# The New Permanency

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In recent decades, as assisted reproductive technology and same-sex parenting have spurred private family law to begin recognizing multiple parenthood arrangements, and wrestle with the implications of those arrangements, a parallel development has emerged in public family law. Permanency options for foster children have diversified significantly and now reflect multiple parenthood statuses as an essential means for helping children leave foster care to stable and permanent family arrangements. Indeed, the child welfare field has embraced such multiple parenthood arrangements far more fully than private family law, and they now occur with great frequency and regularity.

This article analyzes those trends in child welfare law, and explains ongoing barriers to realize fully the promise of these diverse permanency options. Child welfare law differs from private family arrangements in at least one crucial way – the state plays an even stronger role, because the state has removed a child from her family of origin, created a new foster family arrangement, and (in the cases on which this article focuses) pressured all individuals involved to accept a permanency option other than reunification with the child's family of origin. This article will identify and propose solutions to some of the challenges that this state role creates.

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

That binary—reunify or terminate and adopt—has faced significant criticism for overly relying on terminations, creating legal orphans,[1] and unnecessarily excluding permanency options which maintain a legal relationship between parent and child or seek to place children permanently with caretakers who did not want to adopt. Assuming permanency required terminating parental rights, many states terminated many thousands of parents' rights, but failed to find adoptive families for all children whose legal relations with their parents were severed. This created legal orphans, and critics complained that states served these children poorly – states raise these children in foster care, then "emancipate" them when they reach majority, and these children fare poorly on important life outcomes.[2] Critics explained how child welfare law subordinated permanency options such as guardianship to adoption and demonstrated empirically that guardianships are just as stable and lasting as adoptions. Simultaneously, child welfare agencies began placing increasing numbers of children with extended family members, many of whom did not want to terminate their relative's parental rights, even if the kinship caregivers would raise them to adulthood. And

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

[2] *See, e.g.*, MARK E. COURTNEY, ET AL., MIDWEST EVALUATION OF THE ADULT FUNCTIONING OF FORMER FOSTER YOUTH: OUTCOMES AT AGE 26, 6 (2011) (summarizing the "disquieting" conclusion that youth who emancipate from foster care are "faring poorly . . . [a]cross a wide range of outcome measures, including postsecondary educational attainment, employment, housing stability, public assistance receipt, and criminal justice system involvement . . . ."), *available at* http://www.chapinhall.org/sites/default/files/Midwest%20Evaluation_Report_4_10_12.pdf.

research demonstrated that kinship care provided foster children with more stable placements and facilitated better permanency outcomes.

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

A milestone in the development of this new permanency was the 2008 Fostering Connections to Success and Increasing Adoptions Act ("Fostering Connections"). Through Fostering Connections, Congress provided federal funds to reimburse states for kinship guardianship subsidies. This reform rectified a long-standing inequity in child welfare law—the federal government had helped states pay adoption subsidies for foster children since 1980, but had not done so for guardianship. But as the permanency continuum developed in the intervening decades, and as research firmly established that guardianship was just as lasting and stable as adoption, this inequity was increasingly untenable.

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

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

This article is the first to explore the reasons for Fostering Connections' failure to spark major practice changes, to explore a jurisdiction in which the expected changes appear to be taking shape, and to propose further legal reforms to achieve Fostering Connections' promise. Fostering Connections failed to have as broad of an impact as possible because of problems built into its structure. It provides federal funding for guardianship, but only for kinship caregivers—even though non-kin caregivers may be just as willing to choose guardianships. It requires states to rule out adoption before being eligible for a guardianship subsidy, and thus establishes a permanency hierarchy that subordinates guardianship to adoption. This provision reinforces an ideology that permanency requires something legally binding and that adoption is more binding than

guardianship because it is legally hard to undo. This argument, however, ignores the empirical reality that adoption and guardianship are equally permanent.

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

These shortcomings are particularly concerning because of the immense authority in child welfare agencies have in most cases. They determine when they will place children with kin or with strangers, whether and under what conditions they will pay guardianship subsidies, and when they will inform families that guardianship is an option. Court oversight of these decisions is weak. Agencies' wide discretion permits them to continue practicing under the old permanency—without giving due deference to kinship placement possibilities and continuing to subordinate guardianship as a permanency option.

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

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

This article proposes a set of reforms that would help fully implement the new permanency nationwide, achieving the benefits and avoiding the pitfalls evident in the District of Columbia. First and most obviously, the law should no longer impose a hierarchy among permanency options and should instead treat adoptions and guardianships as equal. When reunification is not an option, all potential permanent caregivers should understand the full continuum of permanency options available to them. The law should provide similar procedural and substantive protections to the parent-child relationship before guardianships as are provided before adoptions. And agencies and policy makers should track adoption and guardianship data more equitably.

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

The law should also place greater emphasis on the effective procedures for the selection of permanency plans. Making the best choice along the permanency continuum for each child is essential because that choice will shape the negotiating field that will lead many parents and caregivers to reach agreement on one option along the permanency continuum. Evidentiary hearings in appropriate situations and the right to an expedited appeal of permanency hearing decisions will improve permanency plan decision-making substantially.

Finally, to facilitate the above reforms, a greater emphasis on quality counsel for parents, children, and, once reunification is ruled out, potential permanent caregivers is essential. Quality representation for parents and children can speed permanency by helping parties negotiate permanency agreements by consent, and by ensuring all options on the permanency continuum are explored. The same is true for counsel for caregivers, who can ensure that all caregivers are aware of all possible permanency outcomes, even if individual caseworkers are loath to share such information with foster families.