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The New Permanency

Joshua Gupta-Kagan
Columbia Law School, jgupta-kagan@law.columbia.edu

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JOSH GUPTA-KAGAN*

*Assistant Professor of Law, University of South Carolina School of Law. I would like to thank Avni Gupta-Kagan, Sarah Katz, Colin Miller, and Claire Raj for their thoughtful comments on earlier drafts, and David Kershaw for excellent research assistance.

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

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

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

This article also explores a jurisdiction in which the new permanency is close to reality. The District of Columbia has seen the number of guardianships surpass the number of

adoptions, with more children reaching permanency, and fewer unnecessary terminations. The District thus represents an extreme version of what the new permanency could do nationally—although it also illustrates the problems with overly wide agency discretion regarding kinship placements.

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

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

That binary—reunify or terminate and adopt—has faced significant criticism for overly relying on terminations, creating legal orphans,[1] and unnecessarily excluding permanency options which maintain a legal relationship between parent and child or seek to place children permanently with caretakers who did not want to adopt. Assuming permanency required terminating parental rights, many states terminated many thousands of parents' rights, but failed to find adoptive families for all children whose legal relations with their parents were severed. This created legal orphans, and critics complained that states served these children poorly – states raise these children in foster care, then "emancipate" them when they reach majority, and these children fare poorly on important life outcomes.[2] Critics

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

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

explained how child welfare law subordinated permanency options such as guardianship to adoption and demonstrated empirically that guardianships are just as stable and lasting as adoptions. Simultaneously, child welfare agencies began placing increasing numbers of children with extended family members, many of whom did not want to terminate their relative's parental rights, even if the kinship caregivers would raise them to adulthood. And research demonstrated that kinship care provided foster children with more stable placements and facilitated better permanency outcomes.

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

A milestone in the development of this new permanency was the 2008 Fostering Connections to Success and Increasing Adoptions Act ("Fostering Connections").

http://www.chapinhall.org/sites/default/files/Midwest%20Evaluation_Report_4_10_12.pdf.

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

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

This ideal world has not been realized. Six years after Fostering Connections, the number of guardianships and adoptions remain roughly the same as they were in 2008. Permanency outcomes have not improved, and in many states families have no greater ability to choose the best option for them than before 2008.

This article is the first to explore the reasons for Fostering Connections' failure to spark major practice changes, to explore a jurisdiction in which the expected changes appear to be taking shape, and to propose further legal reforms to achieve Fostering Connections' promise. Fostering Connections failed to have as broad of an impact as possible because of problems built into its structure. It provides federal

funding for guardianship, but only for kinship caregivers—even though non-kin caregivers may be just as willing to choose guardianships. It requires states to rule out adoption before being eligible for a guardianship subsidy, and thus establishes a permanency hierarchy that subordinates guardianship to adoption. This provision reinforces an ideology that permanency requires something legally binding and that adoption is more binding than guardianship because it is legally hard to undo. This argument, however, ignores the empirical reality that adoption and guardianship are equally permanent.

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

Present law has also placed immense authority in child welfare agencies. They determine when they will place children with kin or with strangers, under what conditions they will pay guardianship subsidies, and when they will inform families that guardianship is an option. Court oversight of these decisions is weak. Agencies' wide discretion permits

them to continue practicing under the old permanency—without giving due deference to kinship placement possibilities and continuing to subordinate guardianship as a permanency option.

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

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

This article proposes a set of reforms that would help fully implement the new permanency nationwide, achieving the benefits and avoiding the pitfalls evident in the District of Columbia. First and most obviously, the law should no longer impose a hierarchy among permanency options and should

instead treat adoptions and guardianships as equal. Adoption should not need to be ruled out before guardianship subsidies are provided. When reunification is not an option, all potential permanent caregivers should understand the full continuum of permanency options available to them. The law should provide similar procedural and substantive protections to the parent-child relationship before guardianships as are provided before adoptions. And agencies and policy makers should track adoption and guardianship data more equitably.

If any hierarchy exists, it should reflect the better outcomes that children have in kinship rather than stranger foster care. The law should establish a strong kinship care preference, requiring agencies to place children with kin unless the agency can establish good cause why that would be unsafe or otherwise detrimental to the child. And children and parents should be able to challenge that decision in court early in a case, rather than leaving the issue to nearly unfettered agency discretion. Such reforms could increase the number of children benefitting from kinship care, resolve disputes over kinship care placements early, and avoid the litigation challenges evident in the District.

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

Finally, to facilitate all of the above, a greater emphasis on quality counsel for parents, children, and, once reunification is ruled out, potential permanent caregivers is essential. Quality representation for parents and children can speed permanency by helping parties negotiate permanency

agreements by consent, and by ensuring all options on the permanency continuum are explored. The same is true for counsel for caregivers, who can ensure that all caregivers are aware of all possible permanency outcomes, even if individual caseworkers are loath to share such information with foster families.

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

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

The central importance of permanency has been codified in federal child welfare law since 1980.[4] When

[3] Federal law has long disfavored any plan that would lead to long-term foster care, now known in child welfare jargon as "another planned permanent living arrangement." In fall 2014, Congress banned such long-term foster care plans as a condition of federal funding to states for all children under 16. Preventing Sex Trafficking and Strengthening Families Act, Pub. L. No. 113-183, § 112 (codified at 42 U.S.C. § 675(5)(C)(i) (2011)).

[4] For a brief history of the "permanency planning" movement leading to this codification, *see* Mark Testa, *New Permanency Strategies for Children*

children and parents cannot reunify, the law has long recognized adoption and guardianship (or some other form of custody) as the available permanency options.

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

This continuum is the core of the new permanency, and it should be embraced for multiple reasons. First, research shows that more permanency options will help more children leave temporary foster care to legally permanent families. Second, more choices help families select the legal status that best fits their situation. Different legal statuses can better reflect the variety of relationships that foster children have with their biological parents. When such parents are so harmful that any ongoing relationship will damage the child, their rights should be terminated. But in many cases, children's ongoing bonds should be preserved, counseling

in Foster Care, *in* CHILD WELFARE RESEARCH: ADVANCES FOR PRACTICE AND POLICY 108, 111–12 (Duncan Lindsey & Aron Shlonsky eds., 2008) [hereinafter "Testa, *New Permanency Strategies*"]; Mark Hardin, *Child Protection Cases in a Unified Family Court*, 32 FAM. L.Q. 147, 151–52 (1998).

against terminations of parental rights and in favor of ongoing contact rights. Relatedly, more permanency choices can help limit the overuse of terminations and thus the creation of legal orphans. Third, the permanency continuum can shift power from child welfare agencies to families to determine which legal status is best for them—following the welcome trend in family law of empowering families to order their private relationships.[5]

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

A. The Permanency Continuum

When a foster child cannot reunify with a parent, the permanency discussion is no longer simply a matter of terminating parental rights and finding an adoptive family. Rather, a continuum of permanency options now exists.[6] All options endow a new caretaker with day-to-day control of the child and authority to make decisions for the child, but vary in whether the caretaker is legally considered a parent (as in adoption) or not (as in guardianship). The options vary in what

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

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

relationship, if any, they maintain between children and their biological parents. In some cases, biological parents retain the legal status (but not the authority) of a parent, visitation, or other contact rights, while traditional exclusive adoption severs the entire legal relationship between parent and child, including all contact rights.

This permanency continuum can help shift focus on the proper role of terminations of parental rights. Present law emphasizes terminations as a default path towards permanency, specifically, to traditional, exclusive adoption.[7] For at least three decades, there has been a vigorous debate about the policy wisdom of this focus. Does it create legal orphans? Does it help more children be adopted? Some scholars challenged the notion that terminations should be a widely used tool at all, even if children cannot reunify.[8] Others argued that increasing terminations would likely create more legal orphans.[9] Other scholars argued that present law does not

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

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

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

encourage enough terminations—leaving too many exceptions, and giving unfit biological parents with poor rehabilitation prospects too much time to seek reunification.[10] Embedded in this debate was the assumption that terminations were inextricably linked with permanency.

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

This section will survey the options within the new permanency. It will also explore the evidence establishing the widespread attraction of those options to many families. Moreover, this section will explore the evidence establishing that guardianships provide permanency that is just as secure,

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CHILD. & YOUTH SERVS. REV. 965, 979 (2003); Richard P. Barth et al., *The State Construction of Families: Foster Care, Termination of Parental Rights, and Adoption: From Anticipation to Evidence: Research on the Adoption of Safe Families Act*, 12 VA. J. SOC. POL'Y & L. 371, 397 (2005).

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

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

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

1. *Permanency Without Termination: Expansion of Guardianship*

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

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

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

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

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

[15] Pub. L. 96-272, § 101(a)(1) (1980) (codified at 42 U.S.C. § 675(5)(B)

Despite this history, guardianships were infrequently used until the 1990s, especially because neither states nor the federal government offered subsidies to guardians. In contrast, adoptive parents could obtain subsidies, creating strong financial incentives to pursue adoption and not guardianship.[16] That funding difference flowed from a policy preference (discussed in Part II) for adoption as somehow more permanent than, or otherwise preferable to, guardianship.[17]

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

(2011)), requiring states to regularly review cases to determine when "the child may be returned to … the home or placed for adoption or legal guardianship"); Pub. L. 105-89, §§ 101(b) & 302 (1997) (defining guardianship and listing guardianship as a possible permanency plan).

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

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

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

[19] *Infra* Part I.B.

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

Fostering Connections, which provided federal support to states offering kinship guardianship subsidies.[21]

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

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

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

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

[23] *Id.* at 6.

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

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

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

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LEGISLATURE ON THE KINSHIP GUARDIANSHIP ASSISTANCE PAYMENT PROGRAM, 5 (2006).

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

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

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

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

multiple caregivers is not only possible, but healthy and normal.[29]

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

Procedurally, the absence of termination plays out in two ways. First, avoiding termination may induce biological parents to consent to a guardianship petition, and thus lead to a faster and less contentious legal process. This both leads to faster permanency and, more importantly, avoids the harm that can come from ongoing litigation—both anxiety imposed on the child and family and tensions between adults, all of whom may maintain a relationship with the children.[32] Second, the lack of a termination has led many states to provide fewer

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

[30] *See* U.S. DEP'T OF HEALTH AND HUMAN SERVS., ADMIN. FOR CHILDREN AND FAMILIES, ADMIN. ON CHILDREN, YOUTH AND FAMILIES, CHILDREN'S BUREAU, TRENDS IN FOSTER CARE AND ADOPTION (FFY 2002-FFY 2012) 1 (2013) [hereinafter TRENDS IN FOSTER CARE AND ADOPTION], *available at* http://www.acf.hhs.gov/sites/default/files/cb/trends_fostercare_adoption2012.pdf (reporting total numbers of terminations and adoptions of foster children for the previous decade).

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

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

procedural protections for parents who do not consent to a guardianship than they provide to parents in termination and adoption cases.[33]

Guardianship also helps families select the best option for their situation. The empirical record shows that offering guardianship causes a substitution effect—some families that would have adopted foster children if adoption were the only option instead choose guardianship. The longest study to date followed Illinois families for ten years and showed for nearly 15 percent of families, offering guardianship led them to choose that option over adoption. In the control group—in which a foster or kinship family could only choose adoption—74.9 percent of children were adopted.[34] But in the experimental group—in which families could choose adoption or guardianship—only 60.2 percent of children were adopted.[35] A controlled experiment in Tennessee revealed a larger impact, with 24.6 percent fewer adoptions in the group of families for whom guardianship was an option.[36]

Such a substitution effect ought to create no concerns, given guardianship's record both in helping more children

[33] *Infra* Part II.D.

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

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

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

leave foster care to permanent families, and in creating families that are just as permanent as adoption. It suggests that not offering guardianship pushes families into a legal status that they view as less desirable than guardianship.

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

Historically, guardianship faced concerns that it would prove less permanent for children because, unlike adoption, it was subject to modification motions.[39] "Adoption hawks" insisted on a clear rule-out of adoption before even discussing guardianship with families, while "guardianship doves" objected to any such hierarchy.[40] The empirical record unequivocally rejects this concern; one scholar concludes there is now "overwhelming agreement from child-welfare experts that legal guardianship is a promising permanency outcome."[41] In a rigorous study with a large sample size and

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

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

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

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

[41] Sarah Katz, *The Value of Permanency: State Implementation of Legal*

randomized control and experimental groups, Mark Testa, a leading social work scholar of guardianship, found that only 2.2 percent of 6,820 children living with guardians had a placement disruption or otherwise had their guardianship terminated, and some of these children left their guardians to reunify with their parents.[42] Offering guardianship to families does not affect the likelihood that a child's placement with a family will disrupt either while the child is formally a foster child or after a court enters a guardianship or adoption order.[43] Matching families in the experimental group who chose guardianship to similar families in the control group who pursued adoption, Testa found "no evidence of any adverse impact on the long-term stability of the living arrangement" from guardianship.[44] A California study reported slightly larger, but still small levels of guardianship disruptions—nothing to undermine the "substantially greater" permanency rates that guardianship catalyzed, as compared with offering only adoption as a permanency option.[45] Summarizing all available data in 2011, the federal government wrote that children in guardianships have living arrangements just as stable as in other legal statuses, and that no significant

Guardianship Under the Adoption and Safe Families Act of 1997, 2013 MICH. ST. L. REV. 1079, 1090 (2013).

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

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

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

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

differences existed in the number of children who re-entered foster care.[46]

Pursuing adoptions in place of guardianships is no guarantor of stability. Like guardianships, adoptions are quite stable if achieved—one study found only 3.3 percent of all adopted children to have spent any time in foster care in the four years since a court finalized their adoption.[47] But adoption disruptions—in which a child leaves a pre-adoptive home before finalization—occur with more frequency.[48] Different studies have quantified disruption rates differently, with most ranging from 9 to 15 percent.[49] Disruptions of pre-adoptive placements are as high as 25 percent in at least one jurisdiction.[50] Reviewing the literature, Trudy Festinger notes that disruption rates have increased in recent decades as the number of adoptions—especially those of older children and children with special needs—has increased;[51] and that the disruption rate for older children is "roughly 25 percent."[52] These disruption statistics should only suggest the obvious point that it is difficult for foster care agencies to place children with greater needs permanently, and that working towards an adoption—especially an adoption with a new family—is no panacea for many foster youth.

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

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

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

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

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

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

[52] *Id.* at 457.

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

a. Kinship and Non-kinship Guardianship

Guardianship is an option for both kinship and non-kinship foster families, but is most frequently discussed as a permanency option appropriate for kinship placements. Fostering Connections codified this kinship focus by limiting federally supported guardianship subsidies to kin.[55] Federal law permits an exception to the rule requiring termination of parental rights motions after 15 months in foster care for relative placements only—implying that other placements are not good candidates for this exception, even if such placements are eligible for guardianships and, thus, do not require terminations.[56] And the academic and policy discourse has generally framed guardianship as a permanency option for kin.[57] There is a real connection between kinship placements

[53] *Id.* at 20.
[54] *Id.*
[55] 42 U.S.C. § 673(d). Under administrative guidance from the federal Children's Bureau, states have wide discretion to define the term "relative" broadly, and to include "fictive kin" such as godparents, family friends, former step-parents (or step-grandparents), and the like. U.S. DEP'T OF HEALTH AND HUMAN SERVS., ADMIN. FOR CHILDREN AND FAMILIES, CHILDREN'S BUREAU, ACYF-CB-PI-10-11, PROGRAM INSTRUCTION 14 (2010) [hereinafter PROGRAM INSTRUCTION 10-11], *available at* http://www.acf.hhs.gov/sites/default/files/cb/pi1011.pdf. Still, even such a broad definition would likely exclude a foster parent with whom the child and family have no relationship prior to the child's placement.
[56] 42 U.S.C § 675(E)(i).
[57] Mark Testa, one of the leading scholars of and policy advocates for

and permanency, for reasons explored throughout this article.[58] Historically, subsidized guardianship developed in part as a response to large numbers of foster children in kinship care.[59] And children placed with kin have more stable placements and are more likely to leave foster care to some kind of legally permanent status.[60]

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

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

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

[59] *Infra* Part I.B.

[60] *Id.*

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

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

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

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

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

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

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

(and lose) a termination petition, consented to the foster parents' guardianship petition. My client soon had legal permanency that respected both his ongoing relationship with his mother and other biological family members, and his guardians' identity.

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

More open attitudes to non-kinship guardianship would likely find a receptive audience, as the empirical record suggests non-kinship foster parents are likely to be as attracted to guardianship as kinship foster parents. In Illinois—which offers subsidized guardianship to kinship and non-kinship foster parents, more kinship foster parents obtained guardianship than non-kin. Yet when studies controlled for differences between children placed with kinship and non-kinship foster parents—such as age, race, disability, etc.—the differences shrank. Kinship foster parents were still more

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

interested in guardianship than non-kinship foster parents, but the difference was not statistically significant.[67] Interest levels in guardianship need not be equal between kin and non-kin to make the point—significant numbers of non-kin foster parents are interested in guardianship, and that permanency option is an important element of the new permanency.

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

2. *A Permanency Continuum Even Within Adoption*

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

Historically adoption was viewed as the statutory formation of families—especially infertile couples adopting infants. The law was structured to make adoptive families as similar as possible to "natural" families—going so far as to require the legal fiction of printing new birth certificates

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

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

claiming that adoptive children were born to the adoptive parents, and writing the birth parents out of the child's legal history, relegating them to sealed court or agency files.[69] In the child welfare setting, this view of adoption meant adoptions and terminations of parental rights were inextricably linked, and no ongoing role for the biological parents was envisioned.

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

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

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

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

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

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

Substantively, post-adoption contact agreements maintain the link between terminations and adoptions; the biological parent's rights are terminated (with the exception of whatever contact rights are agreed to) and that parent ceases to be a legal parent. But procedurally, post-adoption contact agreements separate terminations and adoptions. Such agreements require the involvement of biological parents and some discussion between them and adoptive parents about the details of post-adoption contact. Such involvement is difficult if not impossible if the state has terminated parental rights

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

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

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

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

before the adoptive parents are identified. Earlier terminations would stop parent-child visits and remove biological parents from the court case, and make any later post-adoption contact agreement highly unlikely. Accordingly, the possibility of such agreements suggests that such early terminations are appropriate when such agreements would not serve children's interests.

California has gone further, enacting a statute in 2013 permitting non-exclusive adoption; if the adoptive and biological parents agree, then new parents can adopt a child without terminating the legal relationship between the child and the biological parents.[76] Non-exclusive adoption has the potential to provide an entirely new permanency option that obviates the need for terminations of parental rights, and which may serve important interests of some foster children.[77]

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

In the child welfare context, such negotiations can occur along at least two planes. First, in complicated cases in

[76] S.B. 274, § 8 (2013) (codified at CALIF. FAM. CODE § 8617), *available at* http://www.leginfo.ca.gov/cgi-bin/postquery?bill_number=sb_274&sess=CUR&house=B&author=leno.

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

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

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

This is not to suggest that such negotiation always serves children's interests; as with any negotiation, the parties must determine whether the zone of possible agreements are acceptable. In some cases, parents pose such a severe ongoing physical or emotional threat to children that no ongoing relationship is appropriate; in such cases, termination and adoption proceedings are fully appropriate. At the other end of the spectrum, in some cases, parents have rehabilitated or are likely to soon rehabilitate and maintain a strong bond with their children; in such cases motions to restore custody and legal efforts to fight any efforts towards permanency with a non-parent remain appropriate. At both extremes, litigation is preferable to any negotiated adoption with contact.

B. Expansion and Establishment of Kinship Care

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

The percentage of foster children placed with kin increased from 18 to 31% between 1986 and 1990, and did not change much since then.[80] The timing is important to understand this growth; foster care rolls expanded in the late 1980s as child protection agencies removed more children in the wake of the crack-cocaine epidemic. Facing the "limited capacity of the child welfare system to recruit an adequate supply of licensable foster homes, particularly in inner city neighborhoods," from where disproportionate numbers of children were removed, these agencies turned to extended families to provide foster homes.[81] This growth in kinship

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

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

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

placements triggered the policy question of how to achieve permanency for the growing number of children in kinship foster care, especially those children who could not reunify and whose kin did not wish to terminate parental rights. The result was an increased focus on guardianship as a permanency option,[82] and eventually an increase in children who left foster care to guardianship or some other permanency option with kin.[83]

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

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

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[82] *Id.* at 411,

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

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

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

[86] *Id.* at 250.

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

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

A key element in the new permanency is a recognition that historical fears about kinship care and permanency are unfounded, and that, if anything, kinship care correlates with

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

[88] *E.g.*, Eun Koh, *Permanency Outcomes of Children in Kinship and Non-kinship Foster Care: Testing the External Validity of Kinship Effects*, 32 CHILDREN & YOUTH SERVS. REV. 389, 390 (2010) (collecting studies); *id.* at 393 & 396 (reporting findings in his five-state study with matched samples); Koh & Testa, *supra* note 87, at 112 (reporting results from study of matched and unmatched samples). Such stability is evident in both aggregate numbers and in comparing matched samples of children in kinship care to children in non-kinship care. Koh & Testa, *supra* note 87, at 111–12, 114; *see also* Marc A. Winokur, et al. *Matched Comparison of Children in Kinship Care and Foster Care on Child Welfare Outcomes*, 89 FAMILIES IN SOCIETY 338, 341–42 (2008).

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

improved permanency outcomes. Positive results should be expected because kinship caregivers are highly committed to taking care of children, as evidenced in the higher rates of placement stability, and children are more likely to feel that they belong with kinship caregivers. Recent studies have identified such results. These studies have tried to rectify problems with earlier studies, and account for the development of permanency options other than adoption. Studies that have rigorously controlled for differences between kinship and non-kinship placements "disconfirm the previous perception that kinship foster homes are not as effective as non-kinship foster homes in promoting children's legal permanence."[90] For instance, in a review of five states' data, Eun Koh found three states in which kinship care led to stronger permanency outcomes, two states in which it had no statistically significant effect, and no states in which kinship care had negative outcomes.[91] Another study of Illinois foster care cases found that children placed in non-kinship foster care were more likely to exit to adoption or guardianship within the first three years of foster care, but that kinship foster care led to better permanency rates over a longer period of time.[92] Permanency law—and, specifically, the creation of the permanency continuum—has shaped these more positive results. Before guardianship was available, kinship foster care correlated with better permanency outcomes, a result that changed when guardianship became an option.[93] That positive statistically significant results are seen in some states but not others

[90] Koh *supra* note 88, at 395.
[91] *Id.*
[92] Koh & Testa, *supra* note 87, at 109. Another Illinois study found no statistical significant between adoption and reunification rates in kinship and non-kinship foster families. Zinn, *supra* note 89, at 208–09. Coupled with the greater likelihood of kin to seek guardianship, the Illinois finding suggests that kinship placements on the whole positively correlate with permanency outcomes.
[93] Koh & Testa, *supra* note 87, at 106, 112, 114.

merely reflects that significant variation in policies and practices continue to exist across states.[94]

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

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

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

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

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

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

Yet national data shows no significant changes—the adoption hierarchy remains in effect, and the permanency increases found in states that offered guardianship through federal waivers before Fostering Connections do not appear to have been replicated nationally. Guardianships accounted for 7 percent of all exits from foster care in fiscal year 2008, and 7 percent of all exits in fiscal year 2012.[98] In the same years, the percentage of exits from adoptions increased slightly, from 19 percent to 22 percent.[99] Overall permanency rates remain constant; the percentage of foster care exits to "emancipation" (meaning children have grown up in foster care and never left to a permanent family) remained steady between 2008 and 2012.[100] The percentage of foster children with permanency

[98] *Compare* U.S. DEP'T OF HEALTH AND HUMAN SERVS., ADMIN. FOR CHILDREN AND FAMILIES, ADMIN. ON CHILDREN, YOUTH AND FAMILIES, CHILDREN'S BUREAU, THE AFCARS REPORT: PRELIMINARY FY 2008 ESTIMATES AS OF OCTOBER 2009 4 (2009) (hereinafter AFCARS FY 2008), *and* U.S. DEP'T OF HEALTH AND HUMAN SERVS., ADMIN. FOR CHILDREN AND FAMILIES, ADMIN. ON CHILDREN, YOUTH AND FAMILIES, CHILDREN'S BUREAU, THE AFCARS REPORT: PRELIMINARY FY 2012 ESTIMATES AS OF NOVEMBER 2013 3 (2013) (hereinafter AFCARS FY 2012). The federal government also reports exits from foster care to "living with other relatives," and this category accounted for 8 percent of all exits in both years. *Id.* AFCARS reports for these and intervening years are available at http://www.acf.hhs.gov/programs/cb/research-data-technology/statistics-research/afcars.

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

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

plans of guardianship and adoption also appear unchanged. In 2008, 24 percent of all foster children had a permanency plan of adoption while 4 percent had a plan of guardianship, and the federal government reported identical figures for 2012.[101] So, despite a big step toward funding equity, the permanency hierarchy has remained in practice.

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

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

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

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

[103] *Id.*

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

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

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

course of action that continues to subordinate guardianship and elevate adoption.

A. Legal Structure Creates a Hierarchy

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

This structure dates back to the Adoption Assistance and Child Welfare Act of 1980,[106] a statute that requires states to follow a list of requirements in exchange for federal child welfare funding.[107] This federal funding law provides most of the core requirements of modern child welfare practice. When

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

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

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

children remain in foster care for a certain amount of time, state family courts must hold hearings to determine if reunification is likely and, if not, how the child might achieve permanency. The 1980 legislation required states to hold a "dispositional hearing" for all foster children who did not reunify quickly, with the purpose of "determin[ing] the future status of the child," defined as whether "the child should be return[ed] to the parent," "should be placed for adoption," or should remain in foster care.[108] Although the 1980 law recognized guardianship,[109] it framed permanency decisions as binary—reunification or adoption—and that binary has shaped child welfare practice ever since.[110] This hierarchy reflected the emergence in the 1970s of the "permanency planning" movement, which focused on reunification or adoption. Despite some academics urging inclusion of guardianship, and its inclusion in at least one state's federally funded child welfare demonstration, guardianship was nowhere near the center of the debate.[111] And Congress placed its money accordingly. As its title suggests, the 1980 Adoption Assistance and Child Welfare Act provided federal funds to reimburse states for subsidies paid to adoptive parents,[112] while Congress established no such funding for guardianships.

The Adoption and Safe Families Act of 1997[113] (ASFA) reinforced the primacy of adoption and termination of parental rights when children cannot reunify. First, ASFA required states to file termination of parental rights cases and

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

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

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

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

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

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

recruit adoptive families whenever children have been in foster care for 15 of the most recent 22 months.[114] ASFA created an exception for when states had placed foster children in homes with a relative[115]—implying that guardianship was only appropriate for relatives.[116] And nothing in ASFA (or in the pre-existing federal law) provided any preference for kinship placements generally, so there was no push to place children with relatives in the first instance. If child welfare agencies placed children with non-kinship foster homes, then the termination of parental rights exception would not apply—even if viable kinship placements existed. Second, ASFA expanded adoption subsidies, creating new adoption incentive payments that would flow directly to state governments that increased the number of foster child adoptions.[117] ASFA continued to provide no funds for guardianship subsidies.[118] Still, ASFA did solidify guardianship's place as a permanency option, listing it as a possible "permanency plan" that courts could set,[119] and defining guardianship to mean any legal status that grants physical and legal custody to an adult, other than a parent, "which is intended to be permanent."[120]

Policymakers expected that ASFA's push for speedier permanency hearings and termination cases would lead to more adoptions; foster children would be "freed" for adoption, and child welfare agencies could "tap into the presumably

[114] Pub. L. 105-89, § 103(a) (codified at 42 U.S.C. § 675(5)(E) (2000)).
[115] *Id.* (codified at 42 U.S.C. § 675(5)(E)(i) (2000)).
[116] Other exceptions exist, but are used rarely – if the state determines some "compelling reason" exist to not terminate parental rights, or if the state acknowledges that it has not made reasonable efforts to facilitate reunification. 42 U.S.C. § 675(5)(E)(i)&(ii) (2000).
[117] Pub. L. 105-89, § 201 (codified at 42 U.S.C. § 673b (2000)).
[118] ASFA was enacted in 1997, before studies demonstrated guardianship was as lasting as adoption. The prevailing view of the federal government was that guardianship was less permanent than and thus inferior to adoption. *Supra* note 39 and accompanying text.
[119] Pub. L. 105-89, § 302 (codified at 42 U.S.C. § 475(5)(C) (2000)).
[120] Pub. L. 105-89, § 101(b) (codified at 42 U.S.C. § 675(7) (2000)).

large pool of middle-class families who were able and willing to adopt minority children from foster care but were previously discouraged from doing so."[121] A law enacted in 1994, the Multi-Ethnic Placement Act, would facilitate transracial adoptions.[122]

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

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

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

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

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

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

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

[126] *Id.*

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

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

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

[129] *Infra* note200 and accompanying text.

[130] Pub. L. 110-351, §§ 401-403.

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

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

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

B. A "Binding" Ideology

A subtle ideological shift in judges' and agencies' understanding of permanency also contributes to adoption's continued primacy. Leading up to ASFA's passage, the federal government convened a work group to issue "Guidelines for Public Policy and State Legislation Governing Permanency for Children." The resulting guidelines, issued in 1999, defined permanency as a physical and legal arrangement that gives children a good home in which to grow up, lasting relationships with nurturing caregivers, and "stability and continuity of caregivers" in a home "that is legally secure."[133] The next year, the National Council of Juvenile and Family Court Judges published their own "Adoption and Permanency Guidelines," and made an important change. Stable caregivers and a "legally secure" home were not enough; rather, permanency, according to the Council, requires a "legal relationship that is *binding* on the adults awarded care, custody and control of the child."[134] The Guidelines continue

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

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

by recommending that judges ask a series of questions before approving a permanency plan of guardianship; these questions differ from those recommended before approving a plan of adoption, and underscore the concern about a less binding legal status. The questions include "What is the plan to ensure that this will be a permanent home for the child?" even though the empirical research reflect that guardianship is just as permanent as adoption.[135]

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

The emphasis on legally binding commitments has never been fully justified, especially in light of the strong empirical record establishing that guardianship creates real ties that bind child and caregiver just as long and just as effectively as adoption. The Council's Guidelines offer no clear explanation for the "binding" emphasis. Later documents

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[135] *Id.* at 21.

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

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

from the Council repeat the "binding" definition, but without any clear ideology.[138] And it remains controversial, with many legal and mental health commentators defining permanency by children's "feelings of belongingness" in an "enduring relationship" rather than legal status.[139]

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

C. Adoption's Ideological and Cultural Primacy

Adoption's primacy over guardianship is endemic through family court culture. Family courts nationwide celebrate "Adoption Day" every fall.[140] The day is specifically "adoption day"—not "guardianship day" or "permanency

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

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

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

day"—underscoring adoption's primacy in public view.[141] Judges and court officials publicly describe the value and importance of adoption, and finalize foster care adoptions in front of a pool of local press and politicians.[142] Gauzy media coverage follows.[143] This coverage presents adoption as providing a positive "forever home" for earnest and appealing children, and certainly better than the temporary status of foster care.[144] Biological families—and any remaining connections or visitation rights these children may have with them—are not discussed.[145] The public image of permanency is thus presented simplistically—a good family provides a good home to a good child and, implicitly, a bad family and the bad foster care system is left behind.[146] And it is presented

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

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

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

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

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

[146] *See* Sacha Coupet, *Swimming Upstream Against the Great Adoption Tide: Making the Case for "*Im*permanence,"* 34 CAP. U. L. REV. 405, 410

in such a way that excludes the core reason that guardianships and open adoptions have become prominent—the ongoing connections that many foster children have with biological families.

This simplistic image goes deeper than the media, and likely explains why many agencies and caseworkers do not even inform many families about the possibility of guardianship,[147] a phenomenon that helps explain why the 2008 Fostering Connections Act has not led to increases in the number of guardianships nationally.[148] Cynthia Godsoe concludes that many system actors harbor deep-seated biases in favor of simpler "stock stories" about good adoptive families taking the place of bad biological families.[149] Many case workers (not to mention lawyers and judges) continue to see guardianship "as a narrow exception for a select group of families who do not fit into the preferred categories of biological or adoptive families."[150] The strength of this stock story leads many to disbelieve the data establishing that guardianship is just as good for children as adoption.[151]

This stock story's continued hierarchy of adoption over guardianship is reinforced in multiple ways throughout the child welfare profession. Federal agencies charged with reporting national child welfare statistics emphasize adoptions over guardianship. The federal Children's Bureau—a sub-division of the Department of Health and Human Services—

(2005) ("[C]hild welfare policy . . . continues to laud adoption as the singularly ideal 'happy ending' in the sad tale of foster care."); Marsha Garrison, *Parents' Rights vs. Children's Interest: The Case of the Foster Child*, 22 N.Y.U. REV. L. & SOC. CHANGE 371, 386–87 (1996) (describing adoption's emotional appeal).

[147] *Infra* Part II.B.

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

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

[150] *Id.* at 146.

[151] *Id.* at 147.

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

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

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

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

D. Procedural Differences Reinforce the Hierarchy

As a corollary to adoption's present place at the top of the permanency hierarchy, adoption triggers the most stringent procedural protections afforded in child welfare. Terminations of parental rights—a prerequisite to an adoption—must be

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

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

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

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

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

proven by clear and convincing evidence.[162] The U.S. Supreme Court has described terminations and adoptions as "a unique kind of deprivation"[163] because they are so permanent, and the importance of parental rights so great.[164] States typically have detailed termination and adoption statutory schemes to require proof of ongoing parental unfitness that is unlikely to be remedied, and that the termination is in the child's best interests.[165]

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

[162] Santosky v. Kramer, 455 U.S. 745 (1982).
[163] Lassiter v. Dep't of Soc. Servs., 452 U.S. 18, 27 (1981).
[164] *Santosky*, 455 U.S. at 758-59.
[165] *E.g.*, MO. REV. STAT. § 211.447.5&.7 (West 2014).
[166] *See* Katz, *supra* note 41, at 1098–1102 (surveying state statutes and finding only four guardianship statutes that equate guardianship standards with termination standards).
[167] *E.g.*, L.L. v. Colorado, 10 P.3d 1271 (Colo. en banc 2000); D.C. CODE § 16-2388(f) (2001); WASH. REV. CODE. § 13.36.040(b) (2010). Other states have set higher standards of proof. *E.g.*, W. VA. CODE § 44-10-3(f) (2013). *See* Katz, *supra* note 41, at 1097–98 (collecting state statutes).
[168] *In re* A.G., 900 A.2d 677, 680–82 (2006).

termination of parental rights and adoption justified fewer procedural protections.[169]

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

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

[169] *Id.* at 681.
[170] Testa & Miller, *supra* note 14, at 415.
[171] *Supra* note 66 and accompanying text.
[172] *Infra* Part IV.B.
[173] Hardin, *supra* note 4, at 182–83. For example, Missouri guardianship cases are handled through its probate code, MO. REV. STAT. § 475.030 (West 2012), not its juvenile code. MO. REV. STAT. § 211.011 *et seq.* (West 2012). Family court jurisdiction does not include probate actions. MO. REV. STAT. § 487.080 (West 2012). In such states, guardianship cases must be heard in the probate court, or at least referred from the probate court for consolidation with a family court case—a process which takes time and unnecessarily delays permanency. Other states assign guardianship cases to family courts, but direct those courts to apply probate court procedures. New York is an example. N.Y. FAM. CT. ACT. § 661(c) & (a) (McKinney 2011). Probate court standards are less rigorous than termination of parental rights statutes. *Compare* N.Y. SURR. CT. PROC. ACT §§ 1706-1707 (McKinney 2011) *and* N.Y. FAM. CT. ACT §§ 614, 622, 623 & 625 (McKinney 2011). Exceptions to this statement apply in states with statutes specifically governing guardianship of foster children. *E.g.*, D.C. CODE

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

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

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

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

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

§ 16-2381 *et seq.* (2001); N.J. STAT. ANN. 3b:12a-1 *et seq.* (2002). Probate code provisions tend to be far sparser in terms of the substantive findings required and procedures to be followed. *Compare, e.g.*, MO. REV. STAT. § 475.030 (West 2012) *and* § 211.447 (West 2012).

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

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

The weakness of laws regarding kinship foster care is evident in comparing federal child welfare law with the Indian Child Welfare Act (ICWA), which governs child welfare cases

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

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

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

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

involving Indian children. ICWA creates a preference absent "good cause to the contrary" for foster care, pre-adoptive, and adoptive placements with any member of the child's extended family.[179] None of the various kinship placement provisions applicable in non-ICWA cases creates such a clear legal preference for kinship placements. At most, federal financing law requires states to "consider" giving priority to kinship placements.[180] Rather than require anything more than consideration, child welfare law instead concentrates power in child welfare agencies that have discretion to make a kinship placement if they so choose, but no obligation to use that discretion or justify a decision to not do so.

As a result, significant variation exists when it comes to licensing kinship foster homes and placing children in such homes.[181] Even six years after Congress granted states greater flexibility to license kinship foster homes, state agencies have reported unfamiliarity with their authority.[182] Even among states that understand their flexibility apply it quite

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[179] 25 U.S.C. §§ 1915(a) (adoptive placement preference) & 1915(b)(i) (foster and preadoptive placement preference). ICWA also includes a preference for a non-kinship Indian foster home over a non-kinship non-Indian foster home. 25 U.S.C. § 1915(b)(ii)-(iii). My focus is only on the kinship placement preference, and not on those broader tribal preferences. ICWA, enacted in 1978, Pub. L. 95-608, (Nov. 8, 1978), does not include language regarding guardianship, but applying a preference for kinship guardianship would be consistent with its other kinship preference provisions. At least one state requires that a *judge* (not an agency) place a child with kin unless the judge finds such a placement contrary to the child's welfare. LA. CHILD CODE ANN. art. 683(B). That statute is the exception that proves the rule for reasons discussed throughout this subsection.

[180] 42 U.S.C. § 671(a)(19) (2010).

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

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

differently—some states might waive certain licensing requirements that others would not. The federal government reported that in 2009, 15 states prohibited licensing waivers entirely and 11 states lacked "the infrastructure" to report accurate numbers of licensing waivers—suggesting the absence of consistently applied policies in those states. Of the remaining states, the number of waivers granted over a year varied from 1 to 274.[183]

In addition to these policy variations, significant differences exist in the actual number of children that agencies place with kin in each state. In 2009, for instance, the percentage of foster children who states place with kin varied from a low of 2 percent in Alabama to 46 percent in Hawaii.[184] Many states also choose to place children with kin but without granting the kin a foster care license.[185] The percentage of foster children placed in such unlicensed homes ranged from 0 in several states to 33 percent in Iowa.[186] The decision in many states to use unlicensed kinship care limits permanency options. If children are to be eligible for federally reimbursed guardianship subsidies, Fostering Connections requires them to live in homes receiving foster care maintenance payments,[187] which in turn requires placement in a licensed "foster family home."[188] States that elect to place children in unlicensed kinship homes, thus, effectively choose to exclude

[183] CHILDREN'S BUREAU, REPORT TO CONGRESS, *supra* note 80, at 5.
[184] *Id.* at 6–7.
[185] PLACEMENT OF CHILDREN WITH RELATIVES, *supra* note 174, at 3.
[186] *Id.* Several states did not report the number children in kinship placements as a percentage of total placements, and instead reported "the percentages of children in licensed and unlicensed relative care as a proportion of children in relative care only." *Id.* at 6 n.2. Significant variation exists among these states as well—the ratio of licensed to unlicensed kinship care ranged from a high of 87:13 in Idaho to 4:96 in Florida.
[187] 42 U.S.C. § 673(d)(3)(A)(i)(II) (2011).
[188] 42 U.S.C. § 672(a)(2)(C) (2010). The federal statute defines "foster family home" as a licensed foster home. 42 U.S.C. § 672(c) (2010).

those families from the benefits offered by Fostering Connections.

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

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

[189] 42 U.S.C. § 672(a)(2)(B) (2010).
[190] 42 U.S.C. § 671(a)(15)(B)-(C) (2010).
[191] 45 C.F.R. § 1356.21(b) (2012).
[192] *E.g.*, D.C. CODE § 16-2320(a)(3)(C) (2001). The District's foster care agency reports very few children placed through this statute—only 2 of 809 children who entered foster care in FY 2010, the last year in which the agency reported this data. 2010 D.C. GOV'T CHILD AND FAMILY SERVS. AGENCY ANN. PUB. REP. at 23 (2011) [hereinafter . CFSA, 2010 ANNUAL REPORT].
[193] Hardin, *supra* note 4, at 156.

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

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

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

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

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

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

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

Once it is time to discuss permanency options with a foster parent (kinship or not), agencies and caseworkers then have discretion to push families towards one permanency option over another, typically adoption over guardianship, and even to conceal the availability of guardianship from some families. Here too, significant variation exists from one agency to another and even from one caseworker to another—with the result that children and caregivers lack uniform access to guardianship as a permanency option. This was true before Fostering Connections,[198] and remains true today. States differ in how difficult they make it to rule out adoption before considering guardianship, whether children of all ages are eligible for guardianship, and whether foster parents are eligible for guardianship subsidies.[199] States differ in the subsidies offered to guardians; some offer the same subsidies to adoptive parents and to guardians while others offer significantly more to adoptive parents, creating a financial incentive for foster parents to choose adoption over guardianship.[200]

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

[198] Patten, *supra* note 20, at 260.
[199] *Making It Work*, *supra* note 11, at 13–15; *Synthesis of Findings*, *supra* note 25, at 4, 21–22.
[200] Godsoe, *supra* note 148, at 145.
[201] *Synthesis of Findings*, *supra* note 25, at 22–23.

agencies train staff, they communicat their ideological views towards adoption and guardianship.[202]

The bottom line, according to the federal government, is that "[r]egardless of a State's official policy, caseworkers exercise a fair amount of control over the rule-out process," specifically whether to tell foster families about guardianship and whether and how to involve them in ruling out adoption.[203] Surveys of caseworkers in jurisdictions offering subsidized guardianship found that 30 to 56 percent of caseworkers disagree with the statement "guardianship is just as permanent as adoption."[204] Caseworkers choose not to even inform 267 of the 1197 eligible families that subsidized guardianship was an option, effectively pushing the families toward adoption.[205] Surveys of some relative caregivers reflect that many were not informed by their caseworker that financial subsidies were even available with guardianship.[206] Many others said that they were not involved in permanency discussions with their caseworker at all.[207] Unsurprisingly, an agency's or caseworker's decision to tell caregivers that guardianship was an option had a significant impact on whether those caregivers sought guardianship or adoption. For instance, nearly three times as many Tennessee caregivers who were not informed about guardianship sought adoption than those who did.[208]

Even when caseworkers describe both adoption and guardianship to foster parents, that does not mean that caseworkers explain the options fully, without pressure (subtle or otherwise) to choose adoption over guardianship. Eliza

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

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

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

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

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

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

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

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

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

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

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

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

[217] Children from impoverished families endure significantly more abuse and neglect than their richer counterparts. U.S. DEP'T OF HEALTH & HUMANS SERVS., ADMIN. FOR CHILDREN & FAMILIES, OFFICE OF PLANNING, RES., AND EVALUATION, FOURTH NATIONAL INCIDENCE STUDY

(especially kinship families) have low enough income that the government provides foster care subsidies to enable them to take care of the children, and adoption and guardianship subsidies to incentivize permanency.

When determining whether adoption or guardianship is most appropriate, families—including the child's caregiver, the child's parents, and (as is age appropriate) the child—deserve the same respect to choose the arrangement that best suits their needs as middle class families have. If we are going to trust someone to raise a child in state custody through adulthood and make all the decisions inherent in raising a child, surely we should trust that person enough to at least have a strong voice regarding what legal status would be best for the child. Concentrating authority in child protection agencies undermine this principle.

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

Adoption does not need to continue subordinating guardianship. Full implementation of the new permanency would likely lead to significantly different permanency outcomes, with fewer children growing up in foster care, more guardianships, and likely fewer adoptions. These results should be embraced because they would lead to more children leaving foster care to permanent homes, and provide more flexible options to best reflect each child's situation, and in particular, their ongoing relationship (if one exists) with biological parents and other family members. The empirical record should silence any concerns that expanded guardianship would somehow lead to less safe or less lasting options. Yet, as discussed in Part II, the national child welfare system still has not fully implemented the new permanency,

OF CHILD ABUSE AND NEGLECT (NIS-4) REPORT TO CONGRESS 5-11–5-12 (2010).

and Congress's significant step towards the new permanency in 2008 seems to have no discernible effect across the country.

The District of Columbia provides a counter-example to that national trend, and illustrates how permanency might look if other jurisdictions fully embraced the new permanency. The District offers a wide range of permanency options, including subsidized kinship and (since 2010) non-kinship guardianship and post-adoption contact agreements. The District has a long-standing administrative structure to facilitate kinship placements, and the vast majority of its kinship placements are in licensed foster homes. Moreover, the District's legal services structure can help ensure that most (if not all) families are familiar with all permanency options and can be counseled regarding the best option for them, and that some advocacy exists for kinship placements. The District has a well-established office to provide guardian *ad litem* representation for children,[218] parents' attorneys who must apply to and be approved by the court to work in child welfare cases,[219] and a wide set of pro bono attorneys to represent prospective guardians or adoptive parents.[220] In addition, the District has an active foster parent advocacy organization.[221]

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

[219] *Id*.

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

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

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

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

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

A. District of Columbia Permanency Options and Outcomes

When a foster child cannot reunify with a parent, the District offers a range of permanency options, including all options discussed in this article except for non-exclusive adoption. District law, like the law of all other states provides for adoption.[223] The District has also, since 2010, permitted adoptive parents and biological parents and family members to enter into court-enforceable post-adoption contact agreements.[224] District law also permits foster parents to seek subsidized guardianships of foster children.[225] Such subsidies were limited to kin until 2010, when the D.C. Council made both kin and non-kin eligible for subsidies.[226]

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

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

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

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

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

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

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

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

[228] CFSA, 2013 ANNUAL REPORT, *supra* note 50, at 17, 23.
[229] 2012 D.C. GOV'T CHILD AND FAMILY SERVS. AGENCY ANN. PUB. REP. at 27, 30, 33 (2013), [hereinafter CFSA, 2012 ANNUAL REPORT].
[230] 2011 D.C. GOV'T CHILD AND FAMILY SERVS. AGENCY ANN. PUB. REP. at 20, 26 (2012) [hereinafter CFSA, 2011 ANNUAL REPORT].
[231] CFSA, 2010 ANNUAL REPORT, *supra* note 191, at 21, 27.
[232] 2009 D.C. GOV'T CHILD AND FAMILY SERVS. AGENCY ANN. PUB. REP. at 29, 35 (2010).
[233] 2008 D.C. GOV'T CHILD AND FAMILY SERVS. AGENCY ANN. PUB. REP. at 26, 34 (2009).
[234] 2007 D.C. GOV'T CHILD AND FAMILY SERVS. AGENCY ANN. PUB. REP. at 17, 23 (2008).
[235] 2006 D.C. GOV'T CHILD AND FAMILY SERVS. AGENCY ANN. PUB. REP. at 15, 21 (2007).

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

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

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

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

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

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

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

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

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

[240] *Id.*

[241] *Id.*

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

[243] *Id.*

[244] *Id.*

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

[246] *Id.*

[247] *Id.*

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

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

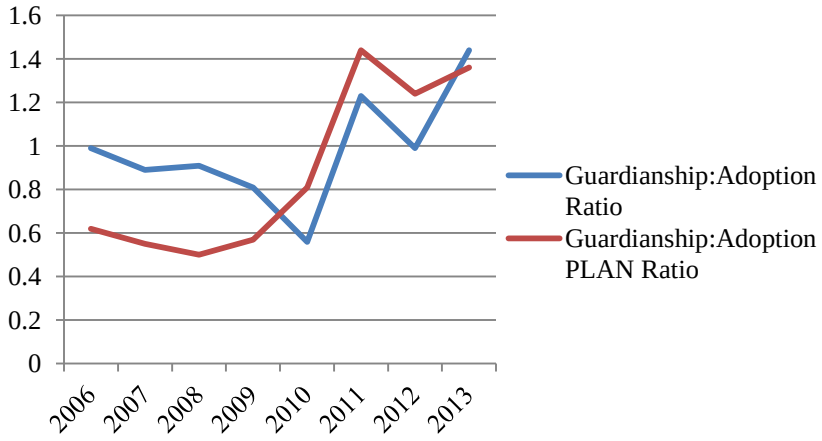
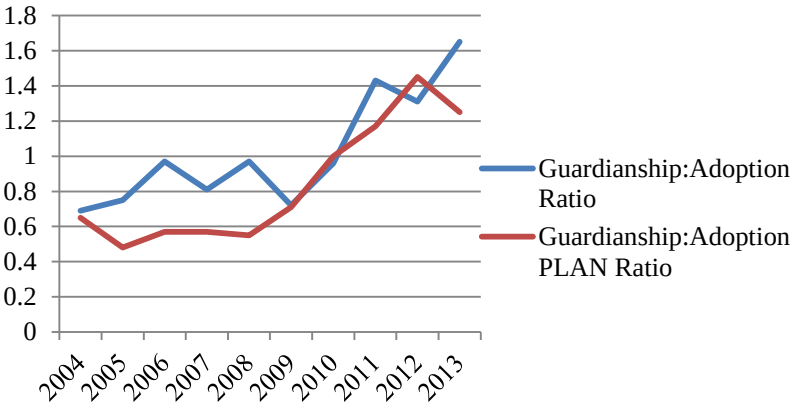


Figure 2: Guardianship to Adoption and Permanency Plan Ratios per judicial data



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

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

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

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

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

The permanency plan statistics are noteworthy because they suggest changes in how child abuse and neglect cases are handled before an actual permanency trial occurs, which has a significant impact on the frequency of termination of parental rights cases. By setting fewer plans of adoption and more goals of guardianship, the District of Columbia court system is identifying cases for which a termination is not necessary.[251] Therefore, the decrease in adoption plans has led to a dramatic decrease in termination cases, reported in Table 3.[252]

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

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

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

more accurate permanency plan decisions, as well as avoiding unnecessary termination filings.

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

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

Fostering Connections and the 2010 legislation also appear to have coincided with six years of steady overall improvement in permanency outcomes. The percentage of children emancipating from foster care (rather than leaving foster care to a reunification or a new permanent family) peaked in 2008 (when Fostering Connections was enacted) at 34 percent of all exits.[264] That figure decreased to 29 percent in 2010 (when the District legislation was enacted) and

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

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

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

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

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

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

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

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

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

adoption finalization, while troublesome guardianship placements occur but do not disrupt until after finalization.

The District's available data does not answer other questions conclusively. The data does not distinguish between kinship and non-kinship guardianships or adoptions, and does not count the number of adoptions that occurred with or without a post-adoption contact agreement. The law that governs the District's data collection and reporting has, unfortunately, not kept up with developments in the District's permanency law.[276] Data collection that reflects the new permanency would yield even more valuable information about how new permanency laws play out in practice.[277]

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

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

District-specific data suggests kinship care for District foster children leads to similar positive outcomes as studies from around the country would suggest.[278] Agency data consistently shows that children placed with kin are several times more likely to have stable placements than children in any other category of placement. For instance, in 2013, children in kinship foster homes had 19 placement disruptions

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

for every 100 placements. The figures were 33 for specialized foster homes (which are usually used for children with developmental disabilities or severe medical conditions), 40 for independent living programs, 53 for non-kinship foster care, and 77 for group homes.[279] In other words, kinship foster placements are more than two and a half times more stable than non-kinship foster placements. Similar statistics have been reported for years.[280] An analysis of District data also demonstrates that foster children placed with kin are 31.7 percent more likely to leave foster care for adoption or guardianship than other foster children.[281]

The District has established administrative policies and procedures to facilitate kinship placements. First, the District has adopted regulations to create more flexibility in determining whether to grant particular family members foster care licenses. Federal law permits states to waive "non-safety standards (as determined by the State)" for kinship foster homes.[282] The District government has issued some policy

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

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

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

[282] 42 U.S.C. § 671(a)(10) (2010).

guidance, identifying foster home regulations that it would consider waiving for kinship placements.[283]

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

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

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

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

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

eligible for federally reimbursed guardianship subsidies at permanency.[287]

In addition to foster care licensing policies, the District also utilizes family team meetings (known by other names, such as family group conferencing, in other jurisdictions) to identify kinship placement options. In these meetings, family members, social workers, other professionals, and sometimes lawyers or advocates discuss whether a foster care placement is necessary and what type of placement is most appropriate. These meetings are held early in a case and so, like a kinship foster home licensing decision, can shape future outcomes. Meeting coordinators are charged with identifying extended family members who can participate.[288] The meetings' purpose includes exploring the possibility of kinship placements,[289] and the District explicitly connects kinship placement identification with "the identification of permanency resources" and lists that as a core purpose of family team meetings.[290] Guardians *ad litem* and other lawyers are often invited and can ensure that kin preferred by their clients are invited to these meetings and considered as placement and permanency options.[291]

Taken together, these administrative policies establish a general preference for kinship placements and focus

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

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

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

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

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

authority and discretion in the agency to make kinship placement decisions, without providing significant due process checks on agency decisions. A family member who is denied a kinship foster home license may file an administrative appeal.[292] The family member would have no right to counsel to file such an appeal, a significant obstacle for a low-income individual. And the family member would have to wait until the agency denies a full foster home license application; the expedited approval process is not appealable.[293] The full application process can take about six months or longer.[294] An administrative appeal can take more than 100 days, not counting time for any judicial appeal.[295] In the meantime, the child is living with another foster family and the reality of that living arrangement may shape future decisions in the child's case. Unsurprisingly, very few such appeals are filed.[296]

The agency's power regarding kinship care is evident in recent increases in the number of children placed with kin. In recent years, the agency administration has made a concerted push to use the administrative tools described here more effectively, and this effort has led to an increase in the percentage of foster children in kinship care—up from 16 percent of all foster children in 2012 to 24 percent in 2013.[297] There was no new rule of law applied in court, only a greater

[292] D.C. MUN. REGS. tit. 29 § 6031.8 (2004).
[293] D.C. MUN. REGS. tit 29 § 6027.8.
[294] The agency has 150 days—about five months—to decide to grant or deny a license. D.C. MUN. REGS. tit. 29 § 6028.5 (2012). That timeline is triggered by the applicant beginning foster parent training; delays in the training could thus trigger a longer licensing decisionmaking period.
[295] The applicant has 30 days to file a fair hearing request. *Id*. at § 5903.4 (2002). A fair hearing must be scheduled within 45 days of that request, but can be extended for good cause. *Id*. at § 5908.3. The hearing examiner then has an additional 30 days to render a decision. *Id*. at § 5910.3.
[296] A Westlaw search on May 20, 2014 for "'Child and Family Services Agency' & foster & (care or home) & license & appeal" yielded no appeals of agency denials of foster home licenses.
[297] CFSA, 2013 ANNUAL REPORT, *supra* note 50, at 11.

administrative focus on kinship care. A 50 percent increase in kinship placements driven by agency policies underscores the power held by agencies—and not courts—to control how many foster children live with kin.

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

No provision of District law governing judicial decisions explicitly creates a preference for kinship placements. Yet, the District of Columbia Court of Appeals has long required courts to give "weighty consideration" to a parent's preferred *permanent* custodian, and a competing petitioner must prove by clear and convincing evidence that the parental preference is contrary to the child's best interests.[298] This rule does create a kinship preference when, as is often the case, a parent prefers their child to live with kin rather than non-kin. Indeed, the rule arose when a child's great-aunt, preferred by the mother, sought custody of a foster child while the child's non-kinship foster parents sought to adopt him.[299] At least, it creates such a preference at the end of a case—the appellate cases applying this rule have uniformly done so in challenges to adoption or termination orders; the rule has not been applied at earlier stages of a case.[300] The District law is thus similar to statutory preferences in 10 states for placing children in kinship *adoption* homes when adoption is the permanency plan.[301] The District case law permits late-

[298] *In re* T.J., 666 A.2d 1, 11, 16 (D.C. 1995).
[299] *Id.* at 4.
[300] *See In re* Ta.L., 75 A.3d 122, 128 (D.C. 2013) (reaffirming rule and citing six cases applying it). The *T.J.* court wrote that "Our discussion applies, of course, . . . to the placement of" a foster child. *In re T.J.*, 666 A,.2d 1, 10 n.4 (D.C. 1995). The D.C. Court of Appeals has not decided whether the "weighty consideration" rule applies to a foster care placement decision or only at permanency. One trial court decision has declined to apply the rule at a pre-permanency stage of the case. *In re* P.B., 2003 WL 21689579 (D.C. Sup. Ct. 2003).
[301] *Placement of Children with Relatives*, *supra* note 174, at 4.

stage challenges to agency case work to identify and investigate potential kinship placements early in a case.

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

Most recently, in *In re* Ta.L., the D.C. Court of Appeals overturned an adoption by non-kinship foster parents in 2013 because the trial court failed to give adequate weight to the parents' preference that the children live with and be adopted by their great-aunt.[304] (The case is now pending before an *en banc* panel of the Court.[305]) The facts reveal inadequate consideration of multiple kinship placements from

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

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

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

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

the first days of the case. Two days after removing the children in 2008 from their parents, the agency identified two extended family members as potential placements, the children's adult sister and great-aunt. The family decided that the sister would pursue a placement first, but her husband, the children's brother-in-law, failed the background test. The agency never contacted the great-aunt, and the great-aunt did not contact the agency after she was told that the plan was to reunify the children with their mother.[306] These facts raise a number of questions about kinship placement. First, why did the brother-in-law fail the background test, and should the agency have waived whatever background issue that existed? Was his conviction for a violent or non-violent crime, and did he pose a real risk to the children? As the sister was going to serve as the children's primary caretaker, could she have mitigated any risk posed by the brother-in-law? Second, why did concurrent planning for permanency not include outreach to the great-aunt as soon as the agency ruled out the sister?

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

This case was also notable because the parent and great-aunt's appeal challenged the permanency hearing

[306] *In re Ta.L.*, 75 A.3d at 125–26.
[307] *Id.* at 126.
[308] *Id.* at 126.

decision, changing the goal to adoption.[309] The court recognized the "compelling case" that permanency hearing decisions ought to be appealable because "a right to appeal at this stage is necessary in order to ensure that this court will have the opportunity to timely address alleged trial court errors that could significantly impact the ultimate outcomes in permanency cases."[310] Indeed, better procedures earlier in the case could have avoided the unnecessary conflict in *In re* Ta.L. In that case, the great-aunt in *In re* Ta.L. was an excellent candidate for kinship placement. The child welfare agency granted her a therapeutic foster home license, and a social worker deemed her home fit.[311] She was raising the children's half-sibling and the trial court found that the sibling "has done very well in [the great-aunt's] care."[312] Federal law rightly suggests that child welfare agencies place siblings together because of the benefits of such placements to children.[313] The trial court concluded that the aunt "ably direct[s] the children's play, set[s] appropriate limits, ha[s] a nice manner with the children, and [i]s attuned to their needs," and expressed no doubts about her fitness.[314] The only factor possibly outweighing a placement with the aunt were the bonds that formed with the non-kinship foster home—bonds

[309] *Id.* at 128–30.

[310] *Id.* at 130 n.4. The Court cited to an amicus brief making this argument. In full disclosure, that brief cited a similar argument that I made. Brief of *Amicus Curiae* Legal Aid Society 7, 18, 19, (citing Gupta-Kagan, *Due Process Donut Hole*, *supra* note 302) (on file with author).

[311] *In re* Ta.L., 75 A.3d at 126.

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

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

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

that never would have existed had the agency and courts followed a strong kinship preference early in the case.

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

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

In addition, the parents' rights-based rule applied in *In re* Ta.L. provides an awkward path towards a kinship preference. Parents who cannot raise their children surely have

[315] S*upra* note 300 and accompanying text.

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

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

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

placement and a non-kinship foster family that has bonded to the child.

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

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

Full implementation will require treating adoption and guardianship as comparably permanent legal statuses – which they are, according to the empirical record discussed in Part I. Congress has recently taken a small step to reduce inequities between adoptions and guardianships. Until 2014, the federal government had given states financial incentives to increase the numbers of adoptions. Under 2014 legislation, those incentives are now available for states that improve the rates of children reaching permanency through both adoption and

guardianship.[317] Congress unfortunately left the other disparities between adoption and guardianship discussed throughout this article intact. But Congress' willingness to erase one disparity shows the possibility of erasing others in both state and federal law.

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

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

Congress and state legislatures should abolish the hierarchy between adoption and guardianship.[318] At the very least, Congress should repeal the requirement of an adoption over guardianship hierarchy as a condition of federal guardianship subsidy funding. This requirement ossifies the law and prevents states from experimenting with alternative

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

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

approaches to permanency.[319] Courts should first determine if reunification remains an appropriate permanency plan. If not, courts should determine which permanency plan serves the child's best interests—and any general preference for one permanency plan over another should not be a permissible consideration. By rejecting a hierarchy of permanency goals, this statutory reform would reject the ideology that the best permanency option is the most legally binding one[320] in favor of one based on research demonstrating that various options along the permanency continuum are equally lasting and beneficial for children.[321]

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

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

Relatedly, removing the legal hierarchy will require renewed focus on when terminations of parental rights are

[319] Vivek Sankaran, *Innovation Held Hostage: Has Federal Intervention Stifled Efforts to Reform the Child Welfare System?*, 41 U. MICH. J.L. REFORM 281 (2007–2008)
[320] *Supra* Part II.B.
[321] *Supra* Part I.A.1.
[322] *Infra* Part IV.E.

necessary. Rather than presume that the length of time in foster care suggests a need for termination and adoption, law and practice should presume that such facts only calls for a close analysis of what permanency plan is best for an individual child. Terminations should logically be reserved for when they are truly necessary—that is, when all permanency options not requiring terminations have been excluded, and the parties (especially foster parents and biological parents) have explored the possibility of agreeing to some consensual arrangement. At the least, this means expanding exceptions to the rule requiring termination filings to include any case with a permanency plan of guardianship, even if the child is not living with relatives.[323]

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

The hierarchy also interferes with the families having meaningful choices among permanency options by empowering agencies to hide the availability of subsidized guardianship from families, or to pressure them to choose adoption over guardianship.[325] That absence of choice is a problem by itself, as families should have the ability to select the most appropriate legal status for their situation. It may also interfere with a core benefit of the new permanency—

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

increasing the number of children who leave foster care to permanent families by offering those families a greater variety of legal statuses. Removing the hierarchy would eliminate the need for any kind of rule-out procedure, and thus remove one core area in which the law permits agency and case worker discretion to prevent caregivers from learning about all permanency options; case workers could no longer justify failing to discuss subsidized guardianship by noting that adoption had not been ruled out.

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

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

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

[326] S*upra* notes 140-146 and accompanying text.
[327] *See supra* Part II.D (summarizing procedural differences).

nature should be reevaluated;[328] although the legal possibility of undoing guardianships exists, the statistical improbability of such developments counsels strongly against providing weaker procedural protections.

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

One might object that stronger procedural protections for biological parents in guardianship cases may weaken or

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

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

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

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

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

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

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

Accordingly, procedural protections for guardianship should be enhanced so that they are roughly on par with similarly permanent terminations and adoptions. Guardianships should require proof of parental unfitness and proof that the guardianship would serve the child's best interests. The standard of proof should be clear and convincing evidence. Guardianship cases should be heard in family court, under statutes designed to adjudicate foster care

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

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

and child maltreatment cases—not in probate court under probate statutes.[335]

C. Establish Stronger and More Enforceable Kinship Placement Preferences

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

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

The law should enforce a specific kinship placement preference that is binding on state agencies and can be litigated in juvenile court. Federal funding laws should not merely require states to "consider" a kinship care

[335] *Supra* notes173–174and accompanying text.
[336] *Supra* notes 85–86 and accompanying text.
[337] *Supra* notes 87–88 and accompanying text.
[338] *Supra* notes 90–92 and accompanying text.

preference,[339] but should require states to apply such a preference. Federal officials should include such a preference in their regular reviews of states' child welfare performance, on which federal funding depends. States that have unusually small percentages of foster children living with kin should feel pressure to improve such outcomes.[340]

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

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[339] *Supra* note 180180 and accompanying text.

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

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

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

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

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

A rule establishing a preference for kinship placements would frame the issue as one of children's rights to live in placements indicated by research to be generally preferable, rather than as a parental right to choose where the child lives. That frame is more consistent with the reasons for a kinship preference—that kinship care is better for children. Recall *In re* Ta.L., the case involving unnecessary permanency litigation because of a missed opportunity to achieve a kinship placement; the great-aunt in that case would have been a good placement for the children because she was a good caregiver who could provide a home for the entire sibling group—not because the children's parent's wanted the children living with

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

her.[345] Focusing on those positive factors avoids the problem of empowering a parent deemed unfit to control where a child lives.[346]

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

D. Record Data to Study New Permanency Options

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

Relevant data should include, at a minimum, statistics regarding the full continuum of permanency options. States should not merely report the number of foster child adoptions every year, but distinguish adoptions along at least two planes. First, states should report varying types of adoptions—traditional exclusive and closed adoptions, adoptions with

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

post-adoption contact agreements, and non-exclusive adoptions. Second, states should report the number of kinship and non-kinship adoptions. The data should reflect the intersection of these two planes—so that the number of closed kinship adoptions and non-kinship adoptions with contact agreements are publicly reported. Similarly, guardianship data should be reported, with clear data regarding kinship and non-kinship guardianships identified.

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

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

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

[349] *Making It Work*, *supra* note 11, at 12.

guardianships might transform into subsidized adoptions.[350] The number of such adoptions should be specifically tracked.

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

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

Permanency hearings require "momentous" decisions.[352] At these hearings, held after children have been in foster care and not reunified for one year, courts must answer two core questions. First, is reunification viable? Second, if not, what is the best permanency option? This article focuses on the second question,[353] and getting it right is essential to put children on the best path towards permanency. The proper permanency goal can lead a case toward prompt and decisive litigation, and avoid unnecessary litigation that can unduly stress children and harm relationships between adults who will remain in children's lives. A permanency plan decision often determines which track a case will follow. An adoption plan will likely trigger a termination filing and negotiations between prospective adoptive parents and

[350] 42 U.S.C. § 673(a)(2)(D) (2011).
[351] 42 U.S.C. § 676(b) (2008).
[352] HARVEY SCHWEITZER & JUDITH LARSEN, FOSTER CARE LAW: A PRIMER 97 (2005).
[353] I have previously argued that the importance of the first question—whether reunification is viable—requires permanency hearings to be evidentiary as a matter of due process and appealable as a matter of good policy. Gupta-Kagan, *Due Process Donut Hole*, *supra* note 302. For purposes of this article, I focus on cases in which reunification is not viable and thus when only the second question—what permanency plan is best—is the only contested issue.

biological parents about any post-adoption contact or, in the one state that currently permits it, whether a non-exclusive adoption is best. A guardianship plan will not trigger such litigation, but should lead relatively quickly to a guardianship petition and negotiations between the prospective guardian and parents about parental visitation arrangements in a guardianship.

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

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

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

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

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

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

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

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

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

permitted expedited appeals of the decisions would prevent the harms that such protracted litigation can cause.

One practice should be explicitly disallowed at permanency hearings: courts should not be able to settle on a particular permanency plan based on an abstract hierarchy between permanency options, for all of the reasons discussed throughout this article. Such hierarchies are particularly dangerous at the permanency hearing stage for certain groups of children, such as older children, and children with disabilities. Such children are particularly likely to be subject to an adoption disruption—being forced to leave a prospective adoptive home before the adoption in finalized.[359] The disruption rate of pre-adoptive placements is as high as 25 percent for some subpopulations, such as older youth.[360] Any decision between whether to set a permanency plan of adoption or guardianship should weigh the comparative chance for a lasting placement that each option provides—and the risk that a prospective permanent placement might disrupt. Setting a goal of adoption for children at high risk of such disruptions could set such children up for a harmful tour through multiple foster homes, without any strong empirical record to support an adoption plan. Such a path should only be chosen after a more individualized assessment of the child's situation.

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

The new permanency comes to the fore of a child protection case after a court has found the parent unfit, placed the child in foster care, and subsequently determined that reunification is no longer the most appropriate permanency plan. The legal practice then becomes a form of plea bargaining with multiple parties. The state, the parent, the

[359] Festinger, *Adoption Disruption*, *supra* note 48, at 460.
[360] *Supra* notes 50–51 and accompanying text.

child and/or the child's lawyer or best interest advocate, and the foster parent(s) or other possible permanency resources engage in negotiation about what permanency plan to pursue. This practice is fundamentally different than the one envisioned by the old permanency binary. There, lawyers are charged with litigating a termination of parental rights case—agency lawyers prosecute, parents' lawyers defend, and children's lawyers advocate for either side depending on the facts of the case and the wishes of their clients. Foster parents who might become adoptive parents or guardians do not play a role until after the core decisions are made. The new permanency requires more complicated and nuanced lawyering on behalf of all parties.

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

These options create an essential negotiation opportunity for parents, which their counsel can assist with. As in criminal plea bargaining, parents can trade their procedural rights to contest or delay permanency in exchange for an agreement to pursue guardianship rather than adoption, or to agree to a formal or informal visitation agreement.[362] Such agreements are not always possible, and not always good

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

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

ideas from the perspective of different clients. Just as effective plea bargaining (and client counseling during plea bargaining) is now considered essential to minimally effective criminal defense,[363] permanency negotiation is an essential element of good lawyering for parents.

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

Second, good lawyers likely help ensure parents have all meaningful opportunities to reunify, and that kinship placements are adequately investigated. These steps might lead to faster rulings against parents when they have failed to

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

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

[365] *Id.* at 1340.

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

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

[366] *Supra* Part III.B.

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

[368] *Id.* at 14.

has shown that such lawyers expedite permanency for their clients.[369]

Finally, an important role can be played by counsel for prospective adoptive parents and guardians – after a court has ruled that a child protection agency should no longer work towards reunification. Foster parents and other potential permanency resources have important roles in planning for foster children's future – after all, if a foster parent is willing to pursue guardianship but not adoption, or vice versa, that should affect the selection of a permanency plan and litigation steps following that plan. Recognizing the role of foster parents, ASFA required that they be provided notice and an opportunity to be heard in court hearings.[370] And commentators have long called for foster parents to have a strong voice in permanency planning and for agency caseworkers to build trust with foster parents more effectively and meaningfully engage them in important decisions.[371]

Yet much reason for caution exists when considering counsel for foster parents. Most cases lead to reunification, and counsel for foster parents—especially foster parents interested in serving as adoptive parents or guardians—could impede that process. Foster parents should be expected to assist with reunification, especially in early stages of a case. Moreover, any rights that foster parents have are

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

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

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

constitutionally subordinate to the rights of parents and children.[372] Providing foster parents with counsel is therefore inappropriate when the court has ordered parties to work towards reunification.

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

Unfortunately, existing law is not structured to provide such attorneys. Federal financing statutes provide state agencies with $2,000 to support the costs of finalizing guardianships (at least those eligible for subsidies under

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

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

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

existing federal law) and adoptions—costs that frequently include counsel.[375]

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

V. **Conclusion**

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

These outcomes require more reforms than existing efforts have created. They require accepting the powerful research showing all options on the permanency continuum as equally lasting, and letting that conclusion guide statutory reforms and agency practices. They require recognizing the connection between kinship placements and permanency, and prioritizing kinship care early in a case. They require changing child welfare's professional culture to value all forms of

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

permanency equally, and empowering families (and not only agencies) to choose among the various permanency options. They require more rigorous procedures to reach the best decisions early in a case and provide a strong check on agency discretion. These reforms are all possible, and strongly implied by the steps already taken to create the permanency continuum.