in foster care is more or less difficult, depending on the jurisdiction of the family or juvenile court.[204] The simplest scenario is followed where the juvenile court has the authority to appoint a guardian as a disposition in a child protective proceeding. When there is sufficient evidence that reunification is unlikely and that adoption is inappropriate, the court can simply appoint the guardian at a dispositional review hearing.[205] Similarly, if the court already has the power to appoint a permanent custodian — who has the same powers as the probate guardian, and parental rights do not have to be terminated — the court could do so and the state could create a program of subsidized permanent custodians.

204. Juvenile court jurisdiction to appoint a custodian in Pennsylvania is not clear on the face of the statute. Judges seem to have the power under the general language of Title 42, section 6351(g) of the Pennsylvania Consolidated Statutes. *See* 42 PA. CONS. STAT. ANN. § 6351(g) (1995). Whether judges are currently using this provision to award custody is a matter of practice and unknown to the author of this paper.

205. *See* MD. CODE ANN., CTS. & JUD. PROC. § 3-820 (1995); N.M. STAT. ANN. § 32A-4-31 (Michie 1995).

A second scenario is followed where the juvenile court has jurisdiction to appoint a guardian, but cannot do so in a child protective proceeding. In this scenario, the parent, the proposed guardian, or the child welfare agency could initiate a separate proceeding seeking the appointment of a guardian and then move to have the two proceedings consolidated. The judge could grant the petition for guardianship and award custody and guardianship to the proposed guardian, then dismiss the child protective proceeding. There would be no further court review, the child would have a guardian capable of making important decisions and the parent would retain visitation and support rights and obligations.

Finally, in states where the juvenile court is without any authority over guardianship matters, the child welfare agency, parent, or proposed guardian would have to ask the probate court to appoint a guardian. Because most juvenile courts have exclusive jurisdiction over children who are brought before them on allegations of abuse or neglect, the probate order appointing a guardian would not be effective so long as the juvenile court retained jurisdiction. Accordingly, if the juvenile court agreed that a guardianship was the best plan for the child, a guardianship proceeding could be commenced in the probate court and, once the guardian is approved, the juvenile court could terminate its jurisdiction so that the guardianship order could take effect.[206]

206. Hardin, *supra* note 99, at 158-59.