THE VALUE OF PERMANENCY: STATE IMPLEMENTATION OF LEGAL GUARDIANSHIP UNDER THE ADOPTION AND SAFE FAMILIES ACT OF 1997

Sarah Katz[*]

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INTRODUCTION

In keeping with the theme of this symposium issue, *In Search of Equality in Family Law*, this Article explores the differential value placed on the parent–child relationship in resolving custody disputes in the public and private law contexts. This Article focuses on the law surrounding cases where legal guardianship has been granted to a relative or other caregiver after a child has spent time in foster care. In these cases, the child is not reunified with a parent, but is also not adopted (and parental rights are not terminated). In most, but not all, states, the parent may later petition to va-

* Assistant Clinical Professor of Law, Temple University Beasley School of Law. J.D., University of Pennsylvania Law School, 2003; B.A., Columbia University, 1993. Professor Katz supervises the Family Law Litigation Clinic at the Temple Legal Aid Office at Temple University Beasley School of Law. The Family Law Litigation Clinic provides free legal representation to low-income clients in custody, child and spousal support, paternity, and adoption cases in Philadelphia, PA. Many thanks to Lee Carpenter, Susan DeJarnatt, Spencer Rand, Nilam Sanghvi, and Bonny Tavares for their helpful comments and edits; and Kelsey Bissonette for her invaluable research assistance. Thanks also to my husband David Love and my son Micah Love for their love and support.

cate the guardianship and seek to regain custody of the child. Unlike private custody disputes, where the parent would likely stand on equal footing against another parent or benefit from a presumption favoring parents against third party caregivers, the law in most states strongly favors custody remaining with the legal guardian.

This is in large part because different law applies. In the public law, or child-welfare, context enormous weight is given to stability of the child's placement, known as "permanency" in the child-welfare terminology.[1] Stability is an important but not determinative factor in resolving private custody disputes. While all states use the "best interest of the child" standard to resolve child placement decisions in private custody matters,[2] children's best interests in child-welfare cases are driven by a hierarchy of "permanency outcomes," or "permanency goals," a set of prioritized endings for a case that are enumerated in federal law in the Adoption and Safe Families Act of 1997 (ASFA).[3] ASFA's permanency hierarchy first grants preference to reunification with the biological parent, then adoption, then permanent placement with a relative or other caregiver, and then lastly long-term foster care (known as Another Planned Permanent Living Arrangement (APPLA)).[4] Although reunification is the primary goal in most child-welfare cases absent certain exceptions,[5] only 51% of children who enter

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1. Permanency has many definitions in child-welfare practice and the law. *See, e.g.*, DONALD N. DUQUETTE & MARK HARDIN, U.S. DEP'T OF HEALTH & HUMAN SERVS., ADOPTION 2002: THE PRESIDENT'S INITIATIVE ON ADOPTION AND FOSTER CARE: GUIDELINES FOR PUBLIC POLICY AND STATE LEGISLATION GOVERNING PERMANENCE FOR CHILDREN, at I-3 (1999), *available at* http://archive.org/stream/guidelinesforpub00duqu/guidelinesforpub00duqu_djvu.txt (defining permanency as when "a child has a safe, stable, custodial environment in which to grow up, and a life-long relationship with a nurturing caregiver").

2. CHILD WELFARE INFO. GATEWAY, DETERMINING THE BEST INTERESTS OF THE CHILD 1-2 (2012), *available at* https://www.childwelfare.gov/systemwide/laws_policies/statutes/best_interest.cfm.

3. Adoption and Safe Families Act of 1997, Pub. L. No. 105-89, 111 Stat. 2115 (codified in scattered sections of 42 U.S.C.).

4. 42 U.S.C. § 675(5)(C) (2006). The permanency hierarchy is further elaborated in DUQUETTE & HARDIN, *supra* note 1, at II-1. In anticipation of the passage of ASFA, the United States Department of Health and Human Services' Children's Bureau, together with the Department of Justice, convened an interdisciplinary Expert Work Group to establish model guidelines for state legislation to advance the goal of providing children with safe and permanent homes and to increase the rate of adoption. *Id.* at I-1 to I-3. These guidelines are elaborated in the Adoption 2002 report. *Id.* at II-2.

5. Under ASFA, 42 U.S.C. § 671(a)(15)(B), (D)(i), agencies are required to make "reasonable efforts" to reunify each child who enters foster care, *unless* a court makes a finding that the agency is relieved from this obligation because "aggravated circumstances" are present. Although ASFA leaves to the states to further define "aggravated circumstances," the statute suggests the following examples of circumstances that may exempt the agency from the obligation to make reasonable efforts at reunification:

foster care nationally are reunified with their parents.[6] Under ASFA, after reunification, adoption is seen as the next most permanent alternative for children, as it requires terminating the parental rights of the child's biological parents forever and creating a new permanent family for the child.[7] Legal guardianship is viewed as the next most permanent alternative, because although legal and physical custody are transferred to a third party caregiver, thus ending the child-welfare case, the biological parents retain residual, if not custodial, rights.[8] Although legal guardianship as a child-welfare practice has been used in most states for many decades, ASFA formalized the role of legal guardianship as a permanency outcome in federal child-welfare law.[9] Approximately 7% (16,424) of children left foster care to legal guardianship arrangements in (fiscal year) 2012.[10]

Nationally, some child-welfare officials and child advocates have voiced mounting concern that legal guardianship is not the best outcome for children, because they do not see it as stable or legally permanent enough. This is because in most states parents retain the right to file to vacate the guardianship and seek primary custody at a later date.[11] Thus, the argument

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(i) the parent has subjected the child to aggravated circumstances (as defined in State law, which definition may include but need not be limited to abandonment, torture, chronic abuse, and sexual abuse);
(ii) the parent has—
  (I) committed murder (which would have been an offense under section 1111(a) of title 18, if the offense had occurred in the special maritime or territorial jurisdiction of the United States) of another child of the parent;
  (II) committed voluntary manslaughter (which would have been an offense under section 1112(a) of title 18, if the offense had occurred in the special maritime or territorial jurisdiction of the United States) of another child of the parent;
  (III) aided or abetted, attempted, conspired, or solicited to commit such a murder or such a voluntary manslaughter; or
  (IV) committed a felony assault that results in serious bodily injury to the child or another child of the parent; or
(iii) the parental rights of the parent to a sibling have been terminated involuntarily.

Id. § 671(a)(15)(D); *see also Id.* § 675(5)(C) (regarding the agency's responsibility for efforts toward reunification and permanency planning for children in agency custody).

6. CHILDREN'S BUREAU, U.S. DEP'T OF HEALTH & HUMAN SERVS., THE AFCARS REPORT: PRELIMINARY FY 2012 ESTIMATES AS OF JULY 2013, at 3 (2013) [hereinafter AFCARS REPORT], *available at* http://www.acf.hhs.gov/programs/cb/resource/afcars-report-20.

7. DUQUETTE & HARDIN, *supra* note 1, at II-1, II-3.

8. *Id.* at II-1, II-10, II-12.

9. 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, 506 (2005).

10. AFCARS REPORT, *supra* note 6, at 3.

11. *See infra* note 103.

goes, children have not truly gained permanency because of the perceived instability that might result from a parent's later court action. As a result, as is discussed in Part IV of this Article, a minority of states have eliminated parents' ability to seek primary custody after legal guardianship has been granted, while other states have set parameters on legal guardianship, for example, by limiting who can be a guardian, when a guardianship can be granted, and in what circumstances a guardianship can be vacated.[12]

This Article argues that it does not serve the interest of children or parents to prevent parents entirely from filing for custody after legal guardianship is granted. To the extent a parent's rights are not terminated as a result of her child-welfare involvement, a family's contact with the child-welfare system should not lessen the value the law places on the parent–child relationship. In short, the courthouse doors should not be closed to children and their parents by barring parents from later requesting, in appropriate circumstances, that a court determine whether it is in that child's best interests to return to the parent. Although permanency has value in the child-welfare context, permanency unto itself should not be the goal in resolving custody disputes—determining children's best interests should always be at the forefront in all custody cases, whether between private parties or between the parent and the state. This Article posits that parents should retain the right to file to vacate the guardianship and regain primary custody, but makes recommendations to the states so as to ensure children have the stability they need while promoting their best interests.

The first Part of this Article presents a case example that underscores the differential value placed on the parent–child relationship in post-legal guardianship custody litigation. The second Part reviews the development of legal guardianship as a permanency goal under ASFA. The third Part evaluates the concerns regarding the potential instability of legal guardianship, in particular underscoring that legal guardianship has been widely recognized as an important permanency option to help children leave foster care,[13] and it is valuable as a permanency outcome for children and parents precisely because it is flexible and potentially modifiable. The fourth Part reviews and evaluates trends in state laws implementing legal guardianship under ASFA. The fifth and final Part makes recommendations for states to clarify their laws, which will lead to a more equal value being placed on the parent–child relationship post-legal guardianship. This Article recommends

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12. *See infra* Part IV.

13. *See* Aron Shlonsky, *What Have We Learned from Evaluations About Subsidized Guardianship?*, *in* USING SUBSIDIZED GUARDIANSHIP TO IMPROVE OUTCOMES FOR CHILDREN: KEY QUESTIONS TO CONSIDER 57, 60 (Mary Bissell & Jennifer L. Miller eds., Cornerstone Consulting Grp. & Children's Def. Fund 2004) [hereinafter USING SUBSIDIZED GUARDIANSHIP], *available at* http://www.aecf.org/upload/PublicationFiles/CW3622H5063.pdf.

that while it does not serve the interest of children or parents to prevent parents entirely from later filing for custody after a legal guardianship is granted, states should clarify the standard and burden of proof to grant a guardianship, as well as the standard and burden of proof for the guardianship to be vacated.

I. WHAT IS PERMANENCY? A CASE EXAMPLE

To demonstrate the differential value placed on the parent–child relationship in the public and private law contexts, consider the following case summary of Ms. G, a potential client who came to the Family Law Litigation Clinic at the Temple University Beasley School of Law where I teach. Ms. G was seeking the Clinic's assistance regaining custody of her children.

Ms. G is the mother of two girls, who are now seven and nine years old. When the girls were four and six years old, Ms. G had a severe asthma attack that sent her into a coma. The children's father, who had never lived with the family or been the girls' primary caregiver, assumed responsibility for the girls. Ms. G, after a long hospital stay, was severely disabled and was transferred first to a rehabilitation hospital and then to a nursing home.

In the meantime, the child-welfare agency (CWA) received a report that the girls' father was using cocaine, and soon after the CWA removed the children from the father's care and placed them in foster care. The foster agency brought the girls for weekly visits with Ms. G at the nursing home throughout their time in foster care and reported that the girls greatly enjoyed and looked forward to these visits with their mother. The girls' father never successfully addressed his drug issues to reunify with the girls.

After a year, in compliance with ASFA's requirements that the CWA accomplish permanency for the girls, the court asked the CWA whether it would seek to terminate the parental rights of both parents. Because Ms. G had a meaningful bond with the girls but was still unable to care for them, the CWA asked the court to find that "compelling circumstances" existed to rule out adoption and sought legal guardianship for the foster parents to which Ms. G agreed.

The court granted the foster parents legal guardianship, thus ending the child-welfare case and enabling Ms. G to keep her weekly visits with her girls.[14]

When Ms. G came to our office, she had regained more of her abilities and was hoping to file a petition for primary custody of her children. My students and I discussed her options with her, explaining that in practice it

14. Ms. G's name is a pseudonym to protect her identity. The case summary is drawn from materials in the client's file, including Temple University Beasley School of Law Family Law Litigation Clinic students' interview with Ms. G and their review of court and agency documents in the case.

would be extremely difficult for her to regain primary custody immediately, if ever. While under current Pennsylvania law,[15] unlike in some other states, Ms. G. is permitted to petition for primary custody subsequent to a grant of legal guardianship, she does so in the face of a strong presumption, at least in practice, favoring the children's continued care by their legal guardian. My students correctly noted that their assessment of the case would be very different if the girls had remained with their father (ideally without him having developed a substance abuse issue), and he had been granted primary or sole legal and physical custody during Ms. G's illness and rehabilitation, with Ms. G maintaining the same type of weekly visitation with the children. In that situation, Ms. G would have been on an even playing field if she filed for primary custody, entitled, as a biological parent, to show that returning to her care was in her daughters' best interests.[16] So what is it about the children's stay in foster care that shifts the calculus in terms of Ms. G's ability to assert parental rights? The answer comes back to "permanency." But what does permanency really mean if the girls are expressing a strong preference to return to Ms. G's care? How does permanency come into play if the girls' legal guardian agrees it would be best for the girls to return to their mother? Arguably, the children's need for permanency should not trump what might be obvious to all involved (mother, legal guardian, and the children) is best for the children.[17]

II. CREATING PERMANENCY THROUGH LEGAL GUARDIANSHIP

Although permanency has been a central element of child-welfare policy for decades, since 1997, with the passage of the federal ASFA, permanency has been codified as the guiding force of child-welfare decision making.[18] As Mark Testa has aptly explained, the definition of permanency has

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15. *In re* S.H., 71 A.3d 973, 980-81 (Pa. Super. Ct. 2013), *reargument denied*, 2013 Pa. Super. LEXIS 2637 (Pa. Super. Ct. Aug. 19, 2013), *appeal denied*, 2013 Pa. LEXIS 2698 (Pa. Nov. 14, 2013). The Pennsylvania Superior Court recently entered a decision in this case, which confirmed that parents retain the right to file for primary custody subsequent to a grant of legal guardianship, known as "permanent legal custody" in Pennsylvania. *Id.* at 975, 982-83.

16. Under Pennsylvania law, there is "no presumption that custody should be awarded to a particular parent." 23 PA. CONS. STAT. ANN. § 5327(a) (West 2013). However, as between a parent and a third party, there is "a presumption that custody shall be awarded to the parent." *Id.* § 5327(b). Although no contrary statute or case law exists for cases where legal guardianship, called "permanent legal custody" under Pennsylvania law, has been granted, in the Author's practice experience, courts apply a presumption in favor of the permanent legal custodian in custody disputes between a parent and a (third party) permanent legal custodian.

17. For a thoughtful and more thorough discussion of the meaning of permanency and its purpose, see Cynthia Godsoe, *Permanency Puzzle*, 2013 MICH. ST. L. REV. 1113.

18. Testa, *supra* note 9, at 499.

shifted from its "original meaning rooted in the psychology of attachment [that] defines permanence as 'lasting': an enduring relationship that arises out of feelings of belongingness,"[19] to "a newer meaning rooted in law [that] defines permanence as 'binding': an enduring commitment that is legally enforceable."[20] Although there is no one definition of permanency, the concept of permanency is interwoven throughout federal child-welfare law. Casey Family Programs offers the following definition:

> [A]chieving "permanency" means having an enduring family relationship that is safe and meant to last a lifetime; offers the legal rights and social status of full family membership; provides for physical, emotional, social, cognitive and spiritual well-being; and assures lifelong connections to extended family, siblings, other significant adults, family history and traditions, race and ethnic heritage, culture, religion and language.[21]

Although ASFA is responsible for creating legal guardianship as an identified permanency outcome in federal law, ASFA is first and foremost an adoption promotion law.[22] Seeking to emphasize child safety as the paramount consideration in all child-welfare placement decisions, and in an attempt to shorten the length of time children spend in foster care, ASFA prioritizes the adoption of children in foster care who cannot safely be reunited with their parents.[23] ASFA requires that, in most cases, states must move swiftly toward termination of parental rights and adoption for children who cannot go home within a prescribed period of time, usually fifteen months, unless certain exceptions are present.[24] As explained above, ASFA promotes a hierarchy of "permanency goals," first prioritizing reunification with the biological parent, then adoption, then legal guardianship with a

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19. *Id.* (quoting ARTHUR EMLEN ET AL., U.S. DEP'T OF HEALTH, EDUC. & WELFARE, OVERCOMING BARRIERS TO PLANNING FOR CHILDREN IN FOSTER CARE 10 (1978)).

20. *Id.* (quoting NAT'L COUNCIL OF JUVENILE & FAMILY COURT JUDGES, ADOPTION AND PERMANENCY GUIDELINES: IMPROVING COURT PRACTICE IN CHILD ABUSE AND NEGLECT CASES 14-15 (2000)).

21. LAUREN L. FREY, SARAH B. GREENBLATT & JIM BROWN, A CALL TO ACTION: AN INTEGRATED APPROACH TO YOUTH PERMANENCY AND PREPARATION FOR ADULTHOOD 3 (2005), *available at* www.aecf.org/upload/publicationfiles/casey_permanency_0505.pdf.

22. ASFA was originally titled the "Adoption Promotion Act of 1997." *See* H.R. REP. NO. 105-77, at 1 (1997).

23. *See id.* at 8.

24. *See, e.g.*, Strengthening Abuse and Neglect Courts Act of 2000, Pub. L. No. 106-314, 114 Stat. 1266 (codified at 42 U.S.C. § 670).

Congress finds the following:

. . . .

(4) To avoid unnecessary and lengthy stays in the foster care system, the Adoption and Safe Families Act of 1997 [for full classification, consult USCS Tables volumes] specifically requires, among other things, that States move to terminate the parental rights of the parents of those children who have been in foster care for 15 of the last 22 months.

Id.

relative or other caregiver or another permanent placement with a fit and willing relative, and lastly long-term foster care.[25]

Once reunification is ruled out, ASFA creates strong financial incentives for states to pursue adoption, over legal guardianship, as a permanency goal through the open-ended entitlement program known as the Adoption Assistance Program,[26] as well as the Adoption Incentive Program, funded through Title IV-E of the Social Security Act.[27] Adoption Assistance is a critical element of promoting permanency through adoption for children leaving foster care, as it allows families adopting from foster care to receive an ongoing subsidy during the child's minority, without regard to the adoptive parents' income and without ongoing agency and court oversight.[28] Further, through the Adoption Incentives Program, states are reimbursed for increasing the rates of adoptions in specific categories.[29] The Adoption Incentives Program was established by ASFA in 1997, and the program has been amended and extended twice: first, by the Adoption Promotion Act of 2003 and, more recently, by the Fostering Connections to Success and Increasing Adoptions Act of 2008, frequently called the Fostering Connections Act (FCA).[30]

Although ASFA created legal guardianship as an alternative permanency outcome for children, it was not accompanied by the same enhanced federal financial incentives for states to pursue it as a meaningful perma-

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25. 42 U.S.C. § 675(5)(C) (2006). The permanency hierarchy is further elaborated and explained in DUQUETTE & HARDIN, *supra* note 1. After the passage of ASFA, the United States Department of Health and Human Services' Children's Bureau, together with the Department of Justice, convened an interdisciplinary Expert Work Group to establish model guidelines for state legislation to advance the goal of providing children with safe and permanent homes. *Id.* at I-2.

26. 42 U.S.C. § 673(a)(1)(B); *see also Child Welfare Policy Manual*, CHILD. BUREAU, http://www.acf.hhs.gov/cwpm/programs/cb/laws_policies/laws/cwpm/policy_dsp.jsp?citID=32 (last visited Nov. 19, 2013).

27. The eligibility requirements for the Adoption Assistance Program are articulated in 42 U.S.C. § 671(a), and the eligibility requirements for the Adoption Incentive Program are articulated in *id.* § 673b.

28. *Id.* § 673(a)(3); Adoption Assistance Program: Administrative Requirements to Implement Section 473 of the Act, 45 C.F.R. § 1356.40(c) (2012).

29. These categories are: increasing the "number of children adopted out of foster care overall; number of children adopted at age 9 or older; number of children adopted with special needs and who are under the age of 9; or rate at which children are adopted from foster care." EMILIE STOLTZFUS, CONG. RESEARCH SERV., CHILD WELFARE: STRUCTURE AND FUNDING OF THE ADOPTION INCENTIVES PROGRAM ALONG WITH REAUTHORIZATION ISSUES 5 (2013). For a detailed explanation of the Adoption Incentives Program, see generally *id.*

30. Adoption and Safe Families Act of 1997, Pub. L. No. 105-89, 111 Stat. 2115 (codified in scattered sections of 42 U.S.C.); Adoption Promotion Act of 2003, Pub. L. No. 108-145, 117 Stat. 1879 (codified in scattered sections of 42 U.S.C.); Fostering Connections to Success and Increasing Adoptions Act of 2008, Pub. L. No. 110-351, 122 Stat. 3949 (codified in scattered sections of 26 U.S.C. & 42 U.S.C.).

nency option for children. After ASFA, some states very quickly incorporated legal guardianship into their child-welfare statutes, while others took longer to fully integrate guardianship as a permanency outcome into their statutes—arguably, at least in part, because ASFA did not include the same financial incentives for guardianship as for adoption. Unlike the financial subsidy adoptive parents receive after the adoption is finalized through the Adoption Assistance Program, under ASFA no such federal subsidy was available for legal guardians unless the state qualified for a waiver of Title IV-E's requirements.[31] Although some states used a combination of state, local, IV-E waiver, or Temporary Aid for Needy Families (TANF) funds to subsidize legal guardianships, by 2008 only twenty-one states had such programs.[32] The passage of the FCA created new incentives for states to utilize legal guardianship as a permanency outcome, as it allows federal Title IV-E money to be utilized by the states toward the subsidy some kinship legal guardians receive after the guardianship is granted, similar to the subsidy adoptive parents receive through the Adoption Assistance Program.[33] This Program is called the Guardianship Assistance Program (GAP). However, the states receive no reimbursement similar to the Adoption Incentive Program for successfully increasing the number of legal guardianships completed. Further, not all legal guardians will qualify for the GAP federal subsidy.[34] Thus, the preference for adoption remains strongly financially incentivized through ASFA.

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31. 42 U.S.C. § 1320a-9(a). Section 1130 of the Social Security Act provides the Department of Health and Human Services with authority to approve child welfare waiver demonstration projects by waiving certain requirements of titles IV-E and IV-B, the sections of the Act that govern foster care, adoption assistance and optional kinship guardianship assistance programs, and related expenses. *Id.* The Child Welfare Demonstration Project was first authorized by Congress in 1994 and then expanded and extended as part of ASFA. Adoption and Safe Families Act of 1997, Pub. L. No. 105-89, 111 Stat. 2115.

32. CHILDREN'S DEF. FUND ET AL., MAKING IT WORK: USING THE GUARDIANSHIP ASSISTANCE PROGRAM (GAP) TO CLOSE THE PERMANENCY GAP FOR CHILDREN IN FOSTER CARE 6 (2012), *available at* http://www.childrensdefense.org/child-research-data-publications/data/making-it-work-using-the.pdf.

33. *Id.* at 3, 24.

34. The federal statute limits guardian assistance payments to a relative of the child. 42 U.S.C. § 673(d)(1). The statute neither defines relative nor require states to define relative, leaving to the states the option to define relative broadly to include someone who is not related to the child by blood, marriage, or adoption, for example a family friend, often broadly referred to as "fictive kin." However, states are free to also limit the definition of relative more closely. Further restrictions on those eligible for a guardianship payment are outlined in 42 U.S.C. § 673(d)(3), which provides for a "child's eligibility for a kinship guardianship assistance payment":

> (A) In general. A child is eligible for a kinship guardianship assistance payment under this subsection if the State agency determines the following:
>
> (i) The child has been—
>
> (I) removed from his or her home pursuant to a voluntary placement agreement or as a result of a judicial determination to the effect that

Nonetheless, ASFA instituted legal guardianship as a concrete permanency option for at least some children who enter the foster care system. ASFA defines "legal guardianship" as

> a judicially created relationship between child and caretaker which is intended to be permanent and self-sustaining as evidenced by the transfer to the caretaker of the following parental rights with respect to the child: protection, education, care and control of the person, custody of the person, and decisionmaking. The term "legal guardian" means the caretaker in such a relationship.[35]

Other than suggesting that reunification and adoption must first be ruled out before legal guardianship is considered, ASFA leaves it to the states to determine in what circumstances legal guardianship should be granted and whether it can be subsequently modified.[36]

Legal guardianship, which, unlike adoption, does not require termination of parental rights, is widely regarded an important permanency option for many children and parents who become involved in the child-welfare system.[37] Legal guardianship is seen as advantageous because it preserves to some degree the parent–child relationship, allowing the parent and child to maintain ongoing communication or visitation, while transferring legal and physical custody to the legal guardian, usually the kinship caregiver or foster parent with whom the child already resides.[38] Thus, legal guardianship is often the appropriate permanency outcome in situations where the children

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continuation in the home would be contrary to the welfare of the child; and

(II) eligible for foster care maintenance payments under section 672 of this title while residing for at least 6 consecutive months in the home of the prospective relative guardian.

(ii) Being returned home or adopted are not appropriate permanency options for the child.

(iii) The child demonstrates a strong attachment to the prospective relative guardian and the relative guardian has a strong commitment to caring permanently for the child.

(iv) With respect to a child who has attained 14 years of age, the child has been consulted regarding the kinship guardianship arrangement.

The requirements that the relative's home be licensed as a foster home and that the child live in the home for at least six months prior to the grant of legal guardianship have been identified as challenges in implementing the guardianship assistance program. *See* CHILDREN'S DEF. FUND ET AL., *supra* note 32, at 19.

35. 42 U.S.C. § 675(7).

36. *Id.* § 675(1)(E). The permanency hierarchy is not explicitly spelled out in the statute, but is further explained in DUQUETTE & HARDIN, *supra* note 1, and in the funding incentives outlined in this Article.

37. *See, e.g.*, CHILDREN'S DEF. FUND ET AL., *supra* note 32. *See generally* USING SUBSIDIZED GUARDIANSHIP, *supra* note 13.

38. *See* CHILDREN'S DEF. FUND, STATES' SUBSIDIZED GUARDIANSHIP LAWS AT A GLANCE 1, 3 (2004), *available at* http://www.childrensdefense.org/child-research-data-publications/data/state-subsidized-guardianship-laws.pdf.

entered foster care through no real fault of the parent, or for older youth who tend to not consent to adoption in large part because they are still attached to their biological parents. Legal guardianship is also commonly used in cases where family members caring for the child, such as grandparents or aunts and uncles, do not wish to terminate their relative's parental rights, as would be required to effectuate an adoption, but wish to continue to be the long-term caregiver for the child.[39] After legal guardianship is granted, the child-welfare agency and court supervision of the family generally end.[40] As discussed above, in some circumstances the family may be able to continue receiving a subsidy until the child turns eighteen.[41] But subsidized or not, the idea of legal guardianship is that it allows the child to achieve "permanency": an exit from the foster care system and a stable custodial arrangement.[42]

Although permanent legal guardianship is widely recognized as a positive permanency outcome by a broad array of child-welfare experts, it is not utilized nearly as frequently as it could be to help children leave foster care. According to Adoption and Foster Care Analysis Reporting System (AFCARS) data, of the 399,546 children in foster care on September 30, 2012, only 14,829 or 4% had a goal of legal guardianship.[43] Of the 241,254 who exited foster care in fiscal year 2012, only 16,424 or 7% were discharged to legal guardianship.[44] The fact that approximately 23,439 or 10% of children were emancipated from (i.e. aged out of) foster care in fiscal year 2012, having never achieved permanency, may suggest that we must look more closely at legal guardianship as a permanency option to help children leave foster care.[45]

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39. *Id.* at 1.

40. Brenda Shum, *Achieving Permanency Through Subsidized Guardianship*, 26 CHILD. L. PRAC. 49, 54 (2007) ("For children who have achieved stability in relative foster placement, subsidized guardianship provides an opportunity to end state supervision and intervention in their lives. . . . Once guardianship is established, most states limit ongoing involvement to annual agency or court reviews designed to confirm that the child is still in placement, the family's financial situation is unchanged, and the needs of the child are being met.")

41. CHILDREN'S DEF. FUND ET AL., *supra* note 32, at 8. In some states, the subsidy may be available until the child turns twenty-one. *Id.* at 8-9.

42. *Id.* at 1.

43. AFCARS REPORT, *supra* note 6, at 1.

44. *Id.* at 1, 3. This is in comparison to the 122,401, or 51%, who were reunified and 51,229, or 21%, who were adopted. *Id.* at 3.

45. *Id.* at 3; Robin Nixon, *How Can Subsidized Guardianship Contribute to Permanency for Older Youth?*, *in* USING SUBSIDIZED GUARDIANSHIP, *supra* note 13, at 37.

III. WHY PERMANENCY? THE LEGAL PERMANENCY MYTH AND CONCERNS REGARDING INSTABILITY OF LEGAL GUARDIANSHIP

Despite the overwhelming agreement from child-welfare experts that legal guardianship is a promising permanency outcome to help more children safely leave foster care, the concerns continue to resonate that legal guardianship is not legally permanent enough because of the potential that parents in most states may later file to vacate the guardianship and seek to regain primary custody. But the theoretical possibility that the guardianship may be vacated does not mean legal guardianships are not in the best interest of children. First, because under most legal guardianships children and their parents continue to have visitation or even more extensive contact, it is not surprising that, in at least some circumstances, children and their parents may wish to reunify, often with the legal guardian even agreeing it is in the child's best interest. Notably, the underlying presumption in federal child-welfare law is that it is best for children to reunify with their families of origin (or stay with them in the first place).[46] Although in legal guardianship cases the court will have ruled out reunification, circumstances may change that make reunification appropriate. Second, courts will only vacate the guardianship and return the child to the parent upon a finding that it is in the best interest of the child.[47] Legal guardianships are granted for many reasons: in cases like that of Ms. G who was simply too disabled to care for her children, or where a parent does not have housing for the child, or where the parent has a chronic capacity issue, such as ongoing substance abuse. As will be addressed in Part IV, in considering whether to vacate a guardianship, a court's best interest determination can address not only whether the parent has resolved these capacity issues, but also what is best for the child right now. Much more alarming than the possibility that some children may leave their legal guardianships to return to their families of origin is the idea that some children will be trapped in a custodial arrangement no longer in their best interests—while a parent whose parental rights remain intact has no ability to petition the court to regain custody of that child.

This debate regarding the true legal permanence of legal guardianship underscores the tension in child-welfare policy between legal permanence, as articulated through the federal child-welfare scheme, and psychological

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46. Under ASFA, child-welfare agencies are obligated to make "reasonable efforts" to reunify children with their families in every case, unless a court finds that "aggravated circumstances" are present and that the child-welfare agency is relieved from its obligation to make reasonable efforts. 42 U.S.C. § 671(a)(15)(D)(i) (2006). ASFA also requires child-welfare agencies to make reasonable efforts to prevent placement of children except in circumstances of imminent danger. *Id.* § 671(a)(15)(B), (D).

47. In most states, the guardianship can only be vacated upon a showing of a material or substantial change in circumstances. *See infra* notes 101-06 and accompanying text.

permanence, i.e. children's actual experiences of connection and stability. Strikingly, studies show that there is very little distinction between children's actual feelings of stability or permanency as between adoption, the form of legal permanency prioritized by ASFA, and legal guardianship.[48] Particularly illuminating is Mark Testa's study in Illinois of children and their kinship caregivers about their feelings of permanency, which he defined as "an enduring relationship that arises out of feelings of belongingness."[49] The study found that the caregiver's long-term commitment to the child, the child's sense of belonging, and the longevity of the placement (which he called "continuity of family care") bore very little relationship to the form of legal permanence the family chose—adoption or subsidized guardianship—whereas "extralegal factors, such as the degree of genealogical relatedness, sense of family duty, feelings of affection and length of acquaintance" had much more bearing on the actual degree of permanence achieved.[50] Notably, over 90% of the children interviewed felt their home was stable and that they were part of a family all or most of the time.[51] Madilyn Freundlich's study of former foster care youth in New York City came to similar conclusions, finding that the youth's desires for family connection were a far greater motivating factor in their desire for permanency than any notion of legal permanence.[52]

The concern that legal guardianships will frequently result in parents regaining custody through the courts seems not to be evidence based. Courts and child-welfare agencies simply do not collect data regarding how frequently legal guardianships are dissolved and for what reasons. Notably, although much further study is needed in this area, initial studies, such as the research regarding kinship guardianships by Mark Testa described above, have found that these guardianships dissolve at a much lower rate than adoptions.[53] By contrast, although it is difficult to track numbers of

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48. Testa, *supra* note 9, at 500.

49. *Id.* at 499-500.

50. *Id.* at 524-25.

51. *Id.* at 527-28 (indicating a rate identical to a comparable group of children in adoptive placements).

52. Madelyn Freundlich et al., *Permanency Options and Goals: Considering Multifaceted Definitions*, 35 CHILD. CARE YOUTH F. 355, 356 (2006) (noting that "long-term security and stability" should underlie permanency, which is possible in more expansive relationships than adoption and guardianship).

53. Testa, *supra* note 9, at 499; Mary Bissell & Karine Kirana, *Establishing Permanence*, *in* USING SUBSIDIZED GUARDIANSHIP, *supra* note 13, at 15 ("Of the 6,071 children who exited foster care into the [California] Kin-GAP program between January 2000 and July 2001, only 55 (0.8%) re-entered foster care. Similarly in Illinois, of the 6,820 children who entered into subsidized guardianship arrangements between April 1997 and February 2002, only 237 (3.5%) are no longer living in the home of the original guardian. Of those children, only 39 returned to live with their birth parents." (citing CAL. DEP'T OF SOC. SERVS., REPORT TO THE LEGISLATURE ON THE KINSHIP GUARDIANSHIP ASSISTANCE PAYMENT (KIN-GAP)

failed adoptions from the child-welfare system, largely because children's names are changed and the child-welfare agency is no longer involved, the studies that exist suggest that these adoptions dissolve at rates of anywhere from 1 to 10% (dissolution is defined as the adoptive relationship being legally ended).[54] Adoptions disrupt at estimated rates of 10 to 25% (disruption is defined as the placement failing before the adoption is legally finalized).[55] Thus, the permanency "gold standard" of adoption does not guarantee true permanency. Sadly, even reunification with a biological parent does not guarantee absolute permanency. While foster care re-entry rates vary widely from state to state, the median rate for fiscal year 2011 was at about 11.9%.[56] So while permanency disruption is a great cause for concern in child-welfare practice and certainly an area for continued research and development of best practices, the proposition that legal guardianships are frequently dissolved with the child returning to the biological parent is factually uncertain.

Legal permanency is not always permanent, no matter how it is achieved. All children's physical, social, emotional, and other needs change over time, as does the capacity of children's caregivers to meet those needs. Even when the court achieves permanency through adoption or reunification, nothing prevents another parent, or a third party such as a grandparent, from filing for and sometimes being granted primary custody at a later date because the court determines the child's *best interest* warrants it. Nor does anything prevent the primary custodial parent or adoptive parent from filing to transfer custody to another party, and the court approving this modification, because the court determines the child's *best interest* warrants it.

But if permanency is so elusive, why the overwhelming emphasis on permanency in the public law context? The emphasis on permanency in child welfare is rooted largely in the influential work of three psychologists, Joseph Goldstein, Anna Freud, and Albert J. Solnit, who, in the early 1970s, posited a theoretical basis for making child-custody decisions that came to

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PROGRAM 10 (2002), *available at* http://cssr.berkeley.edu/childwelfare/pdfs/KinGAPRpt.pdf; MARK TESTA, LESLIE COHEN & GRACE SMITH, ILL. DEP'T OF CHILD & FAMILY SERVS., ILLINOIS SUBSIDIZED GUARDIANSHIP WAIVER DEMONSTRATION: FINAL EVALUATION REPORT 3 (rev. 2003), *available at* http://cfrc.illinois.edu/pubs/rp_20030701_IllinoisSubsidizedGuardianshipWaiverDemonstrationFinalEvaluationReport.pdf)).

54. CHILD WELFARE INFO. GATEWAY, ADOPTION DISRUPTION AND DISSOLUTION 5-6 (2012), *available at* http://www.childwelfare.gov/pubs/s_disrup.pdf.

55. *Id.*

56. CHILDREN'S BUREAU, U.S. DEP'T. OF HEALTH & HUMAN SERVS., CHILD WELFARE OUTCOMES 2008-2011: REPORT TO CONGRESS 20 (2013), *available at* http://www.acf.hhs.gov/programs/cb/resource/cwo-08-11. "Reentry" is defined as a "child re-enter[ing] foster care within 12 months" of reunification with a biological parent. *Id.*

be known as the "psychological parent" theory.[57] The concept is that children form their primary attachment with a "psychological parent"—the person that provides day-to-day care for the child, whether or not that person is the biological parent—and their psychological and emotional well-being requires a continuous and positive relationship with that person.[58] Thus, in the child-welfare context, the theory has been embraced to support the notion that if children cannot return home, then the best possible alternative is that they swiftly cut ties with their biological family and formalize attachments to their current caregivers, thereby creating permanency. This theoretical approach helped frame the legislative purpose of ASFA.[59]

As well-outlined by Eliza Patten and others, there are many criticisms of Goldstein, Freud, and Solnit's approach, namely that it fails to respect or address the needs of children who are raised outside of traditional nuclear family arrangements, in particular poor children of color, who are disproportionately represented in the foster care system.[60] The psychological parent theory, at least as applied through current child-welfare policy and practice focused on "legal permanence," has limited utility in its application for making custody and placement decisions for children who form deep meaningful attachments to multiple caregivers.[61] As Sacha Coupet has argued, because ASFA prioritizes and financially incentivizes adoption, families are pushed toward adoption as a permanency outcome, whether it best serves

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57. The psychologists wrote a trilogy of books that map out and discuss the "psychological parent theory." JOSEPH GOLDSTEIN ET AL., IN THE BEST INTERESTS OF THE CHILD (1986) (regarding the role of child professionals in child placement decisions); JOSEPH GOLDSTEIN, ANNA FREUD & ALBERT J. SOLNIT, BEFORE THE BEST INTERESTS OF THE CHILD (1979) (addressing the grounds for intervention); JOSEPH GOLDSTEIN, ANNA FREUD & ALBERT J. SOLNIT, BEYOND THE BEST INTERESTS OF THE CHILD (1973) [hereinafter GOLDSTEIN, FREUD & SOLNIT, BEYOND THE BEST INTERESTS] (setting out guidelines for child placement decisions).

58. As Goldstein, Freud, and Solnit further explain in *Beyond the Best Interests of the Child*:

> Such primitive and tenuous first attachments form the base from which any further relationships develop. What the child brings to them next are no longer only his needs for body comfort and gratification but his emotional demands for affection, companionship, and stimulating intimacy. Where these are answered reliably and regularly, the child-parent relationship becomes firm, with immensely productive effects on the child's intellectual and social development. Where parental care is inadequate, this may be matched by deficits in the child's mental growth. Where there are changes of parent figure or other hurtful interruptions, the child's vulnerability and the fragility of the relationship become evident.

GOLDSTEIN, FREUD & SOLNIT, BEYOND THE BEST INTERESTS, *supra* note 57, at 18.

59. *See* H.R. REP. NO. 105-77 (1997).

60. Eliza Patten, *The Subordination of Subsidized Guardianship in Child Welfare Proceedings*, 29 N.Y.U. REV. L. & SOC. CHANGE 237, 244-45 (2004).

61. *Id.* at 249-51.

the interests of the child or not.[62] Although Goldstein, Freud, and Solnit envisioned their theory as a comprehensive approach to making custody decisions in both the public and private law contexts, in fact it has never taken hold as an approach to making private custody determinations.[63] This is because private custody law recognizes not only the value of a legal connection to both parents, but also recognizes that the child's best interests may justify changes in the custodial relationship at different points in the child's life.

It appears that Goldstein, Freud, and Solnit's approach has been selectively embraced by child-welfare policy makers. The mainstream of psychological theory has for many decades placed great emphasis on the importance for children to preserve multiple attachments and the importance of maintaining an ongoing attachment to biological parents, regardless of whether the child remains in the parents' custody.[64] As clinical psychologist Matthew Johnson has suggested, the very term "psychological parent" "juxtaposes two notions of parenthood in a false dichotomy" by failing to emphasize the fact that biological parents are psychologically important to children no matter what the child's custodial arrangement.[65] As noted by Eliza Patten:

> Psychological and sociological research over the past thirty years has confirmed (1) the importance of the biological parent-child relationship as a determinant of the child's personality, resilience and relationships with others, regardless of whether the child in fact lives with that parent, and (2) the child's ability to maintain multiple emotional bonds simultaneously.[66]

Indeed, research regarding the benefits and desirability of open adoption, not just for birth parents but for both adopted children and their adoptive parents, reinforces the importance of children maintaining connections to their families of origin.[67] In private custody disputes, nothing is considered completely permanent. In most states, the prevailing governing stand-

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62. Sacha Coupet, *Swimming Upstream Against the Great Adoption Tide: Making the Case for "Impermanence,"* 34 CAP. U. L. REV. 405, 412 (2005) ("In addition to reifying a downstream mentality, the practice of attaching subsidies only to adoption, thereby preferencing it above other options, effectuates a crude sort of 'bounty' on the heads of poor children and families, currently anywhere between $4,000 to $10,000 a head.").

63. Patten, *supra* note 60, at 244.

64. *Id.* at 240-41. *See generally* Loraine Townsend, *Open Adoption: A Review of the Literature with Recommendations to Adoption Practitioners*, 15 J. CHILD. & ADOLESCENT MENTAL HEALTH 1 (2003).

65. Matthew B. Johnson, *Examining Risks to Children in the Context of Parental Rights Termination Proceedings*, 22 N.Y.U. REV. L. & SOC. CHANGE 397, 405 (1996).

66. Patten, *supra* note 60, at 240 (citing Marsha Garrison, *Parents' Rights vs. Children's Interest: The Case of the Foster Child*, 22 N.Y.U. REV. L. & SOC. CHANGE 371, 380-81 (1996)).

67. *See, e.g.*, Harold D. Grotevant et al., *Many Faces of Openness in Adoption: Perspectives of Adopted Adolescents and Their Parents*, ADOPTION Q., July 2008, at 79.

ard guiding decisions regarding custody is "the best interest of the child."[68] The notion is that what children need is ever changing, based on numerous factors such as the individual needs and desires of the child, as well as a wide variety of external factors such as parental fitness and ability and connections to siblings and extended family. Simply stated, under the prevailing custody doctrine, a court may determine that what is best for a three-year old after her parents have separated may be very different than what is best for that same child when she is thirteen-years old. While some state statutes do not define what constitutes "the best interest of the child" in their statute,[69] increasingly, state statutes set out a detailed list of relevant factors that the court must consider in making a custody determination.[70] While stability of the caregiving arrangement is a factor the courts must consider, it is not the *only* relevant factor in determining best interest. While most states require a "significant" or "material" change of circumstances in order for a party to file to modify a custody order, a number of states have moved away from this approach, only requiring a party show that it is in the "best interest of the child" to file to modify the custody order.[71] While this approach may run the risk of frivolous litigation, courts continue to find that these risks are outweighed by the risk of a child's best interests not being reviewed by the courts.[72]

So why the different approach with parents' petitions to regain primary custody after legal guardianship has been granted? There are two issues. First, concededly, the framers of ASFA seem to have intended legal guardianship to carry more weight than a simple custody order.[73] The guardianship is meant to endure until the child reaches majority, unless for any reason it is vacated by the court, thus creating permanency for the child. It stands to reason that there might be some higher burden for parents to meet in these cases. Second, private custody law presumes parents are fit unless proven otherwise. In child welfare cases, however, the parent at some point in the past was found to be unfit or otherwise unable to provide care for the child. Although by definition if legal guardianship has been granted, a court has

68. CHILD WELFARE INFO. GATEWAY, *supra* note 2.

69. *See, e.g.*, ARK. CODE ANN. § 9-13-101 (2013); ALA. CODE § 30-3-1 (2013).

70. *See, e.g.*, MINN. STAT. § 518.17 (2013); 23 PA. CONS. STAT. ANN. § 5328 (West 2013); *see also* CHILD WELFARE INFO. GATEWAY, *supra* note 2, at 3 (noting that twenty-one states and the District of Columbia list a set of factors in the statute which courts must use to determine best interest).

71. *See, e.g.*, *In re* Marriage of Boldt, 176 P.3d 388, 392 (Or. 2008) (requiring a change of circumstance); *see also* 23 PA. CONS. STAT. ANN. § 5338 (codifying that a change in circumstances is not necessary in order to modify a custody order).

72. *See, e.g.*, *In re* S.H., 71 A.3d 973, 982 (Pa. Super. Ct. 2013) ("This concern has been repeatedly addressed in Pennsylvania, and our well-established principle of custody law provides that the courts are always open to review a child's best interests.").

73. ASFA's definition of legal guardianship is that it is "intended to be permanent and self-sustaining." 42 U.S.C. § 675(7) (2006).

found that there is something about the parent–child relationship worth preserving, questions still linger about the value of that parent's role in the child's life because of prior allegations of abuse, neglect, or parental capacity. However, it is important to note that those capacity issues are in the past—a parent should have the opportunity to show those capacity issues are no longer present so that the court may determine what custodial arrangement best suits the child's best interests.

IV. STATE IMPLEMENTATION OF LEGAL GUARDIANSHIP

One lens by which to evaluate the use of legal guardianship is to look at how states have incorporated it into their state child-welfare statutes. After ASFA became law in 1997, in order to draw down federal money, states needed to amend their child-welfare statutes to align them with federal law. Some states moved very quickly to incorporate legal guardianship as a permanency outcome into their statutes. A state-by-state survey of guardianship laws conducted by the Children's Defense Fund in 2004 found that thirty-five states and the District of Columbia had some form of subsidized guardianship incorporated into their statutes.[74] Other states chose not to make use of legal guardianship as a permanency outcome until more recently, after the federal subsidies became available through GAP. For example, Michigan incorporated legal guardianship into its statute in 2011.[75]

A. Definition of Legal Guardian

One of the issues that states address in their statutes is who can become a legal guardian. ASFA does not define who can become a legal guardian. Although under the FCA to be eligible for the GAP subsidy a kinship guardian must meet certain requirements, namely that the kinship guardian's home be licensed as a foster home and the child reside there a minimum of six months,[76] federal law does not define "kinship." Some states have crafted broad definitions of kinship, including in their definition of "relative" not only people related by blood, marriage, or adoption, but also people who have a significant relationship with a child often referred to as "fictive kin."[77] A number of states have expanded their definitions of kin so as to benefit from the availability of the federal GAP subsidy.[78] However,

74. CHILDREN'S DEF. FUND ET AL., *supra* note 32, at 2.

75. *See, e.g.*, MICH. COMP. LAWS § 712A.19a (2011).

76. *See supra* note 34.

77. CHILDREN'S DEF. FUND ET AL., *supra* note 32, at 7. A number of states expanded their definitions to benefit from federal funding allowed under FCA. *Id.*

78. Six states and the District of Columbia expanded their definition of "relative" before applying for federal GAP funding so as to most fully benefit from the available federal subsidy. *Id.*

some states have continued to keep their definitions of relative quite limited. For example, New York provides that a "'[p]rospective relative guardian' shall mean a person or persons who is related to the child through blood, marriage, or adoption who has been caring for the child as a fully certified or approved foster parent for at least six consecutive months prior to applying for kinship guardianship assistance payments."[79] Similarly, Alabama's statute states:

> A relative shall be an individual who is legally related to the child by blood, marriage, or adoption within the fourth degree of kinship, including only a brother, sister, uncle, aunt, first cousin, grandparent, great grandparent, great aunt, great uncle, great great grandparent, niece, nephew, grandniece, grandnephew, or a stepparent.[80]

B. Burden and Standard for Granting Legal Guardianship

Another issue states address in their statutes is when legal guardianship can be granted. The only guidance ASFA provides regarding the legal standard for granting a legal guardianship is that reunification and adoption must first be ruled out.[81] Thus, the burden of proof and any other standard that must be met is a matter of state law. A review of the state statutes shows a great degree of variance between the states regarding the required burden of proof, and the standard that must be proven, to grant a legal guardianship. While some states require a burden of proof of clear and convincing evidence,[82] others require preponderance of the evidence,[83] and oth-

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79. N.Y. SOC. SERV. LAW § 458-a (McKinney 2013).

80. ALA. CODE § 38-12-2 (2013).

81. 42 U.S.C. § 675(5)(C) (2006).

82. *See, e.g.*, ALA. CODE § 12-15-314; ARIZ. REV. STAT. ANN. § 8-872(F) (2013); CAL. WELF. & INST. CODE § 366.26 (West 2013); CONN. GEN. STAT. § 46b-129 (2013); DEL. CODE ANN. tit. 13, § 2353(a) (2013) (regarding permanent guardianship: Delaware has two kinds of legal guardianship, permanent guardianship and guardianship); *In re* Guardianship of J.K., 862 N.E.2d 686, 691 (Ind. Ct. App. 2007) (holding that the applicable burden of proof is clear and convincing evidence); IOWA CODE § 232.104 (2013); KAN. STAT. ANN. § 38-2269 (2013); LA. CHILD. CODE ANN. art. 722 (2013); ME. REV. STAT. tit. 18-A, § 5-204 (2013) (stating that Maine has two different burdens of proof, clear and convincing and preponderance of the evidence, depending on which grounds the guardianship is being granted); Custody of a Minor, 452 N.E.2d 483, 490 (Mass. 1983) (holding clear and convincing evidence is the burden of proof for guardianship proceeding); MINN. STAT. § 260C.317 (2013); MO. REV. STAT. §§ 211.477, 475.030 (2013). *But see In re* B.H., 348 S.W.3d 770, 776 (Mo. 2011) (en banc) (holding that the petitioner must meet a clearing and convincing burden that grounds for termination of parental rights exist but that preponderance of the evidence is the burden for a best interest finding). *See also* NEV. REV. STAT. § 159.055 (2013); N.J. STAT. ANN. § 3B:12A-6a (West 2013); N.M. STAT. ANN. § 32A-4-32 (2013); N.C. GEN. STAT. § 7B-906.1 (2013); N.D. CENT. CODE § 27-20-29 (2013); OHIO REV. CODE ANN. § 2151.353 (West 2013); OKLA. STAT. tit. 10A, § 1-4-710 (2013); OR. REV. STAT. § 419B.365 (2013); 42 PA. CONS. STAT. ANN. § 6351 (West 2013); VT. STAT. ANN. tit. 14, § 2664(a) (West 2013); W. VA. CODE § 49-6-2(c) (2013); WIS. STAT. § 48.977 (2013).

ers are simply unclear as to what burden of proof applies. Of course the question becomes burden to prove what?

The standard to grant a legal guardianship varies from state to state. In many states the standard is quite simple, essentially proof that reunification and adoption have been ruled out.[84] Some states, such as Florida, require

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83. *See, e.g.*, ARK. CODE ANN. § 9-27-325(h)(2)(B) (2013); L.L. v. People, 10 P.3d 1271 (Colo. 2000) (en banc) (holding that the mother's right to due process was not violated by the court's use of a preponderance of the evidence standard with respect to a guardianship order); DEL. CODE ANN. tit. 13, § 2330(a) (regarding guardianship: Delaware has two kinds of legal guardianship, permanent guardianship and guardianship); HAW. REV. STAT. §§ 587A-4, -31 (2013); 705 ILL. COMP. STAT. § 405/2-21 (2013); ME. REV. STAT. tit. 18-A, § 5-204 (stating that Maine has two different burdens of proof, clear and convincing and preponderance of the evidence, depending on which grounds the guardianship is being granted); MD. CODE ANN., CTS. & JUD. PROC. § 3-817 (2013); NEB. REV. STAT. § 43-285 (2013); N.H. REV. STAT. ANN. § 463.8(III) (2013) (requiring that if a parent objects to guardianship, the burden shifts to clear and convincing evidence); N.Y. FAM. CT. ACT §§ 1051, 1055-b (McKinney 2013); UTAH CODE ANN. § 78A-6-314(2)(b), (4)(b) (West 2013); VA. CODE ANN. § 16.1-282 (2013); WASH. REV. CODE § 13.36.040(2)(a) (2013); WYO. STAT. ANN. § 3-2-104 (2013); *see also* TENN. R. JUV. CT. P. 32A(d) (2013), *available at* http://www.tncourts.gov/rules/rules-juvenile-procedure/32a; Critz v. Critz, 297 S.W.3d 464 (Tx. App. 2009) (indicating preponderance of the evidence standard governs).

84. ARIZ. REV. STAT. ANN. § 8-871A ("The court may establish a permanent guardianship between a child and the guardian if the prospective guardianship is in the child's best interests and all of the following apply: 1. The child has been adjudicated a dependent child. 2. The child has been in the custody of the prospective permanent guardian for at least nine months as a dependent child. The court may waive this requirement for good cause. 3. If the child is in the custody of the division or agency, the division or agency has made reasonable efforts to reunite the parent and child and further efforts would be unproductive. The court may waive this requirement if it finds that reunification efforts are not required by law or if reunification of the parent and child is not in the child's best interests because the parent is unwilling or unable to properly care for the child. 4. The likelihood that the child would be adopted is remote or termination of parental rights would not be in the child's best interests."); LA. CHILD. CODE ANN. art. 722 (requiring proof by clear and convincing evidence that "(1) The child has been adjudicated to be in need of care. (2) Neither adoption nor reunification with a parent is in the best interest of the child. (3) The child has resided for at least six months with the proposed guardian, unless the court waives the residence requirement for good cause. (4) The proposed guardian is able to provide a safe, stable, and wholesome home for the child for the duration of minority"); NEV. REV. STAT. § 432B.466(c) ("[m]ust include a statement explaining why the appointment of a guardian, rather than the adoption of the child or the return of the child to a parent, is in the best interests of the child"); N.Y. FAM. CT. ACT. § 1055-b (examining whether a guardianship is in the best interest of the child and whether "compelling reasons . . . exist for determining that the return home of the child and the adoption of the child are not in the best interests of the child and are, therefore, not appropriate permanency options"); N.J. STAT. ANN. § 3B:12A-6d (requiring proof by clear and convincing evidence that "(1) each parent's incapacity is of such a serious nature as to demonstrate that the parents are unable, unavailable or unwilling to perform the regular and expected functions of care and support of the child; (2) the parents' inability to perform those functions is unlikely to change in the foreseeable future; (3) in cases in which the division is involved with the child as provided in subsection a. of section 8 of P.L. 2001, c. 250 (C.30:4C-85), (a) the division exercised reasonable efforts to reunify the child with the birth

specific factual findings as to the reasons the guardianship is being established:

> (1) If a court determines that reunification or adoption is not in the best interest of the child, the court may place the child in a permanent guardianship with a relative or other adult approved by the court if all of the following conditions are met:
>
> (a) The child has been in the placement for not less than the preceding 6 months.
>
> (b) The permanent guardian is suitable and able to provide a safe and permanent home for the child.
>
> (c) The court determines that the child and the relative or other adult are not likely to need supervision or services of the department to ensure the stability of the permanent guardianship.
>
> (d) The permanent guardian has made a commitment to provide for the child until the child reaches the age of majority and to prepare the child for adulthood and independence.
>
> (e) The permanent guardian agrees to give notice of any change in his or her residential address or the residence of the child by filing a written document in the dependency file of the child with the clerk of the court.
>
> (2) In its written order establishing a permanent guardianship, the court shall:
>
> (a) List the circumstances or reasons why the child's parents are not fit to care for the child and why reunification is not possible by referring to specific findings of fact made in its order adjudicating the child dependent or by making separate findings of fact;
>
> (b) State the reasons why a permanent guardianship is being established instead of adoption;
>
> (c) Specify the frequency and nature of visitation or contact between the child and his or her parents;
>
> (d) Specify the frequency and nature of visitation or contact between the child and his or her grandparents, under s. 39.509;

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parents and these reunification efforts have proven unsuccessful or unnecessary; and (b) adoption of the child is neither feasible nor likely; and (4) awarding kinship legal guardianship is in the child's best interests"); VT. STAT. ANN. tit. 14, § 2664(a) (requiring proof by clear and convincing evidence that "(1) Neither parent is capable or willing to provide adequate care to the child, requiring that parental rights and responsibilities be awarded to a permanent guardian. (2) Neither returning the child to the parents nor adoption of the child is likely within a reasonable period of time"); WASH. REV. CODE § 13.36.040(2)(a) (providing that the court must find by a preponderance of the evidence that it is in the child's best interests to establish a guardianship, rather than to terminate the parent-child relationship and proceed with adoption, or to continue efforts to return custody of the child to the parent"); WIS. STAT. § 48.977(2)(d) (requiring proof that a petition for termination of parental rights is not in the best interests of the child and that the child's parents are "neglecting, refusing or unable to carry out the duties of a guardian").

(e) Specify the frequency and nature of visitation or contact between the child and his or her siblings; and

(f) Require that the permanent guardian not return the child to the physical care and custody of the person from whom the child was removed without the approval of the court.[85]

Another example is New Jersey, which requires clear and convincing evidence that:

(1) Each parent's incapacity is of such a serious nature as to demonstrate that the parents are unable, unavailable or unwilling to perform the regular and expected functions of care and support of the child;

(2) the parents' inability to perform those functions is unlikely to change in the foreseeable future;

(3) in cases in which the division in involved with the child as provided in subsection a. of section 8 of P.L.2001, c. 250 (C.30:4C-85), (a) the division exercised reasonable efforts to reunify the child with the birth parents and these reunification efforts have proven unsuccessful or unnecessary; and (b) adoption of the child is neither feasible nor likely; and

(4) awarding kinship legal guardianship is in the child's best interests.[86]

The District of Columbia statute states:

The court may issue a guardianship order only if the court finds that:

(1) The permanent guardianship is in the child's best interests;

(2) Adoption, termination of parental rights, or return to parent is not appropriate for the child; and

(3) The proposed permanent guardian is suitable and able to provide a safe and permanent home for the child[87]

Although some require greater specificity of factual findings than others, these states seem to extrapolate from the language of ASFA, requiring that reunification and adoption be ruled out before guardianship is considered.

In contrast, four states require proof that grounds for termination of parental rights exist before a guardianship can be granted. For example, Connecticut requires that prior to issuing an order for permanent guardianship, the court must find by clear and convincing evidence:

(A) One of the statutory grounds for termination of parental rights exists, as set forth in subsection (j) of section 17a-112, or the parents have voluntarily consented to the establishment of the permanent legal guardianship;

(B) Adoption of the child or youth is not possible or appropriate;

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85. FLA. STAT. § 39.6221(1)-(2) (2013).
86. N.J. STAT. ANN. § 3B:12A-6d.
87. D.C. CODE § 16-2383(c) (2013).

(C) (i) If the child or youth is at least twelve years of age, such child or youth consents to the proposed permanent legal guardianship, or (ii) if the child is under twelve years of age, the proposed permanent legal guardian is: (I) A relative, or (II) already serving as the permanent legal guardian of at least one of the child's siblings, if any;

(D) The child or youth has resided with the proposed permanent legal guardian for at least a year; and

(E) The proposed permanent legal guardian is (i) a suitable and worthy person, and (ii) committed to remaining the permanent legal guardian and assuming the right and responsibilities for the child or youth until the child or youth attains the age of majority.[88]

Similarly, Delaware's permanent guardianship statute requires the court find by clear and convincing evidence that:

(1) One of the statutory grounds for termination of parental rights as set forth in § 1103(a) of this title has been met;

(2) Adoption of the child is not possible or appropriate;

(3) Permanent guardianship is in the best interests of the child;

(4) The proposed permanent guardian:

a. Is emotionally, mentally, physically and financially suitable to become the permanent guardian;

b. Is a foster parent(s) who has been caring for the child for at least 6 months at the time of the filing of the petition or is a blood relative;

c. Has expressly committed to remain the permanent guardian and assume the rights and responsibilities for the child for the duration of the child's minority; and

d. Has demonstrated an understanding of the financial implications of becoming a permanent guardian;

(5) If the child is age 14 or over, the child consents to the guardianship or, if the child does not consent, just cause why the guardian should be appointed; and

(6) If the proposed permanent guardian is a foster parent or parents:

a. The child at least 12 years of age; or

b. The proposed permanent guardian is the permanent guardian of 1 of the child's siblings; or

c. The child receives substantial governmental benefits for a serious physical and/or mental disability which would no longer be available to the child if parental rights were terminated and/or the child was adopted.

(b) If the Court determines that the elements of subsection (a) of this section have been met, the Court shall then also determine by a preponderance of evidence,

88. CONN. GEN. STAT. § 46b-129(j)(6)(A) (2013).

> the nature and extent, if any, of any contact, sharing of information, and/or visitation between the parent and the child. In making such a determination, the Court shall apply the best interests of the child standard.
>
> (c) The parent or parents may voluntarily consent to the permanent guardianship provided the elements of subsection (a) of this section are met.[89]

Missouri's statute requires the court to find one or more of the grounds for termination of parental rights exists, but provides "that termination is not in the best interests of the child because the court finds that the child would benefit from the continued parent-child relationship or because the child is fourteen or more years of age and objects to the termination."[90] Oregon's statute states that the grounds for permanent guardianship are the same as the grounds for termination of parental rights, but requires an additional finding that "[i]t is in the best interest of the ward that the parent never have physical custody of the ward but that other parental rights and duties should not be terminated."[91] These are the only states that require grounds for termination of parental rights be proven in order to grant a legal guardianship.

The requirement that grounds for termination of parental rights be proven is surprising in light of the fact that in most states legal guardianship is commonly used as a permanency outcome where termination of parental rights is explicitly found by the court not to be in the child's best interests. Most states do not require the court to find grounds for termination of parental rights at all. For example, Tennessee's legal guardianship statute does not require the court to rule out adoption or find that termination of parental rights is not in the child's best interest.[92] But more common are states like Iowa, which require proof by clear and convincing evidence that termination of parental rights is not in the child's best interest, that "[s]ervices were offered to the child's family to correct the situation [that] led to the child's removal from the home," that "the child cannot be returned to the child's home," and that guardianship is in the child's best interest.[93] Montana's statute requires the court to find "termination of parental rights to the child is not in the child's best interests or parental rights to the child have been terminated, but adoption is not in the child's best interests."[94] Maine's statute states that the court may appoint a guardian where all parental rights of custody have been terminated or suspended, the parents' consent, or:

> [t]he person or persons whose consent is required under subsection (b) do not consent, but the court finds by clear and convincing evidence that the person or persons have failed to respond to proper notice or a living situation has been created

89. DEL. CODE ANN. tit. 13, § 2353 (2013).
90. MO. REV. STAT. § 211.477 (2013).
91. OR. REV. STAT. § 419B.365(3)(b) (2013).
92. TENN. CODE ANN. § 37-1-802(a) (2013).
93. IOWA CODE § 232.104(3) (2013).
94. MONT. CODE ANN. § 41-3-444(g) (2013).

> that is at least temporarily intolerable for the child even though the living situation *does not rise to the level of jeopardy required for the final termination of parental rights*, and that the proposed guardian will provide a living situation that is in the best interest of the child.[95]

New Mexico's statute states that the court may grant a permanent guardianship where it is in the child's best interest and when:

> (1) the child has been adjudicated as an abused or neglected child;
>
> (2) the department has made reasonable efforts to reunite the parent and child and further efforts by the department would be unproductive;
>
> (3) reunification of the parent and child is not in the child's best interests because the parent continues to be unwilling or unable to properly care for the child; and
>
> (4) the likelihood of the child being adopted is remote or it is established that termination of parental rights is not in the child's best interest.[96]

Oklahoma's statute requires a finding that "[t]ermination of the parent's rights is either not legally possible or not in the best interests of the child or adoption is not the permanency plan for the child."[97] South Carolina's statute states simply:

> If after assessing the viability of adoption, the department demonstrates that termination of parental rights is not in the child's best interests, the court may award custody or legal guardianship, or both, to a suitable, fit, and willing relative or nonrelative if the court finds this to be in the best interest of the child.[98]

Michigan's statute requires that in order to grant a guardianship, the court must first make findings at a permanency hearing "that a child should not be returned to his or her parent," that the child has been in foster care for fifteen of the most recent twenty-two months, and that one of the exceptions to the requirement that the state file a termination of parental rights petition apply:

> (a) The child is being cared for by relatives.
>
> (b) The case service plan documents a compelling reason for determining that filing a petition to terminate parental rights would not be in the best interest of the child. Compelling reasons for not filing a petition to terminate parental rights include, but are not limited to, all of the following:
>
> (i) Adoption is not the appropriate permanency goal for the child.
>
> (ii) No grounds to file a petition to terminate parental rights exist.
>
> (iii) The child is an unaccompanied refugee minor as defined in 45 CFR 400.11.

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95. ME. REV. STAT. tit. 18-A, § 5-204(c) (2013) (emphasis added).
96. N.M. STAT. ANN. § 32A-4-31(C) (West 2013).
97. OKLA. STAT. tit. 10A, § 1-4-709(A)(4) (2013).
98. S.C. CODE ANN. § 63-7-1700(G) (2013).

(iv) There are international legal obligations or compelling foreign policy reasons that preclude terminating parental rights.

(c) The state has not provided the child's family, consistent with the time period in the case service plan, with the services the state considers necessary for the child's safe return to his or her home, if reasonable efforts are required.[99]

As is evident from most of these examples, not only do most states require a finding that termination of parental rights is not in the child's best interests, but also an affirmative finding that the legal guardianship is in the best interest of the child.

C. Rights Parents Maintain After Legal Guardianship

Because parental rights are not terminated when a guardianship is granted, parents in each state maintain some degree of residual rights and responsibilities, such as the rights of inheritance, the right to consent to an adoption, and the duty to support.[100] In many states, parents also maintain some degree of limited custodial rights, usually in the form of a visitation

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99. MICH. COMP. LAWS § 712A.19a(6) (2013).

100. *See, e.g.*, ALASKA STAT. § 47.10.084(c) (2013) ("These residual rights and responsibilities of the parent include, but are not limited to, the right and responsibility of reasonable visitation, consent to adoption, consent to marriage, consent to military enlistment, consent to major medical treatment except in cases of emergency or cases falling under AS 25.20.025, and the responsibility for support, except if by court order any residual right and responsibility has been delegated to a guardian under (b) of this section."); ARIZ. REV. STAT. ANN. § 8-872(G), (H) (2013) (providing that the child retains rights to inheritance, visitation, and support); DEL. CODE ANN. tit. 13, § 2358 (2013) (visitation, information, inheritance, consent to termination of parental rights and/or adoption, support, purveyance of government benefits); D.C. CODE § 16-2389(c) (2013) (inheritance, visitation, consent to adoption, determination of religious affiliation, responsibility to provide financial, medical, and other support); FLA. STAT. § 39.6221(6) (2013) (inheritance, consent to adoption, responsibility to provide financial, medical, and other support); *In re* Guardianship of Doe, 101 P.3d 684, 687 (Haw. 2004) (providing that the parent retains "'residual parental rights and responsibilities . . . including, but not necessarily limited to, the right to reasonable visitation, consent to adoption or marriage, and the responsibility for support'" (quoting HAW. REV. STAT. § 571-2 (2004))); KAN. STAT. ANN. § 38-2272(h) (2013) (child support, medical support, inheritance, right to consent to adoption); ME. REV. STAT. tit. 22, § 4038-C (visitation, child support, inheritance); MASS. GEN. LAWS ANN. ch. 119, § 26 (2013) (notice of court proceedings, consent to adoption, visitation); NEV. REV. STAT. § 432B.4665(2)(e) (2013) (inheritance, succession, government services or benefits); N.H. REV. STAT. ANN. § 463:13 (2013) (support, notice, visitation); N.M. STAT. ANN. § 32A-4-31(A) (court specifies in order); OHIO REV. CODE ANN. § 2151.353(A)(3)(c) (West 2013) (visitation, consent to adoption, determine religious affiliation, support); OKLA. STAT. tit. 10A, § 1-4-709(C) (as specified in the decree); TENN. CODE ANN. § 37-1-803(a) (2013) (inheritance, visitation, consent to adoption, support); UTAH CODE ANN. § 78A-6-117(2)(y)(i) (West 2013) (support); VT. STAT. ANN. tit. 14, § 2663(a) (2013) (visitation, contact, information, inheritance, consent to adoption).

order.[101] Parents can usually file an enforcement action and/or seek to modify the visitation order in some manner.[102] Where states vary the most wide-

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101. *See, e.g.*, ALA. CODE § 12-15-314(7) (2013) ("The juvenile court may order visitation between a parent, legal guardian, or legal custodian and the child to maintain or rebuild a parent-child relationship if the visitation is in the best interests of the child."); ARIZ. REV. STAT. ANN. § 8-872(H); CAL. WELF. & INST. CODE § 366.26(c)(4)(C) (West 2013); COLO. REV. STAT. § 14-10-129 (2013); DEL. CODE. ANN. tit. 13, § 2359; D.C. CODE § 16-2389; FLA. STAT. § 39.621(9); GA. CODE ANN. § 15-11-30.1(a)(2)(C) (2013); IOWA CODE §§ 232.104(4), .107 (2013); ME. REV. STAT. tit. 22, § 4038-C(3) (providing that a parent, grandparent, or sibling may petition the court to determine the rights of contact); MO. REV. STAT. §§ 211.477, 475.046 (2013); NEV. REV. STAT. § 432B.467 ("The court may order a reasonable right of visitation to any person whose right to custody or visitation of the child was terminated as a result of the appointment of the guardian if the court finds that the visitation is in the best interests of the child."); N.H. REV. STAT. ANN. § 463:13 ("The presumption shall be in favor of liberal visitation rights absent a showing of harm to the minor. . . . In guardianships granted as part of the permanency plan for a child previously in the department's custody pursuant to the Adoption and Safe Families Act of 1997, Public Law 105-89, the court may give the guardian discretion to determine visitation."); N.M. STAT. ANN. § 32A-4-31(A); N.Y. FAM. CT. ACT § 1055-b (McKinney 2013); OHIO REV. CODE ANN. § 2151.353(A)(3)(c); 42 PA. CONS. STAT. ANN. § 6351(a)(2.1) (West 2013); TENN. CODE ANN. § 37-1-803(a); VT. STAT. ANN. tit. 14, § 2663(a).

102. *See, e.g.*, DEL. CODE. ANN. tit. 13, § 2359 ("[P]arent may petition the Court for specific enforcement of provisions of the order . . . relating to contact, visitation or information . . . ."); FLA. STAT. § 39.621(9) ("[A] parent who has not had his or her parental rights terminated [may file] a motion for reunification or increased contact with the child . . . ."); GA. CODE ANN. § 15-11-30.1(a)(2)(D) ("The court shall retain jurisdiction over a guardianship action under this paragraph for the sole purpose of entering an order following the filing of a petition to modify, vacate, or revoke the guardianship and to appoint a new guardian."); KY. REV. STAT. ANN. § 403.340(2) (West 2013) (providing for a limited to two-year waiting period absent certain exigent circumstances enumerated in the statute); LA. CHILD. CODE ANN. art. 724B (2013) ("The department, counsel for the child, the guardian, a parent permitted to intervene under Article 707, or the court on its own motion may seek to enforce, modify or terminate a guardianship order."); *In re* Caya B., 834 A.2d 997, 1006 (Md. Ct. Spec. App. 2003) ("If the permanency plan calls for custody and guardianship by a relative but does not contemplate adoption, the court may issue a decree of guardianship to the relative and may then close the case. Parental rights are not terminated in such a situation: the parents are free at any time to petition an appropriate court of equity for a change in custody, guardianship, or visitation." (internal citations omitted)); MINN. STAT. § 518.18(c) (2013); MISS. CODE ANN. § 43-21-613(2) (2013); MISS. R. CT. 28(d); MO. REV. STAT. §§ 211.477, 475.083 ("At any time the guardian, conservator or any person on behalf of the ward or protectee may, individually or jointly with the ward or protectee, or the ward or protectee individually may petition the court to restore the ward or protectee, or to decrease the powers of the guardian or conservator . . . ."); NEV. REV. STAT. § 432B.468 ("Any person having a direct interest in a guardianship established pursuant to NRS 432B.4665 may move to enforce, modify or terminate an order concerning the guardianship."); N.H. REV. STAT. ANN. § 463:16 ("The court may . . . alter any prior orders or make such new order . . . both as the best interests of the minor or the prudent management of the estate may require."); N.Y. FAM. CT. ACT § 635; N.C. GEN. STAT. § 7B-1000(a) (2013) ("Upon motion in the cause or petition, and after notice, the court may conduct a review hearing to determine whether the order of the court is in the best interests of the juvenile, and the court may modify or vacate the order in light of changes in circumstances or the needs of the juvenile."); OR. REV. STAT. §

ly, however, is what right, if any, the parent maintains to file to vacate the guardianship and/or seek to regain primary custody of the child. Although the majority of states allow parents to file to vacate the order,[103] a few states do not permit such an action by the parent.[104] In states that do allow parents

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419B.368(1) (2013) ("The court, on its own motion or upon the motion of a party and after such hearing as the court may direct, may review, modify or vacate a guardianship order."); 42 PA. CONS. STAT. ANN. § 6351(a)(2.1); S.C. CODE ANN. § 63-7-1700(J) ("A named party, the child's guardian ad litem, or the local foster care review board may file a motion for review of the case at any time."); TENN. CODE ANN. § 37-1-806(a) ("A modification or termination of the permanent guardianship may be requested by the permanent guardian, by the child if the child is sixteen (16) years of age or older, the parent, or by the state."); TEX. FAM. CODE ANN. § 156.101(a) (West 2013) ("The court may modify an order that provides for the appointment of a conservator of a child . . . ."); UTAH CODE ANN. § 78A-6-1103(1) ("A parent or guardian of any child whose legal custody has been transferred by the court to an individual, agency, or institution, except a secure youth corrections facility, may petition the court for restoration of custody or other modification or revocation of the court's order . . . ."); VT. STAT. ANN. tit. 14, § 2663(b) ("The parent may seek only enforcement or modification of an order of visitation, contact or information."); WASH. REV. CODE § 13.36.060(1) (2013) ("A guardian or a parent of the child may petition the court to modify the visitation provisions of a guardianship order . . . ."); W. VA. CODE § 49-6-6(a) (2013) ("Upon motion of a child, a child's parent or custodian or the department alleging a change of circumstances requiring a different disposition, the court shall conduct a hearing . . . ."); WIS. STAT. § 48.977(6) (2013) (providing that a guardian, legal custodian, guardian ad litem, parent, department, and others enumerated in the Wisconsin Code may file to revise the guardianship order).

103. ALA. CODE § 12-15-314(8)(a); ALASKA STAT. § 13.26.085(a); CAL. WELF. & INST. CODE § 388(a); COLO. REV. STAT. §§ 14-10-129, -131 (2010); DEL. CODE ANN. tit. 13, §§ 2332(b), 2359 (indicating that Delaware has two types of guardianship, permanent guardianship and guardianship and that parents may file to vacate a guardianship but not a permanent guardianship; D.C. CODE § 16-2395; FLA. STAT. § 39.621(9); GA. CODE ANN. § 15-11-40(c); HAW. REV. STAT. § 587A-24 (2013); IDAHO CODE ANN. § 15-5-212A(5) (2013); 705 ILL. COMP. STAT. 405/2-28.1 (2013); IND. CODE § 31-34-23-1 (2013); KY. REV. STAT. ANN. § 403-340 (providing for a limited two-year waiting period absent certain exigent circumstances enumerated in the statute); LA. CHILD. CODE ANN. art. 724B; ME. REV. STAT. tit. 22, § 4038-C(6)(A); *In re* Caya B., 834 A.2d at 1006; MD. R. 11-116a; MINN. STAT. § 260C.521; MISS. CODE ANN. § 43-21-613; MO. REV. STAT. §, 475.083; MONT. CODE ANN. § 41-3-444 (2013); NEV. REV. STAT. § 432B.468; N.H. REV. STAT. ANN. § 436:16; N.J. STAT. ANN. § 3B:12A-6 (West 2013); N.M. STAT. ANN. § 32A-4-32I; N.Y. FAM. CT. ACT § 1055-b; N.C. GEN. STAT. § 7B-1000(a); N.D. CENT. CODE § 27-20-48.4 (2013); OHIO REV. CODE ANN. §§ 2151.23, .353(E)(2), .42; PA. CONS. STAT. ANN. § 5328 (a parent of the child has standing to file for custody); R.I. GEN. LAWS § 40-11-12(f) (2013); S.C. CODE ANN. § 63-7-1700(J); TENN. CODE ANN. § 37-1-806(a); TEX. FAM. CODE ANN. § 156.101(a); UTAH CODE ANN. § 78A-6-1103(1); WASH. REV. CODE § 13.36.070 ("Any party to a guardianship proceeding may request termination of the guardianship . . . ."); W. VA. CODE § 49-6-6(a) ("Upon motion of a child, a child's parent or custodian or the department alleging a change of circumstances requiring a different disposition, the court shall conduct a hearing . . . ."); WIS. STAT. § 48.977(6) (guardian, legal custodian, guardian ad litem, parent, department, and others enumerated in the Wisconsin Code may file to revise the guardianship order).

104. CONN. GEN. STAT. § 46b-129(j)(7) (2013) (stating that a parent may not file to terminate a legal guardianship); DEL. CODE ANN. tit. 13, § 2359 ("A parent may not petition the Court to modify or terminate a permanent guardianship once granted under this chap-

to file to vacate the order, some use a best interest of the child standard,[105] while some set out more specific criteria that the parent must prove before best interests are considered, such as proving parental fitness[106] or a material change in circumstances.[107] Other state statutes go beyond a material change

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ter."); KAN. STAT. ANN. § 38-2272; MICH. COMP. LAWS § 712A.19a(13) (providing that only the court, department of human services, or child's lawyer may motion to hold a hearing on whether guardianship shall be revoked); OKLA. STAT. tit. 10A, § 1-4-711A(1) ("A motion for modification or termination of a permanent guardianship may be filed by the permanent guardian, the child, or the district attorney."); OR. REV. STAT. § 419B.368(7); VT. STAT. ANN. tit. 14, § 2663(b) ("[T]he parent shall have no right to seek termination of the guardianship order."); WYO. STAT. ANN. § 3-3-1105(a) (2013) ("[T]he ward may petition the court alleging that he is no longer a proper subject of the guardianship or conservatorship and asking that the guardianship or conservatorship be terminated.").

105. *See, e.g.*, ALASKA STAT. § 13.26.085(a); ARIZ. REV. STAT. ANN. § 8-873(C); DEL. CODE ANN. tit. 13, § 2332(b); IOWA CODE § 232.104(6); ME. REV. STAT. tit. 22, § 4038-C; MASS. GEN. LAWS ch. 119, § 26 (indicating that the court conducts six-month review hearings throughout the period of the guardianship); MONT. CODE ANN. § 41-3-444; NEV. REV. STAT. § 159.1905(3) ("[P]etitioner has the burden of proof to show by clear and convincing evidence that the termination or modification of the guardianship . . . is in the best interests of the ward."); 23 PA. CONS. STAT. ANN. § 5328; R.I. GEN. LAWS § 40-11-12(f).

106. *See, e.g.*, N.J. STAT. ANN. § 3B:12A-6 (upon showing that there is no longer parental incapacity or inability to care and that it is in the child's best interest); N.H. REV. STAT. ANN. §§ 463:15, :16; OR. REV. STAT. § 419B.368(3) ("The court may vacate a guardianship order, return the ward to the custody of a parent and make any other order the court is authorized to make under this chapter if the court determines that: (a) It is in the ward's best interests to vacate the guardianship; (b) The conditions and circumstances giving rise to the establishment of the guardianship have been ameliorated; and (c) The parent is presently able and willing to adequately care for the ward.").

107. *See, e.g.*, Young v. Arkansas Dept. of Human Services, 2012 Ark. 334 (2012) ("The burden is on the person seeking to change custody to prove that there is a material change of circumstances that makes a modification of the custody decree in the best interest of the child." (citing Stills v. Stills, 361 S.W.3d 823, 830 (Ark. 2010)); CAL. WELF. & INST. CODE § 388(a)(1) ("any change of circumstance"); D.C. CODE § 16-2395(d) ("substantial and material change in the child's circumstances subsequent to the entry of the guardianship order and that it is in the child's best interests to modify or terminate the guardianship order"); GA. CODE ANN. § 15-11-40(b) ("An order of the court may also be changed . . . on the ground that changed circumstances so require in the best interest of the child . . . ."); HAW. REV. STAT. § 587A-24 (applying the best interest standard); *In re* Guardianship of Doe, 4 P.3d 508 (2000) (interpreting a Hawaii law to require both the best interest and material change in circumstances be proven); IDAHO CODE ANN. § 15-5-212A(6) ("(a) There has been a substantial and material change in the circumstances of the parent or the minor since the establishment of the guardianship; and (b) Removal of the guardian or modification of the guardianship would be in the best interests of the minor."); MD. R. 11-116a (applying best interest standard); MINN. STAT. § 518.18 (providing that "a change has occurred in the circumstances of the child or the parties and that the modification is necessary to serve the best interests of the child"); MISS. R. YOUTH C.P. 28(d), *available at* http://courts.ms.gov/rules/msrulesofcourt/uniform_rules_yc_practice.pdf (applying "substantial change in circumstances" and "best interests" standards); N.M. STAT. ANN. § 32A-4-32(K) ("The court may revoke the order . . . when a significant change of circumstances has been proven by clear and convincing evidence and it is in the child's best interests to revoke the order granting guardianship."); N.C. GEN. STAT. § 7B-600(b) ("[T]he court may not ter-

in circumstances, to build a clear presumption in favor of the legal guardianship. For example, the Alabama statute states the parent must prove:

> not only that a material change in circumstances has occurred since the order granting the kinship guardianship was entered, but also that the change would materially promote the child's best interest and welfare, and that the positive good brought about by the change would more than offset the inherently disruptive effect caused by uprooting the child.[108]

Upon motion of a parent for reunification after a grant of legal guardianship, Florida's statute requires the court to hold a hearing as to whether the dependency case should be reopened and whether there should be modification of the order.[109] The parent must then "demonstrate that the safety, well-being, and physical, mental, and emotional health of the child is not endangered by the modification."[110] Louisiana's statute requires proof by:

> clear and convincing evidence that there has been a substantial and material change in the circumstances of the guardian or child because of any of the following:

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minate the guardianship or order that the juvenile be reintegrated in a parent's home unless the court finds that the relationship between the guardian and the juvenile is no longer in the juvenile's best interest, that the guardian is unfit, that the guardian has neglected a guardian's duties, or that the guardian is unwilling or unable to continue assuming a guardian's duties."); OHIO REV. CODE ANN. § 2151.42(b) ("[B]ased on facts that have arisen since the order was issued or that were unknown to the court at that time, that a change has occurred in the circumstances of the child or the person who was granted legal custody, and that modification or termination of the order is necessary to serve the best interest of the child."); OKLA. STAT. tit. 10A, § 1-4-711(B) ("The court may modify . . . upon a finding by clear and convincing evidence that there has been a substantial change in material circumstances and that a modification or termination of the permanent guardianship is in the child's best interest."); TENN. CODE ANN. § 37-1-806(c) ("An order for modification or termination of the permanent guardianship shall be based on a finding, by a preponderance of the evidence, that there has been a substantial change in material circumstances, or a determination by the court that one (1) or more findings required by § 37-1-802(b) no longer can be supported by the evidence."); TEX. FAM. CODE ANN. § 156.101 ("The court may modify an order . . . if modification would be in the best interest of the child and: (1) the circumstances of the child, a conservator, or other party affected by the order have materially and substantially changed . . . ."); UTAH CODE ANN. § 78A-6-1103(1) ("A parent . . . may petition the court . . . on the ground that a change of circumstances has occurred which requires such modification or revocation in the best interest of the child or the public."); VT. STAT. ANN. tit. 14, § 2666(c) ("An order for modification or termination of the permanent guardianship shall be based on a finding . . . that there has been a substantial change in material circumstances [and] is in the best interests of the child."); WASH. REV. CODE § 13.36.070 ("[A]lleging a substantial change has occurred in the circumstances of the child or the guardian and that the termination [of the guardianship] is necessary to serve the best interests of the child."); W. VA. CODE § 49-6-6(a) (requiring a "change of circumstances"); WIS. STAT. § 48.977(6)(a) (requiring a "substantial change in circumstances").

108. ALA. CODE § 12-15-314(8)(a).

109. FLA. STAT. § 39.621(9) (2013).

110. *Id.*

(1) The guardian no longer wishes to serve or can no longer serve as guardian of the child.

(2) Continuation of the guardianship is so deleterious to the child as to justify a modification or termination of the relationship or the harm likely to be caused from a change in the guardianship is substantially outweighed by the advantages to the child of the modification.[111]

These statutes are designed to build a clear presumption in favor of preserving the legal guardianship and, in most circumstances, preventing parents from disrupting the custodial arrangement.

V. TOWARD A COHERENT STATE APPROACH TO LEGAL GUARDIANSHIP

Many of the concerns regarding the legal permanence of legal guardianship could be addressed through state legislative reform of the statutes implementing legal guardianship under ASFA. Such legislative reform would not only alleviate these concerns, but also serve to strengthen the use of legal guardianship as a permanency outcome in child-welfare cases, thereby helping more children safely leave foster care. Additionally, it would help create a more equal approach to parental rights in the public and private law contexts.

(1) To grant legal guardianship, states should require an evidentiary hearing with a clear burden of proof before granting a legal guardianship. A review of state statutes suggests that some states may not require an evidentiary hearing to grant legal guardianship, only a showing that the agency has ruled out reunification and adoption. For states that do require an evidentiary hearing, the burden of proof was "clear and convincing evidence," "preponderance of the evidence," or was unclear. If legal guardianship is going to create a presumption of permanency in favor of the legal guardian, due process most likely requires a clear and convincing evidentiary burden. But, regardless of the burden, evidence should be presented, and it should be apparent to all parties what evidentiary burden is required.

(2) To grant legal guardianship, states should require a clear standard that requires the court to make factual findings *why* reunification and adoption are ruled out. Because most state statutes require a simple finding that reunification and adoption have been ruled out in order to grant legal guardianship, courts rarely make clear evidentiary findings as to why these two permanency goals are not being pursued. Should the parent later file to vacate the guardianship, it will be factually relevant if reunification was ruled out because the parent was still using drugs or if it was because the parent did not yet have appropriate housing. It will also be fac-

111. LA. CHILD. CODE ANN. art. 724D (2013).

tually relevant if adoption was ruled out because the child did not want the parent's rights terminated or if it was because the prospective caregiver for the child did not wish to pursue an adoption. There are a multitude of reasons why legal guardianship may have been the appropriate permanency goal for the child, but state statutes should require courts to make evidentiary findings as to why it is so. Even where legal guardianships are entered by agreement, which frequently occurs, the parties can stipulate to factual findings or the court should be required to make factual findings so that the reasons reunification and adoption have been ruled out are transparent from the court's order.

(3) All parties, including parents, children, and legal guardians, should be entitled to petition to vacate the legal guardianship. In states where parents' right to petition to vacate the guardianship has been eliminated entirely, there is very little distinction between legal guardianship and adoption/termination of parental rights. This undermines the very legislative purpose of ASFA in creating the permanency goal of legal guardianship, which by design was meant to preserve the parent–child relationship. Although most of the states that bar parents from filing to vacate the guardianship also require grounds for termination of parental rights be proven in order to grant the legal guardianship,[112] it is not clear what advantage there is to children or their parents to entering such an immutable custodial arrangement, given that legal guardianship is meant to be used in situations where the parent–child relationship is *worth* preserving. States should honor the legislative purpose of ASFA and create a mechanism for all parties to file to vacate.

(4) States' statutes governing the standard to vacate a legal guardianship should be much clearer. Although the vast majority of states require a finding akin to a "material" or "substantial" change in circumstances before making a best interests determination regarding whether to vacate a legal guardianship, these statutes would benefit from a more specific standard. If state statutes required more explicit factual findings to be made pursuant to Recommendation (2) above, the court could then require the parent to make a threshold showing that the obstacles to reunification have been resolved. Once the parent has met that burden, the parent should stand on equal footing, as a fit parent, as against the legal guardian, to prove that it is in the best interest of the child to return to the parent. The court can give the appropriate weight to the stability and longevity of the child's placement with the legal guardian, not to mention the child's wishes, in determining the child's best interests.

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112. Michigan is the only state that does not require grounds for termination of parental rights be proven when granting legal guardianship and then later bars parents from subsequently filing to vacate the guardianship. Arguably this presents a procedural and substantive due process problem.

CONCLUSION

Legal guardianship is an important permanency outcome for children who enter the child-welfare system. For most children, it creates a lasting, stable, and permanent exit from the child-welfare system. For some children, the continued relationship with a parent that is enabled through a legal guardianship may eventually give way to an opportunity to reunite with that parent. To the extent parental rights have not been terminated, the law should value that parent–child relationship. Not all custodial relationships can be permanent, no matter how children enter them. States should truly honor the best interests of children and allow best interests, not an abstract concept of permanency, to control in making custodial decisions, regardless of how the child entered the custodial arrangement. The state legislative reform discussed in this Article would facilitate a more equitable and balanced approach to weighing children's best interests in private and public custody decisions and ensure the courthouse doors remain open to all children.