

Fall 2003

Subsidized Guardianship: A New Permanency Option

Cynthia Godsoe

Brooklyn Law School, cynthia.godsoe@brooklaw.edu

Follow this and additional works at: <https://brooklynworks.brooklaw.edu/faculty>

 Part of the [Family Law Commons](#)

Recommended Citation

23 Child. Legal Rts. J. 11 (2003-2004)

This Article is brought to you for free and open access by BrooklynWorks. It has been accepted for inclusion in Faculty Scholarship by an authorized administrator of BrooklynWorks.

Children's Legal Rights Journal

Subsidized Guardianship: A New Permanency Option

by Cynthia Godsoe*

An increasing number of states are turning to subsidized guardianship as a means of permanency for children and youth for whom other avenues have not worked. This article aims to discuss and advocate for subsidized guardianship and its use in a child protection context. I will (1) briefly outline the governing statutory framework of foster care and adoption, the Adoption and Safe Families Act (ASFA), and its focus on permanency; (2) contrast subsidized guardianship with other permanency options for children such as long-term foster care,¹ custody and adoption; (3) describe some of the barriers impeding permanency for many children and youth in the child welfare system and illustrate the potential utility of subsidized guardianship in such cases; and (4) discuss some of the different models of subsidized guardianship used in various states, including their funding sources and preliminary outcomes.

I. ASFA and the Quest for Permanency

In an attempt to address the growing number of children and youth in long-term foster care in the mid-1990s,² Congress passed the ASFA³ in 1997.⁴ ASFA prioritizes reducing "foster care drift," the large number of children experiencing numerous placements and never exiting the foster care system, achieving permanency⁵ for abused and neglected children by expediting reunification—their return to a parent—or another permanent placement.⁶ The ASFA child welfare framework explicitly posits foster care as a temporary solution only,

and it redefines efforts at family reunification as time-limited for all children and excused in certain categories of extremely bad cases.⁷ A permanency planning hearing must be held for every child who has been in foster care for twelve months, at which a permanency goal for him or her is approved by the court.⁸ The statute also requires that a petition for termination of parental rights be filed for every child who has been in foster care for fifteen of the last twenty-two months and in certain other cases of abandonment and egregious abuse.⁹ Several exceptions apply, including two very relevant to subsidized guardianship, as discussed *infra*: (1) cases where the agency has not made "reasonable efforts" at reunification, and, (2) at state discretion, cases wherein children are placed in kinship care.¹⁰

The Administration for Children and Families (ACF) of the Department of Health and Human Services (HHS) describes a permanent placement for a child in foster care under ASFA as: (1) legally intended to be permanent until a child reaches adulthood and to establish lifelong family relationships; (2) legally secure from modification; (3) giving the caregiver the same legal responsibility for a child as a birth parent; (4) removing State supervision of the child and caregiver and freeing the child from State custody.¹¹ One aspect of a permanent placement missing from this list is financial support. Under point four, once children are removed from State supervision, their caregivers no longer receive any Title IV-E foster care funding for them and are not eligible for adoption assistance. Rather, they qualify only for the substantially lower federal Temporary Assistance for Needy Families (TANF) payments.

ASFA prioritizes adoption as the most desirable permanency planning goal, once reunification has been excluded as a possibility, and aims to increase the number of children moving from foster care to adoption.¹² Among other measures, ASFA gives states a financial incentive to increase adoptions of children in foster care, paying them \$4,000 per foster child adopted (\$6,000 per child with special needs) over the number adopted in a base year.¹³ The statute, however, specifies other permanency goals for children in foster care. These include referral for legal guardianship, placement with a “fit and willing” relative, or another “planned, permanent living arrangement” if other options are not appropriate.¹⁴ (Guardianship was also an approved permanency plan under ASFA’s predecessor, the Adoption Assistance and Child Welfare Act.) Despite this, guardianship has been underutilized,¹⁵ largely because of the lack of a subsidy to support children with this goal.¹⁶

The ACF also recommends so-called “permanent guardianship” as a desirable permanency option under ASFA for children in foster care who cannot be reunified with their birth parents and who also have been deemed unadoptable.¹⁷ The policy guidance explicitly states that adoption must be exhausted as a possibility first: “Alternatives to adoption[,] . . . such as permanent guardianship, should be used only when adoption has been thoroughly explored and found inappropriate for the needs of a particular child.”¹⁸ The ACF guidance does acknowledge, however, that permanency options must be flexible to the needs of the individual child and family and that adoption may be less likely in certain cases, such as those involving kin caregivers. Thus, ACF recommends that state law establish numerous permanency options.¹⁹

II. What is Subsidized Guardianship?

A. Guardianship Process and Powers

Subsidized guardianship differs in several key respects from other placement or dispositional options for children in foster care, such as custody and adoption. Any interested person, including children over the age of fourteen, can initiate a guardianship proceeding by filing a petition.²⁰ In child protective proceedings, the foster care agency can

recommend guardianship as placement or a final dispositional plan, or a court can sua sponte discharge the child to a relative or other adult, who may then become the child’s guardian.²¹ This can happen at the outset of the child protective proceeding, although it is more common as a final dispositional order in the proceeding after reunification has been ruled out as an option. (If a parent consents to guardianship, however, efforts need not be made at reunification, and this final disposition can be reached earlier.) The child will often have been placed in foster care, kinship or nonkinship, during the proceedings (which can last years) and the former foster parent will often become the guardian. Thus, subsidized guardianship transfers the care and custody of the child from the child welfare agency to the guardian at disposition.

Subsidized guardianship in child protective cases²² takes varying forms in different jurisdictions.²³ ASFA defines legal guardianship as

[A] judicially created relationship between child and caretaker [i.e. legal guardian] 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.²⁴

In every case, however, the guardian, once appointed by a court using a best interests of the child standard, has the legal authority to make virtually all decisions on behalf of a child. Significantly, guardianship does not require the termination of parental rights, thus making it applicable in many cases where adoption is not an option. Under guardianship, parents lose their right to make both daily and significant decisions regarding the health and welfare of their children; however, they retain the right to visit and consent to a child’s adoption, and they have the duty to support their child unless their rights have been terminated or surrendered.²⁵ Courts can limit a guardian’s power, such as requiring that a guardian seek court permission before making certain decisions regarding a child, or before moving with the child out of state.²⁶ For the most part, however, guardians stand *in loco parentis* to the child for virtually all purposes.

B. Subsidized Guardianship Contrasted with Other Placement and Permanency Options

Guardianship provides significant advantages over foster care as a long-term plan for children.²⁷ First, guardianship removes a child both from court oversight and from the child welfare or foster care agency's authority over his or her custody. This is true even when, as is frequently the case, the former foster parent becomes the guardian. Thus, the foster parent no longer need have agency home visits or ask for agency permission to address the child's medical and educational needs. These reduced administrative costs allow states to reallocate child welfare resources elsewhere and can offset the cost of the guardianship subsidy.²⁸ Most importantly, because it is intended to be permanent and is not subject to annual court review, guardianship gives a child and his or her caregiver an expectation of permanency in the relationship during childhood and beyond that is missing from foster care placements, no matter how seemingly secure. Guardians also have much greater powers to make decisions regarding a child than a foster parent and they have standing in all proceedings regarding their ward.

On the other hand, guardianship, like custody and, in most cases adoption,²⁹ does not entitle children to the same services as foster care. Guardianship, thus, may leave children, especially those with disabilities or other special needs, without needed medical, developmental or child care services. Furthermore, some cases need more agency oversight—for instance, of parent-child visitation and contact—than that provided under subsidized guardianship or adoption (wherein such visitation is supervised by the caregiver, if at all).

Subsidized guardianship also offers numerous advantages over custody because it both grants the caregivers more power and provides a caregiver with more financial resources, often significantly more. As outlined above, guardians are empowered to make virtually all important decisions regarding a child's health, education and so on, while custodians have physical custody of a child, but must share important decisions with parents. (Analogously, agencies having custody of children in foster care still must obtain parental consent for important medical, educational and travel decisions for these children, except in emergency situations.) Because subsidized

guardianships usually provide caregivers with a subsidy higher than the very low TANF child-only rate available to custodians,³⁰ the former allows adults to care for children they might otherwise not have been able to afford.

Although, as outlined *supra*, ASFA prioritizes adoption as the most secure of these options, adoption differs little from subsidized guardianship in many ways. Both provide financial assistance to caregivers and a stable, long-term legal and emotional placement for children. Subsidized guardianship has less legal permanence than adoption, because a parent can petition the court to overturn a guardianship at any time. (To avoid problems in this area, many states with subsidized guardianship programs, discussed in Part IV *infra*, require parental consent before proceeding with the guardianship.) However, courts will only overturn guardianships if doing so would be in a child's best interest. Adoptive parents, moreover, like guardians and biological parents, are open to custody suits by third parties. Even adoptions may be dissolved—adoptive parents may surrender their parental rights or have them terminated just as biological parents can—a possibility contemplated by federal adoption assistance law, which unfortunately does occur from time to time.³¹ On the other hand, adoptive parents have substantially more authority than guardians; they can make all decisions on behalf of a child and do not have to consent to any visitation or contacts between a child and his or her biological parents.³²

Nonetheless, there are many similarities between adoption and subsidized guardianship. Both remove children from the unstable and often harmful world of foster care, which frees families from intrusive oversight and reduces administrative costs for states, and both place them in the care of a safe and known adult with the expectation that it will be permanent. Although how psychologically permanent guardianships are for children is hotly disputed,³³ the few qualitative studies of subsidized guardianship show that it results in both children and caregivers feeling significantly more attached and secure than foster care.³⁴ Finally, because it supports guardians with payments which may be up to the level of adoption assistance, subsidized guardianship places guardians on the same level as adoptive parents in terms of financial security.

III. Cases for Subsidized Guardianship

Subsidized guardianship can be a valuable dispositional option by allowing many children and youth to exit foster care. It has clear advantages over both foster care and adoption. However, due to adoption's greater legal security, many commentators believe and many states require that adoption be ruled out first. Although adoption is the most desirable permanency goal once reunification has been ruled out, caregivers and children old enough should be presented with the range of various permanency options, such as adoption, independent living and guardianship. This enables child and family centered choices and does not delay one option, subsidized guardianship, while another, adoption, is explored and then rejected. One expert on the Illinois system believes that discussing subsidized guardianship and adoption with kinship caregivers increased the number of both outcomes for children, who concomitantly exited from foster care, because "having a second option, having a choice, between guardianship or adoption, really opened up the possibility for discussion."³⁵

Moreover, several categories of cases exist in which children and youth face certain barriers to adoption or other permanent homes. Subsidized guardianship is particularly appropriate for these cases because it does not require that a child be freed for adoption via a surrender or termination of parental rights, and it allows for ongoing contact between children and their parents and families of origin. I will discuss three frequent types of cases: (1) children in kinship care, (2) older children, and (3) children for whom the agency cannot terminate parental rights due to a lack of reasonable efforts.

A. Kinship Care

Relatives care for an increasing number of children and youth, both relatives certified as foster parents and those who are not. Nationally, one in twelve children live in households headed by grandparents or other relatives, and in at least one jurisdiction, the District of Columbia, the number is one in five.³⁶ Almost one-third of the more than 500,000 children in foster care nationwide are placed in kinship foster homes.³⁷ This trend is growing, in large part because many states mandate kinship placements where reasonable.³⁸ Although children in kinship care often do

better than children in non-kinship care,³⁹ they have a somewhat slower rate of exit from foster care.⁴⁰

There are a number of possible explanations for this. Agencies may be biased against paying relative caregivers to permanently care for children because workers feel the relatives should care for them with no financial support.⁴¹ As a result, they do not discuss alternatives like subsidized guardianship with them.⁴² Most kin caregivers are women, often grandmothers or other older relatives, who need financial support to appropriately care for these children.⁴³ If they are ineligible for foster care payments, as in some states, they must rely on TANF to support children in their care. These are not only substantially lower than foster care and adoption assistance payments but also time-limited and have other limitations, including work requirements and family caps.⁴⁴ Thus, many kinship caregivers cannot care for children if they stop receiving foster care payments because they lack the requisite financial support.

Likely, the most significant reason why children in kinship care do not exit the system for adoption is the fairly widespread reluctance of kin caregivers to adopt children when it requires a termination of parental rights, or even a surrender of them. They may feel that agreeing to adopt a child condones the severance of parental rights, and as a result they want to avoid dividing the family in this way.⁴⁵ Kinship foster parents, often grandparents, may feel that it is not only contrary to their child's (the parent's) interests but also artificial for them to adopt their grandchildren.⁴⁶ Under subsidized guardianship, biological parents retain some legal status regarding their children, such as visitation rights and support obligations.⁴⁷ Although "open adoptions", which allow for ongoing parental contact, are increasingly common, their enforceability in court remains undetermined.⁴⁸ Thus, parents are not entitled to post-adoption contacts, as with subsidized guardianship, but rather must rely on agreements with the adoptive parents.⁴⁹

Subsidized guardianship addresses the concerns of many kinship providers because it does not require a termination or surrender of parental rights, it entitles parents to ongoing rights and responsibilities as to the child, and it provides kin caregivers with more financial support than TANF payments. At the same time, subsidized guardianship enables children to have a permanent relationship with an adult caregiver, which is

like adoption in many ways. Additionally, subsidized guardianship recognizes informal caregiving through extended family and kinship patterns common within African American, Latino and Native American cultures, each of which is over-represented in foster care.⁵⁰

One example demonstrating the benefits of kinship care is the Mendez case.⁵¹ Stacey, age six, and her brother Rafael, age three, were placed in foster care several years ago because of their mother's excessive corporal punishment of Stacey, who is developmentally delayed. They have lived with their maternal grandmother the whole time in foster care and they are very attached to her. Their mother visits them sporadically in their foster home and she is unable to care for them at this time. Their grandmother will not consider adoption because she does not want her daughter's rights terminated. She cannot, however, afford to care for the children without foster care payments, especially given Stacey's special needs. The agency is considering moving the children to a pre-adoptive foster home, thus disrupting their placement. Subsidized guardianship, which their mother would consent to, would allow the children to stay with their grandmother, where they are safe and secure, while also maintaining contacts with their birth mother.

B. Older Children and Youth

Another large group in foster care particularly suited to subsidized guardianship are older children and youth. Adoption rates for older children are substantially lower than for younger ones; for instance, in 1996, children over twelve constituted about twenty-seven percent of children in out-of-home care nationally, but only about nine percent of the children were adopted.⁵² There are numerous possible explanations, including the desires and prejudices of adoptive parents, agency efforts, or lack thereof, to have older children adopted,⁵³ and, significantly, the common wish of older children themselves not to be adopted. Older children usually know their parents and frequently have contact with them, even when the agency prohibits it. They often do not want to be adopted because they feel it betrays their parents, or they simply do not wish to have a "new" set of parents.⁵⁴ In such a case, a child's advocate or attorney would oppose adoption (and correspondingly the preceding termination of parental rights) and many adoptive parents understandably would be reluctant to

adopt an unwilling child. Most importantly, most states require the consent of children over a certain age for an adoption, and therefore, adoptions of older children will only happen if they want them.⁵⁵

Take the case of Joy and Eric Fountain, who are thirteen and fifteen years old respectively.⁵⁶ Due to their mother's long-time drug use and history of relationships with abusive men, both children had been in and out of foster care with their "aunt," an old family friend rather than a blood relative. They last lived with their mother several years ago, but they continue to see her in the community even though the agency does not organize visits. Last year the agency filed a petition to terminate Ms. Fountain's parental rights, but both children clearly stated that they would not consent to an adoption because they did not need or want a new mother as they already had one. Because New York law requires the consent of children fourteen and over, the agency withdrew Eric's termination case. It went forward in Joy's case, and she was recently freed for adoption. She, however, has made clear that by the time the adoption could be finalized, by which time she will be fourteen, she will refuse to consent. While the children want to remain in their aunt's care, she cannot afford to care for them without foster care payments and thus will not obtain custody of them.

C. Lack of Reasonable Efforts by the Agency

A third category of cases particularly appropriate for subsidized guardianship are ones where the agency cannot terminate a parent's rights because it cannot prove that it has made the reasonable efforts at reunification required under ASFA.⁵⁷ Congress deemed such efforts necessary (except in certain limited cases where they may be excused) because of the importance and finality of terminating an individual's parental rights.⁵⁸ Unfortunately, this threshold necessary to protect parental due process rights prevents the adoption of many children and youth in foster care because the agency cannot prove reasonable efforts and thus cannot terminate the parents' rights. One HHS report characterized state failures to meet the reasonable efforts requirement as "the primary barrier to implementing permanent plans of adoption."⁵⁹ Child welfare agencies frequently lack the resources to provide adequate reunification services;⁶⁰ although this is no excuse

to terminate a parent's rights, it does bar a child from being adopted.

A lack of reasonable efforts results both in agencies not filing termination petitions and in Family Court judges dismissing termination proceedings, as required under federal and state law. The latter occurred in the Gaines case, in which four children, Monica, Shardene, Anthony and Destiny, ages six to eleven, had been in foster care for six years.⁶¹ Their mother was a long-time crack cocaine abuser and mentally ill. She had very unstable housing and had been homeless for periods of time. The children had been together in the same non-kinship foster home since early on in their placement, and they all wanted to stay there and be adopted by the foster parent. Their mother had eleven caseworkers during the six years and, at times, no caseworker was officially assigned to the case. During the course of her case, she had one referral to a drug treatment program, two referrals to mental health services, and no housing assistance. The mother did not follow up on the referrals. The foster care agency made sporadic attempts to contact her, and for the last three years it had not established a visitation schedule for family visits. Finding a lack of the requisite reasonable efforts, the judge dismissed the termination of parental rights petition. The agency attorney stated that he would not likely file again, at least for some time, because of the agency's failure to work with this parent. Thus, the Gaines children would remain in foster care and not be eligible for adoption. Subsidized guardianship would be a very good option for them because it would allow them to achieve permanence with their foster parent, who would continue to receive the financial support she needed to care for them, and the agency would not have to prove reasonable efforts in order to terminate parental rights.

IV. State Models for Subsidized Guardianship

Recently, a number of states have turned to subsidized guardianship in order to expedite permanency for more children. At least twenty-four states and the District of Columbia had established a subsidized guardianship program as of April 2002.⁶² These states range in size and demographics from California to Rhode Island, and Illinois to Louisiana. The structure, prerequisites, and funding for

these programs vary; in general, however, they are all intended for children who have barriers to permanent placement and many require that adoption be ruled out as an option first.⁶³ Most of the programs require that a child has been in the child welfare system for a period ranging from six months to two years before establishing a subsidized guardianship.⁶⁴ Many also limit potential guardians to caregivers (who may be kin and/or foster parents depending upon the state policy) who have provided "stable" placements for children for six months to two years.⁶⁵ The stated goals for such programs include: expediting permanency; reducing agency intrusion in family life; decreasing court and case management costs; increasing exits from foster care; providing an additional permanency option; and moving children to more stable and/or less restrictive placements.⁶⁶

A. Eligibility Criteria⁶⁷

The criteria for various states' subsidized guardianship programs often explicitly address the barriers to permanency, as discussed above. Consequently, a number of states limit their programs to kinship providers, such as California, Minnesota, and Missouri.⁶⁸ Rhode Island, on the other hand, limits its subsidized guardianship program to non-relatives and refers relative caregivers to apply for the TANF child-only grant.⁶⁹ Other programs require that the proposed guardian be a licensed foster parent; in some states this requirement exists only if he or she is not a relative, while other states require it whether or not the guardian is a relative.⁷⁰

Other criteria include age, special needs, sibling groups, and other factors that have rendered children hard to place for adoption. Indiana and Kansas, for instance, limit this option to older children, but they make exceptions in cases of sibling groups or for other compelling reasons such as a serious disability.⁷¹ Alaska requires an explanation when used for younger children⁷². Nevada, which implemented a subsidized guardianship program a little over one year ago, considers the caregiver's age and limits its program to those over sixty-two years old.⁷³ Minnesota limits its program to children with special needs or to members of sibling groups being placed together.⁷⁴ Alternatively, some programs explicitly do not consider children with special needs, including most notably California's Kin-Gap program. To

this end, California pays up to the general foster care rate, but not the special needs rates available in foster care or for adoption assistance.⁷⁵ One possible explanation is the programs want to preserve incentives for kinship caregivers to adopt children.⁷⁶ At least one state opens its program to any foster child with a “strong attachment” to the potential guardian.⁷⁷ Finally, a number of states have no formal limitations on eligibility of children in foster care.⁷⁸ Even in these states, however, anecdotal feedback from advocates indicates that child welfare workers may, consciously or not, discuss this option only with certain groups, such as children in kin care or older children, resulting in *de facto* criteria.

B. Funding & Subsidy Rates

Both the funding sources and the subsidy rates for subsidized guardianships vary greatly, and there is not necessarily a correlation between them. Funding sources range from TANF surplus dollars to state or county funds. At least five states have used TANF funds, including California, Florida, Louisiana, Missouri and Wisconsin.⁷⁹

On a state level, reduced administrative costs from increased exits from foster care offset the subsidy cost and allow states to reallocate child welfare dollars. Massachusetts, which has had a subsidized guardianship program since 1993, reportedly saves up to \$10,000 per year on each case exiting foster care to guardianship, and Illinois has estimated its savings at \$6,000 per case per year.⁸⁰

Although the AFC cannot distribute Title IV-E foster care funds for subsidized guardianships,⁸¹ eight states to date—California, Delaware, Illinois, Maryland, Montana, New Mexico, North Carolina, Oregon—and the District of Columbia have received demonstration waivers under section 1130 of the Social Security Act to enact subsidized guardianship projects using Title IV-E funds.⁸² Like all IV-E waivers, these programs are expected to be cost-neutral and are aimed at reducing the number of children in foster care, multiple and/or restrictive placements, and re-entries into care. Five states, including Illinois and California, were granted waivers before February, 1998,⁸³ while more were granted and implemented in 1999 and 2000, including New Mexico and Oregon.⁸⁴

Notable variations also exist among the states in terms of the amount and eligibility of the subsidy payment. Not all states automatically grant the subsidy to a guardian of a child exiting foster care; rather, some states have a need determination.⁸⁵ The amount of the subsidy varies greatly, from the low end, which is always more than the TANF child-only grant, to the high end, which matches the foster care or adoption assistance rate, including that for children with special needs. Even though subsidized guardianship rates may be significantly smaller than foster care rates, subsidized guardianship makes financial sense in some states for those guardians who were not previously foster parents. For instance, Maryland’s Guardianship Assistance Demonstration Project, which is limited to relatives, pays a \$300 monthly subsidy (as of 2001), which is \$112 more than a child-only TANF grant but only half of the \$600 monthly foster care rate.⁸⁶ The states typically redetermine the subsidy annually.⁸⁷ It terminates when the child reaches adulthood at age eighteen, or, in some states, it continues for children attending school until age twenty-one or twenty-two.⁸⁸

C. Outcomes

Limited information exists about the outcomes of subsidized guardianship programs because they are relatively new and most states have not yet released evaluations of their programs. However, some data as well as qualitative assessments do exist, showing that subsidized guardianship increases exits from foster care and permanency rates. A recently published study of the Illinois subsidized guardianship program, the largest federally funded program in the country, found that offering kinship caregivers subsidized guardianship and adoption as final dispositional outcomes led to higher permanency rates—52.9% versus 46.2%.⁸⁹ Offering both alternatives, nonetheless, did lead to lower adoption rates.⁹⁰ Similarly, a partial evaluation of Maryland’s subsidized guardianship program, in which the group studied was limited to non-certified kinship providers, indicated that it significantly increases the exit rate for children from the foster care system.⁹¹ The researchers opined that one major factor was the substantial increase between the payment rate for non-certified kinship care providers (who received TANF child-only grants of \$188) versus the subsidized guardianship rate (\$300 per month).⁹² Thus, they concluded

that financial support expedites permanency and is essential to a successful subsidized guardianship program, where success is defined in terms of increasing exits from foster care.⁹³

Studies also show that subsidized guardianship has positive qualitative effects on the stability of the relationship between children and their caregivers. Massachusetts began its subsidized guardianship program in 1983, being one of the first states to do so.⁹⁴ An early evaluation of the program found that the children felt more stable, secure and bonded to their caregivers in guardianship than in foster care, and the guardians felt an increased sense of responsibility and commitment to the children as guardians than as foster parents.⁹⁵ Connecticut's subsidized guardianship program has had similar results, with children feeling a stronger sense of belonging in the home, and kinship caregivers expressing a greater sense of security.⁹⁶

Yet the permanence of subsidized guardianship remains hotly disputed, and the limited studies have had varying results. A great deal depends on how one defines permanency, whether legally, in which case adoption is definitely favored, or psychologically, in which case subsidized guardianship may be equally effective. No study to date known to the author compares the dissolution rates of subsidized guardianship versus adoption. Nonetheless, at least two smaller states (Hawaii and Nebraska) have had significant levels of guardianship dissolution and/or reentry into the child protective system.⁹⁷ Alternatively, at least one study has found that subsidized guardianships with kin last longer than non-relative placements.⁹⁸

V. Conclusion

Subsidized guardianship is a necessary permanency option for many children and youth in foster care. It can help states meet ASFA's goals and accomplish safe and stable homes for children outside of the foster care system, especially in cases of kinship caregivers, older children, and cases where a termination of parental rights may not be viable. Preliminary studies of subsidized guardianship show both increased exits from foster care and greater attachments between children and their caregivers. To increase these positive outcomes, subsidized guardianship should be federally funded and thereby facilitated in more states. It could be expanded more broadly—some commentators

have suggested expanding subsidized guardianships beyond children already in the child welfare system to those at risk of becoming involved in it—in order to increase stability.⁹⁹ In this way, we can begin to move towards a safe and stable home for every child.

Endnotes

* Staff Attorney, Juvenile Rights Division, New York Legal Aid Society. Skadden Fellow 1999, Child Care Law Center. Judicial Clerk, 1998, Hon. Edward R. Korman, United States District Court, Eastern District of New York. J.D. 1998, Harvard Law School.

1. Although ASFA removed the option of long-term foster care as a permanency planning goal for children and youth, it unfortunately remains a *de facto* long term placement for many children. For instance, children who have been freed for adoption via a termination of parental rights, but who are not likely to be adopted, may remain in foster care for many years with a goal of adoption, independent living, or another goal.

2. As of March 31, 2000, the number of children in foster care had increased to a total of 588,000, representing a 40% total increase since the mid-1980s. Subsidized Guardianship AIA Fact Sheet (Apr. 2002) [hereinafter AIA Fact Sheet], available at <http://ist-socrates.berkeley.edu/~aiarc/pubs/SubsGuardian.htm>.

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. A full discussion of ASFA and its ramifications is beyond the scope of this article. For a thorough and critical discussion, see, e.g., Robert Gordon, *Drifting Through Byzantium: The Promise and Failure of the Adoption and Safe Families Act of 1997*, 83 MINN. L. REV. 637 (1999).

5. Many different definitions of permanency exist, be they psychological or legal, but in this article I use the term in the broad sense of a secure relationship with a caregiver intended to last until a child reaches adulthood, and beyond, and which is essential to the child's healthy development.

6. To ensure permanency for children in foster care, agencies must make reasonable efforts to either reunify a child with his or her original family, or, if such efforts are excused, to arrange a new permanent home for the child within a limited time frame. 42 U.S.C. § 671(a)(15) (2000).

7. *Id.*

8. *Id.* § 675(5)(C).

9. *Id.* § 675(5)(E).

10. *Id.* § 675(5)(E)(i)-(iii).
11. Admin. for Children & Families, U.S. Dep't of Health & Human Servs., *Options for Legal Permanency* [hereinafter ACF, *Options*], available at <http://www.acf.hhs.gov/programs/cb/publications/adopt02/02adpt2.htm> (last updated Jan. 17, 2001).
12. Gordon, *supra* note 4, at 646–47.
13. 42 U.S.C. § 673b(d)(1)(A)-(B).
14. *Id.* § 675(1)(E).
15. Meryl Schwartz, *Reinventing Guardianship: Subsidized Guardianship, Foster Care, and Child Welfare*, 22 N.Y.U. REV. L. & SOC. CHANGE 441, 456–57 (1996) (stating that only three percent of cases had a goal of guardianship in twenty-nine states surveyed by the Department of Health and Human Services (HHS) in 1988).
16. Marvin B. Mandell et al., *The Effect of Subsidized Guardianship on Exits from Kinship Care: Results from Maryland's Guardianship Assistance Demonstration Project 4* (Nov. 2001) (unpublished presentation for the Twenty-Third Annual APPAM Conference, Washington, D.C.) (on file with the Children's Legal Right's Journal).
17. ACF, *Options*, *supra* note 11. Regarding a child's unadoptability, it is unclear who is to make this determination and how—by an agency or by a court approving the permanency goal—and what efforts must be made to find adoptive parents before moving down the chain of permanency options.
18. *Id.*
19. *Id.*
20. Schwartz, *supra* note 15, at 478.
21. *Id.*
22. The history of guardianship, different forms of guardianship, and the use of subsidized guardianships in different contexts are beyond the scope of this article. For a thorough discussion of these and other topics related to guardianship, see, e.g., Joyce E. McConnell, *Securing the Care of Children in Diverse Families: Building on Trends in Guardianship Reform*, 10 YALE J.L. & FEMINISM 29 (1998).
23. See *infra* Part IV.
24. 42 U.S.C. § 675(b)(7).
25. The duty to support is not an issue for the parents of most children in foster care.
26. Schwartz, *supra* note 15, at 458.
27. See *supra* note 1.
28. AIA Fact Sheet, *supra* note 2.
29. Some child protective agencies are beginning to offer post-adoption services to rectify this situation. (Author Cynthia Godsoe is a Staff Attorney in the Juvenile Rights Division at the New York Legal Aid Society, *supra* note *, and is writing from her own experience.)
30. See *supra* Part I.
31. 42 U.S.C. § 673(a)(2)(C) (2000). Sadly, from time to time we see cases of abuse and neglect by adoptive parents.
32. See discussion *infra* Part IV.B.
33. See Schwartz, *supra* note 15, at 462–65; AIA Fact Sheet, *supra* note 2.
34. See *supra* Part II.B.
35. Craig Chamberlain, *Research Plays a Key Role in Turning Tide of Foster-Care Crisis*, NEWS BUREAU UNIV. OF ILL. AT URBANA-CHAMPAIGN, Mar. 1, 2000, available at <http://www.news.uiuc.edu/gentips/00/03fostertip.html> (quoting Mark Testa, research director for the Illinois Department of Children and Family Services (DCFS) and winner of an HHS Adoption 2002 Excellence Award).
36. CASEY FAMILY PROGRAMS NAT'L CTR. FOR RES. FAMILY SUPPORT, NATIONWIDE STATISTICAL SUMMARY: GRANDPARENTS AND OTHER RELATIVES RAISING GRANDCHILDREN (2002).
37. Allen W. Harden et al., *Informal and Formal Kinship Care, Vol. 1: Narrative Reports* (1997), available at <http://aspe.hhs.gov/hsp/cyp/kinship/intro.htm>; Marian Wright Edelman, *Foreword to The State of Children in America's Union: A 2002 Action Guide to Leave No Child Behind* (Children's Defense Fund) 2002, at iv available at <http://www.childrensdefense.org/pdf/minigreenbook.pdf>.
38. See, e.g., N.Y. FAM. CT. ACT §1017(1)(a) (requiring the state to explore kinship placement for children in foster care).
39. Gordon, *supra* note 4, at 658.
40. Schwartz, *supra* note 15, at 455.
41. AIA Fact Sheet, *supra* note 2.
42. *Id.*
43. Fed'n of Protestant Welfare Agencies, *SUBSIDIZED GUARDIANSHIP: IT'S TIME* 9 (April 2002) available at <http://www.fpwa.org/news/kinship.pdf> (Discussing studies finding that kin caregivers tend to be poorer and older than non-kin caregivers, the majority being the children's grandmothers).
44. See Stephen G. Anderson & Kelly Righton, *Impact of TANF on State Kinship Foster Care Programs* (Children and Family Research Ctr., Univ. of Ill. at Urbana-Champaign), Feb. 2001, at 42 available at <http://cfcrcwww.social.uiuc.edu/pubs/pdf.files/tanf.pdf> (showing that in 1999 the caretaker of a child in kinship foster care in New York who received the Title IV-E foster care payment would receive \$644 monthly versus a kinship caretaker in North Carolina who was eligible to receive only the TANF child-only rate of \$181 per month).
45. Gordon, *supra* note 4, at 659; See also AIA Fact Sheet, *supra* note 2.
46. This is evidenced through confidential client stories.
47. Author Cynthia Godsoe is a Staff Attorney in the Juvenile Rights Division at the New York Legal Aid Society, *supra* note *, and is writing from her own experience.
48. *Id.*
49. *Id.*
50. Schwartz, *supra* note 15, at 459.

51. This case is a composite of confidential client stories.
52. MICHAEL R. PETTIT & PATRICK A. CURTIS, *CHILD ABUSE & NEGLECT: A LOOK AT THE STATES* 153 (1999).
53. Gordon, *supra* note 4, at 671.
54. *Id.* at 668 (citing a study finding that half of 111 foster children over age nine who were deemed unlikely to reunify with their parents did not want to return home because they did not want to end ties to their family of origin).
55. *See, e.g.*, D.C. CODE ANN. § 16-304 (West 2003); N.C. GEN. STAT. § 48-3-601 (West 2003); N.Y. DOM. REL. LAW § 111(1)(a) (2003).
56. This case is a composite of confidential client stories.
57. 42 U.S.C. § 675(5)(E)(iii).
58. H.R. REP. NO. 105-77, at 12 (1997), *reprinted in* 1997 U.S.C.C.A.N. 2739, 2744.
59. Gordon, *supra* note 4, at 661 (quoting Office of the Inspector General, Dep't of Health & Human Servs., Barriers to Freeing Children for Adoption 11 (1991)).
60. *Id.* at 662.
61. This case is a composite of confidential client stories. The names have been changed to protect client identity.
62. AIA Fact Sheet, *supra* note 2.
63. For instance, California, Delaware, Maryland, Nebraska, and North Carolina require that adoption or reunification is not possible for the child before the child is eligible for the program. Admin. for Children & Families, U.S. Dep't of Health and Human Servs., *Summary of IV-E Waiver Demonstrations* (1998) [hereinafter ACF, *IV-E Waiver*], *available at* <http://www.acf.dhhs.gov/programs/cb/laws/im/im9801a3.htm>.
64. For instance, North Carolina requires placement for six months, California, Delaware, Maryland, and Utah for one year, and Illinois for two years. *Id.* *See also* Ana Beltran, Generations United, *Grandparents & Other Relatives Raising Children: Subsidized Guardianship Programs* (4th prt. 2002), [hereinafter Generations United] *available at* www.gu.org (providing a list of various states' subsidized guardianship requirement).
65. This includes California, Delaware, Illinois, and North Carolina. ACF, *IV-E Waiver*, *supra* note 63.
66. *Id.*
67. Most of the information in this subsection comes from the following source: Generations United, *supra* note 64.
68. Missouri's subsidized guardianship program is limited to a small group of relatives including grandparents, aunts, uncles, and adult siblings. *Id.*
69. *Id.*
70. AIA Fact Sheet, *supra* note 2 (discussing Illinois and Nebraska in the first category, and Delaware, Massachusetts, Montana and Washington in the second).
71. Generations United, *supra* note 64.
72. *Id.*
73. *Id.*
74. *Id.*
75. CAL. WELF. & INST. CODE § 11364 (outlining Kin Gap rate). Compare with *id.* § 16121 (outlining adoption assistance rates).
76. Based on conversations with California advocates, including staff at the National Center for Youth Law.
77. Nebraska's subsidized guardianship program allows children with "strong attachments" to the potential guardian to participate. Generations United, *supra* note 64.
78. Examples include Arizona, Connecticut, Hawaii, Kentucky, Massachusetts, Missouri, and Wisconsin. *Id.*
79. AIA Fact Sheet, *supra* note 2.
80. *Id.*
81. Adoption and Safe Families Act of 1997 § 201, Pub. L. No. 105-89, 111 Stat. 2115 (codified at 42 U.S.C. § 673b (2000)).
82. AIA Fact Sheet, *supra* note 2.
83. Admin. for Children & Families, U.S. Dep't of Health & Human Servs., *Summary of IV-E Waiver Demonstrations*, February, 1998, *available at* <http://www.acf.dhhs.gov/programs/cb/laws/im/im9801a3.htm>.
84. Admin. for Children & Families, U.S. Dep't of Health & Human Servs., *Federal Waivers of Title IV-B and IV-E Provisions*, *available at* <http://www.acf.hhs.gov/programs/cb/dis/tables/sec11gb/waivers.htm>.
85. AIA Fact Sheet, *supra* note 2.
86. Mandell et al., *supra* note 16, at 5–6.
87. Generations United, *supra* note 64.
88. *Id.*
89. Mark F. Testa, *Subsidized Guardianship: Testing an Idea Whose Time Has Finally Come*, 26 SOC. WORK RESEARCH 145, 149 (2002).
90. *Id.* at 157.
91. Mandell et al., *supra* note 16, at 13–14.
92. *Id.* at 14.
93. *Id.* at 15–16.
94. Generations United, *supra* note 64.
95. Schwartz, *supra* note 15, at 458 (citing a study by Frances Wheat and Julia Herskowitz of the Massachusetts Department of Social Services).
96. FED'N OF PROTESTANT WELFARE AGENCIES, *supra* note 43 at 14.
97. AIA Fact Sheet, *supra* note 2.
98. *Id.*
99. This is the case in at least one state already, Wyoming. Several states do not require that a child have been in state custody to be eligible for subsidized guardianship, including Florida, Louisiana, and Missouri. Generations United, *supra* note 64.