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Establishing Legal Permanence for the Child

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Chapter 25: Establishing Legal Permanence for the Child

by Donald N. Duquette[1]

§ 25.1 Introduction

This chapter is intended to identify options for legal permanency that state law and the federal Adoption and Safe Families Act of 1997[2] (ASFA) commonly recognize to better serve children in foster care. Ideally, the child will ultimately return safely to his or her home of origin. But when a return home is not possible, the child welfare legal process should result in a safe and legally secure alternative permanent placement for the child. The emphasis on legally secure permanent placement is meant to provide the child with psychological stability and a sense of belonging and to limit the likelihood of future disruption of the parent-child relationship. All state laws authorize adoption of children, but traditional adoption does not meet the needs of all children in public foster care. Attorneys representing children, parents, or the government agency may seek other legal options for permanent and legally secure placement. Some authorities recommend that these options be broad enough to serve the needs of all children in care who are not able to return to their home of origin; options could include adoption, adoption with contact, permanent guardianship, subsidized guardianship, stand-by guardianship, and "another planned permanent living arrangement" (APPLA) such as permanent long-term foster care.[3]

For children who cannot be reared by one or both of their birth parents, adoption, by relatives or non-relatives, is the preferred option for a permanent legal placement. By providing children with a new family, adoption is most likely to ensure protection, stability, nurturing, and familial relationships that will last throughout their lives. Alternatives to adoption discussed here, such as permanent guardianship and subsidized guardianship, are generally appropriate only when adoption has been thoroughly explored and found unsuitable to meet the needs of a particular child.

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[2] Pub. L. No. 105-89, 111 Stat 2115.

[3] CHILDREN'S BUREAU, U.S. DEPARTMENT OF HEALTH & HUMAN SERVICES, ADOPTION 2002: THE PRESIDENT'S INITIATIVE ON ADOPTION AND FOSTER CARE, GUIDELINES FOR PUBLIC POLICY AND STATE LEGISLATION GOVERNING PERMANENCE FOR CHILDREN (1999), *available at:* http://web.archive.org/web/20030224035115/www.acf.dhhs.gov/programs/cb/publications/adopt02/.

§ 25.2 Priority for Permanence

A certain priority among these options for permanency is generally accepted and reflects a preference for permanent placement of foster children with their family of origin or relatives that is expressed in federal and most state laws. Termination of parental rights is not always appropriate and can lead to the unhappy outcome of making the child a legal orphan raised by the state. The generally accepted priority of permanency options is: (1) safe reunification with the biological parents or a suitable member of the family of origin;[4] (2) adoption; and (3) permanent guardianship. Long-term foster care is generally disfavored but may be appropriate for some children, particularly older children who have a connection with their biological families and strongly object to being adopted.[5]

This hierarchy of preference is not inflexible and requires individualized judgments based on the circumstances of each individual child. For example, if a child is psychologically attached to a relative and has been living for an extended time with that relative, but the relative cannot or will not adopt, a permanent guardianship with that relative may be preferable to moving the child to a recruited adoptive family. On the other hand, a relative with no established relationship with the child who offers to become a child's caretaker late in the court process may not be as appropriate for adoption as foster parents who have cared for the child for some time and who wish to adopt.

§ 25.3 Adoption

Adoption, the legal and permanent transfer of all parental rights and responsibilities to the adoptive parents, remains the placement of choice when a child cannot be returned to his or her birth family because it gives the child a new, permanent, legal family with the same legal standing and protection as a family created through birth. An adopted individual is entitled to inherit from and through the adoptive parents and is treated as the child of the adoptive parents for purposes of social security, insurance, retirement, pension, and all other public and private benefit programs. Conversely, adoptive parents acquire rights to inherit from and through the adopted child. Adoption thus provides, for the most part, the same autonomy, security, and durability of family relationships that children experience in their families of birth. Children, adoptive parents, birth parents, and the general public also

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[4] See § 10.6, Fostering Connections to Success and Increasing Adoptions Act, for a discussion of the Fostering Connections to Success and Increasing Adoptions Act which, among other things, provides additional tools to maintain a child's ties with extended family.

[5] CHILDREN'S BUREAU, U.S. DEPARTMENT OF HEALTH & HUMAN SERVICES, ADOPTION 2002: THE PRESIDENT'S INITIATIVE ON ADOPTION AND FOSTER CARE, GUIDELINES FOR PUBLIC POLICY AND STATE LEGISLATION GOVERNING PERMANENCE FOR CHILDREN at II-2 (1999). For a discussion of services available to youth who do not exit the foster care system into permanent placement, see Chapter 23, Foster Youth: Transitioning from Foster Care into Self-Sufficient Adulthood.

understand and are familiar with this type of legal relationship. Children may be adopted by relatives, step-parents, foster parents, or persons previously unrelated or unknown to them.[6] Commonly, state laws permit a parent to release parental rights directly to a specific adoptive parent or parents or to surrender parental rights to a public or private agency who would then determine who the adoptive parents would be, subject to court approval.[7] However, parents whose rights have been terminated or whose children are legal wards of the court may lose the right to designate a specific adoptive placement.

§ 25.3.1 Adoption Subsidies

Adoption subsidies play an important role in achieving permanency for children. In the past, costs of care and services were major obstacles to individuals who would otherwise adopt.[8] The agency's reasonable efforts to finalize a permanency plan should include informing caregivers about adoption subsidies and securing them when appropriate. For many children, adoption assistance can make adoption possible.[9] Denial of the subsidy or an insufficient subsidy can be a barrier to permanency. In many states, adoption assistance can include regular monthly cash payments, Medicaid, social services to the family, and nonrecurring adoption expenses. The federal government and the state share the costs of adoption assistance for those children who meet federal eligibility requirements. For children who do not meet federal eligibility requirements, some states will pay the entire cost of the subsidy. For children who qualify, federal adoption assistance is an entitlement. Eligibility criteria are as follows[10]:

(1) The child was eligible, before adoption, for assistance under one of two programs:

   (a) Foster care or adoption assistance under Title IV-E. The child (or the child's birth family) must have been eligible to receive federal AFDC. Even though AFDC was discontinued in 1996, a child's eligibility for Title IV-E is based on the states' AFDC eligibility standards as of July 16, 1996.[11]

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6 For a useful guide for state legislatures regarding adoption from foster care, see STEVE CHRISTIAN & LISA EKMAN, A PLACE TO CALL HOME: ADOPTION AND GUARDIANSHIP FOR CHILDREN IN FOSTER CARE (National Conference of State Legislatures 2000).

7 *See* JOAN H. HOLLINGER ET AL., ADOPTION LAW AND PRACTICE (2001).

8 Child Welfare Information Gateway, *Adoption Assistance for Children Adopted From Foster Care: A Factsheet for Families* (2004), *available at* http://www.childwelfare.gov/pubs/f_subsid.cfm.

9 For a more detailed explanation of adoption assistance agreements, see Elizabeth Oppenheim et al., *Adoption Assistance for Children with Special Needs, in* ADOPTION LAW AND PRACTICE (Joan Hollinger ed., 2001). In New York, for example, subsidies are provided in over 80% of the adoptions that occur through the child welfare agency. *Id.*

10 Child Welfare Information Gateway, *Adoption Assistance for Children Adopted From Foster Care: A Factsheet for Families* (2004), *available at* http://www.childwelfare.gov/pubs/f_subsid.cfm.

11 42 U.S.C. § 673(a)(2)(A), (B).

(b) Supplemental Security Income (SSI), a program for low-income people with disabilities.[12]

(2) The child has special needs as defined by the state's definition of special needs.[13] Special needs may include certain medical, emotional, and mental health conditions and membership in a minority, sibling, or age group.[14]

(3) The child could not be placed for adoption without a subsidy. In other words, a "reasonable, but unsuccessful, effort has been made to place the child with appropriate adoptive parents [without providing any assistance]."[15] This requirement can be waived if the child already has a significant relationship or significant emotional ties with the caregiver.[16]

(4) There has been a judicial determination that the child cannot or should not be returned home. Obviously, if the child's parents' rights have been terminated, this requirement is satisfied.

Adoption assistance information by state is available at the Child Welfare Information Gateway.[17] The federal child welfare policy manual is also available online.[18] States may not impose additional eligibility criteria for federal assistance beyond what is required by federal law. Nearly all children adopted out of foster care in recent years received an adoption subsidy.[19]

§ 25.3.2 Post-Adoption Contact

Post-adoption contact between the child and the birth parents, siblings, or other people who are psychologically important to the child may serve the long-term interests of a child and is often arranged. Commonly, the adoptive parents, whether kin or non-kin, recognize that certain people are important to the child and that it is important for the child to maintain contact with them. Purely voluntary, "open adoptions" occur in all states, where the adoptive parents freely and voluntarily permit or even encourage contact with the child's natural networks. No force of law or court

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[12] 42 U.S.C. §§ 673(a)(2)(A)(ii), 673(a)(2)(B)(iii).

[13] 42 U.S.C. § 673(a)(2)(C).

[14] *See* 42 U.S.C. § 673(c)(2)(A). Agencies and courts have traditionally referred to these children as "hard to place." The more common current term is "special needs."

[15] 42 U.S.C. § 673(c)(2)(A), 673(c)(2)(B).

[16] 42 U.S.C. § 673(c)(2)(B).

[17] http://www.childwelfare.gov/adoption/adopt_assistance/index.cfm.

[18] See the Web site of the U.S. Department of Health & Human Services, Administration for Children & Families, http://www.acf.hhs.gov/j2ee/programs/cb/laws_policies/laws/cwpm.

[19] HHS Office of the Assistant Secretary for Planning and Evaluation, *Understanding Adoption Subsidies: An Analysis of AFCARS Data* (Jan. 2005), *available at* http://aspe.hhs.gov/hsp/05/adoption-subsidies/.

order requires that such contact occur, and the adoptive parents may end such voluntary arrangements at will.[20]

State Laws

Approximately 23 states currently have "open" or "cooperative" adoption laws that provide some mechanism for approval and enforcement of post-adoption agreements.[21] Annette Appel reports:

> Though variable in specifics, these statutes are nearly identical in several respects: first, by definition, none permit a court to grant an adoption with contact unless the adoptive parents agree; second, each statute indicates who must approve of the agreement in order for it to be enforceable later; third, all but one (West Virginia) require the agreement to be in writing, either as a written contract, relinquishment, or court order; fourth, all of the statutes explicitly, or through court interpretation, provide for enforcement of the agreements unless there are grounds not to enforce or there are grounds to modify; finally, no statutes permit vacation of the adoption or withdrawal of relinquishment as a sanction for breach or modification of the agreement or order.

While most states make contact between the child and his or her natural networks available to all adoptees,[22] some state laws limit such post-adoption contact to children who have been in foster care.[23] California limits post-adoption contact to children adopted by relatives[24] while Indiana limits it to children age two and over.[25] Other states simply acknowledge that post-adoption contact can occur (e.g., Ohio)[26] or prohibit the court from forbidding such contact (e.g., Missouri).[27] At least one state

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[20] "In general, state law does not prohibit postadoption contact or communication." Child Welfare Information Gateway, *Postadoption Contact Agreements Between Birth and Adoptive Families: Summary of State Laws*, *available at* http://www.childwelfare.gov/systemwide/laws_policies/statutes/cooperativeall.pdf.

[21] *Id.* States that permit enforceable contracts include Alaska, Arizona, California, Connecticut, Florida, Indiana, Louisiana, Maryland, Massachusetts, Minnesota, Montana, Nebraska, Nevada, New Hampshire, New Mexico, New York, Oklahoma, Oregon, Rhode Island, Texas, Vermont, Washington, and West Virginia. *See also* Annette R. Appell, *Survey of State Utilization of Adoption with Contact,* 6/4 ADOPTION QUARTERLY 75 (2003), *available at* http://www.haworthpress.com/store/product.asp?sku=J145.

[22] *E.g.*, MINN. STAT. ANN. § 259.58 ; MONT. CODE ANN. § 42-5-301; N.M. STAT. ANN. § 32A-5-35; (OR. REV. STAT. § 109.305; S.D. CODIFIED LAWS § 25-6-17; WASH. REV. CODE § 26.33.295; W. VA. CODE § 48-22-704.

[23] *See, e.g.*, NEB. REV. STAT. §§ 43-162 to 43-164; N.Y. SOC. SERV. LAW § 383-c.

[24] CAL. R. OF COURT 5.400(b) (2003) (formerly CAL. FAM. CODE § 8714.7 (renumbered 2003)).

[25] IND. CODE ANN § 31-19-16-2 (1997).

[26] OHIO REV. CODE ANN. § 3107.62.

[27] MO. REV. STAT. § 453.080(4).

(Florida) permits the court that is terminating parental rights to order post-termination contact to be reviewed upon the adoption of the child.[28] This may be a useful mechanism when: (1) the child has a need for post-termination or post-adoption contact; and (2) the adoptive parents have not been identified at the time of termination of parental rights; and (3) the birth parents will not be present at the adoption.

Benefits

Many foster children have psychological connections to their birth families, siblings, and other significant persons, such as foster parents, so that it would be in the child's interest to maintain some sort of contact even after adoption. The child may need to know and understand his or her ethnic background and heritage. There may be a need to share medical information and health histories. Preservation of an emotional tie may be beneficial to the child. Continued contact may relieve an older child's guilt or concerns about the birth parent. Contact may help the child come to terms with his or her past. A connection with a biological parent may be a positive, yet limited, influence, and may prevent the child from running away or disrupting a new placement when the child desires continuing ties. Continued contact may avoid the trauma of contested and prolonged termination of parental rights proceedings. Children generally benefit from contact with siblings. These needs may be recognized and agreed to by the new parents and approved by the court. The contact could be as simple as exchanging photos each year without any physical contact, but the arrangements could leave a door open for future relationships *when helpful to the child.*

Birth parents, when given a chance, can be tremendous resources in planning for their children, and their participation can have positive outcomes for adoption. For many years, certain adoption agencies have placed children in adoptions where birth parents and adoptive parents voluntarily maintain contact and exchange information. This happens with infant adoption, direct consent adoption, and in adoptions within the extended family. These "cooperative adoption" arrangements are often negotiated in the context of an adoption of older children, especially children with special needs, who have been in foster care before being placed for adoption. In appropriate situations, even where child protection proceedings have been initiated, state law and the parties to a child protection proceeding could encourage birth parents' involvement in planning for relinquishment of parental rights and adoption of the child.

Pitfalls

On the other hand, there may be pitfalls to maintaining ties between birth parents and their children after children are placed into new permanent homes. For example, the birth parents might only reluctantly accept the new placement and may later try to disrupt or undermine it. The birth parents might be dangerous to the child or the adoptive family or might constitute an abduction risk. The child may be fearful of or

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[28] FLA. STAT. ANN. § 39.811(7)(b), 63.0427.

resistant to continuing contacts. The determination of whether an individual child needs a permanent placement with ongoing birth parent-child contacts or contacts with siblings or members of the extended family is a subtle and sophisticated task. Each case is unique and demands thoughtful and expert consideration.

Some experts recommend against any legally enforceable post-adoption rights of contact between a child and members of his or her family of origin, particularly with those against whom there was an adjudication or stipulation of child abuse or neglect. Others argue that contact should not be allowed if the child is fearful of the parent or fearful that he or she will be removed from the adoptive home and returned to the parent. Contact may also be contraindicated when the child has had many placements and does not have strong ties to the parent, or where there is evidence that post-adoption contact will undermine the integrity and security of the adoptive relationship.

Some argue that contact between the adoptive and biological families, if contact occurs at all, should remain entirely voluntary with no enforceability by the court. An enforceable right of contact, even when based on initial agreement among the parties, may erode the exclusive rights and prerogatives of the adopting parents. In this view, the government should not continue to be involved in the lives of families once an adoption is approved because adoptive families are entitled to as much autonomy as any other legally-recognized family.

Determining Whether Post-Adoption Contact Is Appropriate

To determine whether post-adoption contact is warranted, the primary concern is whether it will meet the child's needs, interests, and desires, not the needs and interests of the adults involved without necessarily benefiting the child. "Adoption with contact" will likely promote settlement of some termination of parental rights cases. The court, however, should not allow adoption with contact merely because it is a convenient settlement option for parents facing a strong termination of parental rights case. Nor should it be allowed merely because it is more expeditious and convenient for an agency that is unwilling to put time and energy into a difficult termination of parental rights case. "Adoption with contact" must serve the best interests of the child.

Elements of a Successful Post-Adoption Contact Agreement

Adoption with contact will be most successful when all of the parties to the contact agree on each of the following points:

- That the contact should occur.
- What type of contact should occur.
- How or where the contact will occur.
- How frequently the contact will occur.

Post-adoption contact agreements should be flexible enough to accommodate the changing needs and abilities of all the parties, particularly the child. The parties could agree simply that the adoptive parents will keep the birth parents informed about the

child through voice, written, photographic, or videographic communication and that the birth parents will keep the adoptive parents updated about medical history. Or the parties could agree to face-to-face visitation. Or they could agree to any combination of the two simultaneously or chronologically. The important issue is that the parties are comfortable with the agreement.

The *Guidelines for Public Policy and State Legislation Governing Permanence for Children* [29] recommend that clarity within the statutes is important to give guidance to the court and parties and to diminish the likelihood of future litigation. States must strike a balance between enabling parties to change orders and making such actions so accessible that the parties will be in court unnecessarily. The *Guidelines* propose that only a party to the agreement may move to enforce it. Typically, the parties to the agreement will be the child, adoptive parent(s), and biological parent(s); in some cases, however, the parties to the agreement could include siblings, grandparents or other relatives, foster parents, or any other significant person in the child's life.

Enforcing the Agreement

Most courts have taken the position that post-adoption visitation agreements are valid and enforceable so long as the court deems the nature and frequency of contact to be in the child's best interests.[30] American Law Reports has a thorough annotation on "Postadoption visitation by natural parent."[31] For agreements to be enforceable, they must be approved by the court that has jurisdiction over the adoption. Five states require the written consent of the child who is age 12 or older.[32] Nine states require the parties to participate in mediation before petitions for enforcement or modifications are brought before the court.[33] Some courts have found post-adoption contact agreements to be invalid and unenforceable, generally concluding that such an agreement would conflict with the adoption of the child.[34]

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[29] CHILDREN'S BUREAU, U.S. DEPARTMENT OF HEALTH & HUMAN SERVICES, ADOPTION 2002: THE PRESIDENT'S INITIATIVE ON ADOPTION AND FOSTER CARE, GUIDELINES FOR PUBLIC POLICY AND STATE LEGISLATION GOVERNING PERMANENCE FOR CHILDREN (1999).

[30] Child Welfare Information Gateway, *Postadoption Contact Agreements Between Birth and Adoptive Families: Summary of State Laws*, *available at* http://www.childwelfare.gov/systemwide/laws_policies/statutes/cooperativeall.pdf; Danny R. Veilleux, Annotation, *Postadoption Visitation by Natural Parent*, 78 A.L.R. 4th 218 (1990).

[31] Danny R. Veilleux, Annotation, *Postadoption Visitation by Natural Parent*, 78 A.L.R. 4th 218 (1990).

[32] Child Welfare Information Gateway, *Postadoption Contact Agreements Between Birth and Adoptive Families: Summary of State Laws*, *available at* http://www.childwelfare.gov/systemwide/laws_policies/statutes/cooperativeall.pdf. The five states are California, Connecticut, Indiana, Massachusetts, and Rhode Island.

[33] *Id.* The nine states are Arizona, California, Connecticut, Louisiana, Minnesota, New Hampshire, Oklahoma, Oregon, and Texas.

[34] Danny R. Veilleux, Annotation, *Postadoption Visitation by Natural Parent*, 78 A.L.R. 4th 218, § 5 (1990).

Many of the existing post-adoption contact statutes provide that the contact can be modified or terminated only (1) when the parties agree or circumstances have changed, and (2) it is in the child's best interests. This standard strikes an appropriate balance because it does not permit frivolous actions and protects the best interests of the child.[35]

§ 25.4 Permanent Guardianship

A legally secure permanent guardianship, particularly with a subsidy, could provide an appropriate permanent plan for those children whose return home or adoption is not appropriate or possible. Children in permanent guardianship would not require ongoing court or agency supervision. Parental rights might not be terminated, but the custodial rights of the parents would be transferred to the guardians. Unfortunately, although a number of distinct legal categories of custody and guardianship are available under state law, many are easily revoked and provide inadequate legal protections for the guardian or custodian as well as inadequate permanence for the child.[36] The forms of guardianship available in most states are too legally vulnerable to provide the permanency that is required.

The Adoption and Safe Families Act of 1997 (ASFA) allows the court, during a permanency hearing, to consider both adoption and legal guardianship as permanent placements.[37] Permanent guardianships under state law are not necessarily consistent with the Federal definition of legal guardianship in ASFA:

> The term "legal guardianship" means a judicially created relationship between child and caretaker which is intended to be permanent and self-sustaining as evidenced by the transfer to the caretaker of the following parental rights with respect to the child: protection, education, care and control of the person, custody of the person, and decision making. The term "legal guardian" means the caretaker in such a relationship.[38]

The Adoption 2002 *Guidelines for Public Policy and State Legislation Governing Permanence for Children* recommend that because the goal of permanent guardianship is to create a permanent *family* for the child, guardians for this purpose should be adult individuals or couples, rather than public or private agencies. Once a

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[35] CHILDREN'S BUREAU, U.S. DEPARTMENT OF HEALTH & HUMAN SERVICES, ADOPTION 2002: THE PRESIDENT'S INITIATIVE ON ADOPTION AND FOSTER CARE, GUIDELINES FOR PUBLIC POLICY AND STATE LEGISLATION GOVERNING PERMANENCE FOR CHILDREN at II-8 (1999).

[36] *See* STEVE CHRISTIAN & LISA EKMAN, A PLACE TO CALL HOME: ADOPTION AND GUARDIANSHIP FOR CHILDREN IN FOSTER CARE (National Conference of State Legislatures 2000); Mark Hardin, *Legal Placement Options to Achieve Permanence for Children in Foster Care*, *in* FOSTER CHILDREN IN THE COURTS 128, 150–70 (Mark Hardin ed., 1983).

[37] Adoption and Safe Families Act of 1997, Pub. L. No. 105-89, § 302 amending 42 U.S.C. § 675(5)(C).

[38] ASFA, Pub. L. No. 105-89, § 101(b); 42 U.S.C. § 675(7).

permanent guardianship is established, there need not be any ongoing court review or agency supervision of the guardianship. The only exception is that the court could retain jurisdiction, just as it would in child custody determinations following divorce, to consider any subsequent motions to modify or terminate the guardianship or enforce orders of child support.[39]

In some jurisdictions, the judge handling the child protection proceeding has the authority to order a guardianship. An efficient legal process should address all of the needs of the child consistent with the principle of one child, one judge. In states where guardianship requires a separate proceeding in another court, there are formidable procedural barriers, and guardianship is sometimes avoided when it is most appropriate for the child and family. California, Michigan, and Rhode Island, among other states, authorize the courts that hear child protection cases to order guardianship.

The permanent guardian has full rights and responsibilities concerning the child, including the obligation to support the child. Birth parents could retain an obligation to contribute to the support of a child to the extent of their financial abilities if ordered to do so by the court. Courts could enter standing orders for support as part of the guardianship order, as appropriate in the circumstances. The court may reserve certain rights concerning the birth family in the decree of permanent guardianship, including rights of visitation with the birth parents, siblings, and extended family. The decree of permanent guardianship divests the birth parents or prior adoptive parents of legal custody and guardianship but does not terminate their parental rights. Thus, the decree of permanent guardianship differs from an adoption in that it does not affect a child's inheritance rights or rights to other government benefits (e.g., social security in certain cases) from and through the birth parents.[40] In fact, one legally significant difference between adoption with contact and permanent guardianship can be the survival of financial rights and benefits from the parents.

Permanent guardianship achieves a legally protected permanency without terminating parental rights. Some legal theorists distinguish between three levels of parental rights:

- Custody (to have physical possession and responsibility for daily care).
- Guardianship (the right to make the important decisions for the child).
- Residual rights (connection to the biological extended family, rights of inheritance, and the possibility of regaining custody or guardianship, should one lose them temporarily).

Termination of parental rights generally terminates all legal relation between the child and the extended biological family, whose legal connection is derived from the

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[39] *See* CHILDREN'S BUREAU, U.S. DEPARTMENT OF HEALTH & HUMAN SERVICES, ADOPTION 2002: THE PRESIDENT'S INITIATIVE ON ADOPTION AND FOSTER CARE, GUIDELINES FOR PUBLIC POLICY AND STATE LEGISLATION GOVERNING PERMANENCE FOR CHILDREN, CH. II (1999).

[40] *See* Mark Hardin, *Legal Placement Options to Achieve Permanence for Children in Foster Care*, *in* FOSTER CHILDREN IN THE COURTS 128, 171–73 (Mark Hardin ed., 1983).

parents' rights, so that the child is no longer related and becomes a legal stranger to them. (Similarly, in adoption the child acquires a new set of parents and a new extended family.) In a permanent guardianship the child remains legally related for inheritance purposes and may receive government and other benefits from the biological mother and father and the extended biological family. Should the permanent guardianship be terminated, for example, by the death or disability of the guardian, the parents and extended family members retain their legal relationship with the child. They could have a right to be notified and an opportunity to show the court that the guardianship should be terminated completely, restoring the rights of the parent or parents, or that the court should appoint another relative or designated person as successor guardian for the child.

Obviously this legal status is not for every child. Adoption probably remains the preferred permanent placement for children who cannot be reunited with their biological parents. But permanent guardianship may serve some children very well. The judgment as to when this status is in the best interests of the child is legally and psychologically complex and should be made on a case-specific basis.

Because a "permanent guardianship" is legally secure and very difficult to set aside, fairness, particularly to the parents, warrants application of strict standards. Permanent guardianship is not a status to be entered into lightly. The court should make a record in support of the guardianship including, where applicable, the fact that prior to the permanent guardianship the child was in state custody as the result of parental abuse or neglect and the parents were not able to resume care. Developing a sound legal record in support of the permanent guardianship protects the status from challenges except on the grounds cited below.

Permanent guardianship may be based on the consent of the parties if a factual basis for the guardianship is preserved on the record. All parties need not consent to a permanent guardianship, however, and the court may order permanent guardianship following a contested hearing. In Washington, for instance, a form of guardianship may be ordered after proofs equivalent to those required for termination of parental rights.[41]

The court must also find that the proposed guardian is suitable. In cases where the child has been living with the guardian, the quality of care will help establish this suitability, along with a careful home study and criminal and other background checks. In cases where the child has not been living with the guardian, the agency and court might rely entirely on the home study and background check, or the court might delay a permanent decision until the child has been in the home for a trial period.

When an adult individual or couple has permanent legal guardianship of a child, the legal position of the guardian should be as secure as that of a typical birth parent or adoptive parent. That is, it should not be possible to remove the child from the guardian unless it is shown that continuing placement in the home is detrimental to the child. If there is a report of child abuse or neglect, the child protection agency will

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[41] WASH. REV. CODE § 13.34.230.

have to provide the same evidence and proof that would be required against a biological parent.[42]

§ 25.5 Subsidized Guardianship

The Fostering Connections to Success and Increasing Adoptions Act of 2008[43] (Fostering Connections Act), which amends numerous provisions of Titles IV-B and IV-E, became law on October 7, 2008. Among its provisions is an expansion of subsidized guardianships—a policy change advocated by a number of groups, including the Children's Defense Fund.[44] For details on a particular state's implementation of Fostering Connections Act, a state-by-state summary is available online.[45] The federal requirements for funding guardianships can be found at the Children's Bureau Web site.[46]

The Fostering Connections Act permits each state to establish a subsidized kinship guardianship program under which "grandparents and other relatives" who have cared for a child in the role of foster parents and who are willing to make a permanent commitment to raising the child may become legal guardians of the child. This program would work much the same way as the adoption subsidy program. In summary, the adult relative would be given guardianship over the foster child that is intended to be permanent. The relative-guardian would receive financial assistance to provide care for that child, and the child would be eligible for Medicaid. Among other requirements, to be eligible for a subsidized guardianship, the relative must have cared for the child as a foster care provider for six consecutive months and the child should have a strong attachment to the prospective guardian. Siblings of children may also be eligible if placed in the same guardianship arrangement even if they are not otherwise eligible. Children 14 and older must be consulted about the guardianship, and some youths may be eligible beyond age 18. Additionally, the state can be reimbursed by the federal government for up to $2000 for nonrecurring expenses related to putting the guardianship in place (e.g., filing fees). Before placing a child in a kinship guardianship, the case worker must document: (1) the steps that were taken to determine that returning the child to the parent is not an appropriate permanency plan; (2) why placement with a relative in a permanent guardianship will serve the

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[42] For recommendations for a state statute providing for permanent guardianship, see CHILDREN'S BUREAU, U.S. DEPARTMENT OF HEALTH & HUMAN SERVICES, ADOPTION 2002: THE PRESIDENT'S INITIATIVE ON ADOPTION AND FOSTER CARE, GUIDELINES FOR PUBLIC POLICY AND STATE LEGISLATION GOVERNING PERMANENCE FOR CHILDREN at II-9 (1999).

[43] Pub. L. No. 110-351, 122 Stat. 3949 (Oct. 7, 2008) (codified in scattered sections of 42 U.S.C.).

[44] *See* Children's Defense Fund, *States' Subsidized Guardianship Laws at a Glance* (Oct. 2004); THE PEW COMMISSION ON CHILDREN IN FOSTER CARE, FOSTERING THE FUTURE: SAFETY, PERMANENCE AND WELL-BEING FOR CHILDREN IN FOSTER CARE 20 (2005). For a fuller discussion of Fostering Connections Act, see § 10.6, Fostering Connections to Success and Increasing Adoptions Act.

[45] See the Web site of the National Association of Public Child Welfare Administrators at http://www.napcwa.org/Legislative/LG.asp.

[46] http://www.acf.hhs.gov/j2ee/programs/cb/laws_policies/laws/cwpm/policy.jsp?idFlag+2.

child's best interests; (3) that adoption by the relative has been discussed; (4) why adoption is not being pursued; and (5) the efforts that were made to discuss the matter with the child's parents.[47]

Research in Illinois, replicated in Wisconsin and Tennessee, indicates that federally subsidized guardianship "is a permanent and cost effective alternative to retaining children in long-term foster care."[48] Fewer children remained in long-term foster care, and thus the states saved the costs of on-going administrative oversight. Concerns have been raised that subsidized guardianship might undermine adoption as a permanency option. The National Council for Adoption recognizes that adoption may not be an appropriate exit from foster care alternative for all children. There are some instances, they say, "when even the most passionate adoption advocate can agree that guardianship is the best permanency option" including:

- When a child is being cared for by a relative who wishes and is able to make a legally binding commitment, but does not want to disrupt existing family relationships by terminating the parents' parental rights;
- When an adolescent 14 years of age or older who clearly understands his or her options chooses guardianship because he or she doesn't wish to be adopted, but wants to forge a permanent, legal connection with his or her caregiver;
- When it is in the best interests of a child below the age of 14 to maintain his or her relationship with a sibling under a guardian's care; and
- When a parent's physical, emotional, or cognitive disability prevent him or her from caring effectively for the child, but where termination of parental rights is undesired and unwarranted.[49]

§ 25.6 Standby Guardianship

Standby guardianship is a legal mechanism that transfers decision-making for children in those circumstances where a custodial parent suffering from a chronic or terminal illness is able to designate a person to care for the child during the time the parent is unable to care for the child or upon the parent's death.

With respect to Standby Guardianship, ASFA contains the following language:

> SEC. 403 SENSE OF CONGRESS REGARDING STANDBY GUARDIANS It is the sense of Congress that the States should have in effect laws and procedures that permit any parent who is

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[47] *See* §10.6, Fostering Connections to Success and Increasing Adoptions Act.

[48] Mark F. Testa, *Subsidized Guardianship: Testing the Effectiveness of an Idea Whose Time Has Finally Come*, Child and Family Research Center, The University of Illinois and Urbana-Champaign (May 2008).

[49] Marc Zappala & Thomas Atwood, *Guarding Adoption While Subsidizing Guardianship*, ADOPTION ADVOCATE (National Council for Adoption), February 2008.

> chronically ill or near death, without surrendering parental rights, to designate a standby guardian for the parent's minor children, whose authority would take effect upon:
>
> 1) the death of the parent,
>
> 2) the mental incapacity of the parent, or
>
> 3) the physical debilitation and consent of the parent.

A parent can arrange for Standby Guardianship without immediately ending his or her parental rights. If the parent dies, the Standby Guardian can become guardian and also should have the option of applying for adoption. Standby Guardianship may be an appropriate option where parents are terminally ill (e.g., with cancer or HIV/AIDS) or when they suffer from a disease or disorder that will become incapacitating. Standby Guardianship allows terminally ill parents to choose who will become their child's guardian. It allows the parent to develop a practical plan for transition of responsibilities. It allows the identified guardian to take over the parental functions when the birth parent dies or becomes incapacitated. At least 25 states have enacted Standby Guardianship laws.[50] The National Conference of Commissioners on Uniform State Laws proposes a standby guardianship in its Uniform Guardianship and Protective Proceedings Act (1997), Section 202(b). Thus, there has now been significant experience with Standby Guardianship as a legal option for permanence.

California allows for "joint guardianship" for terminally ill parents, which is similar but not identical to Standby Guardianship.[51] Joint guardianship allows the parent and guardian to have decision-making authority for the child at the same time, while the parent is still alive and not yet incapacitated. It also allows the surviving joint guardian to automatically take over upon the parent's death or incapacity without confirmation by the court. Eliminating the requirement of court confirmation following the triggering event may create a smoother shift of authority than many

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[50] *See* ANN M. HARALAMBIE, 2 HANDLING CHILD CUSTODY, ABUSE AND ADOPTION CASES § 11:6 (West 2009). *See, e.g.*, ARK. CODE § 28-65-221 (2008); CAL. PROB. CODE § 2105(f) (2008); CONN. GEN. STAT. ANN. §§ 45a-624 *et seq.* (2008); 13 DEL. CODE §§ 2361 *et seq.* (2008); D.C. STAT. §§ 16-4801 *et seq.* (2008); FLA. STAT. ANN. § 744.304 (2008); GA. STAT. §§ 29-2-10 *et seq.* (2007); 755 ILL. COMP. STAT. ANN. §§ 5/1-2.23, 5/11-13.1 (2008); IOWA CODE ANN. §633.560 (2008); KAN. STAT. ANN. § 59-3074 (2007); KY. REV. STAT. ANN. § 387.750 (2007); MD. CODE ANN., EST. & TRUST. §§ 13-901 *et seq.* (2008); MASS. GEN. LAWS ANN. ch 201 § 2B (2008); MICH. COMP. LAWS ANN. § 330.1640 (2008); NEB. REV. STAT. § 30-2608(c) (2007); N.C. GEN. STAT. ANN. §§ 35A-1370 *et seq.* (2008); N.J. STAT. ANN. §§ 3B:12-67 *et seq.* (2008); N.Y. SURR. CT. PROC. ACT § 1726 (2008); N.C. STAT. §§ 35A-1370 *et seq.* (2008); OHIO REV. CODE ANN. §§1337.09(D), 2111.121(D) (2008); 23 PA. CONS. STAT. ANN. §§ 5601 *et seq.* (2008); VA CODE §§ 16.1-349 *et seq.* (2008); WASH. REV. CODE Ann. §§11.88.125 *et seq.* (2008); W. VA. CODE § 44A-5-1 *et seq.* (2008); WIS. STAT. ANN. § 54.52 (2007); WYO. STAT. §3-2-108 (2008). *See also* Child Welfare Information Gateway, Standby Guardianship: Summary of State Laws (July 2008), *available at* http://www.childwelfare.gov/system wide/laws_policies/statutes/guardianshipall.pdf; YOLANDE SAMERSON, CHOICES FOR TERMINALLY ILL PARENTS: A GUIDE FOR STATE LAWMAKERS (ABA Center on Children and the Law 1997).

[51] CALIF. PROB. CODE § 2105.

Standby Guardianship procedures. New York's Standby Guardianship statute, however, permits immediate commencement of the guardian's authority without court confirmation if the parent provides written consent that is filed with the court within 90 days.[52]

§ 25.7 Another Planned Permanent Living Arrangement

"Another planned permanent living arrangement" (or APPLA) is recognized as a permanency option under the Adoption and Safe Families Act[53] (ASFA), but it is the least favored of the permanency options.[54] APPLA, defined as "any permanent living arrangement not enumerated in the statute," is intended to be *planned* and *permanent*.[55] The ABA Center on Children and the Law notes that the preferred permanency plans involve a specific adult or couple (not an organization), who will be in charge of the youngster and likely live with him or her. They give these examples of APPLAs:

- A 14-year-old child, Angela, is in a residential treatment facility. She spends some weekends and holidays with a family friend, Mrs. S., who she has known for years. Mrs. S. is unwilling to adopt Angela because she is concerned that the adoption subsidy would not adequately address Angela's significant mental health needs. Mrs. S. is open to the idea of adopting Angela after she turns 18, and possibly being the representative payee for Angela's SSI benefits. In addition to addressing her mental health needs, Angela's permanency plan would include a structure of regular visitation with Mrs. S., and would include Mrs. S. in Angela's treatment and therapy, as appropriate.
- A 16-year-old boy, Robert, lives in a supervised apartment and is receiving independent living services. He stays with his aunt and uncle every other weekend. They are unwilling to allow him to live there full time because they have three children under age 9. Robert has also had problems with drugs in the past, and they are concerned that he will be a negative influence on their young children. They do help him with school issues, and are in the process of helping him fill out applications for college. Robert's permanency plan would not only include the independent living services he needs, but would also address issues between him

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[52] N.Y. SURR. CT. PROC. ACT § 1726(3)(e)(iii).

[53] 42 U.S.C. § 675(5)(C).

[54] *See* Cecilia Friemonte & Jennifer L. Renne, MAKING IT PERMANENT: REASONABLE EFFORTS TO FINALIZE PERMANENCY PLANS FOR FOSTER CHILDREN 79–84 (ABA Center on Children and the Law 2002), *available at* http://www.abanet.org/child/rclji/pub.html.

[55] *Id.*

and his aunt and uncle so that those relationships are strengthened and nurtured.

- Termination of parental rights is not being pursued for an 8-year-old Native American child because the agency doesn't think they can meet the burden of proving beyond a reasonable doubt that continued custody of the child by the parent is likely to result in serious emotional or physical damage to the child. Consistent with tribal custom, the tribe has placed the child with a (nonrelative) tribe member who has agreed to be responsible for the child, and with whom the child will reside on a permanent basis.
- A sibling group, ages 6, 9, and 14 have been in foster care with Mr. and Mrs. J. for three years. They visit regularly with their biological mother, and the agency is not pursuing termination of parental rights. The children are bonded with Mr. and Mrs. J. who have committed to caring for the children on a permanent basis. This APPLA could be approved as "permanent foster care with Mr. and Mrs. J."[56]

Long-term foster care is the least desirable option among the permanent placement options when a foster child cannot safely return home. ASFA and its regulations explicitly discourage long-term foster care as an APPLA. The preamble to the ASFA regulations explains, "Far too many children are given the permanency goal of long-term foster care, which is not a permanent living situation for a child."[57] Foster care is generally not stable and may be disrupted, leading to frequent moves for the child and instability.

Emancipation, the legal process by which minors are granted legal adulthood, is also discouraged as an alternative permanent placement. "Emancipation and independent living are not permanency goals, they are services."[58] Emancipation lacks the permanency features spelled out in ASFA.

Nonetheless, some youth will not be adopted, and a long-term placement with a specific foster family may be in their long-range best interests. Each decision must be individualized and focus on the context and needs of a particular child. ASFA permits a long-term foster placement as an APPLA option if the agency demonstrates a "compelling reason" to the court. "If the agency concludes, after considering reunification, adoption, legal guardianship, or relative placement, that the most appropriate permanency plan is an APPLA, the agency must document to the court the compelling reasons for the alternate plan."[59]

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[56] *Id.*

[57] Title IV-E Foster Care Eligibility Reviews and Child and Family Services State Plan Reviews, 65 Fed. Reg. 4020-1, 4036 (January 25, 2000).

[58] Brenda G. McGowan, *Facilitating Permanency for Youth, in* CHILD WELFARE FOR THE TWENTY-FIRST CENTURY: A HANDBOOK OF PRACTICES, POLICIES, AND PROGRAMS (Gerald Mallon & Peg McCartt Hess eds., Columbia University Press 2005).

[59] 45 C.F.R. § 1356.21(h)(3).

The regulations give three examples of a compelling reason for establishing an APPLA as a permanency plan:

(1) an older teen who specifically requests that emancipation be established as his/her permanency plan;

(2) the case of a parent and child who have a significant bond but the parent is unable to care for the child because of an emotional or physical disability and the child's foster parents have committed to raising him/her to the age of majority and to facilitate visitation with the disabled parent; or

(3) the Tribe has identified another planned permanent living arrangement for the child.[60]

Children in planned long-term living arrangements should continue to receive assistance from the state agency and supervision of the court, including continuing access to an attorney for the child. All should exercise great caution to support the foster family and child to prevent disruption of the placement.

Decisions resulting in permanent or long-term living arrangements should be based on a thorough assessment of the child's needs *and* the family's capacity to meet those needs *currently and into the child's future*. Simply meeting state licensing standards is not sufficient. A home study or an evaluation of the family, a written agreement between the agency and the family, the child's consent, and a statement of the family's intent to parent the child into adulthood should also be required. These materials should be discussed, developed, and agreed to by all parties, including the child, the foster parents, and the agency. Some states use a "permanent foster family agreement" (PFFA) to structure these arrangements.[61] Such agreements should be based on a thorough assessment of the family's capacity to meet the ongoing, lifelong developmental needs of the child.

§ 25.8 Re-establishing Parental Rights Post-Termination

The permanency planning philosophy of America sometimes results in termination of parental rights where the child is not adopted, the adoption is disrupted, or the child does not settle into some alternative permanent placement. The tight timelines of permanency planning and aggressive termination of parental rights have been criticized for not allowing enough individualized decision-making and for creating a certain number of "legal orphans." Guggenheim observes:

> Modern reforms aimed at helping families in need have resulted in creating the highest number of unnatural orphans in the history of the

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[60] 45 C.F.R. § 1356.21(h)(3)(i), (ii), & (iii).

[61] *See, e.g.*, MICH. COMP. LAWS § 712A.13a(h).

> United States. . . . Now is the time to re-examine a child protection system that relies on foster care as the most prominent child protection mechanism and that also creates more legal orphans than it appears to have the capacity to place in permanent, adoptive homes.[62]

Sometimes, after parental rights are severed and after a youth has been in foster care for some time, the situation changes—the child is older, there may have been unsuccessful or disrupted placements, and the parent's ability to provide for the child has improved. Youth occasionally vote with their feet and run from foster care to be with their extended family, including the parents whose parental rights were previously terminated. It sometimes happens that a reunification with the parent, even after all this history, is indeed in the interests of the child. With the passage of time and change of circumstances a legal, as well as a physical, reunification may be appropriate for the child.

Some state laws permit restoration of parental rights in those circumstances.[63] In other states parents may apply to adopt the child or to become the legal guardians of the child. Although restoration of parental rights is certainly not a common occurrence, it may serve the interests of a child, and we should be open to that possibility.

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[62] 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, 140 (1995).

[63] *See, e.g.*, CAL. WELF. & INST. CODE § 366.26(i)(2); MICH. COMP. LAWS § 712A.20.