

Filling the Due Process Donut Hole: Abuse and Neglect Cases between Disposition and Permanency

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The government's child protection agency removes a child from his mother and convinces a family court judge to rule that the child's mother had neglected him. The family court judge orders the child into foster care and orders the agency to work with the mother to remedy the conditions that led her to neglect him with the plan of reunifying the child with her. One year later, the family returns to family court. The social worker files a report asserting that the mother has not cooperated with the agency's efforts to help her and remains incapable of taking care of the child. The child has been in foster care for one year, and the social worker believes the child needs a legally permanent home. The social worker recommends that the court change the child's plan to adoption by a new family.

At the court hearing, the mother says that she now can take care of her child, but the social worker has never liked her and has not given her a fair chance, nor has the worker given her credit for the progress she has made. The mother knows she still has some problems, but she says they are less severe than they were when her child was removed; she could help solve them if only the social worker helped her, rather than trying to take her child away. She says she tried to work with the social worker, but the worker only referred her to other agencies that did not provide useful help.

How does the family court decide what happens next? A series of factual disputes exist—whether and to what extent the mother has remedied the conditions of neglect; whether the social worker has followed the court's order to help her; whether the social worker is biased against her—that are distinct from the ruling that the court has already issued regarding the mother's past neglectful conduct. These factual disputes are tied to legal questions—has the state agency made “reasonable efforts” to reunify the child?¹ Has the parent been sufficiently rehabilitated to be entitled to the return of her child?² Is reunification so unlikely that the state agency should work to change the child's custody arrangements

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¹ See 42 U.S.C. § 671(a)(15)(B) (2006) and text accompanying *infra* note 23.

² See *In re Knowack*, 53 N.E. 676, 678 (N.Y. 1899) and text accompanying *infra* note 175.

permanently?³ These disputes appear tailor-made for a neutral fact-finder to adjudicate based on time-tested rules of adversarial litigation.

A due process donut hole exists in the middle of abuse and neglect cases. The beginnings and ends of abuse and neglect cases have traditional due process protections. At the beginning, the government must prove that a parent is unfit in a contested trial.⁴ At the end, the government, or a petitioner for adoption, guardianship or some other form of permanent custody must prove their case in a trial.⁵ But what happens in the middle is quite a different story. In tens (and perhaps hundreds) of thousands of child abuse and neglect cases, judges decide to change children's permanency plans based solely on the representations of parties, social workers, and attorneys—not actual evidence—and without giving the parties the ability to appeal the judge's decision.⁶ Parties who want a permanency plan that is different from what the judge orders will have no choice but to wait to challenge the plan. They can wait until the next hearing, but they will face the same procedures as in the first hearing. They can wait until a termination of parental rights or some other permanent custody case is filed and then litigate whether the parent is able to care for the child. But by then, much time will have passed, new facts may emerge regarding the parent's ability to raise the child—facts that have been shaped by the permanency plan decision itself—and the child may have developed strong new bonds with potential permanent caretakers, adding emotional and legal difficulties.

Abuse and neglect cases involve constantly changing facts. They “are unlike civil cases, which typically involve only facts gone by The ultimate parties in interest are the [children] themselves. And for them, their lives are . . . ongoing event[s].”⁷ A child's need to return to his parent may ebb or flow. His parent's fitness may improve, regress, or remain the same. Federal law, followed in all states that wish to receive federal funds to support foster care, requires regular permanency hearings so family courts can make decisions based on evolving factual situations. These decisions, and the lack of greater procedural protections around them, are

³ See 42 U.S.C. § 675(5)(C)(i) (2006) and text accompanying *infra* note 21.

⁴ *Stanley v. Illinois*, 405 U.S. 645, 658 (1972).

⁵ *Santosky v. Kramer*, 455 U.S. 745, 769 (1982).

⁶ I describe what occurs in tens of thousands of abuse and neglect cases, but many states provide more procedural protections. Many require evidentiary hearings for permanency plan decisions and many permit appeals. A detailed fifty-one-state survey is included in Part I.B.2. See *infra* Part I.B.2.

⁷ *In re S.M.*, 985 A.2d 413, 420 (D.C. 2009). The D.C. Court of Appeals stated this language in a different context—ordering a “fresh assessment of the present situation” in the remand of an adoption case involving children in foster care. *Id.* But its fundamental point—that facts in foster care cases change as quickly as children do, and trial court decisions need to take account of these changing facts—applies to other procedural postures.

the focus of this Article. These decisions are important because they can set the course of children's life for years, if not their entire childhood. They are also designed to create the real-life facts that will lead to achieving the permanency plan chosen; thus, they shape the "ongoing events" that will become the factual basis of later termination of parental rights or other permanency trials.

The absence of greater procedural protections in hundreds of thousands of abuse and neglect cases that reach this middle stage leads to poor decisions in abuse and neglect cases; creates unnecessary harm to children even when incorrect decisions are reversed later in a case; and, at least in some cases, violates the due process rights of parents and arguably of children. The federal government (which created the legal structure that states follow to obtain foster care funding), state legislatures that write laws governing abuse and neglect cases, and state courts adjudicating abuse and neglect cases should change child abuse and neglect laws to address these problems.

Part I of this Article will outline existing due process protections in abuse and neglect cases, particularly those protections that exist between an initial adjudication of abuse or neglect and a final decree permanently affecting a child's relationship with his or her parent, including those protections required by federal law and states' implementation of those protections. Part II addresses the argument that due process requires more meaningful procedures. Part III will explain the policy argument—beyond the due process considerations of Part II—that support meaningful trial court procedures and appellate rights. Part IV will also discuss why alternative means of filling this due process donut hole fail to satisfy policy concerns.

I. DUE PROCESS PROTECTIONS IN ABUSE AND NEGLECT CASES

A. *The beginnings and ends of cases*

Lawyers unfamiliar with abuse and neglect law would feel comfortable walking into trials held at the beginnings and ends of abuse or neglect cases. They would see bench trials that have the due process hallmarks of most civil litigation.⁸ A case typically begins with the government formally charging a parent with abusing or neglecting his or her child and asking a judge to put the child in the government's custody so it can protect the child from further abuse or neglect.⁹ In constitutional terms, the government must prove that the parent is unfit to justify changing

⁸ See, e.g., D.C. CODE § 16-2316(a) (LexisNexis 2001).

⁹ See, e.g., D.C. CODE § 16-2305 (LexisNexis 2001) (governing abuse and neglect petitions).

custody.¹⁰ The government, like any other party seeking to prove a case that it files, puts on witnesses and introduces evidence. Opposing parties cross-examine the government's witnesses, challenge its evidence, and can put on their own case.¹¹ The judge considers the evidence presented, his or her state's substantive law and relevant constitutional law, and then enters a ruling, which parties may appeal.

A ruling that parents have abused or neglected their children justifies a temporary remedy—typically, placing a child in foster care—but a second trial is necessary to permanently alter a child's custodial arrangements, such as a termination of parental rights trial, adoption trial, or some other form of permanent custody trial (what I will call a “permanency trial”).¹² Here, too, abuse and neglect cases follow normal procedures. Parties seeking to terminate a parent's rights must prove their case by clear and convincing evidence.¹³ That case includes proving not merely a single act of parental unfitness, but that the parent has not ameliorated his or her unfitness and, therefore, a showing of permanent deprivation is required.¹⁴ Parties have the opportunity to challenge each other's evidence and present their own. States treat such trials very seriously; even without a constitutional mandate to provide counsel,¹⁵ the vast majority of states now do so.¹⁶ Judges consider the evidence and the law and make their ruling, which can be appealed by the parties.

B. The donut hole in between

In most states, those same lawyers who felt at home in a neglect or permanency trial would be confused if they observed a hearing in between the initial abuse and neglect trial and a permanency trial. They would see

¹⁰ See *Stanley v. Illinois*, 405 U.S. 645 (1972).

¹¹ See, e.g., D.C. CODE § 16-2316(b) (LexisNexis 2001) (discussing evidentiary standards for “fact finding hearings”).

¹² Those other forms are discussed below. See *infra* notes 287, 296 and accompanying text.

¹³ *Santosky v. Kramer*, 455 U.S. 745, 769 (1982).

¹⁴ See *id.* at 760 n.10.

¹⁵ *Lassiter v. Dep't of Soc. Servs.*, 452 U.S. 18, 33–34 (1981).

¹⁶ By one count, thirty-nine states now provide a right to counsel in all TPR proceedings, and six other states have enacted laws providing a right to counsel in some TPR proceedings. Those numbers reflect an increase from when *Lassiter* was decided; then, thirty-three states provided for a right to counsel in TPR proceedings. Russell Engler, *Shaping a Context-Based Civil Gideon from the Dynamics of Social Change*, 15 TEMP. POL. & CIV. RTS. L. REV. 697, 701 n.29 (2006). By another more recent count, forty-four states provide an absolute statutory right to counsel in TPR proceedings and six provide counsel in some TPR proceedings. VIVEK SANKARAN, A NATIONAL SURVEY ON A PARENT'S RIGHT TO COUNSEL IN TERMINATION OF PARENTAL RIGHTS AND DEPENDENCY CASES, <http://www.law.umich.edu/centersandprograms/ccl/specialprojects/Documents/National%20Survey%20on%20a%20Parent's%20Right%20to%20Counsel.pdf> (last visited June 29, 2010).

permanency hearings featuring discussion of facts not proven at any trial. In about thirty states,¹⁷ parties would not be required to call individuals to the witness stand and would, instead, assert facts, including many loaded with hearsay, from counsel tables and through written reports not subject to cross-examination. Disputes regarding the facts might exist, but that would not necessarily trigger adversarial fact finding. Purported experts might interpret purported facts a certain way, and multiple purported experts might offer conflicting opinions. The judge would then make decisions about “plans” and “efforts” in the case and order parties to work towards the plan that the judge set. The judge would speak as if the plan she set is the final plan for the child, and the parties could not appeal this ruling. These permanency hearings might even refer to prior permanency hearings held in previous years, with no change other than the passage of time.

Those lawyers might have the same reaction that, as one commentator has described, many children and adults who are the subjects of abuse and neglect cases have: “This is a courtroom?”¹⁸

1. Federal statutory “procedural safeguards” between disposition and permanency

These permanency hearings are creatures of statute. Federal law requires, as a condition of federal funding, that all states to comply with certain minimal procedures in abuse and neglect cases. Foster care agencies must complete a “case plan” describing the child’s foster care placement and how the agency will work with the child and parents to facilitate reunification—or, if the agency is working towards another permanent custody or adoption with someone else, how the agency will work to do so.¹⁹ State courts must hold a “permanency hearing” after the

¹⁷ See *infra* Part I.B.2.a.

¹⁸ Professor Erik Pitchal, describing the several years he spent practicing in Brooklyn Family Court, wrote:

“More than one youngster, eyes bulging at the wonder of it all, blurted out, ‘This is the courtroom?’ Whether from watching Judge Judy on television or from their own mind’s eye of fantastical construction, they had a far different expectation for what a courtroom would look like. Even the older adolescents were surprised—often at the dingy, disrespectful nature of the physical space. What they could not know was that many adults had the same reaction—to the physical space, to be sure, but more critically, to what happened there on a daily basis.”

Erik Pitchal, *Children’s Constitutional Right to Counsel in Dependency Cases*, 15 TEMP. POL. & CIV. RTS. L. REV. 663, 684 (2006).

¹⁹ 42 U.S.C. § 675(1) (2006). See also 42 U.S.C. § 671(a)(16) (2006) (providing for the development of case plans).

child has lived in foster care for fourteen months, and every year thereafter.²⁰ At this hearing, the judge must determine the child's "permanency plan"—that is, whether the plan of the case is for the child to return to his or her parent, to be adopted, to live in the permanent custody of someone else, or to grow up in foster care.²¹ This determination includes deciding, "whether, and if applicable when, the child will be returned to the parent," including, in appropriate cases, an order that a child should be returned to the parent immediately.²²

When the child is not returned to the parent immediately, the judge selects a permanency plan at a permanency hearing, and this plan mandates what work the state agency must do. The state must make "reasonable efforts" to bring to fruition the result identified in the permanency plan. As a default, states must make reasonable efforts to reunify children with the parents or guardians from whom they were removed.²³ When a judge sets a different permanency plan, states must make reasonable efforts to "complete whatever steps are necessary to finalize" that permanency plan in a "timely manner."²⁴

States' federal funding depends on their obtaining a judicial finding that they made reasonable efforts to reunify children or to implement and finalize another permanency plan. These findings must occur on the same schedule on which permanency plans are held: within fourteen months of the child's removal and placement in foster care and every year after that.²⁵ If a judge does not find that a state has made the required reasonable efforts, the state cannot obtain federal funds for that child until a judge has found that the agency has at a later point made the required efforts.²⁶

Federal law does require some "procedural safeguards" at these permanency hearings but is light on detail regarding what "safeguards" are required: "[P]rocedural safeguards shall be applied with respect to parental rights pertaining to the removal of the child from the home of his parents, to a change in the child's placement, and to any determination affecting

²⁰ *Id.* § 675(5)(C)(i) (2006). The first permanency hearing must occur within twelve months of the child's "entry into foster care." *Id.* This is defined as the earlier of a judicial finding that the child was abused or neglected or sixty days after the child was removed from the child's parent or other caregiver. *Id.* § 675(5)(F) (2006). Therefore, under no circumstances can a child remain in foster care for longer than twelve months plus sixty days without a permanency hearing.

²¹ *Id.* § 675(5)(C)(i) (2006).

²² *Id.* See also D.C. Code § 16-2323(f) (LexisNexis 2001).

²³ 42 U.S.C. § 671(a)(15)(B) (2006).

²⁴ *Id.* § 671(a)(15)(C) (2006).

²⁵ 45 C.F.R. § 1356.21(b)(2)(i) (2009). Federal Regulations require such findings within 12 months of the date the child is considered to have "entered" foster care, which is defined as up to 60 days after the child's removal. *Id.* See also 45 C.F.R. § 1355.20(a) (2009).

²⁶ *Id.* § 1356.21(b)(2)(ii) (2009).

visitation privileges of parents.”²⁷ Federal law provides slightly more detail in requiring that children should be “consult[ed], in an age appropriate manner” regarding their permanency plans.²⁸ Federal regulations provide no further guidance on the “procedural safeguards” that should exist at permanency hearings or regarding reasonable efforts findings.²⁹

The legislative history behind these provisions is similarly short on detail regarding the envisioned procedures. The “procedural safeguards” requirement was born in the Adoption Assistance and Child Welfare Act of 1980.³⁰ Congress expressed concern that “many children, because of the inadequacies of current review procedures, and lack of family reunification services, become ‘lost’ in foster care, and continue to remain in care unnecessarily at great cost to the government, themselves and their families.”³¹ Congress thus required states to hold dispositional hearings when a child has been in foster care for eighteen months and, for each such child,

assess the appropriateness of their placement . . .
determine whether the child should be returned to his or
her home; whether the child requires continued placement
. . . whether the child should be placed with a legal
guardian; whether proceedings should be initiated to
terminate parents’ custody rights so the child can be free
for adoption; or whether a child should be placed in
permanent long-term foster care placement because the
child cannot or should not be returned home or placed in
an adoptive home.”³²

Congress, through the Adoption and Safe Families Act (ASFA) of 1997,³³ shortened the timeline, before these “procedural safeguards” are applied, from eighteen to twelve months. The House Committee that drafted the bill explained “that 18 months is a very long time in the life of a young child” and faster hearings are required to prevent “unnecessarily

²⁷ 42 U.S.C. § 675(5)(C)(ii) (2006).

²⁸ *Id.* § 675(5)(C)(iii) (2006).

²⁹ *See* 45 C.F.R. §§ 1355–56 (2009).

³⁰ Adoption Assistance and Child Welfare Act of 1980, Pub. L. No. 96-272, § 101(a), 94 Stat. 511 (codified as amended at 42 U.S.C. § 675(5)(C)(ii) (2006)).

³¹ H. R. REP. NO. 96-136, at 50 (1979).

³² *Id.*

³³ Adoption and Safe Families Act of 1997, Pub. L. No. 105-89, 111 Stat. 2115.

prolonged stays in foster care.”³⁴ The Committee emphasized its expectation that the decisions at this first permanency hearing will be “final permanency decisions,”³⁵ a point underscored by Congress’s decision to change the name of the hearings from “dispositional hearings” to “permanency hearings.”³⁶ Congress’s intention was for permanency hearings to speed actual permanency; a judge would set a permanency plan and that permanency plan would be realized in relatively short order—a goal that has not been achieved.³⁷ Congress did not, however, provide any new guidance as to the “procedural safeguards” that should occur at these permanency hearings.

While the statutory text and legislative history do not illuminate what procedures are envisioned, they do help shed light on what permanency hearings are designed to accomplish. These hearings call upon judges to make both legal and factual conclusions that are distinct from the finding of abuse or neglect that justified the child’s entry into foster care. A judge must decide, first, whether the child can go home or if he needs to remain in foster care, and, if the latter, whether the location in which the agency has placed the child is appropriate.³⁸ That is, the judge decides where the child will live in the immediate future, something that cannot be done at the time a judge orders a child to be placed for the first time. Second, when the child will remain in foster care, the judge should decide what permanent custody arrangement the child should have in the future—whether he should return to the family from whom he was removed or whether a different permanency plan should be followed.³⁹ This determination is based as much on developments since the child’s entry into foster care as it is based on the underlying adjudication of parental unfitness. It stands to reason that both of these determinations would be informed by analyzing the adequacy of the foster care agency’s case plan and the parent’s compliance (or lack thereof) with the case plan—although the federal law does not so state, at least not explicitly. Indeed, an illustrative state law provides that when a judge decides whether a child should return home to her parent at a permanency hearing,

the court shall view the failure of the parent to substantially comply with the terms and conditions of the case service plan . . . as evidence that return of the child to

³⁴ H. R. REP. NO. 105-77, pt. 2, at 13 (1997), *reprinted in* 1997 U.S.C.C.A.N. 2739, 2745–46.

³⁵ *Id.*

³⁶ Adoption and Safe Families Act § 302.

³⁷ *See infra* Part I.B.3.

³⁸ 42 U.S.C. § 675(1)(B) (2006).

³⁹ *Id.* § 675(5)(C)(i) (2006).

his or her parent would cause a substantial risk of harm to the child's life, physical health, or mental well-being.⁴⁰

Moreover, following the ASFA amendments, these hearings are supposed to be final determinations of these issues, as the foster care agency is expected to work to achieve promptly the identified permanency plan.⁴¹ Timeliness is crucial, especially, as ASFA's legislative history indicates, in cases involving children.⁴² Third, the judge should decide whether the foster care agency has made reasonable efforts to achieve the previously set permanency plan.⁴³

2. *State laws governing procedures between disposition and permanency*

Eric Washington, the Chief Judge of the District of Columbia Court of Appeals (the District's highest court), was formerly a trial judge in the District of Columbia Superior Court⁴⁴ and described the procedures for permanency plan changes in this way:

Thinking back to my time as a trial judge, I remember a social worker or somebody coming in and arguing that the individual who had been adjudicated neglectful or stipulated to neglect had once again failed to do something they had been ordered to do by the court and therefore they were recommending that the goal should be changed. I was never sure if there was a requirement or a notice that was given that at this hearing we are going to be discussing a change in goal.⁴⁵

Chief Judge Washington's confusion is understandable. The District's permanency hearing statute requires the foster care agency to submit a report at least ten days in advance of a permanency hearing, but does not

⁴⁰ MICH. COMP. LAWS. SERV. § 712A.19a(5) (LexisNexis 2005).

⁴¹ H. R. REP. NO. 105-77, pt. 2, at 13 (1997), reprinted in 1997 U.S.C.C.A.N. 2739, 2745-46.

⁴² *Id.*

⁴³ See 45 C.F.R. § 1356.21(b)(2)(i) (2009) and text accompanying note 25.

⁴⁴ Chief Judge Washington served as a trial judge from 1995 to his appointment as an appellate judge in 1999. *Bio for the Honorable Eric T. Washington, Chief Judge, District of Columbia Court of Appeals*, available at http://www.dccourts.gov/dccourts/docs/DCCA_Bio_Washington.pdf (last visited Dec. 20, 2010).

⁴⁵ Audio tape: *In re S.M.*, Oral Argument, (on file with author) quote near 11:43:10 in the recording. This case and the context of the quote are discussed further in Part II.A. Chief Judge Washington used the term "goal" to refer to a child's permanency plan.

explicitly require a statement of the agency's recommended plans.⁴⁶ The statute is silent regarding any advance notice of plan change requests from other parties, such as the child's guardian *ad litem*,⁴⁷ or a foster parent who may have been made a party or be granted the right to attend and be heard at a permanency hearing.⁴⁸

Chief Judge Washington's confusion could reasonably extend to how trial court judges are supposed to adjudicate contested permanency plan decisions. The District's permanency hearing statute is silent as to the substantive standard to be applied, which party bears the burden of proof, and how the court is to adjudicate contested facts. The District statute detailing when evidentiary hearings are required, and what rules of evidence shall be applied in such hearings, refers to trials on a neglect petition and the dispositional hearings that shortly follow adjudications of neglect, but does not refer to permanency hearings.⁴⁹

One element of District of Columbia permanency hearing procedures is clear: a trial court's permanency plan decision, no matter what procedural, substantive, or evidentiary objections a party may make, is not an appealable order.⁵⁰

The National Council of Juvenile and Family Court Judges—a membership organization of courts handling abuse, neglect, juvenile delinquency and other cases, which provides “technical assistance” to judges nationwide⁵¹—has issued guidance for permanency hearings that echoes the law in the District of Columbia. The Council urges judges to make detailed, written findings of fact and conclusions of law, including

⁴⁶ D.C. CODE ANN. § 16-2323(d) (LexisNexis 2001). In 2004, after Chief Judge Washington became an appellate judge, the Superior Court issued rules that require foster care agency reports to state a recommended permanency plan. D.C. Sup. Ct. Neg. R. 33(b). In this author's experience practicing in the District of Columbia Family Court, the required reports typically do contain the agency's recommended permanency plan, but are frequently filed only two or three days in advance of permanency hearings, rather than the ten days required by statute, thus affecting the notice provided other parties.

⁴⁷ In the District of Columbia, a foster child is appointed a “guardian *ad litem*,” an attorney who “shall in general be charged with the representation of the child's best interest.” D.C. CODE ANN. § 16-2304(b)(5) (LexisNexis 2001). By representing the child's best interests and not the child him or herself, the guardian *ad litem* may request a plan change contrary to the child's wishes. According to one recent compilation, the District is one of fifty-four states and other American territories that provide a best interest representative to the child, some of which also provide a lawyer for children in all cases or provide discretion for judges to appoint such lawyers. REPRESENTING CHILDREN WORLDWIDE, U.S. SUMMARY CHART, <http://www.law.yale.edu/RCW/rcw/summary.htm> (last visited Oct. 24, 2010).

⁴⁸ D.C. CODE ANN. § 16-2304(b)(4) (LexisNexis 2001).

⁴⁹ D.C. CODE ANN. § 16-2316(b) (LexisNexis 2001).

⁵⁰ *In re K.M.T.*, 795 A.2d 688, 690 (D.C. 2002).

⁵¹ See generally NAT'L COUNCIL OF JUVENILE & FAMILY COURT JUDGES, <http://www.ncjfcj.org/content/view/15/75/> (last visited Sept. 15, 2010).

whether the state agency has made reasonable efforts to help the family reunify, and what the child's permanency plan will be.⁵² The Council has admonished members that permanency hearing findings should be "more specific, final and definitive than at a review hearing."⁵³ But the Council's description of permanency hearing lacks any reference to examination of witnesses, documentary evidence, or other trial-type procedures. The Council also does not specify what detailed factual findings would justify a particular permanency plan ruling.⁵⁴ Instead, the Council writes that state agencies should propose their recommended permanency plans to all parties in advance of hearings and that other parties should "submit a report" if they disagree with the state's proposal.⁵⁵ Such reports "should set out facts to support" the party's position.⁵⁶ The Council's guidance includes no discussion as to how courts are to determine which party's view of the facts is accurate.⁵⁷ Nor does the Council suggest how to respond to delayed or incomplete agency reports—which, as a recent study of New York City family court cases found, were the biggest causes of delayed permanency hearings.⁵⁸

The Council's guidance also includes no suggestion that permanency hearing rulings are subject to appeal. Its guidance speaks of "appeals from adoptions and terminations of parental rights," but not appeals of permanency hearing decisions.⁵⁹

In addition to the federally-required permanency hearings, many states require "review of disposition" hearings, and these review hearings often overlap with permanency hearing requirements.⁶⁰ A survey of the variety

⁵² BARBARA SEIBEL, NAT'L COUNCIL OF JUVENILE & FAMILY COURT JUDGES, ADOPTION & PERMANENCY GUIDELINES: IMPROVING COURT PRACTICE IN CHILD ABUSE & NEGLECT CASES 22 (2000) [hereinafter ADOPTION & PERMANENCY GUIDELINES].

⁵³ NAT'L COUNCIL OF JUVENILE & FAMILY COURT JUDGES, RESOURCE GUIDELINES: IMPROVING COURT PRACTICE IN CHILD ABUSE & NEGLECT CASES 80 (1995) [hereinafter RESOURCE GUIDELINES].

⁵⁴ ADOPTION & PERMANENCY GUIDELINES, *supra* note 52, at 19.

⁵⁵ *Id.*

⁵⁶ *Id.*

⁵⁷ *Id.* at 17–23.

⁵⁸ CHILDREN'S RTS., THE LONG ROAD HOME: A STUDY OF CHILDREN STRANDED IN NEW YORK CITY FOSTER CARE 192–94 (2009), available at http://www.childrensrights.org/wpcontent/uploads/2009/11/2009-1102_long_road_home_full_report_final.pdf. Fifty-five percent of cases studied included at least one "permanency hearing not completed timely." *Id.* at 192. In these cases, reports were untimely 48 percent of the time and incomplete 20 percent of the time. *Id.* at 193–94.

⁵⁹ ADOPTION & PERMANENCY GUIDELINES, *supra* note 52, at 38.

⁶⁰ See, e.g., D.C. CODE ANN. § 16-2323(a)-(b) (LexisNexis 2001) (requiring review hearings every six months to determine the "continuing necessity" of placement, level of compliance with a case plan, and a date when the child's permanency plan will be achieved); MICH. COMP. LAWS SERV. §

of practice regarding different states' review hearing laws and practices is beyond the scope of this Article, as they are not rooted in federal statutory law and are thus less easy to generalize. To the extent that review hearings under a particular state's law have an impact similar to permanency hearings, arguments made in this Article apply with full force.

Although significant state-by-state variation exists, the law of the District of Columbia and the recommendations summarized by the National Council of Juvenile and Family Court Judges are illustrative. This section will next summarize trial and appellate court permanency hearing procedures throughout the United States.

a. Trial court procedures

Like the federal law that requires permanency hearings and like the District of Columbia laws referred to by Chief Judge Washington, many states' laws provide little guidance regarding how trial courts should decide a child's permanency plan or whether the state agency has made reasonable efforts to achieving the child's existing plan.

States with statutes similar to the District of Columbia's—that is, statutes that require permanency hearings to be held but do not provide guidance regarding when, if ever, such hearings should receive contested evidence—include: Alabama,⁶¹ Alaska,⁶² Arkansas,⁶³ Colorado,⁶⁴ Delaware,⁶⁵ Florida,⁶⁶ Hawaii,⁶⁷ Idaho,⁶⁸ Indiana,⁶⁹ Kansas,⁷⁰ Maine,⁷¹

712A.19 (LexisNexis 2005) (requiring review hearings to occur as frequently as every ninety-one days to determine necessity of continued foster care and level of compliance with case plan).

⁶¹ ALA. CODE § 12-15-315 (LexisNexis Supp. 2009). The Alabama statute refers to taking testimony in hearings to determine if a child was abused or neglected, but not permanency hearings. ALA. CODE § 12-15-311 (b) (LexisNexis Supp. 2009).

⁶² ALASKA STAT. § 47.10.080(f) & (l) (2008) (requiring notice and an opportunity to be heard but providing no guidance regarding resolving factual disputes); *Owen M. v. State*, 120 P.3d 201 (Alaska 2005) (upholding permanency plan decision made without evidentiary hearing).

⁶³ ARK. CODE ANN. § 9-27-338 (2009).

⁶⁴ COLO. REV. STAT. § 19-3-702 (2010). *In re M.B.*, 70 P.3d 618, 624 (Colo. App. 2003) (noting the statute's silence regarding permanency hearing procedures and suggesting parent's due process rights at permanency hearings are "minimal").

⁶⁵ DEL. FAM. CT. CIV. R. 216–217. Permanency hearings are not governed by Delaware statute.

⁶⁶ FLA. STAT. § 39.621 (2007).

⁶⁷ 2010 Haw. Sess. Laws, 70–74. Hawaii's legislature recently amended its statute to "ensure compliance with federal Title IV-E State Plan requirements." Haw. S. Comm. Rep. 2312 (2010), available at http://www.capitol.hawaii.gov/session2010/CommReports/SB2716_SD1_SSCR2312_.htm. Hawaii's law does not go beyond the federal legislation with which its legislature wanted to comply in terms of meaningful guidance for the conduct of permanency hearings.

⁶⁸ IDAHO CODE ANN. § 16-1622 (2010).

⁶⁹ IND. CODE ANN. §§ 31-34-21-5, 31-34-21-7 (LexisNexis Supp. 2010).

⁷⁰ KAN. STAT. ANN. §§ 38-2263, 38-2264, 38-2265 (LexisNexis Supp. 2009).

Massachusetts,⁷² Minnesota,⁷³ Mississippi,⁷⁴ Missouri,⁷⁵ Montana,⁷⁶ Nebraska,⁷⁷ Nevada,⁷⁸ New Hampshire,⁷⁹ New Jersey,⁸⁰ North Dakota,⁸¹ Pennsylvania,⁸² Rhode Island,⁸³ South Dakota,⁸⁴ Texas,⁸⁵ Washington,⁸⁶ West Virginia,⁸⁷ Wisconsin,⁸⁸ and Wyoming.⁸⁹ Arizona's statute refers to

⁷¹ ME. REV. STAT. tit. 22, § 4038-B (2010).

⁷² MASS. GEN. LAWS ANN. ch. 119, § 29B (West Supp. 2010). Massachusetts court rules provide that the agency must submit a report to the court in advance of a permanency hearing and that the case worker who wrote that report "shall be available for cross-examination by each of the parties." MASS. TRIAL CT. UNIF. RULES FOR PERMANENCY HEARINGS 6(F). The rules, however, are silent regarding a party's ability to put on any evidence of his own.

⁷³ MINN. STAT. ANN. § 260C.201 (Subd. 11–11a) (West Supp. 2010).

⁷⁴ MISS. CODE ANN. § 43-21-613 (2009).

⁷⁵ MO. REV. STAT. § 210.720 (2010).

⁷⁶ MONT. CODE ANN. § 41-3-445 (2010).

⁷⁷ NEB. REV. STAT. § 43-1312(3) (2008).

⁷⁸ NEV. REV. STAT. ANN. § 62E.170 (LexisNexis Supp. 2009). The court may "[r]equire a written report from the child's protective services officer, welfare worker or other guardian of the child which includes, but is not limited to, an evaluation of the progress of the child and recommendations for further supervision, treatment or rehabilitation." *Id.*

⁷⁹ N.H. REV. STAT. ANN. § 169-C:24-b (2010).

⁸⁰ N.J. STAT. ANN. § 30:4C-61.2(a)–(b) (West Supp. 2010). New Jersey's statute requires the Court to "consider[] and evaluat[e]" information provided by all parties, but makes no mention of whether such information is to be provided through evidentiary means, or tested by cross examination. *Id.* § 30:4C-61.2(c). In addition, the statutory list of "information" to be considered relates to proposed permanency plans and services for children and families and does not include any reference to a parent's continuing (or not) unfitness or a parent's compliance (or not) with the state agency's case plan. *Id.*

⁸¹ N.D. CENT. CODE §§ 27-20-02(15), 27-20-36(2)(b) (Supp. 2009).

⁸² 42 PA. CONS. STAT. ANN. § 6351(e)–(f.2) (West Supp. 2010). The Pennsylvania statute refers to receiving evidence regarding "aggravated circumstances," § 6351(e)(2), and evidence of drug or alcohol abuse by a parent, § 6352(f.2), but not to other evidence regarding a parent's fitness or any other factual dispute which may exist. The absence of any such references to evidence is all the more striking given the specific references to evidence of substance abuse and aggravated circumstances.

⁸³ R.I. GEN. LAWS § 40-11-12.1 (2006). Rhode Island law instructs courts to permit each party an opportunity to present "a report, oral or written, containing recommendations as to the best interest of the child," but makes no reference to evidentiary standards. § 40-11-12.1(c).

⁸⁴ S.D. CODIFIED LAWS § 26-8A-21.2 (Supp. 2010).

⁸⁵ TEX. FAM. CODE ANN. §§ 263.301–263.307 (West 2008 & Supp. 2010). The Texas statute permits parties to submit reports, but does not refer to evidence or testimony to establish or challenge facts asserted in such reports. *Id.* § 263.303(c) (West Supp. 2010).

⁸⁶ WASH. REV. CODE ANN. § 13.34.145 (West Supp. 2010).

⁸⁷ Under West Virginia law, an evidentiary hearing may be held when a party requests a change in disposition. W. VA. CODE ANN. § 49-6-6 (LexisNexis 2009). But West Virginia law does not provide for evidentiary hearings regarding permanency plans. §§ 49-6-5a, 49-6-8 (LexisNexis 2009).

⁸⁸ WIS. STAT. ANN. § 48.38(5m) (West Supp. 2009). This statute permits individuals to "be heard at the hearing" but does not suggest that "be[ing] heard" means the opportunity to put on or challenge evidence or, indeed, anything other than an opportunity to state one's position. *Id.*

some sort of evidence being heard at permanency hearings—and not merely reports from parties—but without much detail regarding what evidence would be admissible or under what procedures.⁹⁰

Some states have, by statute or case law, provided clearer guidance on the procedures at permanency hearings. New Mexico law, for instance, provides that all parties at a permanency hearing have a right to present evidence and call and cross-examine witnesses, but the rules of evidence do not generally apply (permitting witnesses to testify to hearsay and other evidence that would be inadmissible in other hearings).⁹¹ States with similar laws include California,⁹² Connecticut,⁹³ Illinois,⁹⁴ Iowa,⁹⁵ Kentucky,⁹⁶ Louisiana,⁹⁷ Maryland,⁹⁸ Michigan,⁹⁹ New York,¹⁰⁰ North Carolina,¹⁰¹ Ohio,¹⁰² Oklahoma,¹⁰³ Oregon,¹⁰⁴ South Carolina,¹⁰⁵

⁸⁹ WYO. STAT. ANN. § 14-3-431 (2009).

⁹⁰ ARIZ. REV. STAT. ANN. § 8-862(G) (Supp. 2009) (“Evidence considered by the court in making a decision pursuant to this section also shall include any substantiated allegations of abuse or neglect committed in another jurisdiction.”).

⁹¹ N.M. STAT. ANN. § 32A-4-25.1(B), (I) (Supp. 2010).

⁹² CAL. WELF. & INST. CODE §§ 366.22, 366.25 (West Supp. 2010) (referring in multiple locations to evidence at permanency hearings).

⁹³ CONN. GEN. STAT. § 46b-129(k)(1) (2007).

⁹⁴ 705 ILL. COMP. STAT. ANN. 405/52-28 (West 2007).

⁹⁵ IOWA CODE ANN. § 232.104(1)(c) (West Supp. 2010). Section 232.104(1)(c) provides that permanency hearings must be held in “substantial conformance” with section 232.99(2), which provides evidentiary standards. IOWA CODE ANN. § 232.99(2) (West 2006).

⁹⁶ KY. REV. STAT. ANN. § 610.125(4)–(5) (West 2006).

⁹⁷ LA. CHILD. CODE ANN. art. 702, 709 (2004 & Supp. 2010).

⁹⁸ Maryland’s statute contains no guidance. *See* MD. CODE ANN., CTS. & JUD. PROC. § 3-823 (LexisNexis 2006). However, Maryland cases reflect the requirement that evidentiary hearings to be held. *See, e.g., In re Ashley E.*, 854 A.2d 893 (Md. Ct. Spec. App. 2004) (describing evidentiary procedures and rules applied at a permanency hearing).

⁹⁹ The Michigan statute provides little guidance. MICH. COMP. LAWS SERV. § 712A.19a.(12) (LexisNexis Supp. 2010). Michigan court rules permit parties to cross-examine witnesses and submit evidence, though the rules include “reports” as such evidence. MICH. CT. R. 3.976(D).

¹⁰⁰ N.Y. JUD. CT. ACTS LAW §§ 1089(d), 1046(c) (McKinney 2010) (providing rules of evidence for permanency hearings).

¹⁰¹ N.C. GEN. STAT. § 7B-907(b)–(c) (2001) (referring to the court’s consideration of any relevant and credible evidence and requiring written findings of fact).

¹⁰² OHIO REV. CODE ANN. § 2151.417(F) (LexisNexis Supp. 2010). The Ohio statute instructs the court to “summon every interested party to appear at the review hearing and give them an opportunity to testify and to present other evidence,” but no standard of evidence is given. *Id.*

¹⁰³ OKLA. STAT. ANN. tit. 10A, § 1-4-811(A)(4) (West 2009). *See also In re B.T.W.*, 195 P.3d 896, 904–07 (Okla. 2008) (summarizing testimony taken).

¹⁰⁴ OR. REV. STAT. § 419B.476(1) (2009).

¹⁰⁵ S.C. CODE ANN. § 63–7–1700(C)–(D) (Supp. 2008) (requiring family court to hold an evidentiary hearing when requested by a party). *See also Ex Parte Morris*, 624 S.E.2d 649, 653 (S.C. 2006) (“[T]he permanency planning process set forth . . . involves the long-term custody of a child, the

Tennessee,¹⁰⁶ Utah,¹⁰⁷ Vermont,¹⁰⁸ and Virginia.¹⁰⁹

One state, Georgia, requires evidentiary hearings only in certain circumstances, such as when an agency proposes ceasing reunification efforts and moving towards an alternative permanency plan.¹¹⁰

The standards (or lack thereof) summarized above govern all decisions made at permanency hearings, including both permanency plan decisions and decisions whether administrative agencies have made reasonable efforts to achieve a child's existing permanency plan. It is not surprising, therefore, that state courts' implementation of federal "reasonable efforts" requirements has faced criticism as substance-free rubber stamp decisions by state judges—a significant problem given the importance of reasonable efforts in the federal statutory scheme¹¹¹ and the unavailability of federal remedies to enforce states' reasonable efforts obligations.¹¹² In the absence of a federal definition of the term or adequate federal funding for prevention or reunification services, "judicial findings of reasonable efforts are often made by judges by rote."¹¹³ One study of 463 New York City cases involving children who had been in foster care for at least two years, and thus lacked legal permanency for a significant period of time, revealed that judges found that the government had made reasonable efforts to reach permanency in 457 cases.¹¹⁴ When such decisions cannot be appealed until the end of a case—when an adoption decree or termination of parental rights decision is entered—appellate judges face strong incentives to avoid close examination of reasonable efforts decisions. Overturning a permanency decision based on the lack of reasonable efforts earlier in the case could "upset stability for a child who has been previously neglected or

potential termination of parental rights, and the possible adoption of the child in the future. Decisions regarding matters of such import must be made after careful, deliberate consideration of admissible evidence and sworn testimony presented by interested parties and witnesses at an evidentiary hearing.").

¹⁰⁶ TENN. CODE ANN. §§ 37-2-403(a)(4)(A), 37-2-409(b)(5) (2005 & Supp. 2009).

¹⁰⁷ UTAH CODE ANN. § 78A-6-314(3) (LexisNexis Supp. 2010).

¹⁰⁸ VT. STAT. ANN. tit. 33, § 5321(f) (Supp. 2009).

¹⁰⁹ VA. CODE ANN. § 16.1-282(A)–(D) (2010). The Virginia statute envisions that permanency hearings will follow a petition proposing a permanency plan by thirty days, and instructs judges to make decisions "upon the proof adduced." §16.1-282(D) (2010). Virginia cases reflect evidentiary hearings. *See, e.g.*, *Williams v. Hampton Dep't of Soc. Servs.*, No. 1017-02-1, 2002 Va. App. LEXIS 647, at *2–3 (Va. Ct. App. Oct. 29, 2002) (describing a parent's testimony on her own behalf).

¹¹⁰ GA. CODE ANN. § 15-11-58(h) (West Supp. 2009).

¹¹¹ *See* 45 C.F.R. § 1356.21(b)(2)(i) (2009); 45 C.F.R. § 1355.20(a) (2009); 45 C.F.R. § 1356.21(b)(2)(ii) (2009). *See also* text accompanying *supra* notes 25–26.

¹¹² *Suter v. Artist M.*, 503 U.S. 347 (1992).

¹¹³ Deborah Paruch, *The Orphaning of Underprivileged Children: America's Failed Child Welfare Law & Policy*, 8 J.L. & FAM. STUD. 119, 138 (2006).

¹¹⁴ CHILDREN'S RTS, *supra* note 58, at 192.

abused. In such circumstances, courts may find it easier to rule that reasonable efforts need only mean meager or pro-forma efforts.”¹¹⁵ Even when the reasonableness of a state’s efforts to reunify a family is questionable, when that question is only raised at the end of a case—for instance, when an adoption is on appeal and a child has finally left foster care to a permanent family—reviewing courts feel pressure to avoid “punish[ing the child] for the alleged wrongs of the bureaucracy.”¹¹⁶

A significant and unsurprising overlap exists between those states that do not provide parents an absolute right to counsel in abuse and neglect cases and those whose statutes do not require judges to base permanency hearing decisions on evidence. Professor Vivek Sankaran counts twelve states that do not provide an absolute right to counsel, ten of which appear in the above list of states that provide no guidance regarding hearing competing evidence at permanency hearings.¹¹⁷ Of the thirty-nine states and the District of Columbia who do provide an absolute right to counsel,¹¹⁸ twenty provide no guidance regarding evidence at permanency hearings.¹¹⁹ In percentage terms, 83 percent of states that do not provide an absolute right to counsel also do not require evidence at permanency hearings. In contrast, 51 percent of states that provide an absolute right to counsel do not require evidence at permanency hearings. A full exploration of the right to counsel throughout a dependency case is beyond the scope of this Article, except to note the correlation between the right to counsel and the right to put on and challenge evidence, and thus between states that have disregarded “[i]nformed opinion [which] has clearly come to hold that an indigent parent is entitled to the assistance of appointed

¹¹⁵ Jeanne M. Kaiser, *Finding a Reasonable Way to Enforce the Reasonable Efforts Requirement in Child Protection Cases*, 7 RUTGERS J. L. & PUB. POL’Y 100, 103 (2009).

¹¹⁶ *In re L.L.*, 653 A.2d 873, 882 (D.C. 1995) (quotations and citation omitted) (emphasis removed). See also generally David J. Herring, *Inclusion of the Reasonable Efforts Requirement in Termination of Parental Rights Statutes: Punishing the Child for the Failures of the State Child Welfare System*, 54 U. PITT. L. REV. 139 (1992).

¹¹⁷ Those states are Delaware, Hawaii, Idaho, Indiana, Minnesota, Mississippi, Missouri, Nevada, New Jersey, and Wisconsin. Sankaran, *supra* note 16. The two states which do not provide an absolute right to counsel but require some evidence to be heard at permanency hearings are Oregon and Vermont. Compare Sankaran, *supra* note 16, with DEL. FAM. CT. R. CIV. P. 216–217; 2010 Haw. Sess. Laws, 70–74; IDAHO CODE ANN. § 16-1622 (2010); IND. CODE ANN. §§ 31-34-21-5, 31-34-21-7 (LexisNexis Supp. 2010); MINN. STAT. ANN. § 260C.201 (Subd. 11-11a) (West Supp. 2010); MISS. CODE ANN. § 43-21-613 (2009); MO. REV. STAT. § 210.720 (2010); NEV. REV. STAT. ANN. § 62E.170 (LexisNexis Supp. 2009); N.J. STAT. ANN. § 30:4C-61.2(a)-(b) (West Supp. 2010); WIS. STAT. ANN. § 48.38(5m) (West Supp. 2009); OR. REV. STAT. § 419B.476(1) (2009); and VT. STAT. ANN. tit. 33 § 5321(f) (Supp. 2009).

¹¹⁸ See Sankaran, *supra* note 16.

¹¹⁹ See Sankaran, *supra* note 16 (This section counts thirty-one states and the District of Columbia in this category. Ten of those are listed in note 117).

counsel . . . in dependency and neglect proceedings¹²⁰ and those that do not see the value in basing permanency hearing decisions on evidence.

b. Appealing permanency hearing orders

A significant split exists between states regarding the ability to appeal permanency hearing orders. At least twelve states plus the District of Columbia explicitly bar such appeals, three states bar them with narrow exceptions, thirteen explicitly permit them in at least some cases, and at least one state court has noted conflicting opinions within that jurisdiction. The remaining twenty-one states do not have clear case law on point—an absence of clear authority which itself suggests that few, if any, parties or attorneys in those states have even tried to appeal permanency hearing orders. Taken together, this breakdown of state laws on the ability to appeal permanency hearing orders suggests that the majority of states have either concluded that no right to appeal exists or have not addressed the questions. It is my hope that these states, in particular, consider the arguments in this Article.

Among states that do not permit parties to appeal permanency hearing orders, the most frequent analysis is that such decisions are not final orders, thus appellate courts lack jurisdiction over appeals of these orders.¹²¹ The policy concern animating this approach is that taking the time to appeal such plans makes little sense when trial courts face strict federal law timelines for moving towards permanency. An Arizona appellate court worried that permitting such appeals “would undermine the primary purpose of ASFA and [conforming Arizona law]: expediting the process of finding permanent placement for children.”¹²² That court did not discuss the reality that we have already seen—that even with ASFA timelines, a significant number of children remain in foster care for an extended period of time without a permanent legal change of status.

States, like Arizona, that have held that permanency plan orders are not appealable include: Alaska,¹²³ Colorado,¹²⁴ the District of Columbia,¹²⁵ Illinois,¹²⁶ Indiana,¹²⁷ Kansas,¹²⁸ Kentucky,¹²⁹ Maine,¹³⁰ Missouri,¹³¹

¹²⁰ *Lassiter v. Dep’t of Soc. Servs.*, 452 U.S. 18, 33–34 (1981).

¹²¹ *See, e.g., In re K.M.T.*, 795 A.2d 688 (D.C. 2002).

¹²² *Rita J. v. Ariz. Dep’t of Econ. Sec.*, 1 P.3d 155, 158 (Ariz. Ct. App. 2000).

¹²³ *Nicole H. v. Alaska Dep’t of Health and Soc. Servs.*, No. S-11974, 2006 WL 895084, at *6 (Alaska April 5, 2006) (“Because permanency hearings commonly resolve interlocutory issues, orders resulting from such hearings typically cannot be appealed as a matter of right.”).

¹²⁴ *In re H.R.*, 883 P.2d 619, 621 (Colo. App. 1994).

¹²⁵ *In re K.M.T.*, 795 A.2d 688 (D.C. 2002).

¹²⁶ *In re A.H.*, 802 N.E.2d 215 (Ill. 2003). Illinois courts have held permanency plan orders appealable only when issued as part of otherwise appealable orders, such as a dispositional order. *In re Faith B.*, 832 N.E.2d 152, 161 (Ill. 2005).

Nebraska,¹³² Texas.¹³³ Utah generally does not permit appeals of permanency plan decisions, but does when a plan is changed from reunification with a parent to long-term foster care.¹³⁴

Some states do not follow this general rule and permit some immediate appeals. Maryland, for instance, permits appeals from trial court orders changing permanency plans (but not from orders maintaining a permanency plan),¹³⁵ and permanency plan appeals can simultaneously challenge reasonable efforts findings.¹³⁶ Other states similarly permit parties to appeal permanency plan decisions, including Alabama,¹³⁷ Connecticut (where one court has noted that the extension of time in foster care inherent in many permanency plan decisions renders such decisions appealable),¹³⁸ Louisiana,¹³⁹ Massachusetts,¹⁴⁰ Montana,¹⁴¹ New Hampshire,¹⁴² Oregon,¹⁴³ Oklahoma,¹⁴⁴ Pennsylvania,¹⁴⁵ South Carolina,¹⁴⁶

¹²⁷ State *ex rel* K.F., 797 N.E.2d 310, 311 (Ind. Ct. App. 2003).

¹²⁸ *In re* E.W., No. 101,910, 2009 WL 5063416, at *5 (Kan. Ct. App. Dec. 18, 2009).

¹²⁹ J.O. v. Kentucky, Nos. 2006-CA-002100-ME, 2006-CA-002138-ME, 2007 WL 3227255 at *1 (Ky. Ct. App. Nov. 2, 2007).

¹³⁰ ME. REV. STAT. ANN. tit. 22, § 4006 (2004) (“Orders entered under this chapter under sections other than section 4035, 4054 or 4071 are interlocutory and are not appealable.”); *In re* Doris G., 912 A.2d 572, 574 n.3 (Me. 2006) (“Both the cease reunification order and the permanency plan as to Samantha are interlocutory orders, and are thus not appealable . . .”).

¹³¹ *In re* L.E.C., 94 S.W.3d 420, 425–26 (Mo. Ct. App. 2003).

¹³² *In re* Sarah K., 601 N.W.2d 780, 785 (Neb. 1999).

¹³³ *In re* M.A.H., No. 14-06-00190-CV, 2006 WL 1168693, at *1 (Tex. Ct. App. May 4, 2006).

¹³⁴ The Utah Supreme Court has held that changing a permanency plan from reunification to adoption is not appealable, *In re* A.F., 167 P.3d 1070, 1071 (Utah 2007), but that changing a permanency plan to long term foster care (or “individualized permanency”) can be appealed. *Cf.* State *ex rel* K.F., 201 P.3d 985, 992–96 (Utah 2009). The Court distinguished the two plans because a plan of adoption would lead to a later termination of parental rights trial while a plan of long term foster care would not lead to any further order from which a party could appeal. *Id.* at 996.

¹³⁵ MD. CODE ANN., CTS. & JUD. PROC. § 12-303(3)(X) (LexisNexis 2006); *In re* James G., 943 A.2d 53, 89 (Md. Ct. Spec. App. 2008).

¹³⁶ *See, e.g., In re* James G., 943 A.2d at 88–89 (determining whether the agency made reasonable efforts to reunify the father with his son and, finding that it did not, whether the trial court’s change in permanency plan was an abuse of discretion).

¹³⁷ D.P. v. Limestone Cnty. Dep’t of Human Res., 28 So. 3d 759, 762–63 (Ala. Civ. App. 2009).

¹³⁸ *In re* Todd G., 713 A.2d 1286, 1287–88 (Conn. App. Ct. 1998).

¹³⁹ LA. CHILD. CODE ANN. art. 710(D) (2004).

¹⁴⁰ MASS. GEN. LAWS. ANN. ch. 119, § 29B (West 2008).

¹⁴¹ *In re* L.M., No. 03-288, 2003 WL 22838953, at *1 (Mont. Nov. 25, 2003) (considering permanency plan appeal without discussing appealability).

¹⁴² *In re* Juvenile 2005-426, 910 A.2d 1240, 1241 (N.H. 2006) (considering an appeal of a permanency hearing decision without discussing appealability).

¹⁴³ OR. REV. STAT. § 419B.476(7) (2009); *In re* A.V., 182 P.3d 866, 870–71 (Or. Ct. App. 2008).

Virginia,¹⁴⁷ and Wyoming.¹⁴⁸

Some states permit appeals of permanency plan hearings by leave of appellate courts rather than by right, including Iowa,¹⁴⁹ New York¹⁵⁰ and New Jersey.¹⁵¹ California has established narrow procedures for appealing permanency plan decisions.¹⁵²

North Carolina has issued conflicting opinions regarding the ability to appeal permanency plan decisions, but not others.¹⁵³

The remaining twenty-one states do not have clear law on the subject. Some states have permitted appeals of orders extending state custody of a child over a parent's objection, but are silent regarding appeals of permanency plan decisions.¹⁵⁴ In other states, courts have issued non-precedential unpublished decisions considering permanency plan appeals

¹⁴⁴ OKLA. STAT. ANN. tit. 10A, § 1-5-101 (West 2009) (permitting appeal of "any order"); *In re* B.T.W., 195 P.3d 896, 897 (Okla. 2008) (considering appeal of order setting plan of reunification and issuing visitation orders to effectuate that plan).

¹⁴⁵ See *In re* C.M., 882 A.2d 507, 512–13 (Pa. Super. Ct. 2005) (describing change in law to permit all permanency plan appeals, whether of a permanency plan change or denial of a requested change).

¹⁴⁶ *Ex parte* Morris, 624 S.E.2d 649, 651–52 (S.C. 2006) (considering permanency hearing appeal).

¹⁴⁷ *Derr v. Va. Beach Dep't of Human Servs.*, No. 1264-09-1, 2009 WL 4250100, at *1 (Va. Ct. App. Dec. 1, 2009) (considering permanency plan appeal without discussing appealability); *Williams v. Hampton Dep't of Soc. Servs.*, No. 1017-02-1, 2002 Va. App. LEXIS 647, at *5 (Va. Ct. App. Oct. 29, 2002) (same).

¹⁴⁸ *In re* H.P., 93 P.3d 982, 989 (Wyo. 2004). The Wyoming Supreme Court held that the permanency plan change ended reunification efforts and that this change "certainly affects Mother's substantial rights" and was thus appealable. *Id.*

¹⁴⁹ There is no appeal as of right in Iowa. *In re*. W.D. III, 562 N.W.2d 183, 186 (Iowa 1997). But Iowa permits parties to ask appellate courts to hear interlocutory appeals. *In re*. T.R., 705 N.W.2d 6, 11–12 (Iowa 2005). In *T.R.*, the Iowa Supreme Court declined to use its discretion to hear the interlocutory appeal. *Id.* In other cases, the Iowa Supreme Court has used its discretion to hear interlocutory appeals. See, e.g., *In re*. A.K.N.P., No. 07-1294, 2007 WL 2965148, at *2 (Iowa Ct. App. Oct. 12, 2007); *In re*. D.W., No. 07-1028, 2007 WL 2492454, at *2–3 (Iowa Ct. App. Sept. 6, 2007).

¹⁵⁰ N.Y. FAM. CT. ACTS LAW § 1112(a) (McKinney 2010) (permitting appeals of any Family Court orders at the discretion of appellate courts). Appellate cases include various permanency plan appeals. E.g. *In re* Jahyalle F., 886 N.Y.S.2d 823 (N.Y. App. Div. 2009); *In re* Noele B., 886 N.Y.S.2d 831 (N.Y. App. Div. 2009).

¹⁵¹ *Div. of Youth & Family Servs. v. D.H. & J.V.*, 942 A.2d 41, 42 n.1 (N.J. Super. Ct. App. Div. 2008) (granting leave to hear permanency plan appeal).

¹⁵² CAL. WELF. & INST. CODE § 366.26(b)(1) (West 1974). See generally, *Joyce G. v. Super. Ct.*, 45 Cal. Rptr. 2d 805, 807–08 (Cal. Ct. App. 1995) (describing legislative change requiring relevant appeals to be made through a writ system and permitting summary dismissal of such appeals).

¹⁵³ *In re* N.G., No. COA 06-101, 2006 N.C. App. LEXIS 2331, at *3–4 (N.C. Ct. App. Nov. 21, 2006) (noting competing cases and choosing to follow one within its "narrow confines").

¹⁵⁴ See, e.g., *In re* B.B., 777 N.W.2d 350, 361–62 (N.D. 2010) (considering appeal of permanency hearing order continuing child's placement in foster care).

without addressing why such orders could be appealed.¹⁵⁵

3. Permanency hearing orders are often relevant for extended and indefinite periods of time

These “procedural safeguards” in between adjudication and permanency are of great importance because of two realities of abuse and neglect cases. First, in tens of thousands of cases, children remain in state custody, but permanency trials often never occur, making permanency plan decisions serve the same purpose as permanency trials—but without the due process protections. Second, even when permanency trials do occur, they often do so years after permanency plan decisions have shaped the course of a child’s life.

Permanency trials are unnecessary when the child grows up in foster care; with no adoption or other permanent alteration of the parent’s custodial rights at issue, there is no need for a permanency trial. But growing up in foster care can have the same effect as such a trial—a permanent end of the parent’s custodial rights—and therefore permanency plan decisions can have similar effects to permanency trials, but without the due process protections. When a court changes a child’s permanency plan to “another planned permanent living arrangement,”¹⁵⁶ the federal term that means remaining in foster care until a child reaches the age of majority, the court is ordering the foster care agency to work to help the child live in foster care until he reaches the age of majority, when questions of the care, custody and control of children are moot. If that plan is achieved, the parents will have been permanently deprived of their right to the custody of the child.

The Utah Supreme Court recognized the implications of setting a permanency plan of long-term foster care, holding that it “effectuates a permanent change in the child’s status” and was thus appealable.¹⁵⁷ That court acknowledged that the child’s situation might change and that a new permanency plan, whether reunification with the child’s mother or adoption by another person, could occur and the permanency plan changed at a later permanency hearing.¹⁵⁸ But “considering the very real possibility that the relationship between the mother and [child] may not substantially change, this order must be considered final for matters of appealability; otherwise, the mother may never have an opportunity to appeal this order.”¹⁵⁹ The Utah court, however, is an outlier, as the next subsection

¹⁵⁵ *E.g., In re C.G.*, No. 2008-285, 2009 WL 170062, at *1 (Vt. Jan. 14, 2009).

¹⁵⁶ 42 U.S.C. § 675(5)(C) (2006).

¹⁵⁷ *In re K.F.*, 201 P.3d 985, 996 (Utah 2009).

¹⁵⁸ *Id.*

¹⁵⁹ *Id.*

discusses.

The same result occurs when a court changes a child's permanency plan to adoption or guardianship, but no adoption or guardianship ever occurs. If the foster care agency fails to make reasonable efforts to, for instance, find an adoptive family or, despite making such reasonable efforts, fails to find an adoptive family, then there may be no permanency trial, and thus no moment for the parents to assert their due process rights. The same is true if no potential permanent guardian is found by the government or, even if found, the prospective guardian changes his or her mind and decides not to seek guardianship chooses to not file for guardianship.

A significant number of foster children nationally fall into these two situations and thus effectively have permanent custody decisions made via permanency hearings, not permanency trials. According to federal data, 14 percent of all foster children—more than 67,000 children and youth—have a permanency plan of “emancipation” or “long-term foster care.”¹⁶⁰ Many more children have a permanency plan of adoption, but a *plan* of adoption is no guarantee that the child will be adopted any time soon. In 2008, the most recent year for which data is available, more than 111,000 children had a plan of adoption, but only about 54,000 children were, in fact, adopted.¹⁶¹ The remainder waited in foster care, often for multiple years. The proportion of children in this category is even greater in some jurisdictions. In the District of Columbia, for example, more than one-third of all foster children have plans of “alternative planned, permanent living arrangement”—that is, long term foster care.¹⁶² More than 20 percent of all District children who left foster care left via “emancipation.”¹⁶³

Even when a permanency trial does occur, it is often years into a case. Permanency trials end a case; if a court grants an adoption or permanent guardianship, the child ceases to be a foster child, and his abuse or neglect case closes. As described above, permanency hearings occur no later than twelve months after the state first removes a child from his home.¹⁶⁴ But

¹⁶⁰ U.S. DEP'T OF HEALTH & HUMAN SERV., AFCARS REPORT: PRELIMINARY FY 2008 ESTIMATES (2009), http://www.acf.hhs.gov/programs/cb/stats_research/afcars/tar/report16.pdf [hereinafter AFCARS 2008].

¹⁶¹ *Id.* It is not clear how many children with an adoption plan are the children of parents whose rights have been terminated.

¹⁶² D.C. GOV'T CHILD AND FAMILY SERVS. AGENCY, IMPLEMENTING THE ADOPTION & SAFE FAMILIES AMENDMENT ACT OF 2000 IN THE D.C., 26 (Feb. 2009) [hereinafter IMPLEMENTING THE ADOPTION & SAFE FAMILIES AMENDMENT ACT], available at <http://cfssa.dc.gov/DC/CFSA/About+CFSA/Who+We+Are/Publications/Annual+Reports/Annual+Report+2008>.

¹⁶³ *Id.* at 32.

¹⁶⁴ 42 U.S.C. § 675(5)(e)(i), n.20.

permanency trials often occur years later. Federal data regarding when children exit care shows that more than one-fifth of all children who leave foster care—about 62,000 children—have remained in foster care for thirty months or more.¹⁶⁵ These children have remained in foster care for more than a year—and for tens of thousands, multiple years—before the permanency trial occurs. These data points also involve significant state by state variation. In the District of Columbia, nearly half of all children with a permanency plan of adoption or guardianship have been in foster care for two years or more.¹⁶⁶

II. THE DUE PROCESS ARGUMENT FOR MORE MEANINGFUL PROCEDURAL SAFEGUARDS

In certain situations, children and parents' constitutional due process rights demand some minimally sufficient procedural safeguards at permanency hearings—at the very least, that decisions be based on evidence, parties have the ability to present evidence and call witnesses, and witnesses be subject to cross-examination. (In addition to these trial court rights, the right to appeal adverse decisions will be discussed in Part III¹⁶⁷). This Part will follow the familiar three-factor analysis of *Mathews v. Eldridge*, considering the importance of the private interest at stake, the risk of erroneous decisions under the procedures currently used and the probable benefit of alternative procedures, and the governmental interest, to discuss under what circumstances permanency hearings should trigger these procedural protections on a constitutional basis.¹⁶⁸

This section will *only* address a constitutional due process argument; many of the same points made in this section support policy arguments for providing these procedural protections, and further policy arguments are made in Part III.

A. *Private interest*

The importance of the constitutional right to family integrity is well-settled. In 2000, when it most recently addressed the constitutional rights of parents in detail, the Supreme Court wrote that “[t]he liberty interest at issue in this case—the interest of parents in the care, custody, and control

¹⁶⁵ AFCARS 2008, *supra* note 160.

¹⁶⁶ IMPLEMENTING THE ADOPTION & SAFE FAMILIES AMENDMENT ACT, *supra* note 162, at 29. Three hundred and eighty-nine children with plans of adoption or guardianship have been in foster care for three years or more. *Id.* Seven hundred and sixty-three children had plans of adoption or guardianship. *Id.* at 26.

¹⁶⁷ As discussed in Part III, the due process argument for a right to appeal is substantially weaker than the right to evidentiary hearings. *See infra* Part III.

¹⁶⁸ *Mathews v. Eldridge*, 424 U.S. 319, 320–22 (1976).

of their children—is perhaps the oldest of the fundamental liberty interests recognized by this Court.”¹⁶⁹ For nearly a century, parental rights have formed core elements of the Supreme Court’s substantive due process jurisprudence and have been repeatedly reaffirmed,¹⁷⁰ being described as a matter of “intrinsic human rights.”¹⁷¹ Reviewing these cases, the Court concluded, “[i]n light of this extensive precedent, it cannot now be doubted that the Due Process Clause of the Fourteenth Amendment protects the fundamental right of parents to make decisions concerning the care, custody, and control of their children.”¹⁷² Although they are less well established than parents’ rights to the custody of their children, some courts have recognized a reciprocal right of children to live with their parents.¹⁷³

Permanency hearing decisions, independent of later permanency trials, have tremendous impact on children and families and implicate the core rights that inhere in the parent-child relationship. They, first, can terminate or extend a child’s separation from his or her parent. A permanency hearing includes a determination of the “continuing necessity” of foster care, and, if it is not necessary, the hearing can include an order that the child should return home.¹⁷⁴ Indeed, it has been a core rule of child abuse and neglect law for more than a century that when parents remedy conditions of neglect, the state should return their children. The New York Court of Appeals described this rule in 1899 thusly:

Intemperate parents are deemed to be unfit custodians
of their children, and the state steps in and cares for and

¹⁶⁹ *Troxel v. Granville*, 530 U.S. 57, 65 (2000).

¹⁷⁰ *See, e.g., Santosky v. Kramer*, 455 U.S. 745 (1982) (finding a fundamental liberty interest of natural parents in the care custody, and management of their child under the Fourteenth Amendment, which affords them due process rights in termination hearings); *Wisconsin v. Yoder*, 406 U.S. 205 (1972) (respecting a parent’s right to their child’s religious upbringing); *Stanley v. Illinois*, 405 U.S. 645 (1972); *Pierce v. Soc’y of Sisters*, 268 U.S. 510 (1925) (establishing the right of parents to decide where their children will be educated); *Meyer v. Nebraska*, 262 U.S. 390 (1923) (protecting parents rights to have their children taught a foreign language). *Cf. Parham v. J.R.*, 442 U.S. 584 (1979) (noting that a parent’s decision to have a child institutionalized is not absolute and is subject to independent medical judgment); *Prince v. Massachusetts*, 321 U.S. 158 (1944) (noting that parental rights are not absolute).

¹⁷¹ *Smith v. Org. of Foster Families*, 431 U.S. 816, 845 (1977).

¹⁷² *Troxel*, 530 U.S. at 66.

¹⁷³ *E.g., Wallis v. Spencer*, 202 F.3d 1126, 1136 (9th Cir. 2000) (“Parents *and children* have a well-elaborated constitutional right to live together without governmental interference”) (emphasis added). The Supreme Court has also alluded to children’s interests in their relationship with parents, writing “until the State proves parental unfitness, the child and his parents share a vital interest in preventing erroneous termination of their natural relationship.” *Santosky*, 455 U.S. at 760.

¹⁷⁴ D.C. Code Ann. § 16-2323(b)(2) & (f) (LexisNexis 2001).

supports them for the time being. It now appears that the parents have reformed, are living honorable lives, and are abundantly able to care for their children. It seems self-evident that public policy and every consideration of humanity demand the restoration of these children to parental control.¹⁷⁵

Permanency hearings determine whether a parent has reformed sufficiently to be entitled to custody of his or her children or whether the parent will be deprived of their child's custody for a further period of time. The latter option is itself a significant deprivation of liberty, especially from the perspective of children, who are both the subjects of state custody and whose sense of time demands prompt action.¹⁷⁶

Second, permanency hearings establish what services, if any, will be provided to facilitate reunification between parents and children. When a permanency plan is changed, the state agency no longer has any obligation to make "reasonable efforts" to achieve the old permanency plan.¹⁷⁷ Whatever services had been offered to help a parent address the problems led to his or her child's removal will likely no longer be offered—indeed, the parent and child will no longer have any entitlement to such services. The child will now be entitled to a different set of services: those deemed to be "reasonable efforts" to achieve the new permanency goal.

Third (and related to second point), permanency hearing decisions set in motion a process of working towards the chosen permanency plan, which can take years, if not the remainder of a foster child's childhood. The length of time that will follow, which is indefinite at the time a permanency plan is decided, adds significant weight to these decisions, especially considering children's sense of time.¹⁷⁸

At the point a permanency plan is decided, nobody can be sure when or even if a later trial will occur. On one hand, the permanency plan is supposed to be "final,"¹⁷⁹ but, on the other, it may be revised at any subsequent permanency hearing based on new facts. The Utah Supreme Court wrestled with this issue in *In re K.F.*, in which it held that a parent could appeal a decision setting a permanency plan of long-term foster care (contrary to that court's general rule that permanency plan changes were

¹⁷⁵ *In re Knowack*, 53 N.E. 676, 678 (N.Y. 1899).

¹⁷⁶ See Pitchal, *supra* note 18, at 676–77 (describing a child's interest in avoiding state custody throughout abuse and neglect cases and that children "experience time much more slowly than adults").

¹⁷⁷ See 42 U.S.C. § 671(a)(15)(B)–(C) (2006).

¹⁷⁸ See Pitchal, *supra* note 18, at 676–77.

¹⁷⁹ H. R. REP. NO. 105-77, pt. 2, at 13 (1997), *reprinted in* 1997 U.S.C.C.A.N. 2739, 2745–46.

not appealable because they require further judicial action to achieve).¹⁸⁰ The court noted that a permanency plan is “by its very nature . . . subject to revision.”¹⁸¹ But the court held that the abstract ability to revise a permanency plan was not sufficient to deny the protections of an appeal because of “the very real possibility” that the plan would never be changed, and no opportunity would exist to challenge it before the child was an adult.¹⁸²

The Utah Supreme Court addressed one of the easier situations demanding greater procedural safeguards at permanency hearings. Following a permanency plan of long-term foster care means that a child will remain in foster care, and no permanency trial will ever occur—no such trial will be necessary to achieve the plan of keeping the child in foster care until he reaches the age of majority. In such cases, switching the plan from reunification to long-term foster care has the same effect as a trial determination—it means reunification will never occur and a parent will be permanently deprived of the custody of his or her child—and represents an end-run around a trial’s due process protections.

In less clear-cut cases, it is more difficult to distinguish between those permanency plan rulings likely to permanently deny custody and those likely to lead to a permanency trial in the near future. The indeterminate length of permanency plan decisions is itself a strong argument for stronger due process protections for permanency plan decisions. The interest at stake—a permanent decision regarding family integrity—is so precious that some trial-type procedures are required. When it is unclear at a permanency hearing if a permanency trial will ever occur, the only way to ensure that trial-type protections are provided is to do so at the permanency hearing.

Still, factors do exist that courts can use to predict when permanency trials would follow a permanency plan decision. As *State ex rel. K.F.* indicates, a plan change to long-term foster care is least likely to lead to a permanency trial because the state agency is not charged with recruiting an adoptive parent or otherwise working towards a legal status that would require a permanency trial.¹⁸³ On the other end of the spectrum, changing a child’s plan to adoption when the government has already filed a termination of parental rights case and the child’s foster parent has

¹⁸⁰ *State ex rel. K.F.*, 201 P.3d at 995–96. I use the phrase “long-term foster care” as the most precise description of a permanency plan that calls for a child to remain in foster care until he or she reaches the age of majority. Federal law uses an alternative phrase, “another planned permanent living arrangement.” 42 U.S.C. § 675(5)(C) (2006).

¹⁸¹ *State ex rel. K.F.*, 201 P.3d at 996.

¹⁸² *Id.*

¹⁸³ *Id.* at 993.

indicated a desire to adopt is likely to lead to such a trial in the near future. Situations in between—such as setting a plan of adoption with no adoptive parent on the horizon or setting a plan of guardianship, present harder decisions.

In these in-between situations, the long time that can pass after setting a permanency plan is an essential element in establishing the importance of evidentiary standards at permanency hearings. Delaying a due process moment itself raises constitutional concerns; the Supreme Court described an eighteen-month delay in the disposition of \$8,850 to be “quite significant,”¹⁸⁴ so surely waiting years for disposition of the far more weighty right to family integrity is also significant.

Even more important, though, is the effect such a passage of time has on any later permanency trial. The Supreme Court has explained that the state’s “power to shape the historical events that form the basis for termination” (or, by extension, any other form of permanency besides reunification) increases the risk of error at the ultimate termination proceeding.¹⁸⁵ The time that passes between a permanency plan change away from reunification and any later permanency trial heightens this state power and increases the likelihood that a termination of parental rights, adoption, or guardianship motion will both be filed and granted, thereby permanently eliminating parents’ right to care, custody and control of their children. This phenomenon occurs in multiple ways.

By the time an adoption or guardianship trial occurs, the child has been living in foster care—often with the family seeking adoption or guardianship—for years, and courts will likely consider how well the child is doing while in foster care and whatever bonds may have formed between the child and his foster family.¹⁸⁶

Similarly, the court will consider the state of the child’s relationship with his parent,¹⁸⁷ a relationship that will surely have been affected by months or years of forced separation, limited only by state-regulated visitation. As the D.C. Circuit Court of Appeals has explained, abuse and neglect cases are unique proceedings that do not “involve only facts gone by.”¹⁸⁸ Foster children’s “lives are an ongoing event,” and adoption and guardianship cases involve “a fresh assessment of the *present* situation,” not a review limited to facts that occurred in the past.¹⁸⁹ The child’s

¹⁸⁴ *United States v. Eight Thousand Eight Hundred and Fifty Dollars in U.S. Currency*, 461 U.S. 555, 565 (1983).

¹⁸⁵ *Santosky v. Kramer*, 455 U.S. 745, 762–63 (1982).

¹⁸⁶ *See, e.g.*, D.C. CODE § 16-2353(b)(1), (3) (LexisNexis 2001).

¹⁸⁷ *Id.*

¹⁸⁸ *In re S.M.*, 985 A.2d 413, 420 (D.C. 2009).

¹⁸⁹ *Id.* (emphasis added) (describing considerations for new adoption proceeding on remand).

relationship with his parent is particularly likely to have changed because of the immediate legal effects of a permanency plan change. Continuing the child's separation from parents will further reduce the bonds between children and parents. Removing the legal requirement that the state agency make "reasonable efforts" to achieve reunification means that the state will no longer provide those services from which a parent may have benefited, such as assistance obtaining substance abuse treatment, mental health treatment, or anything else that would improve his relationship with his child.¹⁹⁰ The absence of such services will, in many cases, take its toll on the parent's relationship with his child.

Moreover, the decision to change a permanency plan reflects a judge's factual determination about whether reunification is likely, and if not, why not. This determination can establish the factual basis for a later permanency hearing. As a California court observed, "[t]he critical decision regarding parental rights will be made at the dispositional or review hearing, that is, that the minor cannot be returned home and that reunification efforts should not be pursued."¹⁹¹ A New Mexico court put it more modestly: "permanency hearings determine the direction of the proceedings and can increase the risk that the natural family will be destroyed."¹⁹² Indeed, it is the precise intent of Congress that permanency plan decisions have the effect that these California and New Mexico courts identified: that they be "final permanency decisions" for a child.¹⁹³

The practical finality of a permanency plan decision is heightened by the expanding use of unified family courts following a "one family, one judge" model.¹⁹⁴ In such courts, the same judge who makes a permanency plan decision will hear any later cases regarding the termination of parental rights, adoptions, or guardianships.¹⁹⁵ In these later cases, therefore, a judge is asked to issue an order to effectuate the permanency plan that she or he set. Judges, like any human being, may be expected to consider their own prior decisions when making later, more permanent decisions on the

¹⁹⁰ 42 U.S.C. § 675(1) (2006); *see also* 42 U.S.C. § 671(a)(16) (2006); *see supra* text accompanying note 19.

¹⁹¹ *Glen C. v. Superior Court*, 93 Cal. Rptr. 2d 103, 111 (Cal. Ct. App. 2000) (citation omitted). *See also* N.M. *ex rel* Children, Youth & Family Dep't v. Maria C., 94 P.3d 796, 806 (N.M. Ct. App. 2004) ("Hence, the factual basis for termination is largely established at the permanency hearing, even though a formal TPR hearing follows.").

¹⁹² N.M. *ex rel* Children, Youth & Family Dep't v. Maria C., 94 P.3d at 806.

¹⁹³ H. R. REP. NO. 105-77, pt. 2, at 1, *reprinted in* 1997 U.S.C.C.A.N. 2739, 2745-46.

¹⁹⁴ James W. Bozzomo & Gregory Scolieri, *A Survey of Unified Family Courts: An Assessment of Different Jurisdictional Models*, 42 FAM. CT. REV. 12, 16 (2004). The ABA has recommended use of unified family courts and many states have adopted them. *Id.* at 12.; *Developments in the Law—The Law of Marriage and Family*, 116 HARV. L. REV. 1996, 2099-100 (2003).

¹⁹⁵ *See, e.g.*, D.C. Code § 11-1104(b)(2)(B) (LexisNexis 2001).

same subject matter.

The strong role of permanency plan decisions in shaping future events, including permanency trial results, is of crucial importance in light of the rule that the Due Process Clause guarantees the right to be heard “at a meaningful *time*.”¹⁹⁶ When a permanency hearing shapes the facts that will determine a later trial, the meaningful time for due process protections is at the permanency hearing.

Finally, the time that passes from a permanency plan decision to a permanency trial is significant because making important decisions on a child’s sense of time is of particular importance in abuse and neglect cases. Waiting one or two years for a trial and resolution may not seem long in the world of, for instance, commercial litigation. But it is an eternity in the lives of children, especially young children, who are disproportionately represented in foster care.¹⁹⁷ A seminal work informing abuse and neglect practice emphasized that courts and agencies should handle decisions regarding a child’s placement “as a matter of urgency that comports with the child’s sense of time.”¹⁹⁸ Quick decisions are particularly important because children subject to permanency hearings have already spent up to fourteen months in foster care, waiting another year or more to get it right raises significant concerns.

1. The importance of the rights at stake varies depending on the status of the case.

Not all permanency plan decisions have equal constitutional implications. The core constitutional right at stake in abuse and neglect cases is the parent’s right to “care, custody, and control” of their child,¹⁹⁹ and the child’s reciprocal right to a relationship with his parent.²⁰⁰ Changing a child’s permanency plan from reunification with a parent to anything else directly implicates this constitutional right; it means the state agency will no longer work towards protecting the parent-child relationship and will instead work towards a permanency plan that will permanently disrupt that relationship.

Other permanency plan changes do not affect this relationship. Switching a child’s plan from, for instance, guardianship with an extended

¹⁹⁶ *Mathews v. Eldridge*, 424 U.S. 319, 333 (1976) (emphasis added) (quoting *Armstrong v. Manzo*, 380 U.S. 545, 552 (1965)).

¹⁹⁷ The mean age of foster children is under 10 and 35 percent of all foster children are zero to five years old. AFCARS 2008, *supra* note 160.

¹⁹⁸ JOSEPH GOLDSTEIN, ET AL., *THE BEST INTERESTS OF THE CHILD: THE LEAST DETRIMENTAL ALTERNATIVE* 43 (1996).

¹⁹⁹ *Troxel v. Granville*, 530 U.S. 57, 65 (2000).

²⁰⁰ *Santosky v. Kramer* 455 U.S. 745, 760 (1982) (noting a child’s interest in avoiding “erroneous termination of their natural relationship” (citation omitted)).

family member to adoption by a foster parent has less impact on the parent-child relationship. Adoption will terminate parental rights while guardianship will not. That is no small difference; but, through either guardianship or adoption, the parent permanently loses the right to care, custody, and control of the child. Still, in some cases, constitutionally-protected relationships may be at stake. The Supreme Court has applied parental rights doctrines to non-parent caregivers²⁰¹ and, in *Smith v. Organization of Foster Families for Equality & Reform*, recognized that the “intimacy of daily association” may lead to a constitutionally-protected relationship.²⁰² If a permanency plan change affects such a relationship, then constitutional rights are affected—even if those rights are less powerful than the right to a parent-child relationship. In *Smith*, the Court wrote that a foster family—at least one that had raised a young child for several years—could not be “dismiss[ed] . . . as a mere collection of unrelated individuals.”²⁰³ The *Smith* Court assumed, but did not decide, that some liberty interest existed in the integrity of a foster family.²⁰⁴

Smith was particularly concerned with the possibility that recognizing the due process rights of foster parents would inevitably “derogate[e] from the substantive liberty” interest of parents, especially when, as in *Smith*,²⁰⁵ foster parents objected to a child’s reunification with her parent.²⁰⁶ But *Smith* also noted that when the question was between alternative foster placements and not between foster parent and natural parent, then this conflict is absent.²⁰⁷ In these situations, the statutory scheme on review in *Smith* provided foster families with access to a “full adversary administrative hearing” to challenge any removals,²⁰⁸ and *Smith* stated that such procedures adequately respected any rights that foster families have.²⁰⁹

A permanency plan decision that pits, for instance, adoption by one long-term foster parent against adoption by a different foster parent, does not raise the problem of setting parents against foster parents. Such decisions may raise due process concerns. If long-term foster parents were

²⁰¹ The “parent” in *Prince v. Massachusetts* was the aunt of a nine-year-old girl. 321 U.S. 158, 159 (1944).

²⁰² See *Smith v. Org. of Foster Families for Equal. & Reform*, 431 U.S. 816, 844 (1977).

²⁰³ *Id.* at 844–45.

²⁰⁴ *Id.* at 847.

²⁰⁵ *Id.* at 846.

²⁰⁶ *Id.* at 847. See also *id.* at 853.

²⁰⁷ *Id.* at 851 (“When the child’s transfer from one foster home to another is pending, the interest arguably requiring protection is that of the foster family, not that of the natural parents.”).

²⁰⁸ *Smith v. Org. of Foster Families for Equal. & Reform*, 431 U.S. 816, 830 (1977).

²⁰⁹ *Id.* at 847–56.

statutorily entitled to a full adversary hearing to challenge removals of children, it stands to reason that they should also be entitled to more meaningful procedural safeguards regarding permanency plans that will likely lead to such removals. *Smith* did not squarely answer the question whether such situations rose to constitutional due process issues, but it bears noting that constitutionally-protected relationships other than parent-child relationships may be at play.

Even when a permanency plan affects no constitutionally-protected relationship, it can have a significant effect on a child. A plan change affects where the child will live, whether and how long the child remains in foster care, and what “reasonable efforts” the state agency will take. These effects may not rise to constitutional status, and in those cases, only a weak due process argument exists. But the absence of a constitutional claim should not unduly diminish the effect of such changes on children’s lives. State policymakers should be significantly concerned with establishing a system that will make these decisions as effectively as possible. Without evidentiary hearings and appeals, permanency hearings will have high error rates and will significantly impact the lives of foster children. Ordering state agencies to make reasonable efforts to achieve a permanency plan that is either unachievable or harmful to a child will require state agencies to expend significant resources contrary to the state’s or the child’s interests.

B. Risk of error

It hardly requires much explanation to argue that evidentiary hearings are essential to reaching accurate decisions. The Supreme Court has written that “our legal tradition regards the adversary process as the best means of ascertaining truth and minimizing the risk of error.”²¹⁰ John Henry Wigmore wrote that cross-examination of sworn witnesses is “the greatest legal engine ever invented for the discovery of truth.”²¹¹ When facts are contested, holding an evidentiary hearing is the best means of determining which party’s version is the most accurate. Denying such evidentiary hearings is to create an unjustifiable risk of error. As one New York City family court judge stated: “There is such a discrepancy between

²¹⁰ *Mackey v. Montrym*, 443 U.S. 1, 13 (1979). *Mackey* involved an administrative suspension of a driver’s license without an evidentiary hearing. *Id.* at 3. The Supreme Court stated the general rule, quoted in the text, before noting the exception for some administrative deprivations, especially those that do not have a high risk of error. *Id.* at 13–17. The *Mackey* exception does not diminish the strength of the general rule as applied to fundamental rights of family integrity in the midst of an adversarial court process.

²¹¹ 5 JOHN HENRY WIGMORE, EVIDENCE IN TRIALS AT COMMON LAW, § 1367, at 32 (James H. Chadbourne ed., Little, Brown and Co. 1974).

the Permanency Report and the case record sometimes and it's too late when you get [to] the TPR to find out... what's going on."²¹²

In *Kent v. United States*,²¹³ the Supreme Court addressed interlocutory decisions issued in another context, but, like permanency hearing orders, they were based on reports submitted to judges²¹⁴ rather than formal evidence. The Court also held that these reports should be subject "to examination, criticism and refutation" by counsel for parties who disagree with the facts or conclusions asserted in such report.²¹⁵ *Kent* involved judges handling juveniles accused of committing criminal acts. Like judges in child abuse and neglect cases, judges in juvenile criminal cases act pursuant to the State's *parens patriae* authority, but, as the *Kent* Court stated, "the admonition to function in a 'parental' relationship is not an invitation to procedural arbitrariness."²¹⁶ Like federal and state permanency hearing statutes, the statute at issue in *Kent* required juvenile court judges to make a critical decision, but it gave no guidance as to how judges were to do so or what evidence or other information they must consider. The statute required juvenile court judges to determine whether to transfer a teenager to adult criminal court for prosecution as an adult following a "full investigation," but did "not state standards to govern the Juvenile Court's decision."²¹⁷ The lower court had held that cross-examination of material in such reports would be too adversarial,²¹⁸ but the Supreme Court held that some adversarial proceedings (presumably involving the cross-examination of authors of such reports) were essential for "critically important" decisions.²¹⁹ If, as I have argued in Part II.A, permanency hearing decisions are critically important, then *Kent* strongly suggests that adversarial proceedings, including cross-examination and the ability to produce and contest evidence, should exist at such hearings.

When the high risk of error in permanency hearings does lead to actual errors, the result is unnecessarily difficult custody decisions at later points. When a court incorrectly decides not to pursue reunification with a parent,

²¹² CHILDREN'S RTS., *supra* note 58, at 195.

²¹³ *Kent v. United States*, 383 U.S. 541 (1966).

²¹⁴ *Kent* involved discretionary juvenile court decisions to waive minors accused of certain crimes to criminal court to be tried as adults. The Supreme Court described waiver decision at issue in *Kent* as based on "recommendations of the Juvenile Court staff, the Social Service file relating to petitioner, and a report dated September 8, 1961 (three days following petitioner's apprehension), submitted to [the judge] by the Juvenile Probation Section." *Id.* at 547.

²¹⁵ *Id.* at 563.

²¹⁶ *Id.* at 555.

²¹⁷ *Id.* at 547.

²¹⁸ *Id.* at 560.

²¹⁹ *Kent v. United States*, 383 U.S. 541, 563 (1966).

but denies a later-filed adoption petition (or grants such a petition but is later reversed), the court sets up an even more emotionally fraught custody fight. By the time the court revisits the permanency plan, the child has likely been living in a foster home separated from his parents for years. A recently decided District of Columbia case illustrates this phenomenon. Henry Obiazor²²⁰ shared custody of his sons with their mother. Their mother stipulated that she had neglected the children, but Obiazor was never found to be unfit.²²¹ Over Obiazor's objection, the permanency plan was changed from reunification with him to adoption.²²² The trial court justified that change by pointing to Obiazor's recent conviction of misdemeanor sexual abuse of a girl unrelated to him.²²³ Obiazor had no opportunity to appeal this permanency plan decision. Under District law, permanency plan decisions do not require evidentiary hearings and are not appealable orders.²²⁴

This permanency plan decision was suspect for multiple reasons. First, Obiazor was never found to be unfit.²²⁵ Second, the neglect and adoption cases involved no independent exploration of the facts underlying Obiazor's criminal conviction, and that conviction was later reversed.²²⁶ Third, even if Obiazor was in fact guilty (as unsettling as child molestation is), it would not necessarily establish that he was unfit to parent his sons. As the D.C. Circuit Court of Appeals noted, abuse of one child in the home is not conclusive that another child in the home was or would be abused.²²⁷ That is particularly true in this case—even if Obiazor was guilty of molesting an unrelated girl, such guilt does not prove that he posed a danger to his biological sons.²²⁸ Even if the court accepted the later-reversed conviction, more evidence would be necessary to determine that Obiazor was an unfit parent and that reunification with him would not be appropriate.

The resulting gap in time is illustrative of the problem. Obiazor's sons entered foster care in November 2004, and the permanency plan change to adoption followed in September 2005. The parties then waited nineteen

²²⁰ Facts from this case may be found in *In re S.M.*, 985 A.2d 413 (D.C. 2009). Although the parties are referred to only by their initials in the opinion, a related criminal case refers to Mr. Obiazor by name. *Obiazor v. United States*, 964 A.2d 147 (D.C. 2009) (citing *In re S.M.*, 985 A.2d at 416).

²²¹ See *In re S.M.*, 985 A.2d at 415.

²²² *Id.*

²²³ *Id.*

²²⁴ See *supra* Part I.B.

²²⁵ *In re S.M.*, 985 A.2d at 415.

²²⁶ *Obiazor v. United States*, 964 A.2d 147, 154 (D.C. 2009).

²²⁷ *In re S.M.*, 985 A.2d at 418–19 n.9.

²²⁸ *Id.*

months, until May 2007, to begin an adoption trial. A final judgment granting the adoption and terminating Obiazor's parental rights followed fourteen months later, in July 2008.²²⁹ Obiazor appealed, and sixteen months after the final decree of adoption, the adoption was overturned in December 2009—more than four years after the court made the mistaken permanency plan decision.²³⁰

The court of appeals noted the flawed permanency plan at oral argument and indicated that the 2005 permanency plan decision—not the 2008 adoption decision—is where the trial court went off track. Chief Judge Eric Washington put it this way:

There are cases that have come before us where the fact of the goal change in essence makes a fait accompli of the termination of parental rights and adoption.... Is this virtually unreviewable for us because ultimately when they go back down how are they going to take a kid who has been with somebody six years away from them? It's the same point there because courts are eliminating visitation, you know, they are taking all the resources away from assisting in the reunification, which is what adoption goal change means, to eliminate this or create a situation in which you can't defend against a termination²³¹

But once those three years had passed, the court felt limited in what it could do. Obiazor's sons had lived with their would-be adoptive parents since December 2006,²³² three years before the decision reversing the adoption. Recognizing that the “ongoing event[s]” of the children's lives—including, most obviously, whatever bonding may have occurred with the would-be adoptive parents and whatever harm to the relationship between them and their father that occurred in the interim—should be taken into account on remand.²³³ So, more than five years after his sons initially entered foster care, Obiazor was nominally victorious on appeal, but all he truly won was a remand for more litigation to consider his sons' fate, during which they would spend yet more time separated from him. Had the permanency hearing gotten it right the first time, Obiazor would have had a much more meaningful victory: the right to immediately regain

²²⁹ *Id.* at 415–16.

²³⁰ *Id.*

²³¹ Transcript of Oral Argument at 11:36:34, *In re S.M.*, 985 A.2d 413 (No. 08-FS-1093) (on file with author).

²³² *In re S.M.*, 985 A.2d at 415.

²³³ *Id.* at 418, 420.

custody of his sons.

The lack of sufficient procedural safeguards at the permanency hearing in 2005, therefore, set up an unnecessarily difficult and emotionally fraught decision upon remand after the 2009 appellate decision: return the children to their fit (or, at least, not proven unfit²³⁴) father or leave them with the individuals who have acted as their parents for three years—the longest span in these boys’ lives that they have had steady parental figures. No matter how this case is resolved, the boys will be unnecessarily harmed by the protracted litigation and the likely (if not inevitable) separation from either their father or their caretakers of the previous three years. I do not suggest that the Obiazor children’s foster parents and their father stand on equal footing; they do not.²³⁵ Rather, I suggest only that by delaying the due process moment for four years imposes unnecessary emotional trauma on everyone involved—the children, their father, and their foster parents—that the legal system ought to avoid. The due process relief—overturning the adoption and traumatizing the children by separating them from their caretakers of many years or their fit father—is, in the words of Chief Judge Washington at oral argument, “almost a sham.”²³⁶

C. State interest

The state interest also weighs in favor of greater protections at permanency hearings. The State is not well served by creating dilemmas like the remand in Obiazor’s case. Indeed, the State’s interest in speedier resolution of cases, and the avoidance of cases such as Obiazor’s, is served by greater procedural safeguards at permanency hearings.

Greater procedural protections at permanency hearing stages would impose additional litigation burdens on the state agencies. But these burdens should not be great when considered in light of the broader set of child abuse and neglect laws. If a state agency seeks to change a child’s permanency plan from reunification to adoption, the agency should have, under federal law, made reasonable efforts to reunify the child with his parent or parents, developed a case plan to achieve reunification, and, if the

²³⁴ The government indicated it would attempt to retry Obiazor on molestation charges after his conviction was reversed on appeal, and had alleged that he neglected his sons by leaving them with their mother and grandmother who he knew to be drug addicts, even though this allegation was not the basis of a neglect adjudication or the later adoption. *Id.* at 415–16 & n. 3.

²³⁵ The D.C. Court of Appeals, consistent with the Supreme Court, made clear that the children’s father is entitled to a constitutional presumption that custody with him will serve their best interests. *Id.* at 417. (discussing parental presumption). *See also* *Smith v. Org. of Foster Families for Equal. & Reform*, 431 U.S. 816, 846–47 (1977) (describing rights of foster families as secondary to rights of natural families).

²³⁶ Transcript of Oral Argument at 11:27, *In re S.M.*, 985 A.2d 413 (No. 08-FS-1093) (on file with author).

state urges a permanency plan other than reunification, documented why its efforts failed and why a new plan is appropriate. Having done all of that work as required by the federal statutory and regulatory scheme summarized above²³⁷ (which the state should have done regardless of the procedures required at permanency hearings), the additional burden of proving that the state agency has done that work and defending its professional judgment is relatively slight. When the state has failed to do that work or has not exercised sound or lawful judgment regarding a child's permanency plan, the State has no legitimate interest in avoiding accountability in court.

Greater procedural protections at permanency hearings would also impose greater burdens on state courts, which would have to hold these evidentiary hearings. But by improving the quality of decision-making, such protections should lead to more children reaching legal permanency faster, thus reducing the burden on state courts imposed by long-open abuse and neglect cases. If the District of Columbia family court had gotten the permanency hearing in *Obiazor* correct the first time and reunified Mr. Obiazor with his children, it could have closed the case fairly quickly and avoided the need for several years' worth of permanency hearings and at least one permanency trial. Such added efficiencies balance out those cases in which courts would reach the same result with evidentiary hearings as they would without. To the extent one believes that the latter category of cases outweighs the former and thus creates significant judicial efficiency concerns, the Supreme Court's response to such concerns in the core parental rights case *Stanley v. Illinois* is apropos:

[T]he Constitution recognizes higher values than speed and efficiency. Indeed, one might fairly say of the Bill of Rights in general, and the Due Process Clause in particular, that they were designed to protect the fragile values of a vulnerable citizenry from the overbearing concern for efficiency and efficacy that may characterize praiseworthy government officials.²³⁸

III. SOLUTION

The due process donut hole should be filled through two basic steps: providing evidentiary hearings regarding permanency plans and reasonable efforts findings when the factual basis to those findings is contested, and a right to appeal adverse rulings. The arguments made in Part II also

²³⁷ See *supra* Part I.B.

²³⁸ *Stanley v. Illinois*, 405 U.S. 645, 656 (1972).

establish policy grounds for taking these two steps, and further policy arguments are developed below.

A. Evidentiary hearings when permanency plan is contested

Permanency plan decisions often rest on various mixed questions of fact and law: what steps are necessary for a parent to regain custody of his or her children? Has a parent fully or substantially complied with those steps? If not, is the harm to the child of continued separation from his or her parent greater or less than the harm of returning to an incompletely remedied home? Has the state agency provided adequate assistance to help the parent comply with necessary steps?

When a judge must make important decisions as the facts underlying those decisions are contested, it is elementary that evidentiary hearings should occur. The essence of due process is the opportunity to be heard in a meaningful way at a meaningful time.²³⁹ If, as I have argued, permanency hearings involve important decisions, and if questions like those listed in the preceding paragraph are contested, then it seems indisputable that being heard in a meaningful manner must “include[] an opportunity to review and present evidence, confront and cross examine witnesses, and consult with counsel”²⁴⁰—in other words, to have a contested evidentiary hearing.

Such evidentiary hearings should be required by law whenever the parties disagree over what permanency plan the court should adopt for a child. When such disagreements exist, the evidentiary hearing should also address whether the State has made reasonable efforts to achieve the permanency plan that has been in place. To make these evidentiary hearings as meaningful as possible, states should provide indigent parents with counsel.²⁴¹

The availability of evidentiary hearings will have an additional positive effect of strengthening the negotiating position of parents and children regarding permanency hearing decisions. Professor Erik Pitchal has relayed the story of two of his former child clients who had been in foster care and who could not reunify with their mother because she had not remedied the conditions that led to the boys’ removal.²⁴² The boys wanted to live with an aunt, but their social worker thought that their aunt would

²³⁹ *Mathews v. Eldridge*, 424 U.S. 319, 333 (1976).

²⁴⁰ N.M. *ex rel. Children, Youth & Family Dep’t v. Maria C.*, 94 P.3d 796, 805 (N.M. Ct. App. 2004).

²⁴¹ *Cf. supra* text accompanying notes 117–120.

²⁴² Pitchal, *supra* note 18, at 663–65.

not take care of them well.²⁴³ The boys disagreed; their aunt had lived with them in the past, “achieved some stability in her own young life,” and was planning to move to South Carolina where other extended family members could support her.²⁴⁴ The judge treated permanency hearings as “ten minute pro forma” events at which he “generally endorsed whatever caseworkers presented.”²⁴⁵ Without a chance to challenge the social worker’s conclusions about the boys’ aunt through an evidentiary hearing, or at least threaten to do so, the children’s lawyers had little opportunity to make their case to leave foster care and live with their aunt.

Fortunately, the children’s lawyer could use evidentiary tools to achieve a better result for them because New York law provides that parties may introduce material and relevant evidence at permanency hearings.²⁴⁶ Following discovery requests and written interrogatories, the foster care agency settled, and the boys eventually lived with their aunt.²⁴⁷ The risk of error for these children was reduced because their attorney could use these classic due process tools. If those tools had been foreclosed, the agency could have ignored the lawyer’s request, and the boys would likely have remained in foster care.

This conclusion applies, of course, regardless of the competing plans at issue, or whether parents or children use the tools described. If the boys wanted to reunify and they or their mother could prove that their mother was fit and able to take care of them, the same lawyerly tactics should have been available and could have led to analogous results.

B. Appealing adverse rulings

Policymakers should also permit aggrieved parties to appeal adverse permanency plan and related reasonable efforts decisions.

Constitutional doctrine does not provide the primary reason for this recommendation because the Supreme Court has held that “the Federal Constitution guarantees no right to appellate review.”²⁴⁸ Some constitutional concerns are evident; although the Court has not recognized a due process right to appeal, it has addressed equal protection challenges to state actions that limit an individual’s right to appeal when the State grants it in similar situations. That is, “once a State affords” the right to

²⁴³ *Id.* at 663.

²⁴⁴ *Id.*

²⁴⁵ *Id.*

²⁴⁶ See N.Y. JUD. CT. ACTS LAW §§ 1089(d), 1046(c) (McKinney 2010) and text accompanying note 100.

²⁴⁷ Pitchal, *supra* note 18, at 665.

²⁴⁸ *M.L.B. v. S.L.J.*, 519 U.S. 102, 110 (1996).

appeal, “the State may not ‘bolt the door to equal justice.’”²⁴⁹ Although some creative arguments may exist to establish a right to appeal, that is beyond the scope of this Article.

Rather than constitutional doctrine, my argument rests on policy concerns that should animate state action to provide for appeals of permanency plan decisions. The same argument regarding evidentiary hearings applies; the risk of trial court error is high and the State (as *Obiazor* demonstrates) should have an interest in getting permanency plan decisions correct. Appellate courts’ error-correction function helps ensure trial court accuracy and thus address these concerns. In addition, by resolving whether the State made reasonable efforts to reunify children with parents early in a case, the State can ensure that a later termination of parental rights (hereinafter “TPR”) or adoption or guardianship will not fail due to a finding that the State failed to make such efforts.²⁵⁰

In addition, the law-creating function of appellate courts should encourage state policymakers to permit appeals of permanency plan decisions. These decisions currently suffer from a lack of clear legal guidance. The most common standard to be applied is the best interests of the child—that is, no standard at all.²⁵¹ Federal law requires permanency hearings to exist, but it does not prescribe the standards to be applied to plan changes. Similarly, federal law requires state courts to determine if a state agency has made “reasonable efforts” to reunify the child or achieve whatever other permanency plan has been set, but it does not define the term.²⁵²

It is this absence of clear legal guidance that led to mistakes like those in Henry Obiazor’s case, discussed above. The absence of any finding of

²⁴⁹ *Id.* (quoting *Griffin v. Illinois*, 351 U.S. 12, 16 (1956) (Frankfurter, J., concurring)). See also *id.* at 120 (noting that most decisions regarding the right to appeal are subject to an equal protection analysis).

²⁵⁰ As a recent Alabama decision held, State courts would rule that such challenges should be raised at the appropriate time at permanency hearings and not at permanency trials. “[A]ny error the juvenile court may have committed in this case by relieving DHR of the duty to use reasonable efforts should have been appealed at that point and cannot now be raised following the judgment terminating the mother’s parental rights.” *M.H. v. Jefferson Cnty. Dep’t of Human Res.*, No. 2081070, 2010 WL 565281, at *2 (Ala. Civ. App. 2010). Such rulings respond to the concern that waiting until permanency trials to hear appeals of reasonable efforts findings amounts to “punish[ing] the child for the agency’s failure.” David J. Herring, *Inclusion of the Reasonable Efforts Requirement in Termination of Parental Rights Statutes: Punishing the Child for the Failures of the State Child Welfare System*, 54 U. PITT. L. REV. 139, 194 n.161 (1992).

²⁵¹ The New Jersey Supreme Court, for instance, has described the best interest of the child standard as providing a “judicial opportunity to engage in social engineering.” *Watkins v. Nelson*, 748 A.2d 558, 567 (N.J. 2000). See also MARTIN GUGGENHEIM, *WHAT’S WRONG WITH CHILDREN’S RIGHTS* 40 (2005) (The best interest of the child standard “invites the judge to rely on his or her own values and biases to decide the case.”).

²⁵² 45 C.F.R. § 1356.21(b)(2) (2009).

unfitness against Mr. Obiazor should have affected the permanency plan decision; any other result would violate the core doctrine that a parent is presumed fit and custody with the parent is presumed in the child's best interests. When Obiazor appealed the ultimate adoption ruling, the D.C. Circuit Court of Appeals ruled in his favor, vindicating the long-standing legal rights of fit parents. But because the permanency plan could not be appealed, no new law regarding the permanency plan decision was created; thus, no new guidance is offered to trial judges the next time a case like Obiazor's occurs, let alone a more difficult case in which a parent's past unfitness is established but present unfitness is unclear and contested.

More difficult questions will also arise in permanency plan cases, such as:

- When a parent has partly remedied conditions that supported a finding of neglect, should the child reunify, or should the plan be changed away from reunification due to the parent's incomplete actions?
- When a parent has remedied conditions that supported a finding of neglect, but the State claims that some other facts justify continued or permanent separation of the child from a parent, under what circumstances is continued separation legally justified?
 - In close cases, how should courts weigh a child's opinion about his or her permanency plan? How does the answer to this question vary with a child's age?²⁵³
 - How should a state agency's failure to make reasonable efforts to achieve reunification in the past inform a decision about a permanency plan in the future?
 - What hearsay testimony, if any, should be admitted at permanency hearings?

My purpose is not to answer these questions, and doing so is beyond the scope of this Article. Rather, I offer a short list of questions of law and fact that arise at permanency hearings and for which appellate guidance would be useful. Without appeals of permanency plan and related reasonable efforts findings, however, only a void exists.

State law must fill the void, but, with most states merely echoing

²⁵³ Federal law requires consultation "in an age-appropriate manner" with children regarding permanency plans. 42 U.S.C. § 675(5)(C)(iii) (2006).

vague federal law in their own statutes,²⁵⁴ trial courts are left with nearly unfettered discretion. Permitting appeals of permanency plan and reasonable efforts decisions will force appellate courts to develop decisional law, providing more useful guidance to trial courts. Uniformity of decisions would be enhanced, and difficult substantive questions of law could receive some answers.

The concern expressed by some state courts is that appeals will take too long.²⁵⁵ These concerns can be addressed through specific appellate mechanisms: states can provide for expedited appellate procedures, including specific deadlines for briefs and decisions. The National Council of Juvenile and Family Court Judges has proposed a 150-day timeline for adjudicating TPR appeals,²⁵⁶ and shorter timelines should be possible for permanency hearing appeals. States can also provide rules for when, if ever, a permanency plan decision should be stayed pending appellate review or when consideration of an appeal should be stayed pending other prompt trial court developments. Just as the due process right to an evidentiary permanency hearing is less when a TPR trial will occur imminently,²⁵⁷ hearing an appeal of a permanency plan order is less important when a permanency trial based on that order occurs in a short time after the permanency hearing. States with multiple levels of appellate review can at least provide access to intermediate appellate review.

C. Implementing these policy changes

As the law governing child abuse and neglect cases finds its sources in federal statutory law, constitutional law, state statutory law, and state case law, the above solutions should be implemented through all such sources.

Congress and the Children's Bureau (the division of the Department of Health and Human Services charged with implementing the relevant provisions of federal law) should better define the "procedural safeguards" at permanency hearings. Through statute, regulation, or non-regulatory guidance, they should make clear that evidentiary hearings should be available to any party that contests the basic facts relevant to permanency hearing decisions, and that state court systems should provide for prompt appeals of such decisions.

²⁵⁴ See, e.g., D.C. CODE § 16-2323(c) (LexisNexis 2001) (requiring courts to determine a child's "permanency plan" at a permanency hearing, but not providing details regarding the procedural protections surrounding such decisions).

²⁵⁵ See *Rita J. v. Ariz. Dep't of Econ. Sec.*, 1 P.3d 155 (Ariz. Ct. App. 2000) and text accompanying note 122.

²⁵⁶ ADOPTION & PERMANENCY GUIDELINES, *supra* note 52, at 40.

²⁵⁷ See *supra* Part II.A (distinguishing permanency plan decisions leading to indefinite stays in foster care before a permanency trial with those likely or certain to lead to a prompt permanency trial).

As a matter of federal constitutional law, as well as state law, courts handling these cases should provide the basic protections outlined here: evidentiary hearings and the right to appeal. If state courts fail to do so, state legislatures should step in, a point particularly appropriate in those states whose courts have explicitly ruled that evidentiary hearings or appeals are not required for permanency hearings.

IV. ALTERNATIVE DUE PROCESS PROTECTIONS PROVIDE UNSATISFACTORY SOLUTIONS

One might ask whether the due process protections at the beginning and end of an abuse or neglect case are insufficient on either constitutional or policy grounds. In other words, might the donut itself resolve whatever concerns exist within the donut hole? This section will argue that neither the initial abuse or neglect trial nor the permanency trial provides sufficient process to satisfy the constitutional or policy concerns discussed above.

A. Initial abuse or neglect findings are insufficient protections

As discussed in Part I.A, the initial stage of an abuse or neglect case involves trials—with all the due process protections common in most civil trials—regarding whether a parent has neglected his or her child in the past. These trials provide insufficient protections because their subject matter is distinct from the subject matter that determines a permanency plan. An abuse or neglect trial is necessarily backwards-looking; it determines whether a parent has abused or neglected the child in the past. It does not determine what services are necessary to remedy the parent's unfitness, whether the agency provided adequate services to remedy the parent's unfitness, whether the parent would continue to abuse or neglect the child in the future, or whether reunification or some other permanency plan (and if some other plan, which one) would best serve a child's interests.

Existing federal law establishes that an initial finding of abuse or neglect does not, in the vast majority of cases, indicate that any of the other issues are irrelevant. Federal law provides that, in most cases, reasonable efforts to reunify families “shall be made . . . to make it possible for a child to safely return to the child's home.”²⁵⁸ The only exception to this requirement is when the parent's conduct demonstrates that “aggravated circumstances” exist, such as the murder or voluntary manslaughter of another child, or the serious physical abuse of the child.²⁵⁹ These extreme cases are the only situations that, under federal law, indicate abuse so

²⁵⁸ 42 U.S.C. § 671(a)(15)(B)(ii) (2006).

²⁵⁹ 42 U.S.C. § 671(a)(15)(D) (2006).

severe that reunification ought not be pursued at all. They are, therefore, the only situation in which post-adjudication facts—such as the adequacy of agency and parental efforts to reunify—are not relevant. The logical corollary is that in the vast majority of cases,²⁶⁰ a finding that abuse or neglect occurred in the past is not sufficient to conclude whether the child should reunify with a parent or whether the agency should work towards placing the child in someone else's permanency custody. An abuse or neglect adjudication, therefore, does not answer the questions that permanency hearings are required to answer and thus cannot provide sufficient due process protections at such hearings.

B. Permanency trials—and, especially, termination of parental rights trials—are insufficient protections

The stronger counterargument to more due process protections for these interim periods is that TPRs or other permanency trials (such as guardianship trials) will provide parents and children with the necessary procedural protections. These permanency trials address some of the same issues that inform permanency plan decisions, such as a parent's remediation (or lack thereof) of the conditions leading to the child's neglect. But, as discussed above, it is not possible to determine at a permanency hearing when or even whether such permanency trials will occur. The only way, therefore, for these permanency trials to fill the due process donut hole is to require that they occur relatively quickly after a permanency hearing. Federal law has indeed taken a step in this direction. Since 1997, federal law has required, absent certain exceptions, states to file termination of parental rights petitions whenever a child has been in foster care for fifteen of the previous twenty-two months,²⁶¹ making it more likely that TPRs will occur promptly and effectively providing due process protections when children remain in foster care for an extended period of time. Some state laws go further; Florida, for instance, requires that a TPR be filed or that one will soon be filed as a condition precedent to setting a permanency plan of adoption.²⁶²

TPR trials, however, do not empirically provide these due process protections in many cases; existing law does not require them to do so, and their policy purpose is ill-suited to fill the due process donut hole.

What empirical data exists suggests that many states take advantage of

²⁶⁰ More than two-thirds of all children removed from their families by child protection authorities were removed for neglect, not the severe abuse that would trigger the "aggravated circumstances" requirement. U.S. DEP'T OF HEALTH & HUM. SERV., CHILD MALTREATMENT 79 (2008), available at <http://www.acf.hhs.gov/programs/cb/pubs/cm08/cm08.pdf>.

²⁶¹ 42 U.S.C. § 675(5)(E) (2006).

²⁶² FLA. STAT. ANN. §39.621(2)(b) (West Supp. 2010).

federal law provisions that excuse states' decisions to not file or not pursue TPRs. Federal law lists several exceptions to the requirement of filing TPRs, including whenever the State documents "compelling reason[s]" not to do so.²⁶³ Federal law also only requires states to "file" TPRs; in individual cases, the government and other parties are free to ask judges to delay holding TPR trials until an adoptive parent is identified to avoid unnecessarily terminating rights. A 2002 General Accounting Office survey of states found wide use of exceptions to the requirement of filing TPRs. Among participating states, "the number of children exempted from the provision [encouraging TPRs after fifteen of twenty-two months in foster care] greatly exceeded the number of children to whom it was applied."²⁶⁴ In addition, national data shows 123,000 children "waiting to be adopted," only 75,000 of whom have been the subject of a TPR.²⁶⁵ About 50,000 children, therefore, have had a court set a permanency plan of adoption but have not been the subject of a TPR. These children may "wait" for a TPR or adoption trial for months or years, and these permanency trials do not provide due process protections in the interim. About 100,000 more children have permanency plans other than reunification or adoption,²⁶⁶ a TPR is not necessary to achieve these permanency plans, and these children are thus unlikely to be subject to TPR proceedings.

The empirical reality that TPRs do not fill the due process donut hole is as it should be. TPRs are limited and imperfect policy tools; using them to more fully fill the donut hole would lead to bad results.

Terminating parental rights is a "drastic remedy"²⁶⁷ intended to increase a foster care agency's chances of finding adoptive parents for those children.²⁶⁸ Despite this purpose, little empirical evidence exists to

²⁶³ 42 U.S.C. § 675(E)(ii) (2006).

²⁶⁴ U.S. GOV'T ACCOUNTABILITY OFFICE, GAO-02-585, FOSTER CARE: RECENT LEGISLATION HELPS STATES FOCUS ON FINDING PERMANENT HOMES FOR CHILDREN, BUT LONG-STANDING BARRIERS REMAIN 27 (2002).

²⁶⁵ AFCARS 2008, *supra* note 160.

²⁶⁶ *Id.*

²⁶⁷ *In re C.M.*, 916 A.2d 169, 175 (D.C. 2007).

²⁶⁸ Some legislatures have connected TPRs to adoptions more directly, stating, for instance, that the "sooner a child is freed for purposes of an adoptive placement [that is, subject to a TPR], the sooner he or she will finally obtain an environment of permanence and continuity of relationships." COUNCIL OF THE DISTRICT OF COLUMBIA, COMMITTEE ON THE JUDICIARY, REPORT ON TITLE IV OF BILL NO. 2-48, THE PREVENTION OF CHILD ABUSE AND NEGLECT ACT OF 1977 at 6 (1977). Courts have put the issue more modestly, stating that a TPR decision includes "[a]n analysis of the likelihood that the child would be adopted if parental rights were terminated." Cal. Welf. & Inst. Code § 360(a)(6) (West 2008); *cf. In re Dependency of A.C.*, 98 P.3d 89, 95 (Wash. Ct. App. 2004) (considering "the likelihood the child would be adopted if parental rights were terminated"); Dep't of Children & Family

suggest that widespread TPRs actually lead to more adoptions. On the contrary, significant evidence exists that widespread TPRs only lead to more “legal orphans”—children deprived of a legal parent by the TPR whom child welfare agencies do not place in a legally permanent family.

Richard Barth, the Dean of the University of Maryland School of Social Work and a leading child welfare scholar, has studied national data regarding the effect of TPRs on adoption and concluded:

There seems to be negligible evidentiary support for ASFA’s implicit assumption that TPRs would allow for improved child-specific recruitment and result in a vastly greater, national pool of adoptive families to provide permanency to older children. Instead, there is growing evidence that a substantial number of children will reside in foster care, or leave foster care to exits other than adoption, after their legal ties to their parents have been terminated.²⁶⁹

Barth has quantified this effect: in recent years, an average of 20,000 more children were subjects of termination orders than were adopted, meaning the number of legal orphans increased by tens of thousands each year.²⁷⁰ Dean Barth’s conclusion echoes the conclusions of various studies over the past two decades. A 2003 study of federal foster care and adoption data concluded that “termination of parental rights is not assuring swift, legal permanency for children in foster care.”²⁷¹ A 1997 study found that the number of children whose relationship with their parents had been legally terminated, but who remained in foster care without a permanent family, had more than doubled across the United States.²⁷² A detailed multi-year study of Michigan and New York—both states that increased the number of TPRs even before passage of the federal Adoption and Safe Families Act—reached a sobering conclusion:

v. J.W., 773 So.2d 128, 129 (Fla. Dist. Ct. App. 2000) (declining to grant TPR because of unlikelihood of adoption following a TPR).

²⁶⁹ Richard P. Barth et al., *The State Construction of Families: Foster Care, Termination of Parental Rights, and Adoption: From Anticipation to Evidence: Research on the Adoption of Safe Families Act*, 12 VA. J. SOC. POL’Y & L. 371, 397 (2005).

²⁷⁰ Richard P. Barth, *Adoption from Foster Care: A Chronicle of the Years After ASFA, INTENTIONS AND RESULTS: A LOOK BACK AT THE ADOPTION AND SAFE FAMILIES ACT* 64, 65 (2009), http://www.urban.org/UploadedPDF/1001351_safe_families_act.pdf.

²⁷¹ Brenda D. Smith, *After Parental Rights are Terminated: Factors Associated with Exiting Foster Care*, 25 CHILD. & YOUTH SERVS. REV. 965, 979 (2003).

²⁷² Patrick Parkinson, *Child Protection, Permanency Planning and Children’s Right to Family Life*, 17 INT’L J.L. POL’Y & FAM. 147, 159 (2003).

Five years of aggressively terminating parents [sic] rights has produced a clear pattern: The number of children freed for adoption goes up every year; the number of children adopted fails to keep pace with the number of adoption-eligible children; and the total number of orphaned children not adopted continues to increase fastest of all.²⁷³

More frequent use of TPRs coincided with an increase in the number of adoptions,²⁷⁴ but a causal link remains unclear and, as the study concluded, those increases did not “keep pace” with the number of legally orphaned children.²⁷⁵

District of Columbia statistics demonstrate a similar conclusion: a majority—perhaps a very large majority—of children whose relationships with their parents are terminated without an adoptive parent already identified become legal orphans. The District of Columbia family court has reported very low rates of TPRs leading to adoptions. In contrast, the percentage of children who remain legal orphans after a TPR has increased substantially. In 2005, the family court granted fifty TPR motions, and 56 percent of affected children remained legal orphans. In 2006, forty TPRs were granted and 65 percent of affected children remained legal orphans. In 2007, forty-seven TPRs were granted and 75 percent of affected children remained legal orphans.²⁷⁶ Although one might conclude that these TPRs did lead to a substantial number of adoptions—ranging from 25 percent in 2007 to 44 percent in 2006—the data does not provide enough evidence to support that conclusion. In many, and probably most, of the cases in which an adoption followed a TPR, the TPR was adjudicated only after a prospective adoptive parent had been identified and after the child had moved in with that individual. Those TPRs are better considered as part of the adoption process once an adoptive parent is identified; they are not legal actions to further adoption *recruitment*.

TPRs, of course, have serious implications for parents’ and children’s fundamental constitutional rights. The Supreme Court has repeatedly observed that TPRs, unlike other child custody decisions and unlike “mine

²⁷³ Martin Guggenheim, *The Effects of Recent Trends to Accelerate the Termination of Parental Rights of Children in Foster Care— An Empirical Analysis in Two States*, 29 FAM. L.Q. 121, 132 (1995).

²⁷⁴ *Id.* at 129–30 (showing an approximate increase of 700 adoptions in Michigan between 1987 and 1992, and 600 adoptions in New York between 1987 and 1991).

²⁷⁵ *Id.* at 132.

²⁷⁶ HON. RUFUS G. KING III, C.J., D.C. SUPER. CT., FAM. CT. 2007 ANNUAL REPORT TO THE PRESIDENT & CONGRESS 67–68 (2008), available at http://www.dccourts.gov/dccourts/docs/family/family_annualreport2008.pdf.

run civil actions,²⁷⁷ impose a “unique kind of deprivation.”²⁷⁸ Permanently and irrevocably terminating the legal relationship between a parent and a child “involve[s] the awesome authority of the State” and TPR orders “are among the most severe forms of state action.”²⁷⁹ The weight of the right at stake, and the lack of empirical evidence suggesting that terminating this fundamental right on a wide scale leads to positive aggregate results, counsels strongly against using TPR trials as an all-purpose due process guarantee.

Terminating parent-child relationships is especially troublesome for older children and youth, the group that represents two-thirds of children in the District of Columbia’s foster care system,²⁸⁰ and a majority of foster children nationally.²⁸¹ Older children and youth are more likely to have strong relationships and ongoing contact with their birth parents, siblings and extended family members. Older children have formed a sense of identity dependent on these relationships. Terminating children’s relationships with these individuals can harm their identity, and undermine their adjustment to a new home and long-term wellbeing.²⁸² For all of these reasons, the older a child is when the government removes him from his family, the less likely he is to be adopted; nationally, 38 percent of children removed before turning one year old are later adopted, compared to 19 percent of children removed between one year and five years old, and less than 10 percent of children removed between six years and twelve years old, and likely even less for older youth.²⁸³

Indeed, many states have already recognized the significant importance

²⁷⁷ *M.L.B. v. S.L.J.*, 519 U.S. 102, 127 (1996).

²⁷⁸ *Lassiter v. Dep’t. of Soc. Serv.*, 452 U.S. 18, 27 (1981).

²⁷⁹ *M.L.B.*, 519 U.S. at 128 (citing *Santosky v. Kramer*, 455 U.S. 745, 759 (1982); *Rivera v. Minnich*, 483 U.S. 574, 580 (1987)).

²⁸⁰ D.C. GOV’T CHILD & FAM. SERV. AGENCY, 2008 ANNUAL REPORT 26 (2009) (listing number of foster children by age).

²⁸¹ AFCARS 2008, *supra* note 160.

²⁸² See, e.g., Natalie M. Barone et al., *Psychological Bonding Evaluations in Termination of Parental Rights Cases*, 33 J. PSYCHIATRY & L. 387, 408 (2005) (“[G]iven that this child is well into adolescence, three years from adulthood, severing her relationship to her primary love object may result in more harm than good.”). Perhaps as a result, children have a more difficult time adjusting to an adoptive home the older they are at the time of adoption. See Thomas P. McDonald et al., *The Postadoption Experience: Child, Parent, and Family Predictors of Family Adjustment to Adoption*, 80 CHILD WELF. 71, 86 (2001) (“Older adopted children had more difficult adjustments in their adoptive homes.”); David Howe, *Age at Placement, Adoption Experience and Adult Adopted People’s Contact with Their Adoptive and Birth Mothers: An Attachment Perspective*, 3 ATTACHMENT AND HUM. DEV. 222, 231 (2001) (“[W]hen asked if they felt they had belonged in their adoptive family while growing up, 73.5% of those placed before they were 7 months old agreed, compared with 50.9% of those placed after their second birthday.”).

²⁸³ Barth, *supra* note 270, at 65.

of youths' connections with their birth families, even when they cannot reunify with their parents. That is precisely the concern underlying guardianship statutes, which allow a child to live with a legally permanent family while maintaining the child's relationship with his birth family.²⁸⁴

The increasing variety of legal options for permanency, including options other than adoption and which do not require TPRs, also demonstrates the inappropriateness of using TPRs to fill the due process donut hole. TPRs are an unnecessarily drastic remedy in the growing proportion of cases in which children leave foster care to a legal status other than adoption. These legal statuses—most commonly referred to as “guardianship”²⁸⁵—do not terminate the parent-child relationship, thus obviating the need to terminate parents' legal rights, as some courts have begun to recognize.²⁸⁶ In fiscal year 2008, 15 percent of children who left foster care went to live in a permanent guardianship or to otherwise live with a relative other than their parents.²⁸⁷ This reflects an increase from the 11 percent who did so in fiscal year 1998.²⁸⁸

The increasing frequency of kinship care is also grounds for restraint in using TPRs. Federal law already recognizes that states need not file TPRs when a child is living with a relative.²⁸⁹ About one quarter of foster children now live in a kinship foster home,²⁹⁰ following significant increases in the 1980s and 1990s.²⁹¹

Congress was slow to recognize this trend, but federal law now recognizes and funds permanency options with relatives that do not require TPRs. In 1997, Congress expressed some awareness of kinship foster care but only established an advisory committee to report on it.²⁹² More than a decade later, Congress amended federal law in 2008 to recognize guardianships, providing funding to states to support subsidies for kinship

²⁸⁴ See, e.g., Foster Children's Guardianship Act of 2000, D.C. CODE ANN. § 16-2381 (LexisNexis 2001) (effective Apr. 4, 2001). See also, D.C. CODE ANN. § 16-2389 (LexisNexis 2001) (effective Apr. 4, 2001).

²⁸⁵ *Id.*

²⁸⁶ N.J. Div. of Youth & Fam. Servs. v. M.M., 2009 WL 928416, at *1 (N.J. Super. Ct. App. Div. Apr. 8, 2009).

²⁸⁷ AFCARS 2008, *supra* note 160 (noting that seven percent of foster care exits were to guardianship and eight percent to “living with other relative(s)”).

²⁸⁸ U.S. DEP'T OF HEALTH & HUM. SERV., AFCARS REPORT: FINAL ESTIMATES FOR FY 1998 THROUGH FY 2002 (2006), http://www.acf.hhs.gov/programs/cb/stats_research/afcars/tar/report12.pdf.

²⁸⁹ 42 U.S.C. § 675(5)(E)(i) (2006).

²⁹⁰ AFCARS 2008, *supra* note 160.

²⁹¹ Rob Geen, *The Evolution of Kinship Care Policy and Practice*, 14 THE FUTURE OF CHILDREN 131, 134 (2004), available at http://www.princeton.edu/futureofchildren/publications/docs/14_01_07.pdf.

²⁹² Adoption and Safe Families Act of 1997, H.R. 867, 105th Cong. § 303 (1997).

guardianships,²⁹³ a development likely to increase the number of children who leave foster care to guardianship.

States have also begun to expand subsidized guardianship to non-kin for the explicit purpose of permitting foster parents to obtain permanent custody of a foster child without terminating the child's legal relationship with his parents. In 2003, the Children's Defense Fund documented twenty-four states offering subsidized guardianship to non-kin.²⁹⁴ That number is increasing; the District of Columbia has enacted legislation expanding subsidized guardianship to non-kin.²⁹⁵ As this trend grows, it is likely to eliminate the need for TPRs for tens of thousands of foster children, including those who in present practice might be subject to a TPR. A study of a pilot program in Illinois shows that offering subsidized guardianship to non-kin induces many families who otherwise would have chosen adoption to choose guardianship.²⁹⁶ It also helps more children leave foster care to permanent families than offering subsidized adoption alone. The study included a control group in which the only means for a non-kinship foster family to obtain legal permanency was to adopt the foster child, and an experimental group in which non-kinship foster families could obtain legal permanency through either adoption or guardianship. In the control group, 25.3 percent of children in non-kinship homes were adopted, but that number was only 16.7 percent in the experimental group.²⁹⁷ However, 15.8 percent of children in the experimental group left foster care to guardianship with their foster families. That group appears to include the 8.6 percent of children in non-kinship foster care forced into adoption (and, by legal necessity, a TPR) when guardianship is not an option, and 7.2 percent of children in non-kinship foster care who would have remained in foster care without guardianship as an option.²⁹⁸ This study provides an empirical basis for the policy judgment of those states that offer subsidized guardianship to non-kin: a significant number of families choose that option over a legal option that requires terminating rights, and a significant number of children, who

²⁹³ Fostering Connections to Success and Increasing Adoptions Act of 2008, Pub. L. No. 110-351, § 101, 122 Stat. 3949, 3950–53 (2008) (to be codified as amended at 42 U.S.C. §§ 671(a)–673(d)).

²⁹⁴ MARYLEE ALLEN ET AL., CHILDREN'S DEFENSE FUND, EXPANDING PERMANENCY OPTIONS FOR CHILDREN: A GUIDE TO SUBSIDIZED GUARDIANSHIP PROGRAMS 46 (2003), http://cdf.convio.net/site/DocServer/subsidy_guide.pdf?docID=917.

²⁹⁵ Adoption Reform Amendment Act of 2010, D.C. Act 18-478, § 502(b)(1)(B) (repealing D.C. Code § 16-2399(b)(3), which had limited guardianship subsidies to kin)<http://www.dccouncil.us/images/00001/20100624152755.pdf>.

²⁹⁶ MARK F. TESTA ET AL., ILLINOIS SUBSIDIZED GUARDIANSHIP WAIVER DEMONSTRATION: FINAL EVALUATION REPORT 2 (2003), <http://www.cffc.illinois.edu/pubs/Pdf.files/sgfinalreport.pdf>.

²⁹⁷ *Id.* at 40.

²⁹⁸ *Id.*

would otherwise remain in state custody, will leave foster care to that option.

None of this is to suggest that TPRs should never happen. TPRs can serve important purposes in certain cases. They play a legally necessary role in furthering an adoption (when that is appropriate). Despite the lack of evidence that widespread TPRs meaningfully increase the chances of finalizing an adoption, it is plausible that TPRs of certain subsets of foster children will further adoption, such as very young children without substantial bonds to their parents. In some rare cases, a parent may be so dangerous that placing a child in foster care is insufficient to protect the child, and a TPR may be necessary. But these useful purposes of TPRs are not so widespread that they could justify their use in all cases. They therefore are a poor choice to fill the due process donut hole.

CONCLUSION

The American abuse and neglect system has established multi-stage legal processes to determine whether a state may use its authority to temporarily or permanently break up a family. To respect the fundamental constitutional rights at stake and to ensure that states only use their authority to separate children from their parents when absolutely necessary, judges and policymakers should pay greater attention to what federal law calls “procedural safeguards” within this system. The supposed safeguards that exist in the years-long middle of abuse and neglect cases are in serious need of reform. Congress, state legislatures, and state courts should move to require that contested permanency planning hearings involve evidentiary hearings and factual findings, and involve the right to appeal and have such appeals decided promptly. These reforms will result in more accurate decision-making and better results for children and families in foster care.